12-1-1978

Lenore and Janich: Competitors and Predators in the Ninth Circuit

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/lr/vol12/iss1/5
I. INTRODUCTION

Congress enacted the antitrust laws to protect and promote competition. The Sherman Act and the Clayton Act, the primary federal antitrust laws, were fashioned by Congress so that both the government and individuals have the right to sue for antitrust violations. Section 4 of the Clayton Act is the enabling section for the private antitrust plaintiff to sue to recover damages for its injuries. By virtue of section 4, the private antitrust plaintiff has been placed in a most favorable position, for not only does that plaintiff have the right to sue, but it also has the right to recover threefold its damages.

The courts have noted the Congressionally created favored position of section 4 plaintiffs, and have been generally liberal in their analyses.

3. Id. §§ 12-27.
7. This section enables the private plaintiff to sue for damages sustained by reason of anything forbidden by the antitrust laws. Thus, the section 4 plaintiff has the full panoply of antitrust violations upon which to base his claim for damages.
of section 4 lawsuits.9

For example, one major development in the enforcement of the antitrust laws is the doctrine of per se violations.10 As defined by the Supreme Court, the scope of the per se doctrine encompasses those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."11 The rationale for the doctrine is that certain types of conduct afford a quick detection of anticompetitive purpose and effect, and from that purpose and effect flows the conclusive presumption of illegality.12 The types of conduct typically found to be per se violations of the antitrust laws include vertical and horizontal price-fixing agreements,13 market allocation by and among competitors,14 and group


10. A review of the history of the development of the per se concepts shows that:
These concepts were born during the era of economic evils which threatened the competitive processes of our economy. They had their beginnings in price fixing conspiracies of the 1920's and were spawned in the atmosphere of restrictive arrangements between competitors, arrangements which had as their sole purpose and effect restraint on competition.


As the government attempted to enforce the antitrust laws through the medium of the judicial system, patterns emerged in numerous cases of similar egregious facts. In an effort to expedite these cases to judgment, and thus conserve substantial judicial time and energy, the doctrine of per se violations emerged. Under this doctrine, the courts could reach a conclusive presumption of illegality at an early stage of a case. As the Supreme Court stated in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963): "in any case in which it is possible, without doing violence to the congressional objective [of the antitrust laws], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." Id. at 362 (citation omitted). With the establishment of this concept of "simplifying the test of illegality," or per se finding of illegality, came reliance on it by all plaintiffs, private as well as governmental.


boycotts.15 "When the conduct or practice, such as [group boycott], is established, illegality automatically follows."16 For example, a Clayton Act section 4 claim for relief is automatic with the allegation of a per se illegal group boycott, and the plaintiff need not plead the usual elements of anticompetitive purpose and effect.17 This strict liability aspect of the per se doctrine tends to ease the plaintiff's burden of proof, and facilitate the obtaining of a judgment granting recovery.18

To be sure, section 4 and per se rules favoring recovery by plaintiffs tend to encourage private antitrust litigants to pursue a remedy. Nevertheless, the section 4 right to recover trebled damages is unusual and drastic. Several courts have held that because of the unique nature of


17. Proof of purpose and effect has been the classic test for the legality of conduct encompassed by the antitrust laws. This test, dubbed the "Rule of Reason" in antitrust jurisprudence, is a general rule which requires a factual showing of anticompetitive, illegal conduct. The Rule of Reason was introduced in the early Sherman Act cases of Standard Oil Co. v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco Co., 221 U.S. 106 (1911). Shortly thereafter, in the Sherman Act § 1 (restraint of trade) case of Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) Justice Brandeis presented the following formulation of the Rule of Reason:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

This classic articulation of the Rule of Reason has survived over the years, and was recently reaffirmed by the Supreme Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977).

18. In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the Court held that conduct in the nature of a group boycott or concerted refusal to deal is per se violative of the Sherman Act, regardless of its purpose or effect. In so holding, the Court indicated that per se violations of the antitrust laws cannot be defeated by a defendant's allegations of reasonable purpose, nor by a plaintiff's omission of a charge of anticompetitive effect:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned.

*Id.* at 212 (citations omitted).
the rights created by section 4, there should be strict construction of the claims under the antitrust laws which support the section 4 claim.19

So far as is pertinent here, section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore [in federal court] . . . 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.20

A conflict of policies has grown from the differing treatment accorded section 4 claims by various courts. On the one hand, there is a strong policy of liberal construction of section 4 claims. Competition is deemed central to the American free market system and the encouragement given by section 4 to plaintiffs plays a strong role in enforcing the policy of the antitrust laws.

[A] niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combating unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction.21

On the other hand, there is the concern that the treble damages provision in section 4 may result in unjust or windfall recovery. This concern is a focal point for the policy of strict construction of section 4 claims. The warning has been issued that "the possibility that the antitrust laws might develop into a racketeering practice should not be enhanced . . . ."22 As one commentator has stated:

Courts should not be blinded by unwarranted solicitude for plaintiffs in treble damage actions. There can be no doubt that many such suits are completely without merit and instituted in the hope that the defendants would make a settlement rather than incur the expense of preparation and trial. Undue judicial protection of such cases can only serve to impair the dignity of our courts. When it becomes obvious that the particular private case has no merit and that it is really an attempted "shakedown" the

Courts should not hesitate to make short shrift of it.\(^\text{23}\)

In the Ninth Circuit, a policy is emerging which not only endorses the rule of strict construction, but also tends to establish per se rules of construction of the antitrust claims underlying section 4 suits. These per se rules have developed through two separate lines of cases addressing two separate types of section 4 claims based upon specific antitrust violations. One line of cases addresses the issue of the standing of a section 4 plaintiff to sue on a Clayton Act section 7 claim of anticompetitive acquisition. The other line of cases addresses the concept of predatory conduct, one of the prima facie elements of a Sherman Act section 2 charge of attempted monopolization. Since these strict rules of construction in the Ninth Circuit will tend to limit the number of cases properly before the courts, the potential impact on antitrust litigation is immense. It is the purpose of this Comment to analyze some of the recent cases which establish the policy of strict construction, and to explore the practical effects of that policy.

II. Per Se Rules of Standing For a Clayton Act section 4 - section 7 Plaintiff

Under the statutory wording of Clayton Act section 4, the private plaintiff may sue for injuries sustained “by reason of anything forbidden in the antitrust laws . . .”\(^\text{24}\) Thus, the section 4 plaintiff who is injured by anticompetitive conduct must bring suit not only under section 4 but also under the statute which prohibits the injurious conduct. For example, section 7 of the Clayton Act forbids anticompetitive acquisitions. As such, its violation could support a section 4 treble damage claim. Section 7 of the Clayton Act provides:

No corporation engaged in commerce shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.\(^\text{25}\)

Clearly, section 7 is aimed at the preservation of competition. The section 4 plaintiff would claim that its injury was “by reason of”\(^\text{26}\) the proscribed section 7 acquisition. The formula appears straightforward, and has been argued before countless courts. One of the most typical fact patterns of a section 4 - section 7 suit is that of the distributorship

\(^{25}\) Id. § 18.
\(^{26}\) Id. § 15.
termination following an anticompetitive acquisition. This claim arises when one supplier/producer acquires a competing supplier/producer and replaces the distributors of the acquired entity with its own distribution network. Clearly, the terminated distributor has been injured because it has lost all (if an exclusive distributor) or some (if a general distributor) of its business. Potentially, such an acquisition violates section 7 since the elimination of a competitor may "lessen competition, or . . . tend to create a monopoly . . . ."\textsuperscript{27} The terminated distributor would see its injury as being caused by the allegedly anticompetitive acquisition and sue under Clayton Act sections 4 and 7.

In the Ninth Circuit, these distributorship termination cases have been analyzed according to a policy of strict construction of the "by reason of" element of the section 4 claim. The "by reason of" element has been found to be so critical to the section 4 claim that it is dispositive of the plaintiff's standing to bring suit under section 4.

\textbf{A. The Target Area Test}

In the seminal case of \textit{Kirihara v. Bendix Corp.},\textsuperscript{28} the District Court of Hawaii outlined a comprehensive analysis of standing to sue. Kirihara was a distributor of Fram automotive oil filters in Hawaii. When Bendix acquired Fram, Kirihara was terminated and replaced by a Bendix distributor. However, Kirihara remained free to distribute other lines of automotive oil filters. Kirihara sued for damages under sections 4 and 7 of the Clayton Act, alleging that the Fram/Bendix merger was illegal. The court dismissed Kirihara's complaint for lack of standing, applying a target area\textsuperscript{29} test of standards for a section 4 - section 7 suit. The court ruled that:

In order to have a § 4 cause of action based upon an alleged § 7 violation, not alone [sic] must the claimed injury be directly and proximately caused by the proscribed acquisition, but also the injured must be one of the components of the competitive infra-structure of the relevant market involved in the complaint, be it in any section of the country, and the effect

\textsuperscript{27} \textit{Id.} § 18.

\textsuperscript{28} 306 F. Supp. 72 (D. Hawaii 1969).

\textsuperscript{29} As Chief Judge Pence reviewed the history of section 4 claims, he mentioned that "[a]ll courts have persistently held that the person injured must be within the target area of the alleged violation before he can state a claim thereunder. . . ." \textit{Id.} at 88. The court went on to note:

Manifestly, therefore, whenever the plaintiffs are the direct and primary objectives of the antitrust violation they have a standing to sue. But the target area in most cases is not so simply ascertained, nor, as this court views it, has there been any decisional definition of the perimeter of a § 7 target . . . .

\textit{Id.} at 89 (footnotes omitted).
of such injury on that component must validate the reasonable probability that a substantial anti-competitive effect upon the viability of competition in that market will flow from the condemned acquisition. An injury to a component of minimal, i.e., non-effective, competitive significance therein, was not intended by Congress to come within the perimeter of the above "target area" of a § 7 violation.\(^{30}\)

Thus, the section 4 - section 7 plaintiff must prove presence in the target area of the section 7 violation in order for that violation to support a section 4 claim. The Kirihara target area standards require direct, proximate damage done to the plaintiff by reason of the defendant's anticompetitive conduct, rather than mere indirect, incidental ramifications of such conduct. In addition, the plaintiff must be competitively significant\(^{31}\) such that injury to it will support the inference of probable injury to competition in general.\(^{32}\) The application of these "target area" standards, with their focus on the directness of the injury and the significance of the plaintiff, will tend to have the correlative effect of limiting the number of proper section 4 - section 7 plaintiffs.

The target area standards announced by the district court in Kirihara were subsequently endorsed by the United States Supreme Court. In

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30. *Id.* at 90 (emphasis in original) (footnotes omitted).

31. The "competitive significance" of an antitrust plaintiff has been viewed by the Supreme Court as a matter of the "quantitative substantiality" of that plaintiff's share of the relevant market in terms of product and dollar volume. In Standard Oil Co. v. United States, 337 U.S. 293 (1949), the Supreme Court affirmed the ruling of the district court that when the competitive activity of a quantitatively substantial entity is eliminated, a substantial lessening of competition is the automatic result. *Id.* at 298, 315. It is that "substantial lessening of competition" which the antitrust laws guard against. The Standard Oil case concerned exclusive supply contracts for petroleum products and automobile accessories. Such contracts deny "dealers opportunity to deal in the products of competing suppliers and [exclude] suppliers from access to the outlets controlled by those dealers." *Id.* at 298. The district court had found that the contracts covered "a substantial number of outlets and a substantial amount of products . . . ." *Id.* (quoting United States v. Standard Oil Co., 78 F. Supp. 850, 875 (S.D. Cal. 1948)).

Contra, United States v. General Dynamics Corp., 415 U.S. 486 (1974). This case concerned an acquisition by a coal mining company of a strip mining company. The fact of already great concentration in the industry was noted by the Court as being relevant in gauging the anticompetitive effect of the acquisition. In this case, the Supreme Court held that:

While the statistical showing proferred by the Government . . . would . . . support a finding of "undue concentration" in the absence of other considerations, . . . the District Court was justified in finding that other pertinent factors affecting . . . the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened. . . .

*Id.* at 497-98.

32. The antitrust laws were enacted for the protection of competition, not competitors. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., the Court unanimously held:

that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

The announcement of this rule brings with it, in part, a new and rigid requirement of proof. The section 4 plaintiff must prove "antitrust injury," showing both that its injury is the type intended to be prevented and that its injury is directly and inseparably a result of the illegality of the defendant's conduct. But the rule announced in Brunswick is not only a rule of proof, it is a further endorsement of the Supreme Court's frequently stated policy of interpretation of the antitrust laws. The Court has stated that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Further, the Court has viewed the purpose of the antitrust laws to be "the protection of competition, not competitors."

These strict target area rules that the section 4 plaintiff's injury be an antitrust injury and that its injury be an injury to competition are rules of standing. If the section 4 plaintiff does not satisfy these requirements, it does not have the standing to sue. Many section 4 cases must fail on a motion for summary judgment because of these standing rules. The number of proper section 4 plaintiffs can thereby be limited to a relative few. However, these few plaintiffs would seem likely to be successful in their suits since their injuries would necessarily be squarely in the target area of the antitrust laws. Clearly, these target area rules require a trade-off. In the place of giving time and, occasionally, judgments to competitively insignificant plaintiffs who have suffered marginal antitrust injury, the courts might now encourage the truly significant antitrust plaintiff who will succeed at trial. Thus, the policy of the antitrust laws would be effected: antitrust violations would be prevented or redressed, and their direct injuries would be compensated. In addition to providing guidelines to the courts for the standing

34. Id. at 489 (emphasis in original).
37. 429 U.S. at 489.
38. 306 F. Supp. at 90.
of antitrust plaintiffs, the implementation of "target area" rules will tend to economize on judicial time spent on section 4 claims.

B. The Target Area Test Applied:
John Lenore & Co. v. Olympia Brewing Co.

Following the proposal and confirmation of the concept of target area, and the clear legislative and judicial intent\(^3\) that the focus of the antitrust laws be on competition, the Ninth Circuit recently decided *John Lenore & Co. v. Olympia Brewing Co.*\(^4\) In *Lenore*, the court synthesized the rules of *Kirihara* and *Brunswick*. The result of that synthesis is a per se standard for section 4 - section 7 standing to sue. This per se standard, of course, will contract the number of proper section 4 - section 7 plaintiffs, following the trend set in *Kirihara* and *Brunswick*.

In *Lenore*, as in *Kirihara*, the pertinent facts concerned a distributorship termination following an acquisition. Lenore was a distributor of Hamm's beer. Olympia Brewing acquired Hamm's, and then terminated Lenore and other former Hamm's distributors, replacing them with Olympia's own distributors. After termination, Lenore was free to sell brands of beer other than Olympia. Lenore sued Olympia for treble damages, under sections 4 and 7, claiming that Olympia's acquisition of Hamm's was anticompetitive. Olympia moved for summary judgment on the ground that Lenore lacked standing to sue under sections 4 and 7. Olympia's motion for summary judgment was granted by the trial court and affirmed by the Court of Appeals for the Ninth Circuit.

An analysis of standing was central to the holding of *Lenore*. The Ninth Circuit began with the proposition that standing is a question of law.\(^4\) Noting that standing has proved to be a "perplexing problem,"

\(^3\) The Supreme Court has referred to the purpose of the antitrust laws as being the protection of competition. "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). "Congress has encouraged private antitrust litigation... to vindicate the important public interest in free competition." *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). Accord, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See, e.g., 95 CONG. REC. 11486, 11489, 11494-95, 11498 (1949) (remarks by Representatives Celler (cosponsor of 1950 amendments to Clayton Act), Keating, Bryson and Patman, respectively); 96 CONG. REC. 16448, 16452, 16503 (1950) (remarks by Senators Kefauver (cosponsor of 1950 amendments to Clayton Act), Murray and Aiken). Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945): "Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake... an organization of industry in small units which can effectively compete with each other."

\(^4\) 550 F.2d 495 (9th Cir. 1977).

\(^4\) Id. at 498.
the court pointed to the well established target area test and integrated that test with the antitrust injury test from *Brunswick*. The court reasoned:

This court has adopted the "target area" approach as a prerequisite to standing in antitrust cases . . . .

The analysis of standing requirements under §§ 4 and 7 does not end here, however. It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy. Antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not allowed all of those merely affected by the ripples to sue for treble damages. Congress, in passing this legislation, did not intend to protect every possible or potential injury which could remotely be connected to a corporate merger or acquisition.42

Referring to *Brunswick*, the Ninth Circuit pointed out that a plaintiff must prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."43 Turning then to *Kirihara*, the Ninth Circuit quoted and adopted the target area test for standing outlined there.44 Combining the salient language from the holdings in *Kirihara* and *Brunswick*, the Lenore decision establishes a rigid test for a plaintiff in the Ninth Circuit to have standing to sue under sections 4 and 7. That test can be stated as follows: (1) the claimed injury must be directly and proximately caused by the proscribed acquisition and not merely incidental matter which the unlawful activity made possible but did not cause; (2) the injured plaintiff must be a significant competitor in the relevant market involved such that injury to it will import injury to competition in that market; and (3) the claimed injury must be of the type the antitrust laws are intended to prevent (i.e., injury to competition) and flow from that which makes the defendant's conduct unlawful (i.e., the possible substantial lessening of competition or the tendency to create a monopoly).

The first two elements of this test were borrowed from the target area analysis in *Kirihara*. The third element came from *Brunswick*. The mix is complete: the first two elements direct attention to the factual composition of the plaintiff's claim, while the third element integrates policy concerns into the test. Each of these elements is critical to the standing of a plaintiff to bring suit under sections 4 and 7. The absence

42. 550 F.2d at 499.
43. Id. (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis in original)).
44. Id. at 499 (citing Kirihara v. Bendix Corp., 306 F. Supp. 72, 90 (D. Hawaii (1969)).
of any one element will support the granting of summary judgment for the defendant.

This per se test of standing has significant ramifications for the plaintiff in a distributorship termination section 4 - section 7 suit. First, the requirement that the injury be directly caused by the unlawful acquisition presents a virtually insurmountable hurdle to the plaintiff distributor. The only direct injuries resulting from an anticompetitive acquisition of a producer are injuries to other producers because of a lessening of competition in production. As the court in Lenore explained, the termination of a distributorship may be made possible by an acquisition, but it is not caused by it.

The second required element of standing for a section 4 - section 7 plaintiff is that plaintiff be a significant competitor in the relevant market. This is an arbitrary rule, tending to limit the number of plaintiffs to those whose injuries suggest injury to competition. Of particular importance here is the definition of the relevant market. If, as in Lenore, the relevant market is the production and distribution of a product (as opposed to a specific brand of a product), then the exclusive distributor of one brand will probably not be "competitively significant." Likewise, the general distributor of several brands may not be competitively significant, depending on a dual market share analysis that would examine the share of the market owned by the acquired brand and the share of that share distributed by plaintiff. This element of the plaintiff's position as a significant competitor does afford some leeway to the plaintiff's burden of proof as there are various theo-

45. Conceivably, of course, a proper distributor plaintiff could allege that its injury was direct because it was an exclusive distributor, foreclosed from selling any other line of the product. 306 F. Supp. at 91. However, this situation would be rare, reserved possibly for the situation of a unique product with no competing lines of product.

46. 550 F.2d at 499-500.

47. In Lenore, the relevant market was "the production and sale of beer in the Western United States." Id. at 499.

48. Of course, it is possible that there could be so few brands of the product that an exclusive distributor of one brand would have a large enough share of the market to be competitively significant.

49. Certain circumstances will afford a presumption against "competitive significance." In Lenore, the relevant market was "the production and sale of beer in the Western United States" and the plaintiff was only one of hundreds of beer distributors. The trial court found that the plaintiff was a "component of minimal competitive significance in that market," and the Ninth Circuit agreed. 550 F.2d at 500. On the other hand, the Supreme Court in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), indicated that the small general competitor may be significant: "Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." Id. at 213.
ries of relevant market and market share. However, the plaintiff must still meet the other two required elements of standing.

The third required element of the plaintiff’s standing is a showing that the injury to plaintiff was an antitrust injury. For a section 4 - section 7 plaintiff, the claimed injury must be an injury to competition and flow from a lessening of competition or a tendency toward the creation of a monopoly. Section 7 proscribes mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” Hence, section 7 is concerned with preventing apprehended consequences of inter-corporate conduct. A section 4 - section 7 plaintiff must prove more than a violation of section 7 by the defendant because “such proof establishes only that injury may result.” The plaintiff must prove that its injury was the type intended to be prevented by section 7, and flowed directly from that which caused the defendant’s conduct to be unlawful under section 7.

In the context of a terminated distributor, the harm suffered derives from a dislocation of its pre-existing relationship with the acquired producer and not from a reduction in competition. In addition, while its termination may have followed the acquisition, it may not have been caused by that which makes the acquisition unlawful. As the Supreme Court indicated in Brunswick:

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects . . . .

. . . . Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should . . . . be “the type of loss that the claimed violations . . . would be likely to cause.”

The implementation of these per se rules of standing and the reiteration of the policy that the antitrust laws are to be directed to the preservation of competition as a whole will have the effect of reducing the number of section 4 - section 7 cases before the courts in the Ninth

50. Relevant market is typically analyzed in terms of product or geography. Market share is analyzed in terms of dollar volume or product volume.
52. 429 U.S. at 485 (citing United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957)).
53. 429 U.S. at 486 (emphasis added).
54. Id. at 487-89 (emphasis in original) (citation omitted).
Circuit. This is so because the threshold concern for the plaintiff, the issue of its standing, has now been defined in such a way that few plaintiffs will qualify. A smaller number of plaintiffs are in the target area of anticompetitive conduct than the number of would-be plaintiffs who are injured by way of a distant ripple of the proscribed conduct. This reduction of cases through the use of a rigid rule of standing will insure that a particular type of plaintiff will be the one who appears in court; that type must be the competitively significant, directly-injured plaintiff. Thus, a certain class of "pure" plaintiffs, with a great chance of success in prevailing upon their claims, will pass the threshold test of standing. Further, this "purity" of plaintiffs will also insure a certain "purity" of defendants because the target area and antitrust injury rules require that result.

The Ninth Circuit's adoption of these strict rules of standing promises to be a limitation on the number of section 4 - section 7 cases and a restriction on access to the courts for private antitrust plaintiffs. The commitment of the courts to this trend is already strong. The extent of the trend remains to be established. However, it is not altogether unlikely that other claims which a section 4 plaintiff might assert will become similarly limited by strict rules of construction.

III. PER SE RULES OF PREDATORY CONDUCT UNDER A CHARGE OF ATTEMPTED MONOPOLIZATION

In the apparent trend of limiting the number of plaintiffs acting as private attorneys general under section 4 of the Clayton Act, the Ninth Circuit has made some significant rulings on the proof required for the prima facie elements of a charge of attempted monopolization.\footnote{55} In its recent ruling in Janich Bros. v. American Distilling Co.,\footnote{56} the Ninth Circuit addressed the following prima facie elements of a charge of attempted monopolization: (1) specific intent to control the prices or

\footnote{55} The charge of attempted monopolization is governed by section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). It is different from a charge of anticompetitive acquisition under Clayton Act § 7, 15 U.S.C. § 18 (1976), but frequently a plaintiff (private or governmental) will allege claims arising from both an attempt to monopolize and an anticompetitive acquisition. The essential difference between these statutes is one of degree: Sherman Act § 2 condemns activity that "monopolizes" or "attempts to monopolize", while Clayton Act § 7 condemns activity that "may tend to create a monopoly." Clayton Act § 7 is frequently termed an "incipiency" statute as its focus is prophylactic and intended to prevent activity which might culminate in actual monopoly. On the other hand, Sherman § 2 is directed to activity which is already monopolistic.

\footnote{56} 570 F.2d 848 (9th Cir. 1977), cert. denied, 99 S. Ct. 103 (1978).

\footnote{57} Id. at 853. See also Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977) (predatory conduct); Hallmark Indus. v. Reynolds Metals Co., 1978
destroy competition; (2) predatory conduct directed at accomplishing the unlawful purpose; and (3) dangerous probability of success.

In that case, the plaintiff, Janich, was a rectifier of alcoholic beverages who processed, bottled and distributed its product for local sale in California. The defendant, American, was a distiller/manufacturer of alcoholic beverages, marketing its product throughout the United States. Janich filed suit under Clayton Act section 4 alleging that American had violated section 2 of the Sherman Act by attempting to monopolize the sale of private label gin and vodka in California. Janich also charged American with violating section 2(a) of the Robinson-Patman Act by selling gin and vodka of like grade and quality at discriminatory prices. Janich claimed that these activities cost it chain store sales, loss of customers and a reduction in sales to existing customers.

So far as relevant here, section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states, . . . shall be deemed guilty of a felony.

Section 2(a) of the Robinson-Patman Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen


58. Predatory conduct in attempt to monopolize cases is usually concerned with pricing. Predatory pricing is a lowering of price beyond legitimate competitive pricing. As the Janich court stated:

> Pricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits . . . . Therefore, the product must be such that if predatorily priced, rivals are likely to be driven out of the market or excluded, allowing the firm to raise prices.

570 F.2d at 856 (citing Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 HARV. L. REV. 697, 698-99 (1975) [hereinafter cited as Areeda & Turner]; Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 723 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976)).

59. 570 F.2d at 853.
61. Id. § 13(a). The Robinson-Patman Price Discrimination Act was passed in 1936 as an amendment to the Clayton Act.
62. Id. § 2.
competition or tend to create a monopoly . . . .

In reviewing the elements of the charge of attempted monopolization, the court reaffirmed its rulings in earlier cases and held that the trier of fact may infer the element of dangerous probability of success from proof of the other two elements, specific intent and predatory conduct. Normally, the proof of a dangerous probability of success would center on evidence that the defendant's share of the market, or market power, was so great that unless its conduct was stopped it would obtain actual monopoly power. In Lessig v. Tidewater Oil Co., the Ninth Circuit rejected the premise that probability of actual monopoly is an essential element in proving an attempt to monopolize. The court held instead that specific intent is sufficient proof of the dangerous probability of success required by the charge of attempt. The court's reasoning that evidence of specific intent would support the inference of probability of success was based on the "not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective."

The Janich court also endorsed its earlier rulings that it is proper to infer the element of specific intent from proof of the element of predatory conduct "so long as this (predatory) conduct can serve as the basis for a substantial claim of restraint of trade." This inference is proper because specific intent is difficult to prove directly, and circumstantial evidence of egregious anticompetitive conduct is tantamount to proving the intent that the conduct is to accomplish the unlawful purpose.

The court then took one more step, one of synthesis, and held that proof of predatory or anticompetitive conduct will, in some circumstances, permit an inference of specific intent and, in turn, of dangerous probability of success. By so doing, the court placed the issue of predatory conduct at the threshold of the plaintiff's case. It is the issue of predatory conduct which will either establish the plaintiff's prima facie elements of its case or result in failure to state a claim and accompanying dismissal from court. The pivotal importance of the element

63. Id. § 13(a).
64. 570 F.2d at 853; see also Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 & n.46 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
65. 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
66. Id. at 474 & n.46.
67. Id. at 474.
68. 570 F.2d at 853-54 (citing Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 12-13 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Bushie v. Stenocord Corp., 460 F.2d 116, 121 (9th Cir. 1972)).
69. 570 F.2d at 854.
of predatory conduct is obvious. But it is also true that the inferences are a shortcut to proving all three usual elements of the claim of attempt to monopolize. Apparently, the plaintiff's burden of proving all three prima facie elements is substantially lessened. However, the court was not unmindful of this result and qualified its permission for use of the inferences of specific intent and dangerous probability of success by stating that the proof of the predatory, anti-competitive conduct must be sufficient to "serve as the basis for a substantial claim of restraint of trade." The court cautioned that under this approach of allowing the inference of intent, trial courts should look to the circumstances of the conduct in order to determine the type of intent which can be inferred. For example, certain aggressive conduct by a small and not especially significant business might be viewed merely as a reaction to competition, whereas similar conduct by a large and competitively significant business might suggest intent to monopolize. Hence, when a plaintiff relies on its proof of predatory conduct to infer the other necessary elements of its case, i.e., specific intent and dangerous probability of success, the courts should allow the inference only when the conduct is unambiguous and "clearly threatening to competition." It is this type of circumstantial evidence which would show predatory conduct sufficient to serve as "the basis for a substantial claim of restraint of trade" and so "may be used to prove the requisite intent."

A. Geographical Price Differentiation as a Circumstance of Predatory Conduct

The Janich court then began an economic analysis of "circumstantial evidence" of predatory conduct. That analysis relies on strict rules of economic theory and is consistent with the apparent trend of limiting the fact patterns which give rise to a plaintiff's standing under Clayton Act section 4. The analysis of the economics of predatory conduct began with a discussion of discriminatory pricing and geographical

70. Id. (citing Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 12-13 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Bushie v. Stenocord Corp., 460 F.2d 116, 121 (9th Cir. 1972)).
71. 570 F.2d at 854 n.4.
72. Id.
73. Id.
74. Id.
75. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13 (1976), forbids discrimination "in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . ."
price differentiation,\textsuperscript{76} two typical and illegal forms of predatory pricing. These concepts were approached with a per se analysis:

All we need do is look at the overall circumstances to determine if \ldots geographical price differentiation [is] sufficient as a matter of law to sustain a charge of attempted monopolization.

As a first step, we conclude that a geographical price differential \textit{cannot sustain a charge of attempted monopolization unless it is shown to have a substantial effect on competition}.\textsuperscript{77}

This test is now applied by the Ninth Circuit to determine whether geographical price differentiation is the kind of conduct which will serve as the “predatory conduct” linchpin of the plaintiff’s claim of attempted monopolization. An examination of the factual circumstances is required. If the geographical pricing policy is so unambiguous and egregious as to show that it is having a substantial adverse impact on competition, then it is predatory and will carry the plaintiff’s claim. If not, then, as a matter of law, it will not serve to sustain the plaintiff’s claim. Clearly, the court’s analysis relies on a per se standard of illegality.

In reaching a conclusion as to whether geographical price differentiation is per se unlawful, the court ruled that the dispositive factor is whether the pricing conduct has a substantial adverse effect on competition. The court indicated that there is clear statutory authority for applying that standard because “[i]n effect, Congress has determined that price differentiation poses a threat to competition sufficient to justify legal intervention only where such an effect can be shown.”\textsuperscript{78} However, the court’s interpretation appears to disregard the clear language of the statute. Section 2(a) of the Robinson-Patman Act forbids price differentiation whose effect “\textit{may be substantially to lessen competition or tend to create a monopoly}...”\textsuperscript{79} The difference between these two versions of section 2(a) of the Robinson-Patman Act can be viewed, at least, as one of degree, resulting in an increase in the plaintiff’s burden of proof.

The \textit{Janich} court’s analysis of predatory conduct finally resulted in equation of section 2(a) of the Robinson-Patman Act with section 2 of the Sherman Act. Thus, if the plaintiff is the direct competitor of the defendant, and alleges a Sherman Act section 2 claim of attempt to

\textsuperscript{76} Section 3a of the Robinson-Patman Act, 15 U.S.C. § 13a (1976), forbids the sale of “goods in any part of the United States at prices lower than \ldots elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor. \ldots”

\textsuperscript{77} 570 F.2d at 854 (emphasis added) (citation omitted).

\textsuperscript{78} \textit{Id.} at 855.

monopolize based on a geographical price differential, then section 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act "are directed at the same economic evil and have the same substantive content."\textsuperscript{80} Since the court read section 2(a) of the Robinson-Patman Act to require a showing of substantial impact on competition, and since section 2 of the Sherman Act focuses on "the same economic evil and [has] the same substantive content,"\textsuperscript{81} then the Sherman Act section 2 claim must also include that showing. Or, to phrase the rule another way, proof of a violation of section 2(a) of the Robinson-Patman Act will also prove a violation of section 2 of the Sherman Act. It is important to note that this rule is consistent with the court's policy, referred to above,\textsuperscript{82} that proof of predatory conduct will sometimes permit inferences of the other prima facie elements of a Sherman Act section 2 claim. In other words, proof of predatory conduct may be sufficient to prove the Sherman Act claim. The reasoning of the equation of section 2(a) of the Robinson-Patman Act with section 2 of the Sherman Act is completed by adding the element that proof of the predatory conduct required by section 2 of the Sherman Act can be established by proving a violation of section 2(a) of the Robinson-Patman Act.

The court's reasoning is clear and truly syllogistic. The problem with the rule lies not with its logic but with its scope. The claim of \textit{attempted} monopolization under section 2 of the Sherman Act contemplates an incipient impact. The language in section 2(a) of the Robinson-Patman Act requiring a showing that the complained-of conduct "\textit{may} . . . lessen competition or \textit{tend} to create a monopoly . . ."\textsuperscript{83} is also incipiency language. The Ninth Circuit in \textit{Janich} changes the thrust of these statutes from possibility/probability to present actuality by requiring a showing of a "substantial effect on competition."\textsuperscript{84} The change in emphasis is a strong constraint on the law of attempts under the Sherman Act. The claims of proper plaintiffs will tend to be limited to those which are substantial by reason of the continuation of the harmful conduct beyond the beginning stage. Thus, injured plaintiffs will not have a remedy if competition has not been substantially affected by the differential pricing conduct of the defendant. It is possible that any individual small competitor cannot withstand even short-term price discrimination, but the elimination of that competition would probably

\textsuperscript{80} 570 F.2d at 855 (citing Areeda & Turner, \textit{supra} note 58, at 727).
\textsuperscript{81} Id.
\textsuperscript{82} See text accompanying note 69 \textit{supra}.
\textsuperscript{84} 570 F.2d at 855.
not have a substantial impact on competition in the market. The court anticipates that situation, steadfastly maintaining that its concern is with competition and not competitors:

A firm which cuts its price in a single geographical area and maintains high prices outside of that area may be able to maintain a satisfactory revenue position. Consequently, it may have considerably more staying power than a competing firm which is limited to a single geographical area.

Under these circumstances, it may be possible for a geographically broad-based firm pricing at a cost in a single area to drive out a . . . competitor which operates only in that area. . . . All we need do is look at the overall circumstances to determine if . . . geographical price differentiation [is] sufficient as a matter of law to sustain a charge of attempted monopolization. . . .

As a first step, we conclude that a geographical price differential cannot sustain a charge of attempted monopolization unless it is shown to have a substantial effect on competition.85

Therefore, a defendant's geographical price differentiation is per se insufficient proof of an attempt to monopolize absent a showing of a significant adverse impact on competition. Apparently, such conduct may be found to be per se unlawful as an attempt to monopolize if that showing is made. This rule is strikingly similar to the standing rule of the Lenore decision, discussed above.86 The two rules require that a proper plaintiff must have sustained an injury which is also a significant injury to competition (an antitrust injury87). Again, these rules are based on the premise that the antitrust laws are “concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise.”88

B. Price Competition and Predatory Conduct

As the Janich court continued its analysis of the economics of predatory conduct, it focused on business efficiency and on different theories of price in relation to costs. A form of pricing which may sometimes be found to be predatory, and hence possibly unlawful as an attempt to monopolize under section 2 of the Sherman Act, is pricing at decreased or non-remunerative levels in order to drive out rivals.89 The Janich

85. Id. at 854 (citation omitted).
86. See text accompanying notes 41-55 supra.
87. See text accompanying notes 43 & 51-55 supra.
89. 570 F.2d at 855.
The court reviewed non-remunerative pricing theories, and urged that a practical, business standard be used to determine their legality. The court noted that "[e]ven legitimate price decreases will necessarily have a non-remunerative effect upon other firms in the market." This non-remunerative effect on competitors would result in, at least, reduced profit margins or, at most, complete disability to compete and eventual liquidation. These effects may be felt even if the business which first reduced its prices continues to make a profit. The profiting business which reduces prices and drives competitors out of business may not be committing any antitrust wrong. That profiting business may simply be more efficient than its competitors. "It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws."

Heeding its own caution to "exercise great care in differentiating between legitimate price competition and that 'predatory pricing' which constitutes a restraint of trade," the court attempted to formulate a test for determining predatory pricing by applying the doctrines of "marginal cost," "variable cost" and "average variable cost." Marginal cost "is the increment to total cost that results from producing an additional increment of output." "Variable costs . . . are costs that vary with changes in output. They typically include such items as materials, fuel, labor . . . . The average variable cost is the sum of all variable costs divided by output." The court followed its earlier ruling in Hanson v. Shell Oil Co. that prices at or above marginal or average variable cost "should not ordinarily form the basis for an antitrust violation." The reasoning for this result is that a price at or above marginal or average variable cost will not injure competitors if the competitors are as "efficient" as the entity pricing at that level. If a business prices its product above or at its costs, it will make a reason-

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id. at 856.
97. Id. at 857 n.8 (quoting Areeda & Turner, supra note 58, at 700).
98. 570 F.2d at 858 n.11 (quoting Areeda & Turner, supra note 58, at 700).
100. "Average variable cost is likely to approximate marginal cost." 570 F.2d at 858 (citing Areeda & Turner, supra note 58, at 700 n.13, 716-17 & n.42).
101. 570 F.2d at 857.
102. Id.
able profit, or at least break even. A less efficient business will have higher costs and hence will neither make a profit nor break even at the efficient business' price. "The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices . . . so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency."103 This rule seems to bode ill for newcomers in a market, as they probably cannot be as "efficient" as an established competitor can be. It would seem that if a newcomer enters a market, an established competitor could lower its prices, keeping them above or at its marginal or average variable cost, and drive out the inefficient newcomer without risking litigation.

In the same vein, a policy of pricing below marginal or average variable cost "may well form the basis for the antitrust violation."104 The reason for this is "the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the price-setting firm."105 This step follows logically from the court's view that efficient businesses can successfully compete when the price is at or above costs.106 The effect of below cost pricing can be damaging to efficient and non-efficient businesses alike. Below cost pricing is, in its very essence, anticompetitive. The court is focusing on the efficiency of businesses and the equality of competitive opportunity as long as competitors keep their prices at or above their costs. From that focus a policy appears to be emerging which limits the application of antitrust remedies to only plainly anticompetitive conduct. "Competition on the merits" is paramount.107 While not quite holding that pricing below marginal or average variable cost is per se violative of section 2 of the Sherman Act, the court's language indicates a strong bias toward finding an attempt to monopolize from evidence of such pricing. This predatory pricing test, which looks at whether prices are above or below costs as indicative of their predatory character, is akin to a test of standing. If an injured plaintiff can not show pricing below marginal or average variable cost, it may well fail at the outset in establishing a prima facie case. Similarly, if the plaintiff only shows injury sustained from a competitor's pricing scheme which was at or above that competitor's costs, then the plaintiff has not sustained an antitrust injury. In

103. 541 F.2d at 1358-59.
104. 570 F.2d at 858.
105. Id.
106. See text accompanying notes 101-02 supra.
either case, the plaintiff's claim will fail on a defendant's motion for summary judgment or a directed verdict.

The Janich court's approach to predatory pricing via the use of above- and below-cost guidelines appears straightforward. However, it is not so easy in application. One of the major problems, as the court itself noted, is that there are different theories of allotting various cost items to average variable or marginal cost.\textsuperscript{108} This means that a plaintiff's case might be refuted by a defendant's chosen economist or accountant. In the end, the court would be in a position of arbiter between different theories of economics. Among the problems inherent in that approach would be the possibility of a judge or jury unversed in sophisticated economic analysis, making a decision without sufficient grasp of the concepts. Rather than clarifying or simplifying the process of litigation, these elaborate theories of economics confuse laymen (attorney, jury and judge). In addition, an adoption of these concepts, with all of their complex ramifications, does not ease the task of an attorney who must advise a client about how to avoid violating the antitrust laws, or about how to redress an injury caused by an apparently predatory act.

\section*{IV. Conclusion}

In an apparent effort to slow the tide of private antitrust plaintiffs, the Ninth Circuit has endorsed rigid rules of standing and of the prima facie elements of certain claims. The rules are based on facts and circumstances: the competitive significance of the plaintiff or the significance of the impact on competition of the defendant's conduct. The number of proper plaintiffs will be limited by the imposition of these rules, with the result that litigation will tend to be pursued exclusively by significantly injured plaintiffs. The theory is that the success of these plaintiffs will, in turn, vindicate competition as an economic structure. A further benefit of this constraint on plaintiffs is that less

\textsuperscript{108}. 570 F.2d at 858 n.11. The court specifically addressed the question of whether costs of sales, warehousing and transportation of outgoing goods are included along with production costs as average variable costs. Sometimes costs of sales, warehousing and transportation are charged on the books of a business as direct expenses and sometimes as investments for purposes of depreciation and tax considerations.

In addition, cost items on the books may be kept on an accrual theory (recorded at the time the cost is incurred) or on a cash theory (recorded at the time the cash is paid). This difference in bookkeeping may affect the cost figures used to calculate whether prices are above or below cost.

Finally, the size of the business could be an important consideration. If the business is either a multi-product or multi-plant operation, figuring costs per product is an inexact calculus.
judicial time and energy will be expended on private antitrust litigation when the claim is that of a small competitor and the result will do little for the preservation of the competitive structure.

The Ninth Circuit has made a clear choice between the conflicting policies of "preserving competition and . . . preserving competitors from their more energetic and efficient rivals." The protection of competition is the policy of the circuit. However, the rigid rules of *Lenore* and *Janich* essentially attach strict liability, and strict disability to sue, to situations which are factual and circumstantial. Hence, the implementation of these rules promises to produce haphazard results. Accidents of fact will be the turning point for private antitrust litigation, not the full pursuit of antitrust violators. Whether the value of a decrease in judicial time spent on antitrust litigation is greater than the loss of numerous small competitors remains to be seen. Whether the loss of such small competitors is properly a separate concern from the goal of protecting competition also remains to be seen.

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