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II. Antitrust

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Compensable Injuries Under Section 4 of the Clayton Act

Under section 4 of the Clayton Antitrust Act[1] private parties injured by illegal anticompetitive activities may bring actions for recovery of treble damages.[2] In *Lee-Moore Oil Co. v. Union Oil Co.*,[3] the Fourth Circuit found that a plaintiff seeking section 4 recovery can suffer compensable injury[4] even though the plaintiff's profits increased during the period following the defendant's alleged statutory antitrust violation.[5]

In *Lee-Moore*, the plaintiff bought Union Oil Products at wholesale and distributed the products to retail outlets.[6] The retailers then sold the products to consumers under the Union brand name.[7] The plaintiff and

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mission determination. *Id.* at 17. Reasoning that the EEOC's determination of reasonable cause is nonbinding and is investigative rather than adjudicative, the First Circuit concluded that the failure to receive such a determination represents no loss which would involve due process consideration. *Id.* at 18.

Similarly, the Maryland federal district court held in a recent case that the APA does not provide for review of a reasonable cause determination since the EEOC has engaged in no final action. Kelly v. EEOC, 468 F. Supp. 417, 418 (D. Md. 1979) (citing *Georator*). *See also* Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979) (citing *Georator* in declining to review non-final decision of Securities and Exchange Commission).

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[1] 15 U.S.C. § 15 (1976). *See* note 2 *infra.*

[2] A private plaintiff must establish six factors in order to recover § 4 treble damages. The plaintiff first must prove that it is a "person" within the meaning of § 4. *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 311-20 (1978). Second, a violation of the antitrust laws must have occurred. *See* Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 887 (4th Cir. 1934). Third, the violated antitrust statute must be within the coverage of § 4. *See* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76 (1958). Fourth, there must be an injury to the plaintiff's business or property. *See* Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969). Fifth, a direct and causal anticompetitive relationship must exist between the statutory violation and the plaintiff's injury. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-89 (1977). Sixth, the plaintiff's injury must be measurable in dollars to some degree. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968). *See generally* J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 293-301 (1976) [hereinafter cited as VAN CISE]; 16A *Business Organizations*, J. VONKALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 11.04[1] (1979) [hereinafter cited as VONKALINOWSKI]; *The Private Action—The Corporate Manager's Heavy Artillery*, 43 ANTITRUST L.J. 5 (1973).

Antitrust actions brought by private parties rather than government agencies are considered a principal means of statutory enforcement. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968)(importance of private actions discussed); 16J VONKALINOWSKI, *supra* § 81.02[1]; Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 167-69 (1958) [hereinafter cited as Loevinger].

[3] 599 F.2d 1299 (4th Cir. 1979).

[4] *See* note 2 *supra.*

[5] 599 F.2d at 1304-05.

[6] *Id.* Lee-Moore was formed in 1972 as a result of the merger of four petroleum distribution companies. The present action involved Lee-Moore's predecessor, Johnson Oil Co. of Sanford, Inc. *Id.* at 1300.

[7] *Id.* The *Lee-Moore* plaintiff claimed that brand name gasoline was superior to unbranded or non-major brand gasoline because of differences in consumer perceptions. *Id. See* text accompanying notes 51-52 *infra.*

defendant operated on a year to year contract which was automatically renewed unless one party gave timely notice of cancellation. In September, 1972, the defendant notified the plaintiff that the agreement would not be renewed on expiration.[8] The plaintiff was unable to locate an alternate source of brand name gasoline for most of its customers[9] and bore the cost of converting most stations to a non-major, independent brand.[10]

The plaintiff filed suit against Union claiming Union's refusal to renew the agreement violated sections 1 and 2 of the Sherman Antitrust Act.[11] The plaintiff alleged Union was part of an illegal conspiracy among major oil producers to drive maverick distributors, such as the plaintiff, out of business.[12] As a result of the alleged conspiracy, the plaintiff sought treble damages[13] for lost profits and costs incurred in searching for alternate supplies and switching to an independent brand.[14]

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[8] 599 F.2d at 1300-01. The *Lee-Moore* plaintiff did not contend that the termination violated any provisions of the dealership agreement. Rather, Lee-Moore claimed that failure to renew amounted to an antitrust violation. *See* note 12 *infra.*

[9] 599 F.2d at 1301. Lee-Moore actively sought alternate brand name gasoline supplies. Amoco Oil was willing to supply brand name gasoline for a few of Lee-Moore's stations but because there were already numerous Amoco stations in the area, Amoco refused to supply all of Lee-Moore's needs. Under mandatory federal fuel allocation rules, Union resumed supplying some petroleum products to Lee-Moore in November, 1973. These products, however, were not sold at retail under the Union brand name. *Id.*

[10] *Id.* One of Lee-Moore's bases for damages was the cost incurred in converting stations from the Union brand name to a non-major brand. *See* text accompanying notes 65-70 *infra.*

[11] 15 U.S.C. §§ 1, 2 (1976). Lee-Moore originally sought damages under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), but the district court dismissed the § 3 claim without prejudice. Lee-Moore Oil Co. v. Union Oil Co., 441 F. Supp. 730, 740-41 (M.D.N.C. 1977). Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies which restrain interstate commerce. 15 U.S.C. § 1 (1976). *See generally* VAN CISE, *supra* note 2, at 38-45; 16 vonKALINOWSKI, *supra* note 2, §§ 4.01-6.02. Under § 2 of the Sherman Act monopolization, an attempt to monopolize, or a combination or conspiracy to monopolize interstate trade or commerce is a felony. 15 U.S.C. § 2 (1976). *See generally* VAN CISE, *supra* note 2, at 45-49; 16 vonKALINOWSKI, *supra* note 2, §§ 7.01-8.02.

[12] 599 F.2d at 1301. Lee-Moore claimed major oil producers sought to increase profit margins and prices but were stymied by the competitive pricing techniques of certain independent distributors. *Id.* The defendant's refusal to sell petroleum products to the plaintiff would be illegal only if the refusal was part of a conspiracy. *See* note 68 *infra.* Neither the district court nor the Fourth Circuit considered the validity of Lee-Moore's substantive antitrust allegations against the defendant. *See* text accompanying note 23 *infra.*

[13] *See* note 2 *supra.* Trebling of damage awards is intended as a punitive measure. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

[14] 599 F.2d at 1301. Generally, an antitrust plaintiff may recover for increased costs resulting from the defendant's antitrust violation, lost past net profits, and reductions in the value of the plaintiff's business. *See* 16N vonKALINOWSKI, *supra* note 2, § 115.03[1]. *See generally* McSweeney, *Damages, Including Proof and Causation—The "Passing On" Defense,* in TREBLE DAMAGE ACTIONS 155, 157-70 (PLI Corporate Law & Practice Course Handbook No. 72, 1971) [hereinafter cited as McSweeney]; Parker, *Measuring Damages in Federal Treble Damage Actions,* 17 ANTITRUST BULL. 497, 497-501 (1972); Note, *Measuring Damages in Antitrust Cases,* 36 ALB. L. REV. 773, 773-77 (1972). Lee-Moore sought damages for increased costs, *see* text accompanying notes 53-70 *infra,* and for lost profits, *see* text accompanying notes 43-52 *infra.*

The defendant moved for summary judgment in the action[15] and the district court granted the motion.[16] The district court concluded that even if the defendant had violated antitrust statutes, the plaintiff did not suffer a competitive injury compensable under section 4 of the Clayton Act.[17] The district court noted that in the period following the defendant's refusal to renew the contract, the plaintiff's petroleum sales increased substantially.[18] The court reasoned that since an ample alternate supply was available, the plaintiff's competitive position had not been harmed.[19] The district court also refused to consider the possibility that the plaintiff could recover damages for costs incurred in seeking alternate gasoline supplies because the plaintiff would have incurred these costs even if the defendant's termination of the distributorship agreement had been legal.[20] In granting summary judgment the district court specifically did not reach the question of whether the defendant committed substantive antitrust violations.[21]

The Fourth Circuit overturned the summary judgment decision and remanded the case for a full hearing.[22] Like the trial court, the appeals court did not consider whether Union committed violations of federal antitrust statutes.[23] Rather, the Fourth Circuit addressed the issue of whether Lee-Moore could have suffered a competitive injury assuming the allegations against Union were true.[24] The Fourth Circuit also

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[15] A defendant in a civil action in federal court may move for summary judgment when pre-trial proceedings show that no general issue of material fact exists to be tried. FED. R. CIV. P. 56(b). *See* 6 MOORE'S FEDERAL PRACTICE ¶ 56.04[1] (2d ed. 1976) [hereinafter cited as MOORE'S]. Summary judgment is discouraged in complex antitrust litigation where questions of motive and intent exist. Poller v. Columbia Broadcasting Sys. Inc., 368 U.S. 464, 473 (1962). *See generally* 6 MOORE'S, *supra* ¶ 56.17[5]; 16J VONKALINOWSKI, *supra* note 2, § 81.09[3].

[16] Lee-Moore Oil Co. v. Union Oil Co., 441 F. Supp. 730, 732 (M.D.N.C. 1977).

[17] *Id.* at 739-40. *See* note 2 *supra.*

[18] *Id.* at 735, 738. *See* note 43 *infra.*

[19] *Id.* at 738. The district court in *Lee-Moore* noted that an antitrust plaintiff who claims damages based on a supplier's refusal to deal has not sustained damages if sufficient alternate sources of supply are available. *Id.* The district court apparently reasoned that any alternate source of gasoline, regardless of whether the alternate source carried a major brand name, represented a comparable source of supply. The district court stated the plaintiff was in the business of selling gasoline to retail outlets and that for the plaintiff to equate comparable source of supply with comparable major brand was untenable. *Id.* at 739. On appeal, however, the Fourth Circuit concluded that the brand name of the alternate source was important. 599 F.2d at 1305-06. *See* text accompanying notes 51-52 *infra.*

[20] 441 F. Supp. at 738-39. The district court in *Lee-Moore* did not cite any cases supporting its holding that the plaintiff could not recover certain costs because the plaintiff would have incurred the same costs if the contract termination was legal. *Id.* By contrast, the Fourth Circuit provided ample case support for concluding that the possibility of legal termination of an agreement is immaterial in awarding damages for illegal termination. *See* text accompanying notes 65-70 *infra.*

[21] 441 F. Supp. at 733-34, 740. *See* text accompanying note 23 *infra.*

[22] 599 F.2d at 1300, 1307.

[23] *Id.* at 1306-07. *See* text accompanying notes 11-12 *supra.*

[24] *See* text accompanying notes 29-64 *infra.*

considered the types of damages the plaintiff could recover if harm was proved at trial.[25]

The Fourth Circuit took a different approach to the issue of competitive injury than the district court. While the district court simply concluded that since the plaintiff had an ample alternate supply of gasoline there was no injury to competitive position,[26] the Fourth Circuit provided a two step analysis. The court first considered whether the plaintiff's claimed injuries were the proximate result of the defendant's alleged antitrust violations.[27] Second, the court considered whether the plaintiff could recover as lost profits the difference between the plaintiff's actual market position and the plaintiff's market position but for termination of the distributorship agreement.[28]

In deciding that the plaintiff's injuries were the proximate result of the defendant's alleged actions the Fourth Circuit distinguished the Supreme Court's opinion in *Brunswick Corporation v. Pueblo Bowl-O-Mat.*[29] In *Brunswick,* the operators of several bowling centers sought section 4 treble damages from Brunswick, a leading manufacturer of bowling equipment.[30] Brunswick became the largest operator of bowling centers in the nation by assuming the operations of financially troubled centers.[31] Since the *Brunswick* plaintiffs were competitors of the

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[25] *See* text accompanying notes 65-70 *infra.*

[26] *See* text accompanying notes 18-19 *supra.*

[27] 599 F.2d at 1302-04.

[28] *Id.* at 1304-05.

[29] 429 U.S. 477 (1977). The *Lee-Moore* district court in granting summary judgment did not consider the effect of *Brunswick* even though *Brunswick* was handed down eleven months before summary judgment was granted. Whether the district court properly could have applied *Brunswick* as a basis for summary judgment is doubtful. *See* text accompanying notes 35-42 *infra.*

[30] 429 U.S. at 479. In *Brunswick,* the plaintiff bowling centers claimed that Brunswick violated § 7 of the Clayton Act, 15 U.S.C. § 18 (1976). 429 U.S. at 480. Under § 7, a corporation engaged in interstate commerce is prohibited from acquiring another corporation engaged in interstate commerce if the acquisition may substantially lessen competition or tend to create a monopoly. *See generally* VAN CISE, *supra* note 2, at 62-66; 16A VONKALINOWSKI, *supra* note 2, §§ 15.01-15.05.

The plaintiffs charged that Brunswick's acquisitions of bowling centers represented a "deep pocket" threat to the bowling center industry. *See* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127, 1128 (1976) [hereinafter cited as Areeda]. *See also* note 31 *infra.* A proposed merger represents a "deep pocket" threat to an industry when the financial resources of the incoming firm give the firm an overwhelming and unfair advantage over competitors in the industry. *See* F.T.C. v. Proctor & Gamble Co., 386 U.S. 568, 578-79 (1967); Reynolds Metals Co. v. F.T.C., 309 F.2d 223, 229-30 (D.C. Cir. 1962); Note, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.: *Injury and Causation Under Sections 4 and 7 of the Clayton Act,* 10 SW. U.L. REV. 667, 670 n.31 (1978) [hereinafter cited as *Injury and Causation*].

[31] 429 U.S. at 479-80. Brunswick's sales of automatic pinsetting equipment for bowling centers soared in the late 1950's and Brunswick financed many of the equipment purchases. *Id.* The popularity of bowling, however, waned in the early 1960's and a number of Brunswick's customers defaulted on loans. In order to protect outstanding investments, Brunswick assumed operations of a number of the defaulting centers. Although Brunswick by 1965 was the largest single operator of bowling centers in the nation, the corporation operated only two percent of the centers nationwide. *Id.*

defendant, the Supreme Court concluded that allowing damage recovery in this instance would be anomolous, even if the defendant had violated antitrust statutes.[32] If Brunswick had not entered the market, the financially troubled centers would have closed and competition would have been reduced.[33] The *Brunswick* Court reasoned that although the plaintiffs may have suffered injuries as a result of Brunswick's entry into the market, the plaintiff's injuries were not proximately caused by a violation of antitrust statutes.[34]

The Fourth Circuit found *Brunswick* inapposite to *Lee-Moore,* concluding the *Brunswick* opinion did not represent a radical revision of section 4 causation law.[35] The court noted that the substantive violations

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[32] *Id.* at 487.

[33] *Id.* The *Brunswick* Court, noted that Congress intended to protect competition, not competitors, by enacting antitrust statutes. 429 U.S. at 488. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962) (discussing Clayton Act § 7 legislative history); note 34 *infra.*

[34] 429 U.S. at 488. The *Brunswick* Court noted that the plaintiffs' competitive situation would have been the same if the failing bowling centers had obtained refinancing or had been purchased by small sacle competitors. *Id.* at 487. Yet, if the defendant in the action had not been a comparatively large firm like Brunswick, the plaintiffs could not have claimed there was a "deep pocket" threat to the industry and thus would have no cause of action for statutory antitrust violation, an essential element of § 4 recovery. *See* Areeda, *supra* note 30, at 1133. *See also* notes 2 & 30 *supra.*

The Supreme Court's differentiation of compensable and non-compensable injuries stemming from an antitrust violation may be analogized to foreseeability of injury and recoverable and non-recoverable damages in tort law. *See* Carstensen, *Annual Survey of Antitrust Developments 1976-77,* 35 WASH. & LEE L. REV. 1, 81-84 (1978) [hereinafter cited as Carstensen]. If the Supreme Court in *Brunswick* had held that a plaintiff may recover for all injuries stemming from a defendant's violation of an antitrust statute, the Court's holding would be analogous to *In re* Poleimis and Furness Withy & Co., [1921] 3 K.B. 560 (C.A.). In *Poleimis* the defendant was held liable for all injuries stemming from a tortious act even though some of the injuries were not forseeable. *See* Carstensen, *supra* at 81. The *Brunswick* Court's approach, however, is analogous to Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., Ltd., [1961] A.C. 388 (the Wagon Mound case) where the *Poleimis* approach was rejected and the defendant was held liable only for those injuries which were foreseeable results of the tortious act. Similarly, Brunswick would be liable to competitors only for those injuries caused by Brunswick's representing a "deep pocket" threat to the bowling center industry. *See* Carstensen, *supra* at 83. *See also* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action,* 57 NW. U.L. REV. 691, 699-700 (1963) [hereinafter cited as Pollock].

[35] 599 F.2d at 1303. While the *Lee-Moore* court read *Brunswick* as not substantially affecting private antitrust litigation, *Brunswick* may have a substantial effect on the causation question in private § 7 monopolization litigation. *See* 16N VONKALINOWSKI, *supra* note 2, § 115.02[3][b][i]; *Injury and Causation, supra* note 30, at 684-92. Prior to *Brunswick,* courts generally decided the causation issue by inquiring whether the plaintiff had standing to sue. *See* Note, *Treble Damage Actions for Violations of Section 7 of the Clayton Act,* 38 U. CHI. L. REV. 404, 407-08 (1971) [hereinafter cited as *Violations of Section 7*]. In ascertaining standing to sue, courts utilized two different approaches. Some courts inquired whether the plaintiff was in the target area of the alleged antitrust violation. *See, e.g.,* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487-88 (5th Cir. 1967). Other courts took a more restrictive approach and inquired whether the injury actually occurred after the allegedly illegal merger took place. *See, e.g.,* Ames v. Bostich, Inc., 240 F. Supp. 521, 524-25

in *Brunswick* arose under section 7 of the Clayton Act[36] while *Lee-Moore* was based on sections 1 and 2 of the Sherman Act.[37] While monopolization as alleged in *Brunswick* is not necessarily a violation of the law,[38] conspiratorial refusal to deal with a trader, as alleged in *Lee-Moore,* is considered a *per se* violation of antitrust statutes.[39] The Fourth Circuit noted that victims of a section 1 conspiracy typically are harmed by the defendant's statutory violation, thus providing victims with standing to recover damages.[40] While principally distinguishing *Brunswick* on the basis of the underlying antitrust violations, the *Lee-Moore* court also noted that the factual setting of *Lee-Moore* distinguished it from *Brunswick.* Unlike *Brunswick,* causation could be

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(S.D.N.Y. 1965). *See generally* 16N VONKALINOWSKI, *supra* note 2, § 115.02[4]; Pollock, *supra* note 34, at 701-06; *Violations of Section 7, supra* at 410-17. The *Brunswick* causation approach of inquiring whether the plaintiff's injuries were actually caused by the statutory antitrust violation had been adopted previously in other antitrust contexts, *see* note 40 *infra,* and had been advocated by commentators. *See, e.g.,* Areeda, *supra* note 30, at 1134-36; Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act,* 16 ANTITRUST BULL. 351, 369 (1971).

[36] *See* note 30 *supra.*

[37] 599 F.2d at 1301. *See* text accompanying notes 11-12 *supra. See also* text accompanying notes 38-39 *infra.*

[38] *See* Areeda, *supra* note 30, at 1128-36. Some courts have held that private plaintiffs can never bring § 4 actions for § 7 violations because § 7 addresses potential rather than actual restraints of trade and an antitrust plaintiff can only bring action for actual injuries. *See, e.g.,* Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D.N.Y. 1963), *rev'd,* 414 F.2d 956 (2d Cir. 1969). *Brunswick,* however, acknowledged that § 4 remedies are available for actions based on § 7. 429 U.S. at 489. *See* 16N VONKALINOWSKI, *supra* note 2, § 115.03[4].

[39] 599 F.2d at 1303. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-14 (1959). *See also* text accompanying notes 68-70 *infra.* In *Klor's,* the plaintiff alleged that the defendant was part of a conspiracy denying the plaintiff the right to sell certain brands of appliances. 359 U.S. at 212. The Supreme Court in *Klor's* held group boycotts and concerted refusals to deal with customers are *per se* antitrust violations. *Id.* at 213. *See generally* Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case,* 45 VA. L. REV. 1165 (1959) (criticizing *Klor's*). *Per se* antitrust violations are those agreements or practices which, because of their pernicious effect on competition, are conclusively presumed to be illegal without elaborate inquiry into the precise harm caused by the practice. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). *See generally* 16 VONKALINOWSKI, *supra* note 2, § 6.02[3].

[40] 599 F.2d at 1303-04. *See* Handler, *Changing Trends in Antitrust Doctrines: An Uprecedented Supreme Court Term—1977,* 77 COLUM. L. REV. 979, 993-94 (1977) (*Brunswick* will have little effect on causation in many § 1 actions). Despite the Fourth Circuit's contrary interpretation of *Brunswick,* there may be instances where a victim of a § 1 conspiratorial refusal to deal may lack standing to sue. In GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973), the plaintiff sought § 4 damages alleging that the defendant had conspired, in violation of Sherman Act §§ 1 and 2, to restrain interstate commerce by illegally seeking to merge with the plaintiff. As part of this conspiracy the defendant stopped dealing with the plaintiff and the plaintiff claimed lost profits. *See* note 48 *infra.* The Second Circuit held the plaintiff had no standing to sue, concluding that if there had been an illegal monopolization of interstate commerce, the plaintiff's competitors, not the plaintiff, would have suffered antitrust injuries. 463 F.2d at 557-58.

found between the *Lee-Moore* defendant's alleged statutory violations and the plaintiff's injuries.[41] In *Lee-Moore*, the plaintiff sought to remain in business thus enhancing competition, while the *Brunswick* plaintiffs effectively sought to limit competition.[42]

The Fourth Circuit in *Lee-Moore* next considered whether the plaintiff could have suffered any injuries for lost profits since the plaintiff's sales and profits increased after the alleged antitrust violation.[43] The court reasoned that whether Lee-Moore's profits rose following the violation was immaterial.[44] The assessment of damages for lost profits is relative in nature[45] and Lee-Moore could have suffered a compensable injury if profits would have been higher but for Union's alleged antitrust violation.[46] The court noted that if lost profits damages were not assessed on a relative basis many antitrust violators could escape section 4 liability.[47] If profits for all companies in the violator's industry were increasing, the injured competitors' profits would also be increasing, although at a rate depressed by the violator's activities.[48]

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[41] 599 F.2d at 1304.

[42] *Id. See* text accompanying note 33 *supra*. In *Lee-Moore* the plaintiff alleged that the defendant terminated the dealership agreement in furtherance of a conspiracy among major oil companies to stop competitive independent distributors from handling major brand gasoline. *See* text accompanying note 12 *supra*. All of Lee-Moore's claimed injuries stem from the inability to sell major brand gasoline. *See* text accompanying notes 13-14 *supra*.

[43] 599 F.2d at 1304. In 1973, the year following Union's termination of the dealership agreement, Lee-Moore received approximiately 17% more gasoline from suppliers than in 1972. By 1975 Lee-Moore's petroleum sales were more than double the 1972 level and profits were 2.6 times higher than in 1972, the last year Union supplied brand name gasoline to Lee-Moore. *See* 599 F.2d at 1307-08 (Widener, J., dissenting). Numerous courts have recognized that lost profits are the principal area of recovery in conspiratorial refusal to deal cases. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969) (conspiracy concerning international patents); Becken v. Gemex Corp., 272 F.2d 1, 4-5 (7th Cir. 1959) (conspiracy to set prices). *See also* 16A VONKALINOWSKI, *supra* note 2, § 11.04[1][d].

[44] 599 F.2d at 1304-05.

[45] *See* Pollock, *supra* note 34, at 694-95. An inquiry into lost profits should not consider the size of the plaintiff's business or growth in the plaintiff's profit rate. Rather, the court should consider whether the plaintiff would be in a relatively better position if the defendant's misdeeds had not taken place. *Id. See* note 48 *infra*.

[46] 599 F.2d at 1304-05.

[47] *Id.* at 1305. *Cf.* Areeda, *supra* note 30, at 1128-30 (certain violators of Clayton Act § 7 may be immune from § 4 liability because no competitor of the violator has been injured).

[48] 599 F.2d at 1305. The Fourth Circuit's conclusion that lost profits from antitrust injuries should be assessed on a relative basis appears to conflict with the Second Circuit, but is in accord with the Fifth Circuit. *See* Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 547 (5th Cir. 1978); GAF Corp. v. Circle Floor Co., 463 F.2d 752, 759 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973). In *GAF* the plaintiff alleged that Circle Floor illegally attempted to gain control of GAF by, *inter alia*, discontinuing purchases of floor tile from GAF. GAF sought damages for lost profits resulting from the discontinued purchases. *See* note 40 *supra*. The Second Circuit denied recovery, noting that GAF alleged only that it could not sell the normal amount of floor tile to Circle Floor. The *GAF* court could not perceive how GAF suffered lost profits since overall sales had not decreased and only the indentity of the purchasers had changed. 463 F.2d at 759. The Fourth Circuit dis-

While recognizing that the *Lee-Moore* plaintiff could recover lost profits, the Fourth Circuit left the issue of whether Union's actions actually depressed Lee-Moore's profits for trial.[49] The Fourth Circuit also concluded that the availability of an alternate gasoline supply did not preclude the possibility of antitrust injury.[50] While antitrust defendants can escape liability for section 4 damages if the plaintiff locates a comparable alternate product,[51] the Fourth Circuit decided that gasoline which could not be sold under a major brand name was not necessarily comparable to major brand gasoline.[52]

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tinguished *GAF* from *Lee-Moore* on the facts. The Fourth Circuit hypothesized that *GAF* would have been decided differently if GAF had alleged that profits would have risen rather than remaining stable but for Circle Floor's illegal acts. 599 F.2d at 1305 n.10. The Fourth Circuit clearly misread *GAF*. The *GAF* opinion states that GAF was denied recovery because GAF did not allege suffering a decrease in total sales. 463 F.2d at 759.

The Fifth Circuit in *Mohammad* took a similar position to *Lee-Moore* on lost profits. In *Mohammad*, the plaintiff, a medical clinic, alleged that a group of doctors had conspired to fix prices and control the performance of abortions in Tallahassee, Florida. The Fifth Circuit overturned an award of summary judgment for the defendants. 586 F.2d at 547. The defendants argued that the plaintiff lacked standing to sue because the plaintiff's profits rose during the period of the alleged antitrust violations. The court noted there was no assurance that the alleged actions of the defendants did not retard the plaintiff's growth. *Id.* As did the Fourth Circuit in *Lee-Moore*, the Fifth Circuit concluded that an increase in an antitrust plaintiff's income does not preclude existence of injury any more than a decrease in income proves there has been an injury. *Id.*

[49] *See* text accompanying notes 74-76 *infra.*

[50] 599 F.2d at 1305.

[51] *See* Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 148-49 (6th Cir. 1972) (damage award overturned as plaintiff had not demonstrated that comparable alternate brands were unavailable); Ace Beer Distrib., Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir. 1963) (dismissal of action upheld as plaintiff failed to demonstrate inability to distribute alternate brand of beer). *See also* note 52 *infra.*

[52] 599 F.2d at 1305-06. In *Lee-Moore*, both the majority and dissenting opinions considered Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138 (6th Cir. 1972), and Mullis v. ARCO Petroleum Corp., 502 F.2d 290 (7th Cir. 1974), in deciding whether independent brand gasoline is a comparable alternate product to major brand gasoline. *See* 599 F.2d at 1305-06, 1308.

In *Elder-Beerman*, the plaintiff filed for § 4 damages claiming that the defendant was part of a conspriacy restricting the brands of appliances the plaintiff could sell. 459 F.2d at 139-40. Judge Widener, dissenting in *Lee-Moore*, cited *Elder-Beerman* for the proposition that a plaintiff whose supply contract is terminated suffers no injury if an adequate supply of a comparable alternate product is available. 599 F.2d at 1308 (Widener, J., dissenting). Actually, the *Elder-Beerman* plaintiff was denied recovery because the evidence was insufficient to establish that comparable brands were unavailable, thereby decreasing sales. 459 F.2d at 148-49.

In *Mullis*, the plaintiff sought injunctive relief to prevent the defendant from terminating a dealership agreement and claimed the defendant had violated § 2 of the Sherman Act. 502 F.2d at 292-93. For the plaintiff to prove a § 2 violation, a court must find that the defendant attempted to monopolize a "relevant market." The court must consider what constitutes a particular relevant market. *See* United States v. Grinnell Corp., 384 U.S. 563, 575-76 (1966)(relevant geographic market considered); United States v. duPont & Co., 351 U.S. 377, 394-96 (1956) (relevant product market considered); 16 VONKALINOWSKI, *supra* note 2, § 8.02[2]. To find that ARCO gasoline was a relevant market, the *Mullis* court required proof that ARCO brand gasoline was a unique product. The court admitted ARCO brand gasoline

The *Lee-Moore* court next considered whether the plaintiff could recover the difference between the cost paid for alternate gasoline supplies and the amount the plaintiff would have paid if Union had not terminated the agreement.[53] Union argued that the additional costs were not recoverable because the plaintiff had passed the costs on to customers.[54] The Fourth Circuit disagreed, relying on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[55] which generally disallowed the pass-on defense.[56] In *Hanover Shoe,* the plaintiff sought damages for the extra costs incurred in leasing machinery from the defendant, claiming that the leasing costs were artifically high because of antitrust violations.[57] The Supreme Court rejected United Shoe's defense that Hanover Shoe had passed the higher cost on to customers.[58] The *Hanover Shoe* Court expressed an unwillingness to relieve antitrust violators from financial liability simply because of the difficulty in assessing antitrust injury and damages.[59]

The *Hanover Shoe* Court, however, recognized that in certain circumstances the pass-on defense may be appropriate.[60] While the *Lee-*

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was possibly a unique product but the court found no evidence of uniqueness in the record of the case. 502 F.2d at 296. By contrast, in *Lee-Moore* the plaintiff made several claims concerning the uniqueness of Union and other major brand petroleum products. 599 F.2d at 1301. The *Lee-Moore* plaintiff noted that the advantages of major brand customer goodwill, advertising, and credit cards were lost by switching to a non-major independent brand. *Id. See also* Edward J. Sweeney & Sons, Inc., v. Texaco, 478 F. Supp. 243 (E.D. Pa. 1979) (Texaco gasoline does not constitute relevant market for § 2 monopolization). *But see* Jennings Oil Co. v. Mobil Oil Corp., [1979] 931 ANTITRUST & TRADE REG. REP. (BNA) A-17, A-17 (S.D.N.Y. Aug. 27, 1979)(summary judgment denied because Mobil gasoline may alone constitute a relevant market for § 2 monopolization.)

[53] 599 F.2d at 1305-06. Lee-Moore alleged that the gasoline purchased to replace Union gasoline cost one to twenty cents more per gallon than Union gasoline. *Id.*

[54] *Id.*

[55] 392 U.S. 481 (1968).

[56] 599 F.2d at 1306. *See* text accompanying note 60 *infra.* Under a "pass-on" defense, the defendant claims that the plaintiff is not entitled to damages, even if the defendant is guilty of the alleged antitrust violation, because the plaintiff has passed the illegal extra costs on to customers. *Id. See generally* McSweeney, *supra* note 14, at 170-83; 16N VONKALINOWSKI, *supra* note 2, § 115.03[6]; Shapiro, *Proof of Damages—A Causation Perspective,* 44 ANTITRUST L.J. 88, 89-90 (1975).

[57] 392 U.S. at 483-84.

[58] *Id.* at 489. The Court in *Hanover Shoe* reasoned that as long as the price the buyer pays is illegally high, the seller is taking more than allowed by law. Thus, the buyer's profits are unnecessarily depressed. *Id.*

[59] *Id.* at 492-93. In *Hanover Shoe,* the illegally high cost for leasing machinery was only one factor in the plaintiff's pricing scheme for shoes. The Court noted that the plaintiff would have difficulty providing the exact effect of a single factor on an overall pricing scheme. *Id.*

[60] 392 U.S. at 494. The *Hanover Shoe* Court gave "cost plus" contracts as an example of where the pass-on defense would be appropriate. *Id.* Under a "cost plus" contract, the purchaser pays all of the costs incurred by the seller in performance of the contract plus a fixed fee over and above such costs. *See* Continental Copper & Steel Indus., Inc. v. Bloom, 139 Conn. 700, _, 96 A.2d 758, 759 (1953). The overcharges in a "cost plus" contract thus are easily traceable to the eventual customer. *See* text accompanying note 61 *infra.*

Moore court applied *Hanover Shoe* to reject Union's use of the pass-on defense,[61] reasons for prohibiting the defense in *Hanover Shoe* are largely inapplicable to the facts of *Lee-Moore*. Unlike the pass-on effect in *Hanover Shoe*, the pass-on effect in *Lee-Moore* would be easily calculable.[62] Further, while the pass-on defense in *Hanover Shoe* would have allowed the defendant to escape all financial liability, the *Lee-Moore* defendant would still be liable for lost profits and other costs.[63] Finally, the magnitude of the potential damages in *Lee-Moore* compared to the harm suffered by the plaintiff would lead to recovery of windfall damages.[64] Thus *Lee-Moore* may be a situation where use of the defense would be appropriate.

The *Lee-Moore* court also approved expenses the plaintiff incurred in seeking alternate supplies and converting stations to a non-major, independent brand as a basis for recovery of damages.[65] The Fourth Circuit, disagreeing with the district court,[66] concluded that although Lee-Moore would have incurred search and changeover costs had the agreement been legally terminated, recovery was not precluded if the contract termination was illegal.[67] The court noted that a supplier may refuse to deal with a customer only when the refusal is not part of an illegal combination or agreement.[68] Since Lee-Moore alleged that Union's

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[61] 599 F.2d at 1306. *See* text accompanying notes 53-56 *supra.*

[62] While the cost of shoe machinery in *Hanover Shoe* was only one of many factors in the plaintiff's pricing scheme, *see* note 59 *supra,* the price Lee-Moore paid for petroleum products would have been the principal element in determining the price Lee-Moore charged retailers. *See* note 60 *supra.* The position of Lee-Moore is similar to that of the plaintiffs in the "oil jobber" cases. *See, e.g.,* Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied,* 321 U.S. 792 (1944). In the "oil jobber" cases courts allowed the defendant oil companies to use the pass-on defense even though the plaintiffs proved a conspiracy among the defendants to illegally raise gasoline prices. 138 F.2d at 971. *See* McSweeney, *supra* note 14, at 180 ("oil jobber" cases represented high point of pass-on defense).

[63] *See* text accompanying notes 43-47 *supra* and 65-70 *infra.*

[64] 599 F.2d at 1308 (Widener, J., dissenting).

[65] *Id.* at 1306-07. *See* note 70 *infra.*

[66] *See* text accompanying note 20 *supra.*

[67] 599 F.2d at 1302.

[68] *Id.* In considering the illegality of conspiratorial refusals to deal, the *Lee-Moore* court cited Unted States v. Colgate Co., 250 U.S. 300 (1919) and United States v. Parke, Davis & Co., 362 U.S. 29 (1960). In *Colgate,* the defendant forced retailers to maintain certain minimum prices by refusing to deal with retailers that sold products below the minimum prices. 250 U.S. at 302-03. The Supreme Court refused to find a Sherman Act violation since if a monopoly is not created, a manufacturer or trader engaged in private enterprise may exercise independent discretion in choosing with whom he will deal. *Id.* at 307.

In *Parke, Davis,* the defendant was also charged with enforcing minimum retail prices by refusing to deal with parties that did not observe minimum pricing schemes. 362 U.S. at 30-32. Unlike the *Colgate* defendant, the defendant in *Parke, Davis* was found guilty of antitrust violations. The Court found that the defendant had created an illegal conspiracy to enforce the prices by blackmailing wholesalers. *Id.* at 45. *See generally* Osborn v. Sinclair Refining Co., 324 F.2d 566, 573 (4th Cir. 1963)(*Colgate* and *Parke, Davis* discussed); 16 VONKALINOWSKI, *supra* note 2, § 6.02[2][c] at 6-87 n.34; Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance,* [1960] S. CT. REV. 258.

refusal to deal was part of an illegal conspiracy,[69] costs incurred as a result of the contract termination could be the result of an antitrust violation.[70]

The Fourth Circuit's conclusion in *Lee-Moore* that an antitrust plaintiff can suffer a compensable injury even though the plaintiff's profits increased following the defendant's anticompetitive act is well reasoned.[71] However, the court's decision to remand the case in full may be faulted as imprudent. Dissenting Judge Widener concluded that under the facts of *Lee-Moore*[72] the plaintiff would have difficulty at trial proving actual injury.[73] Widener would have initially remanded only for a consideration of whether Union's termination of the dealership agreement actually injured Lee-Moore's business and lowered Lee-Moore's profits.[74] Only upon proof of injury would the district court have considered whether Union violated substantive antitrust statutes.[75] Widener's partial remand would have been a reasonable disposition of the case. If Lee-Moore was unable to prove actual injury on remand, extenuated and intricate litigation on the alleged underlying statutory violations would have been avoided.[76] A limited remand thus could have prevented waste of private and judicial resources while allowing the plaintiff ample opportunity to establish section 4 injury. By giving the plaintiff an opportunity to fully establish the existence of injury, the court would have recognized the importance of private antitrust litigation in

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[69] *See* text accompanying note 12 *supra*.

[70] *See* note 42 *supra*. The *Lee-Moore* court cited several cases where courts allowed recovery of damage for illegal refusals to deal where no damage recovery would be possible if the refusal to deal was legal. 599 F.2d at 1302 n.5. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-14 (1959) (conspiracy among competitors of plaintiff and manufacturers to deny plaintiff right to sell certain items); Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907, 913-15 (2d Cir. 1976) (conspiracy to drive plaintiff newspaper out of business by refusal to deal); Osborn v. Sinclair Refining Co., 324 F.2d 566, 575 (4th Cir. 1963) (refusal to deal with plaintiff unless plaintiff followed illegal tying agreement); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 713-16 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960) (illegal refusal to purchase plaintiff's products).

[71] *See* text accompanying notes 43-49 *supra*.

[72] *See* note 43 *supra*.

[73] 599 F.2d at 1306 (Widener, J., dissenting). In proving actual injury at trial, the *Lee-Moore* plaintiff would have to demonstrate the existence of lost profits while profits increased substantially. *Id.* *See* text accompanying notes 43-49 *supra*.

[74] *Id.* at 1307. Judge Widener, dissenting in *Lee-Moore*, asserted the record failed to show conclusively that the defendant's actions did not depress the plaintiff's profits. *Id.*

[75] *Id.*

[76] The potential for protracted litigation in *Lee-Moore* is obvious. The plaintiff first filed suit in October, 1973 and over four years later the action had reached only summary judgment. 441 F. Supp. at 733. The Fourth Circuit did not overturn the grant of summary judgment until eighteen months later. 599 F.2d at 1299. Thus, five and a half years after the action was instituted the case had not yet gone to trial. Further, no court during that five and half year period had considered the merits of the defendant's alleged antitrust violation, an intricate issue left completely for trial.