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### Re-opening the Door to Antitrust Standing: R.C. Bigelow, Inc. v. Unilever N.V.

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# RE-OPENING THE DOOR TO ANTITRUST STANDING: *R.C. BIGELOW, INC. v.* *UNILEVER N.V.*

In order to protect free enterprise from anticompetitive conduct,<sup>1</sup> a number of statutory prohibitions and remedies have been developed and codified in the antitrust laws.<sup>2</sup> Among the most important of these enactments is section 7 of the Clayton Act<sup>3</sup> (the "Act"), which prohibits any merger or acquisition<sup>4</sup> where the effect

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<sup>1</sup> See T. BRUNNER, T. KRATTENMAKER, R. SKITOL, & A. WEBSTER, *MERGERS IN THE NEW ANTITRUST ERA 6-7* (1985) [hereinafter *ANTITRUST ERA*]. When rivals "compete perfectly" goods are produced at maximum efficiency, with the least use of resources and at the least cost, so that the goods will be sold at the lowest price. *Id.* at 6. However, absent competition, there is no need for a firm to concern itself with maximum efficiency; instead it may maximize profits by selling at prices well above those it could charge in the presence of competitors. *Id.* at 7. The result is that some consumers may not have the means to purchase the higher priced goods for the very reason that the goods were not produced at maximum efficiency. *Id.* Thus, by protecting free enterprise and competition, the consumer is protected as well. *Id.*

<sup>2</sup> Specifically, the antitrust laws include the following:

1. The Sherman Act, 15 U.S.C. §§ 1-2 (1982), whose purpose is to promote unrestrained competition so as to result in optimal resource allocation and, therefore, the lowest prices, see T. VAKERICS, *ANTITRUST BASICS* § 1.01, at 1-1 to 1-2 (1985);

2. The Clayton Act, 15 U.S.C. §§ 12-27 (1982 & Supp. V 1987), whose purpose is to supplement the general provisions of the Sherman Act by addressing specific problems it overlooked, such as mergers and acquisitions, interlocking directorates, and exclusive dealing arrangements, see T. VAKERICS, *supra*, § 1.01, at 1-3, § 1.02[2], at 1-6 to 1-7;

3. The Robinson-Patman Act, 15 U.S.C. §§ 13(a)-(f) (1982), embodied in § 2 of the Clayton Act, prohibiting certain instances of price discrimination, see T. VAKERICS, *supra*, § 1.02, at 1-7 to 1-8; and

4. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1982 & Supp. 1989), which strengthens the authority of the federal government to proceed against a broad range of potentially anticompetitive practices, see T. VAKERICS, *supra*, § 1.02[4], at 1-9.

The antitrust laws focus primarily on the conduct of market participants rather than on the market structure per se, *id.* § 1.01, at 1-4, striking at conduct such as collusion, unreasonable refusal to associate with competitors, distribution restriction, resale price fixing, monopolization, and participation in certain mergers and acquisitions. See B. KELLMAN, *PRIVATE ANTITRUST LITIGATION* 36, 66, 92-93, 107, 161, 189 (1985).

<sup>3</sup> 15 U.S.C. § 18 (1982 & Supp. V 1987).

<sup>4</sup> See Lewyn & Mann, *Ten Years Under the New Section 7 of the Clayton Act: A Lawyer's Practical Approach to the Case Law*, 36 N.Y.U. L. REV. 1067, 1073-1074 (1961). Mergers can be divided into three classes: horizontal, vertical, or conglomerate. *Id.* Horizontal mergers are mergers between manufacturers of the same product. *Id.* They disadvantage consumers in that they eliminate one alternative source of supply. *Id.* Vertical mergers involve the merging of a manufacturer with its supplier. *Id.* Not only do competing suppliers

“may be substantially to lessen competition, or to tend to create a monopoly.”<sup>5</sup> Section 4 of the Act provides that a party aggrieved

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lose a potential customer, but, alternatively, competing manufacturers may find that their supply source has been eliminated or that the merging manufacturer now has an advantage arising out of operating economies. *Id.* In a conglomerate merger, two firms at different functional levels in different product or geographic markets join together. *Id.* The resulting firm's increased resources may create a significant competitive advantage. *See id.*

Antitrust laws governing mergers provide protection only from anticompetitive behavior, not from increased or vigorous competition. *See Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 488 (1977); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (antitrust laws protect competition, not competitors). Therefore, the antitrust laws provide no relief where a firm drives competitors out of business or monopolizes a particular market merely by exercising superior skill. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). Inherent in any merger is the potential for economic adjustments adversely affecting competition. *See Brunswick*, 429 U.S. at 487. For instance, mergers may act to decrease consumer choice without increasing industry capacity, jobs, or output. *Brown Shoe*, 370 U.S. at 345 n.72. Nevertheless, mergers can serve important economic functions, such as penalizing inefficient management, aiding the efficient flow of investment capital and maximizing resource allocation. *See United States Dep't of Justice Merger Guidelines*, 49 Fed. Reg. 26,823, 26,827 (1984) [hereinafter *1984 Merger Guidelines*].

<sup>5</sup> 15 U.S.C. § 18 (1982 & Supp. V 1987). Section 7 reads in pertinent part: “No person engaged in commerce shall . . . acquire, directly or indirectly, the whole or any part of the stock or . . . assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” *Id.*

Monopoly power is said to exist where a product is controlled by a single interest and there are no reasonable substitutes available for the product. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956). However, merely possessing monopoly power does not “ipso facto condemn a market participant.” *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Before the Clayton Act was passed in 1914, mergers had been challenged by the federal government as violative of the Sherman Act, but without much success. ANTITRUST ERA, *supra* note 1, at 3. The difficulty lay in the fact that the Sherman Act was aimed at the realization, as opposed to the expectation, of monopoly. *United States v. United States Steel Corp.*, 251 U.S. 417, 444 (1920). Section 7 of the Clayton Act was specifically designed to arrest corporate mergers while the threat to competition was “still in its incipiency.” *Brown Shoe*, 370 U.S. at 317; *see United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622 (1974); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 592-93 (1957); S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950). Recognizing that market control may be gained through a series of acquisitions, as opposed to a single transaction, Congress intended that § 7 provide a mechanism through which such a cumulative process could be enjoined when a proposed acquisition would have a substantially adverse effect on competition. *Id.* at 5.

As originally enacted, however, § 7 applied to acquisitions of stock and not to the acquisition of the assets of the target company. *Lewyn & Mann*, *supra* note 4, at 1067 n.1. Corporations began using this loophole to circumvent the statute and defeat its purpose, thus making the Miller-Tydings amendment in 1950 a practical necessity. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 338-40 (1963). The main purpose of the Miller-Tydings amendment was to bring asset acquisitions under the purview of § 7 in order to alleviate the fear caused by increasing economic concentration. *See Brown Shoe*, 370 U.S. at 315.

However, the Miller-Tydings amendment failed to provide a clear indication of whether a quantitative or qualitative standard is to be used in measuring the anticompetitive effects

by a violation of section 7 may recover treble damages for the resulting loss to business or property.<sup>6</sup> In addition, section 16 permits a private plaintiff to seek injunctive relief "against *threatened* loss or damage" from a section 7 violation.<sup>7</sup> In order for a private

of mergers. See *Brown Shoe*, 370 U.S. at 321-22. Apparently, Congress intended that a variety of economic factors be used in determining the potential for any anticompetitive effects. *Id.* Because Congress could not reasonably draw up a laundry list of proscribed activities, the Federal Trade Commission ("FTC"), the Justice Department, and the courts must exercise discretion and evaluate mergers in a manner that is reasonable in light of the particular facts and circumstances. See *1984 Merger Guidelines*, *supra* note 4, at 26,827; J. VAN CISE, *THE FEDERAL ANTITRUST LAWS* 9-11 (4th rev. ed. 1982). For example, "a definition of illegal monopolization as a person seeking to control 90 percent of the trade might be justified for large producers of basic commodities competing in a national market, but . . . would be unrealistic for the only theater in a small town." *Id.* at 10.

<sup>6</sup> 15 U.S.C. § 15(a) (1982). Section 4 reads in pertinent part: "[A]ny 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 . . ." *Id.* The treble damages provision apparently provides great incentive to bring suit. From June 30, 1965 through 1983, more than 90% of the antitrust suits filed in the federal district courts were private actions. T. VAKERICS, *supra* note 2, § 3.01, at 3-1.

<sup>7</sup> 15 U.S.C. § 26 (1982) (emphasis added). Section 16 provides in pertinent part: Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws including [§7] 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 . . . and a showing that the danger of irreparable loss or damage is immediate. . . .

*Id.* Prior to the enactment of § 16 in 1914, a private party was not entitled to sue to prevent or restrain violations of the antitrust laws, see, e.g., *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 286 (1922), even if that party was threatened with an injury different from that suffered by the public at large. *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). Section 16 was designed to cure an anomaly: a private plaintiff could recover treble damages for his losses, but "[t]here [was] no provision . . . to prevent threatened loss or damage even though it be irreparable. The practical effect of this [was] that a man would have to sit by and see his business ruined before he could take advantage of his remedy." 51 CONG. REC. 9261 (1914). There appears to be some question as to whether quantifiable damages need to be shown in order to obtain injunctive relief. Compare *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 617 F. Supp. 1058, 1064 (S.D.N.Y. 1985) (quantified damages not necessary) with *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 723 n.3 (11th Cir. 1984) (quantified damages required).

Private injunctive relief has come to serve three main purposes: ending the illegal conduct, depriving the violators of the benefits of their conduct, and restoring competition. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1059 (6th Cir.), cert. denied, 469 U.S. 1036 (1984); T. VAKERICS, *supra* note 2, § 3.04[1], at 3-31. To be entitled to injunctive relief, the private plaintiff must make the same showing as is required for an injunction in any equitable action. See B. KELLMAN, *supra* note 2, at 364. The plaintiff must show that: (1) he is likely to succeed on the merits; (2) he will suffer irreparable harm not compensable by damages if the injunction is denied; (3) the harm to the defendant if an injunction is granted will be less than the harm to the plaintiff if it is denied; and (4) the public interest will be served by an injunction. *Warner v. Central Trust Co.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506,

plaintiff to bring such an action, he must first demonstrate that he has suffered, or is in danger of suffering, an "antitrust injury."<sup>8</sup> Because actions for injunctive relief, unlike actions for treble damages, pose no threat of multiple lawsuits or duplicative recoveries,<sup>9</sup> a question existed as to whether the requirement of antitrust injury should be as strict under section 16 as it is under section 4.<sup>10</sup> The Supreme Court apparently resolved this issue in *Cargill, Inc. v. Monfort of Colorado, Inc.*,<sup>11</sup> when it affirmatively stated that the presence of antitrust injury is as necessary to an action under sec-

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511 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

Courts have been hesitant to grant injunctive relief because of the serious consequences of the remedy. See *Allis-Chalmers Mfg.*, 414 F.2d at 510-11 & n.8. Injunctive relief may put an end to the defendant's business while failing to compensate the plaintiff for his losses or attorney's fees. Kintner & Wilberding, *Enforcement of the Merger Laws by Private Party Litigation*, 47 IND. L.J. 293, 298-99 (1972). The remedy may be particularly fatal in merger cases since the parties may abandon their plans instead of going through long, costly litigation. *Allis-Chalmers Mfg.*, 414 F.2d at 510-11 & n.8.

Perhaps the most significant difference between the remedies provided under § 4 and § 16 is that under the former the plaintiff is required to show *actual* injury to recover, while under the latter just the threat of injury is sufficient for recovery. See 15 U.S.C. §§ 15, 26 (1982). Despite this difference, the provisions are said to provide "complimentary remedies for a single set of injuries," *Cargill*, 479 U.S. at 113, and should be applied only when necessary to protect the public interest in a manner consistent with the congressional intent. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).

<sup>8</sup> *Brunswick*, 429 U.S. at 489. "Antitrust injury" is defined as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* Merely showing that a purported injury was proximately caused by an antitrust violation is not enough. See *id.* at 488. "The injury must reflect the anticompetitive effect of either the violation of antitrust law or of the anticompetitive acts made possible by the violation." *Midwestern Waffles*, 734 F.2d at 710. However, even if a plaintiff can show antitrust injury, standing may still be defeated for a number of other reasons, such as the indirectness of the injury, the presence of another potential plaintiff whose self-interest would cause him to defend the public interest, the speculative nature of the injury, and the difficulty inherent in determining and apportioning damages between direct and indirect victims so as to avoid duplicative recoveries. See *Volvo North Am. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988).

<sup>9</sup> See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972). Once an injunction has been granted for one party, it is, in effect, granted for every other party who may have sought one. See *id.*

<sup>10</sup> See *Cargill*, 479 U.S. at 111 n.6; *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357-58 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985). In the past, the prevailing view seems to have been that a more liberal standard would be applied in determining standing under § 16 than under § 4, *Ashley Meadows Farm*, 617 F. Supp. at 1063, so that a plaintiff would have to meet a lower threshold requirement to gain injunctive relief, although antitrust injury would still have to be shown. *Christian Schmidt Brewing*, 753 F.2d at 1358. For a discussion of the evolution of standing requirements under § 16, see generally Note, *Standing to Sue for Clayton Act Injunctions: Chrysler—Injured Party or Disgruntled Competitor?*, 31 WAYNE L. REV. 1275, 1278-85 (1985).

<sup>11</sup> 479 U.S. 104 (1986).

tion 16 as it is under section 4.<sup>12</sup> Recently, however, in *R.C. Bigelow, Inc. v. Unilever N.V.*,<sup>13</sup> the Second Circuit Court of Appeals held that in a summary judgment proceeding, a showing of substantial post-acquisition market share is sufficient in itself to establish a threat of antitrust injury and thus grant standing to a competitor seeking to enjoin a challenged merger.<sup>14</sup>

In *R.C. Bigelow*, the defendant, Thomas J. Lipton, Inc. ("Lipton"), had entered into an agreement to purchase the co-defendant, Celestial Seasonings, Inc. ("Celestial").<sup>15</sup> The proposed merger would have resulted in Lipton having an eighty-four percent share of the market for herbal tea.<sup>16</sup> The plaintiff, R.C. Bigelow, Inc. ("Bigelow"), was the third largest producer of herbal tea, with a thirteen percent market share.<sup>17</sup> After the announcement of the proposed acquisition, Bigelow brought an action pursuant to section 16 of the Clayton Act to enjoin the merger,<sup>18</sup> claiming that the proposed acquisition would give Lipton an undue share of the herbal tea market and thereby threaten to substantially lessen competition and create a monopoly.<sup>19</sup> The defendants moved for

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<sup>12</sup> *Id.* at 105, 109-11, 122. The *Cargill* Court made it significantly more difficult for competitors to enjoin corporate mergers since merely being a competitor of an alleged monopolist would no longer be sufficient to establish antitrust standing. *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 102 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988). The *Cargill* Court stated that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition." *Cargill*, 479 U.S. at 116 (quoting *Arthur S. Langenderfer*, 729 F.2d at 1057) (emphasis added); see *Phototron Corp.*, 842 F.2d at 100. Although the *Cargill* Court declined to adopt a per se rule against granting competitors standing to challenge mergers, *Cargill*, 479 U.S. at 121, it did note that merely competing for increased market share is not the type of activity the antitrust laws were introduced to prevent. *Id.* at 116.

<sup>13</sup> 867 F.2d 102 (2d Cir.), *cert denied*, 110 S. Ct. 64 (1989)

<sup>14</sup> *Id.* at 111.

<sup>15</sup> *Id.* at 103.

<sup>16</sup> *Id.* at 103-04. Celestial was the largest producer of herbal tea, with 52% of the market share. *Id.* at 103. Lipton, with a 32% market share was the second largest producer. *Id.* at 104.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* In the interim, the FTC had made a full investigation of the proposed transaction and apparently found no reason to challenge it. See *id.*

<sup>19</sup> See *id.* Bigelow claimed that the proposed merger would allow Lipton to engage in various anticompetitive activities. *R.C. Bigelow, Inc. v. Unilever N.V.*, 689 F. Supp. 76, 80 (D. Conn. 1988), *rev'd*, 867 F.2d 102 (2d Cir.), *cert. denied*, 110 S. Ct. 64 (1989). Most importantly, Bigelow contended that Lipton would engage in predatory pricing. *Id.* Bigelow also claimed that Lipton would exercise improper control over shelf space in retail stores since Lipton's parent, Unilever, was one of the world's largest distributors of grocery goods, with access to supermarket shelf space nationwide. *R.C. Bigelow*, 867 F.2d at 104. Finally, Bigelow argued that Lipton would exercise improper control over distributors to retail stores

summary judgment, arguing that Bigelow had failed to raise a genuine issue of fact as to whether it was threatened with antitrust injury.<sup>20</sup> The district court, finding no evidence of anticompetitive or predatory behavior, granted the motion.<sup>21</sup> On appeal, the court of appeals reversed.<sup>22</sup>

Writing for the court, Judge Altimari stated that, while a post-acquisition market share of eighty-four percent does not constitute a per se violation of the antitrust laws,<sup>23</sup> it is prima facie evidence of monopoly power, and thus raises a presumption of illegality sufficient to survive a motion for summary judgment at the preliminary injunction stage.<sup>24</sup> Reasoning that the transaction and resulting market share would give Lipton a "decisive advantage" over the competition, the court concluded that a "demonstrated probability" of antitrust injury existed.<sup>25</sup> In reaching this conclusion, the court relied on *United States v. Philadelphia National Bank*,<sup>26</sup> in which the Supreme Court held that transactions which significantly increase market share are "so inherently likely to lessen competition substantially that [they] must be enjoined."<sup>27</sup>

In *R.C. Bigelow*, the Second Circuit turned a blind eye toward the fact findings of the trial court when it chose to focus solely on market share data. In doing so, it is submitted that the court misinterpreted *Cargill*, and misapplied the law regarding summary judgment as it has come to relate to antitrust actions. Furthermore, the court broke with the modern trend against applying mechanical, protectionist rules in merger cases. Finally, this Comment will suggest that the *R.C. Bigelow* holding is actually antithetical to the purpose of the antitrust laws, as it will have a chil-

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and suppliers of raw herbs. *R.C. Bigelow*, 689 F. Supp. at 80.

<sup>20</sup> *R.C. Bigelow*, 867 F.2d at 104. For the purpose of the summary judgment motion, the defendants agreed that the relevant market was one for herbal tea, not all tea. *R.C. Bigelow*, 689 F. Supp. at 79 n.3.

<sup>21</sup> *R.C. Bigelow*, 689 F. Supp. at 82. The district court found no evidence of improper intent behind the proposed merger or of any substantial likelihood that Lipton would engage in anticompetitive activity, *id.* at 80-82, and held that mere possession of potential monopoly power is not sufficient to establish that such power will be used to the detriment of competitors and thus create antitrust standing. *Id.* at 79. Further, the court found that Lipton intended only to "play hardball" with the competitors and had no intention of eliminating competitors other than by "vigorous competition" and "efficiency." *Id.* at 80.

<sup>22</sup> *R.C. Bigelow*, 867 F.2d at 103.

<sup>23</sup> *Id.* at 110.

<sup>24</sup> *See id.* at 108-111.

<sup>25</sup> *See id.* at 109.

<sup>26</sup> 374 U.S. 321 (1963).

<sup>27</sup> *R.C. Bigelow*, 867 F.2d at 108 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 363).

ling effect on competition and serve to encourage meritless litigation.

### THE *Cargill* RULE AND SUMMARY JUDGMENT

Although *Cargill* represents a landmark case in the field of antitrust law, its holding is relatively simple and unequivocal: to establish standing under section 16 of the Clayton Act, a plaintiff is required to show a threat of antitrust injury.<sup>28</sup> The *Cargill* Court sought to ensure that absent some evidence of their having engaged in anticompetitive conduct,<sup>29</sup> successful market participants would not be threatened by their less successful competitors. In *R.C. Bigelow*, although the district court found no evidence of any such conduct,<sup>30</sup> the Second Circuit found that an inherent threat of antitrust injury in the defendants' potential market share in itself was sufficient to satisfy *Cargill*.<sup>31</sup> Judge Altimari reasoned that a substantial market share would foster predatory pricing.<sup>32</sup> Relying on the *Cargill* Court's refusal to adopt a per se rule denying standing for necessarily speculative claims of antitrust injury, such as claims of predatory pricing,<sup>33</sup> the *R.C. Bigelow* court held that

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<sup>28</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986).

<sup>29</sup> *See id.* at 115-19.

<sup>30</sup> *R.C. Bigelow*, 689 F. Supp. at 80-82. The trial court found no evidence of improper intent behind Lipton's proposed acquisition or of any substantial likelihood that Lipton would use its post-merger status in any proscribed manner. *Id.* Most importantly, *Bigelow* alleged that a threat of predatory pricing would be posed by the merger but "failed to submit any evidence whatsoever" and even admitted having "no idea what prices will do" after the merger. *Id.* at 80; *see also infra* note 33 (discussing predatory pricing).

<sup>31</sup> *See R.C. Bigelow*, 867 F.2d at 110. The court extensively relied on market share as a measure of a firm's ability to eliminate competition. *See id.* at 107-08. However, it is well documented that market share standing alone may not be indicative of the potential anticompetitive effects of a corporate transaction. *See infra* notes 45-46 and accompanying text.

<sup>32</sup> *See R.C. Bigelow*, 867 F.2d at 110-11.

<sup>33</sup> *Id.* at 110; *see Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121-22 (1986). Predatory pricing is pricing below the level necessary to sell particular goods or at a price below the cost of such goods, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986), in order to eliminate competitors and reduce competition. *Cargill*, 479 U.S. at 117. In *Matsushita*, the Supreme Court recognized that predatory pricing is "by [its] nature speculative," as the profitability of such schemes depends on maintaining monopoly power long enough to both neutralize the competition and recoup losses. *Matsushita*, 475 U.S. at 588. All that is certain is that the predator will have to forego immediate profit, and, therefore, such schemes are "rarely tried and even more rarely successful." *Id.* at 589; *see Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). Thus the Supreme Court noted that only direct evidence of pricing below cost will be sufficient to overcome the strong presumption that rational businessmen do not engage in such practices. *Matsushita*, 475 U.S. at 585 n.9.



market share alone may pose a substantial threat of antitrust injury.<sup>34</sup>

The *Cargill* Court, however, was merely recognizing that injuries which rarely occur are nonetheless injuries.<sup>35</sup> Declining to adopt a per se rule in no way mitigated the plaintiff's burden of coming forward with some evidence of a threat of antitrust injury.<sup>36</sup> Simply equating a substantial market share with such a threat defeats *Cargill's* purpose of ensuring that the alleged antitrust injury is something other than mere loss due to vigorous competition.<sup>37</sup>

The *R.C. Bigelow* court distinguished *Cargill* by emphasizing that the instant appeal was not related to a permanent injunction, but merely a motion for summary judgment at the preliminary injunction stage.<sup>38</sup> The *Cargill* Court, however, gave no indication that such a distinction would have changed its analysis.<sup>39</sup> Furthermore, the Supreme Court has explicitly recognized that, despite the inherent complexity of the typical antitrust action, summary judgment is nonetheless appropriate in certain circumstances,<sup>40</sup>

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<sup>34</sup> *R.C. Bigelow*, 867 F.2d at 111.

<sup>35</sup> See *Cargill*, 479 U.S. at 121. The *Cargill* Court noted that "[w]hile firms may engage in [predatory pricing] only infrequently there is ample evidence suggesting that the practice does occur. It would be novel indeed for a court to deny standing . . . merely because such injuries rarely occur." *Id.* (footnote omitted).

<sup>36</sup> See *id.* at 121-22. Immediately after declining to adopt such a rule, the Supreme Court reiterated the requirement of demonstrating antitrust injury. *Id.* at 122.

<sup>37</sup> See *id.* at 116; see also *supra* note 4 (antitrust laws do not protect against vigorous competition).

<sup>38</sup> See *R.C. Bigelow*, 867 F.2d at 109-10.

<sup>39</sup> See *Cargill*, 479 U.S. at 122 ("We hold that a plaintiff seeking injunctive relief under section 16 of the Clayton Act must show a threat of antitrust injury").

<sup>40</sup> C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2732.1, at 324 (1983) [hereinafter C. WRIGHT]. The Supreme Court has made it clear that Federal Rule of Civil Procedure 56 (the summary judgment rule) has not been read out of antitrust cases. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 283-90 (1968). In fact, "the modern trend appears to reflect a view that antitrust cases should not . . . be treated differently from other complex cases where summary judgment is appropriate." T. VAKERICS, *supra* note 2, § 3.04[2], at 3-5. For example, summary judgment in antitrust cases may be appropriate where questions of motive or intent are immaterial, see *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), or where the case turns solely on documentary evidence. *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1111 (5th Cir. 1979); *SEC v. Geyser Minerals Corp.*, 452 F.2d 876, 881 (10th Cir. 1971). However, because antitrust cases often do involve questions of motive, intent, credibility, and conspiracy, *i.e.*, questions involving a subjective state of mind, typically they can be answered only after a full trial where witnesses have been presented and subjected to cross-examination. See *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). For this reason, summary judgment has been granted sparingly in antitrust cases. *Id.* at 473;

particularly where extensive discovery has been conducted and has failed to produce any significant evidence in support of the allegations.<sup>41</sup> Since the parties in *R.C. Bigelow* indicated that they were prepared to go to trial and that no further discovery was needed,<sup>42</sup> it is submitted that summary judgment was proper in the absence of specific evidence of anticompetitive activity.

Moreover, the plaintiff in *R.C. Bigelow* should have been required to produce substantial evidence; reliance on pleadings, allegations and self-serving statements<sup>43</sup> should not have sufficed. The court relied on post-acquisition market share as sufficient evidence of antitrust injury.<sup>44</sup> However, it is well documented that market-share data standing alone are ambiguous at best.<sup>45</sup> As the *Cargill* Court explained, a finding of increased market share is at least as indicative of vigorous competition as it is of an antitrust viola-

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C. WRIGHT, *supra*.

<sup>41</sup> See *Midwestern Waffles Inc. v. Waffle House, Inc.*, 734 F.2d 705, 717 (11th Cir. 1984); *cf. Cities Serv.*, 391 U.S. at 299 (dismissal should be granted sparingly *prior* to discovery). It is well settled that "summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce 'significant probative evidence' in support of the allegations in their complaint." *Midwestern Waffles*, 734 F.2d at 717 (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1140 (E.D. Pa. 1981)).

<sup>42</sup> *R.C. Bigelow*, 689 F. Supp. at 78.

<sup>43</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986); *Cities Serv.*, 391 U.S. at 289-90; *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98-99 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988); *Midwestern Waffles*, 734 F.2d at 714; see also FED. R. Civ. P. 56 advisory committee notes (to permit pleadings to stand in way of justified summary judgment defeats rule's purpose); MOORE'S FEDERAL PRACTICE 933 (2d ed. 1970) (purpose of summary judgment is to pierce allegations).

<sup>44</sup> *R.C. Bigelow*, 867 F.2d at 111.

<sup>45</sup> See *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market share, while greatly significant, must be looked at in view of industry in question); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962) (same). While market share data is the primary index of market power, *id.*, it is not a conclusive indicator of anticompetitive effects. *General Dynamics*, 415 U.S. at 498. Market share must be evaluated in light of other relevant economic factors, such as the trend toward and degree of concentration in the industry, the past history of the firm in question, and the barriers to entry into the industry. *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1071-72 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett v. United States*, 401 U.S. 986 (1971). In *R.C. Bigelow*, the Second Circuit simply assumed that market share data is an accurate indicator of the threat of antitrust injury. See *R.C. Bigelow*, 867 F.2d at 111. Although the court acknowledged that fuller development of the relevance of the market share data could be undertaken at a trial on the merits, *id.*, it is submitted that the court should have required some specificity in the allegation of anticompetitive conduct before undertaking a potentially massive factual controversy. See *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) ("in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed").

tion.<sup>46</sup> Equating substantial market share with a threat of antitrust injury simply because a case is in the preliminary injunction stage is not warranted.

#### MECHANICAL RULES AND THE "ANTI-BIG" BIAS

In holding that an eighty-four percent market share, absent any evidence of anticompetitive behavior, raises a presumption of illegality,<sup>47</sup> the court in *R.C. Bigelow* resurrected an "anti-big" bias of an earlier era and the concomitant rule which prohibited mergers that would result in single-control of a substantial market share.<sup>48</sup> This early concern with market share was based on a fear that the concentration of economic power would result in an industrial oligarchy capable of usurping power from the people and their elected representatives.<sup>49</sup> Gradually, however, the courts recog-

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<sup>46</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). The burden is on the plaintiff to produce some evidence which excludes the possibility that a violation has not occurred. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). But where that evidence is as indicative of permissible competition as it is of anticompetitive activity, it will not alone support an inference of antitrust violation. *Id.* at 763-64; accord *Matsushita*, 475 U.S. at 597 n.21. This is especially true where the conduct complained of, predatory pricing, is achieved by the same method which is used to stimulate competition, i.e., cutting prices. *Cargill*, 479 U.S. at 122 n.17; *Matsushita*, 475 U.S. at 594. Further, the legislative history makes clear that § 7 was meant to deal with probabilities, not possibilities, *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957), and not merely with ephemeral or remote probabilities, but with probabilities which are sufficiently imminent. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 & n.22 (1974); *Brown Shoe*, 370 U.S. at 323. Moreover, granting summary judgment where evidence of an antitrust violation is at best speculative or ambiguous is not likely to encourage businesses to engage in improper activity. *Matsushita*, 475 U.S. at 595.

<sup>47</sup> See *R.C. Bigelow*, 867 F.2d at 108.

<sup>48</sup> See Marinelli, *Judicial Reexamination of Section 7 of the Clayton Act*, 20 AM. BUS. L.J. 203, 204-05 (1982). The "anti-big" bias finds its roots at least as early as 1911 in comments made by Justice Brandeis. According to Justice Brandeis, "the proposition that mere bigness can not be offense against society is false, because . . . our society, which rests upon democracy, cannot endure under such conditions. Something approaching equality is essential." *Hearings on S. Rep. No. 98 Before the Senate Comm. on Interstate Commerce*, 62d Cong. 1st Sess. 1167 (1911) [hereinafter *S. Rep. on Interstate Commerce*].

<sup>49</sup> See *United States v. Columbia Steel Co.*, 334 U.S. 495, 535-36 (1948) (Douglas, J., dissenting).

Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.

*Id.* at 536 (Douglas, J., dissenting). In the view of the FTC, if nothing had been done to check economic concentration, the government would have been forced to intervene in order to avert giant corporations from taking over the country. ANTITRUST ERA, *supra* note 1, at 5.

nized the potential economic benefits of corporate mergers so that the mere possession of monopoly power was no longer an automatic condemnation.<sup>50</sup> The mechanical, protectionist policies of the past began to give way to a policy of economic realism<sup>51</sup> in which the per se market share test was rejected<sup>52</sup> in favor of a rule of reason, requiring a showing of danger in the merger itself, as opposed to its size alone.<sup>53</sup>

In conferring standing on the plaintiff in *R.C. Bigelow*, the court relied on *United States v. Philadelphia National Bank*,<sup>54</sup> a 1963 Supreme Court case which held that mergers producing firms

This concern with market share grew to such proportions that acquisitions involving market share increases as little as three percent were deemed to be sufficiently anticompetitive to merit relief. See *Brillo Mfg. Co.*, Trade Reg. Rep. (CCH) ¶ 28,667 (FTC Order, March 25, 1960). The per se rule against bigness adopted by the early Court caused the antitrust laws to be used as a "charter to roll back the supermarket revolution" so as to preserve small local businesses which in many instances had become "economically and technologically obsolete." *United States v. Von's Grocery Co.*, 384 U.S. 270, 288 (1966) (Stewart, J., dissenting).

<sup>50</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); see also *supra* note 4 (discussing some advantages of mergers). But see *Arizona v. Maricopa Medical Soc'y*, 457 U.S. 332, 343-44 (1982) (merger which promotes efficiency may still be prohibited by per se rule for sake of business certainty).

<sup>51</sup> See *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-500 (1974); *Von's Grocery*, 384 U.S. at 287-88 (Stewart, J., dissenting). In the view of one commentator, the Court has actually swung in the opposite direction, "discarding precedent and straining statutory language and legislative history in an effort to avoid finding a Section 7 violation," in effect adopting a new "anti-antitrust bias." Marinelli, *supra* note 48, at 204. Another commentator finds that the Supreme Court has not only abandoned any presumption of illegality based on market share, but that it has also adopted "substantive presumptions in favor of the validity of the challenged merger . . . [and] has raised the threshold of illegality perceptibly." Fox, *Antitrust Mergers and the Supreme Court: The Politics of Section 7 of the Clayton Act*, 26 MERCER L. REV. 389, 390 (1975) (emphasis added).

<sup>52</sup> See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 (1974) (Supreme Court declined to adopt per se rule against geographic market extension mergers); *General Dynamics*, 415 U.S. at 497-98 (statistical data alone do not mandate determination as to effects on competition); *United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (2d Cir. 1984) (large post-merger market share raised only a rebuttable presumption of illegality); see also *1984 Merger Guidelines*, *supra* note 4, at 26,825 (market share is not used as "strict mathematical rule[]]" for determining antitrust violations); cf. T. VAKERICS, *supra* note 2, § 9.01, at 9-2 (Justice Department and FTC more likely to permit mergers involving firms with larger market shares than in the past).

<sup>53</sup> See *General Dynamics*, 415 U.S. at 496-500; *Brown Shoe Co. v. United States*, 370 U.S. 294, 334-35 (1962); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 102 (5th Cir.), cert. denied, 108 S. Ct. 1996 (1988); see also *1984 Merger Guidelines*, *supra* note 4, at 26,825 (Justice Department will not challenge mergers based solely on market share); D. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL 56 (1986) (rule of reason permits mergers when social gains exceed losses).

<sup>54</sup> 374 U.S. 321 (1963).

with large market shares can be so inherently dangerous that they must be enjoined.<sup>55</sup> However, after recognizing that merger cases were being decided solely on market-share data, the Supreme Court rejected this approach and required that some evidence of the anticompetitive effects of the transaction be demonstrated.<sup>56</sup> Although post-acquisition market share remains an important factor in determining whether a proposed merger will be injurious to competition,<sup>57</sup> it must be viewed along with other relevant economic factors.<sup>58</sup> Even at the preliminary injunction stage, the assertion that a proposed merger is presumed illegal based solely on market share appears facially untenable.<sup>59</sup> It is submitted that the *Cargill* rule is the culmination of a two decade movement toward allowing vigorous competition for increased market share so long as it remains within the boundaries of fair play.<sup>60</sup> By equating a substantial market share with a threat of antitrust injury, the *R.C. Bigelow* court has reverted back to the mechanical rules thought to

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<sup>55</sup> *Id.* at 363.

<sup>56</sup> *General Dynamics*, 415 U.S. at 496-500. A potential monopoly, standing alone, is no longer sufficient to demonstrate a threat of antitrust injury. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 123 (1986) (Stevens, J., dissenting); *Phototron Corp.*, 842 F.2d at 100; see also *supra* note 8 (meaning of "antitrust injury").

<sup>57</sup> See *General Dynamics*, 415 U.S. at 498; *Brown Shoe*, 370 U.S. at 322 n.38, 343. "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power . . . [and] one of the most important factors to be considered when determining the probable effects of the combination on effective competition. . . ." *Id.*

<sup>58</sup> *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 (1974); *General Dynamics*, 415 U.S. at 498; *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1071-72 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett v. United States*, 401 U.S. 986 (1971). Other important factors to be considered in addition to market share include industry trends toward concentration, the degree of concentration presently in the industry, the acquisition history of the merging firms, and the barriers to entry into the industry. *Id.*

<sup>59</sup> See *Phototron Corp.*, 842 F.2d at 102 ("Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (more than "a finding of monopoly power [is] necessary to complete a violation"), *cert. denied*, 444 U.S. 1093 (1980). Under the modern view, competitors may obtain a preliminary injunction only upon a showing of some anticompetitive behavior demonstrating a substantial likelihood of antitrust injury, and the plaintiff must produce some evidence of this type to survive a summary judgment motion. See *Cargill*, 479 U.S. at 121-22; *Phototron Corp.*, 842 F.2d at 102; see also *General Dynamics*, 418 U.S. at 498 (market share not conclusive indicator of anticompetitive effects). To allow a firm to challenge a competitor's merger based on market share alone, "on the basis of essentially no evidence" of future anticompetitive effects, goes further than the Supreme Court has been willing to go. *Marine Bancorporation*, 418 U.S. at 623; *supra* note 7 (discussing potentially fatal nature of injunctive relief on corporate mergers).

<sup>60</sup> See *Cargill*, 479 U.S. at 116. Vigorous competition for increased market share does not, without more, constitute a violation of the antitrust laws. See *id.*

have been finally eliminated by *Cargill*.

### *R.C. Bigelow* AND THE CHILLING OF COMPETITION

The purpose of the antitrust laws is to promote and encourage free enterprise<sup>61</sup> so that the benefits which accrue to market participants by virtue of vigorous competition may be passed along to consumers.<sup>62</sup> Accordingly, it has often been said that the antitrust laws were intended to protect *competition, not competitors*.<sup>63</sup> Therefore, only those activities which may be denoted as anticompetitive, predatory, or inimical to free competition are prohibited by the antitrust laws.<sup>64</sup> However, by conferring antitrust standing under section 16 based solely on market-share data, without a showing of predatory intent,<sup>65</sup> the *R.C. Bigelow* court cleared the way for market-share contenders to challenge their competitors merely because they enjoy more success in the marketplace.<sup>66</sup> Thus, the antitrust laws, which are supposed to serve as a deterrent to anticompetitive behavior, may instead deter vigorous competitors for fear of long and expensive antitrust litigation.<sup>67</sup> This

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<sup>61</sup> See *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 398 (1978); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972).

<sup>62</sup> See *supra* note 1 (discussing how competition benefits consumers); *supra* note 2 (discussing antitrust laws and their purpose).

<sup>63</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Injuries which reduce competition and, consequently, injure consumers are the types of injuries which are cognizable under the antitrust laws. *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 26 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Lewyn & Mann*, *supra* note 4, at 1072; see also *supra* note 1 (discussing relation between competition and consumer interest).

<sup>64</sup> See *Phototron Corp. v. Eastman Kodak Corp.*, 842 F.2d 95, 100-01 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988). However, the antitrust laws do not provide protection from continued or vigorous competition. *Cargill*, 479 U.S. at 109-10; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Brown Shoe*, 370 U.S. at 344. Small business may be adversely affected by such competition, even to the point of being driven out of the market, but so long as the competition is legitimate, the antitrust laws provide no relief since it would be "inimical to award damages" for continued competition. *Brunswick*, 429 U.S. at 488.

<sup>65</sup> See *R.C. Bigelow*, 867 F.2d at 109.

<sup>66</sup> Cf. *Cargill*, 479 U.S. at 116-17 (1986). Under the holding in *Cargill*, relief should be granted under § 16 only where losses will result from predatory practices forbidden by the antitrust laws. *Id.* at 116. Successfully competing for market share by legitimate means is not such an activity. See *id.* at 117. Legitimate means of gaining such status include successful price competition, see *id.* at 116-17, the exercise of superior business skill, see *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 392 (1956), and eliminating competition by being more efficient. See *R.C. Bigelow*, 689 F. Supp. at 88; R. BORK, *THE ANTITRUST PARADOX* 138 (1978).

<sup>67</sup> See *Cargill*, 479 U.S. at 116-17; Reich, *The Antitrust Industry*, 68 GEO. L.J. 1053, 1068-69 (1989) (discussing considerable attorneys fees involved in antitrust litigation). The

danger is particularly acute in merger cases since firms faced with injunctions may choose to forego transactions which could promote efficiency<sup>68</sup> in order to avoid potential lawsuits.<sup>69</sup> Caution is especially necessary where, as in *R.C. Bigelow*, allegations of predatory pricing are raised since the means by which a firm engages in predatory pricing—cutting prices—is the same as it employs to stimulate competition.<sup>70</sup> Legitimate price competition is not the type of activity which was intended to be the subject of antitrust prohibitions.<sup>71</sup> Absent some showing of conduct proscribed by the antitrust laws, competitors should not be granted standing to seek a

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heavy burden placed on the court system by private antitrust actions also bears noting. See B. KELLMAN, *supra* note 2, at vii. From 1960 to 1980, the number of such actions almost doubled every five years, so that more than six times as many private antitrust suits were begun in 1980 as in 1960. *Id.* Further, in 1980 antitrust actions accounted for less than one percent of the civil cases in the federal courts, but 4.1% of cases pending for more than three years, and 24% of cases needing more than 20 days to try. W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 4 (1982).

<sup>68</sup> See Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 382-83 (1980). Mergers may serve to increase efficiency in a number of ways. *Id.* Horizontal mergers may provide the volume required for economies that result from obtaining a large size. *Id.* Vertical mergers may also increase efficiency where internal operation costs are less than those of non-integrated firms in that market. *Id.*; see also *supra* note 4 (describing the various types of mergers).

<sup>69</sup> See *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 510 & n.8 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). The *R.C. Bigelow* court emphasized that its decision granted the plaintiff standing only to seek a preliminary injunction. See *R.C. Bigelow*, 867 F.2d at 111. This is of little comfort to the party accused of an antitrust violation however, given the "onerous effects" of a preliminary injunction, *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988), which forces the defendant to choose between foregoing what it believes to be a beneficial transaction or engaging in a lengthy and expensive trial. *Allis-Chalmers*, 414 F.2d at 510 & n.8. Therefore, although "no rigorous proof of antitrust injury [is] necessary at this early stage . . . more than mere pleading is necessary to establish standing." *Phototron Corp.*, 842 F.2d at 98. The courts have been increasingly cognizant of the dilemma antitrust defendants face in having to choose between settling cases of questionable merit and facing the burdens of fruitless litigation, and as a result have been more ready to grant them summary judgment where plaintiffs put forward sparse evidence of antitrust injury. See *id.* at 98; *Ashley Meadows Farm, Inc. v. American Horse Shows Assoc., Inc.*, 617 F. Supp. 1058, 1060 (S.D.N.Y. 1985).

<sup>70</sup> See *Cargill*, 479 U.S. at 121 n.17; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94 (1986). Because price competition for market share is a legitimate form of competition, see *Cargill*, 479 U.S. at 116-17, it is imprudent to conclude solely from a showing of substantial market share that antitrust injury will likely result, and to do so may serve to deter what is actually *pro*-competitive activity of the type the antitrust laws were intended to promote. See *Matsushita*, 475 U.S. at 593-94; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-64 (1984).

<sup>71</sup> See *Cargill*, 479 U.S. at 116-17; *Matsushita*, 475 U.S. at 593-94; *Monsanto Co.*, 465 U.S. at 762-64.

remedy as potentially fatal as a preliminary injunction simply in the hope that some evidence might later develop at a full trial.<sup>72</sup> This is not to say that competitors will be denied relief should such evidence later surface.<sup>73</sup> Although a remedy under section 16 may be foreclosed at that point, an action for treble damages under section 4 would still be available.<sup>74</sup>

#### CONCLUSION

In *R.C. Bigelow*, the Second Circuit recognized the Supreme Court's mandate requiring antitrust injury for standing in a section 16 antitrust suit. However, the court also established a more lenient standard under section 16, holding that a substantial market share is in itself sufficient to confer antitrust standing. In doing so, the court has reverted back to an era of applying mechanical rules in furtherance of a bias against large corporations. Such a bias will in fact defeat the pro-competitive purpose of the antitrust laws by presenting a threat of meritless litigation and thus chilling vigorous and legitimate competition for market share.

*Robert F. Nostramo*

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<sup>72</sup> *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968); T. VAKERICS, *supra* note 2, § 3.02[2], at 3-5.

<sup>73</sup> *Phototron Corp.*, 842 F.2d at 102.

<sup>74</sup> *Id.*; see also *supra* note 6 (discussing treble damages under § 4).