

Michigan Law Review

Volume 94 | Issue 1

1995

Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals

Joseph F. Brodley
Boston University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

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

Available at: <https://repository.law.umich.edu/mlr/vol94/iss1/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ANTITRUST STANDING IN PRIVATE MERGER CASES: RECONCILING PRIVATE INCENTIVES AND PUBLIC ENFORCEMENT GOALS

*Joseph F. Brodley**

TABLE OF CONTENTS

INTRODUCTION	2
I. THE CRISIS IN PRIVATE MERGER ENFORCEMENT ...	3
A. <i>The Cargill Decision</i>	4
B. <i>Subsequent Lower Court Decisions</i>	6
C. <i>Enforcement Failure</i>	9
II. FOUNDATIONS OF COHERENT POLICY	10
A. <i>Enforcement Goals</i>	10
1. <i>Dual Enforcement</i>	11
2. <i>The Deterrence Goal</i>	12
3. <i>Substantive Uniformity</i>	13
B. <i>Standing and Incentive Management</i>	15
1. <i>Antitrust Injury</i>	16
2. <i>Effective Private Enforcement</i>	21
3. <i>Injunctions</i>	22
III. A SYSTEMS APPROACH TO PRIVATE MERGER ENFORCEMENT	25
A. <i>Criteria for Effective Enforcement</i>	26
1. <i>Enforcement Capability</i>	26
2. <i>Gravity of Violation</i>	27
3. <i>Incentive Compatibility</i>	28
4. <i>Equity Controls and Mechanisms</i>	30
B. <i>Possible Merger Enforcers</i>	34
1. <i>Private Enforcers</i>	35
2. <i>States Suing as Parens Patriae</i>	38

* Professor of Law and Economics and Kennison Distinguished Scholar of Law, Boston University. B.A. 1949, U.C.L.A.; LL.B. 1952, Yale; LL.M. 1953, Harvard. — Ed. This article has benefited from comments by Robert Bone, Edward Correia, John Flynn, Elizabeth Foote, Clayton Gillette, Michael Harper, Herbert Hovenkamp, Susan Koniak, John Leubsdorf, Stephen Marks, Albert Ma, Daniel MacLeod, Tina Miller, Deborah Minehart, Robert Pitofsky, Michael Riordan, William Ryckman, Lawrence Sager, Edward Sherman, Manuel Utset, Ingo Vogelsang, and Angeli Brodley, from workshop participants at Boston University School of Law and Chicago-Kent Law School, and from research assistance by Michael O'Connor, Matthew Cohen, and Peter Nessen.

C. <i>Effective Private Enforcers</i>	44
IV. COMPETITORS	46
A. <i>Enforcement Capability</i>	47
B. <i>Incentive Compatibility and Threatened Injury</i> ..	48
C. <i>The Economics of Competitor Injury</i>	51
1. <i>Cartel Punishment</i>	51
2. <i>Dominant Firm Predation</i>	53
D. <i>Proposed Approach: Antitrust Injury Screen</i> ...	56
1. <i>Sherman Act Approach</i>	56
2. <i>Exclusionary Capability</i>	57
3. <i>Threatened Market Dominance</i>	62
4. <i>Illustration: Aspen Skiing Co.</i>	66
E. <i>Equity Controls and Mechanisms</i>	68
1. <i>Existing Procedures</i>	69
2. <i>Improved Procedures</i>	70
3. <i>Effectiveness of Proposed Procedures</i>	75
F. <i>Gravity of Violation</i>	77
V. TAKEOVER TARGETS	78
A. <i>Enforcement Capability</i>	79
B. <i>Incentive Compatibility and Antitrust Injury</i>	80
1. <i>Partial Acquisitions</i>	81
2. <i>Full Acquisitions</i>	84
3. <i>Loss of Trade Secrets</i>	88
4. <i>Loss of Independence</i>	91
C. <i>Controlling Managerial Incentives</i>	95
1. <i>Existing Judicial Controls</i>	96
2. <i>Improved Procedures</i>	96
3. <i>Effectiveness of Proposed Procedures</i>	103
D. <i>Gravity of Violation</i>	105
CONCLUSION	106
APPENDIX	108

INTRODUCTION

Private antitrust enforcement is riven by a tension between public enforcement goals and the self-interested agendas of private enforcers. The antitrust statutes give private antitrust enforcers powerful weapons, attesting to the public importance of competition goals, the pursuit of which Congress was unwilling to leave exclusively in the hands of government officials. At the same time, private enforcers are driven by the strong winds of their own economic interests, which may sharply deviate from antitrust goals. It falls on the courts to reconcile these often conflicting purposes —

as demanding and challenging a task as any that confronts the judiciary.

This article examines a vital problem of private antitrust enforcement — the standing of private merger litigants — where the unresolved tension between public antitrust goals and the private interests of litigants threatens enforcement breakdown. Private merger enforcement is at risk not because courts have determined that such enforcement is undesirable, but because courts have failed to see the problem as an issue of systems design requiring effective integration of public and private enforcement. Instead they have focused on particular elements of antitrust standing — feared abuses by wrongly motivated plaintiffs — neglecting systemwide effects and jeopardizing the health of private enforcement as a whole. In this paper, I attempt to develop a coherent method for reconciling public interest goals and private enforcement incentives that will be useful not only for merger enforcement, but for other areas of antitrust law, and perhaps for public interest litigation generally.

Part I describes the present plight of private merger enforcement, where narrow standing rules threaten enforcement breakdown. Part II sets forth the substantive goals, procedural mechanisms, and incentive structure that underlie coherent policy. Part III proposes criteria for assessing standing rules and private enforcement procedures and for managing the distorted incentives of private enforcers. Parts IV and V apply the proposed enforcement criteria and procedural controls to competitors and takeover targets — the private enforcers upon whom effective enforcement of the merger law inevitably rests.

This paper focuses on merger enforcement alone because such enforcement is critical in order to maintain effective competition and because by treating a single enforcement policy in depth I am able to develop a fully specified methodology that appears suitable for other types of antitrust and nonantitrust enforcement as well. In a time of increasing skepticism toward public interest litigation, such an approach, concentrated on achieving systemwide goals and effectively managing the incentives of private enforcers, provides a constructive alternative to more draconian proposals that would close the door to many types of private suits because of feared litigation abuse.

I. THE CRISIS IN PRIVATE MERGER ENFORCEMENT

Restrictive judicial decisions threaten the ability of private litigants to challenge unlawful mergers. Where once private merger

cases centered on the anticompetitive effects of the merger, now the spotlight of attention focuses on the plaintiff's litigation credentials. Thus, the merger court must engage in a microscopic examination of the injury sustained by a plaintiff, in order to determine whether the injury is of the character that gives the plaintiff standing to sue. In technical terms, courts ask whether the plaintiff has sustained "antitrust injury" — the standing doctrine at issue in merger cases. While courts at first thought the rule would not apply to merger injunction actions, that view changed in 1986, resulting in drastic curtailment of private merger enforcement.¹

At the same time, public merger enforcement atrophied during the 1980s.² The disturbing result was that mergers that appeared clearly unlawful under core judicial holdings occurred with virtually no restraint. This led to a frantic rush to merge, intensified by the desire to take advantage of a permissive regime that many believed could not last. The growing merger wave of the mid-1990s gives renewed urgency to merger enforcement policy.³

A. *The Cargill Decision*

The crisis in private merger enforcement was brought to a head by the Supreme Court decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*⁴ In a divided ruling, the Supreme Court held that a competitor, which in the judgment of two lower courts had proved a clear violation of the Clayton Act,⁵ lacked standing to bring an injunction action to block the merger. The problem was not that there was doubt that the merger between the second and third largest meat-packers in the United States violated the antitrust laws, for the Court did not review the merits, or that the plaintiff was not

1. See U.S. GEN. ACCOUNTING OFFICE, JUSTICE DEPT.: CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 48 (Oct. 1990) (50% decline in ratio of private merger cases to Hart-Scott-Rodino filings in 1987; 90% decline as compared with 1982-86); ABA ANTITRUST SECTION, MONOGRAPH NO. 16, PRIVATE LITIGATION UNDER SECTION 7 OF THE CLAYTON ACT: LAW AND POLICY 5 (1989) (stating that antitrust injury doctrine may cause private merger enforcement to "wither on the vine").

2. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 47-52; Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 213, 225-28 (1988).

3. See *Shifting Deal Flow Back to the Fast Lane*, MERGERS & ACQUISITIONS, Jan.-Feb. 1994, at 60 (arguing that merger activity is "starting to resemble the 1980s"); Randall Smith, *Rising Tide: Higher Stock Prices Are Feeding a Revival of Merger Activity*, WALL ST. J., Oct. 14, 1993, at A1; Greg Steinmetz, *Mergers and Acquisitions Set Records, but Activity Lacked that '80s Pizazz*, WALL ST. J., Jan. 3, 1995, at R8.

4. 479 U.S. 104 (1986).

5. 15 U.S.C. § 18 (1994) (barring mergers that "may . . . substantially lessen competition").

threatened with injury as a result of the merger. The defect in the case was that the plaintiff had not suffered "antitrust injury," a judicial limitation on antitrust suits that requires a plaintiff to prove not only that it has been injured by an antitrust violation but also that its injury is an anticompetitive effect of the violation.⁶

The plaintiff in *Cargill* had claimed antitrust injury because the merger created multiplant efficiencies that would enable the defendant to compete more vigorously with rivals, lowering the plaintiff's profit, and because following the merger, the defendant would attempt to drive the plaintiff out of business by "sustained predatory pricing."⁷ Although these claims of threatened injury had satisfied the lower courts, the Supreme Court found them insufficient because the first claim, based on lower prices due to increased efficiency, was merely a claim of injury from intensified competition, and the second claim, future predation, was neither effectively alleged nor proved.⁸ Moreover, the Court found that the market did not have the anticompetitive structure necessary to support predatory pricing.⁹

The *Cargill* decision is notable, not because of these findings, but because the Court applied the antitrust injury doctrine to a merger injunction action. As the Court had explained in an earlier decision, to allow parties to collect damages for losses that stem from competition even though the transaction itself violates the antitrust laws would undermine the very purpose of those laws.¹⁰ The Supreme Court, however, had previously applied this limitation on standing only to damage cases. In *Cargill*, the Court held for the first time that the antitrust injury doctrine prevented a plaintiff from maintaining suit under the antitrust injunction statute.¹¹ The Court reasoned that it would be "anomalous" to allow a plaintiff to obtain an injunction to prevent a threatened injury for which the plaintiff could not obtain damages if the merger occurred and that the injunction and damage statutes are "best understood" as providing "complementary remedies for a single set of injuries."¹²

6. See *Cargill*, 479 U.S. at 109-13; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484-89 (1977) (providing the first recognition of antitrust injury doctrine).

7. 479 U.S. at 117.

8. 479 U.S. at 114-19.

9. The postmerger firm would have neither high market share nor excess capacity sufficient to absorb the market share of rivals, and there was no showing of high entry barriers sufficient to permit predatory pricing. 479 U.S. at 119 n.15.

10. *Brunswick Corp.*, 429 U.S. at 487-88.

11. See 15 U.S.C. § 26 (1994).

12. *Cargill*, 479 U.S. at 112-13. The Court relied on the sketchy legislative history of the injunction statute, which it found to be at least consistent with the view that injunctive relief

A strongly worded dissent written by Justice Stevens and joined by Justice White expressed concern that the majority decision would effectively bar private enforcement of the merger law.¹³ The dissenters feared that the majority had rejected the prophylactic and preventive purpose of merger enforcement by requiring what amounted to proof of a Sherman Act¹⁴ violation. The remedy sought was an injunction, which required proof only of *threatened* future loss or injury, but the majority would demand evidence of actual injury, as in a damage action. The Court's decision would lead to a statute "enforceable by no private party."¹⁵

Thus, the standing of private merger plaintiffs remains unclear after *Cargill*. What proof must a merger plaintiff present to show antitrust injury? If the plaintiff is a competitor of the merging firms, must the plaintiff prove threatened price predation by the same evidence that would be required in a damage case? Apart from predatory pricing, what evidence must the competitor plaintiff present to demonstrate threatened injury from other anticompetitive effects, such as nonprice predation, market exclusion, or cartel punishment? How do the *Cargill* decision and its progeny affect the standing of other private merger litigants, particularly takeover targets? What constitutes antitrust injury as to them, and how is it to be proved? If both competitors and takeover targets face difficult or impossible standing requirements, what private party with the incentive and legal resources remains to challenge unlawful mergers within the fast-breaking pace of a merger injunction action?

B. *Subsequent Lower Court Decisions*

Since *Cargill*, the lower courts have been deeply divided in their approach to standing in merger cases, and the circuits are in direct conflict. In competitor cases some lower courts have required rig-

was available only to prevent injuries for which damages could be recovered. See 479 U.S. at 112-13.

13. 479 U.S. at 122-29 (Stevens, J., dissenting).

14. 15 U.S.C. § 1 (1994).

15. *Cargill*, 479 U.S. at 129 (Stevens, J., dissenting). The issue of standing in merger cases was not clarified by the Supreme Court's subsequent decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), a nonmerger case, discussed *infra* in text accompanying notes 70-75. In denying standing to the plaintiff, however, the Court — perhaps heeding the *Cargill* dissenters' concern about antitrust statutes enforceable by no private party — emphasized that other viable private enforcers existed "whose self-interest would . . . motivate them to vindicate the public interest in antitrust enforcement" 495 U.S. at 345 (quoting *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983)).

orous proof of predation, which plaintiffs have been unable to present in advance of the merger, and as a result mergers that appeared patently unlawful were upheld. Other lower courts have been willing to base findings of threatened antitrust injury on proof of market structure and economic conditions that create the capability and incentive to engage in predation or other anticompetitive conduct.

The Fifth Circuit followed the rigorous proof approach in *Phototron Corp. v. Eastman Kodak Co.*¹⁶ and refused to enjoin a merger between Kodak and another film processor that would give the merging firms between sixty-six and eighty-five percent of the wholesale photo-finishing market, augmented by the dominant position of one of the merging firms in the upstream photo materials market. The Fifth Circuit rejected the plaintiff's attempted showing of threatened predatory pricing and other monopolizing acts because the plaintiff could not prove that the merged firm would sell below cost. In ironic tones, the court explained that the "facially sensible proposition" that a competitor "of a monopolist always has standing to challenge the conduct forcing it from the market . . . has been undermined by *Cargill*" and that "merely facing the specter of a monopoly" does not create standing.¹⁷ Conceding that it would be difficult for a competitor to make a showing of predation in advance of a merger, the court could only suggest that if "bad acts" occurred, the victim might be able to sue afterward for treble damages.¹⁸

The Second Circuit took a different approach to competitor standing in *R.C. Bigelow, Inc. v. Unilever N.V.*¹⁹ The court held that evidence that the merger would create a dominant firm having a market share of eighty-four percent, with the plaintiff remaining as its only rival, was sufficient in itself to create an inference of antitrust injury requiring a trial on the merits. The plaintiff had produced no evidence of past predatory pricing or present intent to engage in predatory behavior, but the court gave plaintiff "the benefit of all reasonable inferences" that those who deliberately acquire monopoly will use it to eliminate competition by such acts as

16. 842 F.2d 95 (5th Cir.), *cert. denied*, 468 U.S. 1023 (1988).

17. 842 F.2d at 100.

18. 842 F.2d at 102; *see also* *Treasurer, Inc. v. Philadelphia Natl. Bank*, 682 F. Supp. 269 (D.N.J.), *affd. mem.*, 853 F.2d 921 (3d Cir. 1988) (requiring proof of actual predation in competitor suit).

19. 867 F.2d 102 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989).

reducing the plaintiff herbal tea manufacturer's access to supermarket shelf space.²⁰

The lower courts are similarly divided on the standing of takeover targets — the other significant private merger litigant. In *Anago, Inc. v. Tecnol Medical Products, Inc.*,²¹ the Fifth Circuit read *Cargill* to preclude a target from challenging the legality of a merger that would “dramatically decrease competition and raise prices” because the target would suffer no injury relating to the anticompetitive effects of the violation.²² Although the target would lose its independence as a result of the merger, it would suffer the same “loss” whether or not the takeover violated the antitrust laws. Moreover, far from being injured by the merger, the target and its shareholders would benefit from the resulting increased prices and reduced competition.²³ A district court, taking a similar view, commented that the target “is a poor private attorney general” because its managers may seek “to defend their own positions, not . . . to vindicate any public interest.”²⁴

By contrast, in *Consolidated Gold Fields PLC v. Minorco, S.A.*,²⁵ the Second Circuit held that a takeover target suffered antitrust injury because it faced curtailment of its production as a partly owned subsidiary of a rival firm, because it would lose its independent decisionmaking authority as to price and output, and because the standing of target firms is necessary for effective private merger enforcement.²⁶ The court would not speculate whether in some sense the target might derive economic benefit from the merger because the antitrust laws protect the target from loss of its right to compete in the marketplace by mergers that violate the antitrust laws. Indeed, the court could not conceive of a more direct injury to competition than “the elimination of a major competitor's power to determine its prices and output.”²⁷ The court supported its determination by relying on the absence of other viable private merger enforcers and the need to construe standing doctrines to

20. 867 F.2d at 111. The Second Circuit distinguished *Cargill* on the grounds that the postmerger market share in *Cargill* (20%) was insufficient to justify an inference of predatory conduct. See *Cargill*, 479 U.S. at 119 n.15.

21. 976 F.2d 248 (5th Cir. 1992), cert. dismissed, 114 S. Ct. 491 (1993).

22. 976 F.2d at 250.

23. 976 F.2d at 251.

24. *Burnup & Sims, Inc. v. Posner*, 688 F. Supp. 1532, 1534 (S.D. Fla. 1988).

25. 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989).

26. 871 F.2d at 258.

27. 871 F.2d at 258.

promote effective enforcement.²⁸ This concern with effective enforcement articulates an important theme of this article.

C. Enforcement Failure

Restrictive judicial decisions have limited the ability of private litigants to challenge unlawful mergers.²⁹ This result was not a deliberate policy choice; in *Cargill*, the Supreme Court rejected arguments calling for general disqualification of competitors — key private litigants in merger cases. Rather the isolated focus of the courts on one element of the enforcement system — antitrust injury — has jeopardized the system as a whole. By creating doubt as to whether competitors and takeover targets — the only two viable private merger enforcers — can challenge unlawful mergers, recent merger decisions threaten to destroy the private merger action as a viable enforcement instrument.

This weakening of private merger enforcement has occurred at a time when private enforcement would have been of utmost value in filling an enforcement void. During the 1980s, federal authorities drastically reduced merger enforcement against all but the most egregious mergers.³⁰ As a result, market-concentrating mergers and joint ventures that violated existing judicial standards were not challenged.³¹ This departure was all the more serious in view of the incipency standard of the Clayton Act,³² which rests on the premise that merger enforcement provides the first best policy for controlling anticompetitive conduct.³³ The combined effect of

28. 871 F.2d at 260. Recent district court decisions in New York and Louisiana have followed this analysis. See *Square D Co. v. Schneider S.A.*, 760 F. Supp. 362 (S.D.N.Y. 1991); *A. Copeland Enter. v. Guste*, 1989-2 Trade Cas. (CCH) ¶ 68,713 (E.D. La. Nov. 28, 1988).

29. Indeed, the plight of private litigants has worsened in recent years. In 1991-94, private litigants (excluding state attorneys general) obtained standing in only 6 of 16 reported cases, and in 2 of these, the standing issue was somewhat mooted by the joinder of a state as co-plaintiff. These statistics were obtained through a search of 1991 through 1994 Trade Cas. (CCH) and an electronic search on 8/10/95 of Westlaw Allfeds library, search terms: "Clayton Act" & Acquisition! Merger! & DA (after 12/90). See *Bon-Ton Stores, Inc. v. May Dept. Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994); *Stanley Works v. Newell Co.*, 1992-2 Trade Cas. (CCH) ¶ 70,008 (D. Conn. Oct. 2, 1992).

30. See *Krattenmaker & Pitofsky*, *supra* note 2, at 213, 225-28.

31. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 45 (discussing the failure to bring cases clearly violating existing judicial standards); *Krattenmaker & Pitofsky*, *supra* note 2, at 213, 225-28 (describing tacit abandonment of already lenient merger enforcement guidelines). To be sure, judicial standards needed updating; the Supreme Court had not decided a substantive merger case since 1978. The lack of up-to-date law was no justification for not presenting the Court with cases that would have allowed modernization of merger law.

32. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957) (recognizing that the Clayton Act protects against incipency effects).

33. Cf. Joseph F. Brodley, *Post-Chicago Economics and Workable Legal Policy*, 63 ANTI-TRUST L.J. 683, 689-90 (1995) (describing how effective merger enforcement avoids costly

diminished public and private enforcement led to a clear underdeterrence of mergers violating core antitrust standards.³⁴

An effective policy toward private merger enforcement requires a global or systems approach. Such an approach would concentrate on the operation of the enforcement system as a whole, attempting to assure a viable private enforcement remedy, as Congress surely intended. This article shows how the courts may achieve these objectives within the statutory framework Congress created.

II. FOUNDATIONS OF COHERENT POLICY

Underlying antitrust policy, including private merger enforcement, is a limited set of basic principles derived from the antitrust statutes, legislative history, and judicial decisions. These principles consist of key enforcement goals and the incentive-shaping procedures that implement these goals. In developing a coherent policy toward private merger enforcement, it is necessary to make the principles explicit because cases and commentary often lose sight of them — whether by simple neglect, subtle distortion, or opaque formalistic doctrine.

A. *Enforcement Goals*

Three crucial goals motivate private enforcement, most particularly merger enforcement, and each contains an essential public interest component. First, private enforcement strengthens public enforcement because it creates private remedies that augment public remedies — *the dual enforcement goal*. Second, though antitrust enforcement has both compensation and deterrence goals, deterrence is the primary goal of private merger enforcement — *the deterrence goal*. Third, private enforcement vindicates the same substantive goals as public enforcement — *the substantive uniformity goal*. Although these objectives may appear noncontroversial, disagreement on the scope of antitrust procedures often rests on neglect or implicit rejection of one or more of these basic premises.

and complex proceedings under the Sherman Act, thereby enhancing legal predictability, promoting transactional freedom within unconcentrated markets, and reducing the need for disruptive takeovers to discipline managers because competition does the job).

34. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 47-52 (describing how fewer resources and changed policies hindered merger enforcement); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 196-98 (1992) (explaining that weak antitrust enforcement was a "contributing factor" to the unprecedented merger wave of 1980s).

1. Dual Enforcement

The dual enforcement goal, which recognizes that private enforcement augments public enforcement, is reflected in the statutes, legislative history, and consistent judicial articulations. The antitrust statutes contain exceptionally powerful private remedies, comparable in scope and effect to the remedies available under public enforcement. The statutes thereby create a parallel enforcement system, complete with punitive sanctions, enforcement funding, and enabling processes. Thus, the statutes contain the striking penalty of treble damages, attorney's fees by right for successful plaintiffs, expansive venue provisions, and other powerful procedures.³⁵

Comparison of public and private remedies makes the statutory plan transparent. The trebling of damages is the private analogue to the public penalty of imprisonment and fine.³⁶ The awarding of attorney's fees to a prevailing plaintiff is the analogue to the public funding of the Attorney General. Expanded venue and injunction remedies apply without distinction in both public and private actions.³⁷ Moreover, Congress expanded these remedies in 1976 by extending mandatory attorney's fees for prevailing plaintiffs to private injunction actions, including merger cases.³⁸

Legislative history also reflects an intent to strengthen public enforcement through private suits — an intent particularly apparent in the Clayton Act and the 1976 Antitrust Improvements Act.³⁹ The House Report on the 1976 Antitrust Improvements Act — the most recent legislation on private antitrust actions — explained that private actions “reflect the national policy of encouraging private parties . . . to help enforce the antitrust laws.”⁴⁰

35. 15 U.S.C. § 15 (1994) (treble damages and attorney's fees); 15 U.S.C. § 16 (1994) (prima facie evidence); 15 U.S.C. § 25 (1994) (expanded venue).

36. Although some have argued that trebling simply reflects discounting for the difficulty of detecting a hidden offense, RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST* 549-53, 555-59 (2d ed. 1981 & Supp. 1984), the ability to conceal is not a condition for trebling, which is mandatory. Thus, trebling adds a punitive amount, as the courts have noted. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (citing legislative histories of the Sherman Act and Clayton Act that discuss how treble damages meet punitive purposes as well as other goals).

37. 15 U.S.C. §§ 15, 22, 26 (1994).

38. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302 (3), 90 Stat. 1383, 1396 (codified as amended at 15 U.S.C. § 16 (1994)).

39. 15 U.S.C. § 1311 (1994).

40. H.R. REP. NO. 499, 94th Cong., 1st Sess. 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2589; *see also* S. REP. NO. 803, 94th Cong., 2d Sess. 38 (1976); 21 CONG. REC. 3146 (1890) (statement of Sen. Hoar) (asserting that a private remedy would be “a very efficient measure . . . in suppressing [antitrust violations]”); Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 845-50 (1977); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21-30 (1989).

Finally, the courts have repeatedly emphasized that private anti-trust enforcement is designed "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws."⁴¹ To that end, the antitrust statutes designate antitrust plaintiffs as " 'private attorneys general' to enforce the antitrust laws,"⁴² and thereby to maintain "an ever-present threat" against antitrust wrongdoers.⁴³ In private merger enforcement, these aspirations can be realized only if there are viable private enforcers, able and motivated to bring merger actions.

2. *The Deterrence Goal*

Although private antitrust enforcement has both deterrence and compensation goals, deterrence is primary in private merger enforcement. To be sure, Supreme Court decisions in nonmerger cases differ in their relative emphasis on deterrence and compensation depending on the specific context of the case, but even here, the Court often emphasizes the deterrence aspect.⁴⁴ Although some decisions have emphasized the compensation goal,⁴⁵ in most of its decisions, the Supreme Court has recognized the key importance of deterrence.⁴⁶

41. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), cited with approval in *California v. American Stores Co.*, 495 U.S. 271, 284 (1990).

42. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

43. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); see also *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990) (stating that § 4 of the Clayton Act "must promote the vigorous enforcement of the antitrust laws"); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983); *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (stating that private action "encourages private challenges to antitrust violations"); *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

44. See, e.g., *American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) (holding that imposing liability for nonprofit standard-setting association defers such conduct in future); *Pfizer, Inc.*, 434 U.S. at 314-15 (extending the right to seek treble damages to foreign plaintiffs due to the enhanced deterrent effect); *Perma Life Mufflers*, 392 U.S. at 138-39 (rejecting the equal fault doctrine as a defense to private suit).

45. In *Brunswick*, the Supreme Court said that "the treble-damages provision . . . is designed primarily as a remedy." 429 U.S. at 485-86. Yet even in that case, which was a suit for damages, the Court acknowledged that "treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing," 429 U.S. at 485, and the Supreme Court has cited the case to support the notion that the antitrust laws seek both deterrence and compensation. See *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989).

46. See, e.g., *Utilicorp United, Inc.*, 497 U.S. at 226 (promoting "twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims") (White, J., dissenting); *ARC Am. Corp.*, 490 U.S. at 102 (stating that the purposes of federal antitrust law are "detering anticompetitive conduct and ensuring the compensation of victims"); *Blue Shield*, 457 U.S. at 472; *Illinois Brick*, 431 U.S. at 745-46; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Fortner Enter. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); see also H.R. REP. NO. 499, *supra* note 40, reprinted in 1976 U.S.C.C.A.N. at 2589 (stating that national policy should encourage private

Deterrence is paramount in private merger enforcement because the action is typically filed before the merger occurs and the remedy sought is an injunction to bar the merger. Thus, there is no present injury to be compensated but only a future injury to be prevented. For this reason, the injunction remedy in private merger enforcement functions wholly as a deterrent.⁴⁷

3. Substantive Uniformity

The substantive policy goals of antitrust enforcement remain the same whether enforcement is public or private.⁴⁸ Strange as it may appear, this principle is sometimes challenged in the interpretation of the antitrust injury doctrine. As we have seen, that doctrine requires that the claimed private injury be within the anticompetitive rationale of the statutory violation. The problem of substantive uniformity arises because some would hold that an anticompetitive rationale sufficient to establish antitrust injury requires proof of a direct causal link between plaintiff's injury and the output restriction of a monopoly or cartel that has entered its exploitive stage.⁴⁹ But this formulation, which registers only the immediate and short-run allocative effects of anticompetitive behavior, omits the vital long-run goals of preserving competitive processes and market structures and promoting dynamic efficiency. To be sure, one way of attempting to achieve both short-run and long-run goals would be to penalize only immediately exploitive behavior or conduct

antitrust suits both to compensate victims and to punish and deter violations). See generally Berger & Bernstein, *supra* note 40, at 845-46.

47. The *Brunswick* decision, which declared that the private action was designed primarily as a remedy, is not contrary because there the plaintiff sought damages from a past merger rather than an injunction to prevent a future merger. 429 U.S. at 485-86. Thus, the Court's dictum was not addressed to the merger injunction suit, which is the subject of this article and which constitutes almost the whole of private merger enforcement. In addition, as discussed *supra* in note 45, the Court now interprets *Brunswick* as upholding the importance of both compensation and deterrence.

48. To be sure, antitrust goals have changed in recent years, at least in emphasis. See generally Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987). My point is simply that the correctly formulated goals of public enforcement also articulate the goals of private enforcement.

49. See, e.g., *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1202-03 (7th Cir. 1986) (finding that termination of dealer for price cutting in resale price fixing violation was not within anticompetitive rationale); Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1160 (1982) ("[P]laintiff's injury is part of or flows directly from the allocative efficiency loss of monopoly."). See generally Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539 (1989); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985).

closely linked to such demonstrably exploitive behavior.⁵⁰ But this is not the path our antitrust enforcement system has taken — or indeed that of any other developed antitrust regime.⁵¹ Thus, though exploitive or monopoly pricing stemming from collusion or predation provides an important indicator of antitrust violation, the law is not confined to final stage intervention to prevent cartel or monopoly price exploitation.

Antitrust law also protects the competitive mechanisms by which free markets achieve the goals of higher output and consumer welfare. Thus, particularly in merger enforcement, antitrust law strives to maintain competitive market structures that preclude collusive and predatory conduct. While ultimately antitrust anticipates that injuries to competitive conditions will raise prices and lower output, the essence of illegality for many antitrust violations, including merger violations, lies in the injury to competitive conditions themselves. In these cases, antitrust accepts the identified restraint of trade as a proxy by which an ultimate pricing or other output effect is deemed likely.⁵² As then-Judge Breyer recently explained, antitrust law protects the competitive process in order to achieve “low, economically efficient prices, efficient production methods, and innovation.”⁵³

50. The viability of such an approach requires the heroic assumption that the probability and magnitude of the eventual penalty would achieve the desired optimum and that all economic actors would reach common and accurate assessments of these magnitudes — which assumes unbounded rationality contrary to the prescription in *Eastman Kodak*. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 470-72 (1992). See generally Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 268-69 (1993) (arguing that legal sanctions are inherently imprecise due to incomplete information); Eric Rasmusen, *How Optimal Penalties Change with the Amount of Harm*, 15 INTL. REV. L. & ECON. 101 (1995).

51. See D.G. GOYDER, *EC COMPETITION LAW* 11-12 (2d ed. 1993) (stating that the EC protects process of competition); MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* 87 (1993) (stating that the antimonopoly law restricts anticompetitive market structure).

52. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505-11 (1988) (finding unlawful deliberate biasing of a standard-setting body in order to injure rival); *FTC v. Indiana Fedn. of Dentists*, 476 U.S. 447, 461-62 (1986) (holding disruption of market information flow to be unlawful even absent proof of higher price or reduced output); *American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570-72 (1982) (finding illegal biasing of a standard-setting body); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (holding that trade association's arbitrary refusal to certify rival product violated Sherman Act without showing of specific public harm).

53. *Grappone, Inc. v. Subaru of New Eng., Inc.*, 858 F.2d 792, 794 (1st Cir. 1988); see also 7 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 1052 (1980); Brodley, *supra* note 48, at 1023; William K. Jones, *Concerted Refusals to Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73, 88-90 (1989).

Thus, conduct is anticompetitive under the antitrust laws not only when it is directly exploitive and output reducing but also when it damages the long-run competitive conditions by which antitrust seeks to achieve superior performance in pricing, production, and innovation. This is most especially true of section 7 of the Clayton Act, which regulates market structure — by definition a long-run market condition. Consistent with this view, the Clayton Act forbids mergers that “may” injure competition and typically involves enforcement action before economic effects are visible and before the merger has occurred. As the Supreme Court stated recently in *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, “it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the [merger] Act prohibits.”⁵⁴

Most assuredly, private antitrust enforcement raises issues for judicial management, and these are discussed below. What the policy uniformity principle holds, however, is that procedural controls cannot shrink the substantive policies enforceable by private suit. To hold otherwise would cripple the private action as an instrument of substantive policy, distort the will of Congress, and reduce our ability to maintain dynamically competitive markets.⁵⁵ Thus, the meaning of competition is invariant as between public and private cases.

B. *Standing and Incentive Management*

To achieve its goals, private antitrust enforcement relies on the efforts of private litigants. But private enforcers, driven by their own self-interest, may deviate from antitrust goals, and the strong penalties and litigation advantages available to private litigants magnify the mischief such litigation may cause. In order to reduce deviations between private incentives and public goals, the courts have created standing rules designed to prevent both overdeterrence and underdeterrence of antitrust violations.⁵⁶ I shall argue

54. 113 S. Ct. 2578, 2591 (1993) (citing *United States v. Philadelphia Natl. Bank*, 374 U.S. 321 (1963)).

55. See JOHN VICKERS & GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS* 67-69 (1988) (competition provides market participants indispensable feedback on economic performance); Oliver D. Hart, *The Market Mechanism as an Incentive Scheme*, 14 *BELL J. ECON.* 366, 366 (1983) (competitive markets “reduce[] managerial slack”); see also Joseph F. Brodley, *Massive Industrial Size, Classical Economics, and the Search for Humanistic Value*, 24 *STAN. L. REV.* 1155, 1174-78 (1972) (book review) (discussing the teaching function of competition).

56. The antitrust statutes are virtually open-ended in their description of injured persons who may sue. The antitrust remedies are available to any person whose business or property

that at bottom these rules, most especially the antitrust injury doctrine, are incentive managing devices to assure that private enforcers promote public competition goals.

To prevent *overdeterrence*, the courts limit the magnitude and uncertainty of recovery and have evolved a special standing rule called antitrust injury to bar plaintiffs from pursuing private actions incompatible with antitrust goals. General standing rules, such as limitations on duplicate recovery and complex damage apportionment, do not apply to merger injunction actions, where damages are not involved.⁵⁷ It is thus the antitrust injury requirement that provides the key limitation on standing in merger cases.

To prevent *underdeterrence*, the courts apply a pragmatic doctrine of "effective private enforcement," which limits the preclusive thrust of standing rules to assure that viable private enforcers remain available to vindicate antitrust goals. In merger cases, effective private enforcement requires injunction actions to achieve effective deterrence. Together, the two principles — antitrust injury and effective private enforcement — provide a guiding standard for shaping standing procedures in private antitrust cases.

1. *Antitrust Injury*

The antitrust injury doctrine addresses the problem of the wrongly motivated private litigant by scrutinizing the plaintiff's injury to determine whether the self-interest the plaintiff seeks to vindicate is consistent with antitrust goals. Although it might appear that any recovery against an antitrust violator would promote antitrust goals, the courts have barred such recoveries when the plaintiff's injury is unconnected with the antitrust wrong.

The antitrust injury requirement is typically expressed in terms of whether the injury is of the type that the antitrust laws aim to prevent.⁵⁸ That formulation, however, is deceptively simple and subject to manipulation, particularly as applied to a merger law with the broad public purpose of preserving future competitive con-

is injured or threatened with injury "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1994). It would be difficult to formulate a remedy at any higher level of generality. The legislative history of the Clayton Act provides little illumination beyond an intent to provide an effective remedy to consumers and small competitors who must battle large producers. See Berger & Bernstein, *supra* note 40, at 845-46; Hovenkamp, *supra* note 40, at 27-31. Necessarily, therefore, it was left to the courts to shape a body of procedural law to guide private antitrust enforcement.

57. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-62 (1972).

58. See *supra* text accompanying note 6.

ditions, implemented by a remedial statute that gives any person the right to sue "against threatened loss or damage."⁵⁹ Whether an injury is within the rationale of a substantive statute with such a broad purpose requires a judicial characterization that is far from inevitable.⁶⁰ Indeed, in each of the Supreme Court's antitrust injury decisions discussed below it is possible to recharacterize the injury to reach the opposite result. A deeper rationale, however, can provide a coherent explanation for the decisions.

Thus, I shall argue that the antitrust injury requirement is at heart a principle of incentive compatibility. It examines whether the plaintiff's litigation incentives, objectively viewed in terms of the injuries sustained or threatened, are compatible with antitrust goals.⁶¹ Expression of the antitrust injury principle in incentive compatibility terms provides a transparent and operational meaning for this otherwise opaque doctrine.⁶²

The antitrust injury doctrine stems from the 1977 merger decision of the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-*

59. 15 U.S.C. § 26 (1994): "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws"

60. Cases under other public interest statutes illustrate the flexibility of the injury characterization. Thus, in Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2300-03 (1993), the lower court found that white contractors sustained no injury from minority set asides because they could not show that they would otherwise have obtained the contracts, while the Supreme Court found injury through loss of the opportunity to compete. Similarly, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 319-20 (1978), the Supreme Court upheld a challenge to an affirmative action program without a showing that the plaintiff would otherwise have been admitted to medical school. These examples demonstrate that the injury precondition for maintaining a suit under public interest statutes is highly manipulable. See Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 41-42. The antitrust injury requirement is subject to the same elasticity of interpretation. See Blair & Harrison, *supra* note 49, at 1541-42, 1556; see also Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 94 & n.204 (1994) (citing other commentators).

61. The antitrust injury doctrine thus addresses the principal-agent problem of public interest litigation in antitrust law. The government acts as the principal and establishes inducements in the form of treble damages, attorney's fees, and other litigation advantages to induce its agents, capable private enforcers, to bring antitrust cases that serve the public interest. The agents, motivated by their own private interest, augmented by the generous reward system of private antitrust enforcement, are motivated to bring suits even when they do not promote the principal's interest in competition. Anticipating such deviations, the principal — acting through the courts — establishes the antitrust injury test to screen out enforcers with incentives adverse to the principal, thereby reducing agency risk. But as we shall see in Part III, analysis of the agency problem of private enforcement is incomplete and does not consider the multistage nature of the interaction between the government and private enforcers.

62. It is possible to criticize the antitrust injury doctrine as an unjustified narrowing of the substantive statute and contrary to congressional intent. See John J. Flynn, *Which Past Is Prolog? The Future of Private Antitrust Enforcement*, 35 ANTITRUST BULL. 879, 902-04, 910-11 (1990). The doctrine, however, is now well-settled in Supreme Court jurisprudence. My goal here is to place that jurisprudence on a more sound basis by making the standing inquiry operational and consistent with the foundational principles of private antitrust enforcement.

Mat, Inc.,⁶³ decided after the number of private antitrust actions had tripled over an eleven-year period.⁶⁴ The plaintiff claimed injury from a merger that had prevented the failure of one of plaintiff's rivals, and thereby increased competition in the market. Plaintiff's damages were the profits it would have made had its rival failed. Rejecting the plaintiff's claim as "inimical to the purposes" of the antitrust laws because it sought damages for losses from continued competition, the Court formulated the principle of antitrust injury.⁶⁵ The plaintiff must show more than an injury causally linked to an antitrust violation. The Court also stated that "[p]laintiffs 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."⁶⁶ Subsequent courts rephrased the doctrine more simply — as a requirement that the injury be within the rationale of the violation.⁶⁷

The Court's formulation of the antitrust injury principle in *Brunswick* might on first consideration appear to be no more than a rendering of the statutory language of the Clayton Act, which requires that a plaintiff claiming damages "be injured in his business or property by reason of anything forbidden in the antitrust laws."⁶⁸ But the Clayton Act language scarcely compelled the *Brunswick* holding that the plaintiff must be injured by effects themselves anticompetitive and in close nexus with the violation.

In fact, the *Brunswick* decision expressed the germ of the incentive compatibility idea in its explanation that the antitrust laws were not merely indifferent to the injury claimed but would be undermined if the plaintiffs were to be awarded damages for the profits they would have earned from reduced competition. To hold the defendant liable for any loss "causally linked" to the defendant's illegal presence in the market "divorces antitrust recovery from the purposes of the antitrust laws."⁶⁹ These expressions suggest that antitrust damages can be awarded only to a private litigant with

63. 429 U.S. 477 (1977).

64. Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 4 tbl. 1.1 (Lawrence J. White ed., 1988) [hereinafter PRIVATE ANTITRUST LITIGATION].

65. 429 U.S. at 488.

66. 429 U.S. at 489.

67. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 [hereinafter *ARCO*] (1990); see also 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 362a (rev. ed. 1995).

68. 15 U.S.C. § 15 (1994).

69. 429 U.S. at 487.

economic motivation consistent with the competitive aspirations of the law. Certainly, as the Court viewed the facts, *Brunswick* revealed a direct incentive incompatibility between plaintiff's litigation interest and the goals of the merger statute because the plaintiff sought to recover damages from increased competition.

The incentive compatibility principle implicit in *Brunswick* received clear expression in the Court's most recent antitrust injury decision, *Atlantic Richfield Co. v. USA Petroleum Co.*⁷⁰ In *ARCO*, as in *Brunswick*, the plaintiff claimed injury from the pro-competitive effects of a violation. Using language of incentive compatibility, the Court explained that the antitrust injury requirement is satisfied when a plaintiff is within "an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement."⁷¹ Contrary to that dictum, the *ARCO* plaintiff claimed injury from a vertical *maximum* price fixing agreement that limited the ability of its rivals to raise prices. The plaintiff, which was not a party to the agreement, thus was attempting to claim damages not from reduced competition but from intensified rivalry.⁷² The *ARCO* plaintiff therefore sustained no antitrust injury because

[a] competitor is not injured by the *anticompetitive* effects of vertical, maximum price-fixing . . . and does not have any incentive to vindicate the legitimate interests of a rival's dealer. . . . In short, a competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a *pro-competitive* impact on the market. Therefore, providing the competitor a cause of action would not protect the rights of dealers and consumers under the antitrust laws.⁷³

Such a plaintiff was therefore not qualified "to perform the office of a private attorney general."⁷⁴ Incentive compatibility thus provides an operational and straightforward meaning for antitrust injury.⁷⁵

70. 495 U.S. 328 (1990).

71. 495 U.S. at 345 (quoting *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983)).

72. Moreover, the Court determined that the rule against maximum price fixing under which plaintiff sued was intended to preserve the competitive freedom of the manufacturer's own dealers and to protect consumers from disguised minimum price fixing. It was not designed to shield a rival dealer in competition with the manufacturer's own dealers, threatened by low, but nonpredatory, prices. 495 U.S. at 335-41.

73. 495 U.S. at 345.

74. 495 U.S. at 345 (citing *Associated Gen. Contractors*, 459 U.S. at 542); see also Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 33-39 (1984), cited in *Brunswick Corp.*, 429 U.S. at 345.

75. The incentive interpretation readily accounts for other leading antitrust injury cases. Thus, in *Blue Shield v. McCreedy*, 457 U.S. 465 (1982), consumers sustained antitrust injury when a group health plan refused to reimburse them for treatment by psychologists despite

The Supreme Court's *Cargill* decision, which applied the anti-trust injury principle to merger injunction suits, is also explainable in incentive compatibility terms. The Court in *Cargill* denied standing because the competitor-plaintiff claimed injury from lower but nonpredatory prices resulting from a cost-reducing merger, which is to say from "increased competition." Thus, the plaintiff's litigation incentives were incompatible with the antitrust goal of maintaining competition and low prices in consumer markets.⁷⁶

Functionally, therefore, the antitrust injury doctrine narrows the potential reach of the broad statutory language of the Clayton Act to screen out cases in which the plaintiff's motivation, objectively viewed in terms of its economic interests, fails to promote antitrust

the fact that the object of the boycott by the group health plan was not to injure consumers but to disadvantage psychologists who competed with the M.D. members of the plan. The consumers suffered antitrust injury because their injury was "inextricably intertwined" with the injury to the psychologists, 457 U.S. at 484. In incentive compatibility terms, the consumer's self-interest in being reimbursed for psychological services under the group health plan was fully compatible with the interests of the targeted psychologists to compete free from boycott disadvantages. Thus, in incentive terms, the consumers' injury was compatible with antitrust goals.

By contrast, in *Associated General Contractors*, the Supreme Court rejected the standing of a union to challenge an agreement between employers that would have restrained competition in the building construction market. The Court doubted that the plaintiff union had sustained antitrust injury because it was unclear that the union's members would be hurt and indeed they might benefit from an agreement that raised prices and reduced competition in the product market. Thus, the union's litigation incentive was not clearly compatible with the antitrust goal of protecting competition and competitive pricing in the product market. The Supreme Court's denial of standing was based on other grounds as well, but its application of the antitrust injury principle was consistent with the incentive interpretation. 459 U.S. at 539-45.

76. As noted earlier, the Court stated that it would be "anomalous" to read the Clayton Act to allow an injunction suit against a threatened injury for which it could not obtain damages if the injury actually occurred. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 112 (1986). The *Cargill* dissenters feared that this cryptic passage might be read to require proof of a postmerger Sherman Act violation. 479 U.S. at 128-29 (Stevens, J., dissenting). But such a reading would be contrary to the Court's later decision in *California v. American Stores Co.*, 495 U.S. 271, 281-82 (1990), finding the antitrust injury requirement "unquestionably satisfied" by proof that a merger would substantially increase concentration and oligopoly conditions, without inquiry whether this would justify independent Sherman Act recovery. Thus, the brief *Cargill* dictum should not be read to require proof of a Sherman Act violation but simply a threat of injury from the anticompetitive effects the Clayton Act aims to prevent — for example, oligopolistic price coordination.

Indeed, a contrary reading of the *Cargill* dictum — holding that only proof of actual injury would suffice for standing — might jeopardize the ability of State Attorneys General to challenge mergers in the federal courts. Under the Hart-Scott-Rodino Act, the states may bring *parens patriae* actions only for injury to natural persons under the Sherman Act. Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 301, 15 U.S.C. § 15c(a)(1) (1994). Thus, if a merger threatened to cause future damage that violated the Clayton Act, but not necessarily the Sherman Act, states would be barred from suit. See ABA ANTITRUST SECTION, MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT 14-17 (1995). But such a conclusion would undermine almost the whole of state merger enforcement. Thus, the anomalous language of *Cargill* must be read cautiously and with attention to specific context. See *Pennsylvania v. Russell Stover Candies, Inc.*, 1993-1 Trade Cas. (CCH) ¶ 70,224, at 70,088-89 (E.D. Pa. 1993) (rejecting preclusive reading of *Cargill*).

goals. So understood, the antitrust injury doctrine complements the concept of plaintiff as a private attorney general or agent for the public interest. That is to say, the antitrust injury doctrine screens the economic interests of the plaintiff to assure that a disabling conflict of interest or other motivation inconsistent with competition does not hamper plaintiff's capacity to serve the public interest.⁷⁷ A coherent system of private antitrust enforcement, however, requires more than the antitrust injury principle.

2. *Effective Private Enforcement*

The courts apply a pragmatic policy of "effective private enforcement" as a counterweight to the antitrust injury doctrine and as a protection against underdeterrence. In recent years, as the modern doctrines of standing and antitrust injury have evolved, the Supreme Court has made the policy more explicit, stating that effective private enforcement requires an effective class of private enforcers and, in merger cases, injunction actions that achieve divestiture remedies.

Thus, effective private enforcement requires that one or more classes of private litigants be motivated and capable of challenging antitrust violations. The Court has articulated this requirement in both indirect purchaser and antitrust injury decisions. In *Illinois Brick Co. v. Illinois*,⁷⁸ *California v. ARC America Corp.*,⁷⁹ and *Kansas v. Utilicorp United, Inc.*,⁸⁰ the Court, holding that only direct purchasers from a price-fixing conspiracy may sue, explained that enforcement was concentrated on a single class of enforcers to assure that there be a class of plaintiffs with "sufficient incentive to sue."⁸¹ In *Associated General Contractors v. California State Coun-*

77. The antitrust injury doctrine is thus similar to the process interpretation of the state action doctrine. According to that interpretation, financially interested persons are not entitled to antitrust immunity under the state action doctrine because such persons cannot be entrusted to act as disinterested and politically accountable agents for the state. See Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668 (1991). Similarly, under the antitrust injury principle, private antitrust plaintiffs cannot be entrusted with the authority of private attorneys general when instituting burdensome and costly antitrust litigation if their economic interests are not compatible with public enforcement goals. As we shall see, just as active supervision by the state overcomes the objection to regulatory action by interested state officials, judicial supervision can overcome the problems of incompatible litigation incentives in merger suits.

78. 431 U.S. 720 (1977).

79. 490 U.S. 93 (1989).

80. 497 U.S. 199 (1990).

81. 490 U.S. at 104; see also *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983).

cil of Carpenters,⁸² the Court, denying standing to the plaintiff union that failed to meet several of the enumerated standing criteria, including antitrust injury, noted that denial of standing was not likely "to leave a significant antitrust violation undetected or unremedied."⁸³ In its recent *ARCO* decision, the Court held that competitors had not sustained antitrust injury in a maximum-pricefixing case only after finding that two other classes of litigants remained available to "vindicate the public interest in antitrust enforcement."⁸⁴

The controlling principle that emerges from these cases is the need to assure effective private enforcement. Whether a single class of enforcers will suffice depends on the type of antitrust violation and the remedy sought. In *Illinois Brick*, the Court found that a single class of enforcers — direct purchasers able to recover the entire cartel overcharge — would constitute an effective enforcing class,⁸⁵ but a merger injunction case requires a different analysis. First, there are no damages to be concentrated in a single litigant class because damages have not yet occurred when a merger suit is brought. Second, free-rider effects reduce litigation motivation, even within a single litigant class, because other class members may benefit, but the absence of damages discourages class actions.⁸⁶ Finally, no single class of litigants will have incentive to sue in all types of cases.⁸⁷ Thus, effective merger enforcement requires more than one class of enforcers.

3. Injunctions

Injunctions are the standard remedy in merger enforcement cases because postmerger damage suits provide insufficient deterrence, and the flexible remedies and judicial controls of injunction actions ideally serve the preventive purpose of the merger law. Merger law is preventive due to the imperfect ability of the Sherman Act to constrain anticompetitive conduct in highly concen-

82. 459 U.S. 519 (1983).

83. 459 U.S. at 542.

84. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1989) (quoting *Associated Gen. Contractors*, 459 U.S. at 542).

85. 431 U.S. at 729.

86. See *infra* text accompanying note 140. I found no private merger case that was brought as a class action.

87. See *infra* text accompanying notes 137-46. For example, competitors may be affected unequally by a merger, and takeover targets will have no incentive to challenge friendly mergers.

trated markets.⁸⁸ For that reason, merger enforcement aims to stop mergers "in their incipiency" before they have worked competitive harm — a purpose manifest in the legislative history of the Clayton Act and reaffirmed in the 1976 Antitrust Improvements Act.⁸⁹

Economic analysis supports the congressional premise that injunction actions are necessary for effective merger enforcement. Such analysis concludes that ex ante injunction remedies are desirable when ex post damage remedies alone provide insufficient deterrence, whether by reason of low probability of suit, widely dispersed victims, difficulties of proof, uncertainties in the legal standard, or inadequacy of future damage recoveries to offset realized illicit gains.⁹⁰ As the previous discussion has made clear, most of these conditions hold for mergers.⁹¹

Nevertheless, Frank Easterbrook and Daniel Fischel have taken the position that merger injunction actions are inherently inferior to damage actions.⁹² They argue that injunction actions create acute holdup problems because each plaintiff can threaten to block the acquisition unless paid the merger's full transactional value, a sum likely to exceed any threatened injury to the plaintiff.⁹³ In addition, merger plaintiffs other than consumers cannot bargain effectively with the acquiring firm to reach a desirable social result because

88. Sherman Act damage remedies are not available for tacit interdependence and are less than fully effective against collusion, which may involve subtle facilitating practices or hidden agreement. Although predatory conduct appears more amenable to damage enforcement, proof of predation, especially predatory pricing, must overcome deliberately underinclusive liability rules. See, e.g., *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993).

89. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962) (amended Clayton Act); H.R. REP. NO. 1343, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.A.N. 2596, 2597 (Antitrust Improvements Act); S. REP. NO. 698, 63d Cong., 2d Sess 1 (1914) (original Clayton Act).

90. See Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984). An important corollary of this analysis is that when both ex ante and ex post remedies are applicable, the ex ante standard should be set below what would be the social optimum if ex post liability did not exist. See Kolstad et al., *supra*, at 889. The permissive nature of current merger regulation would appear to satisfy this requirement.

91. Thus, difficulties of proof and uncertain legal standards reduce the probability of ex post damages. Transaction costs impede organization of dispersed victims of collusive pricing from maintaining suits when they cannot proceed on the strength of a prior government adjudication. Treble damages do not adjust for these difficulties when the time value of money and other costs are considered. In fact, treble damages turn out to be closer to single damages when current losses, litigation costs, and future recovery are discounted to present value. See Joseph F. Brodley, *Critical Factual Assumptions Underlying Public Policy*, in PRIVATE ANTITRUST LITIGATION, *supra* note 64, 252-54; Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

92. Easterbrook & Fischel, *supra* note 49.

93. *Id.* at 1169.

they have not sustained the type of injury the statute seeks to prevent.⁹⁴ These arguments, however, neglect the realities of merger enforcement and fail to consider systemwide effects.

To begin with, the holdup argument is exaggerated. Plaintiffs cannot credibly threaten to block most unlawful mergers because the typical injunction does not prohibit the merger; rather it restructures the merger transaction to remove antitrust risks.⁹⁵ This reduces the amount of any holdup fee to the cost of restructuring. Equity supervision and other procedural mechanisms, discussed below, can minimize remaining holdup and delay costs. Although consumers generally have more compatible enforcement incentives than other types of litigants, they lack capability as merger litigants and have rarely brought suit.⁹⁶

Second, even if consumers were willing to sue, the immediate consumer interest in lower prices does not reflect the totality of antitrust concerns in merger enforcement. Merger policy also seeks to prevent probable future collusion and predation that threaten no immediate loss to consumers, to promote dynamic efficiency and innovation,⁹⁷ to maintain the disciplining effect of competitive markets, and to preserve alternative centers of decisionmaking.⁹⁸

Finally, the holdup argument proves too much. Consumers also have incentives to exact holdup payments that exceed their injury, especially in class actions brought by self-appointed lawyers. Thus, the holdup argument is really an argument against injunctions. As we have seen, however, the incipiency standard of the merger law can be vindicated only by injunction actions.⁹⁹ Although the holdup problem remains — for all types of merger litigants — its prevention requires not the elimination of merger injunction actions but effective judicial supervision and procedural mechanisms.

In its recent *American Stores*¹⁰⁰ decision, the Supreme Court recognized the key importance of vigorous private merger enforce-

94. *Id.* at 1160-64.

95. Cf. Clifford H. Aronson & James A. Keyte, *Innovative Solutions to Merger Challenges by the DOJ and FTC*, ANTITRUST, Summer 1992, at 26 (increasing willingness of enforcement authorities to allow merger relief short of divestiture).

96. See discussion *infra* text accompanying note 141.

97. See Department of Justice & Federal Trade Commission *Horizontal Merger Guidelines*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1559 §§ 0.1-0.2 (Supp. 1992) [hereinafter *Merger Guidelines*].

98. Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 40-42 & n.164 (1977); cf. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (discussing independent centers of decisionmaking).

99. See *supra* section II.B.3.

100. *California v. American Stores Co.*, 495 U.S. 271 (1990).

ment through injunction actions.¹⁰¹ Upholding the availability of the divestiture remedy in a private merger suit, the Court declared that the injunction remedy — as well as other provisions of the Clayton Act —

manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition [within] a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.¹⁰²

American Stores and other recent Supreme Court decisions evidence an awareness that standing and antitrust injury are components within a larger private enforcement system and that no single doctrine can be pursued in isolation. For example, a single-minded attempt to root out any trace of incentive incompatibility could eliminate all capable and motivated antitrust plaintiffs. Thus, in order to assure that private enforcement remains an effective supplement to public enforcement, the courts in applying the antitrust injury principle must balance incentive compatibility gain against enforcement loss. The failure of courts to engage in such balancing in recent private merger cases is perhaps the single most important reason for the threatened breakdown in private merger enforcement.

III. A SYSTEMS APPROACH TO PRIVATE MERGER ENFORCEMENT

Coherent private merger enforcement requires a unified or systems approach. A systems approach would view the goals and procedures of private merger enforcement as a single mechanism designed to provide an effective supplement to public enforcement. The critical test for determining whether private enforcement meets this objective is whether in the absence of government challenge against a merger that violates core judicial standards, legally qualified litigants with the capability and motivation to mount an effective merger challenge exist. Because private merger enforcement currently fails to meet this minimum condition, there is a need to restore its viability. To do this, we must modify the private enforce-

101. *But see* Aronson & Keyte, *supra* note 95, at 27 (stating that divestiture is not imposed frequently).

102. 495 U.S. at 284-85 (citations omitted).

ment system to assure that the most capable and informed litigants are able to pursue the most seriously anticompetitive mergers with the least divergence between the private and public interest.

A. *Criteria for Effective Enforcement*

Effective private antitrust enforcement depends on four critical factors: (i) enforcement capability, (ii) gravity of the antitrust violation, (iii) incentive compatibility between the enforcer's interest and the public interest, and (iv) availability of equity or other corrective procedures to modify incompatible litigation incentives. In an ideal world, we would maximize each factor, but that is, of course, impossible. Indeed, the tendency to focus on a single factor in isolation from others threatens the viability of private merger enforcement. Instead, the global objective of achieving effective private enforcement requires a pragmatic balancing of all four criteria.¹⁰³ But first, we must understand why each factor is indispensable.

1. *Enforcement Capability*

Effective private merger enforcement depends on plaintiffs who have the financial resources, knowledge of the industry, legal sophistication, and motivation to mount a powerful case with speed and precision. The need for such litigation capability is critical in injunction cases because of the short time frame allowed for obtaining preliminary relief, which may be as little as fifteen days,¹⁰⁴ and the absence of a treble damage incentive. Unless plaintiffs gain preliminary relief before the merger takes place, the chances for effective injunctive relief are remote. The target's assets have been melded into the acquiring firm, and the best that can be achieved is a divestiture of already-scrambled assets to some third firm, a remedy that has not typically been effective in restoring premerger competitive conditions.¹⁰⁵ Thus, enforcement capability is the first indispensable condition for an effective system of private enforcement.

103. Cf. Burns, *supra* note 60, at 90-93 (suggesting a similar approach to antitrust standing based on seriousness of violation, indispensability of plaintiff, and judicial ability to manage litigation by a less-than-ideal plaintiff).

104. Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 201, 15 U.S.C. § 18a (b)(1)(B) (1994) (15 days for cash tender offers, 30 days for other mergers).

105. See *Laidlaw Acquisition Corp. v. Mayflower Group, Inc.*, 636 F. Supp. 1513, 1517 (S.D. Ind. 1986); Frank H. Easterbrook, *Breaking Up Is Hard to Do*, REGULATION, Nov.-Dec. 1981, at 25; Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J.L. & ECON. 43, 53-61 (1969).

2. Gravity of Violation

The second requirement for effective enforcement is that private enforcers must be able to challenge the most egregious merger violations. Public enforcers consider the gravity of the violation in exercising enforcement discretion and are able to concentrate public resources on the most serious antitrust violations. Similarly, in shaping procedural rules to control private actions, courts should also consider this factor as an indicator of the social harm from the violation.

Indeed, in its antitrust injury decisions, the Supreme Court appears to have implicitly considered the seriousness of the violation. In the Court's key decisions creating and extending the antitrust injury principle, the marginal nature of the antitrust violation is, to say the least, a striking coincidence. Thus, in the *Brunswick* decision, which first enunciated the antitrust injury principle, the substantive violation was a discredited deep-pocket theory.¹⁰⁶ In the recent *ARCO* decision, which denied standing in a nonmerger case, the substantive violation was maximum vertical price fixing — a theory that, as the Court itself noted, is now rejected by most commentators.¹⁰⁷ In *Cargill*, the challenged merger caused only moderate concentration, and theories of competitive injury were weak.¹⁰⁸ Had the Court been convinced in these cases that the challenged transaction was strongly anticompetitive, it conceivably could have upheld standing, given the elasticity of the antitrust injury doctrine.¹⁰⁹ By contrast, in *Blue Shield v. McCready*,¹¹⁰ which upheld standing in expansive terms, the substantive violation was a professional boycott of rival health providers that was injurious to

106. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977); cf. *Brodley*, *supra* note 98, at 31-33.

107. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343 n.13 (providing detailed analysis); see *The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 129, 324 (1990) (stating that *ARCO* "all but overruled" decisions holding maximum price fixing per se unlawful).

108. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116-17, 119 & n.15 (1986).

109. For example, in *Brunswick*, the Court might have found that plaintiff had survived through competitive merit and that its resulting monopoly, free from disruption by an unlawful merger, was the appropriate reward for competitive success. See Easterbrook & Fischel, *supra* note 49, at 1157 & n.7. In *Cargill*, the Court might have found, as Salop suggests, that the defendant was engaged in a strategic price squeeze, forcing up the plaintiff's input prices while lowering prices in the plaintiff's downstream market. See Steven C. Salop, *New Economic Theories of Anticompetitive Exclusion*, 56 ANTITRUST L.J. 57, 58 (1987). In *ARCO*, the Court might have found that other enforcers were not reasonably available because consumers would have no incentive to challenge maximum vertical price fixing, and the manufacturer's own single-brand dealers would be inhibited by fears of incurring the ill will of their sole supplier. See generally Burns, *supra* note 60, at 94 & n.204 (citing commentators).

110. 457 U.S. 465 (1982).

consumers and obviously a serious violation.¹¹¹ These cases suggest that the Court implicitly recognizes and considers the gravity of the violation.

In merger cases, the gravity of violation determination is relatively straightforward. Authorities agree that horizontal mergers raise the most serious competitive risks; Congress also held this view in adopting the modern antimerger law.¹¹² Thus, in an early private merger injunction case, the Second Circuit, exercising equity discretion, upheld a denial of an injunction against a nonhorizontal merger.¹¹³ After that decision, antitrust lawyers concluded that an injunction in a private suit against a nonhorizontal merger was generally unobtainable.¹¹⁴

A standard for assessing gravity of the violation is readily available in the Department of Justice and FTC *Merger Guidelines*,¹¹⁵ which contain structural indicia for appraising anticompetitive risk created by mergers.¹¹⁶ This guides the Department's exercise of enforcement discretion and can be useful in making gravity determinations in private cases. Thus, consistent with the tenor of Supreme Court decisions and the *Merger Guidelines*, the gravity of the antitrust violation should be considered explicitly in shaping an effective system of private merger enforcement and in determining appropriate equity relief.¹¹⁷

3. Incentive Compatibility

Effective antitrust enforcement also requires an essential compatibility between the plaintiff's private interest in attacking the merger and the public interest in competition. Critics of merger suits by competitors and takeover targets often exaggerate the conflict between the incentives of merger plaintiffs and antitrust goals.¹¹⁸ Nevertheless, private enforcement clearly raises incentive compatibility risks. A competitor might challenge a merger be-

111. 457 U.S. at 483.

112. See Brodley, *supra* note 98, at 41-42 (stating that horizontal mergers between competitors or potential competitors were the object of greatest congressional concern).

113. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

114. Cf. ABA ANITRUST SECTION, MONOGRAPH NO. 1, THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT 32-36 (1977).

115. *Merger Guidelines*, *supra* note 97, § 2.1.

116. *Id.* § 2 (identifying market concentration, entry barriers, and similar structural factors).

117. Cf. *California v. American Stores Co.*, 495 U.S. 271 (1990) (allowing for equity balancing in issuing merger divestiture remedy).

118. See *infra* section IV.A.

cause it fears that the merged firm will become a more efficient rival; a takeover target might try to block a merger because its managers fear loss of their jobs. As discussed in Part II, the antitrust injury principle addresses this issue by screening the plaintiff's economic interest for its consistency with antitrust goals, and that inquiry is based essentially on an incentive compatibility rationale.¹¹⁹

The antitrust injury principle alone, however, cannot assure incentive compatibility without risk of undermining effective private merger enforcement. To rely solely on antitrust injury to assure incentive compatibility is to assume that courts can divide merger litigants into two neatly bifurcated groups — bad litigants with incompatible incentives and good litigants with compatible incentives. Litigants cannot be so neatly separated into those with compatible and those with incompatible incentives. To be sure, cases of clear incompatibility can be identified, as in *Brunswick*, in which the plaintiff claimed injury from increased competition caused by a merger.¹²⁰ It does not follow, however, that in other cases the plaintiff's incentives are necessarily compatible. Assured compatibility with antitrust goals arises only when the plaintiff can prove actual anticompetitive conduct or a specific intent by the defendant to engage in such conduct. Such cases will be rare because litigants typically bring suit before the merger is consummated and hence before postmerger conduct has occurred.¹²¹

As a result, many cases will involve issues of uncertain compatibility, as the plaintiff's incentives will be hidden from judicial scrutiny at the time of suit. In such cases, the plaintiff will allege a future injury that is within the anticompetitive rationale of the merger law but will lack clear and definitive proof that the injury will occur, apart from the anticompetitive structure of the postmerger market. If courts deny antitrust standing to litigants of uncertain incentive compatibility, they effectively bar some competitors and takeover targets with compatible incentives as merger litigants. On the other hand, if courts allow unregulated pursuit of merger claims by all merger litigants who assert anticompetitive injury, they allow wasteful and disruptive litigation.

Abandonment of the myth that courts can effectively divide all merger plaintiffs into good and bad litigants allows for policies that

119. See *supra* text accompanying note 77.

120. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 480-81 (1979).

121. Even if the litigation continues into the immediate postmerger period, anticompetitive conduct injurious to the plaintiff appears most unlikely in the face of ongoing litigation and expected judicial scrutiny.

promote socially productive private merger enforcement. Instead of limiting the incentive compatibility inquiry to a single-stage determination of whether the plaintiff sustains antitrust injury, the courts should follow a two-stage process. The first stage would use the antitrust injury principle as a threshold screen to eliminate plaintiffs with clear and apparent incentive incompatibility. In the second stage, courts would apply procedural controls and mechanisms to discourage plaintiffs with hidden incentive incompatibility from pursuing merger litigation and to prevent litigation abuse by any plaintiffs not so discouraged.¹²² The availability of the second-stage procedure allows the first-stage procedure to be less demanding than the current antitrust injury analysis because the second stage operates as an additional constraint and offers protection against suits by incentive-incompatible plaintiffs. A brief overview of the second-stage equity procedure will facilitate an understanding of my proposed approach.

4. *Equity Controls and Mechanisms*

Antitrust courts should use their equity powers to assure that the litigation conduct of merger plaintiffs promotes antitrust goals. Courts need not accept flawed litigation incentives as immutable. Instead, antitrust courts can utilize a powerful array of procedural mechanisms to control and regulate the skewed incentives of plaintiffs who pass the antitrust injury screen — a possibility largely ignored by previous discussions of standing and antitrust injury.

Stating the mechanism design problem in exaggerated terms will serve to clarify our understanding. The plaintiff knows whether the merger is lawful or unlawful — for example, whether it promotes increased efficiency or injures competition — but the plaintiff's decision to sue does not reliably signal its knowledge because some plaintiffs seek to block lawful mergers and mergers that cannot threaten them with anticompetitive injury. The antitrust injury principle screens out cases of clear incentive incompatibility, but it cannot by itself eliminate all incentive problems without undermining private merger enforcement.

Thus, despite application of the antitrust injury screen, the risk remains that plaintiffs whose incentives are hidden from judicial

122. Expressed in principal-agent terms, the second stage recognizes that in regulating private merger enforcement, the government as principal need not restrict its supervision to a single, one-time only response to the private enforcement agent's suit — an in-or-out determination of antitrust injury. Instead, the interaction between principal and agent can be continuing and interactive, responsive to the case at hand.

scrutiny will bring merger suits incompatible with antitrust goals. Such plaintiffs may (i) engage in strategic litigation, filing suits without intrinsic merit in order to block or delay a merger; (ii) induce wrong outcomes by causing courts to misidentify lawful mergers as unlawful; (iii) enter into anticompetitive or collusive settlements that do not promote and may harm competition; (iv) fail to brief the court on the complexities of merger relief, leading to inappropriate relief; and (v) defer merger challenge until after the acquired assets have been integrated into the postmerger firm when divestiture becomes costly and often impractical.¹²³

What previous analysis has ignored, however, is that the merger court, sitting in equity, has extensive powers — both actual and potential — to prevent litigation abuse by merger plaintiffs.¹²⁴ Two basic mechanisms are available through the court's supervisory powers. First, the court can use litigation management controls to regulate the plaintiff's litigation conduct. Second, the court can utilize costs and rewards, which operate as separating mechanisms to discourage plaintiffs with incompatible incentives from pursuing merger litigation.¹²⁵

123. An additional risk in private merger litigation is that it might upset international coordination of antitrust enforcement. A recent cooperation agreement between the United States and the European Economic Community bound the contracting parties to notify and coordinate enforcement actions, including merger proceedings, when they affect important interests of the other party. Agreement on the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1487, reprinted in 61 *Antitrust & Trade Reg. Rep.* (BNA) No. 1534, at 382 (Sept. 26, 1991). The agreement does not prevent suits by private plaintiffs, which could cause jurisdictional and comity conflict.

Contemplating possible jurisdictional conflict, however, the agreement allows EEC officials to ask their U.S. counterparts to file an amicus brief in a private case and vice versa. See 61 *Antitrust & Trade Reg. Rep.* at 377. Indeed, the United States can file an amicus brief in any case in which it perceives a conflict problem; defendants, eager to enlist federal agencies to intervene on their behalf, will surely notify federal authorities of any potential conflict. Of course, ultimate resolution of the issue — whether by denying the injunction or shaping relief to avoid conflict — would be up to the courts, but on a matter of foreign relations, the government's views are likely to be persuasive. Finally, most cases involve no jurisdictional conflict. See 61 *Antitrust & Trade Reg. Rep.* at 375 (only 11% of significant mergers in 1991 involved EEC-located firms).

124. See generally 11A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 2947-48 (1995) (detailing judicial discretion in issuing preliminary injunction and imposing conditions); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *HARV. L. REV.* 525, 526 (1978) (stating that absence of standards for preliminary injunctions increases court's discretion).

Although courts recite several specific factors to be considered in preliminary injunction cases — for example, threatened harm to plaintiff, impact of the injunction on defendant, likelihood of success on the merits, and the public interest in antitrust enforcement — these are not rigid requirements but balancing factors in exercising equitable discretion. See 11A WRIGHT ET AL., *supra*, § 2948; 1 ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS* 365-69 (3d ed. 1992) (describing the factors courts should consider in merger cases).

125. A separating mechanism is a commitment by one party that forces the other party to reveal its type. Thus, an auction house that requires a \$10,000 guaranteed deposit to engage in bidding forces impecunious bidders to reveal themselves.

a. *Litigation Management Controls.* Courts have extensive powers to prevent delaying tactics that obstruct mergers and to supervise litigation to assure that it promotes the public interest. Merger cases require skilled judicial management because such suits can upset the delicate timing and financing of a merger and because issuance of a preliminary injunction is often dispositive. Available judicial controls to achieve these objectives include: (i) expedited hearings, which can significantly reduce delay and litigation costs by shortening preliminary injunction proceedings to only a few weeks;¹²⁶ (ii) hold-separate orders, which allow the merger to go forward with the acquired assets held separate until the antitrust issues are resolved, thereby allowing the bidder to acquire the target and the target's shareholders to sell their shares, while preserving the court's ability to achieve effective divestiture relief;¹²⁷ (iii) possible appointment of an equity trustee to hold the target's shares during the pendency of the merger litigation, which functions in similar fashion to the hold-separate order, with the added benefit of preventing the target from using anticompetitive litigation tactics;¹²⁸ (iv) amicus participation by federal or state enforcement agencies to advise the court on the government's views, particularly on remedial issues — advice that when offered has been highly influential in the courts;¹²⁹ (v) the *laches* doctrine, which bars unreasonable delay in filing and prosecuting merger challenges;¹³⁰ (vi) "curative relief" proposals by which merger defendants agree to divest themselves of particular assets raising competitive risks, thereby rendering the balance of the acquisition lawful and frustrating suits by plaintiffs whose real objection is to block the merger's

126. See, e.g., *Missouri Portland Cement Co. v. Cargill Inc.*, 498 F.2d 851 (2d Cir.) (granting preliminary injunction 17 days after filing of complaint), *cert. denied*, 419 U.S. 883 (1974); *Pennzoil Co. v. Texaco, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,848 (N.D. Okla.) (denying preliminary injunction 22 days after complaint filed), *aff'd*, 1984-1 Trade Cas. (CCH) ¶ 65,896 (10th Cir. 1984); *Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741 (D. Del. 1973) (granting preliminary injunction relief 9 days after filing); see also *Tasty Baking Co. v. Ralston Purina Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987) (deciding complex merger challenge in 5 months); cf. *Texas Teller-Machine Case Resolved by Law Professor*, in 6 ALTERNATIVES TO THE HIGH COST OF LITIGATION 161 (1988) (describing complex antitrust case involving electronic funds transfer network tried in a few weeks, based on focused attention of counsel and arbitrator).

127. See, e.g., *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981); *FTC v. PepsiCo, Inc.*, 477 F.2d 24 (2d Cir. 1973); *United States v. American Technical Indus., Inc.*, 1974-1 Trade Cas. (CCH) ¶ 74,873, at 95,875 (M.D. Pa. 1974); *United States v. G. Heileman Brewing Co.*, 345 F. Supp. 117 (E.D. Mich. 1972); *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969); *United States v. Brown Shoe Co.*, 1956 Trade Cas. (CCH) ¶ 68,244 (E.D. Mo. 1956), *aff'd*, 370 U.S. 294 (1962).

128. See, e.g., *United States v. BNS, Inc.*, 848 F.2d 945, 947 (9th Cir. 1988).

129. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 54-60.

130. *California v. American Stores Co.*, 495 U.S. 271, 297-98 (1990) (Kennedy, J., concurring).

pro-competitive aspects;¹³¹ and (vii) judicial balancing of the equities to determine whether to issue a preliminary injunction, allowing consideration of public interest factors, including strategic litigation, incentive incompatibility, and gravity of the antitrust violation.¹³²

b. Separating Mechanisms. The separating mechanism addresses the problem of the plaintiff with hidden incentives — the plaintiff who claims probable future injury from the merger but cannot present clear proof that such injuries will actually occur. The separating mechanism uses costs and rewards that induce the actor to reveal whether its incentives are compatible or incompatible with antitrust goals. Such mechanisms reduce the ability of wrongly motivated plaintiffs to pursue anticompetitive suits but do not suppress the litigation effort of plaintiffs with compatible incentives.

Separating mechanisms available in merger injunction actions include: (i) Rule 11 sanctions against litigants and their attorneys where the suit lacks a legal basis or the plaintiff uses improper litigation tactics;¹³³ (ii) litigation bonds, authorized by both the Clayton Act and Rule 65(c), requiring the plaintiff to post a bond to compensate defendant for losses from an injunction improvidently granted, which imposes costs on plaintiffs who bring nonmeritori-

131. See, e.g., *United States v. Westinghouse Elec. Corp.*, 1989-1 Trade Cas. (CCH) ¶ 68,607, at 61,200 (S.D.N.Y. 1989) (approving joint venture contingent upon divestiture of certain assets); *United States v. Waste Management Inc.*, 1989-1 Trade Cas. (CCH) ¶ 68,481, at 60,650 (W.D. Tex. 1989) (approving acquisition conditioned on divestiture of assets in limited geographic area); Aronson & Keyte, *supra* note 95, at 28 (stating that alternative relief includes licensing of key assets or technology and regulation of conduct). See generally 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, *supra* note 124, at 344-51 nn.24-26.

132. See 1 ABA ANTITRUST SECTION, *supra* note 124, at 365-69. See generally *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258, n.6 (2d Cir.) (construing an equity remedy as “flexible and capable of ‘nice adjustments and reconciliation between public interest and private needs’” (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944))), *cert. dismissed*, 492 U.S. 939 (1989).

133. FED. R. CIV. P. 11; see, e.g., *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) (ordering plaintiff to pay defendant’s attorney’s fees for failure to conduct a reasonable inquiry that would have revealed no antitrust injury), *modified*, 821 F.2d 121 (2d Cir. 1986), *cert. denied*, 484 U.S. 918 (1987); *Ford Piano Supply Co v. Steinway & Sons*, 1990-91 Trade Cas. (CCH) ¶ 68,920, at 62,934-35 (S.D.N.Y. 1990) (imposing sanction after all complaints were dismissed due to insufficient inquiry); *Danik, Inc. v. Hartmarx Corp.*, 1988-1 Trade Cas. (CCH) ¶ 67,915, at 57,592-94 (D.D.C. 1988) (imposing sanction where reasonable inquiry would have revealed alleged anticompetitive practice did not exist), *aff’d*, 875 F.2d 890 (D.C. Cir. 1989), *modified sub nom.* *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). But compare FED. R. CIV. P. 11(c), which was recently amended to make the penalty discretionary rather than mandatory.

ous suits,¹³⁴ and (iii) the existing statutory remedy of attorney's fees for prevailing plaintiffs, which creates a large differential in expected reward as between meritorious and nonmeritorious plaintiffs.¹³⁵

Moreover, courts can strengthen separating procedures by increasing the amount of litigation bonds above their current modest levels, issuing preliminary injunctions conditioned on plaintiff's agreement to make advance public disclosure of proposed settlement terms, thereby discouraging collusive settlements and recognizing voluntary undertakings by plaintiffs that demonstrate pro-competitive motivation as a public interest factor bearing on the issuance of a preliminary injunction — for example, adoption by a takeover target of governance procedures that separate control of the litigation from continued managerial tenure.¹³⁶

Thus, effective private merger enforcement does not require draconian standing rules that bar private merger litigants who cannot demonstrate actual injury under a Sherman Act standard. Instead, courts can effectively constrain private enforcement using existing or judicially augmented equity controls and mechanisms. The choice of mechanisms depends, of course, on the particular facts, including most importantly, the competitive relationship of the potential merger enforcer to the merging firms, whether as a competitor, takeover target, supplier, or customer. Hence, it is critical to determine which of these possible plaintiffs have the capability and motivation to serve as effective enforcers of merger law.

B. Possible Merger Enforcers

Possible merger enforcers include purely private litigants, of which there are several types, and state attorneys general suing in a quasi-governmental representative capacity. Because the two groups present different issues, they are discussed in separate sections.

134. FED. R. CIV. P. 65(c); *Tic-X-Press, Inc. v. OMNI Promotions Co.*, 815 F.2d 1407, 1422-23 (11th Cir. 1987) (imposing \$150,000 bond on order enjoining tying arrangement); *Laidlaw Acquisition Corp. v. Mayflower Group, Inc.*, 636 F. Supp. 1513 (S.D. Ind. 1986) (issuing \$250,000 bond on injunction against takeover attempt); *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86 (E.D.N.Y.) (imposing \$5 million bond on preliminary injunction), *affd.*, 665 F.2d 10 (2d Cir. 1981); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.) (requiring \$10,000 bond on injunction against voting stock in merger target), *affd.*, 206 F.2d 738 (2d Cir. 1953).

135. See 15 U.S.C. § 15(a) (1994).

136. See *infra* text accompanying notes 367-69.

1. *Private Enforcers*

Purely private enforcers fall into five groups — takeover targets, competitors, consumers, suppliers, and business customers.

Competitors and takeover targets are ideal litigants in terms of litigation capability because they are likely to have the skill, knowledge of the industry, financial resources, legal sophistication, and motivation to mount a powerful case with the speed and precision necessary in merger injunctions. Indeed, such litigants may possess litigation capability superior to the government itself. The relatively modest litigation staff the government can field in a typical case, subject to a high turnover rate at junior levels, is not comparable to the litigation capability of a well-financed target or competitor, with expert knowledge of the industry, the most seasoned and distinguished counsel, the most noted economic experts, and whatever litigation support it needs. This is particularly true under the hydraulic pressures of merger injunction litigation, when a case that would normally require months, if not years, of preparation must be presented within weeks.

The superior capability and motivation of competitors and takeover targets as litigants is borne out by statistical data; these data show that over a fourteen-year period, 1977 to 1990, competitors and takeover targets brought fifty-four out of sixty-six reported private merger injunction cases, or eighty-two percent of such cases, and obtained thirteen of the fourteen preliminary injunctions granted in such cases.¹³⁷ A further indicator of the litigation capability of competitors and takeover targets appears in a recent study of the relative success rates of private litigants and the federal anti-trust agencies in cases actually litigated. Over a roughly comparable period, 1982-1992, private litigants in merger cases succeeded in sixty-two percent of the cases tried, a figure substantially equivalent to the Federal Trade Commission's success rate and far exceeding the Justice Department's twenty-seven percent success rate.¹³⁸ The merit of the private merger cases is further indicated by a study of detailed economic findings in the somewhat smaller number of cases in which findings appeared, showing the presence of highly

137. See app. (merger statistics); see also ABA ANTITRUST SECTION, *supra* note 1, at 11-12. The measuring period ends in 1990 because that year marked the end of the merger wave of the 1980s.

138. See Malcolm B. Coate, *Merger Analysis in the Courts*, in MANAGERIAL & DECISION ECON. 3-4 (1995) (defining success as obtaining preliminary injunction or full trial on the merits).

oligopolistic market structures and collusive risks and a low likelihood of efficiencies.¹³⁹

Litigation capability, however, is a double-edged sword. Due to their superior capabilities, competitors and takeover targets are the litigants who can most seriously obstruct mergers by strategic litigation. Moreover, such litigants raise the worst incentive compatibility problems because target firms may oppose mergers to preserve the jobs of their managers, and competitors may seek to block mergers because they fear their efficiency consequences.

Consumers are the least capable litigants in merger injunction cases. No individual consumer is likely to have a large enough stake to justify investment in the litigation, and a class action poses severe organizational problems within the few weeks or days available to challenge the merger. Moreover, success in merger litigation does not lead to damages because the monetary inducements that typically drive consumer class actions are absent.¹⁴⁰ In addition, neither consumers nor their lawyers are likely to have the detailed knowledge of the industry held by business litigants who are directly engaged in the relevant market. The statistics support this low assessment of consumer litigation capability: over the fourteen-year period studied there were only two reported consumer suits, neither of which obtained an injunction.¹⁴¹

Consumers appear to have strong incentive compatibility advantages because their desire for competitive prices accords with anti-trust goals. Consumer incentives, however, are not perfectly aligned with merger goals. Consumers want to buy at low prices now, without regard to the effect such prices have on competitive conditions necessary to sustain productivity and low prices in the future. As Judge Learned Hand wrote in 1916, the antitrust laws aim to protect the long-run interests of consumers and not always

139. *Id.* at 4-5 (showing that average Herfindahl index approached 4000, high entry barriers were present in 78% of private cases as compared with only 42% of Justice Department cases, efficiencies were present in only 11% of the private cases as compared with larger percentages in the government cases, and an overall index of the evidentiary strength of the cases found private cases to be stronger than either FTC or Justice Department cases). The study of evidentiary findings necessarily excluded cases in which findings were not entered. *Id.*

140. To be sure, the successful merger plaintiff can recover attorney's fees, but these are unlikely to motivate counsel when there is no pool of damages in which counsel can share and which can be used to justify a generous fee award. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-84 (1986).

141. See app. (merger statistics).

their short-run desire for "an immediate fall in prices."¹⁴² This is especially true of merger enforcement, which seeks to preserve competitive market structures over the long run and often produces no immediate gains for consumers. Moreover, suits by consumers are typically class actions, brought by lawyers who seek to earn fees, with considerable room for slippage between that objective and the public interest.¹⁴³ In sum, consumers have compatible, but not perfectly compatible, enforcement incentives. Consumers, however, lack the capability and motivation to be effective enforcers of the merger law.¹⁴⁴

Suppliers and business customers of merging firms fall into an intermediate category. They are likely to be more capable litigants than consumers but less capable than competitors and target firms. In addition, suppliers often face standing difficulties based on the directness of the injury when their losses result from a breakdown in competition in the end product market rather than in the upstream input market to which they sell.¹⁴⁵ Neither suppliers nor customers necessarily possess detailed knowledge about the industry because they are sellers or buyers, not direct participants in the market.

Suppliers and business customers also occupy an intermediate position in terms of incentive compatibility. They would not, of course, welcome a merger that creates monopolistic conditions in the market from which they must buy or to which they must sell, but their motivation to sue is often limited. First, their purchases or sales to the threatened market may only be a small fraction of their total sales or purchases. Second, their decision to sue creates a free-rider problem because their action would benefit other buyers and sellers who bear none of the costs. Third, even if the supplier or customer believed the merger would reduce its earnings sufficiently to justify litigation, it would have to weigh these concerns against the loss of goodwill likely to result from a suit against a customer or supplier.

In fact, suppliers and business customers have played only a minor role in private merger litigation. Over the fourteen-year period

142. *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1012 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919).

143. See generally John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983).

144. See *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir.) ("Consumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction."), *cert. dismissed*, 492 U.S. 939 (1989).

145. See 1 ABA ANTITRUST SECTION, *supra* note 124, at 364.

from 1977 through 1990, customers and suppliers brought only four reported cases and failed to obtain any preliminary injunctions.¹⁴⁶ Thus, suppliers and customers cannot fulfill the role of effective private enforcer of the merger law.

Our survey of purely private enforcers leads to the conclusion that the only effective private merger enforcers are competitors and takeover targets and that without their effort there would have been virtually no private enforcement of the merger law.

2. *States Suing as Parens Patriae*

A final possible private litigant is the state suing in a quasi-governmental or representative capacity as *parens patriae* on behalf of consumers or for injury to its general economy.¹⁴⁷ Can the states fulfill the role of effective private enforcer of the merger law, removing the need for other private litigants in merger cases? This question assumes increasing importance as the standing of other private litigants becomes more precarious.¹⁴⁸

Despite the importance of their enforcement effort in recent years, the states cannot by themselves vindicate the dual enforcement principle. They lack the enforcement capability to replace all other private merger plaintiffs in an effective manner; their incentives, while generally superior to those of competitors and takeover targets, are subject to their own distorting influences; and the states — under whatever legal mantle they act — remain agencies of government, not aggrieved private persons applying the self-help remedy embodied in dual enforcement.

The durability of the present state enforcement effort is not assured, due to drastic fluctuations in state enforcement over the years. State enforcement, active in the early years of the Sherman Act, virtually ceased over a fifty year period, reviving only in the mid-1980s.¹⁴⁹ State merger enforcement is confined to a relatively few merger-enforcing states and is dependent on the views of changing state attorneys general and state budgetary support in a time of increasing financial stringency. The narrowness of state

146. See app. (merger statistics). Since 1990, the number of customer cases has increased, but customers have been singularly unsuccessful in gaining standing, succeeding in only one out of six cases during 1991-1995. See *supra* note 29 (search description).

147. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). A state may also bring merger injunction suits as a purchaser in the restrained product market, but it then acts as a purely private litigant.

148. See *supra* text accompanying note 29.

149. See Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1053-56 (1990).

economic interests and local political concerns that may be incompatible with national antitrust goals can distort the incentives of state enforcers. Moreover, the need to conserve limited state enforcement resources and to avoid federal-state conflict has drawn the states into an ever more intimate partnership with federal antitrust authorities — a governmental, not a private, enforcement role. Thus, it would be a startling interpretation of congressional intent in creating the dual enforcement system to hold that the only entity with standing to maintain a private merger suit is an agency of government itself.

Resources and personnel limit state merger enforcement. Merger cases are the most resource-intensive antitrust litigation.¹⁵⁰ Within a matter of weeks, sometimes even days, the plaintiff must marshal a sophisticated antitrust case involving proof of complex economic facts, including market definition, market power, and oligopolistic conduct — an awesome task, even for a large team of lawyers and economists representing a billion-dollar corporation. Yet most states have only three to five antitrust lawyers, others no more than one or two, and some states none at all.¹⁵¹ In addition, almost none of the states has a staff economist,¹⁵² and the tight time limits of merger litigation tend to hamper the effective multi-state coordination that occurs in other types of state antitrust litigation.¹⁵³

Financial pressures also inhibit state merger capability and growing budgetary limitations on state finances may intensify these pressures. Many state legislatures expect antitrust enforcement to

150. *Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 968 (1995) (statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice); Telephone Interview with Robert M. Langer, former Connecticut Assistant Attorney General and Head of the Antitrust-Consumer Protection Department and former Chair of NAAG Antitrust Task Force (July 31, 1995).

151. Telephone Interview with Kevin J. O'Connor, Wisconsin Assistant Attorney General and Head of Antitrust Department, and Chair of the NAAG Antitrust Task Force (Aug. 3, 1995).

152. *Roundtable Discussion*, *supra* note 150, at 968 (statement of Laurel A. Price, Chair, NAAG Multistate Antitrust Task Force); Telephone Interview with Kevin J. O'Connor, *supra* note 151. Absence of in-house economic expertise has been ameliorated in recent years through access to federal agency economists and financial support from a treble damage recovery. Telephone interview with Kevin O'Connor, *supra* note 151. But there is no assurance that such resources will continue to be available in a time of growing budgetary stringency.

153. Telephone Interview with Robert M. Langer, *supra* note 150. Other factors hampering effective coordination include differences in enforcement philosophies, economic impact, and antitrust expertise as between the states. ABA ANTITRUST SECTION, *supra* note 76, at 70-71. See generally Lande, *supra* note 149, at 1064, 1085 (discussing how states lack resources and expertise).

be self-supporting.¹⁵⁴ Unlike treble-damage claims and civil penalties in Sherman Act cases, merger injunction cases make no contribution to state revenues apart from a possible attorney's fee award.¹⁵⁵ Federal support for state antitrust enforcement under the Federal Crime Control Act,¹⁵⁶ which subsidized state antitrust enforcement beginning in the 1970s,¹⁵⁷ is no longer available.¹⁵⁸ While the lack of direct financial subsidy is offset to some extent by in-kind help, such as federal training and expert economic assistance,¹⁵⁹ future federal support is by no means assured in a time of severe budgetary reduction and differing political views as to the merits of state merger enforcement.¹⁶⁰

Reflecting these influences, state merger enforcement has been limited. Probably no more than eight or ten states are strongly engaged in merger enforcement.¹⁶¹ As recently as 1985, in several states merger enforcement did not exist.¹⁶² States have taken a more active enforcement role only in the last few years, and they became a major enforcement factor only in the 1990s.¹⁶³ The viabil-

154. See Susan Beth Farmer, *Introduction to 18 J. REPRINTS FOR ANITRUST L. & ECON.*, 1, 4 (1988). In at least 14 states, penalties and damages go into a revolving fund to support antitrust enforcement. *Id.*

155. Even if the attorney's fee award is computed at the prevailing private compensation rate, it will not approximate the return from a significant treble damage award.

156. State Antitrust Grant Program Amendment to Crime Control Act, 42 U.S.C. § 3739 (1978).

157. See Farmer, *supra* note 154, at 3.

158. Telephone Interview with Kevin J. O'Connor, *supra* note 151.

159. See *ABA Spring Meeting Scrutinizes Redirected Antitrust Enforcement*, 66 *Antitrust & Trade Reg. Rep.* (BNA) No. 1659, at 411, 413 (Apr. 14, 1994) (statement of Laurel A. Price); Telephone Interview with Kevin J. O'Connor, *supra* note 151.

160. See Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 *CONN. J. INTL. L.* 501, 534 (1994) (discussing the "destructive potential" of competition between state and federal antitrust enforcement agencies). Significantly, Donald Flexner was Deputy Assistant Attorney General for the Antitrust Division during the Reagan administration.

161. Telephone Interview with Robert M. Langer, *supra* note 150; see Lande, *supra* note 149, at 1050, 1056-59 (revealing that over a 10-year period, 1980-1990, seven states conducted most of the merger enforcement activity). More recent data, collected since 1990, combined with earlier data, show that only 10 states have been involved in more than one reported merger case (including consent decrees) from 1980 through 1994: California, Connecticut, Massachusetts, Maine, Minnesota, North Carolina, New York, Pennsylvania, Texas, and Washington. See *supra* note 29 (search description).

162. See Lande, *supra* note 149, at 1054-55, 1085 (noting that during a 50-year period, 1930-1980, states filed only 4 merger cases, and none of these occurred from 1930 through 1960, and that most states have never brought a merger case).

163. Over the 14-year period, 1977-1990, there were only 7 reported state-instituted merger decisions in the federal courts out of a total of 66 reported private merger cases. See *app.* As recently as 1990, leading antitrust practitioners considered a merger suit by a state to be an unlikely occurrence. See, e.g., Edwin M. Zimmerman, *Section 7 and the Evolving Role of Economics*, 35 *ANTITRUST BULL.* 447, 460 (1990). By contrast, between 1990 and 1994, the states brought 11 out of 27 reported private merger cases.

ity of state merger enforcement depends on the views of changing attorneys general in the relatively few active enforcing states.¹⁶⁴ Consumers in other states, comprising large regions of the country, remain unprotected by effective state merger enforcement.

The states have been very selective in their enforcement efforts, concentrating on cases having local consumer impact in a few highly visible consumer markets or adverse employment effects on vital local industries.¹⁶⁵ Budgetary constraints, both state and federal, could reduce state enforcement efforts in the future or focus it even more exclusively on purely local transactions.¹⁶⁶ Indeed, the states themselves have recognized their inability to sustain private merger enforcement alone and have urged Congress to amend the Clayton Act to broaden the standing of competitors, takeover targets, and other business litigants in merger cases.¹⁶⁷ Thus, the state enforcement effort is incomplete, leaving many mergers that have serious anticompetitive impact outside the zone of state enforcement influence.¹⁶⁸

Further, the state's enforcement incentives are not always compatible with national antitrust goals. As we have seen, state enforcement is intensely local.¹⁶⁹ The state is concerned with the

164. See ABA ANTITRUST SECTION, *supra* note 76, at 69-70 (suggesting that localized political factors may influence enforcement decisions); Robert M. Langer, *Commentary: The Impact of Antitrust on Merger Activity in the 1980s — Suggestions for Change*, 29 WASHBURN L.J. 290, 290 (1990). In New York, one of the most active merger enforcing states, a change of Attorney General and Governor led to a 65% decrease in the previous antitrust staff of 17 lawyers. Interview with Lloyd E. Constantine, former Assistant Attorney General in New York and former head of NAAG Multistate Antitrust Task Force (Aug. 8, 1995).

165. See ABA ANTITRUST SECTION, *supra* note 76, at 70 & n.345, 80 (describing state merger activity predominantly local); Michael H. Byowitz, *Mergers, Acquisitions and Joint Ventures*, in BASIC ANTITRUST LAW 309 (1994) (stating that state merger enforcement is most active in wholesale and retail businesses, including supermarkets, department stores, and hospitals). My survey of reported state merger cases brought from 1991 through 1994 showed that only 3 out of 11 cases involved allegations not focused on purely local effects. At present, at least 50% of state merger activity involves hospital mergers. Telephone Interview with Kevin J. O'Connor, *supra* note 151.

166. The Justice Department currently attempts to persuade state attorneys general to limit their antitrust prosecutions to transactions that “do not have a national character.” See *Bingaman Details Division Priorities in International Antitrust Enforcement*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1637, at 568-69 (Oct. 28, 1993) (quoting Anne K. Bingaman, Asst. Atty. Gen. in charge of antitrust).

167. See NAAG Resolution on *Standing and Divestiture in § 7 Cases*, 54 Antitrust & Trade Reg. Rep. (BNA) No. 1372, at 1175 (June 30, 1988); cf. NAAG Task Force Report, 7 Trade Reg. Rep. (CCH) ¶ 50,068, at 48,751 (Nov. 12, 1991) (statement of Robert M. Langer, former Chair of NAAG Multistate Antitrust Task Force) (saying that competitors should have standing to challenge mergers without proof of predation); Lloyd E. Constantine, Speech to New England Antitrust Conference (Nov. 2, 1990), in Trade Reg. Rep. (CCH) No. 131, at 5 (Nov. 6, 1990) (discussing limited role of states in merger enforcement).

168. See generally Richard Blumenthal et al., *Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat*, 67 CONN. B. J. 1 (1993).

169. See *supra* note 165.

impact of the merger on economic interests within the state — its workers, consumers, communities, and tax revenues. But these objectives can be inconsistent with the national goal of competitive markets. As a result, the states are motivated to oppose mergers that cause losses to their own economies, without balancing gains that may be realized outside the state.¹⁷⁰ On the other hand, the state may *not* oppose a merger that increases employment within the state even when it reduces competition generally.¹⁷¹ The state will have relatively little incentive to challenge mergers that cause generalized national injury but have no particularized impact on the state, such as mergers among manufacturers of nationally sold products.¹⁷²

Finally, it would be a startling reading of the antitrust statutes and their legislative history to hold that the states alone comprise the effective class of private merger litigants required by the dual enforcement principle. Congress created a private antitrust action to enable suits by consumers and, perhaps most of all, competitors and potential competitors.¹⁷³ The states did not play a part in this private enforcement scheme. Congress viewed state antitrust enforcement as governmental: the states were parallel sovereigns enforcing state antitrust laws, many of which had existed before the Sherman Act.¹⁷⁴ The Sherman Act would enable the federal government to enforce antitrust law in interstate commerce, thereby supplementing state enforcement and closing any gap in public enforcement.¹⁷⁵

The role of the states in antitrust enforcement differs today but remains essentially governmental. The governmental character of current state antitrust enforcement arises not from a separate intra-

170. State attorneys general have expressed concern about loss of jobs and local facilities within the state — local losses that do not necessarily injure competitive interests. See ABA ANTITRUST SECTION, *supra* note 76, at 70 & n.345; Blumenthal et al., *supra* note 168, at 12-13 (stating that state enforcers may take job protection into account when deciding among cases that “make sense” on traditional economic grounds); Lande, *supra* note 149, at 1068 (same).

171. Indeed, state merger enforcement may be a zero-sum game in that a merger embraced in one state because it strengthens a local enterprise may be “villified” in another state because it raises prices or reduces local employment. ABA ANTITRUST SECTION, *supra* note 76, at 70-71.

172. See Blumenthal et al., *supra* note 168, at 10 (stating that local factors almost always influence a decision to prosecute a merger violation); Lande, *supra* note 149, at 1082 (discussing how states rarely challenge mergers unless they have a disproportionate intrastate impact).

173. See 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman); Hovenkamp, *supra* note 40, at 23-27.

174. See generally Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75 (1990).

175. See ABA ANTITRUST SECTION, 1 State Antitrust Practice and Statutes 19-20 (1990).

state enforcement sphere but from the state's inescapable status as a governmental entity and the resulting need for close federal-state collaboration to avoid transaction-detering intergovernmental conflict.¹⁷⁶ Such collaboration now includes institutionalized liaisons between federal and state enforcement authorities, federal training of state personnel, joint federal-state filings of merger suits, proposals for deputization of state personnel as acting U.S. attorneys to assist in federal prosecutions, and federal plans to divide merger enforcement responsibilities with the states.¹⁷⁷ While such collaboration conserves enforcement resources and helps to avoid federal-state conflict, it undermines the states' role as independent victim-driven enforcers of the antitrust laws that can functionally replace purely private enforcers.

The legislative history of the antitrust statutes further negates the conclusion that the state *parens patriae* suit satisfies the dual enforcement requirement. When Congress originally enacted the private antitrust remedies, the federal courts had not yet accepted the antitrust *parens patriae* action.¹⁷⁸ But we need not speculate on whether the state *parens patriae* action, recognized by the Supreme Court in 1945,¹⁷⁹ displaces suits by other private litigants. In 1976, Congress codified the *parens patriae* action and made clear that the federal authorization, far from displacing the rights of other private litigants, sought to provide an alternative procedural means to vindicate substantive antitrust claims.¹⁸⁰ Indeed, the 1976 legislation, which authorized the states to bring Sherman Act damage claims on behalf of consumers,¹⁸¹ specifically excluded the states from representing any business entity because such entities "are able . . . to fend for themselves"¹⁸² and to pursue their antitrust remedies inde-

176. Such conflict may arise from differing enforcement criteria reflected in separate state and federal merger guidelines, differences between regional and national enforcement goals, and differing degrees of antitrust expertise. See ABA ANTITRUST SECTION, *supra* note 76, at 66-70, 72, 78.

177. Some commentators would go further and require a fixed division of responsibility between federal and state antitrust authorities mandated by enforcement agency guidelines or statutory enactment. See ABA ANTITRUST SECTION, *supra* note 76, at 83-85.

178. Private remedies were contained in the original Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890). The Supreme Court first recognized the state *parens patriae* antitrust action in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945).

179. 324 U.S. at 450.

180. See *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 218-19 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 n.14 (1977).

181. Hart-Scott-Rodino Antitrust Improvement Act of 1976, § 301, 15 U.S.C. § 15c(a)(1) (1994).

182. H.R. REP. NO. 499, *supra* note 40, at 9, reprinted in 1976 U.S.C.C.A.N. at 2579.

pendently.¹⁸³ Thus, in authorizing the state *parens patriae* action, Congress assumed the continued presence of other private enforcers, most especially business entities.¹⁸⁴ It follows that the state *parens patriae* action neither satisfies the dual enforcement mandate nor precludes the courts from recognizing that suits by takeover targets and competitors are necessary for effective private enforcement of the merger law.

C. *Effective Private Enforcers*

A review of the advantages and disadvantages of private merger enforcers shows that purely private litigants — apart from target firms and competitors — have been ineffective as merger litigants and that the states standing alone cannot fulfill the role of effective private enforcers of the merger law. Thus, the only effective private enforcers are takeover targets and competitors. Yet, we have seen that these are precisely the litigants whose credentials are most vigorously challenged under the antitrust injury doctrine. Indeed, some lower courts, echoing commentators, have asserted that the litigation incentives of competitors are inherently perverse and those of target firms oblivious to the public interest.

Thus, we appear to confront a dilemma. Stated in exaggerated terms, competitors and targets know whether a merger is unlawful and have the resources and expertise to prove illegality in court, but these merger litigants also have distorted incentives that lead them to misrepresent lawful and beneficial mergers as anticompetitive. The flaw in current thinking about standing and antitrust injury is to conclude that the dilemma is incurable and that the courts must therefore bar competitor and target suits. Such a conclusion, however, repudiates the dual enforcement principle and risks serious underenforcement of the merger law. Instead, courts should follow a more constructive approach, screening out cases of clear incentive incompatibility through the antitrust injury principle and eliminating remaining incentive incompatibility through equity and other incentive management controls.

Some may object to any revitalization of private merger enforcement because it will authorize suits by some litigants with

183. *Id.* at 9-10, reprinted in 1976 U.S.C.C.A.N. at 2577.

184. The 1976 statute does not, by its terms, bar the states from representing business entities in Clayton Act merger cases, the statute having been adopted in response to a judicial ruling hostile to state *parens patriae* actions in Sherman Act damages cases. But it would be strikingly inconsistent to conclude that the states can represent business entities in merger cases when the states are forbidden to represent them in Sherman Act cases because such entities are able to fend for themselves.

flawed incentives. But to admit to such an objection is to pursue the illusion of purity of litigation motivation. Litigants in antitrust cases, like other economic actors, seek to benefit themselves, not to promote social welfare. Most assuredly, therefore, competitors and target firms will use merger litigation to pursue their own self-interest but so will all other litigants; no litigant's personal agenda will correspond fully with the social agenda.

Nor are federal agencies ideal enforcers, as public choice theory teaches and as we have seen in connection with state enforcement. Government enforcers have bureaucratic and political agendas that motivate their actions in ways that are quite distinct from concerns for social welfare.¹⁸⁵ Congress itself recognized the tension between bureaucratic agendas and the public interest when authorizing the state *parens patriae* action: it required the state to pay defendant's attorney's fees in actions filed for oppressive reasons.¹⁸⁶

Certainly, federal merger enforcement has experienced drastic swings from one extreme to the other — from zealous enforcement in the 1960s to high permissiveness in the 1980s. Political agendas raise special risks in antitrust law for enforcement policy may become the captive of changing economic ideologies or the unintended victim of drastic government-wide budgetary constraints. If the public interest is defined as coinciding with judicial interpretations of antitrust statutes, then the alignment between the public interest and government enforcement policy is far from perfect. Indeed, the 1980s witnessed an unwillingness by federal antitrust agencies to enforce significant areas of antitrust law because enforcers disagreed with judicial precedent. In some instances, purely political considerations influence government merger enforcement policy — as the Nixon tapes revealed.¹⁸⁷ Indeed, a chief merit of a dual enforcement system is its ability to offset such occasional ideological or political bias.¹⁸⁸

185. See SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* 171 (1977) (noting a strong tendency to prosecute cases that can be won easily even when not of economic significance).

186. 15 U.S.C. § 15c(d)(2) (1994).

187. ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 847-50 (1989) (describing how the Nixon tapes show politically motivated interference by the White House with federal merger enforcement).

188. See generally Coffee, *supra* note 143, at 227 (stating that private enforcement helps assure "stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature").

It is true of course that antitrust litigants must meet the antitrust injury test the courts have required as a condition for evoking the powerful antitrust remedies. But the statutory standard requires only that the plaintiff's threatened injury occur "by reason of anything forbidden in the antitrust laws."¹⁸⁹ Nothing in that language prohibits, and common sense requires, that courts apply the statutory test to vindicate the congressional purpose of an effective system of private enforcement.¹⁹⁰ As we shall see, courts have an ample basis for finding threatened antitrust injury in suits by competitors and takeover targets.

Thus, the illusion of unattainable enforcement ideals should not deter us from our earlier conclusion that an effective system of private merger enforcement requires that courts permit the most litigation-capable plaintiffs to challenge the most seriously anticompetitive mergers, subject to appropriate equity and other controls. It remains to apply these enforcement criteria to competitors and takeover targets — the two classes of litigants who alone can provide an effective supplement to public enforcement.

IV. COMPETITORS

Competitors should have standing to challenge egregiously unlawful mergers because they are highly capable litigants, because Congress sought to protect their freedom to compete without risk of predatory injury from market powerful firms created by anticompetitive mergers, and because effective private enforcement of section 7 does not appear possible without their participation. Although suits by competitors may raise incentive compatibility risks, competitors' incentives are not systematically and perversely opposed to the public interest in competition. Instead, courts

189. 15 U.S.C. § 15a (1994).

190. Courts follow such a common-sense approach to private enforcement in other contexts. Thus, they allow patent licensees to challenge the validity of patents even when the licensees have expressly agreed not to do so (and presumably have been compensated for so agreeing) because only they may have the economic incentive to test patent validity. *See, e.g., Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). Rival bidders and target firms have standing to sue under the securities laws for misstatements of material facts even though Congress intended these provisions for the protection of investors because bidders and targets are the only litigants capable of policing the SEC filings. *See GAF Corp. v. Milstein*, 453 F.2d 709, 719-21, 722 n.27 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *see also Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799 (M.D.N.C. 1987). Perhaps most striking of all, injured competitors may bring false advertising suits under the Lanham Act without any showing of consumer injury, despite the fact that the false advertising law has output perfecting and consumer welfare goals similar to the Sherman and Clayton Acts. *See Burns, supra* note 60, at 64-69.

should evaluate competitors' incentives realistically, screening out those with clearly incompatible incentives and controlling and modifying the incentives of other competitors through equity mechanisms, thereby facilitating challenges by competitors of the most seriously anticompetitive mergers. Under these circumstances, competitors can be highly effective enforcers of the merger law.

A. Enforcement Capability

As compared with other business litigants, competitors are generally the best-placed firms to pursue merger litigation. The special advantages a competitor has as a merger litigant by virtue of its knowledge and proximity to the market were well summarized in Judge Fullam's recent opinion in *Tasty Baking Co.*:¹⁹¹

[C]ompetitors — with specialized knowledge of their market — may recognize that an acquisition will enable the acquiring company to harm competition by harming the remaining competitors; with this special knowledge that enables rapid action, together with their access to resources needed to prosecute an antitrust action, competitor-plaintiffs well may assure that “a plaintiff adequately represents the interests of ‘victims’ of the antitrust violation” and that “in fashioning relief [judges] appropriately address and remedy the actual violation rather than simply correct an incidental injury.”¹⁹²

Although competitors do not have the immediate insight of the target firm, whose assets will form a part of the merged entity, competitors frequently have enforcement advantages over targets, who will not wish to challenge a friendly merger and typically will be unable to challenge an unfriendly merger beyond the preliminary injunction stage. An unfriendly merger challenge cannot survive a denial of a preliminary injunction because after the bidder acquires the target the first order of business of the new board of directors, now under the bidder's control, will no doubt be to dismiss the antitrust suit. A competitor suffers no such disability.

Competitors also have litigation advantages over customers and suppliers because they need not be concerned about maintaining a continuing business relationship with the merging firms. Moreover, a competitor with a major stake in the impacted market will have greater motivation to prevent restraints of trade injurious to it than

191. *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1256 (E.D. Pa. 1980).

192. 653 F. Supp. at 1256; *see Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 407-08 (1st Cir. 1985) (“We cannot conceive of a more appropriate plaintiff to challenge . . . [a predatory] merger.”); *cf. California v. American Stores Co.*, 495 U.S. 271, 278, 279 & n.4, 292 n.21, 294-95 (1990) (adopting *Cia. Petrolera's* view as to availability of divestiture remedy in private merger cases and its interpretation of the legislative history of the merger injunction provision of Clayton Act).

will a supplier or customer whose sales or purchases within the restrained market may constitute only a fraction of the total operations in that market. Finally, competitors with first-hand knowledge of the industry are best qualified to evaluate an efficiencies defense.

Historically, competitors are the most numerous private merger litigants, and their relative importance has increased in recent years.¹⁹³ Competitors obtained six of eleven preliminary injunctions granted against mergers between 1977 and 1990, with targets obtaining almost all of the balance. Competitors have been the most important class of merger litigants, and together with targets, they have brought eighty-two percent of the reported private cases during the above fourteen-year period.¹⁹⁴

B. *Incentive Compatibility and Threatened Injury*

The objection to competitor standing in merger cases is based on an absence of threatened injury or incentive incompatibility. In *Cargill*, the Solicitor General asserted that competitors who attack mergers on predatory pricing grounds have perverse incentives: that competitors will challenge only efficient mergers that "threaten" them with lower prices and vigorous competition.¹⁹⁵ Some commentators have joined the negative chorus, asserting that competitors in antitrust cases are almost always wrongly motivated;¹⁹⁶ that even if some competitor cases have merit, they should nevertheless be barred because of their infrequency and the difficulties courts face in analyzing modern theories of anticompetitive injury to competitors;¹⁹⁷ and that "[t]he identity of the plaintiff is all

193. Competitors brought 31 of the 66 private merger cases reported during the period 1977-1990 and 19 of the 34 cases reported during the more recent 1984-1990 period. *See app.* Although these data reflect only reported cases, a comprehensive study of case filings over an 11-year period also showed that competitors were the most numerous type of private merger plaintiff. *See also* Salop & White, *supra* note 64, at 9 (stating that competitors are the most numerous type of private merger plaintiff).

194. *See app.*

195. Brief for the United States as Amicus Curiae at 9-12, *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 88-473).

196. *See* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 256-59 (1985). *But see* Brodley, *supra* note 91, at 257-63 (asserting that cost-benefit analysis using empirical data indicates value of private antitrust suits, including competitor suits); James C. Miller III, *Comments on Baumol and Ordover*, 28 J.L. & ECON. 267 (1985) (stating that academic fears are exaggerated in view of declining case filings and reduced substantive liability). *See generally* Salop & White, *supra* note 64 (explicating 1985 Georgetown study of private antitrust litigation).

197. *See* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 554-60, 567-76 (1991). Professors Snyder and Kauper's negative conclusions on competitor suits were based on their appraisal of the merits

the court needs to know."¹⁹⁸ These statements present an oversimplified and incomplete account of collusive behavior and the dynamics of business rivalry, however.

In fact, competitors may rationally fear injury from mergers that create high concentrations of economic power. Although rivals may be able to reap short-run benefits from a collusive merger, the rivals' advantage is precarious. The dominant firm or group of firms has an incentive not only to collude but also to prevent outsiders who did not contribute to the collusive investment from sharing the gains and to exclude rivals who threaten to undermine the collusion.¹⁹⁹ Thus, market-concentrating mergers can make the competitive firm a potential target for cartel punishment or market elimination through exclusionary and predatory strategies.²⁰⁰ Indeed, coalescing merger standards, consistent with developments in economic theory, indicate that anticompetitive mergers will be precisely those that create the exclusionary or predatory capability to

of 74 cases docketed in 5 district courts within a 2350 case sample used in the Georgetown private litigation study, covering the period 1973 to 1983. Applying the standards of recent economic analysis of exclusionary transactions to files that were often fragmentary, they found the cases largely lacked merit. But perhaps it is not totally surprising that files in cases, most of which were brought in the quite different antitrust climate of the early- to mid-1970s, *see id.* at 599-603, should lack evidence to fit economic theories not yet articulated. In any event, a study of more recent cases covering the period 1982 to 1992, most of which were competitor cases, showed that private merger cases actually tried had a success rate of 62%, comparable to the FTC's success rate, and much better than the Justice Department's success rate of only 27% on approximately the same number of cases tried; moreover, the private cases were based on strong evidence of probable anticompetitive effects — stronger in fact than was present in the government cases. *See Coate, supra* note 138, at 3-4.

In addition, whatever the defects of filed cases, they do not inform us of the deterrence effect of competitor suits — an issue not explored in the Georgetown data. *See Brodley, supra* note 91, at 262 (stating that other empirical studies show important deterrence effects). Finally, turning to recent economic theory, *see infra* text accompanying notes 204-05, it seems premature to dismiss its legal utility when commentators are only beginning to craft detailed legal approaches. *See, e.g.,* Michael H. Riordan & Stephen C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995). Professors Snyder and Kauper also make insightful suggestions on the legal applications of the new theories. Snyder & Kauper, *supra*, at 563-64.

198. Easterbrook, *supra* note 74, at 36.

199. *See* KARL PRIBRAM, CARTEL PROBLEMS 64-71 (1935) (stating that a struggle against outsiders is essential to the protective goal of cartels); Leonard W. Weiss, *Cartel*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 372, 373 (John Eatwell et al. eds., 1987) (stating that the growth of fringe firms threatens a cartel and may evoke disciplinary action). *See generally* R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579 (1992).

200. The terms "predatory" and "exclusionary" are often used interchangeably. *See Aspen Sking Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). But a distinction between the two can sometimes be analytically helpful. Thus, I shall generally use "predation" to mean welfare reducing conduct by a dominant firm to drive out a smaller rival and "exclusionary action" to describe a broader range of strategies that encompass both market exclusion and raising rivals' costs as well as foreclosure of new entry.

exclude rival firms or to raise their costs.²⁰¹ It follows that the incentive incompatibility of competitors is exaggerated and that such firms, confronted with market exclusion or higher costs, may realistically be threatened with injury from collusive mergers.

To be sure, we normally assume that competitors will benefit from collusion in their market, choosing either to follow the oligopoly consensus or to deviate only to the point where they do not provoke punishment. But the existence of exclusionary capability limits the firm's independence and adds strategic uncertainty to its other risks. The firm must henceforth constrain its actions in deference to the predatory power of its rivals. No doubt some would say that is a small price to pay for a rigged market, but why should the independent-minded firm be barred from challenging the creation of exclusionary market power in its market when plausible conditions exist in which unconstrained independence will benefit the firm more in the long run and when possible litigation abuses can be controlled by the procedures and mechanisms suggested below?

Thus, the *Cargill* decision wisely rejected a broad assault on competitor standing and instead denied standing based on a specific failure of proof. The plaintiff, though claiming injury from predatory pricing, had neither alleged nor proved predation, and the structure of the market made claims of predatory pricing implausible. *Cargill* did not hold that competitors were unqualified as a class, nor did the Court follow the urging of the amicus briefs of the Solicitor General and the Business Roundtable to bar competitor suits in predatory pricing cases.²⁰² Most significantly, the Court did not decide whether the plaintiff might have sustained antitrust injury from other predatory or collusive effects of the merger.²⁰³ Accordingly, the Court refused to rule whether the market power created by a merger might place smaller rivals at a disadvantage by means *other than predatory pricing*. *Cargill*, therefore, does not foreclose an evolution of standing doctrine to permit rivals to challenge mergers that threaten them with injury arising out of highly concentrated markets and oligopolistic conditions.

201. Thus, the 1992 *Merger Guidelines*, reflecting modern economic views, identify collusive mergers as those where detection and punishment of deviating firms serve to enforce the collusion. As discussed below, the punishment of deviant firms is anticompetitive conduct that may harm competitors. See *Merger Guidelines*, *supra* note 97, § 2.1, and *infra* text accompanying notes 230-52.

202. Brief for the United States as Amicus Curiae at 9-12, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473); Brief for the Business Roundtable as Amicus Curiae at 4-5, 9-10, *Cargill* (No. 85-473).

203. *Cargill*, 479 U.S. at 114 n.9.

C. *The Economics of Competitor Injury*

Competitors face possible injury from anticompetitive mergers as probable targets of exclusionary strategies by colluding or market dominant firms. Exclusionary strategies may encompass cartel punishment or dominant firm predation.

1. *Cartel Punishment*

Cartel theory teaches that effective collusion requires the ability to punish or exclude deviants and new entrants who would undermine the cartel. Colluding firms confront a classic prisoner's dilemma. Despite the mutual advantage of strict adherence to the collusive agreement, individually maximizing firms will deviate and thereby destroy the collusion unless the colluding firms have a feasible means to identify and punish cheating.²⁰⁴ Thus, the power to punish deviating rivals is essential to effective collusion. The punishment of rivals requires the ability to raise their costs or to place them at other harmful disadvantage — in short the ability to exercise exclusionary market power. Exclusionary market power involves the power to exclude rivals or to reduce their output and thereby raise prices.²⁰⁵ Typically, the exclusionary mechanism will involve the withholding of a necessary input or the denial of access to an essential downstream outlet.

Consequently, when we identify the market conditions under which the dominant firm or dominant group of firms possess exclusionary market power, we also identify the conditions under which effective collusion is likely.²⁰⁶ This leads to the striking result that under cartel theory analysis, the issues of collusive risk and exclusionary capability become one and the same. The cartel theory of collusion is now well-accepted and has been incorporated in the Justice Department's *Merger Guidelines*: mergers that reduce competition are precisely those where firms, having reached profitable terms of "coordinated interaction," have "an ability to detect and

204. See Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 415, 417-24 (Richard Schmalensee & Robert D. Willig eds., 1989).

205. See DENNIS W. CARLTON & STEPHEN C. SALOP, YOU KEEP ON KNOCKING BUT YOU CAN'T COME IN: EVALUATING RESTRICTIONS ON ACCESS TO INPUT JOINT VENTURES 26 & n.33 (University of Chicago Center for the Study of the Economy and the State Working Paper No. 111, 1995); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1532-34 (1982); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 249-50 (1987).

206. In addition to an enforcement system, a cartel requires agreed terms of coordination, but coordination is probable if an effective enforcement system exists. See *Merger Guidelines*, *supra* note 97, § 2.1.

punish deviations,"²⁰⁷ and for that purpose, a credible threat of punishment can be as effective as actual punishment.

Although some fringe firms may thrive for a time under a regime of collusive prices, no permanent sanctuaries exist for potential targets of exclusionary strategies. When a cartel group has exclusionary capability, the fringe firm faces an ever present risk of market exclusion. The risk can be particularly acute for the maverick firm — the firm with low costs, high excess or divertible capacity, superior innovation, an ability to disguise output increases, or other factors that make it a "disruptive" or competitive influence in the market.²⁰⁸ The maverick firm is at risk because its conduct threatens to disrupt the cartel and because its elimination may allow a larger increase in prices than eliminating other rivals.²⁰⁹

To be sure, exclusionary capabilities may not be exercised. The exclusionary target may gain more by remaining within the cartel than by deviating. The maverick firm, for example, in addition to the cartel profit earned by an average firm, stands to gain both an efficiency rent to the extent it has lower costs and a bargaining rent from threatened defection. On the other hand, defection may remain attractive to the maverick and other firms because of the even greater profit it can earn from undercutting the cartel due to lags in detection and punishment. Thus, the positive probability remains that pro-competitive conduct by a competitor may provoke an exclusionary response that threatens injury to the target and restricts its independence. In challenging a merger that would give its rivals exclusionary market power in its home market or in a market it realistically seeks to enter, the potential target of cartel punishment acts under incentives compatible with antitrust goals and thereby suffers antitrust injury.²¹⁰

207. *Id.*

208. See *id.* § 2.12. Another factor likely to make a firm a disruptive influence is its small size. See Steven N. Wiggins & Gary D. Libecap, *Firm Heterogeneities and Cartelization Efforts in Domestic Crude Oil*, 3 J.L. ECON. & ORG. 1 (1987) (stating that price cutting in defiance of a regional crude oil cartel in the 1930s primarily involved small producers in low cost fields while larger producers adhered to the cartel price); *Merger Enforcement Guidelines Under Canada's Competition Act Adopted by the Director of Investigation and Research*, 60 Antitrust & Trade Reg. Rep. (BNA) No. 1513 § 4.8 (Apr. 25, 1991) (asserting that small firms exercise a disproportionately large influence on competition).

209. Of course, this situation also increases the maverick's bargaining power within the collusive group. But that increased bargaining power also heightens the cartel's incentive to exclude the maverick and avoid sharing its profits.

210. Threatened injury from cartel punishment stands in sharp contrast to the claim made in *ARCO* that a competitor-plaintiff in a nonmerger case sustained antitrust injury based simply on "broad allegations of harm to the 'market' as an abstract entity." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338-40 & n.8 (1990). In a cartel punishment case, the threatened injury results from the likelihood that the competitive firm will itself

2. Dominant Firm Predation

Competitors also face threatened injury from mergers that create dominant firms. The dominant firm case is an extension of the cartel punishment case.²¹¹ Indeed, dominant firms have even greater incentive to use exclusionary strategies against smaller rivals than a collusive group because the benefits from predation increase with the market share of the predator.²¹² The conclusion that dominant firm mergers threaten injury to competitors draws support from economic theory, empirical studies, the views of business strategists, and the under-inclusiveness of Sherman Act rules against predation.

Earlier economic views questioned the rationality of predation because it cost the predator more than the prey. These views, however, require modification under the critique of modern theory. The old approach, which was essentially a single market, static analysis, has given way to a strategic analysis in which reputation effects and signaling strategies based on information asymmetry between the predator and the prey show that predation can be both profitable and feasible.²¹³ Although the Supreme Court has questioned the plausibility of predatory pricing in cases where market structures were only moderately concentrated,²¹⁴ it has vigorously up-

become the target of predatory moves. As a result, the Supreme Court did not question the standing of a plaintiff who claimed injury from cartel-punishment tactics by a dominant collusive group in its recent *Brook* decision. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); see also *Volvo N. Am. v. Men's Intl. Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), discussed *infra* text accompanying notes 244-48.

211. The *Merger Guidelines* describe the dominant firm case in terms of the "[u]nilateral [e]ffects" of a merger, where the merged firm "find[s] it profitable to alter [its] behavior unilaterally . . . by elevating price and suppressing output." *Merger Guidelines*, *supra* note 97, § 2.2.

212. See Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra* note 204, at 537, 567.

213. Thus, pricing predation is rational under modified "long purse" models, where the predator's strategy is to reduce the prey's assets or profits in order to cut off its access to bank credit, see Patrick Bolton & David S. Scharfstein, *A Theory of Predation Based on Agency Problems in Financial Contracting*, 80 AM. ECON. REV. 93 (1990); Ordover & Saloner, *supra* note 212, at 548-50, reputation models, where the predator prices below cost in one market in order to establish a reputation as a predator in other markets, see Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. POL. ECON. 266 (1986); Ordover & Saloner, *supra* note 212, at 550-56; Balder Von Hohenbalken & Douglas S. West, *Empirical tests for predatory reputation*, 19 CAN. J. ECON. 160 (1986), signaling models, where a predator operating in a market of incomplete information, fixes its price and output level to mislead rivals into believing that the market is unprofitable, inducing exit and preventing new entry, Ordover & Saloner, *supra* note 212, at 556-61; Garth Saloner, *Predation, mergers, and incomplete information*, 18 RAND J. ECON. 165 (1987).

214. See *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) (discussing the implausibility of a predatory pricing scheme orchestrated by a jointly acting oligopoly); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (same).

held enforcement against nonprice predation and exclusionary practices.²¹⁵

Nonprice predation provides a more plausible and legally acceptable setting for predatory conduct because it is not subject to the objection that the predatory strategy may impose higher costs on the predator than the prey. Nonprice predation includes raising rivals' costs or reducing the demand for the rival product by such stratagems as exclusive dealing; foreclosure of essential inputs; driving up common input costs;²¹⁶ refusing to engage in mutually profitable joint marketing;²¹⁷ predatory system design, which makes components produced by rivals incompatible with the system; predatory product innovation, which prevents or reduces the demand for the rival's product but is otherwise nonoptimal;²¹⁸ predatory vertical restraints, with which a dominant upstream producer induces the exit of a more efficient rival by extending its market power to the downstream market and then engages in exclusive dealing;²¹⁹ and penalty contracts, which are long-term contracts designed to deter entry or to capture economic rent from a lower cost producer entered into by a monopolistic supplier and its customers.²²⁰

Empirical evidence also documents the reality of both price and nonprice predatory strategies. Studies of business behavior and case experience reveal unmistakable instances of attempted and consummated predation.²²¹ A particularly striking example appears in a recent study of the early years of the American Tobacco

215. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (citing modern theory in tying lock-in case); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that refusal to deal by dominant firm may be characterized as exclusionary).

216. See, e.g., *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965) (holding that labor union and large mine operators conspired to fix labor costs of smaller operators).

217. See, e.g., *Aspen Skiing*, 472 U.S. at 610-11.

218. See Thomas J. Campbell, *Predation and Competition in Antitrust: The Case of Fungible Goods*, 87 COLUM. L. REV. 1625, 1646-52 (1987).

219. See Oliver Hart & Jean Tirole, *Vertical Integration and Market Foreclosure*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 205, 206 (1990); Janusz A. Ordover et al., *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990). But see Snyder & Kauper, *supra* note 197, at 591-96 (challenging economic analysis of vertical arrangements as speculative).

220. See Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 STAN. L. REV. 1161 (1993).

221. See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 339-46 (1990); Ordover & Saloner, *supra* note 212, at 545-46; B.S. Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129, 137-42 (1972); see also *Aspen Skiing*, 472 U.S. at 589-95; *United States v. Empire Gas Corp.*, 537 F.2d 296, 299-301 (1976), cert. denied, 429 U.S. 1122 (1977).

Company that reveals repeated instances of predatory pricing by the dominant firm to reduce the acquisition price of rivals, both directly and through reputation effects.²²² Moreover, business strategists treat predatory strategies as real phenomena.²²³

Thus, modern economic theory shows that dominant firm predation is rational and plausible; empirical evidence confirms the existence of predatory conduct, as theory predicts; and business people make decisions based on predatory strategies. At the same time, Sherman Act suits to recover for predatory injury face great obstacles due to the difficulty courts have encountered in devising legal rules to distinguish between predation and welfare-increasing competition.²²⁴ These findings underscore the importance of maintaining vigorous merger enforcement to prevent the market concentration that makes predatory strategies feasible.²²⁵ Because competitors are the only private litigants with the incentive to oppose mergers that create predatory and exclusionary capability, they should have standing to challenge such mergers — subject to appropriate equity controls.

222. Burns, *supra* note 213. Unlike earlier empirical studies of predation, which are essentially ad hoc case studies that rely on impressionistic readings of case records and are often cited by courts, *see, e.g.,* Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 589-90 (1986) (citing Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971), and John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958)), Burns undertakes a mathematically sophisticated scientifically based study using a multiple regression model. Thus, his findings give powerful support to predation. Burns, *supra* note 213, at 267; *see also* Yun Joo Jung et al., *On the Existence of Predatory Pricing: An Experimental Study of Reputation and Entry Deterrence in the Chain-Store Game*, 25 RAND J. ECON. 72 (1994) (providing experimental evidence that showed incentive in markets with incomplete information to engage in predation in order to deter entry); Von Hohenbalken & West, *supra* note 213, at 176-77 (providing an empirical study of entry and exit in Edmonton supermarkets that confirmed predatory reputation hypothesis, showing deterred entry in new markets).

223. MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE* 482-536 (1985); MICHAEL E. PORTER, *COMPETITIVE STRATEGY* 88-107 (1980).

224. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 121 n.17 (1986); *Zenith Radio*, 475 U.S. at 594; *see also* Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993) (stating sustained below-cost pricing insufficient to prove predation without proof of recoupment).

225. Objections can be made about the persuasive force of modern predatory conduct theory and its empirical support. *See generally* Franklin M. Fisher, *Organizing Industrial Organization: Reflections on the Handbook of Industrial Organization*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS* (1991). Moreover, the Supreme Court still cites outdated theory without recognizing recent modifications. *See, e.g.,* Cargill, 479 U.S. at 122 n.17. But antitrust analysis must follow consensus approaches, and the modern theory of strategic behavior is clearly central to the contemporary theory of the firm. Reflecting such consensus is the use of modern economic theory in the 1992 *Merger Guidelines*, *supra* note 97, adopted by a Republican administration and adhered to by a successor Democratic administration, as well as in the recently adopted Canadian *Merger Guidelines*. *See Merger Enforcement Guidelines Under Canada's Competition Act*, *supra* note 208. Finally, even if residual doubts about modern theory limit Sherman Act applications, use of modern theory is justified under the prophylactic goals of the merger law.

D. *Proposed Approach: Antitrust Injury Screen*

An effective policy for competitor merger suits requires a two-stage approach. In stage one, the courts would apply an antitrust injury screen to eliminate cases that raise no significant threat of exclusionary injury to rivals. In stage two, discussed in the next section, the courts would apply equity controls and mechanisms to discourage suits by plaintiffs with hidden incentive incompatibility and to assure that prosecution of the merger suit promotes antitrust goals. The second stage is vital because the threshold antitrust injury screen cannot identify every case of incentive incompatibility unless given a draconian interpretation that would threaten to bar all competitor suits. Thus, the stage-two procedure operates as a necessary corrective mechanism to prevent anticompetitive prosecution of incentive incompatible suits that escape the stage-one screen.

The stage-one inquiry rests on existing standing doctrine, but, as applied to competitors, that doctrine is neither settled nor fully rationalized with enforcement goals. Indeed, since *Cargill*, the lower courts have followed three distinctive approaches in competitor cases. First, under the “Sherman Act” approach, the plaintiff must prove either actual predatory acts that threaten the plaintiff with injury or the defendant’s specific intent to engage in such acts. Second, under the “exclusionary capability” approach, the plaintiff can establish standing by showing that the merger creates structural conditions and specific market mechanisms that would expose competitors to significant risks of either predatory exclusion or cost-raising tactics that threaten to reduce their output. Third, under the “threatened market dominance” approach, the plaintiff need only prove that the merger creates a market structure likely to lead to single-firm market dominance. Analysis will show that a combination of the second and third approaches is necessary for effective private merger enforcement.

1. *Sherman Act Approach*

The first approach requires proof of specific predatory acts based on the defendant’s past conduct or a present intent to engage in predation following the merger — conduct that would suffice to show a violation of the Sherman Act. The Fifth Circuit followed this approach in *Phototron Corp. v. Eastman Kodak*,²²⁶ which held that in the absence of specific proof of predatory conduct, the plain-

226. 842 F.2d 95 (5th Cir.), cert. denied, 486 U.S. 1023 (1988).

tiff had no standing to challenge a merger that would create a dominant position in the upstream supply market. The court believed that the *Cargill* decision compelled it to reject the "facially sensible proposition" that a competitor has standing to challenge a merger that results in a monopoly.²²⁷ The dissenting Justices in *Cargill* had expressed similar fears.²²⁸ As we have seen, however, neither the facts nor the language of *Cargill* compels such an expansive reading.

To hold that competitors have standing to challenge a merger only upon specific proof of predatory conduct would make the Clayton Act redundant for competitors. Proof of specific predation, whether based on past conduct or present intent, is enjoined under the Sherman Act. To require the same showing for a Clayton Act violation would defeat the Act's underlying policy to stop mergers *before* they become Sherman Act violations. Among other adverse effects, a Sherman Act standard would bar suits where the merger creates market power that did not previously exist because, absent previous market power, there could be no past history of predation, and well-advised firms would avoid any expressions of predatory intent. Thus, the first approach is untenable.

2. Exclusionary Capability

The second approach would find the antitrust injury requirement satisfied when the merger creates economic conditions that expose competitors or clearly identified potential competitors to significant risks of market exclusion or reduced output from cost-raising stratagems. Such risks arise when a collusive group or a single dominant firm has exclusionary capability. By exclusionary capability, I mean the ability to exclude rivals or clearly identified potential rivals or to reduce their output significantly by raising their costs, thereby threatening to reduce economic welfare. Proof of exclusionary capability requires identification of the structural conditions and specific mechanisms that make exclusionary practices or cost-raising strategies feasible.²²⁹ As we have seen, under the *Merger Guidelines*, this will be substantially the same analysis as

227. 842 F.2d at 100. Similar conclusions have been reached in several other lower court cases. See, e.g., *Treasurer, Inc. v. Philadelphia Natl. Bank*, 682 F. Supp. 269 (D.N.J.), *affd. mem.*, 853 F.2d 921 (3d Cir. 1988).

228. *Cargill*, 479 U.S. at 123 n.1 (Stevens, J., dissenting).

229. Cf. 2 AREEDA & HOVENKAMP, *supra* note 67, § 373d2 (explaining that the *Cargill* standard requires proof of "market conditions that make predation economically feasible").

the inquiry into whether the merger creates collusive risks that threaten substantial injury to competition.²³⁰

The cartel theory of collusion is well accepted by economists and has been incorporated into the 1992 *Merger Guidelines*. Economists generally agree that the economic conditions under which effective collusion is likely include (1) high concentration; (2) high sunk costs and other entry barriers; (3) excess capacity in the collusive group; (4) ability to raise rivals' costs, for example, constrained sources of supply or customer access that can be foreclosed by exclusive dealing contracts; (5) hostage exchange methods, such as joint ventures, that enable cartel participants to punish deviants; (6) segmented markets that enable the collusive group to target punishing price reductions on limited markets; (7) information asymmetries between an informed collusive group and outside rivals, which enhance the market power of the disciplining group;²³¹ (8) agreements that directly punish price reductions, such as meeting-competition and most-favored nation clauses, or that exclude or disadvantage potential entrants, such as take-or-pay-for clauses and penalty contracts;²³² or (9) special vulnerability of the predatory target to exclusionary and cost-raising tactics.²³³

Similarly, under the *Merger Guidelines*, acquisitions that reduce competition are precisely those where firms, having reached profitable terms of "coordinated interaction" have "an ability to detect and punish deviations,"²³⁴ and deviations will be deterred "where

230. The Supreme Court's recent decisions in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) do not bar courts from adopting a predatory capability approach to competitor standing. In *Cargill*, the Court found that the market did not have the anticompetitive structure necessary to support predatory pricing, and thus the merger could have created no predatory capability. 479 U.S. at 119 n.15. Similarly, in *ARCO* and in *Matsushita*, both of which arose under the Sherman Act, the facts failed to show predatory capability. *ARCO*, 495 U.S. at 336-39; *Matsushita*, 475 U.S. at 587-88.

231. *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1262-71 (E.D. Pa. 1987); PAUL KLEMPERER, *COMPETITION WHEN CONSUMERS HAVE SWITCHING COSTS: AN OVERVIEW* (Centre for Royal Economic Society 1992); Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 81 COLUM. L. REV. 295, 308-09 (1987); Richard J. Gilbert, *Mobility Barriers and the Value of Incumbency*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra* note 204, at 475; Paul Klempere, *Markets with Consumer Switching Costs*, 102 Q.J. ECON. 375, 377, 386-87 (1987); Ordovery & Saloner, *supra* note 212, at 591.

232. See Ayres, *supra* note 231, at 316-18; Brodley & Ma, *supra* note 220.

233. See Bolton & Scharfstein, *supra* note 213 (describing the susceptibility of capital constrained firm dependent on outside financing to predatory tactics); Judith A. Chevalier, *Capital Structure and Product-Market Competition: Empirical Evidence from the Supermarket Industry*, 85 AM. ECON. REV. 415 (1995) (same).

234. *Merger Guidelines*, *supra* note 97, § 2.1.

the threat of punishment is credible.”²³⁵ In enumerating the criteria for determining whether these conditions are present, the guidelines incorporate several of the specific factors enumerated above.²³⁶ Thus, the examination required under the *Merger Guidelines* is essentially the same as that called for under the second approach.

A possible refinement of the second approach would limit standing to competitors who can show economic characteristics that make them a particular target for cartel punishment or predatory exclusion. Firms with such characteristics, often called “maverick firms,” may have low costs, excess or divertible capacity, an aggressive expansionary business strategy, or a past record or reputation as a price cutter or disruptive market influence.²³⁷ Confinement of competitor standing to maverick firms would reduce the feared possibility that an underperforming competitor might launch antitrust litigation to foil an efficiency-producing merger; it would still enable suit by the smaller firms that have been among the most competitive elements in collusive markets.²³⁸

Nevertheless, to limit competitor standing to maverick firms would threaten effective private enforcement. Such a limitation introduces a complex issue of the plaintiff’s economic performance and gives defendants a weapon to frustrate competitor suits. It would enable defendants to conduct searching discovery into plaintiff’s costs and business strategies, putting sensitive business data at risk and turning the case into an inquisition into plaintiff’s own business operations.²³⁹ Proof of general market conditions that facilitate exclusionary strategies should suffice to establish exclusionary or predatory capability. Equity supervision and judicial controls on litigation abuse, rather than confinement of standing to maverick firms, provide the better approach to the problem of wrongly motivated competitor suits in markets where exclusionary strategies are likely.

The second approach also applies to potential entrants when mergers threaten to block entry into a highly concentrated market. To be sure, the identification of potential entrants is fraught with

235. *Id.* § 2.12.

236. *Id.* §§ 2, 2.12.

237. *See id.* § 2.12 (emphasizing competitive threat posed by maverick firms, which constitute an “unusually disruptive and competitive influence”).

238. *See supra* note 208.

239. Although the plaintiff could, on its own initiative, introduce evidence of its maverick character and specific risks of inducing cartel punishment or exclusionary tactics, thereby placing the issue in controversy, courts should not require it to make such a showing.

difficulty, requiring a showing that an entrant is in close proximity to the market, has the capability and incentive to enter, and possesses entry advantages over other firms.²⁴⁰ Exclusionary capability against potential entrants typically involves the power to withhold an indispensable input, the control of which the merger consolidates within a single firm or small group of jointly acting firms.²⁴¹ These conditions will not often occur, but strikingly, when they are present, suit by a potential entrant may present a less acute incentive incompatibility problem than suit by an existing rival. The incentive incompatibility risk is reduced because, apart from a pure strike suit, the outside firm has no incentive to block a merger unless it actually intends to enter the market — a competition-improving step.²⁴² Thus, particularly when other qualified litigants are not available — for example, because no competitors remain in the market, suits by potential entrants can serve a vital private enforcement need.²⁴³

240. See Joseph F. Brodley, *Potential Competition Under the Merger Guidelines*, 71 CAL. L. REV. 376 (1983); see also *Justice Department Merger Guidelines*, 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1169 § 4.1, at S-8 (Supp. 1984). See generally 2 AREEDA & HOVENKAMP, *supra* note 67, ¶ 374.

241. See, e.g., *Bon-Ton Stores, Inc. v. May Dept. Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994), *decision supplemented by* 1995-1 Trade Cas. (CCH) ¶ 70,917 (Mar. 6, 1995) *discussed infra* text accompanying note 252; cf. *Los Angeles Memorial Coliseum Commn. v. National Football League*, 791 F.2d 1356, 1364-65 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (holding that football stadium foreclosed from bidding by NFL rule restraining location of teams had standing to sue NFL).

242. Of course, an inefficient potential entrant might in theory seek to stop an efficient merger in order to maintain its prospect for future entry. But it seems implausible that an outside firm would seek to enter a market in which a future consolidation of assets would place its entry investment at risk.

243. A similar analysis supports the standing of an unsuccessful bidder in a takeover. Although the cases are split on the issue, compare *Santa Cruz Medical Clinic v. Dominican Santa Cruz Hospital*, 1995-1 Trade Cas. (CCH) ¶ 70,915 (N.D. Cal. Oct. 26, 1994) (standing granted) with *Axis, S.P.A. v. Micafl, Inc.*, 870 F.2d 1105 (6th Cir.), *cert. denied*, 493 U.S. 823 (1989) (standing denied), and the commentators are largely negative, see 2 AREEDA & HOVENKAMP, *supra* note 67, § 373e, standing for unsuccessful bidders promotes antitrust goals when (1) the merger creates intensely oligopolistic conditions; (2) high entry barriers preclude de novo entry; and (3) other likely challengers are not available.

Conditions warranting standing were present in *Axis*, 870 F.2d at 1106, where the merger between two of only four competitors in the market, created a postmerger firm with a 50% market share in a three-firm market. The merger foreclosed the only available means by which plaintiff could compete in the market because patent barriers blocked de novo entry. In the absence of the challenged merger, plaintiff would surely have entered the market because the target was for sale, the plaintiff had matched the defendant's bid, and there was no other likely purchaser, the plaintiff being the only producer not already in the U.S. market. Under these circumstances, the plaintiff's incentives were entirely compatible with antitrust goals because the plaintiff stood to profit from increased competition, and there was no other available private litigant. Thus, the plaintiff suffered antitrust injury and should have been accorded standing. The court's contrary conclusion illustrates the danger of applying a formalistic standing doctrine without sufficient reflection on underlying policies.

Three recent lower court cases upholding competitor standing illustrate how the second approach can be applied. The first case involves exclusionary cartel restraints, the second involves predatory capability by a dominant firm, and the third involves exclusionary foreclosure of new entry. In *Volvo*,²⁴⁴ the Second Circuit held that participants in a cartel had standing to challenge exclusionary cartel restrictions that hampered their ability to compete with other cartel members. The challenged cartel rules prevented the plaintiffs, who were producers of tennis events, from sponsoring separate tennis matches in competition with league-sponsored events. Rejecting the defendants' argument that competitors could only benefit from membership in a cartel, the court explained that even though a rule "presumably operates to the cartel's *aggregate* benefit, the restraint may operate to the detriment of an *individual* member."²⁴⁵ Individual members may have different costs or other characteristics that make competition attractive. Under these conditions "the [cartel] member's interest coincides with the public interest in vigorous competition . . . [satisfying] the antitrust injury requirement."²⁴⁶

The *Volvo* decision thus supports competitor standing in merger cases when market conditions facilitate exclusionary practices by cartel members. In *Volvo*, these conditions included denial of access to an essential input, that of league-sponsored players; hostage exchange dependencies based on the need for continuing cooperation from the other members of the tennis league; and other rules that raised the costs of deviating rivals.²⁴⁷ The plaintiffs were likely targets for cartel discipline or market exclusion because they were seeking to compete in innovative ways and to expand the number of tennis matches offered to the public.²⁴⁸

In *Tasty Baking Co. v. Ralston Purina, Inc.*,²⁴⁹ the court upheld the standing of a competitor to challenge a merger based on evi-

244. *Volvo N. Am. v. Men's Intl. Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988).

245. 857 F.2d at 67.

246. 857 F.2d at 67-68 (citations omitted); see also *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104-08 (1984) (asserting that restrictions by sports league on individual competitors' freedom to compete can be anticompetitive); 2 AREEDA & HOVENKAMP, *supra* note 67, ¶¶ 340.2f to -2g.

247. 857 F.2d at 60-62.

248. See 857 F.2d at 58-60. The fact that the *Volvo* case involved actual restraints within a presently operating cartel does not bar its application to merger cases. If a competitor has standing to challenge exclusionary cartel practices under the Sherman Act, then under the incipency standard of the Clayton Act, it should be able to challenge a merger that creates the exclusionary capability to engage in such practices.

249. *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987).

dence of exclusionary capability by a dominant firm. The merger threatened the plaintiff with antitrust injury because exclusionary conduct was feasible in the impacted baking industry and would benefit the market dominant defendant. Evidence of exclusionary capability rested on proof of market dominance, high entry barriers, excess capacity in the dominant firm, and other market characteristics that made predatory tactics feasible, including customer leverage through control of dominant brands, localized markets that enabled existing producers to target exclusionary moves, and similar structural features.²⁵⁰ Although proof of past predation in other markets and proof of intent to monopolize the present market buttressed the showing of exclusionary capability in *Tasty Baking*, the court's finding that the plaintiff-competitor was threatened with antitrust injury essentially rested on proof of exclusionary capability.²⁵¹

In *Bon-Ton Stores, Inc. v. May Department Stores Co.*,²⁵² the court upheld the standing of a potential department-store entrant to challenge a merger that would have foreclosed entry into a highly concentrated market. The plaintiff's status as a potential entrant into the Rochester, N.Y. regional market was clear because plaintiff, which owned a chain of department stores elsewhere in the Northeast, was engaged in a general expansion of locations in western New York and had ten stores in nearby Buffalo. The merger clearly threatened to foreclose the plaintiff's entry into the Rochester market because the merged firm would control all presently available space in the four major regional shopping malls critical for effective department-store competition. Thus, the case provides an apt illustration of potential entrant standing where the merged firm has the capability to bar effective entry by a clearly identifiable potential entrant into a highly concentrated market.

3. *Threatened Market Dominance*

The third approach, a simplified version of the second, would give competitors standing to challenge mergers when the merger

250. 653 F. Supp. at 1260-70. Other factors included (1) constrained access to customers due to limited retail shelf space and an unwillingness by retailers to carry more than three or four brands; (2) large cash resources, allowing credible predatory threats; and (3) a capacity to absorb the market share of rivals who leave the market. 653 F. Supp. at 1273-75.

251. Similar results were reached in *White Consol. Indus. v. Whirlpool Corp.*, 612 F. Supp. 1009, 1027, 1032 (N.D. Ohio), *injunction vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986), and *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1357-58 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985).

252. 881 F. Supp. 860 (W.D.N.Y. 1994), *decision supplemented by* 1995-1 Trade Cas. (CCH) ¶ 70-917 (Mar. 6, 1995).

creates a market structure that results in single-firm market dominance. The third approach simplifies the issue of antitrust injury when the market structure meets two essential preconditions, high concentration and significant entry barriers — conditions explicitly recognized in the *Cargill* case as necessary for predatory pricing. The presence of these conditions permits a presumption of both collusive and exclusionary risk. The presumption is justified because both collusion and exclusionary conduct are most likely in markets dominated by a single firm, where organizational costs are low, and benefits need not be shared with outside firms.²⁵³

The simplified presumption the third approach permits roughly follows the Justice Department's *Merger Guidelines*, which draw a distinction between horizontal mergers in highly concentrated markets and those in less concentrated markets.²⁵⁴ The guidelines presume that in highly concentrated markets a significant merger is "likely to create or enhance market power or facilitate its exercise," while in less concentrated markets, mergers are suspect only when other factors indicate significant risks of collusive action and cartel enforcement capability.²⁵⁵

Economy of enforcement leads to a preference for the third approach when structural conditions strongly indicate the probable violation of section 7. Using the definition of predatory capability outlined in *Cargill*, suspect market structures for dominant firms can be defined in terms of a postmerger market share of at least sixty percent and the presence of significant entry barriers.²⁵⁶ If a plaintiff has established that these two conditions are present and that the merger would significantly increase concentration, it has made a sufficient showing of threatened injury under the Clayton Act.²⁵⁷

253. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTI-TRUST IMPLICATIONS* 245-46 (1975) (explaining that dominant firms more easily maintain collusion because they need not write a contract specifying terms of coordination but need only work out punishment system); Ordovery & Saloner, *supra* note 212, at 567 (explaining that benefits of predation increase with market share).

254. See *Merger Guidelines*, *supra* note 97, §§ 1.51, 2.0.

255. *Id.*

256. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986).

257. In *Cargill*, the Court also noted a third condition: the excess capacity sufficient to serve the market after the victim is excluded. 479 U.S. at 119-20 n.15. This condition was a realistic constraint in *Cargill*, where the alleged predator would have a postmerger market capacity share of only 28%, but it becomes less important as the dominant firm achieves preponderant market control. Except in economic booms, markets generally have some excess capacity, presumably capacity sufficient to allow a dominant firm to serve the supply gaps that the exit of small fringe rivals creates. Thus, as applied to dominant firm mergers, the use of an excess capacity precondition weakens the simplicity and predictability of the

The third approach thus permits a finding of antitrust injury where the risks of predation or exclusionary conduct are highest, and the probability of efficiencies loss is least because the firms are already of large market size.²⁵⁸ These are in fact the mergers that require the most careful scrutiny and also those where private challenge by competitors can best supplement public enforcement.

The Second Circuit decision in *R.C. Bigelow, Inc. v. Unilever N.V.*²⁵⁹ essentially followed the third approach. The court held that a plaintiff-competitor satisfied the antitrust injury requirement by proving that a merger would increase the market share of the leading firm from fifty-two to eighty-four percent, leaving the market with only two significant competitors. Despite this high market concentration that resulted in an extraordinary postmerger two-firm market share of ninety-seven percent,²⁶⁰ the district court ruled that the plaintiff had suffered no antitrust injury because it had offered no proof of past predation or present predatory intent.

Reversing the district court, the Second Circuit held that a market share "indicative of substantial market power . . . constitutes sufficient evidence, in and of itself, of antitrust injury to a competitor to create a genuine issue for trial."²⁶¹ The Second Circuit found no inconsistency with *Cargill*, where the postmerger market share of twenty-one percent was too low to support an inference of threatened predation.²⁶²

The *Bigelow* decision thus permits an inference of both anticompetitive risk and threatened predatory injury when the merger would create a dominant firm in a market with high entry barriers. Under these extreme structural conditions, the same evidence that supports a prima facie presumption of injury to competition from acquisition of "substantial monopoly power" permits a finding of dominant firm predatory or exclusionary capability that threatens injury to a competitor.²⁶³ Thus, the Second Circuit held that, at

third approach. Although it remains possible that an excess capacity constraint hampers predatory capability, courts should place the burden of proof on the dominant firm.

258. See Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777, 778-91 (1989).

259. 867 F.2d 102 (2d Cir.), cert. denied, 493 U.S. 815 (1989).

260. 867 F.2d at 111.

261. 867 F.2d at 111. The court made no explicit entry barrier findings, probably because such barriers were self-evident in a merger between the two leading brands of highly advertised consumer products that created a two-firm market share of 97%.

262. 867 F.2d at 109-10.

263. The court suggested that predatory injury might occur "*inter alia*, [by] reducing [the plaintiff's] access to supermarket shelf space for its products." 867 F.2d at 111. But this example was simply one of several possible examples the plaintiff had offered to show how

least on the issue of standing to seek a preliminary injunction, the plaintiff need not show the precise mechanism of future predatory injury from a merger that effectively creates a market dominating firm.²⁶⁴

The Supreme Court's recent *ARCO* ruling,²⁶⁵ discussed earlier, which denied standing to a competitor who sought to challenge a vertical maximum price fixing agreement, does not bar the third approach. The antitrust injury issue in *ARCO* differed from that presented in a horizontal merger because the alleged antitrust violation challenged in *ARCO* — vertical maximum price fixing — was designed to protect a manufacturer's *own dealers* from competitive domination by their supplier but not rival dealers such as the *ARCO* plaintiffs, who remained independent actors in the market. By contrast, as *Cargill* recognized,²⁶⁶ Congress did not intend the merger statute to preclude protecting competitor-plaintiffs' ability to compete free of threatened injury from predatory restraints by market dominating firms. Moreover, in *ARCO*, the Court found that other classes of private enforcers were available to enforce the much criticized rule against vertical maximum price fixing whereas in a merger case the competitor-plaintiff will typically be the only available private enforcer.²⁶⁷ Thus, *ARCO* does not foreclose the third approach to competitor standing nor undermine the persuasive force of *Bigelow*.²⁶⁸

In the first stage of antitrust injury analysis, therefore, courts should follow a combination of the exclusionary capability and threatened market dominance approaches. Where the merger leads to market concentration falling short of single firm dominance, courts should use the exclusionary capability approach, finding

the dominant firm might use the monopoly power created by the merger to injure the plaintiff and was not a proven fact. There was no finding that the dominant firm was likely to use any specific predatory tactic.

264. 867 F.2d at 111.

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

266. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121-22 (1986).

267. In addition, in *ARCO*, serious incentive incompatibility was present because the plaintiff claimed injury from *increased* competition in a market where the participants lacked market power. *See USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304-06 (C.D. Cal. 1983), *revd.*, 859 F.2d 687 (9th Cir. 1988), *revd.*, 495 U.S. 328 (1990). By contrast under the third approach, the plaintiff claims injury from a merger that would create a market-dominant firm with presumed predatory capability.

268. *But see Remington Prods. v. North Am. Philips Corp.*, 755 F. Supp. 52, 57-58 (D. Conn. 1991) (declining to follow *Bigelow* in light of *ARCO* where plaintiff had failed to prove specific predatory practices); William H. Page & Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111, 117-18 (1991) (questioning whether *Bigelow* presumption survives *ARCO*).

threatened exclusionary injury when the merger creates market conditions that enable a single firm or small group of jointly acting firms to exclude rivals or to raise their costs significantly in ways that reduce economic welfare. Where the merger leads to single-firm market dominance with high entry barriers, courts should find threatened predatory injury based on those facts alone, subject to the affirmative defense of lack of excess capacity. Either finding would satisfy the first-tier requirement for standing. But, of course, the plaintiff would remain subject to the formidable constraints of the second-stage procedure.

4. *Illustration: Aspen Skiing Co.*

The facts in *Aspen Skiing Co.*²⁶⁹ provide a vivid illustration of the proposed first-stage antitrust injury analysis. In *Aspen*, the Supreme Court upheld findings that a market dominant firm had engaged in predatory conduct against a smaller rival in violation of the Sherman Act. Although the defendant had achieved its dominant position through merger, the plaintiff did not challenge the merger, which had occurred many years before. Suppose, however, that the plaintiff had sought to enjoin the acquisition when it occurred. Would the plaintiff have been able to demonstrate antitrust injury?

The development of the Aspen skiing area was the work of three separate investment groups. The three groups cooperated in offering a multi-area ski pass, which had great consumer appeal, enhancing the variety of a ski vacation. Subsequently, two of the three groups merged, combining three of the four ski facilities in Aspen and leaving plaintiff as the sole remaining competitor with about twenty percent of the market. For a few years cooperation continued, but eventually, the defendant sought to minimize the plaintiff's share of revenues and ultimately to exclude it entirely from the multi-area arrangement. This left the plaintiff with no effective way to offer skiers access to the variety of skiing facilities that customers preferred, and plaintiff's share of ski revenues fell drastically. The Supreme Court upheld a Sherman Act damage judgement, ruling that defendant's conduct reduced competition, lacked business justification, and injured both the plaintiff and consumers.²⁷⁰

269. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

270. *See* 472 U.S. at 610-11.

Suppose that at the time of the original Aspen acquisition, the plaintiff had sought an injunction to prevent the merger. Defendant would no doubt have argued that the plaintiff sustained no anti-trust injury. The judicial ruling on standing would then have depended on which of the three approaches discussed above the court followed. Under the first approach, which requires proof of past predation or present intent to engage in predation, the court would almost surely have found an absence of antitrust injury. The defendant, which owned ski facilities in other geographic areas, had apparently not engaged in predatory acts elsewhere.²⁷¹ In Aspen itself, predation became possible only after the merger, when the defendant obtained market dominance. No doubt the defendant would have argued that plaintiff only stood to gain from the collusive effects of the merger.

Under the second approach, plaintiff could have made a strong argument that the merger would give the defendant exclusionary capability, threatening the plaintiff with future injury, but the issue would not have been free from doubt. Tending to show exclusionary capability are: the merger would have created a market dominant firm in a market with high entry barriers and high sunk costs; entry required governmental approvals, which were difficult to obtain due to environmental concerns; defendant could have raised plaintiff's costs by denying access to three of the four ski facilities; defendant apparently had excess capacity, giving it an incentive to either exclude plaintiff or to reduce its market share; a hostage exchange mechanism existed enabling the defendant to punish the plaintiff because the existing multi-area pass by necessity required the defendant's continuing cooperation on a variety of procedural matters; and plaintiff was particularly vulnerable to such exclusionary and cost-raising tactics because continued participation in the joint pass arrangement was necessary for access to weekly destination skiers in a market too geographically remote to attract day skiers.²⁷²

On the other hand, the product was not homogeneous as the mountains differed in skiing characteristics and facilities, and viewing the issue prospectively, various counterstrategies by plaintiff appeared possible to offset the effects of exclusion from the multi-area arrangement.²⁷³ In addition, future predation might have appeared

271. See 472 U.S. at 589-93, 610-11.

272. 472 U.S. at 588, 592, 594.

273. In fact, plaintiff attempted several countermeasures to create its own multi-area arrangement, but all failed. For example, when plaintiff tried to issue cash vouchers redeem-

implausible in view of Aspen's need to compete with other national ski destinations in offering multi-area ski passes. These offsetting factors appear insufficient to rebut the strong elements indicating exclusionary capability, but a multifactor analysis applied in advance of the merger transaction can never be fully predictive.

Under the third, or, threatened market dominance approach, plaintiff would clearly have standing. The merger created a firm with an eighty percent market share and an HHI concentration ratio of 6800 in a market with very high entry barriers, and there appeared no basis for finding the dominant firm lacked excess capacity to serve an increased market share. The court would thus presume threatened antitrust injury from the clear prima facie showing of market dominance resulting from the merger. Defendant of course could attempt to disprove the threat to competition but not by attacking the plaintiff's standing to challenge the merger.

The subsequent history of the *Aspen* dispute as reflected in the plaintiff's drastic loss of market share²⁷⁴ would have justified a competitor's concern that a merger creating a market dominant firm may eventually threaten it with predatory injury and ultimately destroy its ability to compete effectively. In such cases, the competitor should not have to wait until it is actually injured or excluded from the market to seek redress. The *Aspen* illustration shows how the courts can prevent antitrust abuse, promote effective merger enforcement, and maintain competitive markets by recognizing a competitor's standing to challenge mergers that create high concentrations of market power.

E. *Equity Controls and Mechanisms*

Although the indictment against competitor suits is overdrawn, competitor suits do present incentive problems. At the same time, such suits also serve indispensable enforcement purposes, and without them, no viable private enforcement of the merger law can occur. The proposed two-stage enforcement procedure addresses the dilemma directly. After the first-stage inquiry has eliminated competitor plaintiffs with clear incentive incompatibility, the court

able at local banks for local purchases, defendant refused to honor the vouchers. Similarly, defendant refused to sell ski tickets to plaintiff. Plaintiff was thus reduced to issuing traveler's checks for skiers to use at other facilities, obviously a more costly alternative. 472 U.S. at 593-94.

274. After abolition of the four-area ticket, plaintiff became basically "a day ski area in a destination resort," and accordingly, plaintiff's market share fell by almost 50% in the following four years. 472 U.S. at 594-95.

would then move to the second-stage analysis. In stage two, the court would apply procedural controls to prevent litigation abuse by plaintiffs who challenge mergers in markets where predatory capabilities exist and injurious predatory strategies are plausible.

The incentive compatibility problem of competitor suits arises from risks of strategic litigation that can upset the timing of a merger, collusive or anticompetitive settlements that compromise public interest goals, the lesser problems of wrong outcomes caused by the need for speedy resolution, and ineffective relief due to possible delayed filing or insufficient briefing on remedial issues. Existing procedures can effectively manage most, if not all, of these risks. Suggested improved procedures can control the remaining problems, of which the risk of collusive settlement is perhaps paramount.

1. *Existing Procedures*

Effective procedures to prevent competitor abuse in merger litigation include: (1) expedited hearings, which can shorten preliminary injunction proceedings to a few weeks; (2) hold-separate orders, which allow mergers to go forward with the acquired assets held separately thereby assuring continued independence of the target until the antitrust issues are resolved; (3) curative relief orders, by which defendants agree to divest particular assets raising competitive risks, thereby allowing the merger to proceed while frustrating suits by competitors intent on blocking the merger's pro-competitive aspects; (4) amicus participation by state or federal enforcement agencies advising the court on the government's views, particularly on issues of effective relief; (5) the *laches* doctrine, which bars unreasonable delay in filing and prosecuting merger suits; (6) litigation bonds, requiring the plaintiff to compensate the defendant for losses from injunctions improvidently granted, which penalize strategic plaintiffs, who face a high probability of bond forfeiture;²⁷⁵ (7) Rule 11 sanctions, which impose penalties on counsel and parties who file nonmeritorious suits;²⁷⁶ and (8) judicial exercise of equitable discretion in issuing preliminary injunctions.

275. But the failure of the courts to set bonds at sufficiently high levels has limited the disciplining effect of this procedure. See *infra* note 277.

276. Rule 11 sanctions apparently have not been imposed in merger cases but have been exacted in several antitrust cases, see *supra* note 133, and there is at least some concern that the Rule may inhibit antitrust suits. See Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033 (1993).

2. Improved Procedures

Although the existing procedures appear sufficient to contain most risks of litigation abuse, the courts can strengthen these procedures in at least three ways. First, courts may increase the size of litigation bonds to deter strategic litigation more effectively. Second, courts may discourage collusive settlements by requiring public disclosure of proposed settlements or by encouraging the plaintiff's voluntary undertaking to make such disclosure. Third, courts may encourage other voluntary undertakings by merger plaintiffs that reduce risks of litigation abuse, such as an agreement for fee-shifting for suits found to be frivolous or without foundation.

a. Litigation Bonds. Courts can raise the costs of strategic litigation by increasing the size of litigation bonds. Bonds in merger cases appear modest, far below the possible costs an improvident injunction could inflict on the defendant.²⁷⁷ In setting bonds, the courts properly take into account the plaintiff's ability to pay in order to assure that the bond requirement does not bar suit altogether.²⁷⁸ But in many cases, bonds could be much higher than their often de minimis level without preventing suit by plaintiffs with compatible incentives. This conclusion follows because the bond requirement operates differentially, making expected costs much higher for incentive incompatible plaintiffs, who face a high probability of bond forfeiture, than for the plaintiff whose incentives accord with antitrust goals.²⁷⁹ Thus, the bond operates as a separating mechanism, discouraging suits by plaintiffs with incompatible incentives, but not by those with compatible incentives.

277. See, e.g., *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86 (E.D.N.Y.) (requiring \$5 million bond for acquisition of \$844 million target), *affd.*, 665 F.2d 10 (2d Cir. 1981); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.) (requiring \$10,000 bond in acquisition of \$18 million company), *affd.*, 206 F.2d 738 (2d Cir. 1953).

278. See *F. & M. Schaefer Corp. v. C. Schmidt & Sons*, 597 F.2d 814 (2d Cir. 1979); 7 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 65.09 (2d ed. 1994).

279. Expected costs depend on the probability, as well as the magnitude, of a loss, and the two types of plaintiffs face different probabilities of loss. The incentive incompatible plaintiff who attempts to block a pro-competitive merger faces a higher probability of bond forfeiture than the incentive compatible plaintiff who challenges an anticompetitive merger. Of course, even a small risk of paying a financially crippling bond will deter normally risk averse managers. The judicial objective should therefore be to set the bond at the highest level that will not discourage the plaintiff with compatible incentives from challenging a highly collusive merger, taking into account the moderate forfeiture risk if plaintiff misjudges the merger's illegality.

b. Disclosure of Settlement. To discourage collusive and anticompetitive settlements, the court can condition a preliminary injunction on plaintiff's agreement to report and publicly disclose the terms of any settlement, with notice to enforcement agencies. Suits by competitors raise risks of anticompetitive settlement because business rivals can use settlement agreements to mask restraints of trade and because plaintiffs may settle suits collusively, compromising the deterrence goal and the public interest purpose of the private merger suit.²⁸⁰

Although courts have no explicitly stated authority to disapprove settlements in cases that do not involve class actions,²⁸¹ a settlement disclosure condition appears well within the equity court's inherent powers to protect the integrity of its procedures and to assure that an injunction will serve the public interest.²⁸² In view of the risk that an anticompetitive settlement may abort the public interest, it appears appropriate for a court to impose a settlement disclosure condition. The court is only requiring that the plaintiff agree to a "sunshine" requirement to make public disclosure of settlement terms. The condition is imposed in connection with an extraordinary remedy that would halt an ongoing merger. Such an order should burden no good faith litigant, and it addresses a serious problem in public interest litigation. Moreover, precedent exists for granting a preliminary injunction in a private merger case conditioned on the plaintiff's agreement to conduct an expedited hearing.²⁸³ Thus, it seems no large step to conclude that a preliminary injunction conditioned on settlement disclosure is within the judicial power.²⁸⁴

280. Abusive and collusive settlements are the bane of private attorney general enforcement in class action cases for damages even when settlements require judicial approval. See generally *Coffee*, *supra* note 143.

281. See *Wheeler v. American Home Prods. Corp.*, 582 F.2d 891, 895-96 (5th Cir. 1977) (stating that an approval of a settlement was not appropriate in a non-class action case).

282. An equity court has clear authority to impose conditions on issuance of a preliminary injunction. *Meyers v. Block*, 120 U.S. 206, 214 (1887) (ordering an injunction bond); *Russell v. Farley*, 105 U.S. 433, 438 (1882). Such conditions may either require or prohibit specified conduct. See, e.g., *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939) (requiring payment of tariff); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507 (S.D.N.Y. 1974) (prohibiting voting of stock), *modified*, 516 F.2d 172 (2d Cir. 1975), *revd.*, 430 U.S. 1 (1977). Moreover, the court's conditioning power significantly increases when the relief is "in furtherance of the public interest." *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Inland Steel*, 306 U.S. at 157. Although Congress could limit the equity court's conditioning power, this limitation would require the "clearest legislative direction." *Brotherhood of Locomotive Engrs. v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531-32 (1960).

283. *Sun Newspapers, Inc. v. Omaha World-Herald Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,522 (D. Neb.), *modified*, 713 F.2d 428 (8th Cir. 1983).

284. Critics might object that a settlement disclosure condition invades the rights of parties to settle or dismiss lawsuits. See *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989)

c. *Voluntary Undertakings by Plaintiff.* A voluntary undertaking by a competitor-plaintiff of a course of action that forecloses possible litigation abuse provides a powerful incentive improving mechanism. For example, a plaintiff who seeks a preliminary injunction might voluntarily commit itself (1) to pay the defendant's attorney's fees upon finding a lack of any reasonable basis for the suit, or (2) to notify the court and the public of the terms of any settlement. By such an undertaking the plaintiff can place itself in exactly the same position it would be in if the court issued a conditional injunction requiring such terms.²⁸⁵ But why would the plaintiff ever make such a commitment, and should it be a factor in the court's decision whether to issue a preliminary injunction?

The competitor-plaintiff's good faith is likely to be under attack in almost every private merger case, particularly after the *ARCO* case, which made explicit the close connection between the plaintiff's incentives and antitrust injury.²⁸⁶ Typically, the merger defendant will move to dismiss for lack of antitrust injury, and even when the court denies the motion, the issue of motivation will lin-

(stating that courts may not condition the rights of parties to dismiss). But a settlement disclosure condition does not limit that right. The parties remain free to settle secretly if they do not seek a preliminary injunction or to settle with public notice if they obtain a preliminary injunction. What they may not do is both to obtain a preliminary injunction and settle secretly. In the words of the Supreme Court, the preliminary injunction condition is "the price of relief when the injunctive powers of the court are invoked." *Locomotive Engrs.*, 363 U.S. at 531-32.

A settlement disclosure condition is not contrary to the recent decision in *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995), in which the D.C. Circuit ruled that a lower court had abused its discretion in refusing to approve a proposed antitrust consent decree. In *Microsoft*, the trial court reviewed the exercise of prosecutorial discretion by an executive agency, a power the court possessed only as result of a specific statute and constrained by constitutional limitations on the separation of powers. The court held that the trial court's role was to assure that the decree did not "on its face . . . make a mockery of judicial power." 56 F.3d at 1462. More specifically, the court might examine the clarity of the decree, the workability of the compliance terms the court would administer, and any claims of adverse impact by third parties. 56 F.3d at 1461-62. By contrast, in a preliminary injunction proceeding, no executive agency is involved, and hence there is no separation of powers issue, the district court has plenary jurisdiction, and the court is required to weigh and balance public interest factors in determining whether to exercise its broad equitable discretion to block an ongoing transaction.

285. Assuming the court issues a preliminary injunction, it could incorporate the plaintiff's voluntary undertaking into its decree, based on the plaintiff's consent. The defendant might complain, but the defendant would have difficulty articulating a coherent reason for objecting to a plaintiff's stipulation to pay a defendant's attorney's fees or to a disclosure provision that makes it more difficult to enter into an anticompetitive or collusive settlement. Compliance with the attorney's fees undertaking could be assured by a bond, agreed to by the plaintiff. To relieve the court from any administrative burdens, a plaintiff might establish an independent mechanism, such as a neutral stakeholder or arbitrator under a binding instruction to pay out the bonded funds on the condition specified.

286. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335-41 (1990).

ger, coloring the court's decision on the preliminary injunction.²⁸⁷ Why not allow the plaintiff who survives the antitrust injury motion to signal its good faith and incentive compatibility in a credible manner by binding itself not to settle without either prior notice to the court or even the court's approval?²⁸⁸ Similarly, as discussed more fully in the next section, why not allow the plaintiff to make a commitment to pay the defendant's attorney's fees if a court or arbitrator later determines that the suit lacked significant merit? That is to say, why not allow the plaintiff to propose its own separating mechanism to reveal that its incentives are compatible with antitrust goals?²⁸⁹ The court could then consider the plaintiff's undertakings in determining whether issuance of a preliminary injunction would serve the public interest.

d. Attorney's Fee-shifting. A requirement that plaintiffs pay the defendant's attorney's fees if the suit is frivolous or lacks foundation provides a further means to discourage anticompetitive suits. Congress could, of course, impose such a requirement by statute, but more strikingly, as mentioned in the last section, a competitor-plaintiff might make such a commitment voluntarily in order to better convince the court to issue a preliminary injunction.

287. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 854 (2d Cir.), cert. denied, 419 U.S. 883 (1974).

288. A possible objection to a settlement disclosure procedure — whether mandated or voluntary — is that the court's settlement disclosure order might be unenforceable. The problem is that the normal enforcement mechanism — dissolution of the injunction if the condition is breached — would impose no penalty on parties intent on settling the case, and some authorities have questioned whether a court retains judicial power to sanction litigants after voluntary dismissal under Rule 41. See WRIGHT ET AL., *supra* note 124, § 1337, at 131-32. The Supreme Court, however, has recently held that a court retains the power to impose sanctions for Rule 11 violations and for contempt even after voluntary dismissal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). Clearly, the deliberate breach of a judicial order on which the court conditioned preliminary relief that was highly favorable to the plaintiff and equally burdensome to the defendant would raise issues of bad faith conduct justifying Rule 11 and civil contempt sanctions.

In addition, the plaintiff could establish an independent enforcement mechanism by inducing an appropriate litigant to intervene in the litigation, such as a state attorney general or a group of consumers. If the plaintiff then sought to settle secretly, the intervenor would have standing to object. A public agency or consumer group in a meritorious case would have incentive to intervene for this limited purpose because it need bear no significant litigation cost. Thus, the plaintiff would have established a credible enforcement mechanism. I am indebted to John Leubsdorf for this suggestion.

289. Such a voluntary undertaking amounts to performance bonding by the plaintiff of its incentive compatibility. The FTC has used a similar mechanism in consent settlement cases in which it doubts the feasibility of the proposed curative steps to be taken by the defendant. Under this procedure, the FTC accepts the settlement only on the condition that should the defendant not perform the agreed curative steps within a set time period, it will divest itself of a more valuable "crown jewel" asset. See Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 26-27 (1993).

An attorney's fee-shifting rule would modify the present system of one-way fee-shifting in private antitrust cases under which the defendant must pay the attorney's fees of a prevailing plaintiff, but the plaintiff has no similar obligation to pay the defendant's attorney's fees. A fee-shifting rule could follow the pattern of several federal statutes involving public interest type litigation, which has come to be known as the *Christiansburg* rule.²⁹⁰ Under this approach, which has been adopted by a recent antitrust statute²⁹¹ and by the authorization of state *parens patriae* actions in the Hart-Scott-Rodino Act,²⁹² the plaintiff would pay the defendant's attorney's fees if the court finds the action to have been "frivolous, unreasonable, or without foundation."²⁹³

Application of the *Christiansburg* rule in private merger cases would provide a powerful separating mechanism to discourage anticompetitive suits. At the same time, it would create relatively small risk of inhibiting pro-competitive suits, particularly because the rule would operate in conjunction with the one-sided right of the antitrust plaintiff to recover statutory attorney's fees. Thus, the wrongly motivated competitor would face a significant penalty risk under the *Christiansburg* rule, while the competitor who brings a pro-competitive suit would face a low penalty risk and a strong probability of recovering its attorney's fees.²⁹⁴

The *Christiansburg* rule appears superior to a litigation bond because it minimizes the risk that a well-motivated plaintiff will be penalized for losing a meritorious case because the penalty is paid only if the suit is frivolous. Moreover, even if we assume that the wrongly motivated plaintiff gains more from blocking an efficient merger than the pro-competitive plaintiff gains from blocking a col-

290. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (construing Title VII of the Civil Rights Act of 1964); see also Condominium and Cooperative Abuse Relief Act of 1980, § 609, 15 U.S.C. § 3608(d) (1988); Jury Systems Improvement Act of 1978, § 6(a)(1), 28 U.S.C. § 1875(d)(2) (1988); Natural Gas Pipeline Safety Act Amendments of 1976, § 19, 49 U.S.C. § 1686(e) (1988); cf. The Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1988).

291. National Cooperative Research Act of 1984, § 5, 15 U.S.C. § 4304 (1988), amended by National Cooperative Production Amendments of 1993, 15 U.S.C. § 4304(a) (1994).

292. 15 U.S.C. § 15c(d)(2) (1994) (awarding attorney's fees on showing of bad faith).

293. *Christiansburg*, 434 U.S. at 421.

294. Interestingly, this two-sided system of fee-shifting, which combines the pro-plaintiff antitrust rule with the defendant-favoring *Christiansburg* rule in a world where good plaintiffs sometimes lose and bad plaintiffs sometimes win, produces a fee-shifting regime that somewhat resembles the optimal fee-shifting rule proposed in a recent economic paper. See Lucian Ayre Bebchuk & Howard F. Chang, An Analysis of Fee-Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11 (Nov. 14, 1994) (unpublished manuscript, on file with author) (proposing fee-shifting rule that depends on the margin by which a party prevailed).

lusive merger, the *Christiansburg* rule, possibly augmented by a Rule 11 penalty that may exceed attorney's fees, would still provide an effective separating mechanism. Although this may appear counterintuitive, it is explained by the one-sided right of the prevailing plaintiff to recover attorney's fees together with the low probability that a court would impose a *Christiansburg* award or Rule 11 penalty on a well-motivated plaintiff, which together offset the greater return the wrongly motivated plaintiff anticipates in blocking a merger.²⁹⁵

3. Effectiveness of Proposed Procedures

Existing equity procedures give antitrust courts an impressive array of controls by which to ensure that competitor plaintiffs promote antitrust goals in prosecuting merger suits. In addition, improved procedures would allow courts that remain concerned about possible competitor abuse to achieve an added measure of protec-

295. More specifically, the higher benefit that the *wrongly motivated plaintiff* gains from blocking an efficient merger is discounted not only by the low probability that this outcome will occur but also by the substantial probability of a *Christiansburg* penalty. Similarly, in the case of a collusive merger, the relatively lower benefit that the *pro-competitive plaintiff* gains from blocking the merger is increased not only by the higher probability that this outcome will occur but also by the mandatory attorney's fees award.

This result can be illustrated in a simple numerical example. Assume that there are two types of plaintiffs, bad plaintiffs who only challenge procompetitive mergers and good plaintiffs who only challenge anticompetitive mergers. Naturally, the good plaintiffs will have a higher probability of winning (60%) than the bad plaintiffs (20%). Assume that the payoff to the bad plaintiff from blocking an efficient merger is \$200, while the payoff to the good plaintiff from blocking a predatory merger is only \$80; the plaintiff and defendant each pay attorney's fees of \$40; if the defendant loses, he must pay the plaintiff's attorney's fees under the antitrust statutes.

The *Christiansburg* rule changes this unbalanced scheme of fee-shifting by requiring the plaintiff to pay the defendant's attorney's fees if the defendant wins and the court determines that the suit was filed without proper basis. The latter condition is not easy to establish even in a bad case and is also subject to an erroneous determination in a good case (if the plaintiff loses). So to test the analysis, let us make the extreme assumption that in either type of cases there is a 50% chance that a losing plaintiff will face *Christiansburg* liability for the defendant's attorney's fees. Under these conditions, the plaintiff's expected value of suing is its expected payoff from winning less its costs from losing, which consist of (1) its own expected attorney's fees and (2) its expected liability for paying the defendant's attorney's fees. This is expressed in numerical terms as follows:

Bad Plaintiff

$$.2 \times \$200 - .8 \times \$40 - (.8 \times .5) \$40 = -\$8$$

Good Plaintiff

$$.6 \times \$80 - .4 \times \$40 - (.4 \times .5) \$40 = \$20$$

Thus, the bad plaintiff faces a negative return despite its much higher payoff from litigation success and is not motivated to sue. On the other hand, the good plaintiff remains motivated to sue despite its lower payoff. Of course, these outcomes are sensitive to the assumptions used and do not consider the effect of an abandonment of the merger before trial for reasons other than anticipated litigation outcomes, for example, delay costs. The outcomes demonstrate, however, that within a plausible range of values the statutory fee-shifting rule combined with a *Christiansburg* rule would operate as an effective separating mechanism.

tion. Similarly, well-motivated competitors who are concerned that the court will perceive them as wrongly motivated can credibly signal their good faith through voluntary undertakings. By these means, courts can effectively contain the risks of strategic litigation, collusive settlements, and the lesser risks of wrong outcomes and ineffective relief.

a. Strategic Litigation. Existing procedures, which include expedited hearings, hold-separate orders, curative relief orders, litigation bonds, the *laches* doctrine, and the possibility of Rule 11 sanctions, reduce the problem of strategic suits filed to block or delay a lawful merger. Supplemental procedures, such as augmenting the amount of the bond or procuring the plaintiff's voluntarily agreement to an attorneys' fee-shifting arrangement if the court holds that the suit is frivolous, might further diminish strategic risk.

b. Collusive Settlements. Existing procedures do not specifically address the risks of collusive and anticompetitive settlements. Nevertheless, such risks should not be exaggerated. The defendant can never be certain the plaintiff will settle short of effective relief, and in any event, the defendant must bear settlement and litigation costs that may have some independent deterrent effect on anticompetitive mergers. Furthermore, settlement would not bar government suit, which may become more probable if the plaintiff develops strong evidence of anticompetitive effects.²⁹⁶ Although the plaintiff and defendant are typically competitors who might settle the case by dividing markets or fixing prices, antitrust law itself restrains settlements that actively reduce competition. Moreover, antitrust courts can effectively discourage collusive settlements through the additional procedures of conditioning the preliminary injunction on advance public disclosure by the plaintiff of any settlement terms or recognizing a voluntary undertaking by the plaintiff to make such a disclosure.

c. Wrong Outcomes. Both hold-separate orders, which relieve time pressures because the merger is allowed to proceed, and increased litigation bonds, which explicitly penalize the plaintiff who induces a wrong outcome, mitigate the problem of wrong out-

296. A possible additional risk in anticompetitive settlements is losing the deterrent effect of the litigation cost bond in discouraging ill-founded suits because the defendant will no doubt release the bond as part of the settlement. But this risk is less severe than it may appear because the existence of the bond necessarily reduces the benefits the plaintiff can extract in the settlement.

comes caused by compressed time schedules for preliminary injunction hearings. In addition, the problem appears exaggerated in view of the concentrated legal resources typically assembled in preliminary injunction merger cases. What might take a smaller group of lawyers months can be done perhaps with even greater effectiveness by a large team that is able to focus its efforts on a single case.²⁹⁷

d. Ineffective Relief. The *laches* doctrine, which can apply to private merger cases,²⁹⁸ combined with the prejudice delay causes in obtaining a preliminary injunction,²⁹⁹ both reduce the problem of ineffective relief caused by the delayed challenge of a merger until after assets have been intermingled. The Supreme Court's recent ruling that private merger litigants can obtain divestiture relief³⁰⁰ mitigates the problem of insufficient briefing of the court on remedial issues, as it gives defendants every incentive to develop alternative remedies short of divestiture. Moreover, plaintiffs will also have incentive and resources to evaluate relief proposals closely because once a defendant's liability has been established, the plaintiff's statutory right to recover attorney's fees is assured. Amicus participation by government enforcement agencies may also provide effective briefing on the appropriate remedy.³⁰¹ Finally, the issue of relief will not often arise in view of the dispositive effect of the preliminary injunction decision.

F. Gravity of Violation

Both first- and second-stage procedures focus the enforcement capabilities of competitors on mergers that raise the most serious competitive risks. The first-stage antitrust injury screen, whether

297. See *supra* note 136 and accompanying text.

298. *California v. American Stores Co.*, 495 U.S. 271, 297-98 (1990) (Kennedy, J., concurring).

299. Certainly defendants appreciate this point because they typically consummate the merger at the earliest opportunity to forestall preliminary relief. See, e.g., *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *temporary stay vacated* by 56 U.S.L.W. 3682 (U.S. Apr. 5) (vacating temporary stay when, unknown to the Supreme Court, the merger had closed before temporary stay issued), *cert. denied*, 486 U.S. 1023 (1988).

300. *American Stores Co.*, 495 U.S. at 278-96.

301. Although it is doubtful that enforcement agencies could be induced to assume a greater role in private merger litigation generally, see ABA ANTITRUST SECTION, *supra* note 114, at 19-22, the agencies may be more willing to comment on relief issues. See, e.g., *Changes to TWA/Travel Agent Settlement Resolve Division's Competitive Concerns*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1715, at 688-90 (June 1, 1995) (Justice Department files amicus curiae memorandum stating views on proposed class action settlement while taking no views on the merits.). The restructuring of a competitive market presents an issue in which the enforcement agencies should have a keen interest in participating.

formulated in terms of predatory capability or market dominance, registers severity of the violation. Proof of predatory capability requires a showing that a merger will give a small coalition of firms the power to discipline or exclude rivals. As *Cargill* made clear in rejecting the standing of a competitor claiming predatory injury from a merger causing only moderate concentration, such proof is likely to exist only when the merger creates highly concentrated oligopolistic conditions.³⁰² Proof that a merger would create a market dominant firm even more clearly registers violation severity. Mergers creating single-firm market dominance raise the gravest risks to competition, as almost all antitrust authorities recognize.

The second-stage procedure also focuses enforcement efforts on the most aggravated violations. Assessment of violation severity is an essential factor in the equity court's determination whether to issue a transaction-disrupting preliminary injunction. Separating mechanisms, such as litigation bonds and fee-shifting undertakings, also serve to concentrate enforcement on the most serious violations. The fact that a plaintiff may face liability for delay costs under a litigation bond or for attorney's fees under a fee-shifting regime serves to discourage suits except where plaintiffs believe they have high probability of winning. Thus, both first- and second-stage procedures focus the litigation-capable enforcement efforts of competitors on the mergers of gravest public concern.

V. TAKEOVER TARGETS

Target firms in takeover cases should also have standing to challenge unlawful mergers because such firms are uniquely knowledgeable and capable merger litigants; because the takeovers subject to antitrust challenge usually unite direct competitors who face the gravest antitrust risks; because the anticompetitive effects of a merger threaten injury to constituent parts of the firm and benefit shareholders only through violation of the law; because in striving to retain its independence from extinction by an anticompetitive merger, the target firm is vindicating a key statutory goal of the modern merger law; and because when a merger has purely collusive effects such that all competitors gain, only the target remains as a viable private litigant.

302. See *Cargill*, 479 U.S. at 119-20 n.15.

A. Enforcement Capability

Of all possible merger litigants, it is the target firm that is likely to be most capable of mounting an effective suit within the short time limits of a contested takeover. The target possesses the most intimate knowledge of the effects of the merger because it will become a part of the augmented firm whose market power threatens to injure competition. The target will already have in its possession many of the key documents needed. It will usually be the first firm, other than the bidder, to know of the merger, and indeed the target will probably have already studied the antitrust issues when considering the tender offer.³⁰³ Additionally, in critical cases it may be the only available private litigant.³⁰⁴

The Second Circuit recently recognized the advantage of the takeover target as a merger litigant and the necessity of target standing for effective enforcement of the antitrust laws, stating that:

[P]rivate enforcement depends on the willingness of affected companies to enter the fray and risk substantial money, time, and effort in lawsuits that have even more uncertainty of outcome than ordinary litigation. . . . [N]on-target competitors claiming standing face the substantial barriers of proof erected by *Cargill*. Consumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction. The target of a proposed takeover has the most immediate interest in preserving its independence as a competitor in the market.³⁰⁵

In fact, targets have brought almost thirty-five percent of all private merger cases, or twenty-three of the sixty-six reported cases instituted over the fourteen-year period, 1977 to 1990, and obtained fifty percent of the preliminary injunctions granted.³⁰⁶ Targets have proven to be capable litigants, successfully challenging, for example, Mobil Oil's attempt to acquire Marathon,³⁰⁷ LTV's attempt to

303. See 2 AREEDA & HOVENKAMP, *supra* note 67, § 381b (describing the target as the most knowledgeable and perhaps the only motivated plaintiff); Baumol & Ordover, *supra* note 196, at 258 (stating that a target's management is better informed than any other group on the competitive effects of a merger).

304. Although I have stressed that competitors may have pro-competitive incentives in challenging mergers, cases clearly arise in which no competitor is motivated to challenge a collusive merger. Indeed, the target firm may be the last competitive holdout in a market otherwise dominated by a few large firms.

305. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989).

306. See *app.* These statistics encompass the merger and takeover wave of the 1980s, which ended in 1990. See PAUL MILGRAM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* 483-85 (1992).

307. Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir.), *reaff'd*, 669 F.2d 384 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

acquire Grumman,³⁰⁸ and the recent attempt by South Africa's second largest gold mining company to acquire the largest U.S. producer,³⁰⁹ all of which were enjoined. Thus, targets have the best information, the strongest incentive, and generally the highest enforcement capability among private merger litigants.³¹⁰

B. *Incentive Compatibility and Antitrust Injury*

The challenge to target firm standing is based on an absence of antitrust injury and incentive incompatibility. Critics assert that a takeover inflicts no injury on the target and benefits its shareholders by enabling them to sell their shares at a premium.³¹¹ Further, even if in some sense the target is injured, the injury is not an antitrust injury because it is not caused by the anticompetitive effects of the merger.³¹² Even apart from these problems, the target should be denied standing because the real party in interest is not the target but its managers, who sue in the target's name and do so not to vindicate antitrust wrongs but to keep their jobs.³¹³ Thus, the litigation incentives of the target and its managers are fundamentally incompatible with antitrust goals.³¹⁴ Each of these arguments, however, is either mistaken or overdrawn, particularly as applied to horizontal mergers — the focus of almost all takeover litigation.

The target firm may suffer injury even when shareholders appear to benefit because the welfare of the firm is not identical with the short-term interest of a controlling group of shareholders intent on selling their shares and because in some cases shareholders themselves are hurt. The injury sustained by the target is antitrust injury when it stems in whole or in part from output reduction or other anticompetitive effects in the restrained market. Although the motives of managers may indeed deviate from antitrust goals, equity controls and internal corporate mechanisms can modify distorted managerial incentives.

308. *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2d Cir. 1981).

309. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 698 F. Supp. 487 (S.D.N.Y. 1988), *modified on other grounds*, 871 F.2d 252 (2d Cir. 1989).

310. Moreover, in some of the largest mergers, the target may be the only viable private litigant because competitors may lack enforcement incentives or be too small to mount an effective merger challenge.

311. See *Burnup & Sims, Inc. v. Posner*, 688 F. Supp. 1532, 1535 (S.D. Fla. 1988); Easterbrook & Fischel, *supra* note 49, at 1166-68.

312. See *Burlington Indus. v. Edelman*, 666 F. Supp. 799, 805 (M.D.N.C. 1987); Easterbrook & Fischel, *supra* note 49, at 1166-68.

313. See *Burnup & Sims*, 688 F. Supp. at 1534.

314. 688 F. Supp. at 1534.

More specifically, targets face antitrust injury from anticompetitive takeovers because such mergers threaten the target with: (1) collusion-induced output reduction harmful to the target and its constituents in both partial and full acquisitions of shares; (2) possible loss of trade secrets, confidential information, and other intellectual property injuring the target's competitive viability if the merger is not consummated; and (3) termination of its corporate existence in contravention of a merger law intended to preserve the independence of firms threatened by anticompetitive acquisitions. Thus, as explained below, the target's litigation incentives are fully compatible with antitrust goals. The crux of the objection to takeover suits is not the *target's* incentives, but the incentives of its *managers*. Distorted managerial incentives, however, are best handled by procedural and internal controls on managers, not disqualification of the target. The combined force of these considerations justifies the conclusion that takeover targets sustain antitrust injury when they challenge horizontal mergers.

These are issues of first impression in the Supreme Court, which has never decided a target merger case or expressed any view about the application of the antitrust injury principle to takeover targets. In a recent amicus brief, however, the Solicitor General questioned whether the general antitrust injury standard promotes antitrust goals in takeover cases or "whether some refinement of the standard would be appropriate."³¹⁵ The Solicitor stressed the factual difference between the *Brunswick* and *Cargill* cases, in which the plaintiffs claimed injury from increased competition, and a target suit, where the target firm seeks "to remain a viable and aggressive competitor."³¹⁶ Thus, antitrust injury in target merger cases raises distinctive issues that require "careful consideration."³¹⁷

1. *Partial Acquisitions*

The target sustains antitrust injury when a rival firm acquires a controlling interest in the target through acquisition of less than all of the target's shares. Such an acquisition threatens the target with

315. Brief for the United States as Amicus Curiae at 7, *Anago, Inc. v. Tecno Medical Products, Inc.*, 114 S. Ct. 491 (1993) (No. 92-1274) (dismissing cert. petition pursuant to stipulation). The Solicitor General urged denial of the writ of certiorari because the issue of target standing had been sparsely litigated in the lower courts and because the number of takeovers had declined in recent years. Brief for the United States, *supra* at 7-9. Of course, one reason the issue of target standing may have been sparsely litigated in recent years is that the difficulty of obtaining standing discourages target suits.

316. Brief for the United States, *supra* note 315, at 7-9.

317. *Id.* at 7 n.6.

antitrust injury because the bidder's partial ownership of the target impels the bidder to favor its own corporate interest in competition with the target thereby weakening the target's competitive vitality. Because the bidder receives only a fraction of the profit realized by the target, the bidder has an incentive to transfer profit from the partially owned target to its own fully owned profit center, for example, by shifting sales from the target, transferring valuable competitive know-how, or by blocking innovation or other strategies beneficial to the target in its competition with the bidder.³¹⁸

The favoritism toward the bidder that a partial acquisition of shares induces tends to undermine the target's competitive potential, threatening injury to its minority shareholders and its non-shareholder constituents. The injury the target and its stakeholders sustain stems directly from the anticompetitive nature of the acquisition because a bidder not in competition with the target would have no incentive to reduce the target's output and weaken its competitive strength. Moreover, even if the bidder competes with the target, in a fully competitive market, a reduction in the target's output would not enable the bidder to increase its own profits because under competitive conditions the bidder has no power to raise prices. Hence, a partial acquisition threatens the target with injury if, but only if, the merger creates collusive risks.

Established precedents recognize the anticompetitive risks arising from partial acquisitions by direct competitors.³¹⁹ Thus, in its recent *Gold Fields*³²⁰ decision, the Second Circuit upheld the target's standing to challenge a partial acquisition of controlling shares. The bidder, the dominant South African gold producer, sought to acquire a controlling interest in the leading U.S. producer. The target claimed antitrust injury because the bidder would be likely to favor its own wholly owned South African production over its partially owned U.S. subsidiary — an especially pernicious result because the South African facility had higher costs. In up-

318. See *F. & M. Schaefer Corp. v. C. Schmidt & Sons*, 597 F.2d 814, 818 (2d Cir. 1979) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 314 (D. Conn.), *affd.*, 206 F.2d 738 (2d Cir. 1953)).

319. See *Schaefer*, 597 F.2d at 814; *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 693-95 (2d Cir. 1973); *Hamilton Watch*, 206 F.2d at 738; *Consolidated Gold Fields, PLC v. Anglo Am. Corp.*, 698 F. Supp. 487, 489 (S.D.N.Y.), *modified sub nom.* *Consolidated Gold Fields P.L.C. v. Minorco, S.A.*, 871 F.2d 252 (1988), *cert. dismissed*, 492 U.S. 939 (1989); *Gearhart Indus., Inc. v. Smith Intl., Inc.*, 592 F. Supp. 203, 211-14 (N.D. Tex.), *modified*, 741 F.2d 707 (5th Cir. 1984); see Brent W. Huber, Note, *Target Corporations, Hostile Horizontal Takeovers and Antitrust Injury Under Section 16 of the Clayton Act After Cargill*, 66 *IND. L.J.* 625, 646 (1991).

320. 871 F.2d at 252.

holding the target's standing to challenge the merger, the Second Circuit easily found antitrust injury because the target stood to earn less profit due to the ability of "outside corporate forces to cause it to restrain its own competitiveness."³²¹

Two objections may be made to this analysis. First, the bidder's use of its controlling interest to cripple the target in competition with the bidder unjustifiably assumes a breach of fiduciary duty to the target's minority shareholders. Second, the target suffers no antitrust injury because any losses the target sustains from competitive restraints imposed by the bidder are outweighed by the benefits the target receives as a partner in the collusion.

The first objection — unjustified assumption of breach of fiduciary duty — is unrealistic because it would assume perfect compliance with legal rules in the face of a palpable conflict of interest. That assumption defies legal experience and basic premises of corporate law. The directors of the target, elected largely by the bidder, and frequently its officers or employees will at best have divided loyalties, if they are not totally dominated by the parent. Such directors cannot exercise the same independence as directors without divided loyalties, as corporate law conflict-of-interest rules and the Clayton Act's prohibition against interlocking directors both recognize.³²² Indeed, antitrust authorities uniformly acknowledge the dangers from acquisitions of substantial or controlling interests in direct competitors.³²³

The second objection — the target benefits from postmerger collusion with the bidder — neglects both the parent's strong incentive to capture as much as possible of the collusive gain in its own wholly owned entity and related issues of illegality. Thus, it appears unlikely that the net benefit to the target and its constituents would remain favorable when the price is elevated because the collusive output reduction is likely to fall disproportionately on the target. Antitrust courts need not and should not resolve that issue, however, because the determination of whether the target will benefit

321. 871 F.2d at 257. The case also involved a full acquisition of shares, discussed *infra*.

322. See Clayton Act, § 8, 15 U.S.C. § 19 (1994) (prohibiting directors from serving on boards of competing corporations where one company has capital surplus and profits that exceed \$1 million); ROBERT CHARLES CLARK, CORPORATE LAW §§ 4.1-2 (1986).

323. See *Schaefer*, 597 F.2d at 814; *Hamilton Watch*, 206 F.2d at 738; *Gold Fields*, 698 F. Supp. at 499-500; 5 AREEDA & TURNER, *supra* note 53, ¶ 1203c (describing the dangers as board of directors' influence, sensitive information, employee morale, and reduced competitive incentive).

falls peculiarly within the province of the target's directors in deciding whether to bring a merger suit.³²⁴

Moreover, in making its litigation decision, the target's board of directors must face the issue of illegality. Whatever benefits the target receives from the collusive effects of the merger are achieved in violation of law. Although the target is not itself a law violator, it may legitimately sue to prevent a violation of the Clayton Act that is achieved through fundamental change in its ownership structure.³²⁵ In addition, because the target will continue to exist as a separate legal entity, the collusive price raises issues of continuing conspiracy between the partially owned subsidiary and its parent,³²⁶ which a determination of merger legality would help to resolve.³²⁷ Thus, the objections to target standing in partial acquisitions are untenable.

2. Full Acquisitions

The target sustains antitrust injury in a full acquisition because vital constituencies of the firm face threatened losses from merger-induced output reduction. Injury to such constituencies may involve injury to the firm's workers who face diminished employment; its suppliers who face reduced demand; consumers who face higher prices; and the communities in which the firm operates, which face output-related reductions in spending, taxes, and employment. These injuries harm the target itself because under modern legal and economic views, the welfare of the firm includes the interests of its nonshareholder constituents either directly or as encompassed in the long-run welfare of its shareholders and because any immediate gains realized by selling shareholders stem from an unlawful transaction.

The modern business firm is an ingenious network of long-term contractual interests, which includes lenders, labor, managers, suppliers, customers, and supporting communities, as well as share-

324. See CLARK, *supra* note 322, §§ 3.4, 3.5; *supra* notes 294-99 and accompanying text.

325. See, e.g., *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698 (2d Cir. 1973); see also discussion *infra* note 337 and accompanying text.

326. See 2 AREEDA & HOVENKAMP, *supra* note 67, ¶¶ 1464e, 1467f (describing cases divided on whether parent and partially owned subsidiary have conspiratorial capacity); HARLAN M. BLAKE & ROBERT PITOFSKY, *ANTITRUST LAW* 555-56 (1967).

327. If the merger is held unlawful and enjoined, conspiracy issues of course will not arise. If the merger is held lawful based on a finding of absence of market power, future collaboration between affiliated firms engaged in joint production will be lawful in most cases. See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 5.2d (1994).

holders.³²⁸ Although no single theory of the firm prevails, both modern economics and recent legislative and judicial articulations recognize the contractual nature and diverse constituencies of the firm.³²⁹ Indeed, the statutory law of a majority of states and common law decisions elsewhere recognize the nonshareholder constituencies that compose the corporate interest and the duty of directors to serve that composite interest, at least when consistent with the long run welfare of shareholders.³³⁰ Thus, under the governing law of most states, the firm encompasses the welfare of its constituents or stakeholders — all those who have invested human and other capital contingent on the continued existence and health of the enterprise. It follows that to the extent reduced output caused by a collusive merger injures nonshareholder constituencies and produces no offsetting gains, it injures the firm itself, most especially in a takeover.³³¹

328. See MASAHIKO AOKI ET AL., *THE FIRM AS A NEXUS OF TREATIES* (1990); John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 446-48; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 236-38.

329. See AOKI, *supra* note 328; Coffee, *supra* note 328, at 446-48; Andrei Schleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 33, 37-38 (Alan J. Auerbach ed., 1988). See generally Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989).

330. See *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1989) (permitting consideration of "impact on constituencies other than shareholders"); Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW. 1355 (1991) (state statutes accord with common law rule); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 214-15 (1991); Millon, *supra* note 328, at 234 (referring to the common law rule permitting consideration of other constituencies); Marleen A. O'Connor, *Corporate Malaise — Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 3, 4, 279-93 (1991) (stakeholder statutes in over half of the states); cf. 1 AMERICAN LAW INST., *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* § 6.02(b)(2) (1994) (explaining that directors may take into account nonshareholder interests when they would not "significantly disfavor" long-term shareholder interests); Glen A. Graff, *Target Standing Under Section 16 of the Clayton Act*, 1991 U. ILL. L. REV. 219, 239-40 (explaining that nonshareholder interests may be taken into account in deciding to file antitrust suit).

331. Injuries to nonshareholder constituencies are particularly likely in takeover cases because the buyout severs the shareholders' interests from those of the firm's other constituents. Under the normal conditions of an ongoing firm, maximization of the shareholders' residual value maximizes the firm's total value. A takeover, however, breaks the unity of interest between the selling shareholders and other constituents. The tendering shareholders are no longer constrained repeat players who benefit from a reputation for fair dealing but now have every incentive to expropriate the sunk costs of other constituencies. See Coffee, *supra* note 328, at 447; Charles R. Knoeber, *Golden Parachutes, Shark Repellents and Hostile Tender Offers*, 76 AM. ECON. REV. 155, 159-60 (1986); Trevor S. Norwitz, "The Metaphysics of Time": *A Radical Corporate Vision*, 46 BUS. LAW. 377, 377-78 (1991); Schleifer & Summers, *supra* note 329, at 41-42. But cf. Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119, 172 (1992) (claiming empirical evidence does not support expropriation theory as cause for takeovers).

A collusive merger, however, will typically have more than the one-sided effect of injuring nonshareholder constituents. The merger will instead generally benefit the target's shareholders, or some of them, who typically receive a premium for their shares. Thus, the impact of the merger on the target's constituencies appears mixed, and it is surely conceivable that the gain to selling shareholders may exceed the loss to other constituencies, including nonselling shareholders. An antitrust court, however, cannot properly make that determination. Instead, under controlling corporate law principles, the net effect of a takeover is an issue to be resolved by the target's board of directors.³³² Moreover, in making such a determination the directors may properly disregard any gain to shareholders arising from the collusive effects of the merger because such gains do not reflect an increase in the value of the firm, if value is understood as *lawful value*.³³³

The lawful value of the firm is its total value apart from any enhancement due to the antitrust violation. The gain to the target's shareholders from the increased profits due to future collusion, express or tacit, cannot form any part of the firm's lawful value. This is not to question that shareholders are entitled to the residual profit of the firm, but that principle applies only to lawful profit, and the collusive gain from a merger that violates the antitrust laws is necessarily unlawful.³³⁴ Such a gain, stemming from future collusion or tacit interdependence made possible by the merger, consti-

332. See *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 & n.13, 45 (Del. 1994); *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d at 1150; Hansen, *supra* note 330, at 1364-65 (explaining that the issue is for directors under business judgment rule). To be sure, once the corporation has undertaken a sale of control transaction or a breakup of the corporate entity, the Delaware "enhanced scrutiny" test focuses the directors' duty on obtaining the best value for shareholders. *Paramount Communications v. QVC Network, Inc.*, 637 A.2d at 48. But short of that step, the directors retain full authority to consider the interests of other constituencies.

333. See *Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 16 (2d Cir. 1981) (holding that target's shareholders were "not entitled" to gain from tender violating merger law); *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698 (1973) (holding that target's shareholder had no right to proceed with unlawful tender as "requirement of lawfulness is included by implication in every tender offer"); *Paramount Communications v. Time, Inc.*, 571 A.2d at 1153 (holding that target's directors may consider illegality in evaluating tender bid); AMERICAN LAW INSTITUTE, *supra* note 330, § 6.02(b)(1) (explaining that target's directors may consider "questions of illegality" in deciding whether to take defensive action).

334. Note that the premium is not unlawful in the sense that either the target or its shareholders have themselves violated the antitrust laws, but the premium nevertheless constitutes gain from an unlawful transaction. In maximizing the firm's value, the directors are under a legal duty to maximize profit only so far as the profits stem from lawful transactions. See *supra* note 332.

tutes a form of unjust enrichment from illegality.³³⁵ Suit by the target to block an anticompetitive merger can therefore maximize the *lawful* value of the firm,³³⁶ and the authority to determine whether it does, clearly rests with the target's directors, subject to the business judgment rule.³³⁷

It does not follow that all shareholder gain from mergers that violate the antitrust laws is illegal. If the acquiring firm is one of several bidders, the margin of unlawful shareholder gain is simply the difference between the anticompetitive bid of the acquiring firm and the next highest lawful bid.³³⁸ If the acquiring firm is the only current bidder, the unlawful antitrust gain is the difference between the current unlawful bid and the highest future lawful bid discounted for delay. If a merger would increase the target's value for reasons apart from the merger's own collusive effects, future bids should be forthcoming that will enable the target to realize lawful value enhancement without injury to competition. Thus, enjoining the merger deprives shareholders only of the gain stemming from the anticompetitive effects of the transaction.³³⁹

335. Cf. *Grumman Corp.*, 665 F.2d at 16 (stating that the "shareholders are not entitled to a gain obtained from a sale that presents a substantial likelihood of violating § 7"); Huber, *supra* note 319, at 648.

336. The distinction between the lawful and the unlawful value of the firm is consistent with the antitrust damage rules that require corporate defendants to surrender profits gained from collusion — trebled — to the plaintiff. This of course causes loss to the shareholders though they are normally quite innocent of any antitrust violation. The more complete collusion created by a merger cannot give the shareholders greater entitlement to collusive profit.

337. See Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 143 (1986) (stating that the business judgement rule applies to suits by takeover targets). Indeed, the target's directors may have a legal duty to oppose takeovers that harm the corporate interest. See *Panter v. Marshall Field & Co.*, 646 F.2d 271, 297 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Enterra Corp. v. SGS Assocs.*, 600 F. Supp. 678, 686 (E.D. Pa. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955-57 (Del. 1985). Similarly, once a company is up for auction under the *Revlon* rule, the directors arguably have a duty to consider only bids that do not violate the antitrust laws in obtaining the best price for shareholders. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986). *But cf.* Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982) (suggesting change in corporate law to preclude all or most takeover litigation because of manager conflict of interest).

338. Thus, takeover gains from reduced agency costs, tax benefits, postmerger synergies, or other causes not connected with increased market power could be realized by merger with another bidder.

339. In the unlikely event that an anticompetitive merger involves unique and otherwise unattainable synergies, the directors should of course take such gains into account in weighing the net corporate effect; if the gains are sufficiently large to offset any competitive harm, the directors may properly decline to bring suit. Indeed, under these conditions, the merger may in fact be lawful. See 1 ABA ANTITRUST SECTION, *supra* note 124, at 319-22; Pitofsky, *supra* note 34, at 206-27. Such cases, however, are likely to be infrequent because a merger creating market power will rarely be necessary to achieve desired synergies, and operating synergies are seldom present in takeovers. See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 172-74 (3d ed. 1990) (stating that effi-

Courts and commentators who oppose target standing frequently argue that antitrust injury is absent because any injuries sustained by the target result simply from the change in control, not from the anticompetitive effects of the merger; thus, the same injuries would occur even if the merger did not violate the antitrust laws.³⁴⁰ As shown above, however, the injury to the target firm, properly conceived as the lawful collective interest of its stakeholders, results directly from the merger-induced output reduction. These injuries would not occur in a noncollusive merger.

Under these circumstances, the target's incentives in attempting to prevent an anticompetitive merger harmonize with antitrust goals. The output-related injury to nonshareholder constituents, including consumers, reflects the public interest in maintaining competition. To be sure, the target's managers may have private incentives incompatible with antitrust goals, but managerial conflict of interest should not defeat the target's standing when procedural and internal corporate mechanisms are available to control such conflict.³⁴¹ This conclusion is strengthened by the fact that apart from consumers, the target's constituents would not have standing to sue individually, and consumers lack the incentive to sue. Thus, a holding that the target cannot sue to vindicate the rights of its stakeholders might prevent any challenge to an output-reducing merger — a result that, as Judge Newman recently noted, "would substantially impair enforcement of the antitrust laws."³⁴²

3. *Loss of Trade Secrets*

Loss of trade secrets and similar intellectual property unprotected by patent or copyright laws provides an additional source of antitrust injury when the bidder is a rival firm. In either a full or partial acquisition of shares, antitrust injury may occur if the bidder gains control of the target, and the merger is later held unlawful or divested in anticipation of such a holding. Although the target may regain its independence under a divestiture order or consent settle-

ciency reduced on average); Richard E. Caves, *Mergers, Takeovers, and Economic Efficiency: Foresight vs. Hindsight*, 7 INTL. J. INDUS. ORG. 151 (1989).

340. *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 805 (M.D.N.C. 1987); *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246, 250 (C.D. Cal. 1984); *Easterbrook & Fischel*, *supra* note 49, at 1156-70.

341. *See Rosenzweig*, *supra* note 337, at 144, 147-50 (arguing that takeover suits are desirable because they protect the target from illegal conduct when other litigants are not available and because manager conflict can be moderated by incentive mechanisms); *infra* text accompanying notes 368-69.

342. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989).

ment, during the period it is under bidder control, it is threatened with the irreparable loss of its trade secrets.³⁴³ The question arises whether the target's trade secrets can be protected by a hold-separate order, which prevents the scrambling of the target's assets until antitrust issues are resolved, but such orders will not as a practical matter preserve trade secrets and other competitive information after control has passed to a rival firm.³⁴⁴ Thus, when a merger between the bidder and target would be unlawful, the bidder's capture of the target's trade secrets both injures the target and also reduces competition by inhibiting the target's ability to compete. As we shall see, the bidder has an incentive to weaken the target in this way only when the merger would injure competition.

Indeed, the transfer of trade secrets from target to bidder can be viewed as the first step in a two-step restraint of trade: the first step reduces the target's ability to compete by transferring key competitive assets to the bidder; the second step extinguishes competition altogether through merger.³⁴⁵ Normally, the two steps collapse into a single judicial determination of merger legality or illegality. The distinction, however, is important at the preliminary injunction stage because the final injunction cannot effectively restore competition if the target's key informational assets have been lost during the pendency of the litigation. Thus, the law promotes antitrust goals when the target has standing to prevent such irreversible loss of trade secrets.³⁴⁶

Some courts nevertheless object that a trade secret loss cannot be an antitrust injury because the harm flows from a change in corporate control and bears no relation to the fact that less competi-

343. The risk of trade secret loss most commonly arises in suits by the federal government, a state, or a competitor, to which of course the target may also be a party. If the target firm is the only plaintiff, however, the case will not survive a denial of a preliminary injunction and thus the issue of trade secrets becomes academic. See *supra* text accompanying note 192.

344. See *United States v. BNS, Inc.*, 858 F.2d 456, 465-66 (9th Cir. 1988) (sustaining appointment of equity trustee because hold-separate order would not prevent loss of trade secrets); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 (D.C. Cir. 1981) (stating that hold-separate orders create risks of trade secret loss).

345. Cf. *Anago, Inc. v. Tecnol Medical Prods., Inc.*, 976 F.2d 248, 252-53 (5th Cir. 1992) (Parker, J., concurring) (describing how a takeover target may have suffered antitrust injury sufficient to establish standing to sue for injunctive relief under § 7 if merger is "climactic" result of prior anticompetitive conduct), *cert. dismissed*, 114 S. Ct. 378 (1993).

346. See *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 (D.C. Cir. 1981) (affirming preliminary injunction because of confidential information and unique management); *Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 15-16 (2d Cir. 1981) (affirming preliminary injunction because of threatened loss of confidential information and serious disruption of business); *F. & M. Schaefer Corp. v. C. Schmidt & Sons*, 597 F.2d 814, 818-19 (2d Cir. 1979) (affirming preliminary injunction issued because of threatened loss of trade secrets and potential damage to employee morale).

tion exists in the market.³⁴⁷ Moreover, they urge that whatever effect the loss of trade secrets might have on competition generally, the target firm sustains no injury because its shareholders have received the full market value for their ownership interest in the target, including its trade secrets.³⁴⁸

In fact, the loss of trade secrets may injure both competition and the target firm when the target's future viability depends on retention of its trade secrets. In a full acquisition of shares, the transfer of the target's trade secrets to the bidder injures competition by frustrating effective relief, if the merger is subsequently held unlawful or abandoned in anticipation of such a finding. Although the merger is blocked, the bidder's temporary control over the target gives it the opportunity — and it has every incentive — to appropriate the target's trade secrets. Strikingly, this incentive arises only when the merger would create collusive conditions injurious to competition.

The bidder's incentive to take the target's trade secrets arises in a collusive merger because when the target's continued viability is essential to competition, the capture of its trade secrets provides the bidder with an alternative means to reduce the target's competitive viability and thereby earn a supra-competitive return should the merger ultimately be barred. The bidder prefers to capture rather than to preserve the target's trade secrets because absent the collusive conditions created by the merger, the bidder could earn only a normal return from the sale of the target with its trade secrets intact. Thus, when the target's future viability depends on retention of its trade secrets, the bidder's temporary control of the target gives it both the power and the incentive to frustrate effective merger relief and thereby injure competition.³⁴⁹

In a partial acquisition between rival firms, transfer of the target's trade secrets to the bidder causes a similar injury to competition. As in a full acquisition, the trade secret transfer injures the target's future competitive viability. The partial acquisition case differs in one important respect: the bidder in a partial acquisition

347. See, e.g., *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 805 (M.D.N.C. 1987); *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246, 250 (C.D. Cal. 1984); *Burnup & Sims, Inc. v. Posner*, 688 F. Supp. 1532, 1534 (S.D. Fla. 1988).

348. *Easterbrook & Fischel*, *supra* note 49, at 1162-63; Joseph Gregory Sidak, *Antitrust Preliminary Injunctions in Hostile Tender Offers*, 30 KAN. L. REV. 491, 503-04 (1982).

349. The bidder's incentive to gain control of the target's trade secrets remains even if the bidder must pay the full market price for such secrets. The market price will be based either on the value of the trade secrets in the premerger competitive market or their enhanced value in the postmerger collusive market. In either event, the bidder gains by taking the trade secrets.

has an incentive to take the target's trade secrets even in a competitive market because its ownership of the target is only partial.³⁵⁰ The prospect of collusive gain from the merger intensifies that incentive and significantly increases the risk that the bidder will attempt to undermine the target's viability by taking its trade secrets. It follows that when the target holds vital trade secrets, a partial acquisition threatens injury both to the target and to competition.

The issue remains whether the target may suffer antitrust injury in cases where there is no prospect that the merger will later be held unlawful or divested under a consent settlement if a preliminary injunction is denied. In such a case, which will arise when the target is the sole plaintiff, how can the target be hurt considering that the merger price necessarily includes the value of the target's trade secrets? In fact, the conclusion of target injury follows from our previous discussion of antitrust injury in partial and full acquisitions of shares.³⁵¹ There, as in the trade secret case, the target sustains injury through merger-induced losses to its nonshareholder constituents, as well as to minority shareholders in partial acquisitions, who retain an economic and legally recognized interest in the target's continuing welfare. Of course, in trade secret cases, as in partial and full acquisitions of shares, the selling shareholders stand to benefit handsomely from the anticipated collusive effects of the merger. As discussed earlier, however, the illegal source of that gain disqualifies it as an appropriate offset to the losses that the target's nonselling stakeholders sustain.³⁵²

Thus, in both partial and full acquisitions, the injury the target sustains from loss of trade secrets is essentially identical. The injury flows from the enhanced value the trade secrets have in a collusive market. The acquisition of the target, whether partial or full, gives the bidder the power to cripple the viability of the target by seizing its trade secrets, thereby crippling effective merger relief and injuring competition.

4. *Loss of Independence*

The target firm sustains antitrust injury, different in kind but equally contrary to merger policy, from its extinction as an independent firm. The target's loss of independence causes antitrust injury because it is both an anticompetitive effect and the indispen-

350. See *F. & M. Schaefer*, 597 F.2d at 818; *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 314 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

351. See *supra* text accompanying notes 58-77.

352. See *supra* text accompanying notes 332-39.

sable mechanism of the unlawful merger. In its recent *Gold Fields* decision, the Second Circuit upheld the standing of a takeover target as a competitor in the restrained market on just such a theory.³⁵³ The competitive injury to the target stemmed from its loss of "the power of independent decision-making as to price and output" as a result of an unlawful acquisition; as Judge Newman explained:

It is hard to imagine an injury to competition more clearly "of the type the antitrust laws were intended to prevent," [citing *Brunswick*], than the elimination of a major competitor's power to determine its prices and output. It is precisely the loss of this power that makes a section 1 conspiracy so pernicious. For this reason, a member of a section 1 conspiracy has standing to challenge the restraint upon its freedom to compete, even though, in the long run, it may enjoy the benefits of the cartel.

. . . The antitrust laws ensure the right to compete. That is what *Gold Fields* [the target] wishes to do, and that is what it will not be able to do if the threatened takeover succeeds.³⁵⁴

The target's loss of independence is also the indispensable means by which the violation occurs. Thus, the determination that the target sustains antitrust injury also finds support in the Supreme Court's *McCready* decision,³⁵⁵ which upheld antitrust injury where the plaintiff's injury was a necessary step that was "inextricably intertwined" with the violation.³⁵⁶ As the Solicitor General argued recently to the Supreme Court, the target's loss of independence is "integral to the violation," which otherwise would have no anticompetitive effect.³⁵⁷ It is precisely the loss of the target as a competitive decisionmaker that injures competition and reduces output. Under these circumstances, the target's incentive to retain its independence and economic freedom fully accords with antitrust goals.

353. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989).

354. 871 F.2d at 258-59 (citations omitted). But see *Anago, Inc. v. Tecnol Medical Prods., Inc.*, 976 F.2d 248 (5th Cir. 1992) (declining to follow *Gold Fields* rule because Fifth Circuit "narrowly interpret[s]" antitrust injury), cert. dismissed on stipulation, 114 S. Ct. 491 (1993).

355. *Blue Shield v. McCready*, 457 U.S. 465 (1982), cited with approval in *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) and *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986).

356. 457 U.S. at 484. In *McCready*, the plaintiff's injury as a consumer of boycotted psychological services was a necessary step by M.D. psychiatrists in effectuating a boycott against the targeted psychologists. The dissenting Justices and some commentators disagree with the decision in part because the more directly injured psychologists might appear to be better enforcers. *McCready*, 457 U.S. at 487 n.2 (Rehnquist, J., dissenting); 2 AREEDA & HOVENKAMP, *supra* note 67, ¶ 334.1; PAGE, *supra* note 49, at 1499-1511. But in a takeover case, destruction of the independence of the target firm is the overarching goal and direct object of the merger, and clearly there is no more capable enforcer.

357. Brief for the United States, *supra* note 315, at 7 n.6.

The loss-of-independence rationale is not weakened by the fact that the target would also lose its independence if the merger raised no risks to competition — if, for example, as one judge suggested in *Gold Fields*, the target had only a two percent market share.³⁵⁸ To object to standing on these grounds, however, is to equate standing with the presence of an antitrust violation. The correct analysis is to assume the presence of an antitrust violation and then ask if the plaintiff has standing to challenge it.³⁵⁹ Thus, standing does not depend on whether the plaintiff is likely to win the case but on whether, assuming the transaction violates the law, the plaintiff's resulting injury is an anticompetitive effect of the violation. Quite clearly, the loss of independence from an unlawful merger is an anticompetitive effect of the violation, as well as its essential mechanism. It deprives the target of the power to determine its price, output, and other competitive terms in a concentrated market where independent determination is critical to competition.

Indeed, the target's injury from loss of independence bears the same relation to the underlying antitrust wrong as does the victim's lost profit in a predation case. In a predation case — as in a target merger case — the challenged conduct may adversely impact the plaintiff whether or not it is unlawful. Thus, in the recent *Brook Group* case,³⁶⁰ the plaintiff-competitor claimed predatory injury from below-cost pricing. In rejecting the plaintiff's suit due to its failure to prove that the defendant had recouped its own losses through subsequent high prices, the Supreme Court did not question the plaintiff's standing. Yet clearly the plaintiff's losses would have been the same whether or not the defendant had recouped its predatory investment. Similarly, in *Professional Real Estate*,³⁶¹ the Supreme Court did not question the plaintiff's standing to challenge predatory litigation although the plaintiff's injury would have been precisely the same whether or not the alleged predatory litigation was objectively baseless and brought with malicious purpose.

A plaintiff alleging predation may bring a weak case but does not for that reason lack antitrust standing. That is to say, the plaintiff's antitrust injury does not depend on whether the challenged conduct — below-cost pricing or vexatious litigation — would hurt

358. *Gold Fields*, 871 F.2d at 264 (Altimari, J., concurring in part and dissenting in part).

359. 2 *AREEDA & HOVENKAMP*, *supra* note 67, § 360f. If in fact the plaintiff's suit lacks legal basis, summary dismissal procedures are available.

360. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

361. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993).

the plaintiff if and only if the conduct is unlawful but on whether, assuming the conduct is unlawful, the plaintiff sustained an injury the merger statute aims to prevent. Nothing is changed in this analysis if we substitute the target's loss of independence for the predatory victim's lost profit. In both cases the plaintiff's injury — whether lost profits from predation or loss of independence from an unlawful merger — is a consequence the antitrust laws strive to prevent.³⁶²

Finally, recognition of loss of independence as a measure of antitrust injury validates a key congressional goal in enacting the merger law and reconciles an apparent divergence between congressional and judicial policy. In adopting the Celler-Kefauver Act,³⁶³ Congress sought to preserve the independence of business firms threatened by what Congress perceived to be a "rising tide" of concentration.³⁶⁴ Nevertheless, the Act did not change the statutory test, which was phrased in terms of utmost generality.³⁶⁵ The courts, in construing the broad statutory language have developed legal tests that exclude the nonefficiency factors that motivated Congress.³⁶⁶ The two developments appear at odds. The more expansive congressional purpose, however, can be reconciled with the narrower judicial test by recognizing the authority of the courts to define the substantive legal standard but at the same time giving standing to the class of litigants Congress wished to protect, which surely would have included takeover targets threatened with loss of independence.

The problem of managerial conflict of interests remains, of course. The target's managers may be motivated to sue not for any of the reasons previously articulated but simply to keep their jobs. The problem of manager conflict, however, is not confined to the

362. The standing issue is different in a consumer case, where the alleged collusive agreement will injure the plaintiff consumer only if it is unlawful. That difference, however, simply reflects the differing nature of the antitrust violation in consumer and competitor cases. In consumer cases, the effects on the victim and on competition are always the same, while in competitor cases the effects on the victim and on competition may either differ or be the same, causing a more complex characterization problem, but this problem does not defeat the plaintiff's standing to sue.

363. Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. §§ 18, 21 (1994)).

364. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 228-38, 249-55 (1969); see also Brodley, *supra* note 98, at 40-44.

365. Clayton Act, § 7, 15 U.S.C. § 18 (1994) (stating the test as being "substantially . . . [to] lessen competition, or . . . tend to create a monopoly").

366. Compare Bok, *supra* note 364, at 249-55 (Congressional goals included preservation of small locally owned firms from anticompetitive acquisition by larger rivals.) with 4 AREEDA & TURNER, *supra* note 53, ¶ 904 (legal standard).

loss-of-independence rationale but infects all target merger litigation. The answer is not to bar the target from vindicating its antitrust rights but rather to adopt conflict-resolving procedures, as discussed in the next section.

C. *Controlling Managerial Incentives*

The target's managers' perverse incentives are the flaw most often condemned in merger suits by takeover targets. The critics insist that the managers want to retain their jobs, not benefit the target firm. Thus, the incentives of the managers seeking to enjoin the merger bear no consistent relationship with the public interest in competition; indeed, the incentives of the target's managers may be incompatible with both the target's welfare and the public interest.

Unquestionably, a takeover creates a managerial conflict of interest,³⁶⁷ but it does not follow that courts should bar merger suits by target firms. If in fact the target is threatened with antitrust injury, the motives of its managers cause no legal disability to the firm, the real party in interest. As mentioned earlier, the Second Circuit recognized this point in the recent *Gold Fields* decision, where it rejected the notion that a target firm could lose its right to sue because its managers might have improper motives.³⁶⁸ Indeed, the antitrust injury principle would exceed all bounds if the target lost its capacity to sue because the motives of its human agents were flawed. Thus, at bottom the problem of managerial litigation abuse presents not an issue of standing but of judicial control of public interest litigation. Using their broad equitable powers, courts have ample authority to address this issue.

The incentive compatibility problem of takeover suits arises from the risk of strategic litigation to upset the delicate timing of a merger, collusive settlements that defeat antitrust goals even when the merger claim has merit, and the lesser problem of wrong outcomes caused by the need for speedy decisions. Although these problems are inherent in merger litigation, they raise an acute problem in the takeover field, where the granting of a preliminary injunction usually suffices to terminate the bid. Existing equity controls, augmented by improved procedures, however, can effec-

367. See generally James F. Cotter & Marc Zenner, *How Managerial Wealth Affects the Tender Offer Process*, 35 J. FIN. ECON. 63 (1994) (describing conflict between wealth effects on managers and on shareholders).

368. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 257-58 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989).

tively limit opportunistic and abusive litigation conduct by managers.³⁶⁹

1. *Existing Judicial Controls*

Available procedures to control managerial behavior in takeover suits include: (1) expedited hearings that significantly reduce delay costs; (2) "curative relief" proposals by which merger defendants agree to divest themselves of specified assets creating competitive risks, thereby making the balance of the acquisition legitimate; (3) *amicus* participation by federal and state enforcement agencies, which the court may invite on its own motion; (4) possible Rule 11 sanctions against the target's attorneys, including inside counsel, for ill-founded or improperly prosecuted suits;³⁷⁰ and (5) judicial weighing of the equities by which the preliminary injunction court may directly consider factors bearing on possible litigation abuse by managers.

2. *Improved Procedures*

Additional procedures can powerfully augment existing equity controls. First, the target may place control of the litigation in the hands of disinterested outside directors, advised by independent counsel. Second, the target may disconnect the managers' continued tenure in office from the target's success in the merger litigation, through a procedure of conditional resignation. Third, the court may appoint an equity trustee to hold the target's shares during the pendency of the merger litigation. These procedures seek to harness the high litigation capability of the target firm, while containing the agency risk inherent in control of the litigation by managers with their jobs at stake.

The proposed additional procedures either directly limit the authority of the managers to control the merger litigation or reduce managerial conflicts of interest by separating the managers' continued tenure in office from the outcome of the merger suit. Effective containment of the risk of manager litigation abuse, however, does not imply that the procedures should remove all possibility of man-

369. In addressing these issues, it is vital to recognize that private merger enforcement involves an interactive relationship among the equity court, the target, and the target's managers in which multiple moves are possible. As a result, courts are not limited to a single, all-or-nothing response to the filing of a takeover merger suit but instead can apply antitrust procedures and equity controls incrementally and responsively.

370. Rule 11 sanctions against the target itself would not be effective in preventing ill-founded target litigation because the bidder who acquires the target's assets would ultimately pay the sanctions. For the same reason, litigation bonds are ineffective against target firms.

agerial gain from blocking a merger. Self-interest is a powerful and unavoidable motivation in litigation, as in other fields of human endeavor. Thus, the goal of the proposed procedures is not to strip the managers of all personal gain from preventing the merger but to focus their self-interest on cases where serious antitrust harm is threatened. Accordingly, the proposed procedures do not remove the prospect that the managers will benefit from stopping the merger but aim to prevent them from benefitting through litigation tactics that defeat antitrust goals. By this means, the zeal of private ambition can effectively serve the public interest in maintaining competitive markets.

The outlined procedures depend on the initiative of the target firm, which must in each case propose the procedure to the equity court. The target would be motivated to commit itself voluntarily to such a procedure by the expectation that it would help to convince the court that a preliminary injunction would serve the public interest. That would be an important gain for the plaintiff in view of the frequent judicial skepticism concerning target merger suits.

a. Independent Directors. The target can directly limit possible litigation abuse on the part of its managers by placing control of the litigation in the hands of disinterested outside directors, who would retain outside counsel to advise them in their decisions. Of course, the independent directors would themselves be likely to lose their positions in the event of takeover, but the degree of conflict is much less because outside directors typically have other positions; indeed, corporate law specifically recognizes the greater independence of the outside director in merger transactions.³⁷¹ A requirement that the directors consult outside counsel provides greater assurance that they will receive unbiased legal advice.

The litigation control of the independent directors might be limited to major litigation decisions, or it might encompass full control of the litigation by the independent directors. The broader delegation, however, appears preferable. If the independent directors' authority is limited to major litigation decisions, such as the filing of suit, settlement, and compromise, the directors must continue to

371. See, e.g., *Paramount Communications, Inc. v. QVC Network, Inc.* 637 A.2d 34, 44 (Del. 1994) (emphasizing the importance of outside directors in protecting against management partiality in merger transactions); see also James A. Brickley et al., *Outside Directors and the Adoption of Poison Pills*, 35 J. FIN. ECON. 371 (1994) (describing positive stock market reaction to poison pill adoption when target's board controlled by outside directors, supporting hypothesis that outside directors act in shareholder interest); Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315, 379-84 (1987).

rely on the incumbent managers for day-to-day management of the litigation. The incumbent managers, however, remain subject to the conflict of interest that motivated the independent director procedure. The more effective means for the target to achieve managerial neutrality is to place the litigation totally in the hands of the outside directors and their legal advisors. Because part-time directors lack the time to manage an ongoing litigation, the directors would probably need to appoint a litigation manager or "special counsel" with full authority to conduct the antitrust suit, subject to supervision by the outside directors.

The disinterested-director procedure reduces risks of strategic litigation and at the same time preserves managerial incentive to block an anticompetitive merger. Control of the litigation is put in the hands of independent directors, but success in the merger suit is likely to assure the managers' continued tenure. Preservation of the managerial incentive to oppose merger is desirable because the independent-director procedure, like other equity controls and mechanisms, requires an initial managerial decision in order to invoke it. If the managers did not stand to benefit from blocking the merger, they might simply accommodate the takeover, rather than risk antagonizing the bidder without hope of gain.³⁷² The independent-director procedure effectively meets these dual needs by utilizing the managers' motivation to keep their positions while placing control of the litigation in independent agents who, to some significant degree, can channel the force of managerial zeal toward pro-competitive enforcement goals.³⁷³

Requiring the directors to disclose the terms of any settlement agreement to the court and to the public following the issuance of a preliminary injunction could further strengthen the independent-director procedure. Disclosure of settlement tends to discourage collusive or strategic settlements in which competition benefits are

372. This is not to reject the possibility that the managers might act selflessly, opposing a merger that injured the target even if they obtained no personal benefit. Their efforts will clearly be strongest, however, when personal gain is joined with fiduciary obligation; the most effective procedures will combine both motivations.

373. The effectiveness of the disinterested-director procedure turns critically on the independence of the outside directors in making decisions free from managerial influence. A court, in accepting such a procedure as adequate to assure prosecution of the merger suit in the public interest, must be confident of the independence and uncorrupted judgment of such directors. Clearly their stature and prior experience are relevant factors in making such an assessment. In addition, the court would have to be convinced that the board of directors had effectively delegated litigation control to the independent directors. The court might appropriately ask the target to stipulate that it would report promptly to the court any change in the delegation, subject to the sanction of immediate dissolution of the preliminary injunction for failure to report or any impairment of the independent directors' authority.

surrendered for private gain. Although the court has no power to require approval of settlement agreements in non-class action suits,³⁷⁴ it has inherent authority to impose reasonable conditions on the issuance of a preliminary injunction to assure that the injunction promotes the public interest.³⁷⁵ A settlement disclosure condition is a reasonable and limited means to inhibit collusive settlements that frustrate the public interest goal of private merger enforcement. Alternatively, in exercising its discretion to issue an injunction, the court may take into account a voluntary undertaking by the directors to make such disclosure as a factor bearing on the public benefit from an injunction. A settlement disclosure provision is likely to constrain the conduct of outside directors, for whom future reputation effects would normally loom larger than any immediate benefits from allowing the merger.³⁷⁶

b. Conditional Resignations. An alternative approach to limiting possible litigation abuse by the target's managers would be to leave the managers in full control of the litigation but to separate the success of the merger suit from the managers' retention of their positions. A mechanism to achieve this objective would be corporate adoption, with managerial assent, of a procedure under which the managers and inside directors would make binding and irrevocable commitments to resign in the event a merger is enjoined or abandoned after a suit is filed.

Following defeat of a merger bid, the disinterested directors, acting on the advice of an outside management consulting firm having no prior relation with the target, would determine whether the target's officers were then the best persons available to continue as managers. The outside directors would be obligated to rehire the old managers only if so advised. The outside directors might of course rehire the old managers, or some of them, even if they were not the best persons available because of the advantage of management continuity, but the letter-of-resignation procedure would disconnect *assured* continuity in office from defeat of the hostile bid.

374. See FED. R. Crv. P. 23(e) (authorizing judicial approval only for class action settlements).

375. See *Yakus v. United States*, 321 U.S. 414, 440 (1944); *supra* text accompanying notes 281-84; *supra* note 288.

376. By contrast, a settlement disclosure requirement would probably not be effective for full-time managers because of the many ways in which a successful bidder could reward the target's managers after they become employees of the bidder-controlled firm.

The subject of settlement disclosure is discussed further in connection with competitor suits, where the procedure is generally more effective. See *supra* text accompanying notes 281-89.

To that extent, the letter-of-resignation procedure reduces the managers' incentive to resist takeover in order to retain their offices; this is especially true in the case of underperforming managers. The conditional resignation procedure thus mimics a takeover in its effect on managerial tenure because an outside management consultant is likely to replace weak managers with more qualified replacements.³⁷⁷

The problem with the conditional-resignation approach comes from the risk that after the merger bid is defeated, either the directors or the managers might renege. The inside directors might attempt to repudiate the resignation procedure, retaining the old managers. Alternatively, the managers might refuse to honor their resignations, threatening the target with costly and disruptive litigation. Thus, as in the disinterested director procedure, a preliminary injunction court must have confidence that the procedure will be carried out before accepting it as adequate to protect the public interest. One means to increase judicial confidence would be for the inside directors and managers to agree to substantial bonds subject to forfeiture in the event they reneged. Thus, the inside directors would forfeit their bonds if they sought to withdraw control of the resignation process from the outside directors; the managers would forfeit their bonds if they failed to carry out their agreements to resign. In addition, the managers could be asked to agree to an attorney's-fees provision requiring them to pay the target's attorney's fees if the target prevailed in any suit by the managers challenging the resignation procedure. This mechanism will work only if the outside directors are resolute in enforcing any conditional resignations and bonds or penalties to which the parties have agreed.

c. Equity Trustee. The most comprehensive approach to the problem of litigation abuse by managers would be the appointment of an equity trustee. Following the precedent of a recent Ninth Circuit decision,³⁷⁸ the court might appoint a trustee in equity to hold the target's shares and to manage the target during the pendency of the litigation.³⁷⁹ The trustee device serves both to limit managerial control of the merger suit and to disconnect the managers' continued tenure from the litigation outcome. Under such a procedure,

377. The availability of this procedure also gives independent directors a viable strategy by which to oppose an unlawful takeover without assuring continuity of an underperforming management team.

378. See *United States v. BNS Inc.*, 858 F.2d 456 (9th Cir. 1988).

379. See *United States v. BNS, Inc.*, 858 F.2d 456 (9th Cir. 1988).

the trustee would have full control of the litigation but need not intervene in other managerial decisions that do not affect the merger litigation. At the conclusion of the suit, the trustee would either transfer the target's shares to the bidder if the bidder prevails or sell the shares to a less anticompetitive buyer if the target prevails.³⁸⁰

The Ninth Circuit decision in *United States v. BNS Inc.*³⁸¹ upheld the appointment of an equity trustee to manage the takeover target during merger litigation brought by the United States. Admittedly, the circumstances in *BNS* differed from those in a private merger suit because the appointment of the trustee was aimed *not* at controlling litigation abuse by the target's managers but at protecting the target's trade secrets from the bidder during pendency of the government suit.³⁸² Nevertheless, the rationale of *BNS* applies equally to a private merger suit because protection of the target from managerial litigation abuse is as vital to the target's welfare as protection of its trade secrets. In both instances, appointment of an equity trustee stems from the court's broad equitable power to "use novel and flexible methods to mold its decree to fit the necessities of a specific case and effectuate the intent of Congress."³⁸³

A possible objection to the use of the trusteeship device arises from the anomalous position in which it places the trustee. As the legal holder of the target's shares, the trustee must both protect the bidder's equitable interest in the target and manage litigation that may reduce the value of that interest. To resolve this anomaly, the court should instruct the trustee to manage the litigation so as to maximize the target's "stand alone" value — the value of the target as a separate entity apart from the bidder. This instruction is justified because it preserves the status quo pending the court's ruling

380. The same result often is achieved by a hold-separate order, which allows the merger to go forward with the acquired assets held separately until the antitrust issues are resolved, thereby allowing the bidder to acquire the target while preserving the ability to achieve effective relief. See *supra* text accompanying note 127. A hold-separate order, however, is not feasible in takeover litigation because the bidder gains full control of the target and is then free to order the target's managers to dismiss the suit. In addition, the bidder gains access to the target's trade secrets, threatening the target's competitive viability if the merger later is held unlawful. Use of an equity trustee overcomes these difficulties.

381. 858 F.2d 456 (9th Cir. 1988).

382. The target intervened in the consent proceeding to protect its trade secrets, and the appointment of the trustee effectuated that purpose. See 858 F.2d at 465-66.

383. 858 F.2d at 466. See generally 1 ABA ANTITRUST SECTION, *supra* note 124, at 365-69; WRIGHT ET AL., *supra* note 124, §§ 2947-48 (discussing general authority and discretion of courts in granting preliminary injunctive relief); Leubsdorf, *supra* note 124, at 549 (noting the increasing judicial concern with impact of preliminary injunctive relief on society and the public interest).

on the merits. At the same time, appointment of an equity trustee benefits the bidder by providing a less inhibiting alternative than a preliminary injunction because it allows the bidder to purchase the target's shares, thereby avoiding delay risks. Thus, the equity trustee achieves the purpose of a hold-separate order without its drawbacks.

Nevertheless, because the procedure places the trustee in such an unusual position with respect to the beneficiary, some courts may be reluctant to appoint an equity trustee without the consent of both target and bidder. That consent, however, might well be given. The target would be likely to consent if it thought that in the absence of the equity trustee, the court would deny the preliminary injunction. The bidder would be likely to consent if it thought that once the target had proposed an equity trustee, the bidder's refusal to join in the arrangement might lead the court to grant the injunction.³⁸⁴ For these reasons, both parties might well agree to the trustee's appointment, especially if the preliminary injunction court suggests that it might react adversely to a failure to agree. Used in this manner, the trusteeship device facilitates the sale of the target's shares, removes control of the litigation from the managers, and disconnects success in the litigation from the managers' continuance in office.³⁸⁵

The equity trustee approach is limited because it may leave the managers with insufficient incentive to oppose the merger. If the trustee succeeds in blocking the merger, the trustee must then sell the target's shares to the highest eligible bidder. Thus, in all likelihood, the target will come under the control of an outside owner, placing the continued tenure of the managers at risk. On the other hand, if the bidder prevails, the managers, having actively resisted

384. In consenting to an equity trustee, the bidder might reason as follows: by requesting appointment of a trustee, the target has signaled its good faith to the court because even if the target prevails, its shares will be sold to an unknown buyer that is free to appoint new managers; thus, the court will understand that the target's managers have substantially severed their own welfare from the litigation outcome. In addition, the target has placed control of the litigation in an independent trustee, who will no doubt quickly dismiss the suit should it lack merit.

The bidder reasons further: if under these conditions, I refuse to consent to the trustee procedure, the court may well conclude that the target's suit has solid basis. After all, if the target's suit is as weak as I claim, I should be able to convince the trustee to dismiss the case, and in the meantime, use of this procedure assures my ability to purchase the target's shares. If I refuse to consent to a trusteeship that imposes only a short delay cost on a lawful bidder, the court may assume the worst and grant the preliminary injunction. Thus, the bidder is likely to give its consent.

385. The trustee is free to allow the managers to continue to manage the business including the litigation but can intervene if litigation-induced motivations of the managers threaten the corporate interest.

the merger, are even more likely to be ousted.³⁸⁶ As a result, managers may have little incentive to evoke the equity trustee procedure, even when available, and thus it is unclear how frequently the target will use this procedure.³⁸⁷ Nevertheless, the availability of the procedure is beneficial because it so effectively resolves the problem of managerial conflict.³⁸⁸

3. Effectiveness of Proposed Procedures

Existing equity procedures, augmented by one or more of the suggested improved procedures, can effectively contain risks of managerial abuse in takeover litigation, including risks of strategic litigation, anticompetitive settlements, and the lesser risk of wrong outcomes.

a. Strategic Litigation. Several existing procedures reduce the problem of strategic suits filed to block or delay a lawful merger. Expedited hearings can shorten preliminary injunction proceedings to a few weeks, reducing the ability to frustrate a merger through delay. Curative relief, proposed by the defendant, often enables the court to resolve the antitrust problem short of divestiture of the target. Moreover, the preliminary injunction court can directly discourage strategic litigation by denying or dissolving the injunction if the court observes or suspects the suit is purely strategic.³⁸⁹ In ad-

386. See Cotter & Zenner, *supra* note 367, at 66 (discussing above-average manager turnover after takeover).

387. Clearly, a court should draw no negative inference about the merits of a merger suit from the target's failure to propose an equity trustee.

388. Two other improved procedures are possible, but both have serious drawbacks. First, to resolve the issue of managerial conflict, the target's managers might agree to indemnify the target for attorney's fees and court costs if the suit lacks significant merit. Enforcement of such an undertaking presents difficulties. If the bidder prevails, it can release the target's managers from their agreement after it gains control of the target. If the bid is withdrawn, the target remains under the control of its old managers from whom the obligation is owed. Even if the managers nominally pay, indirect reimbursement remains possible when the managers continue to work for the corporation they head. Moreover, enforcement of the undertaking requires a separate proceeding to determine whether the merger suit was meritorious.

Second, the target may issue "golden parachutes" to its managers payable in the event of a takeover in order to compensate them for losing their positions — and to neutralize their incentive to resist a takeover. Golden parachutes, however, may tilt the balance too heavily in favor of a merger, inducing managers to avoid takeover challenges of unlawful mergers injurious to the target and the public. Moreover, although golden parachutes may align the managers' interests with those of selling shareholders, it separates the managerial interest from *nonselling* shareholders and other corporate constituencies. See generally John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 106-07 (1986) (discussing golden parachutes); Rosenzweig, *supra* note 337, at 148-50 (proposing similar procedures).

389. Strategic behavior sometimes benefits the target. For example, the target may bring an antitrust suit to allow time for additional bids to raise the tender offer price. But strategic

dition, powerful supplemental procedures are available to contain strategic abuse by managers. The most feasible of these is probably the independent-director device, under which the target would place full control of the litigation in the hands of its disinterested outside directors. Alternatively, conditional resignation of the managers or appointment of an equity trustee both disconnect managerial tenure from litigation success, thereby removing the managers' incentive to pursue strategic suits.

b. Collusive Settlements. The independent-director and the equity-trustee procedures reduce the problem of collusive settlements under which anticompetitive mergers may be compromised without benefit to the target or the public. Independent directors with external positions are far less susceptible to collusive inducement than managers whose jobs are threatened. An equity trustee presents an even smaller risk of collusive settlement because the trustee has no continuing stake in the target. In addition, conditioning a preliminary injunction on disclosure of settlement terms also discourages collusive settlements.

Even if these procedures are not available, target litigation remains beneficial in deterring anticompetitive mergers. The bidder can never be certain the target will settle short of effective relief, and in any event, the bidder must bear settlement costs that increase with the strength of the antitrust cases. Moreover, settlement does not bar government suit, which becomes more probable if the target develops strong evidence of anticompetitive effects. Thus, target suits retain significant deterrence value despite residual risks of settlements that fail to achieve effective relief.

c. Wrong Outcomes. The problem of wrong outcomes caused by compressed time schedules for preliminary injunction hearings appears exaggerated in view of the target's sophistication, litigation resources, and knowledge of the industry, which permit the target to retain a large team of knowledgeable lawyers able to accomplish within a few weeks what might ordinarily require months.³⁹⁰ The problem of time-induced wrong outcomes, of course, would be completely avoided under the equity-trustee device, which allows

behavior benefiting the target presents no problem of managerial conflict — the focus of the takeover suit critique. Moreover, such behavior is not invariably inconsistent with antitrust goals to the extent that it makes anticompetitive bids more costly. In any event, existing equity procedures constrain strategic behavior by targets.

390. See *supra* text accompanying notes 137-39, 302-10.

the merger to go forward and thus reduces the pressure for an immediate decision.

D. Gravity of Violation

The powerful enforcement capabilities of takeover targets should be concentrated on merger violations that raise the most serious risks to competition. Two mechanisms are available to achieve this result. First, enforcement should focus on horizontal mergers — the most anticompetitive type of merger. Horizontal merger enforcement forms the bedrock of merger policy because the successful prevention of mergers that directly create market power removes the need for other types of merger enforcement. In fact, the federal courts have recognized the primacy of horizontal merger enforcement both in their decisions and in explicit statements.³⁹¹

In a leading and often cited Second Circuit decision, Judge Friendly declined to issue an injunction in a private nonhorizontal merger, noting that the challenged merger “differs totally from the horizontal merger illustrated by *United States v. Philadelphia National Bank*.”³⁹² In reaching that decision, Judge Friendly explicitly recognized the possible strategic use of antitrust litigation and the need for caution in issuing preliminary injunctions that might frustrate takeovers.³⁹³ Since that time, antitrust lawyers have assumed that preliminary injunctions in private cases generally are not available against nonhorizontal mergers.³⁹⁴ Consistent with this appreciation, my fourteen-year review of private merger cases revealed only one instance in which a nonhorizontal merger was enjoined.³⁹⁵

Equity procedures and internal corporate controls provide a second means by which courts can focus the enforcement efforts of takeover targets on the most serious violations. As discussed above, courts can apply direct judicial controls and separating mechanisms to channel the keen enforcement capability of take-

391. See Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 *YALE L.J.* 1, 42 (1977).

392. *Missouri Portland Cement Co. v. Cargill Inc.*, 498 F.2d 851 (2d Cir.) (involving large horizontal merger) (citing *United States v. Philadelphia Natl. Bank*, 374 U.S. 321 (1963), cert. denied, 419 U.S. 883 (1974)).

393. *Cargill*, 498 F.2d at 854; see also *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 806 (M.D.N.C. 1987) (stating that strategic litigation makes denial of preliminary injunction “particularly compelling”).

394. See generally ABA MONOGRAPH NO. 16, *supra* note 1, at 32-36.

395. See *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986).

over targets to challenge horizontal mergers that raise the gravest antitrust concerns. In addition, when balancing the equities, the preliminary injunction court must directly consider gravity of the violation.³⁹⁶ Assessment of this factor is particularly feasible for horizontal mergers because precisely stated Justice Department guidelines permit a threshold determination of potentially serious antitrust violations.³⁹⁷ By these means, the highly effective but unruly enforcement efforts of takeover targets can be focused on horizontal mergers that involve the most serious anticompetitive risks.

CONCLUSION

Private antitrust enforcement raises difficult issues of accommodating public enforcement goals and the self-interested agendas of private enforcers. Effective private merger enforcement is threatened because the courts have focused on a single input into the private enforcement system — the incentive incompatibility of private enforcers. The isolated focus on that factor alone has caused the present crisis in private merger enforcement in which the courts frequently hold that the only two viable enforcers — competitors and takeover targets — lack standing to sue. To restore effective enforcement, the courts must view private merger enforcement as a coherent system with a desired output — a mechanism by which legislative goals are to be achieved through perceptive judicial procedures.

The legislative goals of dual enforcement, deterrence of anticompetitive mergers, and vindication of core merger enforcement objectives require that the most capable merger enforcers be able to challenge the most anticompetitive mergers with the least incentive incompatibility between their own private agendas and public antitrust goals. Effective private merger enforcement requires that courts face the fact that the only capable private enforcers, takeover targets and competitors, have flawed incentives. The courts, however, must view the issue realistically, recognizing that perfect purity of incentives by self-interested enforcers is an impossible and self-defeating illusion; that effective enforcement can be achieved only through a balancing of the factors necessary for enforcement

396. Cf. *Raybestos-Manhattan, Inc. v. HI-Shear Indus., Inc.*, 503 F. Supp. 1122, 1134 (E.D.N.Y. 1980) (stating that preliminary injunction in merger case warranted where violation "fairly clear" and citing *Cargill*, 498 F.2d at 870); *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,932 (N.D. Ill. 1977) (granting injunction in target merger where violation "very clear").

397. *Merger Guidelines*, *supra* note 97.

viability; and that the courts themselves must take an active role in assuring that private suits promote the public interest, using their equity powers to control and modify the litigation conduct and incentives of private enforcers.

By these means, the courts can reconcile the divergent forces of private self-interest and public enforcement goals, restoring the shattered unity of the concept of private attorney general and combining the high idealism of public enforcement goals with the motive power of private economic incentive. Such reconciliation could provide a model for other areas of antitrust law and perhaps for public interest litigation generally.

APPENDIX
 REPORTED PRIVATE MERGER
CASES 1977-1990

<u>No.</u>	<u>Competitor</u>	<u>Target</u>	<u>Customer</u>	<u>Consumer</u>	<u>Supplier</u>	<u>State Atty. Gen.</u>	<u>Total:</u>
<u>SUITS:</u>							
1977-1981	8	13	3	1	0	0	25
1982-1983	4	2	0	0	0	1	7
1984-1986	9	4	1	0	0	1	14*
1987-1990	10	4	0	1	0	5	20
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	31	23	4	2	0	7	66
<u>PRELIM. INJUNC. GRANTED</u>							
1977-1981	1	4	0	0	0	0	5
1982-1983	0	0	0	0	0	0	0
1984-1986	2	1	0	0	0	0**	3
1987-1990	3	2	0	0	0	1***	6
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	6	7	0	0	0	1	14
<u>PERM. INJUNC. GRANTED</u>							
1977-1981	0	0	0	0	0	0	0
1982-1983	1	0	0	0	0	0	1

* Suit brought by dual status competitor and customer, thus the total number of cases brought was 14.

** In addition, one consent decree was entered.

*** In addition, three consent decrees were entered.