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# Let the State Decide: The Efficient Antitrust Enforcer and the Avoidance of Anticompetitive Remedies

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# LET THE STATE DECIDE: THE EFFICIENT ANTITRUST ENFORCER AND THE AVOIDANCE OF ANTICOMPETITIVE REMEDIES

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## I. INTRODUCTION

Over the past half century, concern over private litigation's role in furthering antitrust objectives has spurred dramatic changes in antitrust.[1] This concern is reflected in the antitrust injury and efficient enforcer requirements, which have helped antitrust become more effective at achieving what many believe is its fundamental objective—enhancing consumer welfare.[2] Each requirement

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[1] *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 480–81 (1977).

[2] *See* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50–51 (1978) ("Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. . . . The responsibly of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions."); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1451 (1985) ("In the case of antitrust, most commentators now agree that the purpose of the substantive law is to maximize economic efficiency, or consumer welfare, by the preservation of competitive markets. Under this view . . . the scope of liability should also be defined by the efficiency standard."); Daniel Berger & Roger Bernstein, *An*

limits the standing of private parties in antitrust cases to those parties whose suits would most effectively promote competition.[3] Thus, these doctrines arguably recognize that enhancing competition is of far greater importance in antitrust than the redress of private harms.[4]

However, the antitrust injury and efficient enforcer doctrines do not deny standing to all plaintiffs who would ineffectively vindicate the interest of competition. By focusing on the nexus between a defendant's conduct and the nature of a plaintiff's injury,[5] they fail to consider the implications of a plaintiff's desired remedy.

This Article argues that courts should deny standing to an antitrust plaintiff when his or her desired remedy is likely anticompetitive. Current antitrust standing law is grounded in part on the flawed assumption that awarding damages for anticompetitive conduct is necessarily procompetitive. For example, the treble damages remedy has traditionally been thought to have procompetitive consequences. If one must pay damages for conduct with anticompetitive consequences, one is less likely to act anticompetitively in the future. However, this assumption may sometimes be false. If an award was high enough to send one or more antitrust defendants into bankruptcy, and such a bankruptcy would markedly reduce the number of competitors within a relevant market, then the award of damages could have anticompetitive consequences.[6]

Part II of this Article explores the plausibility of anticompetitive remedies.[7] Part III addresses the current law of antitrust standing and its limitations.[8]

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*Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 836 (1977) ("[Antitrust] standing doctrine is designed to narrow this broad class of injured persons to a subclass of plaintiffs who are deemed proper parties to sue. The scope of antitrust standing should be determined by reference to the special problems created by treble damage actions, such as ruinous or duplicative recoveries. The scope of substantive protection should be determined in each case by analysis of pertinent *substantive* antitrust policies.").

[3] *See* Berger & Bernstein, *supra* note 2, at 836.

[4] *See* Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1541 n.12 (1989) ("With implicit Supreme Court encouragement, the emphasis in antitrust scholarship has been on the deterrence function." (citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977))).

[5] Page, *supra* note 2, at 1445–46 ("[T]he complexity, duration, and expense of antitrust litigation have become a significant burden on the federal court system. Recognizing these characteristics of the antitrust industry, courts have tried to set economically rational limits on the size of treble damage liability and on the frequency of antitrust litigation by limiting *the kinds of harms* that are compensable under Section 4." (emphasis added) (footnote omitted)).

[6] The recent financial industry bailouts illustrate one way the bankruptcy of one or more entities could harm consumer welfare. *See* Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 594 (2010) ("The failure of banks carries huge externalities because of the unique position banks occupy in financial markets by providing liquidity and facilitating maturity transformation. Certain banks, given their size and the volume of commerce they affect, may be so important to the economy that their failure would be devastating.").

[7] *See infra* Part II.

Part IV argues that standing should be denied to private litigants when their cases would harm consumer welfare and proposes a three-prong test for determining when standing should be denied.[9]

## II. THE ANTICOMPETITIVE REMEDY

A private party can suffer an injury of such magnitude that permitting the party to redress the injury through treble damages would (a) harm consumer welfare, and (b) be a less efficient means of addressing the harm than public enforcement alone. The entrance and exit of sellers in and out of a market may meaningfully affect its competiveness depending on market concentration, entry barriers, and other factors.[10] When litigation causes a seller to exit an industry, the departure may not only enhance the market power of its former competitors, but also create conditions ripe for collusion.[11]

Price predation law under section 2 of the Sherman Act illustrates the potential anticompetitive effects of a seller's exit from a market:

> Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice 'inimical to the purposes of the antitrust laws' and one capable of inflicting antitrust injury.[12]

One key difference between a forced exit due to price predation and one due to litigation costs is that the motives of a private plaintiff with bankruptcy-inducing damages may be quite different than those of a predator. While the predator seeks the dissolution of its rival, a plaintiff seeks redress for his or her injuries.[13] Thus, for the predator, the failure of the target is the objective.[14] For the plaintiff, it is a collateral consequence of an award of damages. Therefore,

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[8] *See infra* Part III.

[9] *See infra* Part IV.

[10] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 MERGER GUIDELINES], http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[11] *See id.* at 20–27 (discussing the relationship between enhanced industry concentration and the likelihood of unilateral and coordinated effects).

[12] Cargill, Inc. v. Monfort of Colo., Inc. 479 U.S. 104, 117–18 (1986) (quoting Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

[13] *See generally* Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1, 36–37 (1984).

[14] *Id.*

only the motives of the predator are generally anticompetitive.[15]

This difference is irrelevant, however, because a price predator's aims do not determine the competitive effect of its actions.[16] While it is true that one may be liable for predatory pricing regardless of whether the scheme ultimately succeeds, the law punishes the effort because it considers *successful* predation harmful.[17] Unsuccessful predation may even be procompetitive.[18] Thus, both predatory pricing and failure-inducing damages may injure competition by crippling the business of a market participant.

Like in the predatory pricing scenario, a damages-induced exit is not *necessarily* anticompetitive; in both contexts, actual harm to consumer welfare depends on market structure and the results of a bankruptcy proceeding.[19] For example, if barriers to entry are low, the demise of a competitor is less likely to injure competition because a new market participant can easily replace the failed firm.[20] Thus, courts should evaluate the structure of a defendant's market before

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[15] An exception to this is when a competitor uses litigation as a means of injuring its rival's ability to compete. *See id.* at 33–34 (1984) ("A judicial declaration that some efficient business practice is unlawful will raise costs of production, because the rival must shift to the next-most-expensive method. The imposition of costs may be more direct: treble damages are a cost of doing business, as are the costs of legal assistance, the costs of changing business plans to steer clear of antitrust exposure, and the diversion of the time and energy of executives from production to litigation. Antitrust counterclaims are a common reply to contract or patent litigation precisely because they greatly raise costs.").

[16] *Id.*

[17] *See id.* at 26.

> "The logical story of any exclusionary practice is that a firm with market power adopts a strategy to increase its rivals' costs. This strategy is costly to the aggressor too, but it plans to recoup the costs by raising its prices after expelling the rival from the market or scaring the rival out of entering. The aggressor may reduce its price, and rivals must match the cut or lose sales; the aggressor may build a very large plant or introduce new products, making entry less attractive or diminishing the attraction of rivals' products to consumers; the aggressor may buy upstream or downstream suppliers, forcing rivals to search elsewhere for supplies; the list could be extended. These and other strategies are ambiguous. Low prices and large plants may be competitive and beneficial, or they may be exclusionary and harmful. We need a way to distinguish competition from exclusion without penalizing competition. *If* the practices are exclusionary, they will be profitable only if the aggressor can recoup. If the aggressor cannot, there is no reason for antitrust concern. Either the business losses during the period of aggression will act as the penalty, or the conduct will turn out to be efficient."

*Id.*

[18] *Id.*

[19] For a discussion of the bankruptcy process and its implications, *see infra* notes 117–23 and accompanying text.

[20] *See* Matsushita Elec. Indust. Co. v. Zenith Radio Co., 475 U.S. 574, 589 (1986) ("[T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in

denying a private plaintiff standing based on damages. There would be no reason to deny standing to a private plaintiff for seeking a failure-inducing remedy if the seller's failure would not affect competition. At present, however, the law of antitrust standing permits plaintiffs to pursue a failure-inducing remedy regardless of the relevant industry's competitive structure.

## III. THE CURRENT STATE OF ANTITRUST STANDING

To have standing under section 4 of the Clayton Act, a private plaintiff must have suffered an antitrust injury and constitute an efficient enforcer of the antitrust laws.[21] The Supreme Court first articulated the antitrust injury requirement in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*[22] In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[23] the Court listed several factors for determining whether a plaintiff is an efficient enforcer.[24]

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the excess profits.").

[21] *See* Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010) ("To have antitrust standing, a party must do more than meet the basic 'case or controversy' requirement that would satisfy constitutional standing; instead, the party must show that it satisfies a number of 'prudential considerations aimed at preserving the effective enforcement of the antitrust laws' . . . . The plaintiff must have alleged an antitrust injury, and second, the plaintiff must be an efficient enforcer of the antitrust laws." (citations omitted)); Daniel v. Am. Board of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005) ("Even if we were to conclude that the plaintiffs had adequately stated an antitrust injury, that would not necessarily establish their standing to sue in this case. 'A showing of antitrust injury is necessary, but not always sufficient,' to establish standing. '[O]ther reasons' may sometimes indicate that a party who states an antitrust injury is nevertheless not a proper antitrust plaintiff. These other reasons may 'prevent the plaintiff from being an efficient enforcer of the antitrust laws.'" (citations omitted)).

[22] 429 U.S. 477 (1977).

[23] 459 U.S. 519 (1983).

[24] *Id.* To be clear, the Court has never labeled the *Associated* test for determining standing the "efficient enforcer" test. Lower federal courts gave the test that title. *See Palmyra*, 604 F.3d at 1299; *Daniel*, 428 F.3d at 444; Jonathan Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 297 (1998) ("[A] number of lower courts have held that it is an independent requirement in a private suit that a plaintiff demonstrate that it is an 'efficient enforcer' of the antitrust laws."). The name is slightly misleading because whether a non-party exists which would constitute a more efficient enforcer than the named plaintiff is only one factor in *Associated*'s multi-prong inquiry. *Associated*, 459 U.S. at 536–45 ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. . . . A number of . . . factors may be controlling."). Further, while the Court treated antitrust injury in *Associated* as only one of several efficient enforcer factors, it clarified in *Cargill* that an antitrust injury is an absolute requirement for standing. Cargill v. Monfort of Col., Inc., 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff . . . for other reasons."); William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff*, 82 IOWA L. REV. 127, 137 n.77 (1996) ("Although *Associated General Contractors v. California State Council of Carpenters* implied that antitrust injury is one of several factors in the standing inquiry . . . *Cargill* made clear that antitrust injury is an essential first step before applying any of the other standing

*A. Brunswick*

In *Brunswick*, bowling alley operators sued a bowling equipment manufacturer for violating section 7 of the Clayton Act.[25] The Brunswick Corporation was one of the two largest manufacturers of bowling alley equipment.[26] Most of Brunswick's sales were on secured credit.[27] When the bowling industry experienced declining popularity in the 1960s, Brunswick's bowling alley clients had difficulty making their payments.[28] When they defaulted, Brunswick took possession of the collateral—the bowling equipment it had sold them on credit.[29] However, because of the industry's turmoil, Brunswick had difficulty finding bowling alleys to which it could resell the repossessed equipment.[30] Brunswick decided to enter the bowling alley business itself by acquiring the bowling alleys that had defaulted on their credit agreements and using the repossessed equipment to run them.[31]

Pueblo Bowl-O-Mat and its co-plaintiffs claimed that Brunswick's acquisitions "might substantially lessen competition or tend to create a monopoly" in violation of section 7 of the Clayton Act.[32] The plaintiffs operated three bowling alleys that suffered lower profits while competing with Brunswick's alleys, which would have gone out of business had Brunswick not purchased them.[33] The plaintiffs claimed damages for three times their alleged injury, pursuant to section 4 of the Clayton Act.[34] Thus, although the plaintiffs argued that Brunswick's acquisitions would harm competition, their own injuries stemmed from increased competition.[35]

The Court held the plaintiffs lacked standing because even "if [they] were injured, it was not 'by reason of anything forbidden in the antitrust laws.'"[36] In other words, even if Brunswick had been engaged in monopolization, the plaintiffs' injuries stemmed from increased competition, which the antitrust laws aim

factors. . . . Virtually every circuit now explicitly recognizes this two-step inquiry." (citations omitted)).

[25] *Brunswick*, 429 U.S. at 480–81.

[26] *Id.* at 479.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 479–80.

[31] *Id.*

[32] *Id.* at 481.

[33] *Id.*

[34] *Id.* at 488.

[35] *See id.*

[36] *Id.*

to encourage, not penalize.[37] The *Brunswick* Court said the plaintiffs could not recover for harms that flowed from competition.[38] Henceforth, private plaintiffs would need to have suffered an *antitrust* injury in order to have standing in antitrust cases:

> We therefore hold that the plaintiffs to recover treble damages . . . must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[39]

*Brunswick* transformed antitrust.[40] From the inception of the per se rule against price-fixing in the 1927 case of *Trenton Potteries*[41] until the mid-1970s, the Supreme Court largely expanded the scope of antitrust liability and eased plaintiffs' procedural obstacles.[42] *Brunswick* was one of several cases in the 1970s that curtailed the growth of private antitrust litigation.[43] By establishing the antitrust injury requirement, the Supreme Court restricted private plaintiffs to only those persons whose suits would vindicate a public goal—the protection

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[37] *Id.* at 488 ("At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of competition not competitors.' It is inimical to the purposes of these laws to award damages for the type of injury claimed here." (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

[38] *Id.* at 489.

[39] *Id.* at 489 (quoting Zenith Radio Corp. v. Hazeltine Res., 395 U.S. 100, 125 (1969)).

[40] Jacobson & Greer, *supra* note 24, at 273–74 ("In the last fifty years, few decisions have had a greater impact on antitrust than *Brunswick*. The Court's opinion put a halt to what had been a persistent expansion of the private treble damage remedy. . . . It has helped ensure that the antitrust laws remain true to their essential proconsumer underpinnings.").

[41] United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927) ("Agreements which [fix prices] . . . may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable . . . .").

[42] Jacobson & Greer, *supra* note 24, at 274–77 ("The difficulty of proving an antitrust violation began to lessen with the development of the per se rule. . . . The expansion of substantive liability was accompanied by a series of decisions easing antitrust plaintiffs' procedural burdens as well. . . . The result was an explosion of private antitrust litigation. . . . There were signs starting in 1974 that the expansion was about to stop.").

[43] Jacobson & Greer, *supra* note 24, at 277 (arguing that United States v. Gen. Dynamics, 415 U.S. 486 (1974), United States v. Marine Bancorporation, 418 U.S. 602 (1974), and United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975) signaled that the "expansion [of the number of private antitrust cases in the federal courts] was about to stop").

of competitive free enterprise.[44] Even if an antitrust violation caused a person injury, he or she would lack standing if a pro-competitive consequence of the alleged conduct caused his or her harm.[45]

### *B. Associated General Contractors*

*Associated General Contractors* further delineated standing requirements by establishing that only efficient antitrust enforcers can have standing.[46] A union brought a class action alleging a contractors association and its members not only breached their contracts with the union, but did so in a manner that violated the antitrust laws.[47] Defendants allegedly coerced landowners and others into hiring only "nonunion [labor] . . . or firms that [defendants] actually control[led]."[48] The Court held that the complaint, although vague,[49] pleaded an antitrust claim.[50]

The Court further held the union lacked an antitrust injury, and thus, lacked standing under *Brunswick*.[51] According to the Court, the plaintiff's alleged damages did not flow from an injury to competition.[52] As an organized

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[44] *See* Page & Lopatka, *supra* note 24, at 138 ("The antitrust injury doctrine complements the role of prosecutorial discretion in public enforcement by assuring that suits are consistent with antitrust goals. Under such a dual regime, there may well be individual practices for which private enforcement is rare.").

[45] *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 540 (1983) ("In each case [a plaintiff's] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 487–88 (1977))); Page & Lopatka, *supra* note 24, at 142 ("Antitrust injury establishes an independent requirement beyond proof of the offense and harm to the plaintiff."); Page, *supra* note 2, at 1,459 ("[P]laintiffs must show antitrust injury—that is, injury that flows from the anticompetitive aspect of the defendant's conduct.").

[46] *Associated Gen. Contractors*, 459 U.S. at 521.

[47] *Id.* at 521–29.

[48] *Id.* at 526.

[49] *Id.* at 522–29 ("The complaint's description of [defendants'] actions affecting [those allegedly coerced] is both brief and vague."); *id.* at 525–28 nn.9–18 (describing the complaint's myriad generalities and pleading deficiencies); *see also* Page, *supra* note 2, at 1507 ("The allegations of coercion were so ambiguous that the Court suggested it would have been proper to dismiss the complaint solely on grounds of lack of specificity.").

[50] *Associated Gen. Contractors*, 459 U.S. at 522–29 (holding that although the "deceptive diversion of business to the nonunion portion" of a firm "might constitute a breach of contract, an unfair labor practice, or perhaps even a common-law fraud or deceit," the claim that defendants applied coercive pressure against others who would otherwise use unionized labor could constitute an antitrust violation).

[51] *Id.* at 539–40 ("In this case . . . the *Brunswick* test is not satisfied."); Page, *supra* note 2, at 1510 ("[T]he antitrust injury issue was dispositive of the case: The defendant's activities, though possible violations of labor law, did not restrain trade and therefore could not have caused antitrust injury.").

[52] *Associated Gen. Contractors*, 459 U.S. at 538–40.

labor association, its objective was to "enhance the earnings and improve the working conditions of its membership."[53] The Court recognized that increasing competition among the defendants would pressure the defendants to reduce their operating expenses, including union employees' wages and benefits.[54] Thus, the alleged anti-union activities were not necessarily anticompetitive.[55] Because the plaintiff's injuries did not result from harm to competition, the plaintiff lacked standing to pursue antitrust claims.[56]

The Court also denied the plaintiff standing, however, because a litany of other factors indicated it was an inefficient enforcer of the antitrust laws.[57] The Court established three criteria for determining whether a private plaintiff is an efficient enforcer: (1) whether the defendant's conduct was indirectly related to the plaintiff's harm; (2) whether alleged damages were speculative; and (3) whether a trial would involve either a complex apportionment of damages or duplicative recoveries.[58]

The Court held the "directness or indirectedness of the asserted injury" is a "factor" in determining whether a plaintiff has standing.[59] In *Associated Gen. Contractors*, the plaintiff's injury was indirect because it derived from the behavior of third parties.[60] The defendants allegedly sought to harm the union by pressuring third parties not to hire its members.[61] Thus, the pressured parties interrupted the chain of causality between the defendants' actions and the plaintiff's injury.[62] The pressured parties suffered directly "and would have a right to

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[53] *Id.* at 539.

[54] *Id.* (The unions' "goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.").

[55] *Id.*; *see also* Page, *supra* note 2, at 1510 ("The defendant's activities, though possible violations of labor law, did not restrain trade and therefore could not have caused antitrust injury.").

[56] This does not mean, however, that the defendant's conduct was legal. The Court implied that unions might have had valid non-antitrust claims. *See Associated Gen. Contractors*, 459 U.S. at 539–43 (Discussing the "separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions[,]" and describing the defendants' alleged "breaches of the collective bargaining agreements" as "injuries that would be remediable under other laws . . . .").

[57] *Id.* at 545 ("[R]elevant factors—the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union's antitrust claim.").

[58] *Id.*

[59] *Id.* at 540.

[60] *Id.* at 540–42.

[61] *Id.*

[62] *Id.*

maintain their own treble damages actions against the defendants."[63]

The speculativeness of damages constitutes the second efficient enforcer factor.[64] In *Associated,* the extent to which the plaintiff's damages were attributable to the defendants was unclear because third parties interrupted the chain of events.[65] The union's failure to allege any specific effects from the coercion further illustrated the "highly speculative" nature of its damages.[66]

The final factor was whether a plaintiff's claims presented "either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other."[67] The Court noted that "massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits."[68] A plaintiff is less likely to constitute "a proper plaintiff under § 4 of the Clayton Act" if its damages claims stretch "judicially manageable limits" by presenting courts with serious difficulties in accurately "identifying damages and apportioning them."[69] The Court concluded the union's case raised complex damage apportionment and duplicative recovery issues because the directly-affected third parties could sue the defendants for the conduct at issue.[70]

### *C. How the Antitrust Injury Requirement and Efficient Enforcer Factors Fail to Account for Anticompetitive Remedies*

Both the antitrust injury requirement and the efficient enforcer test would allow a party to have standing regardless of whether the remedy he pursues would injure consumer welfare.[71] In this respect, current antitrust standing law does not restrict standing to those injured persons whose claims would advance the proper objectives of antitrust.[72] By examining only "the nature of the relationship between the victim's harm and the violation,"[73] the antitrust standing doctrines fail to consider the relationship between a remedy and its implica-

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[63] *Id.* at 541–42.

[64] *Id.* at 542.

[65] *Id.*

[66] *Id.* ("There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished . . . .").

[67] *Id.* at 544.

[68] *Id.* at 545.

[69] *Id.* at 543–45.

[70] *Id.* at 545.

[71] *See* Bork, *supra* note 2; Page, *supra* note 2; Berger & Bernstein, *supra* note 2.

[72] *See* Bork, *supra* note 2; Page, *supra* note 2; Berger & Bernstein, *supra* note 2.

[73] Page, *supra* note 2, at 1447.

tions.[74]

Admittedly, the antitrust injury requirement does deny standing to plaintiffs who pursue anticompetitive remedies in a limited sense: if competition caused the victim's harm, the antitrust injury doctrine prevents litigation that would penalize and deter economically efficient behavior.[75] A party, however, can suffer an injury that the antitrust laws intend to prevent, but that is also extensive enough to make a trebled award an inefficient means of prevention.[76] The Second Circuit implicitly acknowledged this in the LIBOR litigation.[77] The court expressed grave concern that plaintiffs' claims would bankrupt systematically-critical financial institutions, yet also held that plaintiffs adequately pleaded an antitrust injury.[78] Thus, a party may suffer an antitrust injury yet seek a remedy which would injure competition.[79]

While the efficient enforcer test *should* deny standing to parties who would injure, rather than vindicate, the interest of competition, the law as it stands does not.[80] The directness factor asks whether the defendant's acts were the direct cause of the victim's injury.[81] The speculativeness factor asks whether interruptions in the chain of causation make it unclear to what extent damages can be attributed to the defendant.[82] The risk of either duplicative recoveries or complex apportionment inquiries focus on difficulties a court will face in deciding how to apportion recovery.[83] No factor asks whether a plaintiff's desired remedy would harm competition.[84]

Concern about the anticompetitive potential of large damages has, however, animated the development of antitrust standing.[85] For example, by restricting standing to only those directly affected, the *Associated* Court reduced the pool of potential plaintiffs and made it less likely damage awards would exceed the amount necessary to deter inefficient conduct.[86]

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[74] *See id.*

[75] *See id.* ("[U]nless treble damages are related to the basis of substantive liability, they may deter efficient business relationships.").

[76] *See* Gelboim v. Bank of Am. Corp., 823 F.3d 759, 772–79 (2d Cir. 2016).

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See supra* notes 60–63 and accompanying text.

[82] *See supra* notes 64–66 and accompanying text.

[83] *See supra* notes 67–70 and accompanying text.

[84] *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

[85] *See e.g. Associated Gen. Contractors*, 459 U.S 519.

[86] *See* Page, *supra* note 2, at 1452–57 ("If compensation were taken as a standard, then all casually related harms would be compensable, and the resulting deterrent effects would be unpredicta-

Judicial concern over ruinous damages is even more explicit in U.S. Circuit Courts of Appeals cases regarding whether plaintiffs may have "umbrella" standing.[87] A cartel price-fixing scheme will raise the price of goods, even for those consumers who buy their goods from fringe firms—firms that are in the cartel's market but not participating in the price-fixing scheme.[88] Umbrella standing is a doctrine that allows consumers to sue cartel members with whom they never interacted because the cartel's acts increased the market price. The Circuits are split on whether this is permissible.[89] Disagreements exist principally over the meaning of "directness" in *Associated*. Does it refer to how closely the victim's injury relates to the defendant's actions?[90] Or does it ask how closely the victim interacted with the defendant?[91] The U.S. Court of Appeals for the Third Circuit decided that "directness" referred to how closely the victim and the defendant interacted and thus held umbrella standing to be impermissi-

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ble from an economic point of view. A heavy social cost would be paid for case-by-case compensation of individuals. Deterrence, however, can provide an efficient standard for defining rules limiting the scope of liability . . . . Any system of deterrence must define the size of the deterrent penalty and identify the person who will bring suit . . . . The optimal penalty is one that minimizes the sum of the costs of underdeterrence and the costs of overdeterrence . . . . The costs of overdeterrence . . . stem from the fact that antitrust violations are not pure social waste; they are also business practices that may permit an efficient integration of facilities and create new wealth. These benefits are . . . real social gains that should be reckoned in a system of deterrence . . . . [I]f allowing all of the likely classes of potential plaintiffs to recover would result in clear overdeterrence, then recovery should be limited to the class or classes in the best position to sue." (footnotes omitted)).

[87] *See e.g.* Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016).

[88] *See id.* at 778 ("Umbrella standing concerns are most often evident when a cartel controls only part of a market, but a consumer who dealt with a non-cartel member alleges that he sustained injury by virtue of the cartel's raising of prices in the market as a whole." (citations omitted)).

[89] *Compare U.S. Gypsum Co. v. Ind. Gas Co.,* 350 F.3d 623, 627 (7th Cir. 2003) (endorsing umbrella standing), *and In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1171 n.24 (5th Cir. 1979) (endorsing umbrella standing), *with* Mid-W. Paper Prods., Co. v. Cont'l Grp., Inc., 596 F.2d 573, 580–87 (3d Cir. 1979) (rejecting umbrella standing).

[90] *See Gypsum,* 350 F.3d at 627 ("A cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel's members."); Beef Indus., 600 F.2d at 1171 n.24 (holding, in a monopsony price-fixing case where plaintiff cattle ranchers argued defendant retailers' conspiracy deflated meat prices, that "[i]t is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.").

[91] *See Mid-West Paper*, 596 F.2d at 583 ("[The plaintiff] is not in a direct or immediate relationship to the antitrust violators: The defendants secured no illegal benefit at [the plaintiff's] expense; their tainted gains were reaped from those firms to which they actually sold their products; and [the plaintiff's] added costs, if any, were pocketed by defendants' competitors, who presumably were free to charge a lower price if they so desired."). The Third Circuit's interpretation of "directness" as implicating direct interaction is further illustrated by the court's frequent analogies to *Hanover Shoe* and *Illinois Brick*. *See id.* at 584–86 (citing Ill. Brick Co. v. Ill., 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)).

ble because "umbrella" plaintiffs do not purchase directly from the cartel.[92]

The Third Circuit is the only Circuit that has rejected umbrella standing.[93] Its peers concluded antitrust violators *do* harm umbrella plaintiffs directly.[94] These other Circuits stated that the "directness" prong of *Associated* asks whether an antitrust violation directly affects a plaintiff or whether the plaintiff's injury is indirect because it derives from harm done to another.[95] They concluded that a cartel engaging in price-fixing affects the *market* price, not solely the prices its own members charge.[96] The elevated market price, under this majority view, directly affects any consumer who purchases from any seller in the market. Thus, the majority of U.S. Circuit Courts to consider umbrella standing concluded it involves no injury derived from another's injury.[97]

Regardless of whether the Third Circuit's disapproval of umbrella standing was correct or mistaken, its reasoning was insightful. The court believed such standing would threaten defendants with damage awards large enough to injure competition.[98] The word "ruinous" and the phrase "cripple a defendant"

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[92] *Mid-West Paper*, 596 F.2d at 583.

[93] *Id.*

[94] *See supra* note 89.

[95] *Id.*; *see also* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 540–41 (1983) ("An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market . . . contains several somewhat vaguely defined links. . . . It is obvious that . . . [the plaintiff's] injuries were only an indirect result of whatever harm may have been suffered by . . . construction contractors and subcontractors.").

[96] *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 337.3 (Supp. 1992); Page, *supra* note 2, at 1465–67 ("When a cartel controls less than the entire market, the competitive nonmembers will increase output until their marginal costs equals the cartel price. Thus, their output reduces the market power of the cartel by increasing the elasticity of the cartel's residual demand function. At the same time, they will recover an 'overcharge' from their consumers by selling at the cartel price. This has been termed the umbrella effect of a cartel. . . . [T]he overcharge to consumers clearly is caused by the output restriction and is therefore antitrust injury." (footnotes omitted)).

[97] *See* Gelboim v. Bank of Am. Corp., 823 F.3d 759 (2d Cir. 2016).

[98] *Mid-West Paper Prod. Co.*, 596 F.2d at 586-87.

> "Moreover, to permit a purchaser from a competitor of the defendants to sue for treble damages would appear to be incompatible with the antitrust goal of maintaining a competitive economy. Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits, because under the theory . . . price fixers would be held accountable for higher prices that arguably ensued in the entire industry. Notwithstanding the seriousness of the [p]er se violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws. In this regard, it should be noted that Congress has enacted relatively stiff criminal penalties to punish those who flout the antitrust laws, that the Supreme Court has been especially reticent in sanctioning multiple treble damage recoveries for the same injury, and that other

suggest concern over a collapse of defendants' enterprises.[99] Thus, the Third Circuit recognized the threat of anticompetitive remedies in its ruling on umbrella standing. This Article's proposed change to the law of antitrust standing would vindicate the Third Circuit's apprehension of "ruinous" damages.

## IV. RAISING THE STANDING BAR IN EXCEPTIONAL CIRCUMSTANCES

If antitrust is focused on enhancing consumer welfare, it must not place its imprimatur on litigation that would harm that welfare. At present, there is no statutory provision limiting the damages a jury may award when the defendant's failure may substantially reduce competition. Absent such a provision, courts should continue to develop the law of antitrust standing so that it more effectively advances its objective: preventing plaintiffs from using the antitrust laws to injure competition. At present, courts hold that plaintiffs have antitrust standing if an anticompetitive aspect of the alleged conduct caused their injuries. This requirement is insufficient because it fails to capture plaintiffs seeking anticompetitive remedies; plaintiffs may suffer injuries antitrust laws aim to prevent, yet seek redress through a means harmful to competition.[100]

Plaintiffs should only have antitrust standing if: (1) an anticompetitive aspect of the alleged conduct caused their harm, *and* (2) they are not pursuing an anticompetitive remedy. Courts should embrace a three-factor test when evaluating the remedy: (1) Do the plaintiffs seek damages large enough to send the defendant into bankruptcy? (2) Is the defendant's industry one in which competition may be substantially injured[101] if the defendant were to enter bankruptcy? (3) Has the government already prosecuted or sued the defendant for the alleged antitrust violations at issue? The first prong recognizes the general risk that high damage awards can pose to competition. The second and third prongs would severely limit the scope of the rule in order to address objections that critics of further limits upon standing might propose.

The second prong ensures that courts would not deny a plaintiff standing if a bankruptcy is unlikely to substantially injure competition. One might object to limiting standing due to the size of a plaintiff's damages on grounds that a de-

> courts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." (footnotes omitted).

*Id.*

[99] *Id.*

[100] *See* sources cited *supra* notes 71–79 and accompanying text.

[101] The "may be substantially injured" standard comes from section 7 of the Clayton Act. 15 U.S.C. § 18 (2012). It is used here for simplicity and familiarity's sake. Because federal courts have already developed an extensive body of common law in considering DOJ and FTC merger challenges, using the same legal standard in this context may encourage courts to adopt parts of the common law of mergers, if necessary, when evaluating arguments relating to this standing objection.

fendant's failure would not necessarily injure competition. Such an objection would have merit. Because industries can indeed be competitive enough to experience no real diminution of competition from a seller's failure, the second prong of this test would mandate that courts examine an industry's structure and conclude that consumer welfare may be substantially injured before denying standing on the basis of damages. Antitrust has no reason to protect a defendant from private litigation if his failure would not adversely affect consumer welfare.

Determining the consequences of a firm's demise is familiar territory for the federal courts. They regularly analyze how changes in an industry's structure may affect competition when they adjudicate Federal Trade Commission (FTC) and Department of Justice (DOJ) merger challenges.[102] Whether an industry is highly concentrated or has low barriers to entry are routine considerations in such cases.[103] The federal courts would engage in a very similar analysis in deciding whether the dismantling of a defendant might substantially injure competition.

The third prong is critical because without it, the test would weaken deterrence of antitrust violations. Antitrust requires violators to compensate their victims in order to dissuade others from committing future violations.[104] The most potent objection one could make to limiting standing on the basis of damages is that the law might incentivize law-breaking by making antitrust violations profitable if it protected firms from having to pay the full amount of their ill-gotten gains whenever doing so would cause their insolvency. For example, if Compa-

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[102] *See, e.g.*, F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 714–18; 2010 MERGER GUIDELINES, *supra* note 10.

[103] *See supra* note 102.

[104] While compensating parties for their own injuries is an antitrust goal, it is a less important one than deterrence. RICHARD A. POSNER, ANTITRUST LAW 266 (2d. ed. 2001) ("The basic objective of a remedial system is to deter people from violating the law. Another objective is to compensate the victims of the violators, but this is subsidiary because a well-designed system of deterrence will reduce the incidence of violations to a low level . . . ."). In addition, the Supreme Court's holding in *Illinois Brick Co.* exemplifies how the Court has attached greater weight to the deterrence objective. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). It held only a direct purchaser of a product whose price was elevated due to an antitrust violation may sue for the overcharge. *Id.* The Court reasoned that although indirect purchasers suffered an injury, allowing them to sue would immensely complicate antitrust litigation and weaken its deterrent power. *See id.* at 736–48 (Although "it is true that, in elevating direct purchasers to a preferred position as private attorneys general, the Hanover Shoe rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."); Gregory J. Werden & Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 638 (1984) ("While we agree with Professor Landes and Judge Posner, and the Illinois Brick majority, that deterrence is far more important than compensation, we must also agree with Professors Harris and Sullivan that Illinois Brick runs counter to the goal of compensation. It seems clear that in most cases indirect purchasers suffer significant injuries from upstream price-fixing due to passing-on, yet under Illinois Brick they cannot recover for their injuries.").

ny A was worth $5 billion and caused antitrust damages of $3 billion to class action plaintiffs, Company A would likely go bankrupt if the plaintiffs succeeded and their damages were trebled. If plaintiffs lacked standing, however, the defendant would keep the $3 billion it gained by violating the antitrust laws. Thus, denying private plaintiffs standing if they pursue bankruptcy-inducing damages might encourage a prospective violator to "go big." If the harm it inflicted were large enough, the law would grant it an immunity of sorts.

The third prong addresses this risk and attempts to strike a reasonable balance between ensuring continued deterrence and protecting industry competitiveness. It would only allow a court to deny a private plaintiff standing on the basis of his remedy if the government has already targeted the defendant through a criminal or civil antitrust action. The FTC and the DOJ have a broad array of tools they may use to deter future behavior and undo harm already caused. The DOJ may criminally prosecute antitrust violators and both the FTC and DOJ may seek equitable relief, including injunctions, penalties, and disgorgement.[105] Thus, government activity against a defendant can ensure sufficient deterrence.

At present, government enforcers often assume private treble damage actions will follow their enforcement actions and add to the deterrent effects of whatever remedies the government obtains.[106] This knowledge affects their enforcement behavior, including the type and strength of the remedies they pursue and the settlement amounts to which they are willing to agree.[107] Because private litigation would be precluded if the three prong test herein proposed is satisfied, government agencies would need to use the full array of remedies at their disposal in order to minimize whatever reduced deterrence might result from the absence of private litigators.[108] For example, while the DOJ appears to have the

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[105] *See* Stephen Calkins, Civil Monetary Remedies Available to Federal Antitrust Enforcers, 40 U.S.F.L. REV. 567, 567–78 (2006).

[106] *Id.*

[107] *Id.* at 570 ("In truth, we have a strange system for punishing persons who commit civil antitrust violations . . . . In the United States a federal government civil enforcement action typically ends with an injunction, usually by consent, that prevents future violations, and it is assumed that private and state damages actions will extract sufficient money from the wrongdoer to compensate victims and adequately deter other violations. The government plays the role of the volleyball setter, leaving for others the more glamorous (and lucrative) spiking.").

[108] To be clear, the fundamental question is not whether the antitrust agencies' current practices suggest they would achieve sufficient deterrence, but rather the extent to which each agency has statutory authority to seek sufficiently strong remedies. Currently, the law is unclear about the extent of the agencies' remedial powers. For example, there is substantial criticism regarding the limited extent to which the U.S. Sentencing Guidelines allow the U.S. Department of Justice to seek remedies sufficient to adequately deter antitrust violations. Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L. J. No. 2 (2011).

> "*Although subject to reservations and some ambiguity*, it *appears* that both law and practice base the fine on something closer to a fixed fraction of firms' revenues in the affected markets, with little or no adjustment to reflect the actual price elevation. Although motivated on grounds of simplicity, this ap-

power to seek disgorgement of a defendant's ill-gotten gains, it has not actively pursued disgorgement.[109] If a particular plaintiff or plaintiff class were unable to engage in private litigation because of the potentially anticompetitive risks inherent in their desired remedy, the DOJ would arguably have good reason to reexamine disgorgement as a remedy capable of picking up the "slack" the absence of private litigation might entail.[110]

The third prong also harmonizes this proposed standing rule with the spirit of existing law by recognizing that the most efficient enforcer under these circumstances is the government. The "most efficient enforcer" language is used very loosely here. *Associated* was concerned with proximate causation questions[111] and antitrust standing doctrines apply to private parties, not the government.[112] The standing question here does not involve proximate causation and centers on whether the government would constitute a better enforcer than a private party. On the other hand, *Associated* suggests—broadly speaking—that only those persons in the best position to advance the interest of competition

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> proach seems surprising in light of the huge variation in overcharges across cases. Accordingly, setting to the side other penalties . . . deterrence is likely to be highly inadequate when large overcharges occur since fines will be less than firms' profits, even ignoring any probability discount."

*Id.* (emphasis added) (footnotes omitted). However, the Supreme Court has held that the U.S. Sentencing Guidelines are discretionary and both the Federal Trade Commission and the Department of Justice appear to have authority for seeking stronger remedies than they typically pursue at present. *See* United States v. Booker, 543 U.S. 220 (2005); Calkins, *supra* note 105; sources cited *infra* note 115.

[109] Calkins, *supra* note 105, at 596–97 ("One other way that additional deterrence could be achieved would be for the Antitrust Division to seek to establish its right to obtain equitable relief just as the FTC does. The Justice Department appears to have taken the position, in the context of litigating disgorgement under RICO, that the Sherman Act's empowering of district courts 'to prevent and restrain violations' of the Act authorizes the courts to award disgorgement to the government. Others agree. Depending on how litigation of related issues progresses through the courts, the Antitrust Division might decide to act on this view." (footnotes omitted) (citation omitted)).

[110] *See id.* at 567–78.

[111] In the opening paragraph of the section listing the efficient enforcer factors, the Court clarifies that the test relates to proximate causation. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–37 (1983).

> "There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances."

*Id.*

[112] Blair & Harrison, *supra* note 4, at 1552.

should be able to do so.[113]

The FTC and DOJ are the best enforcers of the antitrust laws when private litigation may substantially injure competition. They are far less likely than a private litigant to seek an anticompetitive remedy. While a private party is incentivized to maximize the amount of his or her recovery, the government faces no such pressure[114] and has extraordinary discretion in deciding what mix of remedies are most appropriate to protect the public interest.[115] In this situation, the private party's incentive to maximize damages endangers the public interest. On the other hand, the government, tasked with protecting competition, could pursue a mix of remedies that would deter anticompetitive behavior without endangering competition.[116] For example, the government could combine fines amounting to less than a defendant's market capitalization with criminal prosecutions. Thus, when private litigation may substantially impair competition, antitrust enforcement is best left to the government agencies.

In addition, the presence of a government enforcer greatly simplifies the complex relationship between antitrust and bankruptcy law. Even if a firm's exit from a market may substantially impair competition, it is unclear, absent bankruptcy proceedings, whether it will actually do so. That is because the effect of a firm's bankruptcy on competition depends, in part, on what happens to its assets in the bankruptcy sale.[117] Will a monopolistic competitor with a 90% share of the market purchase its assets? Will a business not currently in the market purchase them and effectively replace the failed defendant? Will the defend-

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[113] *See Associated Gen. Contractors*, 459 U.S. at 542 (1983) ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general. Denying the [Plaintiff] . . . a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or remedied."); Page, *supra* note 2, at 1445–46 ("[S]tanding analysis must confine recovery to a narrower group of plaintiffs. To do so, a court must identify the probable classes of plaintiffs for the practice in question and limit the right to recover to the classes . . . whose harm most closely corresponds to the optimal penalty or whose harm is least costly to calculate and involves the smallest risk of error. . . . [In *Associated*,] the Court explicitly recognized the comparative nature of standing inquiry . . . . ").

[114] *See* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2138–55 (2004); John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 236–61 (1983).

[115] *F. Hoffman-LaRoche Ltd., v. Empagran S.A.*, 542 U.S. 155, 170–71 (2004) ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission . . . . '[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.'"); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 325 (2014).

[116] *See* Rubenstein *supra* note 114.

[117] *See infra* notes 120–23 and accompanying text.

ant's market share in an already concentrated market shrink after a reorganization because its assets have been split apart and sold to different purchasers in other industries? Any of these situations are possible.[118] While federal courts often evaluate whether competition *may* be substantially impaired by engaging in a merger-law analysis, they cannot predict this with certainty.[119] In this case, that would require knowing who would eventually buy or possess what assets from a trustee or debtor in possession—an impossible task.[120]

However, so long as the government agencies confront the antitrust violation, such guesswork is unnecessary. If the FTC and DOJ are addressing the defendant's behavior, then denying the private litigant standing would strike the optimal balance: the *threat* of the anticompetitive remedy would be removed and deterrence of future anticompetitive activity would be ensured.

Furthermore, it would be far better policy for the FTC and DOJ to litigate antitrust violations before an Article III judge than to clean up the anticompetitive consequences of private litigation in bankruptcy court. Bankruptcy is a notoriously difficult playing field for the antitrust agencies. The rapid pace of bankruptcy sales and proceedings places enormous strain on Hart-Scott-Rodino reviews and undermines the agencies' effectiveness.[121] It is also more efficient for defendants to see their competition law problems resolved outside of bankruptcy. The "fire sale" nature of bankruptcy makes a Hart-Scott-Rodino review even more financially onerous for its subjects.[122] In short, antitrust and bank-

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[118] *See* Stephen M. Axinn, *Merger Review and Litigation Involving the Acquisition of Bankrupt Companies*, 16 ANTITRUST 74, 74–75 (2002). The crippling of a defendant's ability to compete in a concentrated market after its assets are sold *out of the market* is perhaps most concerning. *Id*. The agencies already may enjoin the bankruptcy sale of a bankrupt defendant's assets to its competitors within a concentrated market. *Id*. However, it would nevertheless be in the interest of the defendant and the agencies if competition law issues were fully resolved without the defendant falling into bankruptcy. *Id.*; *see infra* notes 120–23 and accompanying text.

[119] *See infra* notes 120–23 and accompanying text.

[120] ERIC E. SAGERMAN, PATRICK A. MURPHY, & DAVID NEIER, CREDITORS' RIGHTS IN BANKRUPTCY § 5:2 (2d ed. 2016). There are many reasons for this. Creditors may not have pursued or sought to collect on their claims until a bankruptcy court issued the stay order. *Id*. Parties may also contest the validity of a debtor's claimed exemptions or a creditor's security interests. *Id.* Thus, what assets might remain with the debtor or be delivered to a secured creditor can be unclear prior to bankruptcy proceedings. *See* HOWARD J. STEINBERG, 1 BANKRUPTCY LITIGATION §§ 5:3, 6:8 (2016).

[121] Max Huffman, *World's Colliding: Competition Policy and Bankruptcy Asset Sales*, 60 VILL. L. REV. 839, 841–42 (2015) ("[A]s the term *fire sales* suggests, mergers and acquisitions in bankruptcy proceed at a much accelerated pace. Observers frequently speak of the 'need for speed' or of concerns for a 'melting ice cube.' Where antitrust review is protected in bankruptcy, the enforcement agencies are given a shorter period to analyze the transaction and to take steps to oppose it before the parties close. That same speed is anathema to meaningful antitrust review. . . . These . . . effects combine to produce a likelihood of under-enforcement of antitrust laws relative to the optimum, with the danger that economic decline in an industry will produce an inefficient industry structure leading to broader economic harms." (footnotes omitted)); Axinn, *supra*, note 118, at 74.

[122] *See* David B. Stratton & Barbara T. Sicalides, *Bankruptcy and Antitrust Law: What You*

ruptcy law make terrible bedfellows. They were not meant to intersect and should be kept apart where possible.[123]

## V. CONCLUSION

If the law of antitrust standing aims to further antitrust objectives, it should include a rule that would prevent private treble damage actions from damaging the fabric of competitive industry. It is wrong to assume that treble damage actions, by raising the costs of antitrust violations, necessarily have pro-competitive implications. They may not. Courts should deny private parties standing if their desired remedy may substantially injure competition and if public enforcers are already on the scene. Courts must continue to refine the rules of antitrust standing if antitrust litigation is to promote competition as consistently and effectively as possible.

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*Don't Know Can Hurt You*, AM. BANKR. INST. J., 34, 35 (2004) ("Frequently, when the government opposes a transaction, the parties will abandon it rather than fight the government's injunction action. Indeed, in the 10-year period from 1982-91, 46 bankruptcy transactions were abandoned in the face of the government's opposition. Because the initial purchaser likely was the high bidder for the bankrupt's assets, an abandonment of the transaction generally will result in a smaller purchase price and, thus, a reduced value to the bankruptcy estate.")

[123] *See id.* at 34 ("Antitrust laws and bankruptcy laws have different goals. Generally, the antitrust laws seek to encourage competition, eliminate monopolies and guard against transactions that create market power. . . . The bankruptcy laws, on the other hand, seek to maximize the value of the bankruptcy estate and to return the assets of the bankrupt entity to the marketplace as quickly as possible, regardless of its effect on competition . . . . [This conflict is illustrated in the Hart-Scott-Rodino process. An] acquiring party is . . . required to pay a filing fee ranging from $45,000 to $280,000, depending on the value of the transaction. Even just this step, the filing itself, clearly affects the goals of the bankruptcy laws. Not only is there a mandatory waiting period that acts to slow the transfer of assets from the bankruptcy estate, but even if the government ultimately approves the transaction, the cost to the purchaser will be increased by up to $280,000 plus transaction expenses, money that otherwise might have gone to the bankruptcy estate."); James M. Spears, *Federal Merger Enforcement in Bankruptcy*, 6 ANTITRUST 19, 19–20 (1992) ("[T]ensions [between bankruptcy and antitrust] are exacerbated by the fact that each regime is designed to accomplish very different objectives . . . [t]here appears to be no consensus in the legal community about how the premerger review provisions of Section 7A should interface with the highly structured processes of bankruptcy.").