TWENTY-ONE YEARS OF ANTITRUST INJURY:

DOWN THE ALLEY WITH

BRUNSWICK V. PUEBLO BOWL-O-MAT

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I. INTRODUCTION

Has the plaintiff suffered "antitrust injury"? That is a question no one asked until twenty-one years ago, when the Supreme Court decided *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[1] Today the question arises in every private case, and is typically one of the most fierce battlegrounds in all but the most straightforward horizontal price-fixing disputes. In virtually every private merger action,[2] vertical restraint case,[3] or competitor suit of any kind,[4] antitrust injury is a critical issue.

In the last fifty years, few decisions have had a greater impact on antitrust than *Brunswick*. The Court's opinion put a halt to what had been a persistent expansion of the private treble damage remedy.[5] And it changed the focus of every private case. No longer was the issue whether the plaintiff had been harmed by the defendant's conduct; the issue became whether the plaintiff's injury sufficiently reflected the adverse effect of the defendant's conduct on competition and consumers. Plaintiffs who could not show that their injury was an adequate reflection of some consumer harm – and many plaintiffs fell into that category – soon found themselves out of court.

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1 429 U.S. 477 (1977).

2 *E.g.*, Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104 (1986).

3 *E.g.*, Local Beauty Supply v. Lamaur, Inc., 787 F.2d 1197, 1201-03 (7th Cir. 1986).

4 *E.g.*, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

5 *See infra* text accompanying notes 78-81.

Brunswick has substantially improved antitrust analysis. It has helped ensure that the antitrust laws remain true to their essential proconsumer underpinnings.[6] It has helped in preventing firms from using the antitrust laws strategically to subvert competition. It has reduced the ability of quick strike artists to extort nuisance settlements. Of course, like anything else, there can sometimes be a bit too much of a good thing. Some lower courts have taken the view that the antitrust injury doctrine allows the courts to pick and choose who is a worthy plaintiff and who is not.[7] And several courts have used antitrust injury as an excuse to jettison cases that really should have been disposed of on the merits – thereby creating bad antitrust injury precedents for plaintiffs whose cases on the merits actually make sense.[8] But these issues are minor. The overwhelming impact of *Brunswick* has been to improve antitrust analysis and to focus courts' attention properly on the potential for *consumer* harm.

In the discussion below, we trace the history of the treble damage remedy; discuss the *Brunswick* case and its aftermath; address the many positive contributions of antitrust injury doctrine; and comment on a few areas where some corrections might prove useful.

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6 *See infra* note 95 & accompanying text; *see also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

7 *See infra* text accompanying notes 146-59.

8 *See infra* text accompanying notes 171-76.

II. HISTORY OF THE PRIVATE ANTITRUST ACTION

The private antitrust treble-damage remedy has been in the books for more than a century. It was contained in Section 7 of the original Sherman Act in 1890,[9] and was effectively "moved" to Section 4 of the Clayton Act when that statute was passed twenty-four years later.[10] The private injunctive remedy is of somewhat more recent vintage, appearing first in the Clayton Act in 1914.[11]

From the outset, the private antitrust action was viewed as a tort remedy.[12] Liability was joint and several,[13] and injuries were compensable under a tort standard of proximate cause.[14] The statute's authorizing language was extremely broad; it provided that "*any* person who *shall be injured* in his business or property by reason of *anything* forbidden in the antitrust laws may sue therefor" and "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[15]

Despite the breadth of the statutory language, private antitrust actions in the initial decades of antitrust were very rare. From 1899 to 1939, only 157 treble-damage actions

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[9] Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209.

[10] The current version is at 15 U.S.C. § 15.

[11] 15 U.S.C. § 26.

[12] *See, e.g.,* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906).

[13] *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

[14] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); *see generally* Allan N. Littman & Ronald E. Van Buskirk, *The "Dogmas" of Antitrust Actions: A New Prospective*, 24 ANTITRUST BULL. 687 (1979).

[15] 15 U.S.C. § 15 (emphasis added).

were recorded, with only 14 recoveries by plaintiffs, totaling less than $275,000.[16] Although there were undoubtedly a number of causes for this phenomenon, one primary reason was the standard of liability: the "rule of reason" as articulated in *Standard Oil Co. v. United States*.[17] The requirement of proving an unreasonable restraint on marketwide competition was perceived as a significant obstacle to plaintiffs, both in terms of the nature of the proof required and, as importantly, in the great cost in time and expense of obtaining it.[18]

The difficulty of proving an antitrust violation began to lessen with the development of the per se rule. The Supreme Court had made it clear in *Trenton Potteries*[19] that, in a horizontal price-fixing case, the plaintiff did not have to show that the prices fixed were unreasonable. In 1940 *Socony-Vacuum*[20] confirmed that this was indeed a "per se rule," and that proof of the defendants' market power was not required. In the ensuing years, the Court expanded the per se rule significantly – extending it to group boycotts,[21] tying arrangements,[22] divisions of markets,[23] and resale price maintenance, both minimum[24] and maximum.[25] In 1967

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16 Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 219 n.14 (1980) (citing ANTITRUST ADVISOR 682 (rev. ed. 1978); John D. Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747, 750 (1965)).

17 221 U.S. 1 (1911).

18 *See* H.R. REP. No. 627, 63d Cong., 2d Sess. (1914); S. REP. No. 619, 84th Cong., 1st Sess. (1955).

19 United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

20 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

21 Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

22 International Salt Co. v. United States, 332 U.S. 392 (1947).

23 United States v. Topco Assocs., 405 U.S. 596 (1972).

the *Schwinn* case[26] applied the per se rule to vertically imposed territorial and customer restraints. By the time of the *Topco* decision[27] in 1972, striking down intrabrand territorial restrictions, a wide variety of business practices had become vulnerable to per se condemnation, and the avenues for private litigation had become correspondingly broad. Suits by competitors, per se or not, received particular encouragement. In the predatory pricing area, the Court's decisions in *Mead*[28] and *Utah Pie*[29] seemed to establish a basis for liability on nothing more than a "declining price structure."[30]

The expansion of substantive liability was accompanied by a series of decisions easing antitrust plaintiffs' procedural burdens as well. The *Bigelow* case[31] in 1946 relaxed the standard for proving damages. *Poller v. CBS*[32] and other cases[33] made it particularly difficult for a defendant to prevail on summary judgment. *Hanover Shoe*[34] eliminated the defense that

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24 *E.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

25 Albrecht v. Herald Co., 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Khan, 118 S. Ct. 275 (1997).

26 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

27 United States v. Topco Assocs., 405 U.S. 596 (1972).

28 Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

29 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

30 *Id*. at 703.

31 Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

32 368 U.S. 464 (1962).

33 *E.g.*, Norfolk Monument Co. v. Woodlawn Memorial Gardens, 394 U.S. 700 (1969).

34 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

the plaintiff suffered no harm from an increased price if the increase was passed along to its customers. And, most importantly for present purposes, the *Radiant Burners* decision in 1961 established that there was no requirement that the plaintiff demonstrate any "public harm."[35] The Court said that, to state a claim for relief, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."[36]

The result was an explosion of private antitrust litigation. In the period from 1945 to 1949, there were 399 private cases.[37] From 1950 to 1954, the number jumped to 1002. The figure doubled again in the five-year period beginning in 1960.[38] Although prior to 1950 government antitrust actions represented as much as 95 percent of all antitrust cases, by 1978 private parties were bringing cases at an annual rate of more than 1400, with private cases this time comprising 95 percent of the total.[39] Things had reached the point where a leading business school text on competitive strategy was urging firms to commence antitrust litigation as a strategic device to halt competitors' growth and discipline competitive behavior.[40]

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35 Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656, 659 (1961).

36 *Id.* at 660. The *Radiant Burners* case involved a standards-setting organization that was alleged to have "boycotted" the plaintiff by setting standards the plaintiff could not meet. The lower courts dismissed the complaint for failure to allege "general injury to the competitive process," *id.* at 659; the Supreme Court reversed, holding that the rulings below were inconsistent with the per se rule for boycotts announced in Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

37 *See* Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970).

38 *Id*. The second increase is somewhat misleading; of the 3,354 private cases initiated from 1960 to 1964, 1,919 of them involved electrical equipment. *Id*. A similar table compiling the number of private cases filed from 1960 through 1988 can be found in Terry Calvani & Michael L. Sibarium, *Antitrust Today: Maturity or Decline*, *in* 2 THE ANTITRUST IMPULSE 605, 659 (Theodore Kovaleff, ed. 1994).

39 Brief of the United States as Amicus Curiae at 25-26, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

40 MICHAEL PORTER, COMPETITIVE STRATEGY 85-86 (1980):

There were signs starting in 1974 that the expansion was about to stop. For the first time since the Clayton Act was amended in 1950, the government actually lost an antimerger case in the Supreme Court – *General Dynamics*.[41] That loss was followed shortly by *Marine Banc*[42] and *Citizens & Southern*.[43] These were all government cases, however. It was not until 1977 that the Supreme Court addressed the expansion of private antitrust litigation. The case was *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[44]

III. THE *BRUNSWICK* CASE

> If a firm files a private antitrust suit challenging a competitor, it can be taken as a signal of displeasure or in some cases as harassment or a delaying tactic. Private suits can thus be viewed a lot like cross-parries. Since a private suit can be dropped at any time by the initiating firm, it is potentially a mild signal of displeasure relative to, for example, a competitive price cut. The suit may be saying, "You have pushed too far this time and had better back off," without taking the risks that would accompany a direct confrontation in the marketplace. For the weaker firm suing the stronger firm, the suit may be a way of sensitizing the stronger firm so that it will not undertake any aggressive actions while the suit is outstanding. If the stronger firms feels itself under legal scrutiny, its power may be effectively neutralized.
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> For large firms suing smaller firms, private antitrust suits can be veiled devices to inflict penalties. Suits force the weaker firm to bear extremely high legal costs over a long period of time and also divert its attention from competing in the market. Or, following the argument above, a suit can be a low-risk way of telling the weaker firm that it is attempting to bite off too much of the market. The outstanding suit can be left effectively dormant through legal maneuvering and selectively activated (inflicting costs on the weaker firm) if the weaker firm shows signs of misreading the signal.

41 United States v. General Dynamics Corp., 415 U.S. 486 (1974).

42 United States v. Marine Bancorporation, 418 U.S. 602 (1974).

43 United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975).

44 429 U.S. 477 (1977).

The *Brunswick* case presented the Supreme Court with the question whether a private plaintiff could recover damages in a Section 7 case based on the profits the plaintiff would have earned if the acquisition in question had not been consummated and the acquired companies, the plaintiff's competitors, had gone out of business instead of being acquired. Viewed from today's perspective, it is difficult to understand how the *Brunswick* plaintiff's case could have prevailed, as it did, in the court of appeals. But the antitrust landscape then was substantially different. The Supreme Court had consistently refused to narrow the latitude given private plaintiffs in proving damages.[45] And at the time, private merger cases were quite rare. The concept of seeking damages for an act that *might* lessen competition – the relevant liability standard – was largely untested. Indeed, the Third Circuit opined that *Brunswick* was the first private action for damages under Section 7 of the Clayton Act.[46] The upshot was that no one really knew what kind of damages, if any, a private plaintiff could allege and seek to recover in a case brought under Section 7.

It is valuable to revisit the facts surrounding the case. Brunswick manufactured and sold bowling equipment. Opening a bowling center required significant capital, approximately $12,600 for each lane in the bowling alley. Consequently, Brunswick made the majority of its sales on credit; the bowling center operator would borrow the money to purchase the equipment from Brunswick using the equipment as collateral for the loan.[47] Bowling enjoyed

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45 See *supra* text accompanying notes 31-36.

46 NBO Industries Treadway Cos. v. Brunswick Corp., 523 F.2d 262, 266 (3d Cir. 1975), *vacated and remanded sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

47 *Brunswick,* 429 U.S. at 479.

a surge in business in the 1950s, but in the 1960s, its popularity began to fade. As the industry contracted, Brunswick's delinquent accounts grew to alarming proportions. More than 25 percent of Brunswick's receivables were over ninety days overdue.[48]

Faced with this dire situation, Brunswick devised a plan to reduce the balance of delinquent receivables. The obvious first step was to foreclose on the loans, but that left Brunswick with the dilemma of what to do with the centers. Obviously, in light of its cash flow, Brunswick preferred to sell the centers to third parties; but given the vast numbers involved, the company did not believe that was a viable plan. Brunswick decided to form a new division, and announced its plan to acquire and operate those centers that could be expected to generate a positive cash flow.[49]

Treadway Companies and ten of Treadway's wholly-owned subsidiaries filed suit against Brunswick, alleging that Brunswick was monopolizing or attempting to monopolize the operation of bowling centers, and challenging Brunswick's acquisitions of bowling centers in three cities (Poughkeepsie, New York; Paramus, New Jersey; and Pueblo, Colorado) in which Treadway's subsidiaries operated competing bowling centers.[50] A jury returned a verdict in favor of Brunswick on the Section 2 claim, but found for the plaintiffs on the Section 7 claim. In

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48 *NBO Industries*, 523 F.2d at 267.

49 *Id*.

50 The plaintiffs also alleged a violation of Section 1 of the Sherman Act, claiming that Brunswick engaged in resale price maintenance. This claim was abandoned prior to trial. *Id*. at 264-65.

addition to over $6 million in damages, the district court entered an order directing Brunswick to divest itself of the three bowling centers in Poughkeepsie, Paramus, and Pueblo.[51]

In the court of appeals, there were substantial issues concerning both the liability and damage theories underlying the district court's judgment. The plaintiffs' Section 7 liability case depended on the "entrenchment" or "deep pocket" theory, which enjoyed a brief period of judicial acceptance in the 1960s and early 1970s. According to this theory, an acquisition by a firm with large resources might raise entry barriers by deterring other potential entrants, discouraging competitive challenges from smaller rivals fearful of provoking the industry "giant," or providing competitive benefits unavailable to other market participants.[52] Treadway therefore argued that Brunswick's mere presence in the retail market for operating bowling centers had the potential of lessening competition. The potential adverse effect was the result of Brunswick's size, particularly compared to other competitors in the market.[53] The Third Circuit validated this theory of liability,[54] even though the court conceded that the jury's verdict on the

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51 *Id*. at 265-66.

52 *See, e.g*., Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers."); FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967). For an expansive view of the theory, see the opinion by then-Circuit Judge Burger in Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

53 523 F.2d at 268. As of 1975, Brunswick operated more bowling centers (167) in the United States than anyone else. The next largest competitor operated only 32 centers. *Id*. at 267.

54 *Id*. at 268 ("The entry of a giant into a market of pygmies certainly suggests the possibility of a lessening of horizontal retail competition. This is because such a new entrant has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms.").

Section 2 claim established that Brunswick's vertical integration was not an attempt to monopolize the local markets.[55]

Treadway's damages theory was novel. If Brunswick had not acquired the competing bowling alleys, the plaintiffs reasoned, their business would have been increased and they would have enjoyed additional profits because the bowling alleys operated by Brunswick would have ceased to operate.[56] The Third Circuit endorsed the theory. The court held that if Brunswick's "illegal presence"[57] in the market caused injury to Treadway's subsidiaries, they were entitled to damages. No additional showing was required:

> We hold, then, that a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition.[58]

Although strange by today's standards, the reasoning then was not grossly inconsistent with prior law. After all, the Supreme Court had said in *Radiant Burners* that a private plaintiff need only prove violation and resulting injury. Treadway appeared to have done just that.

The Third Circuit's opinion did not go unremarked. Harvard Professor Phillip Areeda – then an emerging star in antitrust academia – suggested in an article that the mere

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55 *Id*.

56 *Id*.

57 *Id.*

58 *Id*. at 273. The Court remanded the case for a new determination of damages because the district court's instructions did not adequately require the jury to find that Treadway's losses were proximately related to Brunswick's "illegal presence" in the market. *Id*. at 276.

potential for competitive injury should not be enough for damages liability; antitrust plaintiffs should be required to demonstrate harm from an actual adverse effect on competition.[59] Professor Areeda also suggested a requirement of a connection between the alleged violation and some competitive harm.

The Supreme Court unanimously reversed. Importantly, the Court could have based its decision on the comparatively narrow ground, urged by the defense, that a plaintiff could not recover on a mere incipient threat to competition (the Section 7 liability standard) as opposed to actual competitive harm. Had that been the result, a plaintiff would still be allowed to recover by showing (1) harm to competition, and (2) injury caused by the defendant's unlawful conduct. Instead, the Court said that it would no longer be adequate for an antitrust plaintiff to demonstrate injury proximately caused by an antitrust violation. The Court held, in now familiar language, that to recover damages the 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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[60] Because Treadway's subsidiaries sought damages based on the preservation of competition, its theory was "inimical" to the antitrust laws. The Court therefore granted judgment in favor of Brunswick on the damages portion of the case.

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59 Phillip E. Areeda, *Antitrust Violations Without Damages Recovery*, 89 HARV. L. REV. 1127 (1976).

60 *Brunswick*, 429 U.S. at 489.

This "antitrust injury" requirement was new. It clearly had nothing to do with causation. There was no doubt that the acquisitions had caused Treadway the harm for which it sought to recover. Nor was there any issue of remoteness from the harm. The damages suffered were incurred directly by Treadway and were not derived from or duplicative of an injury to someone else. Treadway's problem was that it had not suffered "*antitrust* injury." Its harm did not emanate from any *anticompetitive* aspect of the antitrust violation.

IV. AFTERMATH AND EXPANSION OF SCOPE

The Court's opinion in *Brunswick* left much for further development. To begin with, the Court gave no indication as to whether plaintiffs would have to prove antitrust injury in cases other than those brought under Section 7 of the Clayton Act. Significantly, the Court left open the question of how Section 7's incipiency language – requiring only proof that the challenged merger had the potential for lessening competition – would relate to the Court's new requirement of antitrust injury. Justice Marshall was careful to point out that the Court was *not* saying that a plaintiff would be required to prove an actual lessening of competition in order to recover, but he added that "the case for relief will be the strongest where competition has been diminished."[61] Second, the Court was silent as to whether the antitrust injury standard was limited to damage theories or whether it extended equally to requests for equitable relief.[62] Finally, the Court in *Brunswick* did not mention *Radiant Burners*, in which the Court had

[61] *Id*. at 489 n.14.

[62] Because the Court remanded the Treadway claim for equitable relief, many believed the antitrust injury requirement was limited to damages only. *See also* Cargill, Inc. v. Monfort of Colorado, 479 U.S. at 128 (Stevens, J., dissenting).

appeared to rule that a connection between the plaintiff's injury and some harm to the competitive process was not required.

As discussed below, each of these questions as to the scope of *Brunswick* was answered in the next several years.

A. APPLICABILITY TO ALL SUBSTANTIVE ANTITRUST SUITS

The Court quickly made it clear that *Brunswick*'s antitrust injury rule was not limited to actions under Section 7 of the Clayton Act. The first extension to other statutes came in *J. Truett Payne Co. v. Chrysler Motors Corp.*,[63] a 1981 decision involving the viability of the "automatic damages" rule in price discrimination cases under Section 2(a) of the Robinson-Patman Act.[64] (This was a rule, adopted by some lower courts, pursuant to which a price discrimination plaintiff was presumptively entitled to damages at least in the amount of the price discrimination.) Saying that "[o]ur decision here is virtually governed by our reasoning in [*Brunswick*],"[65] the Court unanimously rejected the automatic damages rule. Justice Rehnquist's opinion emphasized that "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent,"[66] and held that this requirement could not be satisfied by bare proof of a Section 2(a) violation "since such proof establishes only that injury *may* result."[67] Injury and damages had to be proven.

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[63] 451 U.S. 557 (1981).

[64] 15 U.S.C. § 13(a).

[65] 451 U.S. at 562.

[66] *Id*.

[67] *Id*..

Later cases made clear that the *Brunswick* rule applied equally to cases under the Sherman Act. *Blue Shield of Virginia v. McCready*[68] applied the antitrust injury rule to a claim brought under Section 1 of the Sherman Act, and *Atlantic Richfield Co. v. USA Petroleum Co. (ARCO)*[69] held explicitly that antitrust injury was an essential element of every private antitrust case, irrespective of the substantive theory of liability. The Court thus confirmed that the antitrust injury requirement applies not only in cases involving incipient violations (the Clayton Act in *Brunswick*, the Robinson-Patman Act in *Payne*), but also to violations of the Sherman Act where proof of an actual adverse effect on competition is required. As the Court explained in *ARCO*, irrespective of the substantive theory, "a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior."[70]

B. EQUITABLE RELIEF

The applicability of the antitrust injury doctrine to claims for equitable relief was resolved by the 1986 decision in *Cargill v. Monfort of Colorado, Inc.*[71] *Cargill* involved a challenge by the fifth largest beef packer in the country (Monfort) to a merger between the second-largest (Cargill/Excel) and the third-largest (Spencer Beef). As characterized by the

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68 457 U.S. 465 (1982).

69 495 U.S. 328 (1990).

70 *Id*. at 344.

71 479 U.S. 104 (1986).

Court, Monfort's claim was that the merger would injure it by increasing the defendants' market share to 20.4 percent and allowing them to lower prices (albeit not to levels below cost). As in *Brunswick*, there were no issues of remoteness or causation: Monfort was a direct competitor and would surely be injured directly by having to compete against the merged firm's lower prices. The issue was antitrust injury.

The *Cargill* Court held that the *Brunswick* requirement applied to claims for equitable relief, and that Monfort had not satisfied the requirement:

> *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result . . . .[72]

The Court added that, even though the relief sought was purely equitable under Section 16 of the Clayton Act rather than damages under Section 4, "[i]t would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred."[73]

C. APPLICATION IN CASES INVOLVING PER SE VIOLATIONS

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[72] *Id*. at 116.

[73] *Id*. at 112.

The Supreme Court's most recent encounter with antitrust injury was the *ARCO* case.[74] USA Petroleum, an independent gasoline retailer, alleged a conspiracy among ARCO and its dealers to fix the maximum resale price at which ARCO dealers could sell. Under the Supreme Court's 1968 *Albrecht* decision,[75] such a conspiracy was a per se violation of the antitrust laws.[76] Although USA did not allege (at least in the Supreme Court) that the prices were fixed at below-cost, predatory levels, it sought to recover for the harm suffered from being forced to compete against the "unlawful" lower prices that resulted from the conspiracy.

Relying on *Brunswick* and *Cargill*, the Court held that USA had not suffered antitrust injury. As in those prior cases, USA was really complaining that the assertedly unlawful conduct caused injury by increasing the competition the plaintiff had to face. Absent predatory pricing, even if the challenged conduct were unlawful the plaintiff's injury could not be said to have resulted from anything anticompetitive in the defendants' conduct. *ARCO* confirmed that the antitrust injury requirement applied, and with full force, even in cases involving per se violations. Accordingly, although the plaintiff did not have to show actual harm to competition to prove a per se violation, the separate requirement of antitrust injury made it necessary for the plaintiff to prove that "the loss stems from a competition-reducing aspect or effect of the defendant's behavior."[77] *ARCO* thus established that every private plaintiff must show some

[74] 495 U.S. 328 (1990).

[75] 390 U.S. 145 (1968).

[76] *Albrecht* was later overruled in State Oil Co. v. Khan, 118 S. Ct. 275 (1997).

[77] 495 U.S. at 344.

element of "public harm" – harm to competition – to make out a case. Like *Brunswick* and *Cargill*, *ARCO* did not mention *Radiant Burners*; but *ARCO*'s reasoning and result made it very clear that *Radiant Burners* had been overruled.

V. BROAD CONSENSUS AMONG THE COURTS ON THE MAJOR ISSUES

Although full understanding and acceptance of the *Brunswick* doctrine took time,[78] over the years the case has had a significant impact on private actions under the antitrust laws. From the outset, the decision met with fairly universal approval in the academic community, as articles praising the decision and urging expansion of its doctrine appeared in leading journals.[79] District courts eventually became equally enthusiastic, learning to use *Brunswick* as a device for dismissing complex, docket-clogging cases.[80] In part as result of the antitrust injury doctrine, filings of private antitrust actions dropped from a rate of more than 1400 per year in the late 1970s to 521 in 1990.[81] Together with the Supreme Court's

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[78] *See* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) (arguing, based on a statistical sample, that *Brunswick* had effected no major change by 1983); William H. Page & Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111, 114 & n.25 (1992) (arguing that the practical importance of *Brunswick*'s doctrine increased substantially over the course of the 1980s).

[79] *See, e.g.*, William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 33-40 (1984).

[80] *See, e.g.*, Shannon v. Crowley, 538 F. Supp. 476 (N.D. Cal. 1981); Bustop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989 (S.D.N.Y. 1981); American Hosp. Supply Corp. v. Roy Lapidus, Inc., 493 F. Supp. 1076 (D. Mass. 1980).

[81] U.S. GENERAL ACCOUNTING OFFICE, JUSTICE DEPARTMENT CHANGES IN ANTITRUST ENFORCEMENT POLICIES & ACTIVITIES 15 (1990). Of course, *Brunswick* was far from the only cause. The Supreme Court's substantive antitrust decisions played a major role as well. *See generally* Maxwell M. Blecher, *The Impact of* GTE Sylvania *on Antitrust Jurisprudence*, 60 ANTITRUST L.J. 17 (1991).

subsequent antitrust injury decisions, *Brunswick* caused a substantial change in the manner in which virtually all private antitrust actions are brought, defended, and decided.

First, prior to *Brunswick* the primary and often only scrutiny of a plaintiff's right to sue was in determining whether the plaintiff was too *remote* from the violation.[82] This requirement – usually labeled "standing" – barred recovery by plaintiffs whose injuries were too indirect, such as shareholders,[83] landlords,[84] licensors,[85] or creditors[86] of the injured party.[87] *Brunswick* made it clear that this sort of remoteness was not the only reason for denying a plaintiff the right to sue. Its antitrust injury doctrine has required the courts to focus on the "why" and the "what" – the type of injury and its relationship to alleged violation – in addition to the "who."

Second, *Brunswick*'s antitrust injury requirement has forced the courts to recognize that the claims of competitors – once thought to be the model antitrust plaintiffs[88] – are

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82 Courts also scrutinized whether the defendant's conduct in fact caused the plaintiff's injury, *see* Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946), but this analysis focused on the plaintiff's ultimate right of recovery, not on whether the plaintiff had a right to sue in the first place.

83 *E.g.*, Kreager v. General Elec. Co., 497 F.2d 468 (2d Cir. 1974).

84 *E.g.*, Calderone Enters. v. United Artists Theatre Circuit, 454 F.2d 1292, 1296 (2d Cir. 1971).

85 *E.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970).

86 *E.g.*, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

87 Similar reasoning, emphasizing the potential for duplicative recovery against the defendant, and the need to avoid complicated apportionment of damages, was later adopted by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Court there limited recoveries to direct purchasers, barring those who purchased from the direct buyer – notwithstanding their very real injuries – from maintaining suit.

88 *See, e.g.*, Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 23-24 (1989) (discussing legislative history of the Sherman Act).

frequently inconsistent with the most basic objectives of the antitrust law. Competitors' interests are generally served if competition is reduced. They prefer fewer rivals and less aggressive competitive tactics; the less the competition, the greater the competitor's ability to increase prices and profits. The interests of the antitrust laws, however, go in the opposite direction. *Brunswick* and its progeny have forced the courts to confront this fact and to recognize that competitor suits – sometimes intentionally – have significant potential for allowing the antitrust laws to be used to subvert the competitive process.[89] By making the plaintiff demonstrate how its injury reflects the actual harm to competition – if any – *Brunswick* has provided the courts with a powerful weapon to prevent plaintiffs from using the antitrust laws for improper and anticompetitive purposes.

Third, and perhaps most significantly, the antitrust injury requirement has helped the courts better understand what conduct is anticompetitive (and unlawful) and what conduct is not. Prior to *Brunswick*, the Supreme Court had said in *Brown Shoe*[90] that the antitrust laws "protect competition, not competitors."[91] The phrase was memorable, but it did not express the reality of the Court's actual rulings. Case after case promoted the interests of competitors over those of the competitive process.[92] *Brunswick* repeated the phrase,[93] but this time the Court

89 *See* William J. Baumol & Janusz Ordover, *The Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

90 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

91 *Id*. at 320.

92 *See* cases cited *supra* notes 21-30.

93 429 U.S. at 488.

gave it real meaning. In a case directly pitting the interests of competitors against those of consumers, the *Brunswick* Court sided unambiguously with the consumer. Many subsequent decisions have confirmed that the primary objective of antitrust is to protect consumers – to prevent firms from engaging in conduct that causes harm by increasing prices, reducing output, or diminishing consumer choice.[94] But *Brunswick* was the first both to recognize the principle and to apply it in a meaningful way.[95]

Although the lower courts' application of *Brunswick*'s doctrine has not been without some difficulty,[96] for the most part the courts have understood the decision and applied it as intended. Thus, for example, the courts have ruled consistently that plaintiffs harmed by their competitors' business torts incur no antitrust injury absent proof that the injury is associated with some competition-reducing aspect of the tort.[97] In these cases, the business tort surely

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94 *See, e.g.,* NCAA v. Board of Regents, 468 U.S. 85 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); *ARCO*, 495 U.S. at 337-41.

95 The "consumer welfare" standard articulated by the Supreme Court in *Brunswick* and later decisions, *see, e.g.,* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992), is not the same as the approach advocated by some writers from the "Chicago School." *E.g.,* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). The Court's approach recognizes market imperfections such as switching and information costs, acknowledges the significance of capital costs and time factors as impediments to entry, and does not presume strongly that market power is transient and markets self-correcting. *See* Jonathan M. Jacobson '*Kodak*': *Daguerreotype or Laser Projection?*, N.Y.L.J., July 30, 1992, at 5. The Court's approach condemns, for example, minimum resale price maintenance agreements, *e.g.,* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), the use of power in one market to restrict competition significantly in another, *e.g.*, *Kodak*, 504 U.S. at 465-71, and the use of market power to exclude competition in a manner that restricts output, *e.g.,* NCAA v. Board of Regents, 468 U.S. 85 (1984), or reduces significantly the choices available to consumers, *e.g.,* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). It is a "consumer welfare" approach in the *real* sense of the term.

96 See *infra* text accompanying notes 104-70.

97 *See, e.g.,* Music Center S.N.C. v. Prestini Musical Instruments Corp., 874 F. Supp. 543, 555 (E.D.N.Y. 1995); Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338 (7th Cir. 1986).

injures the plaintiff – but the injury typically reflects an increase, rather than any decrease, in competition.[98] Similarly, in cases involving a supplier's substitution of one dealer for another, courts have recognized correctly that the replaced dealer's injury is generally not compensable because the mere substitution of one dealer for another usually cannot reflect any anticompetitive aspect of the supplier's conduct.[99]

Brunswick has been especially useful in barring recovery by plaintiffs whose damages would be based on a denial of a right to share in supracompetitive prices or profits.[100] In the *Todorov* case, for example, the Eleventh Circuit dismissed a claim by a physician whose damage theory presupposed that the plaintiff would share in the very profits his liability theory challenged as supracompetitive.[101] The court recognized that a failure to participate in unlawfully high profits could not possibly reflect any *anticompetitive* effect of the claimed violation.[102]

Brunswick has also been important in cases involving attempts by plaintiffs to aggregate damages attributable to multiple acts and practices. In cases involving such "disaggregation" issues, *Brunswick* has led the courts generally to require that each element of the plaintiff's damages be linked to the anticompetitive aspects of the challenged conduct.[103]

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98 *Ball Memorial*, 784 F.2d at 1338.

99 *See, e.g.,* Balaklaw v. Lovell, 14 F.3d 793, 799-80 (2d Cir. 1994); Filter Queen v. Health-Mor, Inc., 1990-1 Trade Cas. ¶ 69,086, at 63,985 (N.D. Ill. 1990).

100 *See, e.g.,* Local Beauty Supply v. Lamaur, Inc., 787 F.2d 1197 (7th Cir. 1986); Todorov v. DCA Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991).

101 *Todorov*, 921 F.2d at 1453-54.

102 *Id.; see also* Hammes v. AAMCO Transmissions, 33 F.3d 774, 777 (7th Cir. 1994); Purgess v. Sharrock, 806 F. Supp. 1102, 1107 & n.6 (S.D.N.Y. 1992).

103 *See* M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 ANTITRUST L.J. 311, 323 (1997).

VI. DOCTRINAL CONFUSION: THE COMMINGLING OF REMOTENESS, CAUSATION, AND ANTITRUST INJURY CONCERNS

Despite the improvements to antitrust analysis that have resulted from the antitrust injury doctrine, one recurring problem that has developed in the cases decided after *Brunswick* is the courts' confusion as to the meaning of "standing" and the role of "antitrust injury" in "standing" analysis. The courts have not always distinguished properly between causation, remoteness, and true antitrust injury, and have instead tended to lump them all into a broad "standing" inquiry. The result has been some flawed analyses.

A. THE DISTINCT CONCERNS OF CAUSATION, REMOTENESS, AND ANTITRUST INJURY

The determination of "who" can sue and for "what" involves a series of distinct considerations. One is simple *causation*, i.e., whether the plaintiff has suffered "injury in fact" from the antitrust violation. The plaintiff must demonstrate that the defendant's conduct caused the injury.[104] Although the plaintiff is given some leeway in calculating the amount of damages, the fact of injury must be shown with reasonable specificity.[105]

A second consideration – widely known as antitrust standing in the era prior to *Brunswick* – is the directness of the plaintiff's injury and related concerns of *remoteness*. The focus in this respect is whether the plaintiff's injury is derivative of a more direct injury to someone else, and whether allowing the plaintiff to recover would impermissibly increase the risk of duplicative recovery against the defendant or create the need for a complex apportionment of any damages.[106]

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104 *See, e.g.,* Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946). Of course, the plaintiff must also prove "standing" in the constitutional sense. Sanner v. Chicago Board of Trade, 62 F.3d 918, 922-27 (7th Cir. 1995); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1152 (6th Cir. 1975). Proof of injury in fact tends to satisfy this requirement as well.

105 *Bigelow,* 327 U.S. at 265-66.

106 *See* Blue Shield of Virginia v. McCready, 457 U.S. at 472-81. Although the Court in *McCready* indicated that the potential for duplication involves considerations distinct from remoteness, we suggest that the potential for duplication is viewed better as one aspect of the remoteness inquiry. Thus, if a plaintiff's claim presents a serious potential of duplicating damages, the plaintiff is likely to have suffered its injury indirectly and is properly viewed as too remote. A good example is the indirect purchaser from a price-fixing cartel, whose damage suit is barred under *Illinois Brick*. *See supra* note 87. The indirect purchaser's claim poses an undue threat of duplicative recovery in part because its injury is indirect and derivative. The same analysis applies to plaintiffs such as shareholders, landlords, or licensors. Their injuries are viewed as too indirect and derivative, and one of the chief reasons is the potential for duplicative recovery raised by their claims.

The third consideration is the one introduced by *Brunswick*: *antitrust injury*, requiring an analysis of whether the plaintiff's injury sufficiently reflects the anticompetitive aspects of the defendant's conduct.

These three criteria – injury in fact, remoteness, and antitrust injury –involve differing legal and policy issues. Each addresses an analytically distinct concern that may, in any given case, preclude the plaintiff's ability to recover. To illustrate the point, take the case of a retailer who purchases from a wholesaler who, in turn, purchases from a horizontal price-fixing cartel. The retailer, an indirect purchaser, can demonstrate causation and has suffered antitrust injury; its injury, elevated prices, directly reflects the anticompetitive effects of the cartel's activities. The retailer's suit, however, is barred by considerations of remoteness. Under *Illinois Brick*, indirect purchasers are precluded from maintaining suit because of the existence of more direct victims, the danger of duplicative recovery against cartel members, and the need to avoid apportioning damages. Now take the facts of *Brunswick*. Treadway's problem is not that it is too remote. It is the most direct victim of Brunswick's "unlawful presence" in the three affected markets. Its suit is barred for the entirely separate reason that the injury alleged reflects no anticompetitive effect of the alleged antitrust violation.

Distinguishing causation, remoteness, and antitrust injury is especially important in evaluating claims for injunctive relief. A plaintiff seeking an injunction must demonstrate causation in essentially the same way as would a plaintiff seeking damages. The difference is that the plaintiff need show only that the damage is threatened, not that it has already occurred. There is no reduction in the requirement that the defendant's conduct be shown to be the *cause* of the (threatened) harm.[107] Similarly, as *Cargill* squarely holds, the antitrust injury requirement is not relaxed in equity cases.[108] The plaintiff must show that its injury sufficiently reflects the competition-reducing aspects of the challenged conduct. In contrast, *remoteness* considerations are significantly different in injunction cases. As *Cargill* recognized, concerns about multiple lawsuits, duplicative recovery, and complex apportionment – highly relevant in the damages context – are much less important when the relief sought is equitable because "one injunction is as effective as 100, and, concomitantly, . . . 100 injunctions are no more effective than one."[109] Accordingly, the courts have recognized that indirect purchasers and certain other "remote" plaintiffs may seek injunctive relief even in cases where they have no right to recover damages.[110] This does not mean, of course, that the remoteness inquiry is eliminated in equity. Although the requirement is reduced, plaintiffs whose injuries are too indirect and derivative remain unable to sue even for injunctive relief.[111]

Unfortunately, as explained below, the distinct concepts of causation, remoteness, and antitrust injury have become commingled and confused.

B. SUPREME COURT DECISIONS

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[107] *See* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 360b (rev. ed. 1995).

[108] 479 U.S. at 111-13 ("Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries.").

[109] *Id.* at 112.

[110] *See, e.g.,* McCarthy v. Recordex Serv., Inc. 80 F.3d 842, 856 (3d Cir. 1996); Reiter v. Sonotone Corp., 486 F. Supp. 115, 121 (D. Minn. 1980).

[111] *See* Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1449-54 (11th Cir. 1991); 2 AREEDA & HOVENKAMP, *supra* note 107, ¶¶ 346a, 364c, 378; ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 781-82 & n.146 (4th ed. 1997).

In three decisions in the early 1980s, the Supreme Court was less than clear in its analysis of the respective plaintiffs' ability to sue and the role of the antitrust injury doctrine in that analysis. Although each decision reached a sound result for ultimately sound reasons, lack of clarity in the opinions generated confusion which has plagued the lower courts ever since.

The first of these cases was the 1981 decision in *Truett Payne*.[112] The plaintiff was an automobile dealer that alleged injury based on a sales incentive program alleged to have been used discriminatorily by Chrysler. The plaintiff sought damages based on the amount of the discrimination, relying on some lower court cases establishing that Robinson-Patman plaintiffs were "automatically" entitled to damages in that amount. The Court in *Truett Payne* relied on *Brunswick* to reject this "automatic damages" rule.[113] Unfortunately, the opinion suggested that antitrust injury was a concept of *causation*, rather than a concept requiring that the plaintiff's injury reflect the adverse effect of the defendant's conduct on competition (as *Brunswick*, in fact, had held). In fact, because the problem with the automatic damages rule was that it eliminated the need to prove causation, many lower courts reasonably concluded that the Court's reliance on *Brunswick* meant that antitrust injury was a causation requirement.[114]

The failure to recognize the distinctness of the antitrust injury concern continued with *Blue Shield of Virginia v. McCready,*[115] decided in 1982. *McCready* involved an

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112 J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

113 See *supra* text accompanying notes 63-67.

114 *See, e.g.,* Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir. 1982).

115 457 U.S. 465 (1982).

agreement between the Neuropsychiatric Society of Virginia, an association of the state's psychiatrists, and the state's Blue Shield insurance plan, that insurance coverage would be provided for visits to non-physician psychologists only if prescribed by a psychiatrist. McCready received Blue Shield coverage under her employer's group health plan, but her claims for benefits for visits to her psychologist were denied because they had not been prescribed by a physician. She challenged the Blue Shield/psychiatrist arrangement as a violation of Section 1 of the Sherman Act. Describing the question presented as whether she "ha[d] standing to maintain an action under § 4 of the Clayton Act,"[116] the Court, dividing five to four, held that she did.

Justice Brennan's majority opinion addressed the issue in two parts. The first was whether McCready's claim raised an impermissible risk of duplicative recovery of the sort presented in *Hawaii v. Standard Oil Co.*[117] and *Illinois Brick Co. v. Illinois*.[118] Because McCready's damage – the unreimbursed cost of psychology services – was not a cost incurred by her employer, the Court held that there was no risk of duplication and that her claim could not be barred on that basis.[119]

The second part of the analysis involved what the Court described as remoteness concerns. Those concerns, Justice Brennan said, required the Court to "look (1) to

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116 *Id*. at 467.

117 405 U.S. 251 (1972) (holding that a state could not sue for general damage to its economy, since state citizens could sue for and recover damages they incurred).

118 431 U.S. 720 (1977) (holding that only direct purchasers may sue for damages from a horizontal price-fixing conspiracy).

119 457 U.S. at 473-75.

the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful . . . ."[120] The Court concluded (1) that McCready had shown an adequate "nexus" in that she was a consumer covered under defendant Blue Shield's insurance, and (2) that her injury – unreimbursed payments – reflected the anticompetitive effect of the violation charged. Unfortunately, the analysis did not end there. The Court also suggested that the antitrust injury requirement was an aspect of the remoteness inquiry, and that remoteness and duplicative recovery concerns are "[a]nalytically distinct."[121] These suggestions added to the doctrinal confusion initiated by *Payne* for two reasons. First, antitrust injury is not properly understood as an aspect of remoteness. If a plaintiff's injury does not emanate from the anticompetitive aspects of defendant's conduct, the claim must be dismissed even if remoteness is not an issue. Correspondingly, a remote plaintiff's claim – such as that of the shareholder or landlord – cannot be maintained even if it does flow from the consumer harm caused by the defendant's conduct. Second, remoteness and duplicative recovery concerns are not in fact distinct. On the contrary, the potential for duplication is one of the primary criteria that must be used in assessing remoteness.[122]

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120 *Id*. at 478.

121 *Id*. at 476.

122 *See supra* note 106 & accompanying text.

In 1983, the problem of amalgamating antitrust injury into unrelated concerns was exacerbated in *Associated General Contractors v. California State Council of Carpenters*.[123] In that case, two unions filed suit against an association of general contractors, alleging that the association and its members had conspired with others to weaken the unions by coercing landowners, builders, and general contractors to use nonunion labor. The Supreme Court held that "the *Brunswick* test [was] not satisfied"[124] because the union's injury – presumably, reduced membership and lower dues – did not adequately reflect the anticompetitive effect of the conspiracy alleged. The Court noted that, "[a]s a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals."[125]

Although this analysis of the failure to prove antitrust injury in the *Brunswick* sense would have been sufficient to resolve the case, the *Associated General Contractors* Court did not leave it at that. Instead, the Court appeared to integrate antitrust injury into a multi-factor analysis of entitlement to sue under the antitrust laws which, the Court acknowledged, was inherently imprecise.[126] The other "factors" in the Court's analysis included:

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[123] 459 U.S. 519 (1983).

[124] *Id.* at 540.

[125] *Id*. at 539.

[126] *Id*. at 535.

the relationship of the parties, i.e., whether the plaintiff was a consumer, competitor, or other participant in the affected market; the directness of the injury alleged; the degree to which the damage alleged would be speculative; and the potential for duplicative recovery or complex apportionment[127] – all valid concerns, but relating to the remoteness inquiry rather than to antitrust injury.[128]

C. CONFUSION IN THE LOWER COURTS

The many-factored balancing analysis introduced by *Associated General Contractors* appeared to provide a license to the lower courts to engage in imprecise, outcome-oriented decision-making. The problem was compounded by the Court's earlier failure in *Truett Payne* to distinguish antitrust injury from causation, and by *McCready*'s failure to distinguish between antitrust injury and remoteness concerns. The result has been a number of confused decisions in the lower courts.[129]

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[127] *Id*. at 535-46.

[128] *See also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). There, in the course of ruling that Zenith had not presented adequate evidence to support its charge of a predatory pricing conspiracy among Japanese television manufacturers, the majority opinion said that a conspiracy to *raise* prices "could not have caused [Zenith] to suffer an 'antitrust injury' . . . because they actually tended to benefit [Zenith]." *Id.* at 586. This passage compounded the problem, also present in *Truett Payne*, of jumbling causation and antitrust injury concerns.

[129] For cases confusing antitrust injury and causation, see G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766-67 (2d Cir. 1995); O.K. Sand & Gravel, Inc. v. Martin Marietta Tech., Inc., 36 F.3d 565, 573 (7th Cir. 1994); Greater Rockford Energy & Tech. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993); Bob Nicholson Appliance, Inc. v. Maytag Co., 883 F. Supp. 321, 326-27 & n.7 (S.D. Ind. 1994); Irvin Indus., Inc. v. Goodyear Aerospace Corp., 803 F. Supp. 951, 954-56 (S.D.N.Y. 1992), *on remand from* 974 F.2d 241 (2d Cir. 1992); cases cited in 2 AREEDA & HOVENKAMP, *supra* note 107, ¶ 362a, at 210 n.3. For examples of cases confusing antitrust injury and remoteness, see Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1379-80 (7th Cir. 1987); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 219 (4th Cir. 1987); Hairston v. Pac-10 Conference, 893 F. Supp. 1485, 1490-93 (W.D. Wash. 1994), *aff'd on other grounds*, 101 F.3d 1315 (9th Cir. 1996).

A good example is the decision in *Rockbit Industries v. Baker Hughes, Inc.*[130] The plaintiff charged, among other things, a conspiracy between two of its competitors to drive it out of business so as to enable the conspirators to profit from their alleged agreement to fix prices. The court focused on the price-fixing label and concluded that the plaintiff incurred no "antitrust injury" because the plaintiff would benefit from an agreement between its competitors to raise prices.[131] The court's analysis confused the issue of causation with antitrust injury. As a matter of *causation*, it is quite true that a competitor is not injured when its rivals raise prices. As the Supreme Court pointed out in *Matsushita,* [132] such a price increase enables the competitor to increase its own prices or capture market share; the competitor incurs no "antitrust injury" because it incurs no injury at all. But the lack of injury from competitors' price-fixing does not mean the competitor bounced out of a cartelized market is barred from suing. The failure to reap cartel profits is not antitrust injury, but being precluded from competing *against* a cartel surely would be. As Judge Posner said in *Haames v. AAMCO Transmissions,*[133] reaching a result opposite to that in *Rockbit*:

> If the complaint showed [plaintiff] Cooksey's only gripe was that it had been expelled from a cartel and thereby deprived of cartel profits, it could not recover those lost profits as antitrust damages. . . . That Cooksey is seeking lost cartel profits is only one possible interpretation of the complaint, however, and any ambiguities must be left to further proceedings to resolve.

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130 802 F. Supp. 1544 (S.D. Tex. 1991).

131 *Id.* at 1547-49.

132 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83 (1986).

133 33 F.3d 774 (7th Cir. 1994).

> Another interpretation is that Cooksey wanted to compete by underselling the other dealers, thus weakening or breaking the cartel, and that it was ejected from the advertising pool in order to prevent it from, or punish it for, doing this. Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws, for otherwise an effective deterrent to successful cartelization would be eliminated . . . .[134]

Just as *Rockbit* confused antitrust injury with causation, some courts have confused antitrust injury with remoteness. A recent example is the decision in *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*[135] The case involved a claim by a firm retained to solicit nursing home orders for certain vaccines manufactured by defendant SmithKline Beecham. Pursuant to the parties' arrangement, the plaintiff would pass the orders to a firm called GIV, which would purchase the vaccines from SmithKline and supply the nursing homes, remitting a commission on the sales back to the plaintiff. The antitrust claim was that SmithKline had conspired with pharmacists to reduce sales of the products the plaintiff had been retained to market. The court held that the plaintiff had not shown antitrust injury and dismissed the case. The reasoning was that "[b]ecause [plaintiff] was . . . not a competitor or a consumer in the market in which trade was allegedly restrained by the antitrust violations pled by [plaintiff], we hold that [plaintiff's] alleged injury is not 'antitrust injury.'"[136]

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134 *Id*. at 782-83 (citations omitted); *accord* Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 67-70 (2d Cir. 1988); 2 AREEDA & HOVENKAMP, *supra* note 107, ¶ 373e1.

135 118 F.3d 178 (3d Cir. 1997).

136 *Associated General Contractors*, 459 U.S. at 184.

Although the dismissal of the complaint seems correct, the problem was really remoteness, not antitrust injury. The adverse effect (if there was any) of the alleged conspiracy would have been reduced output of the products sold by GIV and brokered by the plaintiff. The plaintiff's injury was caused by that reduction in output and, thus, would appear to satisfy the antitrust injury requirement. The difficulty is that the plaintiff's injuries were purely derivative of the injury to GIV: the reduction in plaintiff's commissions arises only because GIV has lost sales. Its claim was therefore too remote and is subject to dismissal on that ground.

A separation of the inquiries as to causation, remoteness, and antitrust injury would improve the analysis in cases like *Rockbit* and *Barton & Pittinos*. It would also be consistent with the actual holdings – although perhaps not all of the language – of the Supreme Court's decisions. The *Associated General Contractors* Court did say that antitrust injury is one of the "factors" in determining whether a plaintiff can sue,[137] but it also indicated that in any given case one or more of the various "factors may be controlling."[138] Indeed, in *AGC* itself the lack of antitrust injury was held to be dispositive.[139] *Cargill* and *ARCO* confirm that antitrust injury is an essential element of a private antitrust claim and, thus, is a separate requirement that must be met in every case.

To reduce the current confusion and assist in clarifying the different facets of the analysis, consideration should also be given to abandoning use of the term "standing" to

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137 *Id*. at 538.

138 *Id*.

139 *Id*.

describe a plaintiff's entitlement to sue. Properly viewed, "standing" is a requirement imposed by Article III of the Constitution, limiting the class of plaintiffs that can sue in any case to those who are within the "zone of interests" protected by the applicable law.[140] As used in many antitrust cases, however, the term has come to describe remoteness concerns,[141] causation concerns,[142] antitrust injury concerns,[143] or some combination or aggregation of the three.[144] Since use of the term "standing" leads to imprecision, and since imprecision can yield incorrect results, analysis would be improved by referring to the specific concepts, i.e., causation, remoteness, and antitrust injury.[145] If it is necessary to ascribe a single term to encompass all three of these concerns, the phrase "private action predicate" might be a better solution.

VII. OCCASIONAL MISUSES OF *BRUNSWICK* AND ITS PROGENY

The commingling of antitrust injury with other concerns is not the only problem that has arisen in the courts' application of *Brunswick* and later cases such as *Associated General Contractors*. In a few contexts, the lower courts have extended *Brunswick* well beyond its intended scope to bar plaintiffs at the gate for reasons unrelated to the relationship

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140 *See generally* Warth v. Seldin, 422 U.S. 490 (1975).

141 *E.g.*, McCarthy v. Recordex Serv., Inc., 80 F.3d 843 (3d Cir. 1996).

142 *E.g*., Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir. 1982).

143 Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988).

144 *E.g.*, Alberta Gas Chems. v. E.I. *du Pont* de Nemours & Co., 826 F.2d 1235, 1239-41 (3d Cir. 1987); Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991).

145 *See* 2 AREEDA & HOVENKAMP, *supra* note 107, ¶ 360c, at 195-96. *AGC* did not endorse use of the "standing" nomenclature. Although the Court acknowledged the term's use by others, 459 U.S. at 525, the Court's opinion characterized the proper inquiry as one to determine whether the plaintiff is "a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act," 459 U.S. at 546, not whether the plaintiff had "standing."

between the injury asserted and the potential competitive harm. The courts have also used antitrust injury, on occasion, to avoid the need to confront difficult issues of substantive liability. Although, in the general scheme of things these misunderstandings are relatively minor, they warrant mention and, perhaps, correction.

A. THE "EFFICIENT ENFORCER" PROBLEM

One significant problem that has arisen in recent years is that some courts have engrafted an additional private action requirement – that the plaintiff be "the most efficient enforcer" of the antitrust laws – on top of the existing requirements of antitrust injury, causation, and remoteness. The problem can be attributed to an innocent passage in *Associated General Contractors* that lower courts have extended well beyond its original meaning. In observing that the injury asserted in the case by the plaintiff union was indirect and derivative, the *AGC* Court said:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.[146]

Relying on this passage, a number of lower courts have held that it is an independent requirement in a private suit that a plaintiff demonstrate that it is an "efficient

146 459 U.S. at 542.

enforcer" of the antitrust laws.[147] A few courts, such as the Eastern District of Pennsylvania in *Huhta v. Children's Hospital*, have gone even further and held that "the plaintiff must prove: (1) that he has suffered an antitrust injury; and (2) that he is *the most efficient* enforcer of the antitrust laws."[148] *Huhta* was an action by a former staff cardiologist at a hospital against the hospital for denying him the right to perform or officially interpret diagnostic procedures. The plaintiff's theory, apparently, was that the hospital was using market power in various acute care markets to exclude competition from the plaintiff and others in the interpretation of cardiograms.[149] The court held that the plaintiff "lack[ed] standing because he is not a proper antitrust plaintiff . . . . Defendants argue that the direct 'victims' of the alleged antitrust violations are those patients and insurance providers who are consumers of [the relevant] services. I agree with defendants."[150]

The analysis in *Huhta* is problematic. Cases like *Huhta*, involving physician allegations of "exclusion" by hospitals, are typically frivolous, but the problem is not the mere

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147 Huhta v. Children's Hosp., 1994-1 Trade Cas. ¶ 70,619, at 72,361 (E.D. Pa. 1994), *aff'd*, 52 F.3d 315 (3d Cir. 1995); Robles v. Humana Hosp., 785 F. Supp. 989, 999 (N.D. Ga. 1992); Leak v. Grant Medical Ctr., 893 F. Supp. 757, 764 (S.D. Ohio 1995); Rooney v. Medical Ctr., 1994 WL 854372, at *7 (S.D. Ohio 1994); *see generally* Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991).

148 1994-1 Trade Cas. at 72,361 (emphasis added); *see also* Feldman v. Palmetto General Hospital, 980 F. Supp. 467 (S.D. Fla. 1997). *Contra* Ertag v. Naples Community Hospital, 1997-2 Trade Cas. ¶ 71,966, at 80,747 (11th Cir. 1997) (unpublished) ("neither this Court nor the Supreme Court has held that a district court must seek out the *most* efficient enforcer of the antitrust laws."). The *Huhta* case itself articulated "the most efficient enforcer" requirement as one separate from, and in addition to, the requirement of antitrust injury. Thus, in *Huhta* the problem was not misapplication of *Brunswick* as much as it was misinterpretation of *Associated General Contractors* and the issue of remoteness. The confusion is similar in the other "most efficient enforcer" cases discussed above.

149 *Huhta*, 1994-1 Trade. Cas. at 72,362.

150 *Id*. at 72,361.

fact of the plaintiff's status as a competitor. The courts have correctly recognized that competitors frequently should be barred from suit because their injuries reflect increased, rather than decreased, competition in the affected market. But that is not always the case.[151] And the fact that consumers are generally better champions of the public interest does not mean that no one else is allowed to bring suit. Section 4 of the Clayton Act provides that "any person" injured in his or her business or property is entitled to sue under the antitrust laws.[152] While that broad language necessarily requires some limiting principles, it cannot reasonably be interpreted as authorizing the courts to limit the right to sue to "*the* most efficient enforcer" only. Where a competitor can allege credibly that its exclusion is the cause of genuine consumer harm, *Brunswick* and the antitrust injury doctrine are no bar. The Supreme Court said as much in the *McCready* case.[153]

The "most efficient enforcer" approach is often unnecessary. In *Huhta*, for example, the "most efficient enforcer" argument was really being used as an excuse for dismissing a case that was weak on the merits. The district court found that the plaintiff's proposed relevant geographic market was suspect and that the substantive allegations generally

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[151] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985).

[152] 15 U.S.C. § 15.

[153] 457 U.S. at 472, 482. As discussed above, *McCready* involved an alleged conspiracy between an insurer and psychiatrists to deny insurance coverage for psychologist services. The Court held that a patient could sue to recover the unreimbursed cost of psychologist services while recognizing that the excluded psychologists were equally entitled to sue.

were unsupported.[154] It is not immediately apparent, however, why the case could not have been disposed of on the merits alone. If cases that are insubstantial on the merits can be dismissed on substantive grounds, the correct result can be achieved without creating an adverse antitrust injury precedent for some other case, where the defendant might actually be causing some harm.

Compounding the problem of *Huhta*'s holding that competitors are insufficiently "efficient" antitrust enforcers is another line of cases holding that consumers lack "standing" (or antitrust injury) on the same basis. An example is *Simpson v. US West Communications*.[155] *Simpson* was a purported consumer class action against US West, the Bell operating company for a region including Oregon. The plaintiffs alleged that US West's "positive option" marketing program constituted an effort to use the company's market power over local telephone service to monopolize the market for inside wire maintenance (i.e., the servicing of telephone lines inside the consumer's home). The claim involved a completely different industry from the *Huhta* line of cases, but was substantively similar: the defendant was charged with having used its market power in one market to achieve market power in an adjacent market.[156] The plaintiffs alleged injury by being misled into believing they needed the service (and thus paying for something they did not need), and by being led to believe the service could not be provided effectively by anyone else. The district court found that the plaintiffs' proof of market power was insufficient

[154] 1994-1 Trade Cas. at 72,362-63.

[155] 957 F. Supp. 201 (D. Ore. 1997).

[156] *See generally* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).

and that there was "no evidence of impairment of rivals."[157] Although those grounds alone could have disposed of the case, the court also found that the plaintiffs lacked "standing," saying:

> [W]hen defendants engage in . . . anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing. Only when the defendants achieve a monopoly and are in a position to harm consumers by engaging in monopoly overcharging, is the harm to the consumers . . . . The most likely enforcer is the immediate victim of the illegal conduct – namely, the competitor weakened or ruined by the improper conduct.[158]

The court relied on two earlier cases reaching the same result based on the same reasoning.[159]

Something is surely wrong when one set of courts is dismissing a competitor's claim on the ground that only consumers can sue while another group of courts is dismissing the same kind of claims brought by consumers on the ground that competitors are the only proper plaintiffs. The culprit is the "most efficient enforcer" concept.

B. THE SIXTH CIRCUIT'S "NECESSARY PREDICATE" TEST

In a series of cases, the Sixth Circuit has developed what it calls the "necessary predicate" test – pursuant to which the court has applied *Brunswick* to bar recovery for any injury that could have resulted from some cause other than the antitrust violation. The Sixth Circuit has dismissed a number of otherwise viable antitrust claims on that basis, even under

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157 957 F. Supp. at 205.

158 *Id*. at 206 (quoting *In re* Air Passenger Computer Reservation Systems, 727 F. Supp. 564, 568-69 (C.D. Cal. 1989)).

159 *See* Davis v. Southern Bell Tel. & Tel. Co., 1994-1 Trade Cas. ¶ 70,510 (S.D. Fla. 1994); *In re* Air Passenger Computer Reservation Sys., 727 F. Supp. at 568-69.

circumstances where it was clear that the alleged antitrust violation was in fact the cause of the harm.

The first in the series was *Axis, S.p.A. v. Micafil, Inc.*,[160] which involved the market for "armature winding machines." Manufacture of these machines was controlled by patents. Because of that limitation, there were only three manufacturers in the United States, Micafil, Mechaneer, and Odawara. Axis had no U.S. license, but was producing in Europe, and sought to enter the U.S. market by purchasing Mechaneer (and thus gaining access to its patent rights). Axis's attempt was thwarted, however, by Micafil, which purchased Mechaneer itself. Axis sued, claiming that the Micafil/Mechaneer transaction increased concentration and blocked entry of Axis, a potential competitor. The Sixth Circuit held that Axis had failed to demonstrate antitrust injury and dismissed the case. The reasoning was that it was the patents that blocked Axis' entry, and Axis would have suffered the same injury if Mechaneer had been bought by someone else.[161]

The next case was *Hodges v. WSM, Inc.*[162] The plaintiff was an airport shuttle van service that sought to take passengers from the Nashville Airport to the "Grand Ole Opry" amusement center, operated by defendant. The plaintiff alleged that the defendant had entered into an arrangement with other shuttle services in the area pursuant to which (1) none of the others would compete with defendant's airport/Opry van service; (2) defendant would not

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160 870 F.2d 1105 (6th Cir. 1989).

161 *Id*. at 1112.

162 26 F.3d 36 (6th Cir. 1994).

compete with the other shuttle van services for other destinations; and (3) defendant would deny all shuttle services, except its own, entry into the Opryland property. Relying on *Axis*, the court dismissed the case. The reasoning was that the plaintiff would have suffered the same injury if the defendant had denied the plaintiff access to its property in the absence of any conspiracy. The "illegal antitrust conduct" thus was not "a necessary predicate" of the injury and the plaintiff therefore could not sue.[163]

The most recent of the decisions was *Valley Products Co. v. Landmark*.[164] Here a supplier of "guest amenities" (bar soap, shampoo, conditioner) to hotels challenged an agreement between defendant HFS (franchisor of Days Inns, Ramada, Howard Johnson, and other hotels) and two competing guest amenity suppliers pursuant to which the two suppliers would become the co-exclusive suppliers to HFS-franchised hotels and HFS would collect an access fee. Valley claimed that HFS was using its market power as a franchisor to tie the use of its trademarks to the purchase of guest amenities from the designated suppliers in violation of the Sherman Act. It alleged injury and damages as a result of HFS' termination of its arrangements to supply HFS-franchised hotels. The Sixth Circuit dismissed the case for failure to satisfy the "necessary predicate" test:

> We do not believe that the plaintiff in the case at bar can pass the "necessary predicate" test. The loss of logoed amenity sales suffered by Valley upon cancellation of its vendor agreement flowed directly from the cancellation, as we see it; the sales losses would have been suffered as a result of the cancellation whether or not HFS had entered into the alleged tying

[163] *Id*. at 38-39.

[164] 128 F.3d 398 (6th Cir. 1997).

> arrangements with the franchisees. Here, as in *Hodges*, the alleged antitrust violation was simply not a necessary predicate to the plaintiff's injury.[165]

This "necessary predicate" analysis extends *Brunswick* well beyond its intended reach. Instead of focusing on whether the plaintiff's injury adequately reflects the anticompetitive effect of the alleged violation, the Sixth Circuit is throwing out cases on the excuse that the plaintiff's injury could have, but did not, result from conduct that did not violate the antitrust laws. To take the *Valley* case, it should not matter that HFS could have terminated Valley's contract anyway. If HFS in fact effected the termination pursuant to an unlawful tying arrangement, HFS's injury – lost sales of the tied product – plainly reflects the anticompetitive effect of the tying violation. Or in *Hodges*, it should not matter that Opryland could have barred the plaintiff's vans without violating the antitrust laws. That it did so pursuant to a market division agreement means that the plaintiff suffered antitrust injury; its injury – inability to compete against Opryland to carry passengers from the airport – reflects the competition-reducing aspects of the challenged conduct.

Under the Sixth Circuit's logic, it is hard to see how any plaintiff would ever be able to sue. In a more traditional tying case, would the Sixth Circuit bar the suit of a competitor in the tied product market on the ground that customers could have purchased the product from the defendant voluntarily even if they had not been coerced into doing so? Would the victims of a price-fixing conspiracy be barred on the basis that the conspirators could have charged the higher prices even without having met and agreed to do so?

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[165] *Id*. at 404.

Interestingly, the necessary predicate test in general, and the *Valley Products* decision in particular, conflict squarely with the Fourth Circuit's decision in *Lee-Moore Oil Co. v. Union Oil Co.*[166] *Lee-Moore* was a dealer termination case that was dismissed by the district court on the ground that the same damages "could result from even the lawful termination of a supply agreement."[167] The Fourth Circuit reversed:

> If Lee-Moore can show damages caused by Union's antitrust violation, the fact that Union might have caused the same damages by a lawful cancellation of the contract is irrelevant. It is, of course, an established principle that a supplier may lawfully refuse to deal with a customer, so long as the refusal does not involve an illegal combination or agreement. But we fail to understand how this principle can limit a plaintiff's right of recovery under § 4 once a Sherman Act violation is established. The reports contain a multitude of cases in which private recovery for an unlawful refusal to deal has been or will be allowed with regard to elements of damage, which, had the refusal to deal been lawful, would not have recoverable.[168]

It is important for the courts to ensure that plaintiffs' claims have a solid connection to the competitive harm said to be caused by the challenged conduct. That inquiry will necessarily involve an analysis of potential alternative causes of the plaintiff's injury.[169] But as the Fourth Circuit held in *Lee-Moore*, and as the Supreme Court indicated in *McCready*,[170] the analysis cannot end there. If the antitrust violation in fact caused the injury, and if there is no

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166 599 F.2d 1299 (4th Cir. 1979).

167 441 F. Supp. 730, 739 (M.D.N.C. 1977), *rev'd*, 599 F.2d 1299 (4th Cir. 1979).

168 599 F.2d at 1302-03 (citations omitted).

169 *See Brunswick*, 429 U.S. at 487; Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984); Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1558 (Fed. Cir. 1997).

170 457 U.S. at 482-83; *see* 2 AREEDA & HOVENKAMP, *supra* note 107, ¶ 363b.

supervening cause unrelated to the antitrust violation, the only question should be whether the injury adequately reflects the violation's anticompetitive effect. If it does, *Brunswick*'s requirements have been satisfied.

C. IMPACT OF *BRUNSWICK* ON DEVELOPMENT OF SUBSTANTIVE LAW

As the preceding discussion suggests, a number of courts are using antitrust injury and "standing" to avoid addressing squarely the question whether the plaintiff has adequately alleged or proven an antitrust claim. The results in these cases are usually, but not always, correct. But a side effect of the rulings is that outmoded theories of substantive liability are remaining in the books, ready to cause damage in future cases.

Perhaps the best example of a disposition on antitrust injury grounds to avoid confronting a difficult issue on the merits is the *ARCO* case. Competing retail gasoline dealers alleged that ARCO had unlawfully conspired with its retail dealers to set maximum prices above which the dealers could not charge. Under the Supreme Court's 1968 decision in *Albrecht*,[171] such vertical maximum price-fixing was illegal per se. But the Supreme Court nevertheless held that there could be no antitrust injury in the absence of proof that the prices fixed were below cost or otherwise predatory -- even though, under *Albrecht*, the pricing was illegal per se irrespective of the level of the prices that were fixed.[172] The Supreme Court "assumed" that

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171 Albrecht v. Herald Co., 390 U.S. 145 (1968).

172 495 U.S. at 341-45.

Albrecht was correctly decided,[173] but rested its decision on antitrust injury grounds rather than revisiting the question of substantive law.[174]

We have no quarrel with the result in *ARCO*. This was another case where the plaintiffs appeared to be seeking protection from competition. In the absence of a showing of predatory pricing, the injury alleged would not reflect any anticompetitive effect of ARCO's conduct. But the real problem was not antitrust injury. It was that ARCO, in fact, had done nothing wrong. If indeed it set vertical price ceilings, that conduct is usually procompetitive – as the Supreme Court recently recognized in overruling *Albrecht* in *State Oil Co. v. Khan*.[175] By basing its decision on antitrust injury grounds, the *ARCO* Court unnecessarily delayed the demise of *Albrecht* seven more years, giving the precedent additional time to do more damage in the lower courts.[176]

VIII. UNRESOLVED ISSUES OF COMPLEX SCOPE

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173 *Id*. at 335 & n.5.

174 *Id*. at 335, 345-46. Several lower court cases prior to *ARCO* had dismissed maximum RPM cases on similar antitrust injury grounds. *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984); Knutson v. Daily Review, Inc., 468 F. Supp. 226 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981).

175 118 S. Ct. 275 (1997).

176 *See generally* Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980); *In re* Mid-Atlantic Toyota Antitrust Litigation, 560 F. Supp. 760 (D. Md. 1983); Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996), *rev'd*, 118 S. Ct. 275 (1997). Another example is the *Valley Products* case, which the Sixth Circuit disposed of on "necessary predicate" grounds, as discussed *supra* at text accompanying notes 164-65. *Valley* involved, on the merits, the difficult question whether (and if so when) a firm can be guilty of an unlawful tying arrangement where it does not in fact sell the tied product but, rather, collects a fee from the vendor. *Valley*, 128 F.3d at 401 & nn. 2-3. *Compare, e.g.*, 9 PHILLIP AREEDA, ANTITRUST LAW ¶ 1727d (1991) (receipt of access fees should not ordinarily result in per se tying liability) *with, e.g.*, Roberts v. Elaine Powers Figure Salons, 708 F.2d 1476, 1479-81 (9th Cir. 1983) (receipt of fees normally is sufficient economic interest to implicate per se rule). The Sixth Circuit's resolution of the case on dubious antitrust injury grounds meant that this important substantive issue did not receive the further development it appeared to deserve.

Although *Brunswick* has now reached its 21st birthday, and although a very substantial body of antitrust injury law has developed over that time, there are some very important and complex issues that remain unresolved. We discuss perhaps the two most important below: the ability of target companies to sue to enjoin their takeover, and the ability of competitors to enjoin, or recover damages from, a merger of their rivals.

A. TARGETS IN TAKEOVER CASES

One of the most difficult questions that has arisen in the wake of *Brunswick* is whether a takeover target is entitled to sue under the antitrust laws to enjoin the takeover.[177] The decision in *Cargill* involved the broad question of antitrust injury in private actions to enjoin mergers, but it did not address the question whether a takeover target can allege adequate antitrust injury in such a case. *Cargill* focused on the very different question of the type of injury a competitor may allege in order to challenge a merger of its rivals. As the Court recognized, competitor efforts to block mergers by others raise many of the issues addressed in *Brunswick*. Specifically, the challenge to the merger may be based, not on any threat of genuine competitive harm, but on the prospect that the merger would enable the rivals to compete more effectively with the plaintiff. Those indeed were the circumstances in *Cargill* itself, and the Court therefore applied *Brunswick* to dismiss the plaintiff's suit. Although *Cargill* thus required the antimerger plaintiff to prove that it had suffered an antitrust injury, the

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177 *See generally* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 78-105 (1995).

Court did not have occasion to discuss what kinds of injuries could satisfy *Brunswick* in the hostile takeover context.[178]

Hostile takeover cases raise issues very different from competitor actions. The suit by the target is plainly intended to protect its incumbent management, a purpose unrelated to any concern of the antitrust laws. Yet the target's suit is also designed to preserve the target's role as a separate and independent competitive factor in the marketplace. (That is the feature that protects incumbent management.) The difficult question is whether the target's interest in its independence is sufficient to establish antitrust injury under *Brunswick*. Even before the Supreme Court's decision in *Cargill* extended the antitrust injury doctrine to actions for injunctive relief, the question was the subject of a spirited debate both in the courts[179] and among the commentators.[180] The debate has continued post-*Cargill*, with the Second Circuit holding that a target can sue because it otherwise "will lose its ability to compete independently in the . .

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178 *See* 479 U.S. at 492-94.

179 A number of courts held that targets could not bring suit because they had not suffered a cognizable antitrust injury. *See, e.g.*, H.H. Robertson Co. v. Guardian Indus. Corp., 50 ANTITRUST & TRADE REG. REP. (BNA) 166 (3d Cir.), *vacated pending rehearing en banc*, 1986-1 Trade Cas. ¶ 66,911 (3d Cir. 1986); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986); Central Nat'l Bank v. Rainbolt, 720 F.2d 1183 (10th Cir. 1983); Carter Hawley Hale Stores, Inc. v. The Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984). By contrast, a number of courts simply assumed that targets had standing. *See, e.g.*, Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981); Marathon Oil Co. v. Mobil Corp., 669 F.2d 378 (6th Cir. 1981); Laidlaw Acquisitions Corp. v. Mayflower Group, Inc., 636 F. Supp. 1513 (S.D. Ind. 1986); Gearhart Indus., Inc. v. Smith Int'l, Inc., 592 F. Supp. 203, 211 n.1 (N.D. Tex. 1984).

180 *Compare* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155 (1982) (arguing that targets have the wrong incentives to challenge tender offers and therefore should not be permitted to challenge hostile takeovers) *with* Glenn A. Graff, *Target Standing Under Section 16 of the Clayton Act: When Your Antitrust Injury Hurts, Standing Can Be a Problem*, 1991 U. ILL. L. REV. 219 (arguing that targets should have standing).

. market,"[181] and the Fifth Circuit reaching the opposite result.[182] Most other courts have sided with the Fifth Circuit, but a few have agreed with the Second.[183]

Judge Newman's opinion for the Second Circuit in *Consolidated Gold Fields, PLC v. Minorco, S.A.* articulated, with his characteristic clarity, the rationale for permitting the target to sue:

> In our view, Gold Fields has demonstrated a threat of "antitrust injury." If the acquisition is permitted to go forward, Gold Fields will lose its ability to compete independently in the gold production market. Its wholly owned United States mining subsidiary, GFMC, is threatened with curtailment of its production. . . . Surely Gold Fields' loss of independence is causally linked to the injury occurring in the marketplace, where the acquisition threatens to diminish competitive forces. Though what happens to Gold Fields and what happens to competition may not be precisely the same type of injury, there is a common element in that the independent existence of a major competitor is being eliminated. It is not a sufficient answer to say that even though competition is diminished, Gold Fields is not injured because of its absorption into the Minorco group. The enlarged entity that emerges from the takeover may benefit from the acquisition, but Gold Fields will have lost one of the vital components of competition – the power of independent decision-making as to price and output. . . .
>
> Nor is it any of our concern whether the motivation for Gold Fields' suit is to protect competition or the job security of its senior management. We recognize that for a variety of reasons target companies may try to find refuge in the antitrust laws to

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181 Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252, 258 (2d Cir. 1989).

182 *See* Anago, Inc. v. Tecnol Medical Prods., Inc., 976 F.2d 248, 250 (5th Cir. 1992).

183 *See* cases cited *supra* note 179; *see also* Burnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988) (targets can never sue); Burlington Indus. v. Edelman, 666 F. Supp. 799, 805 (M.D.N.C. 1987) (targets might be able to sue depending on the circumstances); Union Carbide Corp. v. Montell N.V., 944 F. Supp. 1119, 1148-50 (S.D.N.Y. 1996) (targets can sue; following controlling authority in Second Circuit).

> fend off unwanted suitors. But whether Gold Fields has standing turns on whether what it is about to lose is an injury of the type the antitrust laws intended to prevent, not on why Gold Fields has decided to complain of this injury.[184]

The court distinguished *Cargill* as involving "a competitor [that] claimed that it stood to lose profits as a result of increased *competition* from merging rivals . . . . Our case involves a threat of *decreased* competition and threatens a target with elimination as an independent competitor."[185]

The other side of the argument has considerable force. First, as Judge Newman acknowledged, the takeover target is less than the ideal champion of the antitrust laws. No matter how the target's arguments are dressed up, the real world concern is that of the target's management in protecting its jobs. Second, as the Fifth Circuit observed in the *Anago* case, the target "will suffer a loss of independence whether or not the takeover violates antitrust principles" and will stand to benefit, post acquisition, "from any increased prices or decreased competition that might result."[186]

Although the question is an extremely close one, the target should be allowed to sue, at least in the general case. First, one of the historic purposes of the antitrust laws has been the preservation of independent firms. That was one of the primary objectives of the Sherman

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184 871 F.2d at 258-59 (citation omitted).

185 *Id*. at 259-60.

186 976 F.2d at 251.

Act in 1890[187] and the Celler-Kefauver amendment to Section 7 of the Clayton Act in 1950.[188] That purpose is disserved if the takeover target is barred from maintaining suit to preserve its independence.[189] In addition, target suits for injunctive relief under the antitrust laws are brought before federal district judges, appointed for life. These judges are fully capable of understanding the target's real motivations and of deciding the case on its actual merits. If, irrespective of the target management's motivation, the acquisition violates the antitrust laws, it should be enjoined. If the acquisition is not likely to lessen competition substantially, however, it should be allowed to go through. At least in cases where the only relief sought is an injunction blocking the acquisition, the target should be allowed to present its case.[190] A simple injunction blocking a purely horizontal merger has a certain, reasonably quantifiable effect. If the injunction proves to be in error, society will lose the benefit of the merger. That error may in any given case be serious, but involves no separate or collateral harm.

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[187] *See* 21 CONG. REC. 2460, 2598, 3147, 4100 (1890) (remarks of Senators Sherman and George and Representative Mason); *see also* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897); HANS THORELLI, FEDERAL ANTITRUST POLICY 67-68, 91-96 (1954).

[188] *See, e.g.*, H.R. REP. NO. 1191, 81st Cong., 2d Sess. 2-3 (1949); S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950); 95 CONG. REC. 11,484, 11494, 11,500-06 (1949) (remarks of Representatives Celler, Yates, Douglas, Biemiller, Boyle, and Byrne); 96 CONG. REC. 16,434, 16,446, 16,452, 16,503 (1950) (remarks of Senators O'Connor, Kefauver, Douglas, and Aiken).

[189] *Accord* Brodley, *supra* note 177, at 91-95.

[190] One of the arguments most frequently advanced in opposition to target standing is that the target's interests are indistinguishable from those of its shareholders and, if the shareholders oppose the takeover, their remedy is simply not to tender their stock. The problem with the argument is that it ignores reality. The shareholders of a public corporation subject to a hostile bid are transient. In a typical hostile takeover context, the identity of the shareholders will change radically from the time prior to the bid. That is not true of the target's other constituencies, however, including employees, suppliers, customers, and managers. Yet it is these other constituencies that in fact represent the company's competitive independence in the marketplace, and that Congress intended to protect in enacting the Celler-Kefauver Act. *See supra* note 188 and accompanying text.

A different outcome may be appropriate when, as sometimes occurs, a private plaintiff seeks different or additional equitable relief in the form of a conduct remedy. For example, if the acquisition has vertical aspects, the plaintiff may seek an order requiring the defendant to deal on particular terms, to refrain from engaging in particular agrressive or competitive activities, or even to refrain from entering particular markets. Courts need to be skeptical of conduct remedies of these types. In particular, when a competitor seeks to regulate the manner in which rivals will operate, the court needs to keep the competitor's motives in mind and to resolve any doubts against issuing the relief. The same is true of conduct remedies sought by takeover targets. The motivation may be directly anticompetitive or may be a concealed device designed to ruin the economics of the deal and force the suitor to walk away. Takeover cases involving something more than a simple horizontal acquisition and a corresponding request for a "full-stop" injunction call for the most searching scrutiny of the target's motives and the strictest standard of antitrust injury.

B. COMPETITOR CHALLENGES TO MERGERS

A second vexing issue is the circumstances under which a competitor should be permitted to challenge a merger of its rivals. The difficulty arises from the fact that competitors are harmed by horizontal mergers frequently from the fact that the merger enhances the ability of the merged firm to compete against the plaintiff competitor – a procompetitive impact that may cause significant injury, but not antitrust injury as *Brunswick* and *Cargill* require. If a horizontal merger is likely to harm competition – resulting in lower output and higher prices – that is usually a benefit to rivals, not a harm for which suit will lie. However, as Professor Brodley has pointed out in his comprehensive analysis of the subject,[191] rivals are most often the best situated parties to commence a challenge to those mergers that are, in fact, anticompetitive. This factor suggests that competitor challenges to mergers should be authorized, at least where other parties lack sufficient incentive to sue.

1. Cases Upholding Competitor Suits

Cargill notwithstanding, a number of courts have authorized competitor challenges to mergers. One of the important decisions in this respect was *R.C. Bigelow, Inc. v. Unilever N.V.,*[192] involving the market for the sale of herbal teas. The merger involved Celestial Seasonings, with a 52 percent share, and Lipton, with a 32 percent share. Bigelow, the plaintiff, had approximately 13 percent of the market. The district court dismissed the case on summary judgment for failure to allege antitrust injury, but the Second Circuit reversed. The court reasoned that, in contrast to *Cargill* where the merged firm's combined 20.4 percent share would be insufficient by itself to cause anticompetitive harm to the plaintiff, if the evidence shows enough "market power to eliminate competition," that will be "sufficient evidence, in and of itself, of antitrust injury to a competitor to create a genuine issue for trial."[193] The 84 percent post-merger share was deemed sufficient to create "a presumption that following the merger

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191 Brodley, *supra* note 177, at 46-78.

192 867 F.2d 102 (2d Cir. 1989).

193 *Id*. at 111.

Lipton would be likely to eliminate competition in [the herbal tea] market by, *inter alia*, reducing Bigelow's access to supermarket shelf space for its products."[194]

More recently, *Bon-Ton Stores v. May Department Stores Co.*,[195] upheld the ability of Bon-Ton (a regional department store chain operating in upstate New York) to challenge the proposed acquisition by May of 12 department stores from McCurdy's in the Rochester, New York area. The court reasoned that, "[b]y acquiring two of the only available mall sites in the Rochester area, May would raise significant barriers to Bon-Ton's entry into the market."[196] These elevated entry barriers were deemed sufficient to satisfy the antitrust injury requirement. The *Bon-Ton* court thus recognized that where the plaintiff's injury can be attributed to the same factors that are likely to raise prices to consumers, antitrust injury necessarily follows. Although the court's factual determinations concerning entry conditions and market definition are open to debate, the antitrust injury analysis based on those determinations is difficult to question.[197]

2. CASES REJECTING COMPETITOR SUITS

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[194] *Id*.

[195] 881 F. Supp. 860 (W.D.N.Y. 1994).

[196] *Id*. at 878.

[197] A few other cases have upheld competitor suits on the basis of reasoning similar to that advanced in *Bigelow* and *Bon-Ton*. *See* Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394, 1400-02 (D. Colo. 1995); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1265 (E.D. Pa. 1987).

The leading circuit court case rejecting a competitor challenge to a merger is *Phototron Corp. v. Eastman Kodak Co.*[198] Phototron was photofinisher (with nine labs) aggrieved by a merger between Kodak (50 labs) and Colorcraft (41 labs). The district court preliminarily enjoined the merger, but the Fifth Circuit reversed, finding no antitrust injury. The court concluded that the injuries alleged – (1) Phototron's fear of the merged firm's monopoly power; (2) the prospect of "massive advertising" by the merged firm; (3) the possibility of entry-deterring limit pricing by the merged firm; (4) the possibility that Kodak would deny competitors access to independent couriers; and (5) the potential for Kodak to manipulate input prices (paper and chemicals for photofinishing) – were too speculative on the record to provide a basis for antitrust injury.[199] The court reasoned that, if anticompetitive post-merger conduct were to occur, Phototron could obtain relief at that time.

A competitor challenge was rejected more recently in *US Airways Group v. British Airways PLC,* decided in late 1997.[200] US Airways contended that the proposed American Airlines/British Airways "alliance" would injure it by impeding its ability to enter the US-UK air travel market and sabotaging its proposed sale to United Airlines. The district court dismissed the antitrust claims, reasoning that, since the amount of US-UK flights was fixed by agreement between the two governments, "the number of seats and flights available to customers would have remained the same" whether British Airways' partner was American or

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[198] 842 F.2d 95 (5th Cir. 1988).

[199] *Id*. at 100-02.

[200] 1998-1 Trade Cas. ¶ 72,037 (S.D.N.Y. 1997).

US Air.[201] The court also concluded that "United's ultimate decision not to acquire USAir did not injure competition. On the contrary, the transaction with United would have eliminated US Air as a separate entity and as a potential competitor."[202]

3. A WORKING CONSENSUS: A COMPETITOR PLAINTIFF INCURS ANTITRUST INJURY WHEN THE INJURY RESULTS FROM IMPAIRMENT OF ITS ABILITY TO CONSTRAIN THE THE DEFENDANTS' MARKET POWER

Despite the apparent conflict in approach, there seems to be a working consensus in the cases on several important principles governing challenges to mergers of rivals. First, as *Cargill* squarely holds, the potential for future predatory pricing is not enough, standing alone, to provide a basis for antitrust injury. Future predation is simply too speculative a basis for a merger challenge to proceed. Second, the prospect that the merged firm will have the power to increase prices or restrict output should not be enough, because that conduct – by itself – causes the plaintiff no injury at all.

But what kind of injury is enough? Although Professor Brodley's suggestion that it be sufficient for the merger to be "egregiously unlawful"[203] has some appeal, that standard seems to be too divorced from the core concept of antitrust injury – that the injury to the plaintiff reflect the anticompetitive aspects of the conduct being challenged. The principle underlying the

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201 *Id*. at 81,180

202 *Id*. For other post-*Cargill* cases rejecting merger (or related transaction) challenges, see O.K. Sand & Gravel, Inc. v. Martin Marietta, 36 F.3d 565, 575-74 (7th Cir. 1994); Remington Prods., Inc. v. North American Phillips Corp., 755 F. Supp. 52 (D. Conn. 1991); Pearl Brewing Co. v. Miller Brewing Co., 1993-2 Trade Cas. ¶ 70,370 (W.D. Tex. 1993), *aff'd mem.*, 52 F.3d 1066 (5th Cir. 1995).

203 Brodley, *supra* note 177, at 46.

antitrust injury requirement is too important for exceptions to be made based on the severity of the substantive violation.[204]

An approach more consistent with the case law would focus instead on the question whether the merger is likely to operate so as to reduce the plaintiff's ability to constrain the post-merger exercise of market power by the defendants. It is an accepted principle that conduct that impairs rivals or raises their costs in such a way as to create or facilitate the exercise of market power violates the antitrust laws and inflicts antitrust injury on the aggrieved competitor.[205] That concept can be applied equally in the context of competitor challenges to horizontal mergers, and doing so will achieve a result roughly consistent with all the decided cases. The analysis is appropriate because conduct that impairs a competitor's ability to act as a constraint on the market power of the merging firms is conduct that harms both the competitor and consumers – the precise sort of conduct that gives rise to antitrust injury in the sense contemplated by *Brunswick* and *Cargill.*

When will a merger operate to impair competitors' abilities to constrain the merging parties? This will occur most frequently in contexts where the post-merger firm will be able to deny competitors access to an important input or customer base, or to raise the cost of access in a significant and enduring way. A good example is the *Bon-Ton* case, where mall

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[204] One might also be more confident than Professor Brodley that truly egregious mergers will be stopped by the enforcement agencies, at least more often than not.

[205] *See, e.g.,* Thomas Krattenmaker & Stephen Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 YALE L.J. 209 (1986); Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992); Premier Elec. Constr. Co. v. NECA, 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.).

locations in Rochester were both scarce and important and where the acquisition significantly impaired the plaintiff's access. Similarly, in the *Bigelow* case, the court was persuaded – at least for purposes of ruling on a motion for summary judgment – that the defendants' post-merger market power would enable it to bar the plaintiff's access to essential shelf space.[206] In contrast, the *Phototron* court rejected allegations that the post-merger firm would be able to discriminate against the plaintiff in pricing photofinishing paper and chemicals, but this appears to be more of a failure of proof than anything else. Kodak's long-held position in paper and chemicals was unaffected by its acquisition of Colorcraft, a finishing firm, and it is difficult to see how this downstream acquisition would cause the plaintiff any incremental anticompetitive harm.[207] Had there been proof that the merger provided additional power to Kodak to impair competitors' ability to compete, a different result might have been warranted.

Not all – or even most – horizontal mergers will harm rivals in a way likely to give rise to antitrust injury. As *Cargill* recognized, the facts that the defendants' market share has increased, or that the market has become more concentrated, or that prices may increase are insufficient, without more, to afford a competitor the right to sue. But in those cases where the defendants will be likely to achieve an incremental ability to exercise market power by

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206 This seems debatable as a factual matter, but the underlying legal principle is sound. If the conduct bars the plaintiff from access to an important factor in marketing its products, and if that impairment facilitates the exercise of market power, consumers are harmed.

207 842 F.2d at 100. There is some language in *Phototron* suggesting that a complaining competitor must prove actual predation or exclusionary conduct to challenge a merger. We respectfully suggest that this is a misreading of *Cargill*, which appeared to reject any such requirement, 479 U.S. at 120-22, and is directly inconsistent with *Brunswick*, 429 U.S. at 489 n.14 (rejecting requirement that plaintiff show an actual lessening of competition).

impairing rivals' ability to compete effectively, there is no basis for denying the plaintiff the right to maintain a claim.

The remedy sought by the plaintiff should again be an important consideration. A plaintiff able to demonstrate that a merger will impair the plaintiff's ability to constrain the exercise of market power by the merging parties should presumably be entitled to an injunction preventing the merger (or afterwards, to damages and possibly divestiture). A request for a conduct remedy in a merger case, however, should be viewed very skeptically. An injunction requiring the defendants to deal with the plaintiffs on specific financial terms may have anticompetitive potential itself, and any request for relief of that sort should be scrutinized with care.

IX. CONCLUSION

Despite some real problem areas and unresolved issues, the state of the law of antitrust injury is one that effectively promotes the underlying goals of antitrust. Courts are focusing on the harm to consumers as the essential basis for antitrust liability. Cases involving genuine harm are going forward. Cases involving pleas for the protection of competitors, not consumers, are being thrown out. Even in cases where the reasoning is faulty, the result is usually right. The Supreme Court has agreed to review precious few antitrust cases in the last five years – and for good reason.

These positive circumstances do not rule out a need for some improvement, however. We have a few modest suggestions:

First, the courts should be more precise in analyzing the bases of a plaintiff's entitlement to sue. Instead of determining whether a plaintiff has "standing," the courts should focus on particularized concerns of causation, remoteness, and antitrust injury.

Second, antitrust injury needs to be given its broadest impact in damages cases and cases seeking injunctions governing ongoing conduct, but should be applied somewhat more narrowly in actions for orders simply blocking proposed mergers or other types of clearly defined and administrable equitable relief. In merger cases in particular, courts should remain vigilant to ensure that the relief sought will not harm competition, but should allow plaintiffs some greater leeway where the merger may cause competitive harm to the plaintiff and the market in the foreseeable future, and where the only relief sought is an injunction blocking the merger outright. In takeover cases, this means that the target should generally be permitted to sue. Alarm bells should go off, however, where the equitable relief sought would include an ongoing conduct remedy.

Third, courts should not use antitrust injury as an excuse to avoid making hard decisions on the merits. Thus, for example, in hospital staff privileges cases, the solution should be to dismiss the case for lack of merit, not to throw the case out on *Brunswick* grounds. Outdated substantive doctrines, such as entrenchment based on increased efficiency, should be handled similarly. Antitrust injury should not be the focus of a dismissal or summary judgment motion in cases where the real problem is that the defendant has done nothing wrong.

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