Fordham Law Review

Volume 55 | Issue 6 Article 7

1987

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ANTITRUST STANDING OF TARGET CORPORATIONS TO ENJOIN HOSTILE TAKEOVERS UNDER SECTION 16 OF THE CLAYTON ACT

INTRODUCTION

Section 7 of the Clayton Act prohibits all acquisitions or mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[1] Consistent with this statutory scheme, the standards for evaluating the legality of intercorporate relationships have developed with cyclical changes in the economy and evolving federal antitrust policy.[2] As amended in 1950,[3] section 7 reflected Congress' strong concern with protecting small businesses from a "rising tide of economic concentration"[4] in American industry and limiting the abuses of corporate power.[5] This policy of small business protectionism shifted

1. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version codified at 15 U.S.C. § 18 (1982)). Section 7 provides in relevant part:

> No person . . . shall acquire, directly or indirectly, the whole or any part of the stock . . . and no person . . . shall acquire the whole or any part of the assets of another person . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

As originally enacted, section 7 applied only to corporations. It has been amended to now include unincorporated, as well as, incorporated entities. *See* H. Hovenkamp, Economics and Federal Antitrust Law § 11.1, at 293 (1985). The term "person" is defined to include "corporations and associations existing under or authorized by the laws of . . . the United States . . . ." 15 U.S.C. § 12(a) (1982).

2. Throughout most of this century, antitrust decisonmaking has been dominated by the traditional approach known as the "Harvard School" which espoused a relatively prointerventionist view focusing on entrepreneurial independence and equality. *See* Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1146-55 (1981); Hovenkamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 217-25 (1982); Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979). Current antitrust thinking reflects the "economic approach" of the "Chicago School" which emphasizes economic efficiency and less government intervention. For classic statements of Chicago School economics, see generally R. Bork, The Antitrust Paradox: A Policy at War With Itself (1978); R. Posner, Antitrust Law: An Economic Perspective (1976).

3. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914), *as amended by* Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (current version codified at 15 U.S.C. § 18 (1982)). The Clayton Act, which was the second major piece of antitrust legislation, was designed primarily to arrest the feared consequences of intercorporate relationships in their incipiency and before consummation. *See* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957). The first federal antitrust law was the Sherman Act, ch. 647, §§ 1-6, 8, 26 Stat. 209-10 (1890) (current version codified at 15 U.S.C. §§ 1-7 (1982)).

4. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

5. The legislative history of the Celler-Kefauver amendment clearly expresses Congress' overwhelming concern with the evils of concentrating economic power in the hands of too few large corporations. As Senator Estes Kefauver, a co-sponsor of the 1950 amendment, stated: "The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development . . . . Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years." 96 Cong. Rec. 16,452 (1950). And Representative Emanuel

markedly in the 1970s,[6] however, in the wake of a national economy fettered by a rapidly accelerating rate of inflation, lower productive output, a growing balance-of-payments deficit, and increasing international competition in world markets.[7] Consequently, antitrust policy in the 1980s emphasizes the efficiencies to be gained from mergers, despite potentially greater postmerger market concentration,[8] on the theory that size and

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Celler, floor manager and another sponsor of the bill, argued that without an amendment, "big business will be hellbent for more and more mergers." 95 Cong. Rec. 11,485 (1949).

Modern judicial treatment of mergers starts with Brown Shoe Co. v. United States, 370 U.S. 294 (1962), the Supreme Court's first decision under amended section 7. Applying the antimerger law, Chief Justice Warren, in his majority opinion, stated:

> It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Id. at 344. For a comprehensive discussion of the legislative history behind the 1950 amendment to the Clayton Act, see *Brown Shoe*, 370 U.S. at 311-23. *See also* L. Sullivan, Handbook of the Law of Antitrust § 199, at 592-93 (1977) ("Congress wanted the courts to be tougher than they had been . . . and not to wait for a showing of power aggressively used . . . . It wanted the courts to act at the edge of harm in order to choke off those mergers likely . . . to cause irreversible injury to the competitive process.").

6. *See* Fox, *supra* note 2, at 1152 ("Beginning in 1974, the first year of the Burger Court's antitrust majority, antitrust law shifted course . . . . Whereas the word 'power' dominated Warren Court antitrust opinions, the words 'efficiency' and 'market impact' have prominence in Burger Court antitrust opinions.") (footnotes omitted). *Compare* United States v. Falstaff Brewing Corp., 410 U.S. 526, 540-43 (1973) (Douglas, J., concurring in part) ("Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship.") *and* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 502-03 (1969) ("[E]conomic power . . . can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.") *and* United States v. Von's Grocery Co., 384 U.S. 270, 274-78 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly — that is the concentration of economic power in the hands of a few.") *with* United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct") *and* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56-7 (1977) ("Economists also have argued that manufacturers have an economic interest in maintaining as much . . . competition as is consistent with the efficient distribution of their products.") *and* United States v. General Dynamics Corp., 415 U.S. 486, 494-504 (1974) (exemplifies the Burger Court's emphasis on efficiencies of production and resource allocation).

7. *See* Fox, *supra* note 2, at 1142-43; Joelson, *Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives*, 14 Int'l Law. 103, 112-13 (1980).

8. *See* U.S. Department of Justice Merger Guidelines, *reprinted in* 1 Trade Reg. Rep. (CCH) ¶¶ 4490-95 (June 14, 1984). These guidelines state: "Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets." *Id.* ¶ 4491. "The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers." *Id.* § 3.5, ¶ 4493.

power may be necessary to compete effectively with foreign firms.[9] The fundamental goal of the antitrust laws, however, remains the same — the enhancement of vigorous competition in the business sector for the benefit of consumers and the economy at large.[10]

The Clayton Act provides two remedial provisions for private enforcement of section 7. Section 4 awards treble damages to anyone who suffers injury in his business or property by reason of a violation of the antitrust laws.[11] Section 16 entitles any person threatened with loss or damage by an antitrust violation to injunctive relief.[12]

As a private party, the target of a contested takeover may seek an injunction under section 16 to enjoin the contemplated action by alleging a threatened violation of section 7 of the Clayton Act. The issue is whether the target corporation has standing under the antitrust laws to maintain such an action. Recently, in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[13] the Supreme Court held that a private party seeking injunctive relief under section 16 has standing only if the plaintiff demonstrates a threat of "antitrust injury."[14] The critical inquiry in the takeover context, therefore, is whether a target corporation can ever assert a plausible theory of "antitrust injury" in order to maintain a section 16 action. Whether the target corporation may invoke the antitrust laws to oppose

9. *See* Bickel, *The Antitrust Division's Adoption of a Chicago School Economic Policy Calls for Some Reorganization: But Is the Division's New Policy Here to Stay?*, 20 Hous. L. Rev. 1083, 1112 (1983); Joelson, *supra* note 7, at 112-13.

10. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("As the legislative history shows, the [antitrust laws were] enacted to assure customers the benefits of price competition . . . ."). In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court stated:

> The [antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition . . . . It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . .

Id. at 4.

11. 15 U.S.C. § 15 (1982). Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." Originally enacted as section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), and extended to the Clayton Act in 1914, section 4 is a deterrence and compensatory provision that awards treble damages to private parties harmed by a violation of the antitrust laws.

12. 15 U.S.C. § 26 (1982). 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 . . . .

13. 107 S. Ct. 484 (1986). For the facts and a detailed discussion of *Cargill*, see *infra* notes 49-70 and accompanying text.

14. *Id.* at 491.

a threatened takeover has created a division among the courts.[15]

This Note examines whether a target corporation could have standing under the Clayton Act to enjoin threatened takeovers. Part I traces the development of standing requirements and the emergence of the antitrust injury concept as an element of both section 4 and section 16 in private antitrust actions. Part II analyzes antitrust injury suffered by a target corporation seeking to enjoin a hostile takeover and the role of target management as a proper plaintiff under the antitrust laws. This Note concludes that conferment of standing is a factual determination to be made under the circumstances of the case. Thus, if the target corporation contesting a takeover can make a proper preliminary showing of a section 7 violation and sufficiently prove a threat of antitrust injury under section 16, the courts should grant it standing.

I. ANTITRUST STANDING

A. *Section 4 Damages and Antitrust Injury*

The somewhat vague and malleable body of law known as "antitrust standing"[16] developed historically as a means of placing judicial limitations on the broad language of the antitrust laws.[17] Because a literal

15. *Compare* Grumman Corp. v. LTV Corp., 665 F.2d 10, 11 (2d Cir. 1981) (preliminary injunctive relief granted to target corporation to enjoin proposed acquisition deemed to be violative of Clayton Act) *and* Marathon Oil Co. v. Mobil Corp., 669 F.2d 378, 383-84 (6th Cir. 1981) (preliminary injunction appropriate for target corporation to block proposed acquisition), *cert. denied*, 455 U.S. 982 (1982) *and* Gearhart Indus. v. Smith Int'l, Inc., 592 F. Supp. 203, 214 (N.D. Tex.) (target corporation had standing to enjoin proposed tender offer but did not show substantial likelihood of success on the merits), *modified on other grounds*, 741 F.2d 707 (5th Cir. 1984) *and* Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1256, 1288 (N.D. Ohio 1977) (target corporation of proposed tender offer had standing to sue but failed to prove its case on the merits) *with* Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983) (neither target corporation nor shareholder-director had standing to prevent takeover where harm asserted was not the result of diminution in competition) *and* A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980) (plaintiff lacked standing because essential connection between the injury and the aims of the antitrust laws not established) *and* Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984) (tender offer target lacked standing where harms alleged were not the result of substantially lessened competition).

16. The doctrine of "antitrust standing" is somewhat different analytically from constitutional standing. Actual or threatened harm to the plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact within the meaning of the "case or controversy" clause of article III of the Constitution. *See* Warth v. Seldin, 422 U.S. 490, 498-501 (1975); Sierra Club v. Morton, 405 U.S. 727, 731-40 (1972). Standing in the antitrust context, however, requires that the courts make an additional determination as to "whether the plaintiff is a proper party to bring a private antitrust action." *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983).

17. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) ("I concede that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. Courts have therefore developed various tests of antitrust 'standing,' not unlike the concept of proximate cause in tort law, to define that

interpretation of section 4 of the Clayton Act conceivably could confer a right to treble damages on every person whose injuries are causally related to an antitrust violation,[18] the courts developed prudential standing requirements to narrow the class of plaintiffs.[19] Imposition of such standing requirements were justified on the grounds of guarding against the dangers of windfall recoveries and other forms of inundation that could result from a deluge of litigation against every company charged with unlawful conduct.[20] Although the courts struggled to articulate a precise standing formula under such labels as the "direct injury" test,[21] the "target area" test,[22] the "zone of interests" test,[23] and the balancing

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point.") (citations omitted); Board of Trade v. United States, 246 U.S. 231, 238-39 (1918) (Congress meant to condemn only unreasonable restraints of trade). *See also* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 810-45 (1977) (discussion of the historical development of the standing doctrine).

18. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-35 (1983); Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465, 472-73 (1982); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 581 (3d Cir. 1979); Multidistrict Vehicle Air Pollution M.D.L. No. 31 v. Automobile Mfrs. Ass'n, 481 F.2d 122, 125 (9th Cir.), *cert. denied sub nom.* Morgan v. Automobile Mfrs. Ass'n, 414 U.S. 1045 (1973); Berger & Bernstein, *supra* note 17, at 812.

19. *See Associated Gen. Contractors*, 459 U.S. 519, 529-35 (1983); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 581 (3d Cir. 1979); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Berger & Bernstein, *supra* note 17, at 835-36; *see also* Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465, 477 (1982) ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property."); Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) ("The . . . courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). For general discussions of standing under section 4 of the Clayton Act to seek treble damages, see 2 P. Areeda & D. Turner, Antitrust Law ¶¶ 333-335, at 160-77 (1978); H. Hovenkamp, *supra* note 1, §§ 14.2-14.5, at 356-76; L. Sullivan, *supra* note 5, § 247, at 770-74.

20. For reasons for imposing standing limitations, see Illinois Brick Co. v. Illinois, 431 U.S. 720, 741 (1977) (ease administrative burden placed on courts); Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64 (1972) (prevent duplicative recoveries); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975) (avoid potentially disastrous financial ruination of defendant); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956) (windfall recoveries). *See also* Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971) ("[I]f the floodgates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."), *cert. denied*, 406 U.S. 930 (1972).

21. Some courts focused on the directness of the injury and permitted only those plaintiffs whose injury is considered to be the "direct" or "proximate" result of the anticompetititve activity to maintain a private action. *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

22. Some courts required that the plaintiff be in a "target area" of the economy threatened by a breakdown of competitive conditions in a particular industry. *See, e.g.*,

test,[24] success proved elusive. More recently, the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[25] consolidated the various policy objectives underlying section 4 into a flexible series of relevant factors that are to be weighed in determining standing under the Clayton Act. The factors include: the specific relationship between the injury and the antitrust violation;[26] the directness or indirectness of the harm;[27] the speculative nature of the injury;[28] whether the scope of the antitrust litigation can be kept within judicially manageable limits;[29] and whether the nature of the injury is of the type the antitrust laws were designed to prevent.[30] In eschewing the mechanical tests of antitrust standing previously used, the Court required that standing questions be analyzed "in light of" the particular factual circumstances presented by each case.[31]

The last standing factor identified in *Associated General Contractors*, whether the nature of the injury is of the type the antitrust laws were designed to prevent, was first articulated as "antitrust injury" by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[32] In

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Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); Calderone Enters. Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

23. Other courts inquired whether the injury arguably was within the "zone of interests" protected by the antitrust laws. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-52 (6th Cir. 1975); Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1255 (N.D. Ohio 1977).

24. Some courts articulated factors they deemed significant in analyzing standing under a balancing test. *See* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 582-87 (3d Cir. 1979); Bravman v. Bassett 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).

25. 459 U.S. 519 (1983).

26. *Id.* at 537.

27. *Id.* at 540-42.

28. *Id.* at 542-43.

29. *Id.* at 543-45.

30. *Id.* at 538-40.

31. *Id.* at 536 & n.33. In identifying these factors, the Court discarded the idea that standing could be determined by bright-line tests or by adopting a "black-letter rule" applicable in all cases. *Id.* at 536.

32. 429 U.S. 477, 489 (1977). The concept of antitrust standing is analytically different from the concept of antitrust injury enunciated in *Brunswick*. *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Colum. L. Rev. 979, 995-96 (1977); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 497-98 (1980). The antitrust standing requirement narrows the class of plaintiffs who may recover for antitrust injury. *See supra* notes 16-24 and accompanying text. Antitrust injury defines the compensable harm. Broadly speaking, it is a rule of standing because the plaintiff who has not suffered antitrust injury will necessarily lack standing. *See* Page, *supra*, at 497. The plaintiff competitors in *Brunswick* had standing to bring suit but could not recover damages. *Brunswick*, 429 U.S. at 490. Thus, in the sense that they failed to show antitrust injury and therefore were unable to recover, they may be said to "lack" standing. Indeed, courts

Brunswick, a major manufacturer of bowling equipment had begun acquiring and operating a large number of defaulting bowling centers that would have gone bankrupt but for the acquisitions.[33] The plaintiffs, competing bowling center operators, challenged three of these takeovers as illegal asset acquisitions under section 7.[34] Seeking treble damages under section 4, the competitors cited as injury, the lost profits they would have made had the rival bowling centers been permitted to fail.[35] In holding that the plaintiffs lacked standing, the Court stressed that the antitrust laws "were enacted for 'the protection of *competition, not competitors*.' "[36] *Brunswick* set down the rule that to recover section 4 treble damages, the plaintiff must prove more than a section 7 violation.[37] 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 the defendants' acts unlawful.[38] The Court observed that the antitrust injury requirement had not been met in this case, however, because the competitors' alleged lost profits resulted not from any anticompetitive action on the part of Brunswick, but rather from the continued competition of the revitalized bowling centers.[39] Thus, unless anticompetitive behavior is present, the fact of injury is not a concern of the antitrust laws, regardless of whether a merger is legal or illegal.[40]

B. *Section 16 Injunctions after* Cargill

Lower courts often have noted that the standing requirements under section 16 are less stringent than those under section 4.[41] While section 4

and commentators have considered *Brunswick* a standing case. *See* John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-99 (9th Cir. 1977); Juneau Square Corp. v. First Wis. Nat'l Bank, 445 F. Supp. 965, 969-70 (E.D. Wis. 1978); Page, *supra*, at 497.

33. 429 U.S. at 479-80. More than $100,000,000 or over 25% of Brunswick's accounts were more than 90 days in arrears. These acquisitions made the bowling equipment manufacturer the largest bowling center operator in the country. *Id.*

34. *See id.* at 480. To establish a section 7 violation, the smaller bowling center operators sought to prove that the larger deep pocket competitor had the capacity to engage in anticompetitive behavior by driving them out of business. *See id.* at 481-82.

35. *See id.* at 481.

36. *Id.* at 488 (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

37. *Brunswick*, 429 U.S. at 486.

38. *See id.* at 489. The Court stated:

> [Plaintiffs] must prove more than injury causally linked to an illegal presence in the market [on account of a section 7 violation]. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. (emphasis in original).

39. *See id.* at 488.

40. *See id.* at 487.

41. *See* Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 n.4 (2d Cir. 1981); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980);

requires a showing of injury in fact,[42] section 16 requires only a threat of injury.[43] Moreover, because plaintiffs under section 16 are seeking equitable relief rather than treble damages and because no complex issues of damages or speculative or duplicative recoveries arise,[44] most courts have not questioned standing under section 16.[45] Thus, in the takeover context some courts have not raised the issue of target standing as it related to the existence of antitrust injury.[46] Rather, these courts granted injunctive relief where anticompetitive effects under section 7 were threatened or present, and where the target's injuries were found to be irreparable.[47] Other courts, however, denied the plaintiff standing when the quantum of proof did not meet the *Brunswick* antitrust injury requirement previously applicable only to section 4 actions.[48]

Recently, the Supreme Court in *Cargill, Inc. v. Monfort of Colorado,*

Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 288 (3d Cir. 1978); Hawaii v. Standard Oil Co., 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

42. 15 U.S.C. § 15 (1982).

43. 15 U.S.C. § 26 (1982). *See* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 489 (1986); Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130 (1969); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 591 (3d Cir. 1979).

44. *See* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 590-91 (3d Cir. 1979) (section 16 claim for injunctive relief "does not present the countervailing considerations — such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses . . . . [A] person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages."). *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 261-62 (1972) (a defendant potentially is liable for numerous individual and cumulative damages claims, but "one injunction is as effective as 100, and, concomitantly . . . 100 injunctions are no more effective than one").

45. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 261-62 (1972); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 590-91 (3d Cir. 1979).

46. *See infra* note 47.

47. *See* Grumman Corp. v. LTV Corp., 665 F.2d 10, 15-16 (2d Cir. 1981); Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 320 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). These cases did not explicitly discuss the *Brunswick* antitrust injury requirement. They seem, however, only to address the first part of the *Brunswick* test, that is, whether the injury was of the type the antitrust laws were intended to redress. The cases fail to address the second part of the test which requires "[injury] that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. For example, in Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1255-56 (N.D. Ohio 1977), the court addressed the standing issue, without discussing the holding in *Brunswick*. The defendant argued that plaintiff lacked standing because it failed to prove injury arising out of a violation of the antitrust laws under section 7 — the second requirement of the *Brunswick* test. The court, however, stated that this argument "confuses standing with an element of an antitrust claim." *Id.* at 1255. The court held that there is standing if the plaintiff alleges injury in fact, and it appears the interests sought to be protected by plaintiff were arguably within the zone of interests to be protected. *See id.*; *supra* note 23 and accompanying text. *See also* Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 250 n.3 (C.D. Cal. 1984).

48. *See* Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1186-87 (10th Cir. 1983); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980); Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 248-50 (C.D. Cal. 1984).

Inc.[49] settled the issue by definitively extending the antitrust injury requirement to standing determinations for section 16 injunction actions.[50] In *Cargill*, a competitor sought to enjoin the proposed merger between two of its larger rivals by alleging a section 7 violation.[51] Applying the rule of *Brunswick*, the Court held that a private plaintiff seeking injunctive relief under section 16 must show a threat of antitrust injury: injury of the type the antitrust laws were designed to prevent and injury that flows from that which makes the defendants' acts unlawful.[52] Although acknowledging the differences between sections 4 and 16, the Court found it anomalous to permit a plaintiff to seek an injunction for threatened injury when it would not be entitled to damages had the injury actually occurred.[53] Therefore, a section 16 injunction may be sought only for a threat of those injuries cognizable under section 4.[54] The Court did note, however, that while both remedial provisions are complementary and provide for private enforcement of the antitrust laws,[55] standing analysis for a section 16 injunction will not always be identical to a section 4 standing determination.[56] The Court established antitrust injury as a threshold requirement for section 16,[57] and noted that, because standing analysis under section 16 raises no threat of multiple lawsuits or duplicate recoveries, courts need consider only those other standing factors identified in *Associated General Contractors* that are relevant to a section 16 standing determination.[58]

The Court considered two possible theories of threatened antitrust injury to the plaintiff competitor. The first theory is the threat of lost profits resulting from the possibility that after the merger the more dominant firm would manipulate prices at the expense of smaller competitors who

49. 107 S. Ct. 484 (1986).

50. *See id.* at 490-91.

51. *See id.* at 487-88. The Justice Department, after reviewing the proposed acquisition under the premerger notification provisions of the Hart-Scott-Rodino Act (15 U.S.C. § 18a (Supp. 1986)), had elected not to contest the merger.

52. *See Cargill*, 107 S. Ct. at 491 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

53. *See id.* at 489-91.

54. *See id.* at 490.

55. *See id.* at 490-91.

56. *See id.* at 490 n.6.

57. *See id.* at 488-91. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-46 (1983); *see supra* notes 25-31 and accompanying text. Although the factors stressed by the Court in *Associated General Contractors* gave the lower courts broad latitude to scrutinize the plaintiff's standing eligibility, it did not state explicitly the weight to be given each factor. *See* Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 n.3 (9th Cir. 1985) ("[T]he Supreme Court did not explicitly state that a plaintiff must satisfy all of the *Associated General Contractors* factors or, indeed, any particular factor . . . ."). The Court in *Cargill* resolved this ambiguity to some extent by establishing the primacy of antitrust injury as a factor in an antitrust standing determination.

58. *Cargill*, 107 S. Ct. at 490 n.6. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 535-46 (1983); *see supra* notes 25-31 and accompanying text.

would be caught in a profit squeeze.[59] Relying on its holding in *Brunswick*, the Court reiterated that the antitrust laws do not protect small businesses from the loss of profits due to vigorous competition, but only from profit losses arising from practices forbidden by the antitrust laws.[60]

The second theory is the threat that smaller competitors would be driven out of business by the possibility that the post-merger firm would engage in predatory pricing practices.[61] The Court found predatory pricing harmful to "both competitors *and* competition"[62] since its purpose is the elimination of competition.[63] Thus predatory pricing is " 'inimical to the purposes of [the antitrust] laws,' and one capable of inflicting antitrust injury."[64] The Court emphasized, however, that the plaintiff had neither alleged nor proved a threat of predatory pricing or that such a practice in fact would occur after the merger.[65] Because the plaintiff failed to make a proper showing of a threat of antitrust injury, standing to challenge the merger under section 16 was denied.[66]

In addition, the Court in *Cargill* expressly declined to embrace a government proposal denying competitors standing to challenge proposed mergers in all cases.[67] In refusing to effectively adopt a *per se* rule,[68] the

59. *Cargill*, 107 S. Ct. at 491-93.

60. *See id.* at 492 ("[C]ompetition for increased market share, is not activity forbidden by the antitrust laws . . . for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.' ") (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984)).

61. *See id.* at 493-94 ("Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.").

62. *Id.* at 493 (emphasis in original).

63. *See id.* at 493 (while "price cutting [is] aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition").

64. *Id.* at 493 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

65. *See id.* at 493-94.

66. *See id.* at 495. Standing implicates the subject matter jurisdiction of the court. Thus, failure to make a threshold showing of standing requires dismissal. *See* Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 250 n.5 (C.D. Cal. 1984). Because plaintiffs failed to make the required section 16 showing of antitrust injury, the Court "need not reach the question of whether the proposed merger violates § 7." *Cargill*, 107 S. Ct. at 495. *But see* Tasty Baking Co. v. Ralston Purina, Inc., 52 Antitrust & Trade Reg. Rep. (BNA) 284 (E.D. Pa. Jan. 21, 1987), where the court found the plaintiff did have standing on a proper allegation of antitrust injury.

67. *See Cargill*, 107 S. Ct. at 495. The Court had been asked to address the broader issue of whether competitors should *ever* be granted standing. *See* Brief for the United States and the FTC as Amici Curiae Supporting Petitions at 10, Cargill, Inc. v. Montfort of Colorado, Inc., 107 S. Ct. 484 (1986) (No. 85-473). There were four parts to the government's argument:

> (1) predatory pricing schemes are rarely tried or successful; (2) competitors' motives in complaining about rivals' mergers are suspicious and create a presumption that a merger is procompetitive; (3) allowing competitor suits to block mergers would lead to delay thereby frustrating efficiency generating mergers; and (4) pre-merger competitor suits for actual predatory pricing injury are sufficient means for enforcing § 7.

Court stated that standing should not be denied to a party alleging threatened injuries caused by anticompetitive behavior, merely because such injuries rarely occur.[69]

In conclusion, by establishing antitrust injury as an element of a section 16 standing determination, the Court clearly has circumscribed the availability of an injunction for an alleged violation of the antitrust laws. Further, the plaintiff's failure to allege a proper claim of antitrust injury in the complaint highlights that the specificity with which the underlying violation and resultant harm are stated is central to the determination of the plaintiff's standing. Finally, the Court's refusal to adopt an absolute bar to standing appears to reaffirm the need for a fact sensitive approach to standing analysis in each case as mandated in *Associated General Contractors*.[70]

II. Target Standing

Section 7 of the Clayton Act was designed to prohibit the acquisition by one corporation of all or part of the stock of another corporation if the acquisition would substantially lessen competition.[71] To establish a violation of the Act, the target company must prove that, given the acquiror's actions, a reasonable probability exists that the takeover will have anticompetitive effects in the relevant market.[72] For purposes of standing analysis, however, the courts generally assume that the plaintiff can actually prove a substantive violation of the antitrust laws.[73] Thus,

Stoll & Goldfein, "Where's The Beef?", N.Y.L.J., Jan. 21, 1987, at 1, col. 1.

68. *See Cargill*, 107 S. Ct. at 495 ("[T]he United States invites the Court to adopt in effect a *per se* rule 'denying competitors standing to challenge acquisitions on the basis of predatory pricing theories.' We decline the invitation.") (citation omitted).

69. *Id.*

70. 459 U.S. 519, 536 & n.33 (1983); *see supra* note 31 and accompanying text.

71. 15 U.S.C. § 18 (1982).

72. The section 7 standard for illegality of an acquisition is whether the effect of the acquisition "may be" to lessen competition substantially. *Id.* The courts have consistently interpreted this phrase to mean that a reasonable probability, and not a mere possibility of a reduction in competition, must be proven in order to establish a section 7 violation. *See, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602, 622-23 (1974); Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962) (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 6); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-57 (1922).

73. *See* Tasty Baking Co. v. Ralston Purina, Inc., 52 Antitrust & Trade Reg. Rep. (BNA) 284, 285 (E.D. Pa. Jan. 21, 1987) ("In all cases . . . plaintiffs must prove that they face threatened antitrust injury, but evaluation of this proof is best separated from the standing analysis, and deferred for consideration as part of the merits of the case and as a factor determining the adequacy of plaintiffs' remedy at law."). *Accord* Monfort of Colorado, Inc. v. Cargill, Inc., 761 F.2d 570, 574 n.2 (10th Cir. 1985), *rev'd on other grounds*, 107 S. Ct. 484 (1986). *See* Berger & Bernstein, *supra* note 17, at 859 ("[T]he assumption that the plaintiff is within the substantive protection of the antitrust laws for purposes of standing does not determine whether he is entitled to antitrust protection on the merits; that question is decided only after appropriate development of the legal and factual bases of the claim . . . ."); R. Taylor, *Antitrust Standing: Its Growing—or More Accurately Its Shrinking—Dimensions*, 55 Antitrust L.J. 515, 518 (1986) (determination of standing not

the requirement that the target corporation allege antitrust injury flowing from the defendant's anticompetitive acts lies at the core of the standing issue. The basic argument advanced for denying standing to a target corporation to resist a takeover is two-fold. First, it is asserted that the target corporation will always benefit from a takeover and, therefore, suffers no harm.[74] Second, it is asserted that target management is a suspect plaintiff whose interests in bringing suit are not necessarily or even presumptively consistent with those of the company or its shareholders.[75]

A. *The Target Corporation and Antitrust Injury*

A target corporation's standing to sue as an appropriate section 16 plaintiff must be predicated on a showing that the section 7 violation is the proximate cause of its injury, and that the injury suffered is antitrust injury.[76] The target plaintiff must establish a precise causal nexus between the alleged antitrust violation and the alleged antitrust injury to itself or standing will be denied.[77]

Targets of hostile tender offers have routinely raised antitrust violations as defensive tactics, citing a litany of injuries that typically include impairment of employee recruitment, morale, and performance; serious

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dependent on whether "plaintiff can actually prove a substantive violation of the antitrust laws").

74. *See* Carter Hawley Hale Stores Inc. v. Limited, Inc., 587 F. Supp. 246, 249 (C.D. Cal. 1984); 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b, at 248; Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155, 1161 (1982) [hereinafter Easterbrook & Fischel I].

75. 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b, at 248; Easterbrook & Fischel I, *supra* note 74, at 1166-68.

76. Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), discusses the standing prerequisite under both sections 4 and 16 of the Clayton Act. In *Reibert*, the court identified the standing test as follows:

> The aggrieved party must satisfy the 'by reason of' and/or 'by' requirements found in Sections 4 and 16 of the Clayton Act, respectively. This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws.

Id. at 731. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see supra* notes 32-40 and accompanying text. *See also* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980) ("Standing under section 16 is dependent on a showing of threatened loss or injury from the alleged antitrust violation. Proximity between the plaintiff's injury and the antitrust violation, albeit necessary to a lesser degree, is still required.") (citation omitted); City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (9th Cir. 1979) (standing under section 16 requires that plaintiff show threatened harm cognizable in equity proximately resulting from alleged antitrust violation), *cert. denied*, 445 U.S. 961 (1980).

77. *See Brunswick*, 429 U.S. 477, 488-89 (1977); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). *See also* Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 248 (C.D. Cal. 1984) (antitrust standing requires injury "arising out of violation of *those* laws") (emphasis in original); *see supra* notes 32-40.

dislocations of management; loss of trade secrets; and disruption and uncertainty in the business affairs of the corporation.[78] These claims do not constitute antitrust injury, however, because they do not result from the possibility of substantially lessened competition. Rather, they are concomitants of any corporate reorganization whether effected by a change in corporate control or merger, legal or illegal.[79] The same harms exist regardless of the anticompetitive effects of the acquisition, and thus, by themselves, do not constitute antitrust injury to the target company.[80] To hold otherwise confuses injury to competitors with injury to competition.[81] Only when the threatened injuries arise out of illegal conduct aimed at the elimination of competition can the target assert antitrust injury.[82] For example, in an attempted horizontal takeover,[83] a

78. *See* Grumman Corp. v. LTV Corp., 665 F.2d 10, 15-16 (2d Cir. 1981) (disruption of target's business and access to confidential information); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 869 (2d Cir.) (dislocation of employees, impairment of long-range planning and hiring, and "unscrambling" of assets), *cert. denied*, 419 U.S. 883 (1974); Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 515-16 (3d Cir. 1969) (negative impact on employee recruitment and performance, access to trade secrets, and impairment of target's "business operations with customers withholding orders due to uncertainty of its future"), *cert. denied*, 396 U.S. 1009 (1970); Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 249 (C.D. Cal. 1984) (termination of head-to-head competition, disruption and uncertainty in the business, and disclosure of trade secrets); Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 320-21 (N.D. Ohio) (impairment of future business, disclosure of confidential information, and employee termination), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

79. In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Court rejected plaintiffs' argument that in order to pursue a section 7 claim, it need only demonstrate injury "causally related" to an illegal presence in the market and stated:

> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned. This holding would make . . . recovery entirely fortuitous, and would authorize [sanctions] for losses which are of no concern to the antitrust laws.

Id. at 487.

80. *See* Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1186-87 (10th Cir. 1983) (harms asserted by stockholder-director and target corporation attributable to change of control of the corporation and not the lessening of competition); A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980) ("If the sale of assets [at an inadequate price] had an effect on competition, it would have occurred whether or not [the corporation] was harmed."); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.) (termination of employment occurred as the "natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency" and not from decreased competition), *cert. denied*, 411 U.S. 938 (1973); Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984) (injuries alleged "would occur in the event of a merger, whether or not the merger would substantially lessen competition").

81. *See* Page, *supra* note 32, at 470.

82. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 492-93 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973);

rival may seek to acquire effective control of a competitor for the purpose of eliminating it in the relevant market.[84] Where it can be shown that customer uncertainty[85] concerning the target's viability in the marketplace is a factor that would lessen competition substantially, causing the target to lose its market share and thus suffer a substantial decline in revenues, antitrust injury of the type the antitrust laws were designed to protect may be found.[86] The loss of the target's competitive edge in the marketplace reflects the anticompetitive effect of the violation and harms both "competitors *and* competition."[87]

Nonetheless, it has been stated that even if a merger has anticompetitive effects, the target company does not have standing to raise the section 7 violation because it becomes a part of the very entity that will enjoy a superior economic advantage.[88] Under the "deep pocket" or economic benefit theory, the acquired target, by virtue of its affiliation with a

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GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-59 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973). As the target area cases suggest, a defendant is not liable for all injuries flowing from his violation, only for those anticompetitive in nature. *See supra* note 22; *see also* Carlson Cos. v. Sperry & Hutchinson Co., 507 F.2d 959, 962 (8th Cir. 1974) ("[A]ny acquisition is likely to create some injury. But it is only anti-competitive injury which § 7 was intended to eliminate . . . .") (footnote omitted).

83. A horizontal merger has two basic consequences: the postmerger market has one less firm; and the postmerger firm has a larger share of the market than the original premerger firms. *See* H. Hovenkamp, *supra* note 1, § 11.1, at 293. Horizontal mergers eliminate competition between the parties, and if unchecked, may facilitate monopolistic or collusive pricing. *See id.* § 14.5, at 373.

84. *See* Tasty Baking Co. v. Ralston Purina, Inc., 52 Antitrust & Trade Reg. Rep. (BNA) 284, 293 (E.D. Pa. Jan. 21, 1987) (competitor's specific illegal intent was to eliminate competition through acquisition program and then increase price in a controlled market).

85. Concern over the target company's ability to deliver the product either because it might be in financial difficulty or cease to exist in the future, may deter customers from continuing their business dealings with the company, presumably to the competitor's advantage. Loss of customer business may be relevant particularly where the target company derives its revenues from a product that must be made to specification. Customers presumably would be reluctant to order in advance from a company that might not exist when the time came to deliver on the contract. *See* Brief for Appellee at 40, H. H. Robertson Co. v. Guardian Indus. Corp., Nos. 85-3232 and 85-3233 (3d Cir. Jan. 9, 1986), *vacated for hearing en banc*, Nos. 85-3232 and 85-3233 (3d Cir. Feb. 27, 1986).

86. *See Cargill*, 107 S. Ct. at 492 ("*Brunswick* holds that the antitrust laws do not require the courts to protect . . . businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."). An operating division of the target company could be the competition that the rival seeks to eliminate. Impairment of the asset base or lost revenues may substantially impact the rival acquiror's investment both as to dividends and capital value. If by virtue of its share holdings, the competitor can gain representation directly or indirectly on the board of directors, it may wield sufficient power to force the abandonment or divestiture of the division on the grounds that the division is on the borderline of profitability and seems likely to result in an investment loss. *See* 5 P. Areeda & D. Turner, Antitrust Law ¶ 1203c, at 318-20 (1980). *See infra* notes 93-100 and accompanying text for discussion of partial acquisitions.

87. *Cargill*, 107 S. Ct. at 493 (emphasis in original).

88. *See* Carter Hawley Hale Stores, Inc. v. Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984).

rich parent, presumably will be in a better position with the takeover than without it, and therefore will suffer no harm.[89] According to this view, a target corporation does not have standing to bring an antitrust action because it *a fortiori* always benefits from the takeover[90] and, thus, does not suffer antitrust injury. In fact, it suffers no injury at all. This theory, however, paints with too broad a brush. It requires the courts to effectively adopt a *per se* rule, expressly rejected by the Supreme Court in *Cargill*.[91] The economic benefit theory has relevance in the merger context only when the circumstances of the case warrant it and only after a careful analysis of the facts presented.[92]

Further, important distinctions must be made between full and partial acquisitions.[93] As a general rule, legal control of a corporation is obtained by acquiring fifty percent or more of the corporation's outstanding stock.[94] In reality, however, the power to control a target corporation effectively may exist with a far lesser percentage of ownership.[95]

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89. *See* 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b, at 248 (1978); Sidak, *Antitrust Preliminary Injunctions in Hostile Tender Offers*, 30 U. Kan. L. Rev. 492, 505 (1982).

90. 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b, at 248 ("Every theory for condemning a . . . merger implies a benefit for the acquired firm."); Easterbrook & Fischel I, *supra* note 74, at 1161 ("The target is a beneficiary, not a victim, of any antitrust injury.").

91. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 495 (1986). *See supra* notes 67-69 and accompanying text.

92. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, Inc., 459 U.S. 519, 536 n.33 (1983); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976); H. Hovenkamp, *supra* note 1, § 11.9, at 317 (1985).

93. *See, e.g.*, Gearhart Indus. v. Smith Int'l, Inc., 592 F. Supp. 203, 211 n.1 (N.D. Tex.) (distinction made between target that ceases to exist after a takeover as the result of a merger and 56% stock acquisition where target becomes subsidiary of the acquiror), *modified on other grounds*, 741 F.2d 707 (5th Cir. 1984); 5 P. Areeda & D. Turner, *supra* note 86, ¶ 1203, at 316-24.

94. *See* H. Hovenkamp, *supra* note 1, § 11.9, at 316.

95. The Supreme Court has assumed that an acquiror gains control when the percentage of shares held is "substantial." In United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), for example, the Court analyzed a section 7 violation of the Clayton Act on the assumption that du Pont had substantial influence over General Motors' buying decisions even though only 23% of General Motors' shares was owned by du Pont. *Id.* at 588. *See also* United States v. General Dynamics Corp., 415 U.S. 486, 489 (1974) (the acquiring firm owned 34% of the acquired company's shares but the parties agreed there was "effective control"). The ability to exercise effective control of the target corporation may be achieved in several ways, such as representation on the board of directors, participation in the policymaking process of the company, or by fostering technological dependency. *See, e.g.*, F. & M. Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 818 (2d Cir. 1979) (per curiam) (29% interest likely to give acquiror the power to appoint directors on target corporation's board of directors to gain "access to the confidential trade information of one of its leading competitors"); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 693-94 (D. Del. 1962) (19.7% interest sufficient to oust target's board of directors); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, 181 (E.D. Mich.) ("Every decision of a . . . director [controlled by the acquiror] will have an immediate or remote effect upon the competitive relationship with [the target company]."), *aff'd per curiam*, 280 F.2d 747 (6th Cir. 1960); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 393-94 (S.D.N.Y. 1957) (23% stock ac-

Although there are no bright line tests to determine "legal control," ownership of fifteen to twenty percent of the target's voting stock can give the acquiror significant influence over the operating and financial decisions of the company.[96] Under such circumstances, a partial acquisition at best will have occurred rather than a complete takeover.[97] The target remains a competitor in the relevant market, albeit subject to the acquiror's control, and its management and holdings are not incorporated into the larger economic entity. Further, because the companies are not merged, there will be no opportunity to realize procompetitive efficiencies.[98] Consequently, in the partial acquisition context, it is possible that the target corporation may be seriously weakened as an effective competitor and may suffer antitrust injury without realizing any economic benefits flowing to it.

Whether a target corporation has suffered antitrust harm, therefore, is a factual determination that can only be made after a careful assessment of the "particular factual matrix"[99] of the case.[100]

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quisition aimed at getting representation on target's board of directors that "would give the nominee of [the acquiror] an opportunity to be thoroughly acquainted with the business and plans of the [target] company and thereby to limit the effectiveness of the competition between them"), *aff'd*, 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 313-14 (D. Conn.) (if acquiror with 24% stock interest is allowed representation on target's board of directors, it can obtain confidential information which will "materially impair [the company's] competitive position"), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

96. *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 855 (2d Cir.) (19% of total outstanding stock with intent to control), *cert. denied*, 419 U.S. 883 (1974); Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 695 (2d Cir. 1973) (19% stock interest sufficient basis for control); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 693-94 (D. Del. 1962) (working control can be obtained with 19.7% of target company's stock); H. Hovenkamp, *supra* note 1, § 11.9, at 316-17.

97. Although a party's stock holdings may not permit complete control of the target company, a partial acquisition, as the first step toward control, is properly analyzed as a merger. For judicial scrutiny of antitrust violations and partial stock acquisitions analyzed as if a merger had occurred, see Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc., 414 F.2d 506, 508-09 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); United Nuclear Corp. v. Combustion Eng'g, Inc., 302 F. Supp. 539, 540 (E.D. Pa. 1969); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 395 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); 5 P. Areeda & D. Turner, *supra* note 86, ¶ 1203b, at 317. Even where control is neither acquired nor contemplated, however, section 7 should confer jurisdiction to consider the anticompetitive effects of the partial acquisition. *See* Denver & Rio Grande Western R.R. v. United States, 387 U.S. 485, 501 (1967) ("A company need not acquire control of another company in order to violate the Clayton Act."); *see also* 5 P. Areeda & D. Turner, *supra* note 86, ¶ 1203b, at 317.

98. *See* H. Hovenkamp, *supra* note 1, § 11.9, at 317.

99. Cromar Co. v. Nuclear Materials and Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976).

100. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 536 & n.33 (1983) (weigh the facts of each case); *see also* Cromar Co. v. Nuclear Materials and Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976) (other factors to be considered in analyzing the facts include: the nature of the industry in which there exists an alleged antitrust violation, the relationship between the plaintiff and the violator, and the effect of the antitrust violation on the plaintiff).

B. *The Role of Target Management*

A corollary issue in takeover contests focuses on whether the target's management is the proper party to protect those interests the antitrust laws were designed to serve. Commentators have suggested that since management's incentives in bringing the action do not coincide so much with protecting competition or their shareholders as with protecting their own interests, the target company should be absolutely barred from contesting a tender offer.[101] The "fox guarding the henhouse"[102] argument states that target managers use litigation as a defensive maneuver to secure their own positions or to gain bargaining leverage in the bidding process and that antitrust interests are rarely involved.[103] Therefore, it is argued that granting antitrust standing to seek a section 16 injunction gives a powerful weapon to target management whose private interests make the company a suspect plaintiff.[104]

Undoubtedly, self-interest does motivate some target managers to resist a takeover.[105] Further, invocation of the protection of the Clayton Act as a routine tactic to raise the ante in takeover situations reflects a clear misuse of the antitrust laws for purposes they were not meant to

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101. *See* 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b, at 248; Easterbrook & Fischel I, *supra* note 74, at 1166-68; Easterbrook & Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1192-94 (1981) [hereinafter Easterbrook & Fischel II].

102. Deputy Solicitor General Louis R. Cohen presented the government's view in oral argument before the Supreme Court in *Cargill* and argued that customers and consumers were the only persons who have standing to challenge a horizontal acquisition. He saw a "fox guarding the henhouse problem" when a competitor sought to block a merger of two of its rivals in a section 7 action explaining that a competitor would oppose mergers that increase competition and favor those that do not increase competition. Justice Scalia agreed with the statement in theory but did not believe the statute allowed such a distinction. *See* Competitor Standing in Merger Cases is Focus of Supreme Court Argument, 51 Antitrust & Trade Reg. Rep. (BNA) 514 (Oct. 9, 1986). *See also* Brief for the United States and the FTC as Amicus Curiae at 10, Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484 (1986) (No. 85-473), *supra* note 67. The same argument applies, by analogy, in the target takeover context. The Supreme Court did not address the issue of motive in *Cargill*.

103. *See* 2 P. Areeda & D. Turner, *supra* note 19, ¶ 346b at 248; Easterbrook & Fischel I, *supra* note 74, at 1166-68; Easterbrook & Fischel II, *supra* note 101, at 1161-62; Sidak, *supra* note 89, at 492-93.

104. *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 854 (2d Cir.) ("Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition . . . ."), *cert. denied*, 419 U.S. 883 (1974). *See also* Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 510-11 n.8 (3d Cir. 1969) (granting target company preliminary injunction may have "final" effect as bidder will abandon its takeover plans rather than await outcome of lengthy and costly litigation), *cert. denied*, 396 U.S. 1009 (1970). It must be noted, however, that an acquiror who has control of a target company may be able to terminate the litigation by virtue of that control without a determination of the legal issues thereby entrenching its position. *See* R. Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L.J. 587, 589-90 (1973).

105. *See* Oesterle, *Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis*, 71 Cornell L. Rev. 53, 55 (1985).

serve. By its holding in *Cargill* that the private plaintiff must plead and prove a threat of antitrust injury,[106] however, the Supreme Court has effectively limited the use of the antitrust preliminary injunction as a defensive tactic to the target company. The question turns on antitrust injury flowing to the target company from the purposefully anticompetitive behavior and not on management's motives, which fade into irrelevance. The proper focus, therefore, should be not on target management's motivations for bringing the action, but upon the adequacy of its showing that the proposed takeover will violate section 7 and on appropriate proof of antitrust injury.[107] Adopting an absolute bar denying a target corporation standing to contest a threatened takeover may arbitrarily preclude a potential plaintiff who has the strongest incentive to prevent anticompetitive behavior flowing from a section 7 violation. Standing determinations, therefore, can only be made after careful scrutiny of the facts of each case.

By limiting too narrowly the class of plaintiffs, the courts weaken the enforcement remedy Congress created for ensuring vigorous competition in the business sector.[108] The target corporation is entitled to fend off a suitor consistent with shareholder interests and to invoke the protection of the antitrust laws when competition is purposefully threatened. Antitrust injury is a rigorous test requiring a showing of harm not only to the target competitor but to competition as well,[109] and thus implicates the public interest in preserving strong competition.[110] Regardless of man-

106. *See* Cargill, Inc. v. Monfort of Colorado, 107 S. Ct. 484, 495 (1986).

107. *See* Grumman Corp. v. LTV Corp., 665 F.2d 10, 11 (2d Cir. 1981); *see also* Berger & Bernstein, *supra* note 17, at 859. The optimal solution appears to be an order allowing acquisition of the target's stock but preventing exercise of the voting rights, that is, "sterilizing" the shares. Two objectives would be accomplished: (1) the target would remain a viable competitor pending a resolution of the litigation; and (2) the acquiror would be prevented from exercising immediate control. *See* Schneiderman, *supra* note 104, at 601-03.

108. *See* Cromar Co. v. Nuclear Materials and Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976). *See also* Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130-31 (1969) (purpose of giving private parties treble damages and injunction remedy not merely to provide for private relief but to serve "the high purpose of enforcing the antitrust laws"); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."). In discussing standing to sue under section 4, one commentator notes that "[t]he concept of antitrust injury defines the kinds of harms that should be compensable . . . . The function of antitrust standing should be complementary: to limit recovery to the . . . plaintiffs who are in the best position to impose the deterrent penalty on the defendant."). Page, *supra* note 32, at 500. This statement is also applicable to injunctive relief under section 16 as a complementary remedy.

109. *See supra* notes 49-66 and accompanying text.

110. *See* Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 517 (3d Cir. 1969) (court is duty bound to consider all issues properly raised where takeover has "far-reaching economic consequences not only to the immediate parties but to the public as well"), *cert. denied*, 396 U.S. 1009 (1970). *See also* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484, 498-99 (1986) (Stevens & White, JJ., dissenting) (Congress made a special provision in the Clayton Act for effective enforcement by private attorneys general

agement's motivation, the target company serves as a "private attorney general,"[111] thereby protecting this public interest.[112] When a takeover threatens the competitive process in a relevant market, the courts have a clear duty to weigh carefully the claim for a preliminary injunction by sifting through the facts, "even though the true concerns of the 'private attorney general' may be more 'private' than 'attorney general.' "[113] A rule of standing for section 16 that requires proximity between the plaintiff's antitrust injury and the antitrust violation ensures that the plaintiff "adequately represents the interests of the 'victims' of the antitrust violation."[114]

CONCLUSION

The antitrust laws were not enacted by Congress to be used as an automatic strategy to resist a threatened takeover or as leverage in the negotiating process for reasons wholly unrelated to antitrust interests. By requiring that the private plaintiff plead and prove antitrust injury in seeking an injunction under section 16 of the Clayton Act, the Supreme Court in *Cargill* preserves the integrity of the antitrust laws in serving its ultimate purpose, that of promoting competition in a dynamic economy and facilitating consumer welfare. When a target company is threatened by an unwanted takeover that may violate section 7, the fact that it is characterized as a "takeover target" should not necessarily prescribe the outcome of standing analysis. Rather, a determination of whether the target litigant has been harmed must be made in light of the circumstances of each case. *Associated General Contractors* mandates this approach requiring the courts to strike a balance among the relevant standing factors in addition to antitrust injury. The inquiry should be fact-sensitive. Only by carefully analyzing the facts of a specific case can a court determine whether the target corporation benefits from the takeover or suffers an antitrust injury and should be granted standing to seek an injunction under section 16 of the Clayton Act.

Matina Kesaris

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and "[i]t would be a strange antitrust statute indeed which defined a violation enforceable by no private party.").

111. Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 542 (1983).

112. *Id.* The Court stressed the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" as private attorneys general.

113. Grumman Corp. v. LTV Corp., 665 F.2d 10, 11 (2d Cir. 1981).

114. Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980).