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Horizontal Mergers, Competitors, and Antitrust Standing under Section 16 of the Clayton Act: Fruitless Searches for Antitrust Injury

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Notes

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INTRODUCTION

Two competing oligopolists,[1] O1 and O2, propose an agreement whereby O1 will acquire the assets of O2. Another competitor, C, files an antitrust suit against O1, alleging that the proposed horizontal merger[2] would violate section 7 of the Clayton Act[3] by decreasing competition through increasing market concentration. C seeks to enjoin the merger under section 16 of the Clayton Act.[4] Before 1984 no federal court

1. An oligopolist is one of a small number of firms in a highly concentrated market. *See* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 4.2, at 92 (1985).

2. "A horizontal merger occurs when one firm acquires another firm that manufactures the same product or a close substitute, *and* both firms operate in the same geographic market." H. HOVENKAMP, *supra* note 1, § 11.1, at 293.

3. Section 7 of the Clayton Act provides in relevant part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1982). Before 1980, § 7 applied only to corporations. H. HOVENKAMP, *supra* note 1, § 11.1, at 293. "Person" now is defined to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 12(a) (1982).

4. Section 16 of the Clayton Act provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

15 U.S.C. § 26 (1982).

In seeking to enjoin the merger under § 16 of the Clayton Act, C alleges that the postmerger firm would abuse its increased market power and engage squarely faced the issue raised by C's antitrust claim. Four recent federal decisions, however, illustrate the primary concern raised when a competitor seeks to enjoin another competitor's horizontal merger or joint venture with a third competitor: that such a competitor may attempt to use the procompetitive antitrust laws to accomplish anticompetitive ends. Despite this concern, the courts in *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*,[5] *Monfort of Colorado, Inc. v. Cargill, Inc.*,[6] and *White Consolidated Industries v. Whirlpool Corp.*,[7] determined that the plaintiff-competitor in each instance had standing to enjoin a merger between two competitors. In a similar case involving a proposed joint venture, the District Court for the District of Columbia in *Chrysler Corp. v. General Motors Corp.*[8] held that a major automobile manufacturer had standing to seek an injunction to block a joint venture between two other major automobile manufacturers.

This Note examines the wisdom of granting antitrust standing to a competitor who seeks to enjoin a proposed horizontal merger or joint venture between two other competitors. Part I describes the applicable provisions of the Clayton Act and the development of standing requirements in private actions for both damage awards and injunctions to enforce the Clayton Act provisions. Part II analyzes the courts' determinations of standing to seek an injunction in the recent horizontal merger and joint venture situations. The Note concludes that courts should not grant standing to competitors who seek to enjoin other competitors' horizontal mergers or joint ventures because such competitors cannot allege a plausible theory of antitrust injury.

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in predatory pricing behavior to drive C from the market. *See infra* notes 74-75 and accompanying text. In response, the newly-merged defendant argues that if C suffers from the merger it would only suffer from the effects of increased competition and therefore can allege no "antitrust injury" nor have standing to enforce the antitrust laws. *See infra* notes 31-39 and accompanying text.

5. 753 F.2d 1354 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985); *see infra* note 69 and accompanying text.

6. 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (No. 85-473); *see infra* note 62 and accompanying text.

7. 612 F. Supp. 1009 (N.D. Ohio), *injunction vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985); *see infra* note 83 and accompanying text.

8. 589 F. Supp. 1182 (D.D.C. 1984); *see infra* note 93 and accompanying text.

I. THE CLAYTON ACT AND ANTITRUST STANDING

Section 7 of the Clayton Act is a prophylactic measure intended to arrest feared consequences of intercorporate relationships before those relationships can work their evil.[9] As amended in 1950,[10] it proscribes mergers which may substantially lessen competition or create a monopoly.[11] The amended section 7 was intended to protect small businesses from larger, more efficient competitors in concentrated industries, even if such protection meant higher prices for consumers.[12] This con-

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9. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977). For the facts and a detailed discussion of *Brunswick*, see *infra* notes 31-40 and accompanying text.

10. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914), *amended by* Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1982)). The Clayton Act was enacted in 1914 to augment the already-existing Sherman Act, ch. 647, 26 Stat. 209 (1890) (currently codified as amended in scattered sections of 15 U.S.C. (1982)). *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 303, at 4-5 (1978). The Clayton Act originally proscribed mergers by stock acquisition where the effect would be to substantially lessen competition. *Id.* The Act did not, however, bar the acquisition by one corporation of the assets of another. Brown Shoe Co. v. United States, 370 U.S. 294, 313 (1962). Through the 1950 amendments, Congress wished to plug this loophole. *See id.* For a thorough discussion of the legislative goals behind the 1950 amendments to § 7 of the Clayton Act, see *id.* at 311-323.

11. *See* 15 U.S.C. § 18 (1982).

12. Senator Estes Kefauver, a co-sponsor of the 1950 amendment, characterized the mood of the Congress:

> The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development. It is no accident that we now have a big Government, big labor unions, and big business. The concentration of great economic power in a few corporations necessarily leads to the formation of large Nation-wide unions. . . . Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years. The control of American business is steadily being transferred . . . from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment. Through monopolistic mergers the people are losing power to direct their own economic welfare.

96 CONG. REC. 16,452 (1950). Representative Emanuel Celler, another co-sponsor of the amendment, expressed his fears by reading from a report filed with a former Secretary of War on the history of industrial concentration in Germany: "Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal, and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war." 95 CONG. REC. 11,486 (1949).

One commentator has concluded that the amendment was passed on the basis of five fundamental assertions: that concentration of industry had reached very high levels in America, that this concentration was still increasing, that mergers traditionally played an important role in the process of concentration, that the country was experiencing a new wave of mergers in which demnation of efficiency for the benefit of small businesses may now be obsolete, however, in light of the Supreme Court's statement in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[13] that the purpose of the antitrust laws is to protect competition, not competitors.[14] *Brunswick* represents a shift in the Court's approach toward the antitrust laws.[15] The Court currently em-

big firms were swallowing little businesses, and that § 7, as originally enacted, was defective because it allowed for acquisition through the purchase of assets. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-35 (1960). Bok further noted:

> [T]he curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency. To be sure, there were allusions to the need for preserving competition. But competition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.

Id. at 236-37. For a discussion of the legislative intent underlying the 1950 amendments to the Clayton Act, see Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (A "fear of what was considered to be a rising tide of economic concentration in the American economy" sparked the enactment of § 7.); *see also* H. HOVENKAMP, *supra* note 1, § 2.4, at 51 ("Congress was concerned chiefly with protecting small businesses from larger competitors who faced lower costs, even though the result of such protection would be lower total output and higher consumer prices."). For a discussion of efficiency and other sociopolitical goals as proper or improper goals of the antitrust laws, see *infra* note 14. For a discussion of the trend in the courts toward more efficiency-oriented antitrust policy at the expense of small businesses, see *infra* note 14; notes 28-39 and accompanying text.

13. 429 U.S. 477 (1977).

14. *Id.* at 488. Under *Brunswick*, private plaintiffs, including small businesses, must allege "antitrust injury" before obtaining standing to enforce the antitrust laws. *Id.* at 489. The Supreme Court in *Brunswick* denied standing to a small business that complained merely of increased competition based upon the greater efficiency of a competitor. The ruling indicates that economic efficiency and consumer welfare now outweigh the protection of small business as a goal of the antitrust laws. *See* Reiter v. Sonotone, Inc., 430 U.S. 330, 342-43 (1979); Note, *Vertical Refusals to Deal Under the Sherman Act:* Products Liability *and* Malley-Duff *Divide the Circuits*, 69 MINN. L. REV. 1355, 1372 (1985); *infra* notes 31-40 and accompanying text.

15. One commentator has observed that

> [i]n the 1960s and early 1970s, the Supreme Court applied the merger law to prevent increasing concentration of business assets into the hands of fewer competitors. Competition was defined by the Court as a process that required numerous participants and decentralization. Competition was equated by the Court with deconcentration; and increasing concentration, by definition, lessened competition because it removed an independent source of competitive effort. Applying the merger law to prevent concentration, the Court protected competition as the Court defined it and as the legislature had viewed it. . . .
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> Beginning in 1974, the first year of the Burger Court's antitrust majority, antitrust law shifted course. In a 1977 opinion, the Supreme Court said that market impact must control antitrust decisions. Market impact was assessed in terms of efficiency. In addition, majority

phasizes greater economic efficiency within the marketplace on the theory that consumers will benefit; social and political factors have become secondary considerations.[16]

Two remedial provisions of the Clayton Act enable a private litigant to obtain relief from a section 7 violation. Section 4, which awards treble damages to anyone injured in business or property as a result of an antitrust violation,[17] serves both remedial and punitive roles.[18] Section 16 provides for injunctive relief against threatened loss or damage from a violation of the antitrust laws.[19]

A. SECTION 4 STANDING AND THE ANTITRUST INJURY CONCEPT

Because the wording of section 4 allows for a potentially large pool of injured parties,[20] courts developed prudential

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> opinions by some members of the Court began to reveal a strong undercurrent that business should be left presumptively free to do what it wishes, apparently on the theory that business freedom tends to maximize efficiency or on the theory that greater private business freedom is crucial to a free society. Whereas the word "power" dominated Warren Court antitrust opinions, the words "efficiency" and "market impact" have prominence in Burger Court antitrust opinions.

Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV. 1140, 1151-52 (1981).

16. In the midst of this Supreme Court shift to a more efficiency-oriented antitrust policy, legal scholars have vigorously debated whether efficiency and consumer welfare should be the sole policy guide to the application of the antitrust laws or whether other considerations, often social and political, should also be considered. *See* H. HOVENKAMP, *supra* note 1, § 2.1, at 41-42. Two general schools of thought have emerged in the debate; the "Chicago School" taking the former position and the "Harvard School" the latter. For the classic Chicago School statements, see R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925 (1979). For views in line with the Harvard School position, see Fox, *supra* note 15, at 1146-55; Hovenkamp, *Distributive Justice and the Antitrust Laws,* 51 GEO. WASH. L. REV. 1, 24-26 (1982); Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979). For a critical discussion of the philosophical differences between the two schools, see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 1, at 2-7 (1977); Sullivan, Book Review, 75 COLUM. L. REV. 1214 (1975).

17. 15 U.S.C. § 15 (1982).

18. *Brunswick,* 429 U.S. at 485. For a discussion of the punitive characteristics of § 4 and its proper application in that context, see 2 P. AREEDA & D. TURNER, *supra* note 10, ¶ 311, at 32-36.

19. 15 U.S.C. § 26 (1982). The appropriateness of injunctive relief is measured by traditional equity standards. *Id.*

20. A literal application of § 4 would appear to confer a right to treble damages on any plaintiff who could establish that defendant's antitrust violation caused damage to his business or property. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L.J. 809, 810 (1977);

standing requirements to favor and disfavor groups of plaintiffs.[21] Courts justified imposing such standing requirements to prevent duplicative or windfall recoveries by plaintiffs,[22] to avoid the financial ruination of defendants,[23] and to ease the administrative burden of enforcing the antitrust laws.[24] The traditional tests used by the circuits to determine standing under section 4 are the "direct injury" test,[25] the "target area" test,[26] the "zone of interests" test,[27] and the balancing test.[28]

Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing In Light of the Alleged Antitrust Violation,* 25 AM. U.L. REV. 795, 796-97 (1976). As one commentator notes, § 4 "appears to give a cause of action to every person who is financially injured by a cartel or overcharging monopolist." H. HOVENKAMP, *supra* note 1, § 14.1, at 356.

21. H. HOVENKAMP, *supra* note 1, § 14.3, at 361. There is a wealth of material on the subject of standing to seek treble damages under § 4 of the Clayton Act. *See generally* 2 P. AREEDA & D. TURNER, *supra* note 10, ¶¶ 333-335, at 160-76; H. HOVENKAMP, *supra* note 1, §§ 14.2-14.5, at 356-76; L. SULLIVAN, *supra* note 16, § 247, at 772; Susman, *Standing in Private Antitrust Cases: Where is the Supreme Court Going?,* 52 ANTITRUST L.J. 465 (1983); Note, *Antitrust Injury and Standing: A Quest for Legal Cause,* 67 MINN. L. REV. 1011 (1983) [hereinafter cited as MINNESOTA NOTE]; Note, *Private Antitrust Standing: A Survey and Analysis of the Law After Associated General,* 61 WASH. U.L.Q. 1069 (1984).

22. *See, e.g.,* Hawaii v. Standard Oil Co. 405 U.S. 251, 264 (1972) (duplicative recoveries); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956) (windfall recoveries).

23. *See, e.g.,* Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975). In *Jeffrey,* a group of residential phone subscribers sued for both damages and an injunction against defendant's alleged anticompetitive acts. In denying standing, the Fifth Circuit recognized a need to prevent "potentially disastrous recoveries by those only tenuously hurt." *Id.* at 1131; *see also* Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953) (noting that § 4 should not be construed to yield unreasonable results and that "obviously, there must be a limit somewhere"), *aff'd,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954).

24. *See e.g.,* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In *Illinois Brick,* the State of Illinois and 700 local government entities sued defendants for an alleged price fixing conspiracy. In affirming the denial of standing, the Court was unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all possible plaintiffs within the defendants' chain of distribution. The court noted it was impossible to determine the number of indirect purchasers and their respective damages. *Id.* at 746-47.

25. *See, e.g.,* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). In *Loeb,* the Third Circuit denied standing to a stockholder of a corporation who alleged injury because of defendant's monopolization of the photographic industry. The court held that the alleged injury was only an indirect consequence of the violation. *Id.* at 709. Courts using this test have similarly denied standing to suppliers of injured customers, licensors of injured licensees, franchisors of injured franchisees, employers of injured employees, lessors of injured lessees, and stockholders of injured corporations. MINNESOTA NOTE, *supra* note 21, at 1016.

26. *See, e.g.,* Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th

The Supreme Court, however, recently discouraged the use of these tests and advocated a more flexible analysis of relevant factors to determine whether a plaintiff has standing.[29] These factors include: the causal connection between the antitrust violation and the harm to plaintiff and whether that harm was intended, the directness or indirectness of the injury and whether the damages are speculative, the potential for duplicative or windfall recoveries, the existence of more direct victims of the alleged violation, and the nature of the injury—whether it is of the type the antitrust laws were designed to forestall.[30]

This last standing factor identified by the Supreme Court embodies the "antitrust injury" concept first articulated by the Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[31] In

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Cir. 1951), *cert. denied,* 342 U.S. 919 (1952). In *Loew's,* the Ninth Circuit held that a labor union and its members were not within the "target area" of an alleged conspiracy between motion picture companies and another union. *Id.* at 54-55. The court concluded that the plaintiff did not show that it was within that area of the economy endangered by a breakdown of competitive conditions in the motion picture industry. *Id.*

27. *See, e.g.,* Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). In *Malamud,* the Sixth Circuit granted standing to plaintiffs who alleged injury as a result of defendant's refusal to finance service stations. Plaintiffs alleged that this refusal reduced profits and inhibited expansion. The Sixth Circuit granted standing to maintain an action for treble damages, holding that the plaintiffs were "arguably . . . within the zone of interests protected" by the antitrust laws. *Id.* at 1152. The Supreme Court originally developed the "zone of interests" test in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

28. *See, e.g.,* Ostrofe v. H. S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982) (*Ostrofe I*), *vacated,* 460 U.S. 1007 (1983), *initial decision adhered to on remand,* 740 F.2d 739 (9th Cir. 1984) (*Ostrofe II*). In *Ostrofe I,* the Ninth Circuit granted § 4 standing to a discharged employee who refused to participate in a price-fixing conspiracy, on the grounds that such standing would promote the goals of the statute without creating any problems of windfall recoveries to numerous or remote plaintiffs. *Ostrofe I,* 670 F.2d at 1384-86. The Supreme Court vacated the Ninth Circuit's decision in *Ostrofe I* and remanded for further consideration in light of its recent decision in Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983). *See Ostrofe I,* 460 U.S. at 1007. On remand, in *Ostrofe II,* the Ninth Circuit adhered to its initial determination on the standing issue. *Ostrofe II,* 740 F.2d at 748.

For other examples of the balancing test, see Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman v. Basset Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir.), *cert. denied,* 434 U.S. 823 (1977); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 505-10 (3d Cir. 1976).

29. *See* Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-46 (1983).

30. *See id.*

31. 429 U.S. 477 (1977).

Brunswick, the plaintiff, an operator of bowling centers in three distinct markets, filed an antitrust action against a large bowling equipment manufacturer that was also the largest operator of bowling centers in the country.[32] The plaintiff alleged that the defendant's acquisition of four bowling centers which had defaulted on equipment payments[33] violated section 7 of the Clayton Act. Plaintiff sought treble damages under section 4. To establish damages, the plaintiff sought to prove that its profits would have increased had the defendant not acquired the defaulting centers but had instead allowed them to close on their own.[34]

In scrutinizing the *Brunswick* plaintiff's damage claim, the Court stated that to recover section 4 treble damages, a plaintiff must prove more than just a section 7 violation, which establishes only that injury *may* result. The Court required that the plaintiff also prove that an injury did in fact result,[35] that the injury was causally related to the section 7 violation,[36] *and* that the injury was "of the type the antitrust laws were intended to prevent and that flowed from that which made defendant's acts unlawful."[37]

In *Brunswick*, the plaintiff sought to recover damages resulting from the defendant's preservation of competition.[38] As one commentator noted, "[t]he plaintiff in *Brunswick* formerly

32. The Court noted that the defendant Brunswick Corp. had acquired 222 bowling centers in the seven years before the trial of the case, making it more than five times as large as the next largest competitor. The Court noted also that petitioner nevertheless controlled only two percent of the bowling centers in the United States. *Brunswick*, 429 U.S. at 480.

33. Because of a decline in the bowling industry in the late 1960s, the defendant had experienced great difficulty in collecting money owed on equipment sales and had lapsed into "serious financial difficulty." *Brunswick*, 429 U.S. at 479. To meet this difficulty, the defendant began to acquire some of the defaulting centers. *Id.* at 479-80.

34. *Brunswick*, 429 U.S. at 481. At trial, the jury awarded the plaintiff damages of $2,358,030, which the district court trebled. *Id.*

35. *Brunswick*, 429 U.S. at 486. The *Brunswick* plaintiff contended that the only additional element it needed to demonstrate was an injury in fact caused by the violation. *Id.* The Third Circuit had agreed with this contention and had found that the *Brunswick* plaintiff's damage claim satisfied this element. *Id.* The Supreme Court, however, disagreed. *Id.* at 486-89.

36. *Brunswick*, 429 U.S. at 488. The Court stated that any damage claim must demonstrate more than a "causal link" to "the mere presence of a violator in the market." *Id.* According to the Court, a mere causal link requirement would enable a plaintiff to divorce antitrust recovery from the purposes of the antitrust laws. *See id.* at 486-87.

37. *Id.* at 489.

38. *Id.* at 488.

had a languishing, spiritless rival. After the merger it faced a rejuvenated and aggressive competitor. Whether or not the merger was illegal, the plaintiff's injury was caused by the post-merger firm's increased efficiency, not by the market's increased proclivity toward monopoly pricing."[39] Such a claim could not succeed, the Court concluded, because the antitrust laws "were enacted for the protection of *competition*, not *competitors.*"[40]

B. SECTION 16 INJUNCTION CASES AND THE RAMIFICATIONS OF *BRUNSWICK*

Unlike an action for damages under section 4 of the Clayton Act, an action for an injunction under section 16 does not require a private plaintiff to show actual injury to business or property.[41] Many of the concerns arising from section 4 damage actions are inapplicable when a competitor seeks to *enjoin* a purported section 7 violation. Notably absent are the treble damage problems such as duplicative recovery and windfall awards inherent in section 4 actions.[42] Courts in section 16 cases, therefore, have applied a less strict test for standing. The plaintiff must allege a *threatened* antitrust injury which, in accordance with *Brunswick*, must be causally related to the alleged antitrust violation, and be of the type the antitrust laws were designed to prevent.[43]

Courts have used the *Brunswick* antitrust injury requirement to deny standing to plaintiffs in section 16 cases. Recently, in *Pennzoil Co. v. Texaco, Inc.*,[44] the Tenth Circuit, although not addressing specifically the question of antitrust standing, affirmed a denial of plaintiff's request for preliminary injunctive relief to block defendants' proposed acquisition be-

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39. H. HOVENKAMP, *supra* note 1, § 14.5, at 374.

40. *Brunswick*, 429 U.S. at 488 (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). The policy result of this holding in effect cuts § 7 away from the policy cord that generated it. *See supra* notes 12-16 and accompanying text.

41. *See supra* note 4. Because the injunction is supposed to protect against *threatened* loss or damage from an antitrust violation, no *actual* damages need be shown.

42. *See* Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 574 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (No. 85-473); *supra* note 22 and accompanying text.

43. *See, e.g., Monfort*, 761 F.2d at 574; Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1358-59 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985).

44. 1984-1 Trade Cas. (CCH) ¶ 65,896, at 67,826 (10th Cir. Feb. 9, 1984).

cause plaintiff's allegations of general injuries flowing from the anticompetitive effects of the merger were insufficient proof of specific antitrust injury.[45] Courts have also used the *Brunswick* antitrust injury requirement to deny standing to plaintiffs in cases involving an attempt to block a hostile takeover,[46] a liquidation trustee's action against purchasers of corporate assets,[47] and a reporting agent's attempt to enjoin manufacturers who chose to deal only directly with vendors.[48]

Application of the *Brunswick* antitrust injury requirement is appropriate to section 16 injunction cases based upon a putative section 7 violation. A primary concern in such a case is that a competitor may attempt to use the procompetitive antitrust laws as a means to accomplish anticompetitive ends.[49] For example, a company suing to vindicate its own private interests may want to block a competitor's acquisition, despite Federal Trade Commission or Justice Department approval of the merger as consistent with the public interest, simply because the challenging company fears it will not be able to match its competitor's newly acquired efficiencies such as economies of scale.[50] Thus, the *Brunswick* scenario is not limited to section 4 damage actions. Private plaintiffs' incentives to enforce the antitrust provisions through an injunction may not be consistent with the goals of those provisions.[51]

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45. *Id.* Pennzoil subsequently won a $10.2 billion state court judgment against Texaco for wrongful interference with a planned merger of Pennzoil and Gulf Oil Co. *See What Texaco Owes Pennzoil,* N.Y. Times, Dec. 14, 1985, at 26, col. 1.

46. *See, e.g.,* Central Nat'l Bank v. Rainboldt, 720 F.2d 1183, 1186-87 (10th Cir. 1983) (denying standing to an officer of a bank attempting to enjoin a hostile takeover by defendant under § 16 of the Clayton Act).

47. *See, e.g.,* Turner v. Johnson & Johnson, 549 F. Supp. 807, 811 (D. Mass. 1982) (denying standing under both §§ 4 and 16 to trustees of a liquidating trust who alleged fraud and misrepresentation as well as violation of federal antitrust and state consumer protection laws on the part of defendants).

48. *See* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980). In *Schoenkopf,* the court held that a reporter of information to cigarette vendors of manufacturer's price promotions lacked standing to enjoin manufacturer's decision to deal only directly with the vendors. The court stated that its "primary concern is that we have before us a plaintiff who adequately represents the interests of the 'victims' of the antitrust violation," *id.* at 210, and held that the information reporter did not adequately represent the small vendors. *Id.* at 211.

49. *See* Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 576 (10th Cir. 1985), *cert. granted,* 106 S. Ct. 784 (1986) (No. 85-473).

50. *Id.* at 576.

51. Private plaintiffs are generally not concerned with the social cost or value of a particular practice. They sue in order to vindicate their own private losses . . . . If the antitrust laws are not to be grossly

An analysis of the economic effects of horizontal mergers illustrates this concern. Two consequences are exclusive to horizontal mergers: the postmerger market has one less firm; and the postmerger firm has a larger share of the market than the original premerger firms.[52] Horizontal mergers, therefore, potentially cause one of two general types of injury. First, the merger may facilitate monopolistic or collusive pricing by increasing concentration in the market.[53] This injury falls on consumers who then must pay higher prices; competitors, however, benefit by charging increased prices under the "umbrella" of the postmerger firm.[54]

A second injury potentially caused by horizontal mergers falls on market competitors because the merger may increase the efficiency of the merged partners, who can then charge lower prices.[55] Mergers that increase efficiency can have significant procompetitive benefits, enabling a firm to acquire economies of scale and productive assets quickly and without substantial costs.[56] Under this alternative scenario, consumers benefit but competitors are invariably injured[57] because the less-efficient competitors have higher costs and are therefore unable to match the low prices of the merged firm. Prevailing antitrust policy, however, is less concerned with protecting small business from more efficient rivals than with deterring oligopolistic or collusive behavior.[58]

The normal economic effects of horizontal mergers, then, have two important ramifications for antitrust law. First, courts should be wary when a competitor seeks to enjoin a horizontal merger between two of its competitors. Such a competitor is likely to sue when it fears the potential efficiencies and increased competition that will result from the merger. A competitor is not likely to sue because of the resulting increased

> overdeterrent, enforcement must be calculated to compensate for the social costs of the defendant's acts, not to remedy private injuries caused by increased efficiency.

H. HOVENKAMP, *supra* note 1, § 14.5, at 375-76.

52. *Id.*, § 11.1, at 293.

53. *See id.* § 14.5, at 373; L. SULLIVAN, *supra* note 16, §§ 61-62, at 116.

54. H. HOVENKAMP, *supra* note 1, § 14.5, at 373.

55. *See* 4 P. AREEDA & D. TURNER, *supra* note 10, ¶ 901, at 3; H. HOVENKAMP, *supra* note 1, § 14.5, at 373-74; L. SULLIVAN, *supra* note 16, § 204, at 614-15.

56. H. HOVENKAMP, *supra* note 1, § 11.1 at 293-94; *see* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 859-60 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974); L. SULLIVAN, *supra* note 16, § 204, at 614-15.

57. H. HOVENKAMP, *supra* note 1, § 14.5, at 374.

58. *Id.* § 11.3, at 300; *see supra* notes 12-13 and accompanying text.

market concentration from which it would benefit. Second, and more important, a competitor seeking to enjoin a proposed horizontal merger between two other competitors cannot in most circumstances satisfy the *Brunswick* antitrust injury requirement. The only plausible injury arising from a horizontal merger that falls on a competitor results from the increased efficiency of the merged partners, which, under *Brunswick*, is not an injury of the type the antitrust laws were designed to prevent. Four recent cases illustrate this problem.

II. ALLEGING THE IMPLAUSIBLE: *MONFORT*, *WHITE*, *CHRISTIAN SCHMIDT*, AND *CHRYSLER*

In *Monfort of Colorado, Inc. v. Cargill, Inc.*,[59] *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*,[60] *White Consolidated Industries v. Whirlpool Corp.*,[61] and *Chrysler Corp. v. General Motors Corp.*,[62] each court acknowledged *Brunswick's* "antitrust injury" requirement but incorrectly granted antitrust standing by failing to scrutinize the alleged theories of *injury* while instead concentrating on the plaintiffs' alleged theories of *violation*. In examining the alleged injury, the courts either looked beyond or failed to recognize the normal consequences of a horizontal merger and its effects on industry competitors. For example, in examining the alleged violation, the Tenth Circuit in *Monfort* and the Sixth Circuit in *Christian Schmidt* failed to distinguish illegal predatory behavior from competitive pricing. Moreover, the District Court for the District of Columbia in *Chrysler* ignored Clayton Act safeguards when it granted standing to a competitor to enjoin a joint venture which was approved by the Federal Trade Commission.

A. FAILING TO RECOGNIZE THE ECONOMIC EFFECTS OF HORIZONTAL MERGERS

In *Monfort of Colorado, Inc. v. Cargill, Inc.*,[63] the nation's second largest beef packer, Excel Corporation, sought to acquire the industry's third largest beef packer, Spencer Beef.

59. 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (No. 85-473).
60. 753 F.2d 1354 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985).
61. 612 F. Supp. 1009 (N.D. Ohio), *injunction vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985).
62. 589 F. Supp. 1182 (D.D.C. 1984).
63. 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (No. 85-473).

The nation's fifth largest beef packer, Monfort of Colorado, Inc., sued to enjoin the acquisition. The Tenth Circuit found that the increased concentration of economic power in the post-merger beef packing industry threatened competition and therefore violated section 7 of the Clayton Act.[64] This theory of violation, however, presented the court with difficulties when analyzed as a theory of antitrust injury. Increased market concentration normally benefits competitors.[65] The Tenth Circuit, therefore, looked beyond the merger's immediate noninjurious effects on competitors to potential injuries that would arise from plaintiff's speculative claims of future illegal behavior.[66] The court noted that

> [i]ndeed, Monfort would surely benefit if beef prices rose following Excel's acquisition. Instead Monfort claims that Excel will be able to engage in what we consider to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers. The resulting cost-price squeeze will, according to Monfort, reduce its profit margin and drive it and other companies out of business. Once that occurs Excel will then use its market power to charge monopoly prices for its beef. Thus, according to Monfort, the harm to competition will follow an intense, but ersatz, period of competition during which Excel will increase its market share.[67]

Finding that the "causal connection" between the section 7 violation and the alleged injury would exist "if Excel abuses its market power"[68] through a cost-price squeeze on its competitors, the Tenth Circuit granted standing[69] and approved a bootstrap antitrust injury theory based upon speculative behavior by the defendants.

The Sixth Circuit in *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*[70] used similar reasoning to grant stand-

64. *Id.* at 576-77.
65. *See supra* note 54 and accompanying text.
66. *Monfort*, 761 F.2d at 575.
67. *Id.*
68. *Id.*
69. *Id.* at 577-78.
70. 753 F.2d 1354 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985).

In *Christian Schmidt*, the G. Heileman Brewing Company, Inc. and H-P Acquisition Corporation entered into an agreement to acquire the common stock of the Pabst Brewing Company. *Id.* at 1355. Heileman also entered into a separate agreement that same day with another brewer, S & P Company, to sell some of the Pabst assets for the purpose of avoiding possible antitrust objections by the Antitrust Division of the Department of Justice. *Id.* Shortly thereafter, the Christian Schmidt Brewing Company and the Stroh Brewery Company filed an antitrust suit in the United States District Court for the Eastern District of Michigan, alleging various antitrust violations and seeking

ing to plaintiffs, two regional brewers, seeking to enjoin the acquisition of one competitor by another larger brewer. The court acknowledged that the plaintiffs would not have standing if their alleged injury was merely the result of increased post-merger efficiencies.[71] The Sixth Circuit, however, looked beyond the normal effect of the merger to a more speculative injury. Plaintiffs alleged that the economic power of the merged corporations would induce distributors to drop them as customers.[72] Using a "lower threshold standing requirement" for the section 16 case, the Sixth Circuit found that plaintiffs had made a sufficient showing of potential or threatened antitrust injury to meet the customary requirements for a preliminary injunction and therefore had standing to sue.[73]

Both the *Monfort* and *Christian Schmidt* courts allowed the plaintiffs to allege an antitrust injury based on speculative claims of "predatory" behavior by defendants. Predatory behavior traditionally refers to driving rivals out of business by pricing below cost.[74] There is considerable debate over whether this behavior actually occurs in practice.[75] Some commentators argue that if a market is susceptible to monopolization and a defendant is a dominant firm within that market, predatory pricing *may* be plausible; others believe that predatory pricing in any market is irrational and virtually never occurs.[76]

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declaratory and injunctive relief. *Id.* The district court granted a preliminary injunction on the grounds that the proposed merger would lessen competition for malt beverages in the Upper Midwest market and that a preliminary injunction would serve the public interest. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 600 F. Supp. 1326, 1328-30 (E.D. Mich.), *aff'd,* 753 F.2d 1354 (6th Cir.), *cert. denied,* 105 S. Ct. 1155 (1985).

71. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1357 (6th Cir.), *cert. denied,* 105 S. Ct. 1155 (1985).

72. The Sixth Circuit found that this "more predatory and anticompetitive consequence" might occur. *Id.* at 1357.

73. *Id.* at 1358.

74. H. HOVENKAMP, *supra* note 1, § 6.7, at 172. Predatory pricing is considered under the antitrust laws as an illegal monopolization or an attempt to monopolize, both of which violate § 2 of the Sherman Act, 15 U.S.C. § 2 (1982), or possibly § 2 of the Clayton Act, 15 U.S.C. § 13 (1982). H. HOVENKAMP, *supra* note 1, § 6.7, at 172. Legal scholars generally agree that the dynamic of predatory behavior involves a trade-off of short-term losses during the predatory period for greater long-term gains during the postpredatory period of monopoly power. *See* Hurwitz & Kovacic, *Judicial Analysis of Predation: the Emerging Trends,* 35 VAND. L. REV. 63, 67-70 (1982).

75. *See infra* notes 76-78 and accompanying text.

76. Whether predation exists is largely a function of a disagreement over what, if anything, constitutes a barrier to entry in a market. For a discussion of this disagreement, see Hurwitz & Kovacic, *supra* note 74, at 71. Some scholars believe that barriers to entry other than those based upon efficiency

Although these scholars have suggested a variety of tests to detect predatory activity,[77] most courts have used a cost-based test to determine whether a defendant has engaged in predatory behavior.[78] Since 1975, however, when these tests came into favor, very few plaintiffs have prevailed in predatory pricing ac-

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rarely, if ever, exist in any market. If this is true, it would be irrational for a firm to engage in predatory behavior—any expected monopoly profits in the future would provide targets of the predatory behavior with a strong incentive to outlast the attack, and would always attract new competitors. *See* R. BORK, *supra* note 16, at 314-20; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 267-72 (1981); McGee, *Predatory Pricing Revisited*, 23 J. L. & ECON. 289, 296 (1980). Other commentators argue that exploitable, nonefficiency-based barriers to entry do exist. *See, e.g.*, Williamson, Book Review, 83 YALE L.J. 647, 658 n.30 (1974) (prospective lenders, because of imperfect information, may perceive risks in loaning sums to a new market entrant who faces a threat of predation). For views that a firm's reputation for predation in a given market may deter entry by other firms in that or other markets, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 185-87 (1976); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 560 (2d ed. 1980); Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1522 (1977).

77. *See, e.g.*, 3 P. AREEDA & D. TURNER, *supra* note 10, ¶ 715b (proposing short-term marginal cost or average variable cost as a floor for presumptive legality); R. BORK, *supra* note 16, at 154 (no standard necessary on the grounds that predatory pricing is irrational and virtually never happens); R. POSNER, *supra* note 76, at 192 (suggesting long-term marginal costs as a floor for lawful pricing); Easterbrook, *supra* note 76, at 336 (proposing that no standard is necessary on the grounds that predatory behavior is irrational and virtually never happens); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 883-90 (1976) (advocating a full rule of reason analysis of the facts of each case). For summaries of additional, more intricate proposals, see Hurwitz & Kovacic, *supra* note 74, at 76-77 & nn.39-42.

78. Different courts have delineated three zones of predation analysis: pricing at or above average total cost, which raises a conclusive presumption of legality; pricing below marginal cost, which raises a rebuttable presumption of illegality; and pricing at or above marginal cost but below average total cost, which usually begets a "bounded rule of reason" standard. Hurwitz & Kovacic, *supra* note 74, at 100-10. To determine the existence of predatory behavior under this standard, courts may consider additional factors such as the defendant's intent and whether barriers to entry exist in the given market. *Id.* at 108-10. For examples of these tests in the circuits, see Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 890-91 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 910 (1985); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231-35 (1st Cir. 1983); D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1437 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3513 (1984); Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1384-88 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1033-39 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 431-34 (7th Cir. 1980); Pacific Eng'g & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

tions.[79] As a result, one commentator argues that courts should dismiss all predatory pricing complaints when defendants are competitors.[80] Because plaintiffs rarely succeed in proving predatory pricing,[81] courts should be especially wary of such claims made on a speculative basis.[82]

Ironically, the District Court for the Northern District of Ohio in *White Consolidated Industries v. Whirlpool Corp.*[83] followed an opposite line of reasoning to grant the competitor-

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79. H. HOVENKAMP, *supra* note 1, § 6.7, at 172. For two rare cases in which plaintiffs were successful in predatory pricing actions, see Sunshine Books Ltd. v. Temple Univ., 697 F.2d 90 (3d Cir. 1982); D & S Redi-Mix Co. v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir. 1982). Two commentators came to the same conclusion after a study of 57 cases involving predatory behavior. *See* Hurwitz & Kovacic, *supra* note 74, at 140-43.

80. *See* Easterbrook, *supra* note 76, at 331. Because predatory pricing claims are so rarely successful in § 4 damage actions, *a fortiori* courts should dismiss predatory pricing allegations in § 16 injuction cases.

81. *See* H. HOVENKAMP, *supra* note 1, § 6.7, at 172.

82. The Supreme Court has stated that speculative antitrust allegations weigh against judicial enforcement of the antitrust laws. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 545 (1983). The Court has also held that something more than the mere possibility of an antitrust violation is necessary to sustain an action for injunctive relief. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). In addition to *White*, other lower courts have held that remote or speculative claims will not sustain a cause of action. *See* Treasure Valley Photo Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 218 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); General Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971).

83. 612 F. Supp. 1009 (N.D. Ohio), *injunction vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985).

In *White*, defendant Whirlpool Corporation, a manufacturer and distributor of a full line of major household appliances, entered into two stock purchase agreements with co-defendants Dart & Kraft, Inc., a diversified food and consumer products company, and Emerson Electric Company, a manufacturer, designer, and seller of many electrical and electronic products. Under the terms of the Whirlpool-Dart & Kraft agreement, Hobart Corporation, a wholly-owned subsidiary of Dart & Kraft, would transfer all of its assets not directly related to its KitchenAid division, a manufacturer and seller of dishwashers, to a separate corporation. Whirlpool would then purchase all the stock of Hobart, known in its reconstituted form as KitchenAid. *Id.* at 1013-14, 1018.

Under the terms of the Whirlpool-Emerson agreement, after acquiring KitchenAid/Hobart from Dart & Kraft, Whirlpool would sell Traboh, a Hobart subsidiary which held the assets of two dishwasher manufacturing facilities, to Emerson. *Id.* at 1018. This latter agreement was made contingent upon an additional supply agreement between Whirlpool and Emerson, under which Whirlpool's acquired KitchenAid would buy all of its requirements for a certain dishwasher from Traboh for a period of eight years at a price calculated to yield Traboh a net after-tax profit of twenty percent of its total operating capital in exchange for limitations on Emerson's marketing of its competing dishwashers. *Id.* The Whirlpool-Emerson stock purchases were intended by plaintiff standing to seek an injunction blocking the proposed acquisition of KitchenAid by Whirlpool Corporation. In *White*, the plaintiff-competitor alleged two theories of injury: increased market concentration[84] and a speculative scenario of a postmerger market featuring abusive behavior such as predation, leverage, and collusion.[85] The *White* court rejected this latter argument outright. Unlike the Tenth Circuit in *Monfort* and the Sixth Circuit in *Christian Schmidt*, the court found no

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defendants to be a "curative divestiture," designed to eliminate possible antitrust problems. *Id.* at 1023.

Plaintiff White Consolidated Industries, a manufacturer and distributor of a full line of major household appliances, filed an antitrust suit in the United States District Court for the Northern District of Ohio against Whirlpool, Dart & Kraft, Hobart, and Emerson alleging, inter alia, that the proposed horizontal acquisition of KitchenAid by Whirlpool violated § 7 of the Clayton Act and other antitrust provisions. White sought to enjoin the acquisition under § 16 of the Clayton Act. *Id.* at 1011-13. Plaintiff Magic Chef, Inc., a manufacturer and distributor of household appliances under various brand names, filed a similar complaint against the same defendants in the Southern Division of the United States District Court for the Eastern District of Tennessee. *Id.* at 1012-13. The cases were consolidated before the District Court for the Northern District of Ohio. *Id.* Plaintiffs then both moved for a preliminary injunction. *Id.* This preliminary injunction was later vacated. *See* 619 F. Supp. 1022 (N.D. Ohio 1985).

84. The plaintiff in *White* based this allegation on a statistical analysis of the post-merger market, using Department of Justice merger guidelines. *White*, 612 F. Supp. at 1019-22. For discussions of these guidelines, see generally *id*; H. HOVENKAMP, *supra* note 1, §§ 11.4-11.5, at 301-05.

The court found that the proposed transaction would violate the antitrust laws despite Whirlpool's argument that the proposed transaction was procompetitive because it would revitalize the declining KitchenAid. *White*, 612 F. Supp. at 1024-25. Whirlpool asserted that the curative divestiture absolved the transaction of any antitrust problems. *Id.* at 1025.

The hearing on the motions for preliminary injunction was "somewhat extraordinary." *Id.* at 1012. Because all the parties had previously participated in proceedings before the Federal Trade Commission regarding the proposed transaction, *see infra* notes 110-111 and accompanying text, the arguments on both sides were the result of extensive preparation. *White*, 612 F. Supp. at 1012. Judge Krenzler described it as "tantamount to a hearing on the merits." *Id.*

The court found that the market-share statistical analysis set forth by the plaintiffs created a prima facie illegal transaction. *Id.* at 1032. Moreover, the court found the curative divestiture defective because of the restrictions placed upon Emerson in the Whirlpool-Emerson supply agreement. *Id.* The court found "that the transaction would increase Whirlpool's ability to restrict output and raise prices, an ability which, over time, would increase further. Given the current state of the dishwasher market . . . such an ability [was] likely to substantially reduce competition." *Id.* Finding that the plaintiffs had made a sufficient showing of potential or threatened antitrust injury to meet the customary requirements for a preliminary injunction, the court granted standing. *Id.*

85. *White*, 612 F. Supp. at 1019.

evidence to show that the defendant Whirlpool had engaged, or was likely to engage in the speculative abusive practices.[86] In short, it refused to allow a "bootstrap" antitrust injury argument.

The *White* court, however, granted the plaintiffs standing on the basis of increased postmerger market concentration.[87] In doing so, the court failed to recognize one of the horizontal merger's normal economic consequences: increased postmerger market concentration benefits competitors.[88] Increased postmerger market concentration *may* threaten competition and violate section 7 of the Clayton Act by fostering collusion among industry competitors who can charge higher prices.[89] Such action would injure consumers,[90] but as the Supreme Court stated in *Brunswick*, a private litigant must allege more than just a section 7 violation: the litigant must allege that it has suffered an *antitrust injury* causally linked to the section 7 violation.[91] Because a competitor is normally a beneficiary of increased market concentration, a competitor cannot allege such injury.[92] In granting standing to plaintiffs on the basis of increased postmerger market concentration, the *White* court failed to distinguish between the plaintiff's plausible section 7 violation theory and the plaintiff's implausible section 16 injury theory.

The District Court for the District of Columbia in *Chrysler Corp. v. General Motors Corp.*[93] also failed to scrutinize the

86. *Id.* at 1031.
87. *Id.* at 1030-32.
88. *See supra* note 54 and accompanying text.
89. *See supra* notes 52-53 and accompanying text.
90. *See supra* note 53.
91. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
92. Consumers, forced to pay the higher prices that result from the increased postmerger market concentration, *would* be able to allege this theory of injury. In addition, suppliers, who may be forced to accept lower prices for their goods as a result of collusion among industry customers, could also plausibly allege this theory of injury.
93. 589 F. Supp. 1182 (D.D.C. 1984).

In *Chrysler*, defendants General Motors Corporation, the world's largest automobile company, and Toyota Motor Corporation, the world's third largest automobile company, proposed a joint venture to manufacture and market in the United States a subcompact automobile derived from an existing Toyota model, the Toyota Corolla. *Id.* at 1184. The Federal Trade Commission scrutinized and approved a modified joint venture plan as consistent with the antitrust laws. *Id.* Plaintiff Chrysler Corporation, however, brought an antitrust action to enjoin the proposed joint venture, alleging that it violated §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act. *Id.* at 1184-87.

The District Court noted its concern over the sharing of price information between General Motors and Toyota. *Id.* at 1193. Two reviewing Federal plaintiff's allegations of injury in granting standing to enjoin a joint venture between two competitors. Like the *White* court, the *Chrysler* court granted standing on the basis of decreased competition,[94] which might harm consumers and suppliers but would only benefit competitors. Each of the eight theories of injury alleged by Chrysler either harmed consumers but benefited Chrysler, harmed Chrysler but benefited competition, or was too speculative.[95]

Five of Chrysler's theories of injury alleged harm to consumers and competition but not to Chrysler. Chrysler's claim that the joint venture would destroy existing competition between General Motors and Toyota in the design and manufacture of subcompact automobiles[96] alleged potential harm to consumers, not Chrysler. The practical result of this allegation—the elimination of one competitor in the postmerger market—means less product variety for consumers. One less subcompact competing with Chrysler's own models, however, benefits Chrysler.

Chrysler's claim that the proposed venture would lessen price competition between General Motors and Toyota[97] also alleged potential harm to consumers but not to Chrysler. Collusive pricing benefits competitors in a concentrated market by allowing them to raise their own prices under the "umbrella" of other competitors.[98] Chrysler's claim that the decreased price competition between General Motors and Toyota would also reduce price competition among the other manufacturers[99] again alleged harm to consumers but not to Chrysler. Reduced price competition can only mean increased prices for Chrysler.

Chrysler's claim that the venture would provide Toyota with a disincentive to begin its own manufacturing operations in the United States[100] similarly alleged potential harm to consumers but none for Chrysler. One less competitor in the American manufacturing industry would most likely mean less competition for Chrysler. Although consumers may be injured,

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Trade Commission members had dissented from the approval of the venture on these grounds. *See* 48 Fed. Reg. 57,246, 57,252-57 (1983) (to be codified at 16 C.F.R. pt. 13).

94. *Chrysler*, 589 F. Supp. at 1193; *see infra* note 109 and accompanying text.

95. *Chrysler*, 589 F. Supp. at 1189-90.

96. *Id.* at 1189.

97. *Id.*

98. *See supra* note 54 and accompanying text.

99. *Chrysler*, 589 F. Supp. at 1189.

100. *Id.*

the decreased competition would benefit rather than injure Chrysler. Finally, Chrysler's claim that the joint venture "is likely to foster mergers, acquisitions, or joint venture relationships involving other major automobile companies"[101] again alleged only increased market concentration, which would potentially harm consumers but only benefit competitors.[102]

Two of Chrysler's theories of injury alleged potential harm to Chrysler, but not of the type the antitrust laws were designed to prevent. Chrysler's claim that other American manufacturers will be induced to rely on importing Japanese subcompacts instead of manufacturing their own models, "resulting in a surrender of the market to a handful of Japanese manufacturers,"[103] is deceptive. It is difficult to determine how such a scenario, if plausible, would reduce competition or harm Chrysler. Moreover, the antitrust laws are not concerned with the origin of products for sale to the American public.[104] In addition, Chrysler's claim that the venture will enable General Motors to market a subcompact model auto without making the capital investment necessary for other American manufacturers to develop a similar model[105] complains only of increased efficiency and more vigorous competition. The antitrust laws are not concerned with mergers that create more efficient competitors.[106] Chrysler, therefore, could not properly allege antitrust injury on this basis.

Chrysler's last claim, that the venture will require General Motors and Toyota to share information about pricing, marketing, and product development and thereby reduce competition between those two manufacturers and enable them to direct their competitive efforts at Chrysler,[107] is not threatening in light of the government's oversight of the venture.[108]

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101. *Id.* at 1190.
102. *See supra* note 54 and accompanying text.
103. *Chrysler*, 589 F. Supp. at 1189.
104. *See* 2 P. AREEDA & D. TURNER, *supra* note 10, ¶ 523(b)(6), at 362-63 (suggesting that foreign imports should not be treated differently than domestic output when defining markets in antitrust cases); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 425 (2d Cir. 1945) (Although Alcoa was the sole producer of virgin ingot in the United States, the court computed Alcoa's market share by including in the defined market the total amount of imported ingot sold in the United States.). For a discussion of *Alcoa* and the relationship between national and international markets in antitrust law, see L. SULLIVAN, *supra* note 16, § 20, at 70-72.
105. *Chrysler*, 589 F. Supp. at 1189-90.
106. *See supra* notes 31-40 and accompanying text.
107. *Chrysler*, 589 F. Supp. at 1190.
108. *See infra* notes 113-16 and accompanying text.

In spite of these allegations, the court granted standing to Chrysler because it could not conclude that "on the record before it . . . Chrysler would not be entitled to recover for the decreased competition between defendants which will it alleges result from the joint venture."[109] The court thus allowed Chrysler to sue on the basis of *decreased competition*, a scenario that would only benefit Chrysler.

In granting standing to the plaintiff in *Chrysler*, the district court also ignored Clayton Act provisions providing for government oversight of horizontal mergers and joint ventures. The 1976 Hart-Scott-Rodino Amendments to the Clayton Act require companies to notify the Federal Trade Commission and the Department of Justice of all proposed mergers and acquisitions.[110] Congress designed the amendments to allow the government to make more informed decisions in its role as enforcer of the antitrust laws and increase its ability to obtain injunctive relief pending suit under those laws.[111] This oversight authority protects the public from antitrust problems that may arise in the future.[112]

After careful scrutiny, the Federal Trade Commission approved the proposed joint venture between General Motors and Toyota under this amendment.[113] The FTC, in fact, concluded that the General Motors-Toyota joint venture would have significant procompetitive benefits to the American public.[114] De-

109. *Chrysler*, 589 F. Supp. at 1193.

110. *See* 15 U.S.C. § 18(a) (1982 & Supp. II 1984).

111. The House Committee on the Judiciary Report stated that the measure would

> strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together . . . .

See H.R. REP. NO. 1373, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2637, 2637. If the government finds a proposed merger repugnant to competition in a particular industry, it may elect to sue the defendants under the antitrust laws. 15 U.S.C. § 18(a) (1982 & Supp. II 1984).

112. United States v. Federal Communications Comm'n, 652 F.2d 72, 106 (D.C. Cir. 1980) (en banc).

113. *Chrysler*, 589 F. Supp. at 1184. The FTC scrutinized the proposal for more than a year. *Id.* at 1184 n.1.

114. 48 Fed. Reg. 57,314 (1983) (to be codified at 16 C.F.R. pt. 13). The FTC determined that the merger could provide four significant procompetitive benefits: that the venture would increase the number of small cars available in America and thereby allow consumers a wider range of choices among models;

spite the FTC's approval, the *Chrysler* court granted plaintiff standing to enjoin the joint venture. FTC approval of a proposed joint venture should command a court to engage in careful scrutiny of a competitor-challenger's claims for clear antitrust injury.[115] Enforcement of the antitrust laws is primarily the responsibility of the government.[116] Absent a showing of clear error by the FTC, a court should defer to the antitrust determinations of that administrative agency.

B. FAILING TO DISTINGUISH BETWEEN PREDATORY AND COMPETITIVE BEHAVIOR

In granting standing based on speculative allegations of illegal postmerger behavior, the courts in *Monfort* and *Christian Schmidt* failed to distinguish predatory from competitive behavior. Competition is lawful; predation, which reduces competition, is unlawful.[117] It is important, then, to recognize the distinction between increased competition and predatory behavior when considering the allegations of competitors seeking to enjoin horizontal activity among other competitors.[118] The

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that the venture car would cost less to produce than if General Motors had to rely immediately on other alternatives; that the venture would allow General Motors to complete its learning of more efficient Japanese manufacturing techniques; and that the venture would give General Motors and ultimately the rest of the American auto industry an opportunity to increase its long-term productive efficiency. *Id.* at 57,314-16. Two FTC Commissioners dissented. *Id.* at 57,246, 57,252-57.

115. Courts should decline to assess the wisdom of the government's judgment concerning the public interest under the antitrust laws. *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961).

116. United States v. Borden, 347 U.S. 514, 518 (1954) ("[I]t is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting public interest under [antitrust] laws."). As commentators have stated: "Notwithstanding the increasing volume of private antitrust suits, government-initiated actions are the key to enforcement of the antitrust laws. They are undertaken in the public interest, addressed to more significant restraints, and backed by substantial resources." 2 P. AREEDA & D. TURNER, *supra* note 10, ¶ 327, at 131.

117. *See* Pacific Eng'g & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir.) (Prices above average variable cost and above marginal cost indicate "rational, competitive behavior."), *cert. denied*, 434 U.S. 879 (1977); Telex Corp. v. IBM Corp., 510 F.2d 894, 926 (10th Cir.) (IBM's price reductions found to be "ordinary marketing methods available to all in the market," not a use of monopoly power), *cert. denied*, 423 U.S. 802 (1975).

118. For examples of authorities that have noted this distinction, see *supra* note 53; see also Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 732-33 (1975) (dis-

courts in *Monfort* and *Christian Schmidt* failed to make this distinction.

The plaintiff in *Monfort* did not allege that the defendant would engage in predatory pricing.[119] The cost-price squeeze referred to by the court in *Monfort*, then, would presumably be caused by the defendant paying more to suppliers and charging less to customers, thereby reducing profit margins.[120] Such a cost-price squeeze, however, does not meet the pricing-below-cost definition of predatory behavior.[121] On the contrary, logic and sense indicate that this behavior is efficient pricing and competitive. Pricing as close to costs as possible in an effort to increase market share is a common business goal and is beneficial to consumers.

Similarly, in *Christian Schmidt*, the speculative behavior of the distributors, who would allegedly drop the smaller plaintiffs and deal only with larger companies in the market, fails to fit within traditional notions of predatory behavior. There is nothing "predatory" in a distributor's decision to distribute certain brands at the exclusion of others if it feels that it would be more economically feasible to do so. The Sixth Circuit acknowledged this.[122] If a distributor did in fact drop the smaller brewers, it is difficult to see why it would do so for any reason other than that it would be economically feasible.

In sum, speculative claims of predatory behavior cannot provide a basis for standing in section 16 injunction cases; such claims only allow plaintiffs to circumvent the *Brunswick* antitrust injury requirement.

CONCLUSION

The *Brunswick* antitrust injury requirement represents the crucial element of a court's determination of standing in both section 4 and section 16 antitrust actions because it pre-

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tinguishing between competitive and predatory pricing by examining the relationship between a firm's costs and its prices).

119. Monfort of Colo., Inc. v. Cargill, Inc., 591 F. Supp. 683, 691 (D. Colo. 1983), *aff'd*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (No. 85-473).

120. *See supra* text accompanying note 67.

121. The Tenth Circuit uses a cost-based standard to determine predatory behavior. *See Pacific Eng'g*, 551 F.2d at 797 (suggesting that in the absence of other evidence, a cost-based test can best determine whether conduct is anticompetitive); *see also supra* note 78 and accompanying text.

122. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1357 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985).

vents private plaintiffs from seeking to remedy injuries caused by increased efficiency. Courts have recognized the need to apply the *Brunswick* requirement to section 16 cases.[123] In addition, section 16 of the Clayton Act links injunctive relief to "threatened loss or damage."[124] These words suggest that an antitrust injury requirement is incorporated into section 16.[125] The courts in *Monfort*, *Christian Schmidt*, *White*, and *Chrysler*, however, failed to correctly apply the *Brunswick* requirement. Each court failed to recognize that a competitor who seeks to enjoin a horizontal merger or joint venture between two of its competitors cannot allege a plausible theory of antitrust injury.

Adherence to the *Brunswick* antitrust injury requirement in section 16 cases would still sanction private actions by suppliers and consumers who could plausibly allege an antitrust injury, and would still allow actions by the government suing in the public interest. Competitors seeking to block horizontal mergers and joint ventures of other competitors, however, are not appropriate plaintiffs and should not have standing to enforce the antitrust laws.

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123. *See supra* notes 44-48 and accompanying text.

124. 15 U.S.C. § 26 (1982).

125. *See* Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1165-66 (1982).