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Denial of Standing to Private,Noncommercial Consumers Under Section 4 of the Clayton Act

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I. INTRODUCTION

The Sherman Act[1] and the Clayton Act[2] are efforts by Congress to promote a free and competitive economy and to compensate those injured by anticompetitive activities. To supplement government enforcement, section 7 of the Sherman Act[3] provided a means of

1. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

2. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44 (1976)).

3. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (superseded by Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914)) (repealed hy Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283) (current version at 15 U.S.C. § 15 (1976)). Section 7 provided:

> Any person who shall he injured in his business or property hy any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

combating antitrust violations through private treble damage actions. Section 4 of the Clayton Act,[4] which superseded section 7 of the Sherman Act with only slight modification, provides for treble damage actions by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[5]

The broad language of section 4 apparently provides that *any* person with the requisite injury in business or property can bring suit. Furthermore, the Supreme Court has indicated that courts should not add requirements to burden private litigants beyond those specifically set forth by Congress.[6] Many lower federal courts have recognized, however, that every antitrust violation creates "ripples of injury"[7] felt by enormous numbers of remote parties. The courts have expressed fear that interpreting section 4 to grant any party standing to sue would open the floodgates of litigation, resulting in an unmanageable number of private actions, far exceeding those contemplated by Congress.[8] Therefore, the majority of lower federal courts have limited the scope of section 4 through a judicially imposed "standing" requirement.

As developed by the courts, standing under section 4 incorporates two distinct components. In addition to showing an antitrust violation, a plaintiff must show: (1) that the alleged injury occurred by reason of the antitrust violation (causal component); and (2) that the alleged injury to business or property was of a type protected by section 4 (type of injury component).[9] The federal courts apply several different tests to determine whether a plaintiff fulfills the causal component of standing.[10] In analyzing the type of injury component, courts require corporate or business plaintiffs seeking

4. 15 U.S.C. § 15 (1976) 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.

5. *Id.*

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

7. Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

8. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *see* Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374, 375-76 (1976).

9. *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 n.11 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184, 1186 (E.D. Ark. 1975). *See generally* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

10. *See* Part III(A) *infra.*

standing to prove their injury was of a commercial or competitive nature. The federal courts are split, however, on the question whether private consumers have standing to bring suit under section 4. In a trilogy of federal district court cases[11] considering actions brought by private consumers[12] alleging injury as a result of abnormally high prices maintained by antitrust violations, the Northern District of California denied standing. The Eastern District of New York, however, has allowed private consumers standing when their injury in property resulted from payment of an inflated price for a product as a result of an antitrust violation.[13] The only reported federal court of appeals decision addressing the issue of private consumer standing under section 4 is *Reiter v. Sonotone Corp.*[14] In *Reiter*, the Eighth Circuit denied standing to a private consumer, reasoning that the alleged injury to the plaintiff's pocketbook was not of a commercial or competitive nature and therefore not an injury in business or property.[15]

In light of the uncertainty regarding private consumer standing under section 4, this Recent Development will analyze the relevant legislative history, the case authority, and the policy concerns underlying antitrust law to determine the correct application of standing to private consumers. This Recent Development suggests that the denial of standing to private consumers frustrates the purposes of section 4 and is contrary to the legislative histories of the Sherman and Clayton Acts and to existing case authority.

II. LEGISLATIVE HISTORY

Congress enacted the Sherman Act[16] in 1890 to combat the trusts and monopolies that grew from the concentrations of economic power in the 1880's.[17] The Clayton Act[18] was enacted in 1914 to extend the scope of the antitrust laws to areas not covered by the

11. Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977); Smith v. Toyota Motor Sales, U.S.A., Inc., [1977-1] Trade Cas. (CCH) ¶ 61,251 (N.D. Cal. 1977); *appeals docketed*, Nos. 77-1724, 77-1725, 77-1845, 77-1850, 77-1851, 77-1852 (9th Cir. 1977).

12. For purposes of this Recent Development, the term "private consumer" refers only to noncommercial, nongovernmental consumers who did not suffer a commercial or competitive injury in business or property.

13. Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978).

14. 579 F.2d 1077 (8th Cir. 1978).

15. *Id.* at 1086-87.

16. *See* text accompanying notes 1-2 *supra*.

17. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940); M. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 32 (1956).

18. *See* text accompanying notes 1-2 *supra*.

Sherman Act.[19] The general purpose of both acts was to prevent restraints on trade and to encourage free competition.[20] Congress recognized that the aggregation of unchallenged economic power was inimical to a vibrant, progressive economy.[21] Section 4 provides a means of combating violations of the antitrust laws by allowing private treble damage actions.[22] The specific purposes of private treble damage actions under section 4 are "to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.' "[23] Private treble damage actions complement government enforcement by increasing

19. *See* H.R. REP. No. 1373, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2637, 2639.

20. In Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), Chief Justice Stone stated that the purpose of the Sherman Act was "the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Id.* at 493. The underlying policy of free competition has been articulated by the Court in other forms. *See, e.g.*, United States v. Reading, 253 U.S. 26, 59 (1920) (secure compotition and preclude practices that defeat it); United States v. Union Pac. R.R., 226 U.S. 61, 82 (1912) (preserve free action of competition). In Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), the court stated:

> The goal of the Federal antitrust laws is to safeguard the interplay of competitive forces in the far-flung commerce of the Nation. The Sherman Act . . . "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." [Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958)]. Its "fundamental purpose . . . was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraints of trade." [Charles A. Ramsay Co. v. Associated Billposters, 260 U.S. 501, 512 (1923)]. The Clayton Act . . . had these wholesome aims no less in view, but sought its contribution to them through a regulatory technique of its own.

Id. at 1319-20; *see* Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957); Maltz v. Sax, 134 F.2d 2 (7th Cir. 1943); H.R. REP. No. 1373, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2637, 2639; FORKOSCH, *supra* note 17, at 32-41.

21. *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946). In *American Tobacco Co.* the Court stated:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . . These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

Id. at 813 (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945)).

22. Section 7 of the Sherman Act provided an identical means of combating violations of antitrust laws. *See* note 3 *supra* and accompanying text.

23. Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978); *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977). The lower courts have also recognized that the purposes of section 4 (section 7) are to "compensate those injured by violations of the antitrust laws . . . [and] to function as an independent method of enforcing antitrust policy." Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59, 71 (S.D.N.Y. 1964).

the number of enforcing parties.[24] To further effectuate the purposes of the antitrust laws, section 16[25] of the Clayton Act provides for the availability of private injunctive relief against threatened violations.

Although the purposes of the acts and of section 4 are clear, the language of section 4 does not definitely identify the plaintiffs who have standing to bring suit. The legislative history of the Sherman Act is inconclusive on the issue of private consumer standing.[26] Similarly, the legislative history of the Clayton Act does not definitely indicate whether a private consumer has standing to sue under sec-

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24. Numerous courts have noted that private actions are stimulated by the possibility of lucrative treble damage recoveries. *See, e.g.,* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969), *aff'd,* 436 F.2d 1205 (2d Cir.), *cert. denied,* 403 U.S. 911 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957); Maltz v. Sax, 134 F.2d 2 (7th Cir. 1943).

25. Clayton Act, § 16, 15 U.S.C. § 26 (1976), provides in part: "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 . . . ." Section 16 provides injunctive relief for "any person" but does not contain the "business or property" limitation of section 4.

26. The legislative history of the Sherman Act is voluminous yet inconclusive on the question of standing under section 7. The bill originally introduced by Senator Sherman authorized in section 2 "[t]hat any person or corporation, injured or damnified by such arrangement, contract, agreement, trust, or combination, may sue for and recover . . . the full consideration or sum paid by him for the goods, wares and merchandise . . . ." S. 1, 51st Cong., 1st Sess. § 2 (1889). Yet section 7 as enacted contained the limitation that a person must be injured in his business or property. *See* note 3 *supra.* In the debate of the bill, Senator George argued:

> The right of action against the persons in the combination is given to the party damnified. Who is this party injured, when . . . there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured."
>
> . . . .
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> . . . It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be—though in the aggregate large, indeed—so small as not to justify the expense and trouble of a suit in a distant court.
>
> I do not hesitate to say that few, if any, of such suits will ever be instituted, and not one will ever be successful.

21 CONG. REC. 1767-68 (1890). In response, the Senate Judiciary Committee reported a revised bill differing substantially from the original. This bill subsequently became section 7 of the Sherman Act. Senator George again voiced opposition to the bill because "the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity of redress . . . ." 21 CONG. REC. 3150 (1890).

Senator Morgan cautioned that the "bill ought not to be a breeder of lawsuits. If there is any one duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can." 21 CONG. REC. 3149 (1890). *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977).

tion 4.[27] Thus, while courts generally consider legislative history to be a valid indicator of congressional intent, the susceptibility of the legislative histories of the Sherman and Clayton Acts to varying interpretations[28] undermines any attempt to infer accurately congressional intent on the question of private consumer standing under section 4.

III. JUDICIAL CONSTRUCTION OF STANDING UNDER SECTION 4

Although one commentator has asserted that section 7 of the Sherman Act (section 4 of the Clayton Act) "is so plain and precise in all its parts that it requires only to be attentively read in order to be understood,"[29] the federal courts have had difficulty in determining the standing of various plaintiffs. In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[30] the Supreme Court stated that instead of confining its protection to a single class of plaintiffs, such as purchasers, competitors, sellers, or consumers, the Sherman Act protects all victims of antitrust violations.[31] The Court reiterated its broad approach to judicial determination of standing under section 4 in *Radovich v. National Football League.*[32] In *Radovich* the Court stated that courts should not burden private litigants with judicial requirements beyond those established by Congress.[33] Some lower federal courts have also indicated that the

27. Representative Taggart emphasized that "[t]he bill is framed for the purpose of liberating business and not for the purpose of injuring or destroying any business. Its great purpose is to protect small business from big business . . . ." 51 CONG. REC. 9198 (1914). House Report No. 1373 gives additional background of section 4:

> These concerns [over dangerous social, political, and economic effects that result when control of an industry is placed in only a few hands], and the belief that democracy can be preserved only by dispersing and decentralizing economic and financial power, together with other dismaying records of turn-of-the-century monopolistic excesses that were unchecked by the Sherman Act, directly led to the enactment of section 7 of the Clayton Act in 1914. [citing United States v. Von's Grocery Co., 384 U.S. 270, 274-76 (1966)].
>
> Unlike the Sherman Act, Section 7 of the Clayton Act was meant to deal with potential, probable monopolies—not actual, completed ones. . . . As the preamble to the original Clayton bill proclaimed, its purpose was "to prohibit certain trade practices which . . . singly and in themselves are not covered by the Sherman Act . . . and thus to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation."

H.R. REP. No. 1373, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2637, 2639 (citation omitted).

28. *See generally* Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972); *see also* 72 COLUM. L. REV. 394, 394, 396 n.15 (1972).

29. A. WALKER, HISTORY OF THE SHERMAN LAW 61 (1910).

30. 334 U.S. 219 (1948).

31. *Id.* at 236.

32. 352 U.S. 445 (1957).

33. *Id.* at 454. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134

efficacy of section 4 should not be weakened by narrow judicial construction.[34]

The vast majority of lower federal courts have limited standing, however, in an attempt to stem the flood of litigants they fear would engulf the courts if they interpreted broadly the term "any person."[35] These courts have developed two distinct components of standing under section 4. In addition to showing an antitrust violation, to have standing a plaintiff must show: (1) that the antitrust violation caused the alleged injury (causal component); and (2) that the alleged injury in the plaintiff's business or property was of a type protected by section 4 (type of injury component).[36] Courts have formulated several tests to determine plaintiffs' standing under the causal component.[37]

A. Causal Component of Standing

(1) Direct Injury Test

The Third Circuit in *Loeb v. Eastman Kodak Co.*[38] first articulated the "direct injury" test of standing under section 4. In *Loeb* the Third Circuit denied standing to a stockholder-creditor of an injured corporation because the injury he received was indirect, remote, and consequential. Basically, the direct injury test provides that the "first party to purchase a product that has been affected by a violation has standing to sue, and all others . . . are barred."[39] Several courts have adopted the direct injury test by name or by application.[40]

(1968), the Court refused to impose broad, common law barriers on litigants in private treble damage suits because of the public purposes served by such suits.

34. *See, e.g.*, Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969), *aff'd*, 436 F.2d 1205 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957). *Contra*, Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237 (D. Mass. 1956).

35. *See* text accompanying notes 7-8 *supra*.

36. *See* text accompanying note 10 *supra*.

37. For a somewhat outdated compilation of tests adopted by each circuit, see *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 n.7 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

38. 183 F. 704 (3d Cir. 1910).

39. 72 COLUM. L. REV. 394, 400 (1972).

40. *See generally* Bravman v. Bassett Furniture Indus., 552 F.2d 90 (3d Cir. 1977); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

(2) Target Area Test

As early as 1945, the Eighth Circuit held that privity was not vital for standing under section 4.[41] Soon afterward, the Ninth Circuit articulated the "target area" test in *Conference of Studio Unions v. Loew's Inc.*[42] This test does not require direct privity as does the direct injury test. Instead, the target area test requires only that a plaintiff have suffered injury as a result of being within a sector of the economy at which the illegal activity was directed.[43] Several courts have adopted this method of testing the causal component of standing.[44]

(3) Zone of Interest Test

In *Malamud v. Sinclair Oil Corp.*[45] the Sixth Circuit rejected both the direct injury test and the target area test,[46] holding that standing under section 4 is governed by the "zone of interest" test that the Supreme Court articulated in *Association of Data Processing Service Organizations, Inc. v. Camp.*[47] The zone of interest test has two requirements: (1) the plaintiff must allege that the defendant caused him injury in fact; and (2) the interest to be protected must be within the zone of interests protected under the statute in question.[48] Few courts have utilized the zone of interest test for purposes of section 4, and at least one commentator has criticized this test.[49]

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41. Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580 (8th Cir. 1945).

42. 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

43. In Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972), Judge Mansfield stated:

> [I]n order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must he within the "target area" of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationship with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves.

Id. at 1295.

44. *See* Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793 (2d Cir. 1977); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); Kemp Pontiac-Cadillac, Inc. v. Hartford Auto. Dealers' Ass'n, 380 F. Supp. 1382 (D. Conn. 1974).

45. 521 F.2d 1142 (6th Cir. 1975).

46. The court stated that these tests "demand too much from plaintiffs at the pleading stage of a case." *Id.* at 1149.

47. 397 U.S. 150 (1970). *See also* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975).

48. 521 F.2d at 1151.

49. Sherman, *supra* note 8, at 399. Sherman bases his criticism on the practical and

(4) Pass-On Doctrine

The Supreme Court in *Hanover Shoe v. United Shoe Machinery Corp.*[50] developed the "pass-on" doctrine in a section 4 action by a commercial lessee of shoe production machinery. The pass-on doctrine confers standing upon a purchaser who buys a product at an inflated price that resulted from antitrust violations, even if that purchaser "passed on" its increased costs to the next purchaser or final consumer.[51] In *Illinois Brick Co. v. Illinois,*[52] however, the Supreme Court reviewed the *Hanover Shoe* doctrine and held that an indirect purchaser could not use the pass-on doctrine offensively—only direct purchasers from a manufacturer had standing under section 4.[53] Thus, the "pass-on" doctrine as modified by *Illinois Brick* closely resembles the direct injury test.

B. Type of Injury Component of Standing

The type of injury giving rise to consumer standing under section 4 is an injury in business or property resulting from an antitrust violation. In determining the type of injury component, most federal courts refer to the terms "business or property" concurrently, implying conjunctive use of the terms.[54] A minority of courts have addressed the grammatical treatment of the terms, interpreting "business or property" disjunctively with "property" having a wider scope and a more extensive meaning than "business."[55] In *Waldron v. British Petroleum Co.*[56] the court stated that a determination of "property" required a value judgment by the court as to whether that which the plaintiff possesses should be legally protected.[57] Writing for the Supreme Court in *Chattanooga Foundry & Pipe*

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theoretical differences that exist between administrative law actions and antitrust actions.

50. 392 U.S. 481 (1968).

51. For defensive use of the pass-on doctrine, however, see Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd per curiam sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

52. 431 U.S. 720 (1977).

53. *Id.* at 725-47. Expressed differently, an indirect purchaser cannot use a pass-on theory to recover unless the defendant could use the pass-on defense in a suit by a direct purchaser. Such defensive use is not allowed by *Hanover Shoe. Id.* at 729. The Supreme Court in *Illinois Brick,* however, did note certain exceptions indicated in *Hanover Shoe* that did not bar the use of a pass-on defense. Indirect purchasers may have standing in those instances. *Id.* at 745.

54. *See generally* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

55. *See, e.g.,* Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

56. 231 F. Supp. 72 (S.D.N.Y. 1964).

57. *Id.*

Works v. City of Atlanta,[58] Justice Holmes stated that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property."[59] Therefore, according to Justice Holmes, a decrease in a person's wealth precipitated by purchase of a product at a price inflated by antitrust violations constitutes an injury in property giving rise to standing under section 4.

Federal courts interpret "business" in the ordinary sense, referring to a commercial or industrial enterprise or establishment.[60] The proof necessary to show a business injury is substantially greater than the proof necessary to show a property injury.[61] Although many decisions have not focused solely on injury in business, these cases have involved commercial, industrial, or business plaintiffs. Thus in *Hawaii v. Standard Oil Co.*[62] the state of Hawaii brought an action on behalf of its citizens for injury to its general economy allegedly resulting from payment of higher prices for petroleum products because of antitrust violations by Standard Oil. The Supreme Court held that the terms "business or property" refer to commercial interests or enterprises. Because Hawaii's alleged injury did not affect the state in its role as a commercial entity, the Court denied standing.[63]

In 1976, in response to the Supreme Court's decision in *Hawaii*,[64] Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[65] This Act empowers state attorneys general to bring *parens patriae* actions for treble damages on behalf of injured consumers.[66] The history of the Act indicates that the *parens patriae* action was added because of congressional recognition that

58. 203 U.S. 390 (1906). *Chattanooga Foundry* considered a suit by the City of Atlanta under section 7 of the Sherman Act for injury suffered as a result of higher prices paid for pipe. Justice Holmes stated that Atlanta was injured in its property, at least, if not in its business of furnishing water, by paying more than the worth of the pipe. *Id.* at 396. Arguably, Atlanta's position as a commercial plaintiff frustrates the use of *Chattanooga Foundry* as authority for private consumer standing under section 4.

59. *Id.*

60. *See, e.g.*, Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 239 (D. Mass. 1956).

61. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

62. 405 U.S. 251 (1972).

63. *Id.* at 262-65. The Court stated that Hawaii would have standing to sue if it were seeking recovery for injuries suffered in its capacity as a consumer of goods and services: "Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a 'payment of money wrongfully induced,' damages are established by the amount of the overcharge." *Id.* at 263 n.14 (citation omitted).

64. *See* notes 62-63 *supra* and accompanying text.

65. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

66. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578.

even though private consumers have a cause of action under section 4, for practical reasons of expense and lack of incentive they are not likely to exercise their right to sue.[67]

Lower federal courts generally have applied the Supreme Court's limitation of the terms "business or property" to interests of the plaintiff-enterprise in commercial or competitive ventures beyond the scope of the Court's *Hawaii* decision.[68] In *GAF Corp. v. Circle Floor Co.*[69] the Second Circuit considered a suit under section 4 by GAF claiming that its acquisition by defendant Circle Floor would reduce competition in defendant's industry. The antitrust violations would not cause injury to GAF; rather, only Circle Floor's competitors would suffer injury. In denying plaintiff standing, the court stated that section 4 provides relief only to those enterprises that have suffered some diminution of their ability to compete.[70] In interpreting the standing of corporate, industrial, or business plaintiffs, the federal courts have consistently indicated that only those injured in their competitive positions or in a commercial manner satisfy the type of injury component of the standing test under section 4.[71]

Until recently, no court has expressly addressed the issue of private consumer standing under section 4. A few courts had intimated, however, that private consumers have standing under sec-

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67. The House Report provides:

> Under § 4 of the Clayton Act, any porson, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question. If, for example, a price-fixing conspiracy results in an overcharge of a dollar on a relatively low priced consumer item, and 50 million such items are sold, the aggregate impact of the conspiracy upon consumers and the illegal profits of the price-fixers are not insignificant—at least $50 million. Yet no single consumer could practically be expected to bring suit. . . . [H]e will quite obviously have neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover his tiny individual stake.

Id. at 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 2575-76.

68. *See In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

69. 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973).

70. *Id.* at 757. The court stated:

> The courts, in interpreting § 4 of the Clayton Act and its predecessor, have endeavored . . . to promote the policy of competition established by the Sherman and Clayton Acts by interpreting § 4 as allowing treble damages only to those who have suffered some diminution of their ability to compete. Whether viewed in terms of "lack of standing" or the absence of *antitrust* damages, the courts, in denying recovery to various kinds of plaintiffs, have sought to confine recovery to those who have been injured by restraints on competitive forces in the economy.

Id. at 757-58 (emphasis in original).

71. *See* Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184, 1187 (E.D. Ark. 1975).

tion 4 when they allege injury in property resulting from purchases of goods at prices maintained at artificial levels by antitrust violations.[72] In *Bosches v. General Motors Corp.*[73] a retail purchaser of an automobile brought an action under section 4. The court addressed the causal component of standing and held that plaintiff came within the cost-plus exception to *Hanover Shoe.*[74] In ruling that plaintiff had standing to sue, the court expressly held that private consumers met the causal component of the section 4 standing test. In addition, by allowing plaintiff to maintain suit, the court implicitly held that private consumers have standing under the type of injury component, since such a finding was necessary in order to proceed with adjudication on the merits. In *Cleary v. Chalk,*[75] the District of Columbia Court of Appeals stated that a consumer purchase of an article in a business transaction at a price higher than the worth of the product injures the consumer in his property. Similarly, the court found that a consumer of a service is injured in his property by payment of a price higher than the worth of the service and has standing under section 4.[76] Recent federal district court decisions have split on the specific issue of the standing of a private consumer alleging injury in property from artificially maintained prices.[77] The only published federal court of appeals opinion to address this specific issue denied a private consumer standing under section 4.[78]

IV. JUDICIAL INTERPRETATION OF PRIVATE CONSUMER STANDING UNDER SECTION 4

A. *Split Among Federal District Courts*

In *Weinberg v. Federated Department Stores, Inc.*[79] a retail

72. *See generally In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *In re* Master Key Antitrust Litigation [1973-2] Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973); Bosches v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *cert. denied,* 404 U.S. 871 (1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

73. 59 F.R.D. 589 (N.D. Ill. 1973).

74. *Id.* at 598-99.

75. 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973).

76. *Id.*

77. *See* Part IV(A) *infra.* The private consumers contend they are forced to pay artificially maintained prices for products because of antitrust violations. These higher than normal prices result in a greater decrease in their wealtb than would have occurred bad no antitrust violations been committed. Thus, the plaintiffs claim they are injured in their property because tbeir wealth is a property interest protected by section 4.

78. Reiter v. Sonotone, 579 F.2d 1077 (8th Cir. 1978). *See also* Part IV(B) *infra.*

79. 426 F. Supp. 880 (N.D. Cal. 1977). Those portions of the opinion in *Weinberg* under

consumer of women's clothing brought suit under section 4 against a department store chain, alleging injury in property resulting from the payment of additional money for clothes as a result of antitrust violations. The Northern District of California examined the legislative history and judicial construction of section 4, and also public policy concerns in seeking to resolve the issue of private consumer standing.[80] The court concluded that because the purpose of the antitrust laws is to enhance free competition, the terms "business or property" are conjunctive and require a competitive or commercial injury in business or property.[81] Thus the court held that a private consumer alleging injury in property from payment of higher prices established by antitrust violations does not allege an injury of a competitive or commercial nature and therefore lacks standing under section 4.[82]

Subsequent to the California cases denying private consumers standing under section 4, the Eastern District of New York granted a retail purchaser of motor homes standing under section 4 in *Theophil v. Sheller-Globe Corp.*[83] In *Theophil* the court questioned the validity of the *Weinberg* holding, stating that injury to a private consumer's pocketbook in the form of higher prices established by antitrust violations constitutes an injury in property.[84] Reasoning that antitrust laws were for the benefit of the consumer, the court emphasized that it would be anomalous to deny private consumers standing under section 4.[85] The court accepted Justice Holmes' definition of property in *Chattanooga Foundry* and concluded that a private consumer forced to pay a higher price for an item as a result of antitrust violations is injured in his property and has standing to sue under section 4.

B. Reiter v. Sonotone Corp.

In *Reiter v. Sonotone Corp.* a private retail consumer of hearing aids brought a class action under section 4 against several manufac-

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the headings *Legislative History, Judicial Construction, Unredressed Injury to Consumers,* and *Section 16 Remedies for Consumers* are identical to those portions in Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), and Smith v. Toyota Motor Sales, U.S.A., Inc., [1977-1] Trade Cas. (CCH) ¶ 61,251 (N.D. Cal. 1977), under the same headings. Thus reference to *Weinberg* encompasses all three cases.

80. 426 F. Supp. at 882-86.
81. *Id.* at 885.
82. *Id.* at 882-85.
83. 446 F. Supp. 131 (E.D.N.Y. 1978).
84. *Id.* at 135.
85. *Id.*

turers of hearing aids.[86] Plaintiff contended that the injury to her pocketbook resulting from the payment of an artificially high price maintained by antitrust violations[87] constituted an injury in her property.[88] Analyzing the legislative history of the Sherman Act, the Eighth Circuit noted congressional concern with the statute's inability to aid the private consumer.[89] According to the court, protection of business was the congressional purpose underlying the Clayton Act. Reviewing judicial construction of the terms "business or property," the court concluded that the injury in business or property must be an injury of a competitive or commercial nature.[90] The court distinguished *Chattanooga Foundry* by reasoning that Atlanta's claim arguably sought recovery for a business injury to the city.[91] The court stated that cases[92] suggesting that consumers should be permitted standing were not inconsistent with the court's interpretation of section 4, and moreover, such cases did not address the specific consumer standing question presented by the instant case.[93] The court interpreted the enactment of the Antitrust Improvements Act as evidence that private consumers did not have standing under section 4, despite the fact that some members of Congress had assumed that ordinary consumers did have standing.[94] According to the court, the Act gave state attorneys general the power to bring *parens patriae* actions because private consumers did not have standing under section 4. The court expressed apprehen-

86. Plaintiff brought the action "on behalf of herself and 'all persons in the United States or any subpart thereof who directly or indirectly purchased . . . hearing aids [at the allegedly unlawful prices].'" Reiter v. Sonotone Corp., 579 F.2d 1077, 1078 (8th Cir. 1978).

87. The artificially high price was maintained by defendants through activities allegedly violating the antitrust laws. The allegations included combining and conspiring with competitors (horizontal price fixing) and controlling the sales practices of their dealers, particularly through the use of resale price maintenance to control their dealers' retail prices (vertical price maintenance). *Id.* at 1078.

88. The injury plaintiff claimed in her property consisted of the payment of a higher price for a hearing aid than she would have paid had there been no antitrust violations by defendants. Plaintiff argued this extra income was property that was illegally taken from her as a result of the antitrust violations.

89. *Id.* at 1080; *see* note 20 *supra.*

90. *Id.* at 1081-84.

91. *Id.* at 1082.

92. *Id.* at 1083 n.12. The court referred to Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Bravman v. Bassett Furniture Indus., 552 F.2d 90 (3d Cir. 1977); and Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973).

93. The court concluded, without any explanation of the basis for its conclusion, that these cases were not inconsistent with its holding and that the specific issue of consumer standing was not addressed by these courts. 579 F.2d at 1083 n.12.

94. *Id.* at 1085.

sion that allowing private consumers standing would reduce court efficiency and would have a detrimental impact on the economy because of the potential flood of litigants.[95] Therefore, the Eighth Circuit, like the Northern District of California, denied plaintiff standing to sue on the ground that injury to her pocketbook was not a competitive or commercial injury in business or property as required by section 4.

V. Analysis of Private Consumer Standing Under Section 4

The overriding policy goal of the Sherman and Clayton Acts is to prevent restraints on trade and to protect free competition.[96] An important method of achieving this general aim of the antitrust law is the private treble damage action under section 4. Moreover, private treble damage actions serve the more specific dual purposes of deterring violations and compensating the injured party.[97] The position taken by the *Reiter* and *Weinberg* courts, however, effectively precludes treble damage actions by private consumers under section 4. Denial of standing to private consumers therefore frustrates the goal of the antitrust laws in many instances by foreclosing suit by the party that may be most willing or able to enforce antitrust violations.

For example, in *Reiter* defendants allegedly were guilty of horizontal price fixing and resale price maintenance. If these allegations were true, dealers purchasing the violators' products may not bring suit for fear of losing their distribution rights. Moreover, if the manufacturer was maintaining minimum resale prices, all retailers may be profiting from uniformly high prices and consequently would be disinclined to sue. Furthermore, collusion and other horizontal restraints may be advantageous to competitors outside the conspiracy because they can often undersell the floor prices maintained by the violators and thereby increase their sales and profits. Finally, competitors who are co-conspirators are unlikely to bring suit because they enjoy the mutual advantages of the horizontal restraint. Even if such a conspirator removes himself from the illegal activity and then sues, the claim may be barred by the *in pari delicto* doctrine

95. *Id.* at 1086. The court reasoned that a multitude of suits by private consumers would lead to the extinction of small firms unable to pay several treble damage judgments. Those firms able to pay would simply pass the cost of the judgments on to other ultimate consumers. The court feared a loss in judicial efficiency resulting from the increase in suits if *any* private consumer were given standing. Although use of the class action could decrease the number of suits, the court viewed large class action suits as unsatisfactory.

96. *See* note 20 *supra* and accompanying text.

97. *See* note 23 *supra*.

or other equitable defense.[98] Although the federal or state governments can bring actions to enforce the antitrust laws, their limited resources often preclude prosecution of many small violations. Furthermore, the government may not even be aware of many small antitrust violations that individual private consumers or consumer groups might detect. Private consumers also are less susceptible to business lobbyists who may deter governmental prosecutions.

Aside from the private consumer's insulation from practical deterrents faced by commercial or governmental plaintiffs, which makes the private consumer the most appropriate party to sue for an antitrust violation, the private consumer plaintiff can fulfill the goal of promoting economic efficiency as well as any other plaintiff under section 4. Since one of the primary purposes of antitrust regulation is to enhance allocative efficiency, the important goal is to identify and correct anticompetitive practices. Consequently, the peculiar identity of the plaintiff is immaterial. If antitrust violations exist, the primary purpose of the court should be to correct the inefficiency rather than artificially to delineate which party has standing to sue. Because they offer substantial monetary reward, treble damage actions by private consumers directly encourage free competition and effectively deter antitrust violations, supplementing the government's more limited enforcement of the antitrust laws. In addition, the compensatory goal of antitrust regulation is accomplished most effectively by allowing the private, ultimate consumer who incurs the injury to bring an action under section 4. Finally, actions by intermediate levels of business entities lead to the unjust enrichment of middlemen at the expense of the final consumer. Suits by business entities that are direct purchasers from the antitrust violator give the direct purchasers the benefit of any recovery obtained *plus* the profit from the product. Most direct purchasers can pass on any overcharge in their purchase price to the final consumer and thereby incur minimal, if any, loss of profit. Thus, allowing private consumer standing promotes the fundamental goals of antitrust—economic efficiency, deterrence of future violations, and compensation of the injured party. The importance of the private consumer in achieving these goals is even more pronounced when he is the *only* party likely to sue.

Rather than addressing these issues, the decisions in *Weinberg* and *Reiter* are oriented toward the goal of closing the floodgates of litigation the courts fear will result if private consumers are allowed standing under section 4.[99] To this end, the courts misconstrued the

98. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

99. *See* text accompanying notes 7-8 & 35 *supra*.

legislative histories of the Sherman, Clayton, and Antitrust Improvements Acts and misapplied judicial construction of the terms "business or property" to a factual situation dissimilar to those in which the terms were originally defined. The legislative history of the Sherman Act indicates Congress' understanding that although private consumers had standing under section 4, they would not have effective redress because of the lack of incentives to sue and the extreme burden and cost of such litigation.[100] The enactment of the Antitrust Improvements Act, which enables a state to bring suit if its citizens lack the incentives to sue or cannot afford the burden or cost of litigation,[101] emphasizes congressional recognition that private consumers lacked effective redress. The legislative history of the Clayton Act similarly indicates that it was designed not only to provide relief to businesses but also to provide relief to both the private consumer and the entrepreneur from monopolistic practices not covered by the Sherman Act.[102]

Judicial restriction of the terms "business or property" to the commercial injury context did not arise in the private consumer setting. Courts requiring injury in business or property to be of a commercial or competitive nature developed the requirement for application to corporate, industrial, or other commercial plaintiffs.[103] In effect, the commercial or competitive injury requirement describes the type of business injury the court views as compensable under section 4. Requiring these plaintiffs to prove a commercial or competitive injury is a means of determining whether they have incurred an injury that actually affects their position in the competitive environment. Injury inflicted by antitrust violations not affecting the commercial interests of these plaintiffs is not actually injury in business.[104]

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100. *See* note 26 *supra.*

101. *See* text accompanying notes 65-67 *supra.*

102. *See* note 27 *supra.* Additionally, Congress provided injunctive relief in section 16 of the Clayton Act. Clayton Act, § 16, 15 U.S.C. § 26 (1976) provides in part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ." *See* note 25 *supra* and accompanying text.

Section 16 allows "any person" standing, but section 4 is limited to "any person injured in his business or property." The difference exists because damages are much more detrimental to a defendant than an injunction would be. A defendant could sustain multiple injunctions on a violation but could not economically sustain several damage judgments for a violation. Additionally, section 16 provides injunctive relief from threatened loss or damage whereas treble damage relief requires quantifiable damage rather than merely speculative assessments.

103. *See* notes 62-63 & 68-71 *supra* and accompanying text.

104. Conceivably, plaintiffs could be the target of action by a group of firms. The collusion of these firms might violate antitrust laws, but if their action did not affect the

The commercial or competitive injury requirement is inapplicable to private, noncommercial consumers, and use of this test by the *Reiter* and *Weinberg* courts to deny private consumer standing was inappropriate. The court should apply the plain meaning of section 4, treating "business or property" disjunctively as did Justice Holmes in *Chattanooga Foundry,* and giving "property" its customary meaning. Under this standard, a consumer who pays the "fixed" price is injured in his property—as the *Theophil* court properly concluded. Attempting to reconcile those cases that seemingly support the plain reading of section 4,[105] the *Reiter* court emphasized that the earlier cases did not address the issue of private consumer standing. The court overlooked, however, several cases intimating that private consumers had standing under section 4[106] as well as the district court opinion in *Theophil.*

In denying private consumers standing under section 4, the *Weinberg* and *Reiter* courts subrogated the purposes of the antitrust laws to the purpose of judicial economy. Although court efficiency is an important consideration, courts should not promote judicial convenience at the expense of free competition, which is the principal aim of the antitrust laws. While the Supreme Court has indicated that lower courts should not overburden antitrust plaintiffs with restrictive judicial constructions,[107] the Court obviously has not advocated opening the courts to unmeritorious or spurious claims by plaintiffs lacking the requisite standing. The *Reiter* and *Weinberg* courts' overcautious concern with spurious claims is unwarranted, however, since several limitations already exist to stem spurious actions under section 4.

First, the different tests developed under the causal component of the standing requirement already restrict the number of private consumers who may bring actions under section 4. The private consumer plaintiff may not be in direct privity with the defendant, or may not be in the target area of the defendant's anticompetitive activity. The pass-on doctrine as modified in *Illinois Brick* essentially denies a private consumer standing if the private consumer is not in privity with the violator, except possibly in cases of cost-plus

plaintiff in any conceivable commercial or competitive manner, *i.e.,* loss of sales or higher costs, then the plaintiff would not have standing under section 4. If the plaintiff brought suit because the antitrust activities would harm some other firms without affecting the plaintiff, the plaintiff would be denied standing. *See* GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973).

105. *See* text accompanying note 92 *supra.*

106. *See* text accompanying notes 72-76 *supra.*

107. *See* notes 32-33 *supra* and accompanying text.

contracts or situations in which the manufacturer dominates the retail dealers. Consequently, the private consumer plaintiff already faces formidable barriers without the imposition of a restrictive type-of-injury standard. The procedural problems associated with consumer actions can be mitigated. *Parens patriae* actions should be encouraged in cases involving unmanageable class actions. Finally, courts can use such procedural devices as joinder, interpleader, and consolidation to reduce the multiplicity of suits by separate private consumers that may arise from the same antitrust violation. These devices also would allow private consumers to pool their resources more effectively and would guard against multiple, repetitive treble damage judgments against a single violator.

VI. Conclusion

Private consumers alleging injury to their pocketbooks because of artificially higher prices generated by antitrust violations are injured in their property and should be granted standing under section 4. Denial of standing to private consumers frustrates the goals of the antitrust laws and in many instances will allow antitrust violations to go unchecked. Fear of a tidal wave of litigation probably is unfounded, but even if existent, such a threat could be controlled by existing procedural devices such as interpleader, joinder, and consolidation. Decisions like those by the Eighth Circuit in *Reiter* and the Northern District of California in *Weinberg* ignore these safeguards at the expense of viable antitrust enforcement. In the future, courts addressing the issue of private consumer standing should emulate the position of the district court in *Theophil* and allow private consumers standing under section 4.

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