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Chapter 91

PRUDENTIAL LIMITATIONS ON PRIVATE U.S. ANTITRUST ENFORCEMENT

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The U.S. federal antitrust laws have always provided for private enforcement, including a right to recover treble damages, and private antitrust plaintiffs have been referred to frequently as "private attorneys general" for their role in enforcing federal competition policy. Yet, despite the breadth of the provisions creating a private right of action, courts have implied limits on the range of parties and claims that are subject to private enforcement based on concerns such as remoteness, speculation, or the potential for duplicative recovery. This chapter traces the history of these limitations, addresses the various issues that inform the implementation of prudential (or policy-based) standing limitations, and offers some thoughts about how standing rules should be applied to align private actions more closely to a public enforcement model.

1. Introduction

Private enforcement has been an essential part of American antitrust law since its inception. However, just as the substantive provisions of American antitrust statutes provide scant guidance to their meaning and in some respects cannot mean what they say,[1] the statutory language granting a private right of action has required judicial limits, among them the doctrine of antitrust "standing." That concept is vaguely related to the Article III "case or controversy" requirement.[2] However, its true antecedents are common-law principles of proximate cause, foreseeability, and remoteness.[3] Its closest siblings are the rules requiring proof of antitrust injury,[4] the *Illinois Brick* doctrine that forbids overcharge claims in federal court by indirect purchasers,[5] and the prohibition against recovery of speculative damages.[6]

Antitrust standing in its strictest sense (and the sense used here) is a narrow concept. It is distinct from the requirement that a plaintiff prove "antitrust injury," which requires a plaintiff to demonstrate that its alleged harm is functionally related to the reason why

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1. *E.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 (1978); Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see also* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 52 (1985) (describing the antitrust laws as "enabling legislation").
2. *See, e.g.*, Sanner v. Bd. of Trade, 62 F.3d 918, 926 (7th Cir. 1995).
3. Associated Gen. Contractors of Cal. v. Cal. St. Council of Carpenters, 459 U.S. 519, 532-33 (1983) (*AGC*).
4. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
5. Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977).
6. Bigelow v. RKO Radio Pictures Corp., 327 U.S. 251, 264 (1946); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 382-83 (7th Cir. 1986).

particular conduct is considered anticompetitive.[7] "Standing" often is improperly taken to include the separate requirements of "injury in fact,"[8] "causation in fact" (as opposed to "proximate" causation, which *is* a standing issue),[9] and the existence of harm to "business or property."[10] Finally, courts not infrequently dismiss claims for lack of standing or lack of antitrust injury when the claim more fundamentally does not support an antitrust offense to begin with.[11]

All those principles are relevant to private enforcement, but they are properly analyzed on their own grounds. The concept of antitrust standing is best reserved for the separate question of when courts should decline to entertain a private antitrust claim that, *as a matter of enforcement policy*, (1) asserts a viable antitrust offense that (2) has caused (3) injury-in-fact to the (4) business or property of the plaintiff, and the injury (5) is "of the type the antitrust laws were intended to prevent" and "flows from that which makes the defendants' acts unlawful."[12]

The broader question that antitrust standing implicates is the extent to which it and other principles affecting private enforcement advance the substantive goals of antitrust.[13] That subject is particularly difficult because those goals themselves are much debated and have evolved substantially over time. Moreover, one size does not remotely fit all when it comes to alleged antitrust offenses, yet the statute authorizing private actions paints with a categorical brush. Meanwhile, the conduct that we wish to deter often looks very much like the conduct we wish to encourage, and treble damages often seem to end up in hands other than those most deserving of compensation.[14]

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7. *Brunswick*, 429 U.S. at 489.
8. *E.g.*, *AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148, 1151 (6th Cir. 1975).
9. *E.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 996 (D.C. Cir. 1977); Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981), *aff'd*, 807 F.2d 520 (7th Cir. 1986).
10. *E.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("A consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of § 4.").
11. PHILLIP AREEDA, HERBERT HOVENKAMP & ROGER D. BLAIR, ANTITRUST LAW ¶ 335f, at 297-99 (2d ed. 2000) [hereinafter AREEDA].
12. Jon Jacobson and Tracy Greer have suggested abandoning the term "standing" and replacing it with more precise terms such as "causation, remoteness and antitrust injury." Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273, 295-96 (1998). This is a worthwhile suggestion since analytic confusion often can be traced to semantic imprecision. Nonetheless, this chapter uses the conventional terminology and strives to provide sufficient clarity to avoid adding to the terminological confusion that surrounds this issue. (This chapter's use of the term "standing" corresponds most closely to "remoteness" as described by Jacobson and Greer.)
13. William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1447 (1985) ("[U]nless treble damages are related to the basis of substantive liability, they may deter efficient business relationships."); *see also* RICHARD A. POSNER, ANTITRUST LAW 266 (2d ed. 2001).
14. Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4-9 (1984); *see also* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("[I]t seems to us as a practical matter most difficult to distinguish in any particular case between a firm that is cutting price to 'discipline' or to displace a rival and one cutting price 'better to compete.'").

This chapter proceeds as follows. Section 2 traces the history of the antitrust standing doctrine from its early years to 1977, while Section 3 examines the dramatic subsequent changes in standing law in the wake of the Supreme Court's seminal antitrust standing opinions in *Brunswick*, *Illinois Brick*, *McCready*, and *Associated General Contractors* (*AGC*). Section 4 then addresses the various issues that inform the implementation of prudential (or policy-based) standing limitations in the wake of the multifactor *AGC* decision and developments in substantive antitrust policy. Section 5 concludes with some thoughts about how standing rules should be applied to align private actions more closely to a public enforcement model, thus truly establishing treble damage plaintiffs as "private attorneys general."

2. The development of antitrust standing law

2.1. Private enforcement and the original intent

Both private enforcement and the debate over its dimensions and limits have been part of American antitrust law since its earliest days. Section 7 of the Sherman Act as originally enacted provided that

> [a]ny person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefore in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.[15]

It is generally accepted that the Sherman Act was not intended to create an entirely new set of legal principles governing the law of competition but was meant to adopt at least a version of common-law notions of improper trade restraints.[16] Senator Sherman himself noted that his bill did not "announce a new principle of law" but rather "applie[d] old and well recognized principles of the common law" governing monopoly and other analogous restraints.[17] That same intent appears to have underlaid the private damages remedy, although nearly a century later the majority and the lone dissenter in *AGC* disagreed fundamentally about just what those principles actually were.[18]

The issue of private enforcement generated little or no contention either during the original debates over the Sherman Act or when the remedial provisions were reenacted

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15. 26 STAT. 210 (1890); *see also* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 530 (1983).
16. *See AGC*, 459 U.S. at 531-35. Although the Supreme Court expressed that view in *AGC*, a number of commentators suggest that it is oversimplified. *See, e.g.*, POSNER, *supra* note 13, at 34-35 ("The draftsman of the Sherman Act borrowed common-law terminology, but without meaning to codify the common law of competition and monopoly."); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 36-37 (1966) [hereinafter Bork, *Legislative Intent*]; William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 384-85 (1954).
17. 21 CONG. REC. 2456 (1890), *quoted in AGC*, 459 U.S. at 531.
18. *Compare* 459 U.S. at 532-33 & nn.24-28, *with id.* at 547-49 & nn.2-5, discussed *infra* in Section 3.4.

as part of the Clayton Act in 1914 and 1955.[19] However, important antitrust scholars such as Judge Robert Bork[20] and Herbert Hovenkamp[21] subsequently have mined the legislative history of the statute and found support for their respective views regarding the purpose of the provision, including identifying its "protected classes."[22] Bork sees the primary concern of the Sherman Act as "allocative efficiency" and decreased output resulting from monopoly, although those are not the terms he uses.[23] He also claims that Congress had little concern for the protection of competitors.[24] Hovenkamp, by contrast, criticized Bork's reading as "heavily influenced by his own ideological agenda"[25] and "strained."[26] In his view, Congress was concerned with "competition" in the sense of "rivalry," as opposed to an anachronistic concept of "a state of affairs in which price equals marginal cost."[27] With regard to private enforcement, Hovenkamp asserts that not only were competitor interests considered relevant but "everyone agreed that competitors should be entitled to sue" to enforce the new act, particularly inasmuch as Congress believed that consumer lawsuits were unlikely to be successful.[28]

2.2. Judicial development of antitrust standing principles

During the first half century of the Sherman Act and its Clayton Act amendment, private antitrust litigation was far less important than government enforcement.[29] By 1975, however, private suits were ten times more common than public enforcement actions.[30] That disparity remains today.[31]

Questions regarding appropriate enforcement arose at a relatively early date and before long the courts were debating limitations to be imposed on the broad language of

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19. *See generally* S. REP. NO. 84-619 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2328; H. REP. NO. 84-422 (1955).
20. Bork, *Legislative Intent*, *supra* note 16, at 47; *see also* ROBERT BORK, THE ANTITRUST PARADOX chs. 1 & 2 (2d ed. 1993).
21. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21-30 (1989) [hereinafter Hovenkamp, *Protected Classes*]; *see also* Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1038-39 (1989).
22. Hovenkamp, *Protected Classes*, *supra* note 21; *see also* Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 67, 150 (1982); George J. Stigler, *The Origins of the Sherman Act*, 14 J. LEG. STUDIES 1, 5-7 (1985).
23. Bork, *Legislative Intent*, *supra* note 16, at 26-31, 33, 36, 39.
24. *Id*. at 10-13, 30-31, 39-43.
25. Hovenkamp, *Protected Classes*, *supra* note 21, at 22.
26. *Id*.
27. Hovenkamp says that such a concept did not exist in the economic literature of 1890, but acknowledges that "the basic concept of marginal cost . . . was known in the economics literature by 1890." Hovenkamp, *Protected Classes*, *supra* note 21, at 23 n.62 (citing A. MARSHALL, PRINCIPLES OF ECONOMICS 151-75 (8th ed. 1938)).
28. Hovenkamp, *Protected Classes, supra* note 21, at 23-27.
29. *See* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809, 809 n.1 (1977); Richard Posner, *A Statistical Study of Antitrust Enforcement*, 15 J.L. & ECON. 365, 370-74 (1970).
30. *Id.* (citing 1975 ANN. REP. OF DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS 212).
31. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 444, Table 5.41 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2003), *available at* http://www.albany.edu/sourcebook/pdf/t541.pdf.

Section 7. An important early case was the Third Circuit's 1910 decision in *Loeb v. Eastman Kodak Co.*,[32] which held that stockholders could not sue for competitive injuries suffered by their corporation since those injuries were "indirect, remote, and consequential," terms that sound remarkably current nearly a century later. The previous year, the circuit court for Massachusetts likewise had disallowed recovery for an illegal acquisition that had rendered the plaintiff's stock worthless, on the grounds that any such recovery would duplicate the recovery potentially available to the company itself, thereby "subject[ing] the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act."[33]

In short, the courts promptly recognized that the remedial provisions of the new Sherman Act could no more be read literally than could the substantive provisions of Section 1 that proscribed "every contract" that restrained trade.[34] The problem was not with that intuition, but with defining and applying those limits, a concern well known to the common law. Cases decided well before passage of the Sherman Act had struggled to explain and apply the concepts of proximate cause, foreseeability, and speculation as limits on tort damages recoveries.[35]

The debate over what we now call antitrust standing focused initially on the issue of "direct" injury. For example, the absence of such injury was what led the court to dismiss the stockholder claims in *Loeb*. According to Berger and Bernstein, "[t]he law of antitrust standing has developed largely by elaboration of the direct injury rule,"[36] a principle they claim was "illegitimate"[37] both in ancestry[38] and logic,[39] yet had become "the sine qua non of antitrust standing" by the 1950s.[40] That standard, in turn, led not

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32. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (1910).

33. Ames v. AT&T, 166 F. 820, 823 (1909).

34. This view was far from universal. A number of early cases granted standing to employees, agents, and the like. *E.g.*, Vines v. Gen. Outdoor Advert. Co., 171 F.2d 487, 490 (2d Cir. 1948) (L. Hand, J.); Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942).

35. *E.g.,* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 351-52 162 N.E. 99 103 (1928) (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depends in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."); *see also* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 535-36 nn.32 & 34 (1983). An important further point about these early cases is that while the new statute was designed to deter antitrust offenses through the prospect of a punitive monetary sanction (which, in turn, encouraged aggrieved parties to file suit), courts viewed the private damages action principally as a system of compensation, which was consistent with the asserted common law underpinnings of the Sherman Act. Leading commentators on the law of torts and damages at the time, such as Sutherland and Cooley, whose writings were expressly relied upon by the Supreme Court in *AGC*, 459 U.S. at 532-33 & nn.24-26, were proponents of a sharp distinction between the remedial function of private law and the punitive or deterrent role of public law. AREEDA, *supra* note 11, ¶ 335d, at 292 n.31. The notion of private treble damage seekers as "private attorneys general" erodes that distinction.

36. Berger & Bernstein, *supra* note 29, at 813.

37. *Id.* at 813-19.

38. *Id.* at 842-43.

39. *Id.* at 818.

40. *Id*. The authors identify Learned Hand's opinions in *Bookout v. Shine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958), *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955),

only to a variety of different articulations and approaches, but to a range of largely irreconcilable decisions "among courts using the same approach."[41] Courts variously asked whether the plaintiff had suffered a "direct"[42] or a "foreseeable"[43] injury, whether it was within the "target area"[44] of the violation, or whether it came at least arguably within the "zone of interests"[45] threatened by the challenged conduct.

The problem with these approaches and articulations was not that they were mistaken or that they did not address important issues for determining when a particular plaintiff should be permitted to sue. Rather, the problem was that they were empty semantic vessels capable of accommodating any number of competing views about the appropriateness of standing in particular situations. They also had a substantial capacity to misdirect the analysis. Asking whether a particular injury is "direct" may imply a requirement of privity, which is more or less what *Hanover Shoe*[46] and *Illinois Brick* require.[47]

However, directness has no relevance when the plaintiff is a competitor. Similarly, asking whether a particular plaintiff is within the target area of a violation may seem to imply a test based on intent. Yet, regardless whether a purpose to harm a particular firm or class of competitors or consumers may shed light on whether members of the target class are appropriate enforcers, intent to harm is not necessary to confer standing. Nor does asking whether a particular plaintiff is within the target area or the zone of injury identify the criteria a court should apply. In that respect, such "tests" are no more useful and no more precise than asking the familiar common law question of whether an asserted offense was the *proximate* cause of the plaintiff's injury as opposed to being *too remote* to support a damage claim.

These formulations thus generated considerable concern that the lack of consistency was unfair to litigants. They thereby undermined efficient private antitrust enforcement.[48] In that context, the Supreme Court finally attempted to bring order to the

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and *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), as the "principal" decisions endorsing the direct injury rule as "the essential test of standing." *Id.* at 818 n.38.

41. *Id.* at 820-35 (citing cases).
42. *E.g.,* Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-95 (6th Cir. 1962); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955).
43. *E.g.*, Mid-West Paper Prods. Co. v. Cont'l Group, 596 F.2d 573, 597 (3d Cir. 1979); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964).
44. *E.g.*, Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18 (1st Cir. 1979); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127-29 (9th Cir. 1973); Calderone Enters. Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292-95 (2d Cir. 1971).
45. *E.g*., Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148, 1151-52 (6th Cir. 1975).
46. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
47. Discussed *infra* in Section 3.2.
48. *See generally* Kevin O. Gordon, *Private Antitrust Standing: A Survey and Analysis of the Law After Associated General*, 61 WASH. U. L.Q. 1069 (1984); Berger & Bernstein, *supra* note 29; Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 27-31 (1971); Earl Pollock, *Standing to Sue, Remoteness of Injury and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 9-11 (1966).

issues surrounding private enforcement, beginning in 1977 with *Brunswick* and *Illinois Brick* and culminating in the early 1980s with *McCready* and *AGC*.

3. Reassessing the private enforcement paradigm: From *Brunswick* to *AGC*

Arguably, 1977 was the most important year in the history of American antitrust law.[49] The Supreme Court decided *Sylvania*,[50] which fundamentally reoriented competition policy away from the political/populist focus of the preceding two decades to an approach rooted firmly in markets and economics.[51] The Court also held in *Brunswick* that since the antitrust laws are concerned with effects on competition, the alleged offense must fit the alleged consequences.[52] Finally, in *Illinois Brick*[53] the Court adopted a bright-line rule that treble damages claims for price fixing may not be brought by plaintiffs who did not purchase the price-fixed products from the defendants or a coconspirator.

The *Brunswick* and *Illinois Brick* decisions did not directly involve prudential standing principles nor do they adequately address issues such as remoteness, misaligned enforcement incentives, duplication, or speculativeness. Nonetheless, they aided the development of antitrust principles by contributing to the evolving analysis of the appropriate bases for (and limits on) private liability, an analysis that the Supreme Court continued in two later cases, *McCready* and *AGC*. They form a foundation for thinking about standing in normative terms.

3.1. Brunswick

In *Brunswick*, the Court said that the

> [p]laintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.[54]

This notion was not entirely new to antitrust.[55] The Areeda treatise suggests that it is implicit in the concept of target area standing,[56] although that view, if not heroic, surely gives more content and consistency to the target area principle than it actually possessed. Nonetheless, the so-called *Brunswick* doctrine has developed as a vitally important principle for private antitrust enforcement.

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49. *See, e.g.*, Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979 (1977).
50. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
51. *Id*. at 53 n.21 ("Competitive economies have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks.").
52. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977).
53. Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977).
54. 429 U.S. at 488-89.
55. Handler, *supra* note 49, at 989. Posner pointed out in *Jack Walters & Sons Corp v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), that antitrust injury is analogous to the tort law principle of causation in fact. *Id.* at 708-09 (discussing Garris v. Scott, 9 L.R. Ex. 125 (1874)).
56. AREEDA, *supra* note 11, ¶ 337, at 309.

Unlike *Sylvania*, whose importance was perceived immediately,[57] the implications of *Brunswick* and its "antitrust injury" principle emerged far more slowly.[58] In part, that may have been a function of the particular facts of the case. The plaintiffs in *Brunswick* were bowling centers that sought to recover profits that they claimed they would have earned if certain of their competitors had gone out of business rather than being acquired in a merger that violated Section 7 of the Clayton Act.[59] While the Court acknowledged that the plaintiffs may well have been injured in fact by the contested merger, their claimed damages resulted from an *increase* in competition and thus were antithetical to the goals that the antitrust laws seek to further.[60] Therefore, those damages could not be recovered under Section 4 of the Clayton Act.

The notion that antitrust damages should not be awarded where the source of the harm is greater competition scarcely seems novel or controversial. However, the broader and more subtle point that *in every private antitrust case* there needs to be a fit between the recovery being sought and the reasons why antitrust policy is concerned about the conduct at issue has proven to be an insight with enormous importance well beyond the obvious situation at issue in *Brunswick*. However muted the early reaction to *Brunswick* may have been, courts have come to recognize the importance of its antitrust injury doctrine to the analysis of private enforcement generally.[61] In fact, if there is a problem with the doctrine as it has developed, it is overuse and misuse.[62]

Antitrust injury is "analytically distinct" from prudential standing, which is examined in a separate chapter. Unlike prudential standing, proof of antitrust injury is a prerequisite to all relief, damages, or an injunction,[63] in every private antitrust action. For much the same reason, it is properly regarded as a first-order limitation on private enforcement.[64] If there is no antitrust injury, there is no basis for any private treble damages liability. On the other hand, because the extent of liability that properly can be classified as antitrust injury often will exceed what is acceptable from the standpoint of deterrence, there is a need for a separate prudential doctrine of (and inquiry into) antitrust standing.

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57. Handler, *supra* note 49, at 980-89; Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 2 (1977).

58. *See* William H. Page & Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111, 113-14 (1992) ("Brunswick . . . had little immediate impact because even informed observers did not view it as an important decision in 1977.").

59. 429 U.S. at 480-81.

60. *Id*. at 486-89.

61. *See* Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 701 (2003) (the implications of *Brunswick* "have turned out to be much more sweeping than was seen at the time of the decision"). Page credits himself as being the first to extend the principle to all antitrust damages actions under an economic efficiency rationale. Page & Blair, *supra* note 58, at 114 (citing Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980)). Whether that claim is justified or not, Page has written extensively about the issue. For example, see the articles cited *supra* in notes 13 and 58.

62. *See* Davis, *supra* note 61, at 729-44.

63. Cargill Inc. v. Montfort of Colo., Inc., 479 U.S. 104, 111 (1986).

64. This notion is advanced and well-developed by Page in his 1985 article, *The Scope of Liability for Antitrust Violations*, *supra* note 13.

3.2. Illinois Brick

In *Illinois Brick*[65] the Court held that inasmuch as defendants were not allowed to assert the defense of passing-on in treble damages overcharge cases under its 1968 decision in *Hanover Shoe v. United Shoe Machinery Corp.*,[66] indirect purchasers were precluded[67] from maintaining a damages action under Section 4 of the Clayton Act except in exceptional circumstances.[68] As with *Brunswick*, the details of the *Illinois Brick* doctrine as it has developed and been applied in federal court are beyond the scope of this chapter.[69] Paradoxically, *Illinois Brick* was the first case in which the Supreme Court actually purported to define antitrust standing when it distinguished (without elaboration) the indirect purchaser issue before it as "analytically distinct" from the antitrust standing question of "which persons have sustained injuries too remote [from an antitrust violation] to give them standing to sue."[70]

The question of whether to preclude indirect purchasers from suit on the basis of the remoteness of their injury, of course, is precisely the type of question that antitrust standing rules are meant to address.[71] Thus, saying that the *Illinois Brick* doctrine is analytically distinct from standing is correct only in the sense that (1) it functions as a black letter principle, as opposed to being a prudential consideration to be addressed in light of other factors; and (2) was adopted as a policy-based corollary to *Hanover Shoe*'s earlier decision to eliminate a pass-on defense in order to promote more efficient enforcement.[72] A better way to have put it would be that the "indirect purchaser" doctrine is a specific application of the remoteness standing inquiry that the Court elected, for the sensible policy reasons it laid out, to subject to an absolute bar. The Court's recognition that standing issues are independent of the *Illinois Brick* rule has some potentially important and beneficial implications for effective private antitrust enforcement.[73]

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65. 431 U.S. 720 (1977).
66. 392 U.S. 481, 494 (1968).
67. 431 U.S. at 736; *see also* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 217-18 (1990).
68. 431 U.S. at 736-37. The *Illinois Brick* rule does not apply to claims for injunctive relief. *Cargill*, 479 U.S. at 111 n.6; Campos v. Ticketmaster, 140 F.3d 1166, 1172 (8th Cir. 1998); McCarthy v. Recordex Serv., 80 F.3d 842, 856-57 (3d Cir. 1996). Injunctive claims may be barred for other reasons. *E.g.*, Kendall v. Visa U.S.A. Inc., No. C 04-04276 JSW, 2005 WL 2216941 (N.D. Cal. 2005) (dismissing claim for injunctive relief).
69. As is the partial evisceration of the doctrine through *Illinois Brick* "repealer" statutes in many states, following the Supreme Court's unfortunate decision in *California v. ARC America Corp.*, 490 U.S. 93 (1989). In *ARC America,* the Supreme Court held that states are free, as a federal constitutional matter, to reject the *Illinois Brick* rule under their respective antitrust statutes notwithstanding any resultant risk of duplicative damage verdicts. *Id.* at 105-06. Also discussed *infra* in Sections 4.1.3 and 5.1.1.
70. 431 U.S. at 728 n.7.
71. Standing cases prior to adoption of the *Illinois Brick* rule had addressed remoteness. *E.g.*, Reibert v. Atl. Richfield Co., 471 F.2d 727, 729 (10th Cir. 1973); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-95 (6th Cir. 1962).
72. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).
73. Discussed *infra* in Section 5.1.4.

Illinois Brick and the Court's earlier decision in *Hawaii v. Standard Oil Co. of California*,[74] which rejected the state of Hawaii's attempt to sue for damages to its economy, also established avoiding exposure to duplicative recovery as a primary guiding principle of private enforcement.[75] That principle was the only one that all of the justices appeared to agree upon a few years later in *McCready* and *AGC*, when they considered the question of standing directly.

3.3. McCready

Having declared that *Illinois Brick* was analytically distinct from standing,[76] in 1982 the Supreme Court stated that it was addressing the standing issue in *McCready*.[77] In fact, the analysis in *McCready* turned on antitrust injury, not standing, and the Court resolved the case on antitrust injury grounds.[78] The Court thus left the development of a fully elaborated doctrine of prudential antitrust standing for another day.

McCready involved an alleged conspiracy between a physician-owned group health insurer and the Neuropsychiatry Society of Virginia to deny reimbursement for mental health services when provided by psychologists as opposed to psychiatrists. By a vote of 5-4, the Court held that an individual who was forced to pay to obtain such services from a psychologist could challenge that conspiracy as an illegal group boycott.

The Court began by noting that the "lack of restrictive language" in Section 4 of the Clayton Act reflected an "expansive remedial purpose" to "deter violators and deprive them of the fruits of their illegal actions" by providing "ample compensation to the victims of antitrust violations."[79] It also referred to its earlier description of the substantive reach of the Act in *Mandeville Island Farms* that

> [t]he statute does not confine its protections to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[80]

The Court then recognized the existence of limitations on that "comprehensive" coverage, noting that "the risk of duplicative recovery" had led it to deny a damages remedy on two occasions notwithstanding the broad language of Section 4.[81] Indeed,

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74. 405 U.S. 251 (1972).
75. 405 U.S. at 264; *Illinois Brick*, 431 U.S. at 731 (quoting *Hawaii*, 405 U.S. at 264).
76. *Illinois Brick*, 431 U.S. at 728 n.7.
77. Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).
78. *Id.* at 483-84.
79. *Id.* at 472.
80. *Id.* (quoting Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) (alteration in original)). The Court further supported its description by invoking a series of earlier cases establishing discrete classes of plaintiffs with standing, including end-use consumers, *American Society of Mechanical Engineers v. Hydrolevel*, 456 U.S. 556, 572-73 (1982) (*ASME*); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-38 (1979); foreign governments, *Pfizer Inc. v. India*, 434 U.S. 308, 312-14 (1978); and persons in pari delicto with the defendant, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).
81. *McCready*, 457 U.S. at 474. In *Hawaii v. Standard Oil*, the Court denied a state permission to sue for damages to its "general economy" both because such recovery would largely duplicate "injuries to the

whereas the Court previously had stressed the compensatory aspects of private antitrust litigation as well as deterrence,[82] the majority in *McCready* observed that in *Illinois Brick* the Court had decided to favor more "vigor[ous]" enforcement over recovery by those who most likely had been harmed in fact.[83]

All of that discussion, however, was merely the *mise en scene*. The Court described the issue actually before it as "the conceptually more difficult question" of what injuries are "*too remote"* to support "standing to sue."[84] As to that question, the Court noted that

> [a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." [*Illinois Brick*, 431 U.S.] at 760 (Brennan, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.[85]

Having identified the standing question as a matter of establishing the boundaries of remoteness, the Court promptly declared its inability to set those boundaries in any categorical sense. It excused that failure by noting the equally "elusive concept" of "proximate cause" at common law.[86] The Court, instead, identified two general issues that it would consider "[i]n applying that elusive concept to this statutory action." It would "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, 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."[87] Instead of providing any guidance regarding how to assess these rather theoretical issues, though, the Court ducked the entire lower court debate over the competing standing tests of target area, zone of interest, directness, and foreseeability by relegating them to an enigmatic footnote assertion that it had "no occasion . . . to evaluate the relative utility of any of these possibly conflicting approaches towards the problem of remote antitrust injury."[88]

'business or property' of consumers for which they may recover themselves" and because no trial could possibly cope with the complexity involved in avoiding such "double recovery." 405 U.S. 251, 264 (1972). Similarly, in *Illinois Brick,* "the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendants." *McCready*, 457 U.S. at 474. Requiring an apportionment of harms between direct and indirect purchasers "could undermine the active enforcement of the antitrust laws by private actions." *Id.*

82. *E.g.*, *Pfizer*, 434 U.S. at 313-14; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 & n.10 (1977); *Perma Life Mufflers*, 392 U.S. at 139; *ASME*, 456 U.S. at 572-73 & n.10; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Fortner Enters v. U.S. Steel Corp., 394 U.S. 495, 502 (1969).

83. 457 U.S. at 474; *see also ASME,* 456 U.S. at 572-73 ("A principal purpose of the antitrust private cause of action, *see* 15 U.S.C. § 15, is, of course, to deter anticompetitive practices.").

84. 457 U.S. at 476.

85. *Id.* at 476-77.

86. *Id.* at 477-78 & n.13 ("the principle of proximate cause is hardly a rigorous analytic tool").

87. *Id.* at 478.

88. *Id.* at 476 n.12.

The reason for its failure to address those issues was that the real debate in the case was not about remoteness at all. It was about whether McCready had sustained an antitrust injury when she chose to pay out of her own pocket for psychological counseling in the face of the alleged conspiracy between the Virginia psychiatric community and Blue Shield to deny her reimbursement for those services.[89] The majority concluded that the plaintiff suffered such an injury by being forced to forego either using her preferred provider or obtaining reimbursement under her employer's group medical plan as a direct consequence of the alleged conspiracy:

> McCready did not yield to Blue Shield's coercive pressure and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market.[90]

The defendants had argued that McCready suffered no cognizable antitrust injury since she did not claim that she had been overcharged.[91] Justice John Stevens expanded on that notion in his dissent, arguing that there was no injury at all since McCready did not pay more for the services she had received than they were worth to her.[92] Meanwhile, Justice William Rehnquist, also dissenting, pointed out that the alleged conspiracy had "*failed* to alter [the plaintiff's] conduct in a fashion necessary to foreclose psychologists" from being utilized by Blue Shield subscribers.[93]

These arguments miss the point. The claim in the case was that conspiring psychiatrists effectively were preventing psychologists from being reimbursed under Blue Shield plans, which led to two consequences. Some patients "gave in" and diverted their business to conspiring psychiatrists. Psychologists lost income on that account and could sue to recover that loss. Other patients, like McCready, in effect paid twice for their mental health services, once for the psychologist services they wanted and again for the psychiatrist services they did not want.[94] The fact that psychologists were not harmed when patients chose to pay twice for mental health services does not mean that the consumers who made that choice were not injured in a sense relevant to why the practice at issue was unlawful. Members of a price-fixing cartel benefit directly only from the overcharges paid by those who buy at the higher price instead of foregoing their purchases.[95] However, consumers who "do without" because of the

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89. *Id.* at 483-84.
90. *Id.*
91. *Id.* at 481-83.
92. *Id*. at 492-94.
93. *Id*. at 489.
94. Neither the majority nor the dissenters analyzed whether this dynamic affected the price of either psychological or psychiatric services.
95. Hovenkamp, *Protected Classes*, *supra* note 21, at 30-31. That the boycott did not result in higher prices for mental health services by psychiatrists does not mean there was no harm to competition. The Court did not analyze whether psychiatrists, facing less competition, would not need to compete as hard on quality of services, a type of harm to competition that is actionable. *E.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement,

price fixing still are harmed. The reason that we do not let such "deterred" purchasers sue has to do with the practical impossibility of identifying such nonpurchasers, not with the fact that they did not suffer injury. That injury is still of a type "which flows from that which makes the [practice] unlawful."[96] In the *McCready* case, McCready suffered injury and an antitrust injury when she chose to forego covered psychiatric care and paid for a psychologist out of her own pocket. Thus, there was no reason under *Brunswick* not to allow her to sue for the damages she had suffered as a direct result of the defendants' violation.[97]

The important question for present purposes, however, is not whether the majority or the dissenters had the better of the antitrust injury argument. Rather, the point is that *McCready* expressly recognized a "remoteness" limit to private damages recovery, albeit in dicta, and again emphasized that the claimed violation must give rise to the type of injury for which compensation is sought.[98] However, it did little to explain these principles or guide their application in future cases.

McCready continues to be invoked by courts eager to find standing based on the Court's reference to injury "inextricably intertwined" with an antitrust violation.[99] Correctly read, that phrase was not meant to establish a broad, or separate, test of antitrust standing. It was simply a way of explaining why the *Brunswick* antitrust injury requirement had been met. The Court's observation about the inextricable relationship between the offense and the alleged injury was not a comment about remoteness or about standing at all.

The *McCready* decision remains highly questioned on the merits;[100] however, for the most part, it has had relatively little enduring influence on the law of antitrust standing because, in the end, the Court did not attempt to provide a broad framework for evaluating the standing issue. Perhaps that is why, only a year later, the Court granted certiorari in another antitrust standing case, *AGC*.

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impairs the ability of the market to advance social welfare."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."). Davis makes a similar point in his discussion of *McCready*, although he describes the harm as a deprivation of "choice." Davis, *supra* note 61, at 710-11.

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

97. The Court did not address the corollary question whether patients who made the opposite choice, yielding to coercion and using a psychiatrist rather than their preferred psychologist, suffer antitrust injury or how such injury, perhaps arising out of years of ineffective treatment, could be compensated.

98. *McCready*, 457 U.S. at 476-78.

99. *See, e.g.*, Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 539 (1983); Glen Holly Entm't v. Tektronix, Inc., 343 F.2d 1000, 1012 (9th Cir. 2003); *In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 400-01 (3d Cir. 2000). *But see* SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 45-46 (1st Cir. 1995) (rejecting appellant's invocation of *McCready* and its "inextricably intertwined" language, noting that "[i]t is doubtful that this language—if taken as a physical image—was ever intended as a legal test of standing").

100. *E.g.*, Davis, *supra* note 61, at 706 (*McCready* "was controversial when decided and remains controversial today"); *see also* Jacobson & Greer, *supra* note 12, at 292 (*McCready* "added to the doctrinal confusion").

3.4. AGC

The Court's nearly unanimous (8-1) decision in *AGC* finally directly addressed the criteria for prudential antitrust standing. The opinion is widely regarded as correctly decided, if not necessarily well-reasoned.[101] It remains the seminal Supreme Court statement on the issue, but both its meaning and its application continue to be vigorously debated.[102]

AGC, like *McCready,* was a boycott case. The issue was whether a group of unions (the Union)[103] could complain about the efforts of a multi-employer bargaining association to cause nonmember contractors to refuse to enter into collective bargaining agreements with the Union, to force builders to deal with nonunion contractors and subcontractors, and to coerce both the association's members and nonmember firms not to deal with union subcontractors. The asserted "purpose and effect" of the alleged boycott was to undermine contractors who dealt with the Union as well as "to weaken and destroy" the Union. The Ninth Circuit reversed the district's order dismissing the case for lack of standing, holding that "the Union was within the area of the economy endangered by a breakdown of competitive conditions" as a matter of both intent and foreseeability, a standard target area test.[104]

The Supreme Court, in turn, reversed, with only Justice Thurgood Marshall dissenting. As noted, the result seems plainly correct. Again, however, the importance of the decision is less about the particular facts or the Court's analysis than about what the Court did and did not say about the question of antitrust standing generally.[105]

As in *McCready*, the *AGC* opinion begins with a discussion of the broad language of Section 4 and the Court's previous construction of that statute in cases such as *Mandeville Farms*, *Reiter*, *Pfizer v. India*, and *McCready*.[106] The Court then signaled a

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101. *See, e.g.*, AREEDA, *supra* note 11, ¶ 335d, at 294 ("The *AGC* Court correctly insisted upon going behind the jargon to examine standing in terms that were more concrete and more expressly connected to the underlying rationales for permitting private antitrust enforcement."); Page, *supra* note 13, at 1449 ("[T]he factors it discusses are all relevant and the result it reaches is correct."). *But see* Jacobson & Greer, *supra* note 12, at 292-93 (criticizing the Court for confusing remoteness and antitrust injury concepts).

102. *See*, *e.g.*, Jacobson & Greer, *supra* note 12, at 293 ("The many-factored balancing analysis introduced by *Associated General Contractors* appeared to provide a license to the lower courts to engage in imprecise, outcome-oriented decision making."); Page, *supra* note 13, at 1449 (*AGC* "fails to develop a coherent method for analyzing all of the questions affecting the scope of liability. . . . the opinion leaves us with an open-ended balancing test that is scarcely more principled than the ones it replaces").

103. 459 U.S. at 521.

104. 459 U.S. at 525. The Ninth Circuit used that as its target area test, after discussing with approval an alternative zone of interests approach. Cal. State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527, 538 (9th Cir. 1980).

105. Just as *McCready* was sui generis because of the presence of a third-party payor between the plaintiff and the alleged conspirators, the analysis in *AGC* seemingly was affected by the unique interplay and tension between federal antitrust and labor policy. 459 U.S. at 539-40. Although the decision purports to accept the notion that the alleged boycott "might violate the antitrust laws," *id.* at 528, Stevens's opinion for the majority reflects considerable uncertainty about exactly what was unlawful in a "competition," as opposed to a "labor," sense. *Id.* at 539-40.

106. *Id*. at 529-30 & n.19.

change in direction by noting that "[i]n each of those cases" the plaintiff had been "directly harmed" by the alleged violation.[107]

The Court then reviewed the historical context of the relevant statutes, noting their common-law antecedents, as well as the well-recognized limitations on damages remedies at common law, in early Sherman Act decisions, and in other federal cases. In particular, the majority quoted Justice Oliver Wendell Holmes's oft-repeated observation that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step."[108]

As in *McCready*, the Court acknowledged the difficulty of attempting to define a universal standard to determine when courts should decline to entertain particular cases:

> 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.[109]

This time the Court looked to "previously decided cases"[110] to "identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." These factors, the Court emphasized, were not intended to be a specific checklist of required elements, nor was proof of any one of them sufficient to establish standing.[111] They were simply among the things to be considered in assessing standing in private antitrust cases.

The effort to enumerate those nonexclusive and nonessential factors promptly got off on the wrong foot. The first factor identified by the Court was "the nature of the plaintiff's injury." That is, is there antitrust injury? Invoking its holding in *McCready*, the Court contrasted the conclusion there that the plaintiff's injury "[fell] squarely within the area of Congressional concern,"[112] with the fact that "[i]n this case . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained."[113] It was "not clear whether the Union's interests would be served or disserved by enhanced competition in the market."[114] Thus, the Court concluded, "[i]n this case . . .

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107. *Id.* at 529 n.19.

108. *Id.* at 534 (quoting S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)).

109. *Id.* at 535-36 (footnotes omitted).

110. As in *McCready*, the Court essentially dispatched lower court standing cases in a footnote that noted their existence and pointed out that "[a]s a number of commentators have observed" the "labels" applied in those cases "may lead to contradictory and inconsistent results." Without specifically disapproving any of the prior standards, the Court merely observed that, "[i]n our view, courts [henceforth] should analyze each situation in light of the factors set forth in the text, *infra*." *Id.* at 537.

111. *E.g.*, *id.* at 536-38 & nn.33-34; *id.* at 545.

112. *Id.*

113. *Id*. at 539 (discussing Blue Shield of Va. v. McCready, 457 U.S. 465, 484 (1982)).

114. *Id*.

the Union's labor-market interests seem to predominate *and the Brunswick test is not satisfied*."[115]

The problem with including antitrust injury in a list of supposedly nondispositive standing factors is that the Court in *Brunswick* (and *Cargill*) had declared that proof of antitrust injury is an *essential* element in every private action, not a prudential or discretionary factor.[116] The Court's determination that the plaintiff was not asserting an antitrust injury thus should have ended its analysis.[117] Instead, the Court went on to consider "additional factor[s]," beginning with the "directness or indirectness of the asserted injury."[118]

That phrase essentially adopts a proximate cause test, the same remoteness inquiry that the Court had identified in *Illinois Brick* and *McCready* as the essence of antitrust standing analysis. However, in *AGC,* the Court treated proximate causation as only one factor to be taken into account instead of being the entire point of the standing exercise. Unlike its mistaken treatment of antitrust injury, the Court's decision to treat remoteness as merely part of the standing inquiry was both correct and an important clarification of its earlier articulations in *Illinois Brick* and, to a lesser extent*, McCready*. If antitrust standing is seen as a mechanism to be used to achieve antitrust substantive policy and that policy is concerned with overenforcement as well as underenforcement, then issues other than remoteness sometimes should be considered.

In addition to antitrust injury and directness, the Court in *AGC* identified (1) the "speculative" character of the claimed injury,[119] (2) the existence "of an identifiable class of persons" who are less remotely situated than the plaintiffs and "whose self-interest is likely to motivate them to vindicate the public interest in antitrust enforcement,"[120] and (3) the "risk of duplicative recoveries" with the attendant problem

115. *Id*. at 540 (emphasis added).

116. Davis, *supra* note 61, at 714-15, notes that "antitrust injury is a *sine qua non* of private antitrust litigation" and the Supreme Court "took pains" in *Cargill* "to resolve any doubts" on that score. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986).

117. At least one court has read the discussion of additional standing factors as dictum in light of the Court's finding of no antitrust injury. Todorov v. DCH Healthcare Auth., 921 F.2d 1438 n.20 (11th Cir. 1991). On the other hand, *Cargill* appears to treat injury as part of standing, s*ee* 479 U.S. at 111 n.6, as did *McCready*, 457 U.S. at 483-84.

118. A number of post-*AGC* decisions have read the Court's reference to "consumers" and "competitors," 459 U.S. at 539, in a dispositive fashion. *E.g.*, Eagle v. Star-Kist Foods, 812 F.2d 538, 541-43 & n.2 (9th Cir. 1987) (affirming dismissal of boat crewmembers' claims that tuna canneries conspired to set artificially low prices for tuna because the "crewmembers were neither consumers nor competitors in the relevant market"); Henke Enters. v. Hy-Vee Food Stores, 749 F.2d 488, 489-90 (8th Cir. 1984) (affirming dismissal of hardware store's claim because it "was neither a competitor, participant, nor consumer within the [allegedly restrained] retail grocery market"); Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290, 294 (6th Cir. 1983) (finding corporate shareholders could have no cause of action because they "were neither competitors nor . . . consumers in the retail grocery market"). The three concurring justices in *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 396 (2004), Stevens, Souter, and Thomas, considered the plaintiff not to have standing because he was not a competitor or a customer in the relevant market. *Id*. at 416.

119. *AGC*, 459 U.S. at 542-43.

120. *Id.* at 542.

of "complex apportionment of damages" as pertinent standing considerations.[121] The Court concluded that the union's claims in *AGC* did not meet any of these criteria either and properly denied standing.

Leaving aside the Court's identification of antitrust injury as a discretionary factor, its conclusion that courts ought to take account of a residual core of discretionary, or prudential, factors and balance them in individual cases seems to be a sensible approach. It recognizes that, in the end, the determination of which plaintiffs should be allowed to sue to enforce the antitrust laws is judgmental, not talismanic. The Court thus, rightly, refrained from joining the debate among various lower courts over the formulation of a single standing test, such as target area, foreseeability, or zone of interests, none of which has any coherent or consistent content.[122] Yet, whether *AGC*'s various factors provide materially better guidance is another question. Whatever difficulty there may be in applying the *AGC* factors, the Court at least focused on the right issues—speculation, duplication, and remoteness—rather than adopting a test based on conclusory terms such as target area or a zone of interests.

It is unfortunate that the Court in *AGC* did not attempt to explain how the various factors relate to each other and how the process of applying them ought to proceed. More importantly, the Court failed to offer a normative framework for thinking about standing, for example, by explaining the necessity of establishing appropriate goals or parameters for private antitrust enforcement and how the various *AGC* factors bear upon those interests, in particular how standing relates to substantive antitrust policy.

Marshall's lone dissent in *AGC* provides a bridge to the discussion of these subjects in the next two sections through his reflection on how the Court's approach to standing is linked to the substance of competition policy. Marshall was not concerned with either the content or the clarity of the majority's enumerated factors, nor, to any great extent, with their application in that case. His objection was more fundamental. In his view, the Court had departed from the clear language of the Clayton Act and from a consistent line of earlier cases that had given an expansive reading to its remedial language. What is more, the Court had done so based on a distorted reading of the common law as applied to *intentional* torts. To Marshall, the majority's reliance on the "common-law background of the antitrust laws" highlighted the "anomaly" of denying standing to intended victims of an antitrust offense:

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121. *Id.* at 544. The Court referred to its decisions in *Hanover Shoe* and *Illinois Brick* as an illustration of complex apportionment. The discussion makes clear that the Court did not mean to limit this factor to those cases or to overcharge claims. Rather, a court should consider this factor any time an issue of duplication or apportionment threatens to "undermine the effectiveness of treble-damage suits." *Id.*

122. That lack of practical guidance is one problem with the concept of antitrust injury as well. *See* Davis, *supra* note 61. The difficulty stems from a more profound debate over what antitrust law is or should be about. *Compare* POSNER, *supra* note 13, *with* Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265 (1994). According to Posner, the war is over insofar as economics versus other values is concerned. POSNER, *supra* note 13, at vii. Others consider the issue less settled. *See* Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N. CAR. L. REV. 219, 259-66 (1995) (arguing that the objects of antitrust should not be limited to economic efficiency). For an enlightening and engagingly written recent summary of the issues, see Richard Schmalensee, Viewpoint: Thoughts on the Chicago School Legacy in U.S. Antitrust (eCCP May 2007).

> Although many legal battles have been fought over the extent of tort liability for remote consequences of negligent conduct, it has always been assumed that the victim of an intentional tort can recover from the tort feasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.[123]

Marshall's analysis of the common law was largely correct, but his major premise was mistaken, or at least out of touch with the direction of antitrust law viewed substantively. His assertion that the antitrust laws are intentional tort statutes carried with it the implication that there was unlikely to be such a thing as too much antitrust enforcement. In that respect, he was delivering a eulogy for pre-*Sylvania* substantive antitrust policy but from an enforcement perspective. By the time of the *AGC* decision in 1983, the conception of sound competition policy under the antitrust laws had undergone a profound shift. As the next section discusses in somewhat greater detail, the *Sylvania* decision effectively amounted to the announcement of an impending sea change in antitrust policy, away from the previously prevailing political, or populist, orientation of those laws and toward a policy based on economic welfare effects. It is neither surprising nor inappropriate that the consequences of that shift also had important implications for private enforcement, including standing. Marshall's opinion, in that sense, was not so much incorrect as outdated. His dissent thus points us toward the ultimate issue in the debate over standing and private enforcement generally: what is the "point," i.e., what is the substantive content, of antitrust, and what is the proper role of private enforcement in advancing competition policy?

4. Understanding standing

Antitrust standing is a subset of the broader issue of private antitrust enforcement.[124] Enforcement itself is an integral part of competition policy and cannot be discussed meaningfully apart from it. Asking what the appropriate rules of antitrust standing should be without a clear definition of substantive competition policy goals is like asking for directions without knowing your destination.

The statutory language purports to create a broad right of private action with mandatory treble damages and a large body of mostly older decisions extols the importance of private enforcement as an essential means of achieving the underlying

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123. Marshall took the majority to task for not recognizing that Sutherland's damages treatise had advocated a very different approach to damages in intentional tort cases. He observed, "[a]lthough Sutherland stated as a general proposition that a defendant is not liable to a plaintiff for injuries suffered as a result of the defendant's conduct with respect to a third party, he distinguished cases in which 'the wrongful act is willful for that purpose,' by which he presumably meant cases in which the defendant intended to injure the plaintiff." 459 U.S. at 549 n.3 (Marshall, J., dissenting) (quoting 1 J. SUTHERLAND, LAW OF DAMAGES 55 (1882)). The only limitations Marshall would have acknowledged were the antitrust injury doctrine and the rule against allowing duplicative damage awards, as in *Illinois Brick* and *Hawaii v. Standard Oil*. Short of those limitations or an actual failure of proof of damages at trial, Marshall believed that the law should be enforced as written.

124. *See, e.g.*, William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); *see also* Page, *supra* note 13, at 1483-84.

goals of antitrust policy.[125] Those decisions appear generally consistent both with legislative history[126] and the judicial view of competition policy in decisions from the mid-1950s until the Supreme Court's 1977 opinion in *Sylvania.*

The past three decades have produced a different narrative.[127] Antitrust is now seen in far more balanced terms outside the cartel area at least. If anything, the courts have emphasized the benefits of protecting aggressive competition,[128] including by dominant firms,[129] concern about the difficulties and dangers of excessive intervention,[130] and

125. *E.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); Ill. Brick Co. v. Illinois, 431 U.S. 720, 745 (1977) (referring to private antitrust suits as an "important weapon of antitrust enforcement" and acknowledging the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws"); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U. S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.").

126. Discussed in Section 1*, supra*.

127. *See, e.g.*, BORK, *supra* note 20, as well as any number of articles (and opinions) by Posner and Easterbrook. Of course, the Areeda treatise remains the definitive work in the field.

128. *E.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . ."); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (observing that the antitrust laws were enacted for "the protection of *competition*, not *competitors*") (emphasis added); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (warning that "care must be taken in defining 'competition'" and that "an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality"); Alberta Gas Chems. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1239 (3d Cir. 1987) ("Conduct that harms competitors may benefit consumers—a result the antitrust laws were not intended to penalize.").

129. *E.g.*, Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.) ("It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979) ("a monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through 'the process of invention and innovation' is necessarily tolerated by the antitrust laws") (quoting United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344 (D. Mass. 1953)).

130. Easterbrook*, supra* note 14, at 2-9; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64 (1984) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.").

considerable skepticism about the ability of courts to differentiate between competition and predation in any reliable fashion.[131]

Views regarding enforcement have followed a similar, if less explicit, trajectory.[132] Since at least *Brunswick* and *AGC*, commentators and courts have recognized that the danger of "overdoing" antitrust is as much about enforcement as it is about substantive antitrust policy.[133] Courts regularly acknowledge the danger of overdeterrence as well as the possible misuse of private antitrust actions to bring about results that are harmful to competition.[134] Enforcement resources also are finite and expensive to utilize, and errors can be costly.[135]

It is, at one level, unclear why changing views of substantive antitrust policy should be accompanied by a similar change in the law regarding the process of antitrust enforcement. After all, as Dennis Curtis and Judith Resnick have colorfully observed, "procedure is the blindfold of justice."[136] However, upon even brief reflection, the parallel shift in substantive policy and enforcement policy is neither surprising nor inappropriate. If antitrust can produce results that are anticompetitive, it makes sense to look closely at who may seek to enforce the antitrust laws and under what circumstances they should be allowed to do so.

The attempt to create a greater concordance between substantive competition policy and antitrust enforcement policy is not only the essential subtext of cases like *Brunswick*, *Illinois Brick*, and *AGC*, but is an appropriate exercise. While our examination here is limited to a relatively narrow subset of those enforcement issues, prudential limitations on antitrust standing, the broader point is that substance and

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131. *See, e.g.*, Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 396, 414-15 (2004) ("Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition are myriad.'") (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)); *Brooke Group*, 509 U.S. at 223 (observing that policing prices above a relevant measure of cost "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting").

132. *McCready* and *AGC* themselves demonstrate the shift. The majority in *McCready* reads as an endorsement of the welcoming tradition of private enforcement. A year later, *AGC* offered a quite different "take" on precisely the same history of the private right of action as a prelude to rejecting the plaintiff's claim for lack of standing. Discussed in Section 3.4, *supra*.

133. *See, e.g.*, POSNER, *supra* note 13, at 43 ("[P]roblems of remedy and enforcement . . . not only are more serious than . . . substantive [antitrust] problems but are the source of most of these problems.").

134. *See, e.g.*, Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999) ("Standing is restricted in antitrust cases to avoid overdeterrence."); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394 (7th Cir. 1993) (warning that "an over-broad reading" of § 4 of the Clayton Act could result in "overdeterrence, imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior"); Todorov v. DCH Healthcare Auth., 921 F.2d 1428, 1449 (11th Cir. 1991) ("The reason for the standing limitation in antitrust cases . . . is to avoid overdeterrence resulting from the use of the somewhat draconian treble-damage award; by restricting . . . private antitrust action . . . we ensure that suits inapposite to the goals of antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability.").

135. *See, e.g.*, *Matsushita*, 475 U.S. at 594 ("[M]istaken inferences in cases [alleging a predatory pricing conspiracy] are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

136. Dennis Curtis & Judith Resnick, *Images of Justice*, 97 YALE L.J. 1728 (1987).

process, like love and marriage, deserve to go together "like a horse and carriage."[137] The remaining sections of this chapter think about antitrust standing from that perspective.

4.1. Achieving the goal(s) of antitrust enforcement

Private antitrust actions both compensate and deter. However, most earlier decisions that addressed private enforcement issues tended to emphasize enforcement as a mechanism designed to compensate victims of anticompetitive conduct for harms suffered on account of those offenses.[138] Not only is that a trivial objective in many instances,[139] but from the standpoint of matching antitrust enforcement to substantive competition policy, deterrence ought to be the primary point. Specifically, the goal of antitrust enforcement should be to deter as much economically inefficient behavior as possible with the least amount of error and at the lowest cost.[140] Achieving that goal involves overcoming a number of significant obstacles.

4.1.1. Over- and underdeterrence

Courts frequently describe antitrust as a "tort"[141] or, more specifically, as an intentional tort, as Marshall asserted in *AGC*.[142] However, the use of that analogy is imperfect and somewhat misleading. First, the tort system is about private compensation to a far greater extent than are the antitrust laws. We do not very often look to the government to police negligent conduct and do so only to a limited extent,

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137. To quote the song "Love and Marriage" by Sammy Cahn and Jimmy van Hausen.

138. *See, e.g.*, *In re* Hotel Tel. Charges, 500 F.2d 86, 92 (9th Cir. 1974) ("The fact that the injured plaintiff is allowed treble damages does not change the basic nature of the private antitrust action as an action intended to compensate."); Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1301 (2d Cir. 1972) (purposes of the antitrust laws include protecting and compensating those injured); *see also supra* notes 36 & 85.

139. Although overcharges in the aggregate may be enormous, the amount paid by individual consumers typically will be small. That is not necessarily the case where direct purchasers are wholesalers or input purchasers. However, in those cases, a substantial portion of the overcharge may get passed on to consumers. Obviously, the situation is different where the plaintiff is an excluded competitor or a terminated dealer. *See generally* Section 5 *infra*.

140. Easterbrook, *supra* note 14, at 16; Landes, *supra* note 124, at 652-53.

141. *E..g.*, Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946) (antitrust violations are essentially "tortious acts"); Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389, 394 (11th Cir. 1988) (violations of federal antitrust law constitute "tortious" behavior); Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n.4 (5th Cir. 1976) ("An antitrust action is in the nature of a tort action."); Simpson v. Union Oil Co., 311 F.2d 764, 768 (9th Cir. 1963) ("[A] cause of action in a private antitrust suit for treble damages is a tort action."); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955) (antitrust action is basically a suit to recover "for a tort"); Nw. Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967, 970 (7th Cir. 1943) ("[T]he action under the Clayton Act is one in tort.").

142. Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 547-48 (1983) (J. Marshall dissent); *accord* Pinney Dock & Transp. Co. v. Penn Cent. Corp., 196 F.3d 617, 622 (6th Cir. 1999) ("[C]ivil conspiracy is an intentional tort."); Gen. Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335, 1345 (S.D. Fla. 2002) ("general antitrust violations are considered intentional torts"); Sabre Shipping Corp. v. Am. President Lines, 298 F. Supp. 1339, 1342 (S.D.N.Y. 1969) (violation of the antitrust laws was an "intentional tort").

under the penal laws, in cases involving intentional torts. While there is a limit to the amount of deterrence that is socially useful to provide,[143] there is rarely a *positive* value associated with tortious conduct, negligent or intentional. If avoidance and enforcement costs were "zero," the optimal number of torts would be "zero," as well.

That simply is not true of conduct challenged as an antitrust offense. For example, one of the principal reasons for the strict limits placed on predatory pricing claims is that the conduct considered predatory and the conduct deemed vigorously procompetitive is often largely indistinguishable.

The analogy between antitrust and intentional torts is also somewhat ironic. William Landes, in his important paper on antitrust enforcement,[144] embraced and developed the analogy to intentional torts at some length in the course of promoting a model of private enforcement far different from the largely boundless approach championed by Marshall in *AGC*.[145] Specifically, Landes's Optimal Deterrence Model would set damages equal to the aggregate overcharge plus deadweight loss.[146] Imposing a penalty of that magnitude in theory will deter "inefficient" violations but not "efficient" ones since the anticipated penalty (assuming 100 percent costless enforcement)[147] will equal the harm caused by the offense. Thus, the conduct will take place only "when the gain to the offender exceeds the net harm to others."[148]

In attempting to draw on intentional tort principles, Landes's discussion does not adequately recognize that conduct claimed to violate the antitrust laws actually can be efficient[149] and that a major purpose of competition policy is to encourage firms to engage in conduct intended to disadvantage competition by their rivals. Not only is such behavior accepted, it is the very point of the competitive process. Thus, one cannot say the more deterrence the better.

Private antitrust enforcement also operates inefficiently as a system of deterrence because the authorizing statute does not discriminate among different classes of offense

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143. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (1973); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 868-72 (1981).

144. Landes, *supra* note 124.

145. *Id.* at 674-77.

146. Landes, *supra* note 124, at 656. "Deadweight loss" in this context refers to the units that are not sold at all when prices rise. According to Landes, this loss represents the "standard economic rationale for making a cartel illegal." *Id.* at 653; *see also* DENNIS W. CARLTON & JEFFERY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 84 (1990) ("Dead-weight loss is the cost to society that results when markets do not operate optimally.").

147. Landes, *supra* note 124, at 653.

148. *Id*.

149. An efficient violation occurs "where the gain to the offender exceeds the harm to the victim." Landes, *supra* note 124, at 653; *see also* Gary Becker, *Crime and Punishment*, 76 J. POL. ECON. 169 (1968). Landes argues that because in intentional tort cases the injurer "spends resources to increase the probability of harming the victim," as opposed to ordinary negligence cases where "both parties spend resources" to avoid doing so, the intentional tortfeasor must merely be persuaded to "refrain from spending resources to avoid the tort." Therefore, he asserts, so long as "the harm to the victim exceeds . . . the injurer's gain" (net of enforcement costs), the optimal solution is for the intentional tort not to take place. Landes, *supra* note 124 at 672-73. That explanation does not recognize that competition produces benefits that are not necessarily captured or measured by the private gains or losses to the injurer or his victim.

according to the probability of detection or the likely consequences of the proscribed conduct. For example, setting the punishment for a particular offense at a certain amount does not accurately describe the penalty as it would be viewed by someone attempting to "calculate" projected gains and losses from a contemplated antitrust offense.[150] Rather, that person would take into account the actual penalty that is likely to be imposed and whether the offense is likely to be prosecuted or detected at all. Since most cases settle for something well below the maximum possible exposure, setting a fine equal to anticipated gains, even multiplied for the likelihood of nondetection, would materially underdeter anticompetitive conduct.[151] On the other hand, imposing mandatory treble damages in a rule of reason case where there is supposed to be an ex post balancing of the procompetitive and anticompetitive effects, for example, of a vertical nonprice restriction or the ancillary restraint of a joint venture, almost certainly will tend to overdeter, not to mention oversanction, conduct that may well benefit competition in fact.

4.1.2. Misaligned incentives

Private enforcement exists so that antitrust offenders will be punished, thereby deterring such conduct from occurring, except where it is socially beneficial. If public enforcement were sufficient to that end,[152] there would be no need for supplemental resources, at least not from a deterrence perspective. In fact, if the penalties for competitively harmful conduct could be set appropriately, there would be no need for actual enforcement since only all inefficient conduct would be deterred.

That is not the case any more than penal laws deter all crimes. In the case of offenses against competition, detection as well as enforcement interests argue in favor of private remedies.[153] While private litigation undoubtedly plays an important role in promoting antitrust enforcement, that role is not wholly positive. As noted previously, private enforcement, itself, can have anticompetitive effects if it punishes or deters conduct that is procompetitive.

The problem is at least partially a matter of incentives. An important reason for penal laws and public enforcement generally is that enforcers are expected to be motivated by the public interest, not by private incentives. They determine how best to allocate available resources, assess appropriate sanctions, and exercise prosecutorial discretion in the interests of proper enforcement policy.

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150. While some version of this exercise might be performed by prospective price fixers or bid riggers, the notion of such an analysis playing a systematic role in most of the business behavior that results in subsequent antitrust litigation is theoretical. Most business people may be aware of the antitrust laws, the penalties that could result from a violation of them, and the way in which enforcement actions actually proceed, but that knowledge would not enable them to engage in the type of calculation assumed by this argument.

151. The prospect of punishment is a deterrence only when the person contemplating sanctionable activity in fact will incur the consequences of it. For a variety of different reasons many businessmen would not incur the consequences. *See, e.g.*, Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

152. Meaning, of course, both detection and prosecution.

153. There are, in fact, many more private enforcement actions than public ones. *See supra* notes 31-33.

The same cannot be said of private enforcers. Their interests are in the private gains from litigation. In antitrust cases, those gains can come not only from treble damages but from deterring aggressive competition by rivals.[154]

Different types of plaintiffs have substantially different incentives. Competitors may sue to make themselves better off retrospectively, based on potential damage recoveries, or prospectively, by giving themselves a competitive advantage. Since such competitors suffer detriment both from conduct that is anticompetitive and from conduct that is highly efficient and since antitrust suits can be brought in order to create (as opposed to forestall or remedy) anticompetitive consequences, allowing competitor suits poses a potential danger to competition. On the other hand, competitors can be efficient enforcers because they are likely to be able to identify violations readily and can act at an early date to prevent or limit the social harm caused by anticompetitive conduct.[155]

Buyer claims present different issues. Leaving aside the troubling issue of mandatory trebling and the problem of providing a remedy for deadweight loss,[156] such actions fit the goal of deterring inefficient conduct reasonably well. However, few buyers have adequate financial incentives to pursue damage actions on their own. More often than not, class action counsel, rather than the parties they represent, are the driving force in such actions.

That has both positive and negative consequences for antitrust enforcement. The incentives of class action counsel lead them to concentrate enforcement efforts on per se cases, which generally involve the most serious threats to competition. In theory, that is efficient. However, a large proportion of such cases are filed as follow-on actions to government criminal enforcement proceedings. Unless the penalties available to the government are inadequate to deter cartels, the value of these follow-on cases is unclear from a deterrence standpoint since they do not involve any effort to detect or prosecute otherwise unknown or unremedied conspiracies. Moreover, since there is no offset for any financial penalties received by the government, there is an obvious Gresham's Law effect in allowing the same measure of recovery in follow-on cases in which the government already has discovered, investigated, and successfully prosecuted the offense as are allowed in cases initiated de novo by private plaintiffs. The fact that prior prosecutions actually can reduce the evidentiary burden on private plaintiffs exacerbates this effect.[157]

There is also the problem, scarcely unique to antitrust, that class counsel's incentives are only coincidentally related to efficient antitrust enforcement. Instead, they are based

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154. Litigation itself can lead to anticompetitive results whether by enabling plaintiffs to act in a coordinated fashion that otherwise would be a per se antitrust violation, or by using the cover of litigation to reach agreements that limit their opponents' ability to compete.

155. *See infra* at Section 5.2.

156. Landes points out that the problem with providing a remedy for deadweight loss is not that those losses are not real or not relevant to why cartels are economically harmful. At least to some economists, restricted output is the central explanation for why cartels should be unlawful. Landes, *supra* note 124, at 653. Rather, the problem is "in proving how much a consumer would have bought but did not." *Id.* at 676; *cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (no remedy under securities laws for nonsellers because of proof problems).

157. *See* 15 U.S.C. § 16(a) (prima facie effect of prior civil or criminal judgment obtained by the United States).

on the opportunity costs of other cases. That incentive will cause them not only to pursue the lowest hanging fruit, but to be willing to settle cases for too little in order to move on to the next lawsuit.[158]

4.1.3. Error costs

Just as punishment that deters anticompetitive behavior furthers sound antitrust policy, punishing efficient behavior deters conduct that antitrust policy wants to encourage. If litigation were costless, never brought for anticompetitive reasons, and adjudicated without mistakes, efficient behavior would not be punished. But that is not the case.

Deterrence is a function of the defendant's estimation of the benefit from engaging in certain conduct less its costs of doing so. If the negative consequences of the conduct are perceived as too severe, the firm will expend resources, in the form of risk-averse behavior, in order to avoid incurring potential liability. A firm may become risk averse when it anticipates that its innocent or efficient conduct nonetheless may be punished. Hovenkamp explains that "an over deterrent rule can be just as costly as an under deterrent one if it forces firms to refrain from hard competition in order to avoid legal sanctions. . . . [T]he social cost is equal to the value of the hard competition that a more accurate rule would have produced."[159] Precisely "the same can be said of punishment costs. If civil damage awards are too large or too frequent, private plaintiffs will litigate too freely and too long."[160]

Proper rules for private enforcement can play an important role in addressing the problem of error costs. One way of doing so is by preventing potentially duplicative recoveries. Another is by controlling standing more closely in cases where the risk of error or an anticompetitive outcome is greater. However, having standing depend on the nature of the alleged offense would overlap the substance and the process of antitrust in ways that are questionable. The traditional assumption is that whether a particular claim has merit is entirely independent of who may prosecute it,[161] and there is much to recommend such separation as a general matter. However, if we are concerned with the danger of punishing conduct that is efficient and we are further concerned that the motives of certain enforcers will lead them to "litigate too freely and too long," it may make sense to take a narrower view of standing as a prudential matter in cases that present a higher risk of such errors.[162]

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158. In a world with a relatively small number of repeat players, class action counsel and defendants could develop a fairly efficient "protection" regime in which firms engage in profitable violations while rebating a portion of their gains to the class action bar whose interests are not furthered by deterrence, but by taking a share of the gains from "prosecuting" the alleged violation. Courts have the ability to prevent that from happening, but their own incentives, limited investigative resources, and need to dispose of cases militate against their playing that role very effectively.

159. Hovenkamp, *Protected Classes*, *supra* note 21, at 2.

160. *Id.* at 2-3.

161. Certainly that is the view taken by Areeda and Hovenkamp. AREEDA, *supra* note 11, ¶ 335f, at 297-99.

162. Two words respond to the argument that such an approach would play havoc with the language of Section 4: *Illinois Brick*. If the Supreme Court can hold that people actually injured in their business or property by reason of an antitrust violation have no cause of action because of enforcement policy

4.1.4. Enforcement costs

Enforcement of the antitrust laws also is costly. Whether a claim possesses or lacks merit, both the parties and society incur costs when a private antitrust action is brought. A successful plaintiff's recovery of its attorneys fees and costs, as well as treble damages, obviously influences the litigation incentives of the two sides and has implications for many of the points discussed previously.

Enforcement costs have obvious implications for prudential standing. First, one lawsuit about a particular dispute is better than two, no matter who pays; therefore, multiple proceedings are undesirable. Second, simpler proceedings generally are better than more complicated ones. If a firm has imposed overcharges and the only point of the private enforcement device is to deter that kind of behavior, it really does not matter whether the *particular plaintiff* ultimately paid an overcharge. Therefore, allowing the defendant to prove that it was able to pass on all or part of that overpayment has no value from a deterrence standpoint.

Also, the interest in avoiding overdeterrence says that the law should not allow subsequent purchasers further down the distribution chain to bring their own suits based on the same alleged overcharge. For much the same reasons, dividing recoveries among different claimants diminishes enforcement incentives and consumes excessive resources because it creates both multiple proceedings and problems of apportionment or duplication. The complexity and speculation inherent in such proceedings also increase error costs.

4.1.5. Summary

The fact that enforcement is always an imperfect instrument for implementing public policy is surely beyond serious debate and therefore, it is no criticism to observe that the same is true of private enforcement of the antitrust laws. However, there is an important disconnect when the goals of those who are encouraged to enforce a law deviate materially, or are antagonistic to, the policy they are being asked to enforce. Taken to its extreme, that fact could argue that the private damages remedy should be done away with altogether, as has in fact been suggested.[163] However, that view is *too* extreme, not to mention unachievable as a legislative matter. The point, instead, should be to try to reduce the distance between the role of the public and private enforcer, while recognizing that the latter plays not only a legitimate role in antitrust policy but at times may be a superior enforcer because of unique "inside" knowledge and a strong private incentive to prevent conduct that is inconsistent with economic welfare.

5. Private enforcement reconstructed: Toward a true "private attorney general" approach to antitrust standing

This section examines the relationship between prudential standing principles and the goal of more efficient private antitrust enforcement. In the pre-*AGC* and pre-*Sylvania*

considerations, courts should be able to draw somewhat sharper enforcement boundaries based on the nature of the purported offense.

163. *See, e.g.*, William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974).

era of antitrust, courts extolling the importance of private antitrust enforcement frequently referred to such enforcers as "private attorneys general."[164] The analogy is more appropriate than those judges may have thought, though for different reasons. Rather than thinking about antitrust as a system of tort law, in which the primary goal is to compensate victims for private losses, a better model for private antitrust litigation is government enforcement. Despite the large damages awards frequently sought, and sometimes obtained, in private antitrust cases, private compensation should not be considered a particularly important goal of antitrust enforcement in most instances. Instead, enforcement should seek to deprive wrongdoers of the gains from their offenses, taking into account the likelihood of nondetection. Antitrust enforcement also should seek to encourage suits by efficient enforcers, while minimizing the costs imposed on society where enforcement is sought for the wrong reasons or where error costs are likely to be high.

Although the private treble damages remedy applies without distinction to all antitrust offenses, it is helpful to think about enforcement issues in different ways in different types of cases. While antitrust violations arise in a wide variety of contexts, antitrust can be broadly seen as directed at two quite different situations: not competing hard enough and competing "too hard." That description corresponds to alleged offenses under Section 1 in which damages are sought for having paid too much and claims under Section 2 in which the injury typically will be for overpayment where the claimant is a buyer, or for loss of competitive position where the claim is brought by a competitor. We consider these two types of offenses and the claims they typically give rise to.

5.1. Claims for having paid too much

If we were legislating on a clean slate, it probably would make sense to provide that the remedy in private actions that allege overcharge damages should be measured by the gain to the defendants from their conduct multiplied by the likelihood of nondetection and whether the offense is one to which a true per se rule applies. However, like the substantive rules governing antitrust liability, antitrust enforcement principles are judge-made and will continue to be. Thus, the question is whether the law as currently written is capable of approximating this approach. The answer is a qualified yes.

Professor Page asserts that the purpose of antitrust standing is "to identify the most efficient plaintiff or plaintiffs from among those who have suffered antitrust injury."[165] Having in mind that, because of independence, prosecutorial discretion, and a lack of private wealth-maximizing incentives, the government will almost always be the most appropriate enforcer so long as it has the resources to discover and prosecute offenses and the statutory right to impose a sanction sufficient to deter, the most efficient *private* enforcer in overcharge cases will be a direct purchaser, either suing for itself or on behalf of all direct purchasers. For reasons previously identified, there are potential

164. *See, e.g.,* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) (referring to "potential litigants" as "private attorneys general"); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976) ("private attorneys general").

165. Page, *supra* note 13, at 1484.

problems with such an approach. Application of a "public enforcement" model to standing can address these problems, at least to some extent.

5.1.1. Duplicative recoveries

Concern about exposure to "sextuple" damages has been a consistent theme in antitrust standing cases nearly from the beginning of private antitrust enforcement. It was raised as early as 1909 in *Ames v. AT&T*[166] and was a principal consideration behind *Illinois Brick,*[167] as well as the earlier decision in *Hawaii v. Standard Oil*.[168] *McCready*[169] and *AGC*[170] also emphasize this concern. While the Supreme Court later held in *ARC America* that individual states may permit duplicative damage recoveries, that decision was based on considerations of federalism, not antitrust policy. Thus, while recognizing the possibility that states might choose to provide a duplicative remedy for the same purchases, courts generally have taken the position that duplicative recovery is inappropriate and should not be permitted.[171]

While the potential for duplicate recoveries may not always lead to overdeterrence,[172] the possibility of such recovery should be treated as an absolute bar to standing, not simply as a factor to be taken into account, as held by *AGC.* Where earlier litigation has been resolved, any subsequent lawsuits seeking overcharge damages based on the same sales should be dismissed. That should be true regardless whether the first case was brought on behalf of direct or indirect purchasers. Where the two groups of cases are pending concurrently, the court should make an early determination which plaintiffs are the more efficient enforcers and only those claims should be allowed to proceed. There is no reason why both types of cases should be allowed to go forward, since that could result in the necessity of apportioning damages among competing claimants as well as the overutilization of enforcement resources. That is the existing rule in price-fixing overcharge cases in federal court as a result of *Illinois Brick*. The same policy considerations should apply in other situations where both sets of buyer claims are in federal court.

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166. 166 F. 820, 823-24 (D. Mass. 1909) ("A construction of the act which makes the defendant liable to sextuple damages is certainly to be avoided.").
167. Ill. Brick Co. v. Illinois, 431 U.S. 720, 730 (1977).
168. 405 U.S. at 263-64.
169. Blue Shield of Va. v. McCready, 457 U.S. 465, 474-75 (1982).
170. Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 533-34, 544-45 (1983).
171. *See, e.g.*, *AGC*, 459 U.S. at 545; Kloth v. Microsoft Corp., 444 F.3d 312, 322-23 (4th Cir. 2006); Howard Hess Dental Labs. v. Dentsply Int'l Inc., 424 F.3d 363, 379-80 (3d Cir. 2005); Paper Sys. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002); Ass'n of Washington Public Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 703 (9th Cir. 2001); Adams v. Pan American World Airways, 828 F.2d 24, 30-31 (D.C. Cir. 1987).
172. From the standpoint of deterrence the duplication issue is more complicated than the cases suggest. Damages are excessive only if the amount of anticipated "fines" exceeds the benefits that the defendant expects to derive from its conduct in the form of wealth transfers plus gains in productive efficiency, both adjusted for the ex ante likelihood of detection and for the anticipated amount of actual, as opposed to potential, sanctions. That expectation may or may not bear a strong relationship to the amount of damages sought in a given case as injury to the plaintiff's business or property, let alone to that amount trebled.

A case should not be dismissed for lack of standing based on the *potential* for duplicative recovery if a second suit has not been brought, even if the subsequent plaintiff would be a superior enforcer. A defendant is not likely to seek dismissal of a case on the ground that it would prefer to be sued by a more efficient enforcer unless it did not expect that "better" case to be filed. If a subsequent, potentially duplicative suit *is* filed, the court still should consider who is the preferred enforcer. However, in making that determination, the fact that one party was first to file and may have expended substantial resources pursuing its claim should be a significant factor in the "best enforcer" analysis and might be dispositive.

A suit that seeks damages for only a portion of the harm caused by the defendant's misconduct, as in nonclass overcharge cases, does not risk duplication. Resolution of that suit will not produce duplicative litigation because it will involve unaddressed exposure. The principle precluding duplicate recoveries does not allow a defendant to seek dismissal on standing grounds where the damages sought are nonduplicative just because it faces multiple lawsuits. Duplication, therefore, refers only to a situation where the same sales by the defendants result in claimed liability to more than one purchaser.

On the other hand, duplication refers to the risk of *exposure*, not to the actual amount of a prior award or settlement. Thus, if a defendant is sued for $1,000 in damages but the jury awards only $200 or the litigation settles for that amount, the defendant should not be able to be sued again for the "remaining" $800. It is the *exposure* in the earlier litigation that should be determinative, not the resolution of that exposure.[173]

5.1.2. Cases involving prior government enforcement actions

Standing also should be denied in overcharge cases where the government has brought prior criminal litigation or otherwise has taken action to deprive the defendant of the benefits of its wrongdoing. While the penalties available in government actions previously were quite modest, that no longer is the case.[174] The fines available to the government now are quite large, as reflected by the hundreds of millions of dollars that it has recovered in several recent cartel cases.[175] Since the law also now allows the

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173. Another question is whether to allow standing for so-called fringe or umbrella claims, that is, claims by purchasers from firms that did not themselves violate the antitrust laws but who were able to increase their prices as a result of the alleged offense. These damages do not duplicate the damages recoverable by purchasers from the defendants. However, they *are* derivative in the sense that they require proof of what some third party did or did not do in response to the activities of the conspirators. Moreover, since any overpayments by customers of the nonparticipants did not inure to the benefit of the conspirators, it is not necessary to deprive the defendants of the profits from these sales in order to deter antitrust offenses. Umbrella claims should not be allowed for these reasons.

174. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increased statutory maximum fines for individuals from $350,000 to $1 million, and the maximum statutory corporate fine increased from $10 million to $100 million. 15 U.S.C. § 1.

175. Over the past five years, the Department of Justice has collected over $1.2 billion in fines from companies alleged to have participated in cartels involving computer memory chips (DRAM), rubber chemicals, citric acid, graphite electrodes, and hydrogen peroxide, to cite but a few examples. Department of Justice, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.usdoj.gov/atr/public/criminal/220752.htm.

government to recover twice the gains from the offense, the penalty provisions also now take account of the likelihood of nondetection.[176]

If it were feasible, a more nuanced approach would be to deny *treble* damages in situations where the government has uncovered and prosecuted an offense, or to give a credit pre- (rather than post-) trebling for the amount of monetary penalties collected by the government as a result of its prosecution. However, that would require legislative action and is unlikely. Therefore, if the only choice is between denying standing in such cases altogether or allowing them to proceed as they do today, the better solution is to deny standing, or at least to do so in cases brought as class actions. The reason why that is true is that there is a significant possibility of multiple recoveries where the government is seeking, and getting, large fines while leaving damages plaintiffs free to recover the full amount of any overcharges, trebled. Moreover, because of the rules that simplify the burden of proof for the plaintiff in such cases,[177] the class action bar has a very strong incentive to prefer cases that, in effect, have already been "made" for them. That tends to direct enforcement resources to precisely the wrong places. If we are going to reward private plaintiffs with treble damages, we should want them to be out searching for otherwise undiscovered or unprosecuted offenses.

This approach is also supported by rules that impose joint and several liability without the right of either contribution or indemnity on all participants in an antitrust conspiracy,[178] as well as the rule that any settlements are credited against a judgment only after trebling, thereby effectively reducing the value of such settlements by two-thirds.[179] The consequence of these rules is that parties who have deep pockets but questionable or peripheral involvement in the conspiracy nonetheless are pressured to settle for amounts that bear little relationship to any gains that they might have expected to achieve from participation in the cartel, assuming that they participated at all.

5.1.3. The question of compensation

What about "compensation"? If most overcharges are passed on and if the true point of private enforcement is to deter would-be antitrust violators from engaging in anticompetitive conduct in the first place, the role of compensation should be small, whatever the rhetoric of many (particularly earlier) cases. Just as a public enforcement model does not concern itself with compensating particular victims, as opposed to punishing the offender and deterring future offenses, a private attorney general model of private damage enforcement should not be concerned with whether a consumer receives a small monetary recovery for his or her purchases years earlier of some price fixed

176. Combined with the government's amnesty program, the available public enforcement remedies are even more likely to be effective in deterring cartels and similar hard core antitrust violations. The Antitrust Division's corporate leniency policy, which sets forth six conditions for leniency if the corporation approaches the Department before an investigation has begun, and seven alternative conditions for leniency, http://www.usdoj.gov/atr/public/guideleines/0091.htm.

177. Under 15 U.S.C. § 16(a) a "final judgment or decree" in a government antitrust action constitutes "*prima facie* evidence against [the] defendant in any" subsequent damages action with respect to the matters covered by the government action.

178. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Paper Sys. v. Nippon Paper Indus. Co., 281 F.3d 629, 632 (7th Cir. 2002).

179. Wm. Inglis & Sons Baking Co. v. Cont'l Baking Co., 981 F.2d 1023, 1024 (9th Cir. 1992).

product. There is little more reason to be concerned about compensating businesses that purchased even a relatively large amount of such products. Unless those purchases are sufficiently large that the buyer considers it worthwhile to devote its own resources to pursuing a lawsuit (a relatively rare situation, I predict), we also should not be overly concerned with compensating them for their overpayment "losses."

That leaves situations in which large purchasers, original equipment manufacturers, for example, purchase enormous amounts of a particular cartelized product and have a strong private incentive to sue.[180] If such buyers bring suit in the first instance without any prior government action, they ought to have standing to recover the full amount of their damages trebled. That should be true without regard to whether they passed on the overcharge to their customers.

If there has been a prior government action, the question is a bit more difficult but on balance these direct purchasers should be allowed to pursue their claims even if the result may be excessive sanctions. Most large companies will not readily file antitrust suits as plaintiffs unless they believe they have suffered significant harm. When they do so, they are likely to be efficient and vigorous enforcers, even if their private incentives may encourage some amount of excessive enforcement. Given a choice between that possibility and overly constricting the private damages remedy, standing should be upheld.[181]

5.1.4. The Illinois Brick *repealer problem*

Perhaps the most vexing issue in addressing prudential standing in overcharge cases is the problem created by so-called *Illinois Brick* "repealer" statutes and cases.[182] The goal of private antitrust enforcement is to allow suits by parties who will pursue them vigorously and efficiently. That was, of course, precisely the intuition behind *Hanover Shoe* and *Illinois Brick*. In fact, those two decisions, taken together, say that the literal language of the Clayton Act tying enforcement to the plaintiff's harm is no impediment to constructing an enforcement system premised on efficient enforcement rather than compensation for losses actually incurred. That principle is not only sensible but is the foundation for the argument here that it is permissible for courts to look to interests

180. For example, in the recent DRAM antitrust cases, more than 80% of the volume potentially "represented" in the direct purchaser class cases opted out and many of the large original equipment manufacturer buyers have filed their own lawsuits. *In re* Dynamic Random Access Memory Antitrust Litig., Master File No. M-02-1486 PJH MDL, No. 1486 (N.D. Cal.).

181. One interesting question that is beyond the scope of this chapter, is whether a court could impose a form of prejudgment remititur as a condition of granting standing. That is, could a court allow an action to continue only if the plaintiff agreed in advance to reduce any resulting judgment to the amount of its actual damages in cases where there has been prior government enforcement proceedings? If that were permissible, there would be even less reason to dismiss a nonclass case for overcharge damages on standing grounds even in the face of earlier public enforcement proceedings.

182. Approximately 20 states have passed such repealer statutes. *E.g.*, CAL. BUS. & PROF. CODE § 16750(a) (enacted in 1978); D.C. CODE ANN. § 28-4509 (1980); HAW. REV. STAT. §§ 480-3, 480-14 (enacted in 1987). Three additional states have authorized such suits judicially: Bunker's Glass Co. v. Pilkington, P.L.C., 75 P.3d 99 (Ariz. 2003); Comes v. Microsoft Corp., 646 N.W.2d 440, 451 (Iowa 2002); Hyde v. Abbott Labs., 473 S.E.2d 680, 684 (N. Car. 1996); *see also* Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, ANTITRUST, Summer 2001, at 34, 35.

other than compensation is determining who is entitled to bring a private damages suit under the Clayton Act and to deny standing where it is inconsistent with sound enforcement policy.

If forced to choose between two different groups of potentially overcharged parties, it might seem sensible to grant the right of action to the parties more likely to bear the ultimate cost of the overcharge, consumers. However, not only are such overcharge injuries typically small when spread among all indirect purchasers, but any interest in compensating those purchasers for their overpayments is outweighed by the clear advantages from an enforcement standpoint of eliminating pass-on issues from the litigation and providing enforcement incentives to large, direct purchasers, as opposed to class action lawyers whose incentives are at best imperfectly aligned with proper enforcement objectives. In short, from the standpoint of efficient enforcement, the Supreme Court got it right in *Hanover Shoe* and *Illinois Brick*.

The *Illinois Brick* repealer statutes (and cases) create a significant obstacle to this approach, but not necessarily an insuperable one. In fact, prudential standing rules provide a potential answer.

As a result of the Supreme Court's decision in *ARC America*, price-fixing cases routinely are filed not only under federal antitrust law, but under the separate antitrust statutes in the 20-plus repealer jurisdictions.[183] At least prior to the passage of the Class Action Fairness Act in 2005,[184] those cases typically were nonremovable, thus creating a largely unsolvable jigsaw puzzle of overcharge litigation in federal and state courts. However, with the passage of that Act most indirect purchaser cases now will be removed to federal court (or filed there as an initial matter). They then can be coordinated or consolidated in a single federal district by the Multidistrict Litigation Panel.[185] However, the problem of duplicative recoveries still remains.

Standing law, as noted, provides a potential answer to this problem. As the Supreme Court observed in *Illinois Brick*, standing is analytically distinct from the policy-based black-letter rule barring indirect purchaser claims in light of the Court's earlier decision to abolish the pass-on defense. Thus, courts confronted with a claim under an *Illinois Brick* repealer statute remain free to apply prudential standing limitations to dismiss such claims where they do not serve an appropriate enforcement purpose. Although this argument has received relatively scant attention until recently, it has been accepted in a number of cases involving lawsuits against the Visa and MasterCard associations in state cases arising out of earlier federal court litigation,[186] and the issue now is being raised by

183. Whether *ARC America* is open to reconsideration in light of more recent cases dealing with due process limits on punitive damages is an interesting and important issue, but not one to be treated further here. *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus. v. Leatherman Tool Group, 532 U.S. 434 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

184. Pub. L. No. 109-2, 119 Stat. 4 (2005).

185. 28 U.S.C. § 1407.

186. Southard v. Visa U.S.A. Inc., 734 N.W.2d 192 (2007); Kanne v. Visa U.S.A Inc., 723 N.W.2d 293 (Neb. 2006); Ho v. Visa U.S.A., Inc., 793 N.Y.S.2d 8 (N.Y. App. Div. 2005), *motion for leave to appeal denied*, 5 N.Y.3d 703 (June 14, 2005); Smith v. Visa U.S.A., Inc., No. CO-04-2096, 2005 WL 1936336 (D. Minn. 2005); Peterson v. Visa U.S.A., Inc., No. Civ.A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. 2005); Strang v. Visa U.S.A, Inc., No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir.

defendants with some frequency, although with mixed results.[187] While the facts in those cases may be extreme, plaintiffs claim that millions of retailers allegedly incurred excessive costs to accept the associations' respective debit cards, which caused those retailers to raise the retail price of all goods sold to consumers, the recognition that standing is an independent ground to dismiss improvident indirect purchaser damage actions suggests a way out of the current duplicative litigation quagmire. Moreover, it is a solution that is preferable, from an efficient enforcement standpoint, to repeal of the *Illinois Brick* rule, as the Antitrust Modernization Commission has recommended.[188]

To the extent that federal courts feel constrained to allow state law indirect purchaser cases to proceed in light of *ARC America*, they should dismiss the *direct* purchaser class suits or should consolidate them not merely for pretrial purposes but for trial. While that is not the most desirable outcome, as compared to the simplifying result of allowing only direct purchaser claims to proceed and thereby eliminating the complications of pass-on issues as well as the need to apportion recoveries and compensate two sets of class action lawyers, that outcome still is preferable to exposing the defendants to multiple liability under a statute that already provides for mandatory treble damages.

5.1.5. Direct versus derivative claims

A rule forbidding duplicative recovery would dispose of many cases in which a buyer's claim does not arise as a direct result of the defendant's anticompetitive conduct, but not all. In those cases, courts therefore need to assess whether the alleged harm

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Ct. 2005); Fucile v. Visa U.S.A. Inc., No. S1560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. 2004); Consiglio-Tseffos v. Visa U.S.A. Inc., No. CV 2003-020170, 2004 WL 3030043 (Ariz. Super. Ct. 2004); Moore v. Visa U.S.A., Inc., No. 03 CV 4086 & 03 C 5002, 2004 WL 3030032 (Kan. Dist. Ct. 2004); Crouch v. Crompton Corp. & Morris v. Visa U.S.A. Inc., Nos. 02 CVS 4375 & 03 CVS 2514, 2004 WL 2414027 (N.C. Super. Ct. 2004); Knowles v. Visa U.S.A. Inc., No. Civ.A.CV-03-707, 2004 WL 2475284 (Me. Superior Ct. 2004); Cornelison v. Visa U.S.A. Inc., Civ. No. 03-1350 (S.D. Pennington County Ct. Sept. 29, 2004); Beckler v. Visa U.S.A. Inc., No. Civ. 09-04-C-00030, 2004 WL 2475100 (N.D. Dist. Ct. 2004); Gutzwiller v. Visa U.S.A., Inc., No. C4-04-58, 2004 WL 2114991 (Minn. Dist. Ct. 2004); Stark v. Visa U.S.A. Inc., No. 03-055030-CZ, 2004 WL 1879003 (Mich. Cir. Ct. 2004).

187. *See, e.g.*, *In re* Intel Corp. Microprocessor Antitrust Litig. No. MDL 05-1717 JJF, 2007 WL 2028113 (D. Del. 2007) (accepting relevance of *AGC* but denying motion); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M 02-1486 PJH, 2007 U.S. Dist. LEXIS 44354 (N.D. Cal. 2007) (dismissing cases using *AGC* factors); D.R. Ward Const. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485 (E.D. Pa. 2006) (rejecting *AGC* both as a matter of law and as applied to facts); Lorix v. Crompton Corp., No. A05-2148, 2007 WL 2199236 (Minn. Sup. Ct. 2007) (rejecting application of *AGC* under Minnesota law).

188. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 265-85 (2007). This report identifies many of the same concerns that are discussed here. However, it suggests dealing with them by legislation that would reverse *Hanover Shoe* and *Illinois Brick*, plus adopting other amendments to insure that both direct and indirect cases are heard by the same federal court. *Id.* at 270-74. Leaving aside the unlikelihood of such legislation, the report seems overly generous to the compensatory function of antitrust class actions while supporting a needlessly complex litigation matrix with all of the problems of proof and administration that both *Hanover Shoe* and *AGC* sought to address. Whether it is any more feasible to expect courts to resolve the indirect purchaser problem through the application of prudential standing principles under state antitrust statutes, as recommended here, is certainly a fair question.

arises from the violation, or whether it results from intervening circumstances. If the latter, the case should be dismissed even if the injuries alleged are not duplicative of the harm caused directly by the defendant's anticompetitive activities.

This principle has led courts consistently to dismiss claims by employees, shareholders, creditors, and landlords,[189] and is sound. Standing should be denied whenever the injury claimed depends upon some intervening event. The reason for such a rule is not a lack of foreseeability. Rather, such claims present a danger of partial duplicative recovery and the risk of overdeterrence. They also will frequently involve difficult problems of proof as to both causation and damages, leading to excessive enforcement costs and increased risks of error. Since the direct victims of the offense should have adequate incentives to sue, the courts should not allow claims based on injuries that result only derivatively.

5.2. Competitor claims

By far the most vexing and contentious issues in private enforcement involve suits by competitors. Specifically, should competitors be allowed to sue to enforce the antitrust laws and, if so, in what circumstances and subject to what limitations? Again, this is not simply a question of standing. The most significant part of the debate over private enforcement by competitors involves antitrust injury. However, there are cases in which this issue is better dealt with as a question of standing.[190]

Existing cases leave no doubt that competitors have standing to sue in certain circumstances.[191] Nonetheless, a number of courts have noted good reasons to be suspicious of competitor claims.[192] The Supreme Court has addressed this concern in part through the antitrust injury doctrine as well as by imposing substantive limits on certain types of claims that most frequently are brought by competitors.[193] More

189. *See* AREEDA, *supra* note 11, ¶¶ 351-353, at 424-41, and numerous cases cited.

190. Snyder and Kauper claim that standing, as opposed to antitrust injury, should not be an issue in competitor suits. Edward Snyder & Thomas Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 583 (1991). Although antitrust injury may be the predominant enforcement issue in such cases, this position is overstated.

191. In *AGC* the Supreme Court observed that one of the questions to consider is whether the plaintiff was a "customer *or competitor*" of the defendant. That same factor has been invoked frequently by lower federal courts and recently was articulated as an essential test of standing by the concurring opinion in *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 396, 418 (2004). Despite the debate about the legislative history of the Sherman Act discussed in Section 2.1, it is hard to argue that Congress did not mean to allow competitors to enforce the antitrust laws through litigation seeking damages or an injunction.

192. *See*, *e.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) (warning that the importance of determining the existence of consumer harm "cannot be overemphasized and is especially essential when a successful competitor alleges antitrust injury at the hands of a rival"); Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 670 (7th Cir. 1992) ("Whenever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing."); Alberta Gas Chems. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1239 (3d Cir. 1987) ("Courts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition.").

193. *E.g.*, Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993) (where a plaintiff claims that its rival has engaged in predatory pricing in violation of § 2 of the Sherman Act,

aggressive critics, such as Frank Easterbrook, maintain that the antitrust laws should be concerned solely with allocative efficiency and they would not allow competitors to enforce the antitrust laws at all.[194]

That view is not universally shared even among scholars who accept the notion that antitrust should be concerned with economic efficiency and the social cost of monopoly. The view that competitors lack standing in general is extreme, not only as a matter of existing case law and legislative history, but as a matter of policy. In many instances, competitors will be efficient enforcers because of their knowledge of the relevant industry. On the other hand, the incentives of competitors not only may diverge substantially from those of public enforcers, their interests may be directly at odds with those of competition policy. Thus, only ironically can they be described as private attorneys general.

Those who believe that competitors generally should not be permitted to enforce the antitrust laws argue that "the private antitrust remedy can be used to subvert competition" in various ways.[195] Professors Snyder and Kauper, no antitrust radicals, assert that among the ways in which that occurs are through suits that seek "to prevent . . . rivals from realizing efficiencies through mergers and other contractual arrangements," "to restrain aggressive pricing," or "merely to burden their rivals with litigation costs."[196] On the other hand, both Hovenkamp and Page maintain that in some situations competitors not only suffer antitrust injury but are appropriate private enforcers. The issue arises most frequently in two contexts: where the claim is for lost profits suffered when the defendant has achieved monopoly power by excluding or limiting competition, or where the defendant's monopoly power is either incipient, as in merger cases, or is the anticipated future consequence of predation.

Hovenkamp argues that the case against competitor enforcement was built on a material understatement of the social cost of monopoly.[197] Specifically, he identifies "inefficient losses" imposed on competitors as firms seek monopoly, such as the destruction of productive assets or the loss of innovation.[198] These costs do not benefit the monopolist, unlike a wealth transfer to the monopolist resulting from a monopoly overcharge. He argues that the failure to account for these costs leads to an

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he must also show below-cost pricing and dangerous probability of recouping investment in such pricing); *Trinko*, 540 U.S. at 411-14.

194. Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 331 (1981). That is not the most extreme view of private enforcement. In 1974, Breit and Elzinga recommended doing away with private treble damages litigation entirely. Breit & Elzinga, *supra* note 163, at 355.

195. Snyder & Kauper, *supra* note 190.

196. *Id*. (citing Easterbrook, *supra* note 14, at 33); *see also* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 256-59 (1985).

197. Hovenkamp, *Protected Classes*, *supra* note 21, at 12-20 (identifying competitors as one of antitrust's "protected classes").

198. *Id.* at 17-19. Hovenkamp refers to these as Welfare Loss 3, or WL3 costs, to distinguish them from the more traditional deadweight loss (WL1) and the cost *to the monopolist* of seeking its monopoly (WL2). *Id*. at 12-20.

understatement of the amount of deterrence required[199] and that deterrence interests justify competitor suits to recover lost profits or lost investment value.[200]

Hovenkamp also asserts that competitor suits may be preferable to overcharge claims in certain circumstances. Competitors experience losses during the rival's attempt to acquire monopoly power through predation and "a system that permits the first person injured by a violation to sue is more efficient than a system that requires the legal system to wait until the last person has been injured."[201] The value of this type of enforcement outweighs the danger of false positives inherent in such actions.[202]

Page agrees in part with Hovenkamp's support for competitor standing. He argues, however, that Hovenkamp fails to recognize that a competitor's loss of productive assets or innovation incentives is a product of sunk costs and "not an additional cost of the monopolistic practice"[203] In fact, Page claims that Hovenkamp is wrong to treat competitors as a protected class at all.[204] Rather, he argues that competitors should be allowed to sue in certain cases on "instrumental" grounds, purely as "proxies" for actually injured buyers.[205] The exclusion of a firm as a consequence of predation results in a loss of returns to the excluded firm that are "causally linked" to output restriction and serve "as a reasonable proxy for it."[206] Moreover, "overcharge" damage claims by buyers will tend to understate the harm from the exercise of market power because they do not account for the deadweight loss from restricted output. Allowing excluded or partially excluded competitors to sue for lost profits on this foregone output is sensible in Page's view as a means of capturing those losses.[207]

Page further suggests that competitors should be able to sue for losses incurred as a result of rivals' cost-raising strategies[208] since "[i]f [an] exclusionary practice raises [a

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199. As an illustration, Hovenkamp posits a firm whose conduct results in a wealth transfer of $200 and a deadweight loss of $100, while producing efficiency gains to the monopolist of $125. The Landes Optimal Deterrence model would set the fine (assuming costless detection and enforcement) at $300. That figure suggests the monopoly is socially efficient because the gain to the monopolist is $325 ($200 wealth transfer plus $125 efficiency gain). However, if the monopolists' conduct also resulted in the destruction of a $35 R&D investment by a competitor, the monopoly is inefficient and should be deterred. Hovenkamp, *Protected Classes*, *supra* note 21, at 20.

200. *Id* at 30-41.

201. *Id*. at 33.

202. *Id*. at 31-35. Hovenkamp also would allow suits for failed attempts to monopolize because "the attempt itself can impose enormous losses on rivals who must spend resources defending themselves or make costly exits from the market . . . ." *Id.* at 36.

203. William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151, 2157 (1990).

204. *Id.* at 2162.

205. *Id.* at 2162-64.

206. *Id.* at 2163.

207. *Id*. at 2163-64. Page and Hovenkamp further disagree on whether "lost profits" or "lost investment" is the appropriate measure of harm in such cases. Compare Page, *supra* note 203, at 2164 (lost profits), *with* Hovenkamp, *Protected Classes*, *supra* note 21, at 38-40 (lost investment).

208. Page, *supra* note 203, at 2162-64; *see also* Page, *supra* note 13, at 1475-79; Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986); Steven Salop & David Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

competitor's] marginal costs by denying access to inputs, economies of scale, or efficient means of distribution, thereby enhancing the offender's monopoly power, the expected profits on those lost sales should be recoverable."[209] However, Page does not support competitor suits based on an "early warning" rationale in predatory pricing or failed attempt to monopolize cases,[210] nor would he allow competitor suits in horizontal merger cases based on the theory that such mergers may facilitate predation.

While the issue is a close one because of the materially divergent incentives of private competitor plaintiffs and public enforcers, competitors should be permitted to sue to recover lost profits incurred due either to predatory pricing schemes that meet the *Brooke Group* test or exclusionary practices that raise rivals' costs. The *Brooke Group* rule, requiring proof of sales below marginal or average variable cost, plus a likelihood of recoupment, if rigorously applied, should be a sufficient safeguard against suits seeking to curb efficient competition. Since there is no interest in allowing conduct that is actually exclusionary and has the capacity to produce real harm if successful, it makes sense on balance to allow competitors standing to pursue such claims, even if these suits may present the potential for abuse. While allowing a competitor to recover damages from a failed attempt that involves low prices may seem anomalous, Hovenkamp correctly points out that a firm will not engage in such a practice unless it expects to succeed.

The balance tips differently for competitor suits seeking to enjoin mergers. By definition, mergers are public and in most cases they are subject to preclosing notification and waiting requirements.[211] The distance between private and public incentives is large and the fact that the anticipated harm is entirely predictive means that the danger of mistakes is substantial.[212]

Joseph Brodley[213] argues that private merger actions are essential to proper antitrust enforcement. He concedes that "private litigants driven by their own self-interest may deviate from antitrust goals," particularly in light of the "strong penalties and litigation advantages available to private plaintiffs [which could] magnify the mischief such litigation may cause."[214] However, he claims that traditional standing limitations, "such as limitations on duplicate recovery and complex damage apportionment" have no application at all to merger injunction actions[215] and argues that courts should use the antitrust injury requirement as the only gatekeeping mechanism "to assure that private enforcers promote public competition goals."[216]

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209. Page, *supra* note 203, at 2164.

210. *Id.* at 2163-65.

211. 15 U.S.C. § 18a(a) (requiring premerger notification); 15 U.S.C. § 18a(b) (prescribing waiting period).

212. Snyder and Kauper concluded as an empirical matter that few competitor suits of any kind were meritorious and that *Brunswick*'s antitrust injury requirement did not materially inhibit the incidence of such suits. Snyder & Kauper, *supra* note 190, at 576, 581. Page and Blair have criticized their empirical results and conclusions. Page & Blair, *supra* note 58.

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

214. *Id.* at 15.

215. *Id.* at 16.

216. *Id*.

Given the refusal of some courts to find antitrust injury in horizontal merger cases brought by competitors,[217] there may be little difference in practice between the antitrust injury and prudential standing doctrines in this instance. However, if harm from particular forms of predation would constitute antitrust injury when the conduct occurred, it is hard to understand why that harm is not still antitrust injury when the conduct is merely incipient.[218]

Since the antitrust injury doctrine will not dispose of many merger cases, it makes more sense to address the issue as a question of standing. Such standing should be denied because these claims are inherently speculative given the recognized infrequency of successful predation.[219] The fact that a claim is speculative is a recognized basis for finding that a plaintiff lacks standing.[220] Given the availability of public enforcement plus the right of private parties later to seek damages in the event the predation scheme comes to fruition, the danger of abuse and the potential error costs involved in such actions together outweigh the enforcement benefits.

6. Conclusion

With the benefit of more than a century of hindsight, it might have made sense for Congress to have paid greater attention to the appropriate contours of private antitrust enforcement. However, as former Defense Secretary Donald Rumsfeld has famously (or infamously) observed: "You have to go to war with the army you have."[221] Whatever its

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217. *See, e.g.*, Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114-17 (1986) (competitor's loss of profits due to increased price competition following a merger does not constitute a threat of antitrust injury); Alberta Gas Chems. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1241-47 (3d Cir. 1987) (dismissing merger challenge where methanol producer failed to present evidence of antitrust injury resulting from competitor's acquisition of another corporation); Anago, Inc. v. Tecnol Med. Prods., 792 F. Supp. 514, 518-20 (N.D. Tex. 1992) (elimination of competition between two merging entities was not actionable antitrust injury to the takeover target); *see also* Page, *supra* note 13, at 1471 (competitors suffer no antitrust injury from horizontal merger resulting in higher prices); Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L. REV. 937, 956 (1984) (private plaintiffs' injuries are as likely to be caused by the efficiency aspects of mergers as by their market power effects).

218. Lack of antitrust injury is an appropriate reason to dismiss merger cases in which the expected harm from the challenged merger is the result of anticipated efficiencies, other forms of increased competition, or higher prices, since those are not cognizable injury claims in actuality any more than in anticipation. However, where the gist of the asserted harm is expected predation, there is no basis to dismiss the suit for lack of antitrust injury.

219. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-91 (1986) ("[T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."); Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) ("general implausibility of predatory pricing"); *Cargill*, 479 U.S. at 122 n.17 ("Although commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous."); *see also* Easterbrook, *supra* note 194, at 268; John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 295-97 (1980); BORK, *supra* note 20, at 149-55.

220. *See supra* notes 36 and 120 and accompanying text.

221. U.S. Dep't Defense, News Transcript, Secretary Rumsfeld Town Hall Meeting in Kuwait (Dec. 8, 2004), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1980.

infirmities, private enforcement of the antitrust laws is both a statutory right and an integral aspect of American competition policy. Its terms are those that are set forth with surpassing generality in Section 4 of the Clayton Act and that is what the courts must interpret in defining the scope and limits of private antitrust suits.

Despite the inherent uncertainties and difficulties produced by the unworkable generality of the law as written, it may well have been beneficial in the long run that the private enforcement mechanism is so poorly specified. Courts have not felt constrained by the draconian terms of the statute to apply it in a literal or inflexible fashion. While limitations on private suits, like the underlying substantive standards of the antitrust laws, have developed unevenly and at times in ways that frustrate rather than further sensible competition policy goals, the very fact that the broad language of the enabling legislation has allowed courts the freedom to adapt the enforcement mechanism to keep it broadly in line with underlying substantive competition policy has been a good thing. As the process continues, most likely through continued judicial interpretation as opposed to legislative intervention, it would be beneficial for courts to acknowledge more explicitly that the role of private enforcers truly is, or should be, akin to that of private attorneys general and that the primary goal of enforcement should be to further the interests of efficient competition. This goal is furthered by encouraging lawsuits that have the potential to enable efficient competition while discouraging suits that seek private gain without regard for or at the expense of such competition. The goal will continue to be elusive but it is well worth pursuing.