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Rethinking Antitrust Injury

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I. Introduction

Substantive changes in antitrust law since 1977 have had a dramatic impact on the vitality of antitrust enforcement.[1] Recent "procedural" changes now seem likely to have as great an influence. In the procedural area, the emphasis has been on antitrust standing and antitrust injury.[2] As a result of recent judicial interpretations of these requirements, antitrust plaintiffs face increasingly formidable hurdles. As courts focus on questions of standing and injury, important discussions about whether a practice should be held to a per se or rule of reason standard[3] frequently are immaterial. If there is no qualified plaintiff, the substantive issue need never be addressed.

Technically, standing requirements limit the array of potential plaintiffs while antitrust injury requirements limit the types of compensable harms.[4] Together, however, they form a generalized standing requirement: a list of conditions a plaintiff must satisfy before qualifying to proceed to the substantive antitrust question. The Supreme Court neglected the issue until 1977.[5] Since that time, the Court has considered the issue on five occasions.[6] Despite this repeated analysis, the Court has provided little guidance with respect to antitrust standing. This lack of guidance can be traced to the Supreme Court's enunciation of rather general guidelines and then applying those guidelines in substantive factual contexts that are not representative of most antitrust litigation. Consequently, a division between circuits has emerged with

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1. In 1977 the Supreme Court decided Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), removing nonprice vertical restraints on distribution from its category of per se illegal practices. In so doing, the Court entered an era of antitrust adjudication in which economic considerations were to play a dominant role. Earlier indications of a changing methodology are found in United States Steel Corp. v. Fortner Enters., 429 U.S. 610 (1977). *See generally* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977).

2. Since 1977 the Court has addressed the standing or injury issue six times. *See infra* text accompanying notes 21-86.

3. In its purest form, the per se standard means that no analysis of individual competitive impact is necessary because certain activities are deemed to work so often in an anticompetitive fashion. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). Under the rule of reason standard, an activity is found to violate the antitrust laws when the actual impact on competition is weighed and determined to be negative on balance. This standard evolved from Standard Oil Co. v. United States, 221 U.S. 1 (1911).

4. *See* T. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications 39-45 (1988).

5. The seminal work documenting pre-1977 judicial treatment is Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977); *see also* Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 Calif. L. Rev. 437 (1984).

6. *See infra* text accompanying notes 21-100.

respect to the status of different classes of antitrust plaintiffs.[7]

Procedural changes may seem merely to alter the universe of qualified plaintiffs, but a closer examination reveals that this impression is misleading.[8] Our first purpose is to demonstrate that the antitrust injury requirement is so elastic that it can be interpreted effectively to alter substantive antitrust law. This substantive alteration may seem to have desirable consequences in some cases. For example, the Seventh Circuit Court of Appeals has ruled in sharp contrast with the Ninth Circuit and held that a seller injured by a scheme fixing a maximum resale price has suffered no antitrust injury.[9] The result of the Seventh Circuit's ruling essentially is to make vertical maximum resale price fixing per se lawful. This result is consistent with most recent scholarly analysis,[10] but is inconsistent with the continuing view of the Supreme Court that such arrangements are unlawful.[11] In other instances, however, a trend seems to be emerging in which the antitrust injury requirement undermines the pursuit of substantive values that the antitrust laws are designed to further. Even those who stress narrow economic objectives for antitrust law and believe the primary purpose of damage awards to be deterrence rather than compensation should be concerned with the potential effects of recent antitrust injury interpretations.[12]

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7. *Compare* Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) (stating that the mere presence of a substantive Sherman Act § 1 violation, whether per se or not, does not by itself bestow on any plaintiff a private right of action) *and* Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.) (stating that to have standing to bring an antitrust action, it is not enough that the plaintiff would not have been injured but for the defendant's alleged violation of the antitrust laws; the injury must be of the type that the antitrust laws are intended to forbid), *cert. denied*, 469 U.S. 1018 (1984) *with* USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988) (stating that injury done to the market and to competitors by price fixing is the type of injury that the antitrust laws were meant to prevent), *cert. granted*, 109 S. Ct. 2446 (1989).

8. This phenomenon is not restricted to antitrust law. *See, e.g.*, Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. REV. 266 (1976); Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

9. The Seventh Circuit's opinion in *Jack Walters* can be factually distinguished from the Ninth Circuit's opinion in *USA Petroleum* in that the former concerned terminated dealers while the latter concerned independent competitors. Any possibility that this factual distinction could lead to a substantive reconciliation of the approaches used by the courts was eliminated by the Seventh Circuit's opinion in *Indiana Grocery*, a case factually similar to *USA Petroleum*. *See supra* note 7.

10. *See, e.g.*, Blair & Kaserman, *The* Albrecht *Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

11. Vertical agreements fixing maximum resale prices are per se unlawful under Albrecht v. Herald Co., 390 U.S. 145 (1968).

12. We do not intend to summarize the various goals that are suggested for antitrust law nor the justifications for them. Those who stress narrow economic objectives believe that the primary

Our second purpose is to propose an antitrust injury standard that is consistent with the substantive ends of antitrust law. The policy issue of what *should* be regarded as antitrust injury is addressed, not whether a particular harm fits within any current formulation of antitrust injury. Most of the commentary to date has presented a "Chicago" view,[13] focusing on allocative efficiency.[14] Permeating the Chicago view is an inordinate concern that an expansive view of antitrust injury will "overdeter" in that it will lead businesses away from efficiency enhancing practices that incorrectly may be deemed antitrust violations.[15] There is little doubt that some antitrust rules can lead to incorrect results, but that problem stems from the substantive rules and should be addressed accordingly.

The premise for our approach is the economic concept of Pareto optimality.[16] The theme of our proposal is that a plaintiff has suffered antitrust injury whenever the injury is a necessary consequence of an act that is part of a plan that would harm consumers. We propose a two-part test to determine whether a plaintiff has suffered antitrust injury as we define it. First, we would ask whether there is a logical connection between the challenged activity and a decrease in the welfare of consumers.[17] If the answer is yes, we would then ask whether the damage to the plaintiff is a necessary consequence of the activity. If it is,

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aims of antitrust law should be to enhance consumer welfare or allocative efficiency. For a discussion of antitrust goals, see R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50-71 (1978); T. SULLIVAN & J. HARRISON, *supra* note 4, at 2-6; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982).

The issue of whether antitrust damages should be awarded in a manner that deters anticompetitive conduct or compensates victims is related to the issue of antitrust goals. *See generally* W. BREIT & K. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS (1986). For a contrasting view, see Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 UTAH L. REV. 57 (1980). With implicit Supreme Court encouragement, *see* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the emphasis in antitrust scholarship has been on the deterrence function. *See, e.g.*, Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980).

13. *See, e.g.*, Easterbrook, *Treble What?*, 55 ANTITRUST L.J. 95 (1986); Easterbrook, *supra* note 12; Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); Page, *supra* note 12.

14. The Chicago School commentators, however, evidently are not equally concerned with all allocative inefficiencies. *See* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 279 (1981).

15. *See* Page, *supra* note 13, at 1452-53.

16. For an explanation of Pareto optimality, see *infra* text accompanying notes 188-89.

17. In the case of per se offenses, the answer to the first question should be an automatic "yes." This position stems from deference to Supreme Court precedent holding that "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . ." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

then the plaintiff should be viewed as having suffered an antitrust injury.

The Supreme Court's recent emphasis on antitrust standing and injury will be examined in Part II.[18] In Part III we examine four areas of antitrust concern: vertical maximum price fixing, resale price maintenance, predation, and collusive monopsony. As already noted, in the context of maximum vertical price fixing, the circuits are in direct disagreement with respect to the proper interpretation of antitrust injury.[19] In the other three areas, interpretations are beginning to emerge that could work to eliminate or greatly reduce private action that is consistent with modern antitrust goals. In Part IV we demonstrate how our approach is consistent with substantive antitrust goals. In Part V we conclude by reiterating the value of the test we have developed.

II. Antitrust Standing and Injury

A. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.[20]

The modern era of antitrust standing and injury began in 1977 with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* In *Brunswick* the plaintiff charged that Brunswick, a manufacturer of bowling equipment, violated section 7 of the Clayton Act[21] by acquiring several failing bowling "centers."[22] The plaintiff, a competitor of the acquired centers, offered as a substantive theory that the presence of the large manufacturing firm in the bowling center market could "substantially lessen competition" as the smaller competitors were driven from the market.[23] The damages were identified as the profit that the plaintiff would have made if the failing bowling centers had closed.[24]

The Supreme Court did not focus on the substantive question of whether the effect of the acquisition was "substantially to lessen competition" under section 7 of the Clayton Act.[25] The Court instead reviewed the remedial question involving an interpretation of section 4 of the Clayton Act, which provides for treble damages for "any person who shall be injured . . . by reason of anything forbidden in the anti-

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18. Although the focus of this Article is on antitrust injury, these two requirements are so closely related that they are better understood when considered together.

19. *See supra* note 7 and accompanying text.

20. 429 U.S. 477 (1977). *See generally* Comment, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 Yale L.J. 1309 (1984) (discussing early standing decisions).

21. 15 U.S.C. § 18 (1982).

22. *Brunswick*, 429 U.S. at 480.

23. *Id.* at 481.

24. *Id.*

25. *Id.* at 485 (quoting 15 U.S.C. § 18 (1982)).

trust laws."[26] The question for the Court was not whether the acquisition violated section 7, nor was it whether the plaintiff had suffered some sort of injury as a result of this entry. The Court focused on the question of whether the injury claimed was " 'by reason of' that which made the acquisitions unlawful."[27]

The Court answered its principal question negatively, finding that the plaintiff's claim for lost profit was not due to injuries incurred "by reason of" a forbidden act. The plaintiff's loss, the Court noted, would be the same regardless of the size or power of a new entrant into the market.[28] More generally, the plaintiff's injury was due to an increase in competition that kept it from acquiring market power itself. The Court defined "*antitrust* injury . . . [as] the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[29] The plaintiff's alleged loss was linked to increased competition in the bowling center market but not to any predatory conduct.[30] Accordingly, Pueblo demonstrated no antitrust injury as a result of Brunswick's acquisitions.

B. Illinois Brick Co. v. Illinois[31]

The Court responded to what was more clearly a standing issue later in the same Term. *Illinois Brick* was the judicial offspring of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[32] a 1968 case in which the Court held that a defendant may not reduce the damages associated with an alleged overcharge by demonstrating that the plaintiff has passed on part of the overcharge to subsequent purchasers.[33]

Illinois Brick addressed the corollary question of whether a plaintiff may use the pass-on theory to collect damages from a firm from which it has not made a direct purchase. The Court first noted that

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26. 15 U.S.C. § 15 (1982).

27. *Brunswick*, 429 U.S. at 488 (quoting 15 U.S.C. § 15 (1982)).

28. *Id.* at 487 & n.11 (citing Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1130-36 (1976)).

29. *Id.* at 489 (emphasis in original).

30. *Id.* at 490. The Court suggested that "competition" carried too far, as in the case of predatory pricing, would give rise to an "antitrust injury." *Id.* n.15. Here, however, the plaintiff linked no losses to helow-cost pricing of the defendant. *Id.* n.16.

31. 431 U.S. 720 (1977).

32. 392 U.S. 481 (1968).

33. *Id.* at 489. *See generally* Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (arguing that a court could deal with allocating the overcharge among multiple plaintiffs in a vertical claim); Landes & Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980) (disagreeing with the position taken by Harris and Sullivan); Snyder, *Efficient Assignment of Rights to Sue for Antitrust Damages*, 28 J.L. & ECON. 469 (1985) (analyzing how the legal rules assiguing treble-damages rights affect the number of private antitrust suits).

consistency required it to deny the action unless *Hanover Shoe* were overruled.[34] Permitting the pass-on theory for offensive purposes but not for defensive purposes would create the possibility of multiple liability.[35] Thus, the Court worked from the premise that the rules regarding passed-on overcharges should be the same for plaintiffs and defendants.

Whether to change the judicial approach to the pass-on theory and make it available for both offensive and defensive use was the more general issue before the Court. The Court ruled against use of the theory and denied standing to indirect purchasers.[36] It is important to note that the issue was not whether indirect purchasers had suffered an "antitrust injury."[37] Certainly they had in that the overcharge is the logical and direct consequence of a price fixing arrangement. Instead, the Court's concern was less technical and more policy oriented; it addressed whether there were good reasons for construing section 4 of the Clayton Act as excluding indirect purchasers from the pool of potential plaintiffs.[38] The primary rationale offered by the Court for excluding indirect purchasers was the complexity likely to result from efforts to apportion an overcharge among various levels of direct and indirect purchasers.[39] The Court noted that, although economic theory offers methods of making the apportionment, such apportionment was not judicially manageable.[40]

The six Justice majority argued that its decision furthered the interests of using the treble damage action as a deterrent.[41] They reasoned that an attenuated process of apportioning damages would decrease the incentive to sue by lowering the stakes for any potential "private attorney general" while increasing litigation expenses.[42] The Court acknowledged that, to some extent, the decision subordinated the compensatory function of section 4 to the goal of deterrence.[43]

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34. *Illinois Brick*, 431 U.S. at 729.

35. *Id.* at 729-36.

36. *Id.* at 736.

37. The Court did not consider the "by reason of" language of section 4 of the Clayton Act.

38. *Illinois Brick*, 431 U.S. at 737-41.

39. *Id.* at 740-41.

40. *Id.* at 742. The methods of making the necessary apportionment depend upon numerous simplifying assumptions that are not likely to mirror reality. *Id.* at 741.

41. *Id.* at 745-46.

42. *Id.* at 745.

43. *Id.* at 746.

C. J. Truett Payne Co. v. Chrysler Motors Corp.[44]

The Court addressed antitrust injury in the context of a price discrimination charge in 1981.[45] In *J. Truett Payne* a Chrysler-Plymouth automobile dealer alleged injury from Chrysler's price discrimination.[46] The plaintiff asked for damages equal to the amount that it was charged for automobiles above the price charged to competing dealers.[47] The Court framed the issue as the appropriate measure of damages in a suit brought under section 2(a) of the Clayton Act.[48]

The Court rejected the claim for "automatic damages" equal to the amount of the discriminatory overcharge.[49] It reasoned that *Brunswick* required treating the issue of damages under section 4 of the Clayton Act as a separate matter from the issue of a substantive violation.[50] The Court then compared the language of section 2(a) of the Clayton Act, which permits a plaintiff to prevail on the substantive issue by showing that the discrimination may lessen competition, with that of section 4 of the Act, which requires a showing of actual harm.[51] According to the Court, "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4."[52] In a single step, the Court applied antitrust injury to hold that a showing of actual injury was required and that the overcharge was not a satisfactory measure of the injury.

The Court devoted much of its opinion to the issue of whether the plaintiff had offered sufficient evidence at the trial court level from which a jury could make a reasonable inference about the amount of damage.[53] In short, the Court addressed the issues of antitrust injury—the type of injury—and the evidence required to show the quantum of injury. This distinction is important, because presumably a plaintiff who has suffered the right type of harm but is unable to show the amount of injury with some degree of certainty still would be eligible for injunctive relief.[54] It is also worth noting that in *J. Truett Payne*

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44. 451 U.S. 557 (1981).

45. *Id.* at 559. The claim was brought under § 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1982).

46. *J. Truett Payne*, 451 U.S. at 559-60.

47. *Id.* at 561.

48. Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act makes it unlawful for a seller to "discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect . . . may be substantially to lessen competition." 15 U.S.C. § 13(a) (1982); *see* T. SULLIVAN & J. HARRISON, *supra* note 4, at 316-30.

49. *J. Truett Payne*, 451 U.S. at 561-63.

50. *Id.* at 562.

51. *Id.*

52. *Id.*

53. *Id.* at 563-68.

54. *See infra* text accompanying notes 87-100.

the Court said nothing to suggest that it was not continuing the long-standing policy of holding antitrust victims to a very low evidentiary standard on the issue of the amount of harm.[55]

D. Blue Shield of Virginia v. McCready[56]

The Court addressed the issue of antitrust standing again in 1982. In *McCready* the plaintiff's employer provided the plaintiff with health insurance.[57] The contract provided that the plaintiff would be reimbursed for treatment by a psychiatrist but not for treatment by a psychologist unless the psychologist was supervised by a physician.[58] The plaintiff alleged that the reimbursement of psychologists was excluded from coverage as a result of an anticompetitive pact between Blue Cross and the Neuropsychiatric Society of Virginia.[59] The refusal of Blue Cross to provide reimbursement for the services of psychologists caused the actual injury.[60]

The Court distinguished its analysis from that in *Illinois Brick*, indicating that the question of multiple liability was absent in *McCready*.[61] Instead, the Court framed the *McCready* standing issue in terms of how remote the plaintiff may be before falling outside the scope of section 4's coverage.[62] Analogizing the question to one of determining "proximate cause," the Court announced that it would look:

> (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) . . . to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.[63]

The first question apparently dealt with the issue of antitrust standing while the second focused on a *Brunswick*-type antitrust injury issue. With respect to the issue of remoteness, the Court emphasized that the plaintiff, although neither a competitor nor literally a consumer, was a foreseeable and necessary victim of the reimbursement agreement. The harm, thus, was not so fortuitous or incidental as to fall outside the protection of section 4.[64]

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55. *J. Truett Payne*, 451 U.S. at 465-67 (discussing Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)); *see* Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751, 756-58 (1980).

56. 457 U.S. 465 (1982).

57. *Id.* at 467-68.

58. *Id.* at 468.

59. *Id.* at 469-71.

60. *Id.* at 470.

61. *Id.* at 473-75.

62. *Id.* at 476.

63. *Id.* at 478.

64. *Id.* at 478-80.

On the issue of antitrust injury, the defendant sought to invoke *Brunswick*, arguing that the plaintiff had not paid elevated rates for psychiatric services, the market supposedly benefiting from the agreement.[65] Nor had the plaintiff claimed that her psychologist's bills were higher than they would have been but for the agreement.[66] Thus, she had not suffered the type of injury generally associated with an anticompetitive effort. The Court, however, ruled that those potential damages did not exhaust the section 4 possibilities.[67] In this instance, the plaintiff could seek the services of a psychiatrist, in which case the anticompetitive impact would have been felt by psychologists, or she could make use of a psychologist and forgo reimbursement.[68] The plaintiff chose the latter route, leading to a higher net cost of psychological services.[69] The Court held these higher net costs to be "inextricably intertwined with the injury the conspirators sought to inflict on psychologists."[70]

E. Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC)[71]

In the following Term, the Court attempted to clarify *McCready* and offered its most comprehensive examination of antitrust standing. In *AGC* the plaintiff union charged that a multiemployer builder's association coerced members and nonmember landowners and subcontractors to hire nonunion labor.[72] The union claimed twenty-five million dollars in damages as a result of the effort designed to "weaken, destroy, and restrain the trade of certain contractors."[73] The union did not couch its complaint in terms of lower demand for union labor and resultant lower wages or financial losses to the union itself.[74] The Court generally viewed the union as an independent business-like entity rather than as a group of sellers of labor.[75] Moreover, the Court viewed the market in which the coercion was alleged to have taken place as

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65. *Id.* at 481-82.
66. *Id.* at 481.
67. *Id.* at 482-84; *see* Maurer, Blue Shield of Virginia v. McCready: *The Limits of the Antitrust Injury Doctrine*, 22 AM. BUS. L.J. 67 (1984).
68. *McCready*, 457 U.S. at 483.
69. *Id.* at 483-84.
70. *Id.* at 484.
71. 459 U.S. 519 (1983); *see* Note, *More Trouble with Treble: The Effects of* McCready *and* Associated General Contractors *on the Antitrust Standing Opinions of the Federal Courts of Appeals*, 10 J. CORP. L. 463 (1985); Note, *Private Antitrust Standing: A Survey and Analysis of the Law After* Associated General, 61 WASH. U.L.Q. 1069 (1984).
72. *AGC*, 459 U.S. at 522.
73. *Id.* at 523.
74. *Id.* at 542.
75. *Id.* at 541 & n.46; *see* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 334.1b (Supp. 1988).

being made up of building contractors and subcontractors.[76]

The Court applied a series of steps in determining that the union suffered no injury in its business or property by anything forbidden by the antitrust laws.[77] The Court first examined the nature of the plaintiff's alleged injury.[78] Here, the Court applied *Brunswick* and apparently incorporated an antitrust injury requirement into the general question of antitrust standing. With respect to the injury, the Court indicated that the union was neither a consumer nor a competitor in the relevant market.[79] In addition, it reasoned that as an economic matter there was no clear indication what the impact of increased competition in the relevant market would be on the union membership.[80] In effect, the union failed to link its injury to the antitrust goal of increasing competition.[81]

The question whether the union had actually incurred any damage was a related, but evidently separate, issue addressed by the Court.[82] The Court focused not on the conceptual notion of antitrust injury nor on speculation as to the actual amount of damage. Instead, the Court indicated that the union failed to specify the way in which it, as opposed to its members, was harmed.[83] The Court also examined the directness of the alleged injury. According to the Court, the initial impact of the alleged violative practice would fall on those contractors, landowners, and subcontractors who were coerced.[84] The Court indicated that the presence of a group of direct victims made it unlikely that a serious antitrust violation would go undetected.[85] This presence of direct victims diminished the need to permit the union to act as a private attorney general. Finally, the Court invoked the policy of *Illinois Brick* and explained that to permit the union to proceed could result in multiple liability and a complex process of apportioning damages.[86]

F. Cargill, Inc. v. Monfort of Colorado, Inc.[87]

In 1986 the Court returned to the issue of antitrust injury in the context of a plaintiff who requested an injunction under section 16 of

76. *AGC*, 459 U.S. at 541.
77. *Id.* at 521.
78. *Id.* at 538.
79. *Id.* at 539.
80. *Id.*
81. *Id.* at 539-40.
82. *Id.* at 542-43.
83. *Id.*
84. *Id.* at 542.
85. *Id.*
86. *Id.* at 544-45.
87. 479 U.S. 104 (1986).

the Clayton Act.[88] The plaintiff sought to block a merger of two of its competitors.[89] Section 16 provides for injunctive relief when there is a "threatened loss or damage by a violation of the antitrust laws."[90] In this instance, the plaintiff was a beef packer who bought beef cattle, slaughtered them, and sold fabricated beef.[91] The plaintiff anticipated "a price-cost squeeze" after the merger: higher costs for cattle and lower prices for fabricated beef.[92]

The issues before the Court were whether section 16 required a showing of antitrust injury and whether the type of injury alleged by the plaintiff met this requirement. The Court held that sections 4 and 16 should be read in parallel fashion. Because section 4 required a showing of antitrust injury, section 16 required a showing that the plaintiff was threatened with an antitrust injury.[93]

The Court then reviewed and rejected two arguments the plaintiff presented to support having suffered an antitrust injury. The first theory was that the defendant would lower its prices to a point just above its cost, thereby decreasing the profits of the plaintiff.[94] In response to this theory, the Court relied on *Brunswick* and reasoned that lost profits due to increased competition did not constitute the type of threatened harm that would invoke the protection of section 16.[95]

The second theory was that the defendant could engage in predatory pricing thereby forcing the plaintiff from the market.[96] The Tenth Circuit Court of Appeals relied upon this theory when it affirmed the district court's grant of the injunction.[97] The Court responded to the Tenth Circuit's affirmation by noting that the lower court was vague about what it regarded as predatory pricing.[98] Furthermore, the Court reasoned that the plaintiff failed to assert at the district court level that the defendant would engage in predatory conduct after the merger or that its potential injury would be the result of below-cost pricing.[99] While holding that the plaintiff did not show the potential for antitrust injury, the Court expressly left open the possibility that a competitor who challenges an acquisition may pass the section 16 antitrust injury

88. *Id.* at 105.
89. *Id.* at 107.
90. 15 U.S.C. § 26 (1982).
91. *Cargill*, 479 U.S. at 106.
92. *Id.* at 108.
93. *Id.* at 113.
94. *Id.* at 114-15.
95. *Id.* at 117.
96. *Id.*
97. *Id.* at 118.
98. *Id.* at 118. For example, if the lower court defined as predatory any price below that of the plaintiff, that was not predation but acceptable competition. *Id.*
99. *Id.* at 119.

test by alleging that the new firm is likely to engage in predatory conduct.[100]

G. Supreme Court Guidelines

Some general observations on the issue of antitrust standing and injury are possible even though Supreme Court guidance remains vague. A party must satisfy two basic tests. First, the plaintiff must allege an injury that has flowed from anticompetitive activity.[101] Second, the plaintiff must not be affected too remotely. Judgment on this second factor will depend on the presence of more directly affected plaintiffs who normally would be expected to bring suit, the risk of multiple liability, and the complexity of the damage allocation.[102] Whether these two tests are viewed as components of a general test for antitrust standing or as separate tests with the first addressing antitrust injury and the second addressing antitrust standing is functionally inconsequential.

The Court is scrupulous about not becoming enmeshed in two questions that are part of a complete antitrust claim. The first is the substantive question whether the alleged practice violates the antitrust laws. In *Cargill*, for example, the Court declined a request by the Department of Justice that it use that case to announce that a predatory pricing theory can never be used by competitors of merging firms to establish standing.[103] Second, the Court, particularly in *J. Truett Payne Co. v. Chrysler Motors Corp.*, makes it clear that proof of the quantum of damages is a different issue than proof of antitrust injury, antitrust standing, and antitrust liability. When applying the "substantial evidence" test to proof of damages, courts are quite lenient in permitting the issue of amount of damage to reach the jury.[104] Nothing in the recent discussions of antitrust injury suggests a change in this policy.

Despite this clarity in the Court's antitrust rulings, the Court's general lack of direction has led to inconsistent outcomes among lower courts. The injury requirement is more problematic than the Court's enunciated standing guidelines. By necessity, the standing guidelines must entail some weighing of various policies. The Court's direction that antitrust injury must be of the right type and must flow from anticompetitive action[105] has failed as a formula for lower courts. Two

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100. *Id.* at 121.

101. *See supra* text accompanying notes 20-30.

102. *See supra* text accompanying notes 71-86.

103. *Cargill*, 479 U.S. at 121.

104. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-66 (1981); *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969).

105. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

questions have emerged. First, should a lower court interpret per se offenses so as to create automatic antitrust injury for those most directly affected?[106] Second, has a party suffered antitrust injury when its losses flow from pressures that force it to lower prices?

III. Antitrust Injury in Substantive Contexts

A successful private antitrust claimant must clear three hurdles sequentially. First, the plaintiff must satisfy the standing and injury requirements. Second, the plaintiff must establish liability.[107] Finally, the plaintiff in an action for damages must satisfy the relatively low evidentiary standard with respect to the actual amount of damage.

The lack of clarity offered by the Supreme Court in determining antitrust injury makes it exceedingly difficult to keep procedural issues from blending with substantive ones. This lack of clarity also gives rise to two related and potentially more dangerous problems. First, interpretations of the Supreme Court's vague antitrust injury standard can result in decreased substantive clarity; judicial interpretations of substantive rules may vary from circuit to circuit. Second, there is a danger that antitrust injury interpretations will undercut established antitrust goals and the deterrence function of antitrust damage awards.

Here we examine vertical maximum price fixing, resale price maintenance (RPM), predation, and collusive monopsony. In the first two instances, conflicting substantive rules already have emerged as a result of varying antitrust injury interpretations. The potential for the same inconsistency exists in the cases of predatory pricing and collusive monopsony. In the cases of RPM, predatory pricing, and collusive monopsony the possibility emerges that substantive antitrust objectives will not be met. First, however, we turn to vertical maximum resale pricing agreements. The problem here is not so much whether narrow interpretations of antitrust injury defeat accepted antitrust aims. Instead, the problem is that the vagueness of the injury requirement has permitted the emergence of what are inconsistent substantive rules.

A. *Vertical Maximum Price Fixing: The Curious Case of* Albrecht

Under the *Albrecht* rule, vertical agreements that fix maximum resale prices are per se unlawful.[108] This rule seems to many to be inconsistent with modern antitrust goals. The days of the *Albrecht* rule

106. As noted earlier, *see supra* note 17 and accompanying text, we believe that proper deference to the Supreme Court requires that this be answered affirmatively. *See infra* text accompanying notes 186-90.

107. Depending on the claim, the standard may be rule of reason or per se.

108. *See* Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968).

appeared numbered after *Continental T.V., Inc, v. GTE Sylvania, Inc.*[109] *Sylvania* moved nonprice vertical restraints on distribution from per se to rule of reason status. The rationale of *Sylvania* is that procompetitive effects may follow from permitting manufacturers to allocate exclusive territories or customers to individual resellers.[110] In effect, the decrease in intrabrand competition that would follow from this allocation of exclusive territories or customers frequently would be offset by increases in interbrand competition.[111] The procompetitive potential, of course, is endangered if the reseller is free to take advantage of its exclusivity by raising prices and restricting output. *Albrecht* thus seems like an impediment to a full flowering of *Sylvania.* Indeed, a strong case can be made that the *Albrecht* rule is inconsistent with virtually every credible goal of antitrust, modern or otherwise.[112] Notwithstanding its seeming inconsistency with *Sylvania* and disapproval from virtually every quarter, *Albrecht* has persisted and possibly was strengthened by recent Supreme Court citation.[113]

The controversy over the *Albrecht* rule now has surfaced in the context of antitrust injury. At least one circuit overruled *Albrecht* through the antitrust injury requirement while another circuit expressly declined such an opportunity. The first approach can be found, not surprisingly, in the Seventh Circuit Court of Appeals. In a 1984 opinion authored by Judge Richard Posner, *Jack Walters & Sons Corp. v. Morton Building, Inc.*,[114] a dealer in building materials charged that a manufacturer had effectively set maximum resale prices. The court held that even if the alleged unlawful price fixing did occur, the plaintiff did not suffer an antitrust injury.[115] According to Judge Posner, even if the agreement were unlawful its effect was to force the plaintiff to lower prices, a practice the antitrust laws were meant to encourage.[116] The court left open the possibility of a different outcome if the resale price were below cost.[117]

Judge Posner's rationale presumably holds for a dealer who reluctantly goes along with resale prices that are lower than he prefers.

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109. 433 U.S. 36 (1977); *see* Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978).

110. *See Sylvania*, 433 U.S. at 55.

111. The *Sylvania* Court expressly declined to change the status of vertical price restraints although it specifically did not address vertical maximum price fixing. *See id.* at 51 n.18.

112. *See* Blair & Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43, 43 (1986).

113. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 346-48 (1982).

114. 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

115. *Id.* at 708.

116. *Id.* at 709.

117. *Id.*

Under this scenario, the damages again are the result of an inability to raise prices.[118] The purchaser also presumably is ruled out. A purchaser could not show harm in terms of higher prices or lower short-run profits because they are logical impossibilities. The approach of Judge Posner thus seems to eliminate all likely plaintiffs including, ironically, the plaintiff in *Albrecht* itself.

At one level, *Jack Walters* exposes the activist nature of Judge Posner's approach to his judicial role. This reaction, however, may be too simplistic. In many respects, Judge Posner's reasoning makes perfect sense: a firm that complains about the harm it suffered from competition with another firm charging a fixed maximum resale price is really claiming that it was unable to raise prices. Except in the context of predatory prices, it is difficult to see how one could argue that the antitrust laws were designed to protect any business from restraints on its ability to raise prices.[119]

One, however, could argne that Judge Posner applied an unnecessarily narrow standard to the injury question. In *Jack Walters* he declined to address the longer-run possibility that maximum prices, even if not set at predatory levels, may eliminate competitors and lessen competition. From one point of view, this omission raises at least an empirical question that, correctly or incorrectly, the Supreme Court can be interpreted as effectively having answered by establishing the per se rule. If Judge Posner recognized this empirical question, one would presume that he would be required to recognize the answer provided by the Supreme Court. Instead, Judge Posner seems to have carved out enough of the substantive issue—the short-run direct impact on dealers—to support his decision.

In a decision to be reviewed this Term by the Supreme Court, the Ninth Circuit Court of Appeals expressly rejected the views of Judge Posner. In *USA Petroleum Co. v. Atlantic Richfield Co.*[120] the plaintiff, an independent retailer of gasoline, charged a manufacturer and its dealers with fixing resale price at "below-market levels."[121] The plaintiff evidently did not allege that the prices were predatory, and the Ninth Circuit defined the issue as "whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the cate-

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118. The economic effect of vertical maximum price fixing is to prevent the exercise of monopoly power. If the restraint is binding, then the plaintiff alleges lost profits because it could not raise prices above the allowed maximum. *See generally* Blair & Kaserman, *supra* note 10; Easterbrook, *supra* note 10. Professors Phillip Areeda and Herbert Hovenkamp conclude that "[t]he reduction in the plaintiff's price-cost margin is not an injury to competition." P. AREEDA & H. HOVENKAMP, *supra* note 75, ¶ 340.3b.

119. *See* Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989).

120. 859 F.2d 687 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 2446 (1989).

121. *Id.* at 689.

gory of 'antitrust injury.' "[122] The court held that the plaintiff alleged an antitrust injury.[123] The court's reasoning proceeded at two levels. At a general level, the Ninth Circuit cited repeated adherence of the Supreme Court to the substantive rule prohibiting maximum price fixing and seemed to seek an interpretation of antitrust injury that would be consistent with the substantive prohibition. To do otherwise, the court indicated, would be to suggest that *Brunswick* had overruled *Albrecht.*[124] In essence, the court sought to achieve this reconciliation by suggesting an "automatic" antitrust injury in the case of price fixing. Thus, "the injury done . . . by price-fixing conspiracies is antitrust injury."[125]

On a more specific level, the court relied on the plaintiff's allegation that the long-run effect of the challenged agreements could be to eliminate retail competitors.[126] The court recognized that antitrust laws were designed to protect "*competition*, not *competitors*."[127] It added, however, that protecting competitors is a means of protecting competition in some instances.[128] Using a long-run perspective, the court suggested that the elimination of retail sellers in a context in which reentry was unlikely could lessen competition. The injury thus flowed from an illegal effort to reduce competition.[129]

The Ninth Circuit's approach seems superior to that of the Seventh Circuit in that it is marked by appropriate deference to the Supreme Court's position on vertical maximum price fixing. That deference is both express and reflected by the manner in which the court reconciled the substantive rule with the antitrust injury requirement. In fairness,

122. *Id.*

123. *Id.* at 697.

124. *Id.* at 693 n.5.

125. *Id.* at 697. The court appears to rely heavily on Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), which was a horizontal price fixing case. Horizontal agreements raise different issues than those raised by vertical maximum resale price agreements; therefore, this reliance may be misplaced.

126. *USA Petroleum*, 859 F.2d at 699.

127. *Id.* at 695 (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

128. *Id.* at 695-96.

129. *Id.* at 696-97. The long-run concern is not obvious. Under traditional concepts of efficiency and under the proper conditions, rivals cannot be excluded in the long-run by fixing maximum resale prices unless they are relatively inefficient. The implications of this conclusion may differ, however, if one either does not accept efficiency as the only goal of antitrust or if one takes a broader view of what is efficient. *See* Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 19-20 (1982) (discussing the possibility of taking a broader view of efficiency); *see also* Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987).

The most recent salvo in the debate between the Seventh and Ninth Circuits can be found in Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989).

though, this reconciliation may well have been motivated in part by more than deference. The discussion of the majority reflects a strong general agreement with the substantive rule.[130] Judge Posner made no effort to effectuate such a reconciliation. He illustrated a more utilitarian orientation and perhaps was driven by a conviction that the substantive rule itself is inconsistent with the goals of antitrust law.[131] The division between the Ninth and Seventh Circuits is probably at least as much about the *Albrecht* rule itself as it is about antitrust injury.[132] Clearly, the time is right for the Supreme Court to address *Albrecht* itself.[133] Unfortunately, because the current battle is waged in "code" of a very elastic concept of antitrust injury, it remains to be seen whether we have moved toward a substantive reconsideration of *Albrecht*.

B. Resale Price Maintenance

Resale price maintenance (RPM) has provided another context for judicial activism designed to respond to a seemingly outmoded substantive rule. The Seventh Circuit has been the leader in arriving at innovative interpretations of the antitrust injury requirement in this context. It has considered cases involving dealers terminated for price cutting and dealers who adhered to minimum prices.

In *Local Beauty Supply, Inc. v. Lamaur, Inc.*[134] the Seventh Circuit considered whether a purchaser who was selling at low prices to discounters suffered antitrust injury when terminated. The terminated reseller prayed for damages equal to the profits lost when its supplies were cut off,[135] a measure recognized by other circuits.[136] The court, in an opinion written by Judge Walter Cummings, held that the plaintiff suffered no antitrust injury. It reasoned that the success of the discounting operation depended on the success of the alleged resale price maintenance arrangement.[137] In essence, the plaintiff's profit was made possible by the price umbrella provided by the conforming dealers, that is, by the antitrust violation itself. Rather than suffering because of a

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130. *USA Petroleum*, 859 F.2d at 696.

131. *See* Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1026-28. For an economic analysis of the *Albrecht* rule demonstrating that it is inconsistent with antitrust goals, see Blair & Fesmire, *supra* note 112. For insight into Judge Posner's basically utilitarian leanings, see R. POSNER, THE ECONOMICS OF JUSTICE (1981).

132. This seems supported by the view expressed by the Seventh Circuit more recently in *Indiana Grocery*, 864 F.2d at 1417-19.

133. For an analysis of why it is so difficult to get *Albrecht* reconsidered, see Blair & Schafer, *Antitrust Law and Evolutionary Models of Legal Change*, 40 U. FLA. L. REV. 379 (1988).

134. 787 F.2d 1197 (7th Cir. 1986).

135. *Id.* at 1199.

136. *See, e.g.*, Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985).

137. *Local Beauty*, 787 F.2d at 1202.

lack of competition, the plaintiff incurred injury because it could no longer "free ride" on the RPM, advertising, and promotional efforts of other dealers. The court found that increased competition in this market would be to the detriment of the plaintiff.[138]

More recently, the Seventh Circuit in *Isaksen v. Vermont Castings, Inc.*[139] considered a situation in which the plaintiff was a dealer who unwillingly acquiesced in the manufacturer's demands to adhere to a minimum price. The court, in a decision written by Judge Posner, held that the reluctant dealer who nonetheless adhered to the minimum price schedule may have suffered antitrust injury.[140] These damages, according to the court, were equal to the "harassment [and] punish[ment]" used to enforce the price floor and "any profits, not due to free riding," that were lost during the period of higher prices.[141] This distinction is critical: unlike the problem in *Local Beauty*, the plaintiff's problem in *Isaksen* was in showing the actual amount of harm, not in showing antitrust injury.[142]

The court continued to explain the relevance of the "free-rider" problem to the issue of measuring damages. The plaintiff's damage model compared the profit earned while adhering to the price restriction with that earned when it did not adhere to the price minimum. The damage alleged was equal to the difference.[143] Judge Posner pointed out that at least some of the profit earned when the restriction was not observed resulted from "taking a free ride on other dealers, who provided valuable point-of-sale services."[144] That portion of the lost profit was not recoverable. Accordingly, "[t]he prevention of free riding is not . . . a defense to a charge of resale price maintenance; but neither is being prevented from taking a free ride on another dealer's efforts a form of antitrust injury."[145]

Although the Seventh Circuit opinions are expressed in terms of antitrust injury, they also can be seen as having the substantive impact of making resale price maintenance effectively per se lawful. First, the terminated dealer has suffered no antitrust injury. Second, the acquiescing dealer, while suffering an antitrust injury, has been damaged only to the extent that its lost profits could not be attributed to free

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138. *Id.*

139. 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1728 (1988).

140. *Id.* at 1162.

141. *Id.* at 1164-65.

142. Precisely the same reasoning seems to apply to terminated dealers. Any profits that a terminated dealer could have earned at the prices that would have prevailed absent the RPM agreement would he recoverable.

143. *Isaksen*, 825 F.2d at 1165.

144. *Id.*

145. *Id.*

riding. Since terminated and acquiescing dealers become unlikely challengers, the net result is that RPM becomes very close to per se legal, in effect, a new substantive rule.

There are a number of issues raised by the Seventh Circuit's position. First, it is internally inconsistent. The dealer who acquiesces to a demand for RPM suffers antitrust injury to the extent it could have profited by price cutting and making sales that were not a function of free riding. On the other hand, the dealer who cuts prices and subsequently is terminated suffers no antitrust injury. The dealer is unable to show that some of the profits that could have been made but for the termination would not have been the result of free riding.

Second, the Seventh Circuit's position suggests an artificially narrow concept of antitrust injury. In the context of RPM, dealers must be required to adhere to the price floor by the threat of termination. If dealers are not required to adhere to the price floor by this threat, those dealers who might be inclined to cooperate will lose sales to those who do not comply and the whole scheme fails, much as a horizontal cartel fails when there are too many cheaters. Thus, in *Local Beauty* the ability to terminate the plaintiff was a necessary step in the illegal operation. RPM cannot be successful unless the price cutter can be cut off. The Seventh Circuit, however, separates the illegal action from the steps required to make RPM work by declaring that the terminated dealer has suffered no antitrust injury.

The better view, and one that is logically consistent with *Isaksen*, as well as Supreme Court precedent, postulates that the terminated dealer has suffered an antitrust injury. Its injury flows from an essential element of a judicially declared anticompetitive scheme. Comparing *Local Beauty* with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[146] clarifies this point. In *Brunswick* the injury flowed from an increase in competition when a powerful competitor entered the plaintiff's market. This entrance created downward pressure on prices.[147] In *Local Beauty* the injury flowed from the forced departure of a competitor. This forced departure eliminated downward pressure on prices.[148]

Local Beauty's narrow view of antitrust injury to some degree stems from confusing antitrust injury with the ability to meet the evidentiary standard with respect to damages. The court, in effect, found that all lost profits resulted from the plaintiff not being able to free ride on the efforts of other dealers.[149] As a factual matter, nothing is offered

146. 429 U.S. 477 (1977).
147. *Id.* at 480-81.
148. *Local Beauty*, 787 F.2d at 1199.
149. *Id.* at 1202.

to substantiate this presumption. In fact, it is likely that the plaintiff would have made some sales even without the promotional efforts of other dealers. Following *Isaksen*, the *Local Beauty* holding should have been that the plaintiff suffered antitrust injury. The damages, however, should have been limited to the profits that would have been earned if the plaintiff had not been terminated and had not benefited from a free ride on the efforts of other dealers.

The fact that the Seventh Circuit approach may be at odds with generally accepted antitrust goals is, perhaps, its most important problem. Even the narrowest version of antitrust aims seems to accept one of two possibilities: Enhancing consumer surplus or maximizing overall or allocative efficiency—the sum of consumer surplus and producer surplus.[150] As a practical matter, the impact of RPM on these goals is an empirical question.

For example, the standard justification for RPM is that dealers who are unable to compete on the basis of price will increase their competitive efforts in other areas such as services and advertising.[151] Obviously RPM would not be undertaken unless it enhanced producer surplus. This observation leaves, then, the issue of the impact on consumer surplus. The theory is that under the best of conditions the value of these services to consumers exceeds the price increase caused by RPM. Thus, both consumer surplus and overall efficiency are enhanced.

The actual impact on consumer surplus, however, is problematic. In particular, in some instances consumer surplus may not increase; that is, consumers may not value the extra services by as much as the cost increase. From the point of view of those who take a consumer oriented view of antitrust, this possibility is enough to establish that, at least in this instance, RPM did not accord with substantive antitrust concerns. Of course, with the decline in consumer surplus, overall efficiency still may increase as long as the increase in producer surplus offsets the decrease in consumer surplus. The outcome will depend on the nature of the demand for the product before and after resale price maintenance.[152] Thus, even those who advocate allocative efficiency as the sole goal of antitrust cannot be sure that RPM achieves this goal nor that its per se prohibition is any less efficient than its per se legality.

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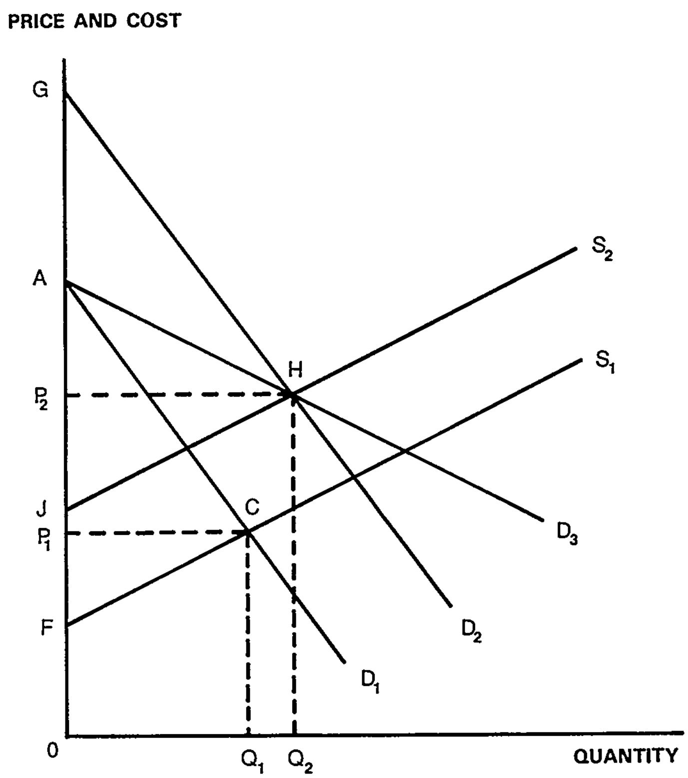
150. For a discussion of the relationship between these goals, see Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987). *See generally* R. BORK, *supra* note 12, at 90-115.

151. *See* T. SULLIVAN & J. HARRISON, *supra* note 4, at 149.

152. *See generally* Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985); Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687 (1983).

The matter is more easily seen in Figure 1.[153] D_1 is the demand curve prior to RPM, and S_1 is the supply curve. Before RPM, the price is P_1, and the quantity bought and sold is Q_1. Consumer surplus is equal to the area P_1AC, and producer surplus is equal to the area P_1CF. RPM affects both supply and demand when it eventually is instituted. On the supply side, dealers respond to their inability to compete on the basis of price by offering additional services. This practice results in increased costs of production and a shift in the supply curve from S_1 to S_2. Buyers are likely to find the services-enhanced product more attractive, and the result is a shift in demand.

FIGURE 1



153. This graph has appeared in a variety of forms. *See, e.g.*, T. SULLIVAN & J. HARRISON, *supra* note 4, at 161-64; Comanor, *supra* note 152; Scherer, *supra* note 152. This simplified version is drawn from Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 318 (1987).

In Figure 1 two possibilities are illustrated. D_2 is parallel to D_1, suggesting that all consumers find the new version of the good more attractive than the first and that its increase in attractiveness is the same for all buyers. In essence, they *all* are willing to pay the same amount in excess of what they originally were willing to pay. The result is that quantity Q_2 is bought and sold. At quantity Q_2 and price P_2, consumer surplus area P_2GH is greater than pre-RPM consumer surplus P_1AC. Similarly, producer surplus has increased from area P_1CF to area P_2HJ. Thus, both consumer surplus and overall efficiency increase with this shift in demand.[154]

Demand curve D_3 depicts another possibility. The curve illustrates demand shifting upward by different amounts for different consumers. This shift reflects the possibility that consumers will vary in terms of how much they value the services offered by dealers. With this particular demand curve, the equilibrium quantity also is Q_2. Consumer surplus, which is equal to P_2AH, is, however, smaller than consumer surplus P_1AC. If this decrease in consumer surplus offsets the increase in producer surplus, RPM enhances neither consumer surplus nor overall efficiency.

The Seventh Circuit's artificially narrow approach to antitrust injury short-circuits the analysis and avoids the empirical question. This approach is most likely traceable to the court's disapproval of the Supreme Court's implicit answer to this question found in the Supreme Court's classification of RPM as a per se offense.[155] Aside from the important issue of whether this classification is an appropriate way to respond to a disagreement with the Supreme Court, there is as yet no empirical justification for the Seventh Circuit's effective position of per se legality rather than per se illegality.

C. *Predatory Conduct*

Predatory pricing and other forms of predatory conduct have received a good deal of academic[156] and judicial attention since 1975.[157] This attention has focused primarily on defining what constitutes predation in the context of attempts to monopolize in violation of section 2

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154. In this regard it is interesting to observe that the fact that P_2 exceeds P_1 (prices have increased) does not provide any relevant information for analyzing the welfare effects of RPM.

155. *See* Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

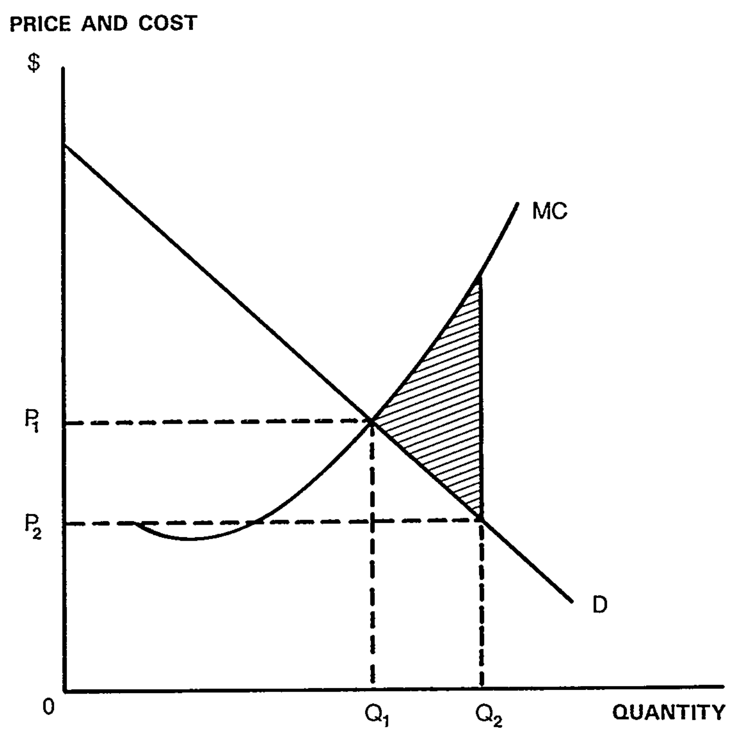
156. *See, e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

157. For a comprehensive analysis of judicial treatment, see Liebeler, *Whither Predatory Pricing? From Areeda and Turner to* Matsushita, 61 NOTRE DAME L. REV. 1052 (1986).

of the Sherman Antitrust Act.[158] We are concerned, however, with identifying antitrust injury occasioned by predation. As in the case of RPM, the problem of identifying antitrust injury in the context of predatory conduct has no obvious solution. During the predatory campaign consumers actually are better off due to low prices.[159] In addition, some antitrust scholars take the view that competitors of a firm engaged in predatory pricing suffer no antitrust injury.[160] These scholars reason that whatever harm the competitors suffer results from price competition. This view, however, turns out to be an artificially narrow concept of antitrust injury and one that ultimately undercuts antitrust goals.

The implications of this narrow approach can be seen most clearly with the help of Figure 2. Figure 2 illustrates what we call "Stage I" losses, the losses that occur during the actual period of predation. In

FIGURE 2



158. 15 U.S.C. § 2 (1982). Section 2 provides that "[e]very person who shall . . . attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *Id.*

159. One antitrust scholar observed that any monopoly overcharge paid by consumers if the firm eventually acquires monopoly power should be reduced by the amount of the undercharge during the predatory period. Page, *supra* note 13, at 1474. The fact that two different groups of consumers may be involved presumably is irrelevant in a deterrence-based system.

160. *See, e.g.*, H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 165-66 (1985); Easterbrook, *supra* note 13. *But see* Williamson, *Antitrust Enforcement: Where It's Been, Where It's Going*, 27 ST. LOUIS U.L.J. 289, 312 (1983).

Figure 2 the negatively sloped line D is consumer demand, and the marginal cost of the alleged predator is shown as the curve labeled MC. When the seller sets price and output at P_1 and Q_1, respectively, the sum of producer and consumer surplus is maximized. This junction is the ideal price-output combination because the social value of the resources used to produce the output in question is precisely equal to the social cost of using those resources to produce that output. In Figure 2 the social value of the resources used is measured by the height of the demand curve, and the social cost of the resources used is measured by the height of the marginal cost curve.

Predation occurs when the predator, faced with competition, expands output to Q_2 and lowers price to P_2. The predator incurs losses because the marginal cost of the incremental output exceeds consumer valuation of that output. The value of the incremental output is measured by the area under the demand curve between Q_2 and Q_1. The social cost of that incremental output is measured by the area under the marginal cost curve between Q_2 and Q_1. The reduction in social welfare is shown as the shaded triangular area. This welfare loss is caused by an excessive use of resources in this industry.

Antitrust concern regarding predation surfaces because predation is thought to be a way to achieve a monopoly. Rivals are driven out of business by the predator's below-cost pricing. The predator raises prices above costs to the monopoly level following this exodus of rivals. The predator then earns monopoly profits to offset the losses incurred earlier during the period of predatory activity. The supracompetitive prices eventually paid by consumers occur during "Stage II." There seems to be little question that consumers have suffered antitrust injury during Stage II. The issue in academic circles is whether the rivals of the predatory firm have suffered antitrust injury. The issue has two versions: cases of successful predation and cases of unsuccessful predation.

1. Successful Predation

If the predation is successful and the bout of below-cost pricing by a dominant firm drives its smaller rivals out of the industry, the monopolist raises prices to the monopoly level and restricts output appropriately. Although there is no doubt that those consumers who are now being overcharged by the difference between the prepredation price and the monopoly price have experienced antitrust injury, some argue that the opposite is true for the excluded rivals. According to the argument, excluded rivals are entitled to a competitive return on their investment, but they can earn that return in other industries.[161] If the excluded ri-

161. *See* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 326-27 (1981). The owners can earn a competitive return in various endeavors when resources are freely mobile in an economy. If actual returns fall below the competitive level in a particular industry, resources will flow out of that industry and into other occupations where a competitive

vals make a claim for a larger sum, they want to be compensated for lost monopoly profits.[162]

This argument, however, is not general. Although it may hold when all of the excluded firms are equally efficient, there may be inframarginal firms that earn profit by virtue of being more efficient in a particular industry than in any other.[163] Similarly, firms with no efficiency advantage whose pockets are not as deep as the predatory firm may find that they too are unable to remain in the market.[164]

In short, the excluded firms may be as efficient as or even more efficient than the firm pricing at predatory levels. In each case, the losses arise out of a substantive violation, predatory pricing. Moreover, their losses occur during the time when allocative inefficiency occurs. Allocative inefficiency is one of the types of harm the antitrust laws are designed to prevent.[165] The fact that this loss is an intermediate consequence should not reduce its antitrust importance. The harm suffered by these firms during Stage I is a necessary element of a successful predatory pricing scheme. It is difficult not to regard this harm as precisely the type the antitrust laws should be interpreted to prevent.[166]

2. Unsuccessful Predation

An unsuccessful predatory effort seems on first impression to present an especially difficult problem. Suppose, for example, that a dominant firm engaged in some below-cost selling with the apparent goal of bankrupting its smaller rivals. Much to its surprise, this strategy was unsuccessful as the smaller rivals hung in there by matching price cuts. Recognizing that everyone was suffering losses and that there was no prospect of victory, the dominant firm abandoned its predation. Assum-

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return can be earned. If the return in one industry exceeds the competitive level and there are no entry barriers, resources will flow into that industry, supply will expand, prices will fall, and the return will be pushed toward the competitive level.

162. *See id.*

163. One scholar, in particular, recognizes this, but incorrectly describes these rents as monopoly profits because he assumes that an inframarginal victim will price above marginal cost. *See id.* at 327. This, however, is not what leads to profits. The fact that price may exceed average cost at the point where price equals marginal cost is what leads to profits. *See* R. BLAIR & L. KENNY, MICROECONOMICS WITH BUSINESS APPLICATIONS 220-22 (1987).

164. *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 185-86 (1976); T. SULLIVAN & H. HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 498 (1984).

165. *See, e.g.*, R. BORK, *supra* note 12, at 116-29; R. POSNER, *supra* note 164, at 8-18.

166. Judge Frank Easterbrook seems to disagree without qualification. *See* Easterbrook, *supra* note 161, at 279. Professor William Page also may disagree. At one point, Page says, "[t]he law's concern should be the allocative inefficiency produced if the predation is successful." Page, *supra* note 13, at 1475. On the other hand, Page's concern may be a result of a fear that consideration of this harm could lead to overdeterrence. *See* Page, *supra* note 12, at 493-94. Support for this view can be found in P. AREEDA & H. HOVENKAMP, *supra* note 75, ¶ 711.2c.

ing that this was a clear attempt to monopolize the market, which violates section 2 of the Sherman Antitrust Act, who would have suffered antitrust injury and thereby had incentive to sue? As it turns out, it is obvious that consumers did not suffer. In fact, consumers paid lower prices for the product thereby enjoying greater consumer surplus and, therefore, would have no damages and no incentive to enforce privately the antitrust laws. One could argue that because the only effect was a period of lower prices, no one suffered antitrust injury.[167]

There remains, however, the intermediate or Stage I social loss associated with devoting too many resources to the production of this particular good or service. This loss is the type that virtually every antitrust scholar believes the antitrust laws were designed to prevent.[168] The social loss results from one firm's efforts to manipulate the competitive process to produce an outcome that ultimately harms consumers. As a consequence, the legitimate competitive expectations of rivals are violated during the predatory efforts.[169] Although their losses are not measured by the general social loss, these rivals would seem to meet any sensible antitrust injury standard in that they are the intended targets of an anticompetitive pricing scheme.

There is another more practical reason for treating the injuries suffered by the smaller rivals as an antitrust injury: if their losses are not deemed antitrust injury, then there will be no private enforcement of the antitrust law. Yet, as demonstrated, there are economic losses even when the predatory effort is unsuccessful. Given the limited enforcement budgets and somewhat idiosyncratic enforcement patterns[170] of public antitrust authorities, failure to encourage private actions by treating this intermediate loss as antitrust injury may lead to suboptimal levels of deterrence.

D. Collusive Monopsony

The arcane term "monopsony" refers to a market situation in which there is a single buyer. Sometimes a small group of buyers,

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167. *See* H. HOVENKAMP, *supra* note 160; Easterbrook, *supra* note 161. Professor Hovenkamp seems to take a somewhat different view in P. AREEDA & H. HOVENKAMP, *supra* note 75, ¶ 340.2b.

168. We mean this in the sense of a generalized misallocation of resources. *See, e.g.*, R. BORK, *supra* note 12; R. POSNER, *supra* note 164; Brodley, *supra* note 150.

169. *See* P. AREEDA & H. HOVENKAMP, *supra* note 75, ¶ 340.2b.

170. *See generally* Adams & Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CALIF. L. REV. 1515 (1986); Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming from? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649 (1982); Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817 (1987). In *Brunswick* the Supreme Court articulated the position that even an unsuccessful predatory effort can result in antitrust injury. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 n.14 (1977).

oligopsonists, collude with the purpose of fixing the prices they will pay for inputs. In other words, they collude in order to reduce the price they must pay below the price that would prevail in the absence of their agreement. It would seem to follow logically from the arguments offered with respect to vertical maximum price fixing, RPM, and predatory pricing that the victim of collusive monopsony has suffered no antitrust injury.[171]

The response of antitrust law to collusive monopsony is fairly clear. For example, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[172] the only three sugar beet refiners in northern California agreed among themselves to pay uniform prices for sugar beets.[173] This agreement effectively reduced the prices paid to some of the sugar beet growers below the level that would have prevailed without the agreement.[174] The Supreme Court had no trouble finding the agreement illegal: "It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[175]

Similarly, in *National Macaroni Manufacturers Association v. FTC*[176] the Seventh Circuit found a buying cartel of macaroni manufacturers objectionable when the cartel attempted to control the price paid for one of its primary inputs. High quality macaroni requires the use of 100 percent durum wheat.[177] Crop damage created a shortage of durum wheat. In the normal course of events such a shortage would cause the price of durum wheat to rise. In this case, however, the manufacturers of macaroni agreed among themselves to change their recipe and use a blend of fifty percent durum wheat and fifty percent farina.[178] This change in the recipe reduced the quality of the final product and artificially depressed the demand for durum wheat, thereby depressing its price.[179] The Seventh Circuit found this practice to be a per se violation

171. Although we have seen no judicial or academic arguments to this effect, the argument might go as follows: The agreement reduces the price of an input thereby reducing the colluders' costs which, in turn, will reduce prices to consumers. Because consumers are better off, no loss in consumer welfare has occurred and, accordingly, no antitrust injury is suffered. A recent case with elements of this reasoning is Balmoral Cinema, Inc. v. Allied Artists Pictures, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1433, at 389 (Sept. 21, 1989).

172. 334 U.S. 219 (1948).

173. *Id.* at 223.

174. *Id.* at 224.

175. *Id.* at 235 (citations omitted).

176. 345 F.2d 421 (1965).

177. *Id.* at 424.

178. *Id.*

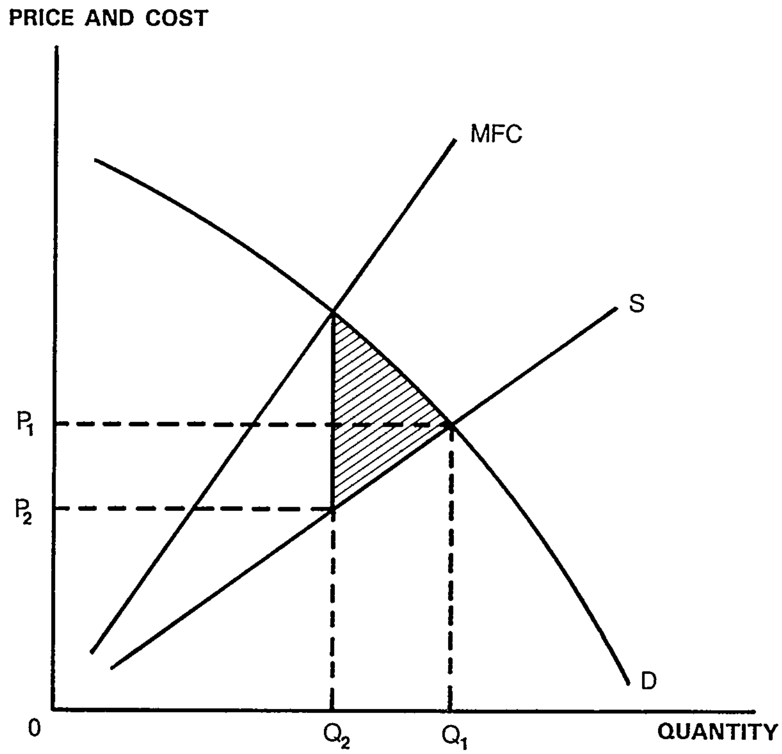
179. *Id.* at 426.

of section 5 of the Federal Trade Commission Act.[180]

These cases may seem misguided in that parties who are able to combine to lower prices are found to have violated the antitrust laws. As it turns out, however, the substantive law is quite consistent with accepted antitrust goals, and a finding that victims have not suffered an antitrust injury would be inappropriate. The substantive basis for concern is the same as with the case of a single buyer or monopsony in that the use of buying power can result in welfare losses.[181]

Figure 3, which depicts demand for an intermediate good as D and supply of the good as S, illustrates this substantive basis for concern. The curve marginal to the supply curve is called the marginal factor cost curve[182] and is labeled MFC in Figure 3. If the monopsonist ig-

FIGURE 3



180. *Id.* at 427.

181. *See* R. Posner & F. Easterbrook, Antitrust 148-50 (2d ed. 1981).

182. The marginal factor cost curve takes into account the increase in price that must be paid when the supply curve is positively sloped and purchases expand. *See* R. Blair & L. Kenny, *supra* note 163, at 375-78.

nored the effect its purchases had on the good's price and behaved as a competitor in the intermediate good market, then it would buy the quantity where demand and supply were equal. This point is shown as Q_1 in the graph. Because the monopsonist's purchases cause the market price to increase, the monopsonist takes this effect into account when making its employment decisions. As a result, it buys where the marginal factor cost equals demand. Consequently, it purchases quantity Q_2. Instead of paying a price of P_1 for the intermediate good, it pays the lower price on the supply curve shown as P_2.

The social welfare effects of monopsony and collusive monopsony are analogous to those of monopoly: too few resources will be employed.[183] At the point where supply and demand are equal, the value of the intermediate good as measured by the demand price is equal to the cost to society of providing that quantity as measured by the supply price. The employment level is optimal in a social sense at this point. But the monopsonist will not hire this number of units because it is not privately optimal to do so. Private profit maximization will lead the monopsonist to employ the smaller number Q_2. As a result, too few resources will be employed. At this point, the value of the intermediate good, which is given by the height of the demand curve, exceeds the social cost, which is measured by the height of the supply curve. This result means that some social value is forgone by the restricted hiring decision. The welfare loss is measured by the striped triangular area.

The holdings in *Mandeville Island Farms* and *National Macaroni Manufacturers* are appropriate because welfare is reduced by collusive monopsony. First, the abused suppliers obviously are hurt by a collusive restraint that reduces the prices that their output commands. Second, because the suppliers provide less of their product, the quantity of the final good must be reduced or its quality must be reduced. Even in cases where supply is fixed and reductions in quantity are not possible in the short run, consumers are hurt because the producer's profits are reduced and their response will be to reduce supply in the future. Consequently, these restraints are inconsistent with consumer welfare. The danger is that the trend toward narrow interpretations of antitrust injury, which examine only the initial impact on prices, could undermine well-founded substantive rules.[184]

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183. *See* R. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS 35-37 (1985); T. SULLIVAN & J. HARRISON, *supra* note 4, at 26-32.

184. The antitrust laws do not appear to forbid what may be termed "natural" monopsonies. Natural monopsonies arise from the existence of a single buyer, where the buyer's sole participation is due to circumstances beyond the buyer's control. This result is appropriate because the buyer cannot do much about the fact that no one else wants to buy the product in question. This is not to say that there will be no adverse consequences for social welfare, but there is no practical

IV. A New Approach to Antitrust Injury

Given that the current formulation of antitrust injury permits interpretations, such as the Seventh Circuit's, that potentially undercut even the most conservative of aims for antitrust law,[185] it is important to consider a more precise approach and one that meshes with generally accepted antitrust goals. We propose that a party be regarded as having suffered antitrust injury whenever the loss incurred is a necessary consequence of an antitrust violation that harms consumers when it is successful. The inquiry can be divided into two steps. First, a successful plaintiff must show that there is a logical connection between the success of the activity and a decrease in consumer welfare. This step may seem unnecessary given that antitrust law is largely about consumer welfare, but the recent Seventh Circuit experience suggests that this focus is easily lost. Deference to Supreme Court ruling[186] requires that this question be answered affirmatively whenever a per se rule is at issue.[187] If the first criterion is satisfied, then a successful plaintiff must show that the damage to the plaintiff is a necessary consequence of successful implementation of the scheme. The plaintiff who satisfies these two criteria has established antitrust injury. This establishment does not mean, however, that the plaintiff necessarily has standing. Issues of remoteness and multiple liability then would be considered in order to complete the overall standing evaluation.

The premise for our approach to antitrust injury generally is derived from the notions of Pareto optimality and superiority and Kaldor-Hicks efficiency.[188] In welfare economics, a change from one state of resource allocation to another is Pareto superior if at least one party benefits and no one is worse off.[189] In a Pareto optimal state, a change cannot be made without making at least one party worse off. A change is said to be Kaldor-Hicks efficient if those benefiting could compensate those who are made worse off even though no actual compensation is made.[190]

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remedy. Collusive monopsony is another matter.

185. *See supra* notes 114-19, 134-45, and accompanying text.

186. *See supra* Part IIG.

187. The problem with deferring to the Supreme Court's catalog of per se violations is that some of them are misguided. For example, the *Albrecht* rule, *see supra* notes 108-13 and accompanying text, probably is inconsistent with most, if not all, antitrust goals. Similarly, the per se, as opposed to rule of reason, status of RPM is hard to justify from an economic standpoint.

188. *See* V. Pareto, Cours d'Economie Politique (1896); Hicks, *The Foundations of Welfare Economics*, 49 Econ. J. 696 (1939); Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 Econ. J. 549 (1939).

189. The Pareto criterion identifies improvements for society only in cases in which everyone is better off or at least no one is made worse off.

190. The compensation principle provides a means for comparing more states of the world:

Those who view consumer welfare as the dominant aim of antitrust address competitive actions from a Pareto optimal standpoint. Those who view activities that harm consumers acceptable as long as those losses are offset by gains to producers have a Kaldor-Hicks approach. In either instance, the beginning point is the question of impact on consumer welfare.

Our proposal would be practical and effective across the spectrum of possible antitrust violations.[191] Here, however, we focus on the relatively difficult cases of RPM, predatory pricing, and collusive oligopsony, demonstrating that each of these practices can lead to decreases

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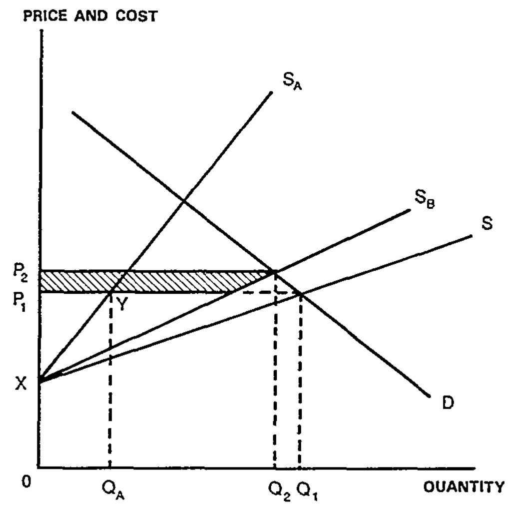
"state B is preferred to state A if, in making the move from state A to state B, the gainers can compensate the losers such that everyone can be made better off." R. JUST, D. HUETH & A. SCHMITZ, APPLIED WELFARE ECONOMICS AND PUBLIC POLICY 34 (1982). Compensation need not actually be paid.

191. One example would be a group boycott. A boycott can be used to exclude a group of would-be competitors. This action will injure both those who are excluded and consumers. In the figure below, the industry demand and supply curves are labeled D and S, respectively.



The supply curve is the horizontal sum of the supply curves of groups A and B, which are labeled S_A and S_B. Prior to any exclusion, the competitively determined price and output are P_1 and Q_1. Suppose that group B is successful in excluding group A from the industry. The new equality of supply and demand occurs where S_B intersects D. Consequently, the new price will be P_2, which exceeds P_1, and the new quantity will be Q_2, which is less than Q_1. The incentive for group B is that their profits will increase by an amount equal to the striped area.

The anticompetitive consequence of a boycott is the exclusion of one group of suppliers. The logical effect of that loss is the increase in price above the competitive price. Accordingly, consumers have suffered antitrust injury to the extent that P_2 exceeds P_1. In this instance, the overcharges to consumers equal $(P_2 - P_1)Q_2$.

The excluded producers also have suffered due to the exclusion. They lose tbe profit that they would have earned in the industry of choice because they must go to other industries. This is measured in the figure by the triangular area P_1XY. This loss is also a direct result of the anticompetitive effect of the exclusion. These injuries are not duplicative.

in consumer welfare.[192] In our view, any plaintiff raising such a claim would establish the first element of antitrust injury. In the context of RPM, there are three classes of possible plaintiffs: terminated dealers, acquiescing dealers, and consumers.[193] Consumers who do not value additional services appear to have suffered an antitrust injury under any standard. But our suggestion goes further than consumers and seeks to include any party whose injury was a required step in the path that leads to the consumer's loss. As discussed in the context of *Local Beauty Supply, Inc. v. Lamaur, Inc.*,[194] terminating dealers who violate the resale price standard is a necessary part of engaging successfully in RPM.[195] Similarly, some instances of RPM are marked by the unwilling acquiescence of dealers. Thus, both terminated dealers and those dealers who unwillingly adhered to the scheme would have suffered an antitrust injury.

In the case of RPM, this approach may seem to broaden dangerously the scope of plaintiffs in the case of an offense whose per se status is subject to serious question. These concerns are unwarranted. First, the Supreme Court's recent strengthening of the *Colgate* doctrine[196] in *Monsanto Co. v. Spray-Rite Service Corp.*[197] and *Business Electronics Corp. v. Sharp Electronics Corp.*[198] continues to make any vertical restraint on price a difficult case from a plaintiff's perspective. Second, both terminated dealers and those who acquiesced in the scheme may find that the amount of damages does not justify the litigation effort, especially if the Seventh Circuit's approach in *Isaksen v. Vermont Castings, Inc.*[199] is widely adopted. Third, in the case of acquiescing dealers, the plaintiffs must demonstrate that at some point they became unwilling participants. Finally, it is important to be realistic about today's per se rules in all areas. Courts, especially the Supreme Court, increasingly are discovering ways to consider procompetitive justifications in virtually every substantive antitrust context.[200]

In the case of successful predatory pricing, overcharged customers

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192. The case of vertical maximum price fixing is less clear. The Supreme Court's per se stance seems to require that one view consumer welfare as endangered. It is difficult, though, to see how this is possible. *See* Page, *supra* note 13, at 1469-70.

193. In the case of maximum resale prices, only dealers terminated or acquiescing would have a complaint.

194. 787 F.2d 1197 (7th Cir. 1986); *see supra* notes 134-38 and accompanying text.

195. The same can be said for vertical restraints on maximum prices.

196. *See* United States v. Colgate & Co., 250 U.S. 300 (1919).

197. 465 U.S. 752 (1984).

198. 485 U.S. 717 (1988).

199. 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1728 (1988); *see supra* notes 139-45 and accompanying text.

200. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

have suffered antitrust injury. Consumer welfare is reduced because prices are higher after the predator drives its rivals out of business. Even though the buyers are charged bargain prices during the bout of predation, the net effect must be to their detriment if predation is to make any sense at all. It must be true that the present value of the losses suffered during the price war while prices were below cost is less than the present value of the monopoly profits that will be earned during the recoupment period. Thus, the overcharged consumers pass the first prong of our proposed test. The second prong is just as easily satisfied. It must be possible to recoup the losses incurred during the price war for predation to make any sense. The damage to the consumer is obviously a necessary consequence of successful implementation of a predatory pricing scheme.

Some of the excluded rivals also suffer antitrust injury. To the extent that inframarginal firms are excluded, they have suffered losses because they will earn lower returns in alternative occupations. Inframarginal firms earn some supracompetitive profits because there is one or more resources owned by the firm that is particularly well suited to being employed in that particular industry. When the firm is excluded from that industry, it must go to another industry where it has no particular advantage.[201] As a consequence, the firm suffers financial loss from its exclusion. Predation already has been found to cause a reduction in consumer welfare; therefore, it is sufficient to pass our proposed test to show that the excluded firms have suffered losses.

In the case of collusive monopsony or oligopsony, our two-prong test shows that such buying restraints impose antitrust injury upon the abused suppliers. First, these restraints cause a reduction in consumer welfare because they reduce the quantity available for sale or they reduce the quality of the final product. In either event, the consumer is worse off. Second, because the conspiracy is aimed directly at the suppliers, there is no doubt that their injury is a necessary consequence of the restraint. Thus, the abused suppliers have suffered antitrust injury under our proposed test.

V. Conclusion

We have been concerned with the possibility that substantive antitrust policy is becoming increasingly inconsistent and, in some instances, is being emasculated by emerging interpretations of antitrust injury. A careful examination of some recent decisions dealing with ver-

201. Even if the predatory effort fails and the inframarginal firm is not eventually excluded, it still has suffered antitrust injury because its losses were a necessary part of a scheme that would have harmed consumers if it had been successful.

tical price restrictions and of the implications of these decisions for predatory pricing and collusive oligopsony illustrates the basis for this concern. Accordingly, we propose a two-prong test for determining the existence of antitrust injury. First, a plaintiff must show that the action complained of is logically connected to an adverse effect on consumers. Second, a plaintiff must show that the injury suffered was necessary for the original action to be successful.

When we applied this two-prong test to resale price maintenance, predatory conduct, and collusive monopsony, we confirmed its usefulness. Our proposed test results in a clear and predictable method of identifying injured parties in a way that complements antitrust goals and avoids the danger of underdeterrence.