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NOTE

DEVELOPING AN ANTITRUST INJURY REQUIREMENT FOR INJUNCTIVE RELIEF THAT REFLECTS THE PROBABILITY OF ANTICOMPETITIVE HARM

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I. INTRODUCTION

Aggregations of economic power typically create the opportunity for mischief.¹ At times, the magnitude of harm is so high that it simply is not worth the risk of allowing such aggregations to form at all.² The antitrust laws, however, cannot condemn every consolidation of market power or wealth, since often, the prospect of gaining market dominance drives firms to compete and innovate.³ Given the broad and prophylactic nature of the language employed in the antitrust statutes,⁴ courts need a method of parsing pernicious aggregations of economic power from benign ones.⁵ The antitrust injury doctrine performs this function.⁶

1. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By ‘political values,’ I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all.

Id.

2. The antitrust laws are frequently described as addressing anticompetitive conduct in its incipiency. See, e.g., S. Rep. No. 63-698, at 1 (1914) (noting that the antitrust laws are meant to target anticompetitive conduct in its nascent stage); see also *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963) (“[S]ection 7 was intended . . . to arrest anticompetitive tendencies in their ‘incipiency.’”).

3. See *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.

Id.

4. See *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 312 (1978) (noting that the broad scope of the provision counsels in favor of expansive interpretation of the language in the Clayton Act); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (“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.”).

5. Courts typically condemn “the willful acquisition or maintenance of [monopoly power] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384

The antitrust injury requirement is an integral part of the antitrust standing inquiry.⁷ While antitrust standing determines whether the correct plaintiff is before the court, the antitrust injury doctrine ensures that injuries redressed by the Clayton Act are injuries against which the antitrust laws were meant to protect.⁸ Section 4 of the Clayton Act⁹ enables an injured plaintiff to seek treble damages,¹⁰ while section 16 of the Clayton Act allows a plaintiff to enjoin a transaction that threatens to inflict antitrust injury on the plaintiff's business.¹¹

When a court must decide whether to enjoin a transaction before the manifestation of any impermissible anticompetitive effects, it must determine the likelihood of such conduct with limited information.¹² Often, a court will have information about a firm's market share in the relevant market.¹³ Given a firm with a large market share, however, a court must still make several assumptions about the firm and the relevant market to ascertain whether the firm will abuse its dominant position.¹⁴ A court must not only assess the likelihood of anticompetitive conduct before it has occurred, but also the likelihood that the anticompetitive conduct will inflict an injury on the plaintiff that the antitrust laws were meant to prevent.¹⁵

U.S. 563, 570-71 (1966).

6. Cf. John E. Lopatka & William H. Page, *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829, 836 (2001) (explaining that the calculation of damages under the antitrust injury doctrine must accurately reflect the harm caused by the anticompetitive conduct alone, and not damages caused by legitimate competitive behavior). Additionally, if any benefit was obtained, it must be subtracted from the damage calculation. *See id.*

7. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establishing standing under § 4 . . .").

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

9. 15 U.S.C. § 15 (2006).

10. *Id.* ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained . . .").

11. *See id.* § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . .").

12. *See infra* Part III.

13. *See infra* Part III.A.

14. *See infra* Part III.

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

The Second Circuit's opinion in *R.C. Bigelow, Inc. v. Unilever N.V.*¹⁶ offers a notable example of a court presuming antitrust injury and enjoining a merger. The court held that market share data could be used to infer a threat of antitrust injury for the purposes of section 16 of the Clayton Act.¹⁷ Using market share data to presume the threat of antitrust injury, as in *R.C. Bigelow*, a court assumes the ability of the parties to abuse their market power. There are two reasons why presuming antitrust injury can be problematic. First, the antitrust injury requirement, as a filtering doctrine, is part of the standing inquiry. Courts should use the standing inquiry to focus on whether the plaintiff is the appropriate party to bring an antitrust case, rather than to decide the merits of a case.¹⁸ Second, factors in addition to market share, such as barriers to entry in the relevant market, may determine whether a firm benefits from anticompetitive conduct.¹⁹ For example, firms are unlikely to engage in predatory pricing²⁰—the act of pricing goods

16. 867 F.2d 102 (2d Cir. 1989).

17. *Id.* at 108.

18. *See Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (“[A]ntitrust injury for standing purposes should be viewed from the perspective of the plaintiff’s position in the marketplace, not from the merits-related perspective of the impact of a defendant’s conduct on overall competition.”).

19. This principle reveals itself through a court’s typical method of market analysis. To determine whether a sub-market exists within a larger market, the smaller market must be insulated from entry to the extent that it forms its own self-contained market. For example, in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), the court considered whether the relevant market encompassed every store that sold office supplies, or only superstores that sold office supplies. The court examined the effect of price competition between the two markets and determined that only superstore pricing affects other superstore prices. *Id.* at 1079-80. The court also noted that other large stores that attempted to expand into office supplies were unsuccessful. *Id.* at 1086-88. This line of reasoning demonstrates a need to define a market by its boundaries; that is, whether others can easily enter. *See generally* *United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984) (resting on the assumption that if firms could enter the sub-market profitably, they would); *United States v. Calamar Inc.*, 612 F. Supp. 1298 (D.N.J. 1985).

20. Most scholars agree that predatory pricing is the pricing of goods below some measure of cost. *See, e.g.*, Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975); Laura Ferrari Bravo & Paolo Siciliani, *Exclusionary Pricing and Consumer Harm: The European Commission’s Practice in the DSL Market*, 3 J. COMPETITION L. & ECON. 243, 258 (2007); Albert A. Foer, *Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307, 1319 (2007) (“The illegal act of predatory pricing is defined as setting one’s prices below an appropriate measure of

below cost to capture market share—due to the difficulty of recouping losses sustained on the goods sold. The firm must simultaneously ward off the entry of competitors into the market to recoup the costs of predatory pricing.²¹ In addition, courts struggle to define predatory pricing and measure the appropriate cost,²² thus making a presumption of predatory conduct based solely on market share even less tenable.

Rather than presume antitrust injury, a court must judge every form of conduct according to its probability of anticompetitive harm. Each set of facts warrants its own individualized inquiry. Jurisprudence free of presumptions will ensure that the court will not make unjustified inferences about the defendant or the relevant market.

II. THE ANTITRUST INJURY REQUIREMENT

In addition to meeting Article III standing,²³ which requires a plaintiff to establish a judicially cognizable case or controversy,²⁴ an antitrust plaintiff must also show antitrust standing to sue for treble damages or injunctive relief.²⁵ To have standing, a plaintiff must suffer an antitrust injury, which is an “injury of the type the antitrust laws were intended to prevent.”²⁶ This requirement is most likely a means of limiting the broad standing provision of section 4 of the Clayton Act,²⁷ which states that “any person who shall be injured in his business or

cost, with the ability to later raise prices sufficiently to recapture the investment made in below-cost pricing.”).

21. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (“The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator’s losses and to harvest some additional gain.”).

22. See *infra* notes 253-62 and accompanying text.

23. U.S. CONST. art. III.

24. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”).

25. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986) (noting that antitrust standing and antitrust injury are required for standing for injunctive relief under section 16 of the Clayton Act); *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 482 (1982) (noting that antitrust injury is required for standing under the treble damages provision of the Clayton Act).

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

27. 15 U.S.C. § 15 (2006). The Clayton Act contains many of the remedial provisions for the antitrust laws. In particular, the treble damages and injunction provisions are found in sections 15 and 26, respectively, of the Clayton Act.

property by reason of anything forbidden in the antitrust laws may sue . . .²⁸ Narrowing the Clayton Act's broad standing provision increases the likelihood that the proper plaintiff will bring suit, rather than a party injured by the ripple effects of anticompetitive conduct.²⁹

The language of the Clayton Act does suggest a broader interpretation without limiting doctrines like antitrust standing or injury.³⁰ In fact, the Supreme Court noted that "[t]he unrestricted language of the section, and the avowed breadth of the congressional purpose, cautions [against cabinining] § 4 in ways that will defeat its broad remedial objective."³¹ Nevertheless, the prospect of allowing any individual to sue for harms they suffer from the mere ripple effects of anticompetitive behavior would be repugnant to the spirit of Article III of the Constitution,³² which grants jurisdiction over discrete cases and controversies, and bars suits based on generalized grievances.

The Supreme Court has struggled to balance the opposing forces implicit in the Clayton Act.³³ On one hand, the Court must prevent the

28. *Id.* The antitrust injury requirement also applies to section 16 of the Clayton Act, which empowers a court to hear cases for injunctive relief. *See Cargill*, 479 U.S. at 122.

29. *See McCready*, 457 U.S. at 476-77.

30. *Id.* at 477.

31. *Id.*

32. *Id.* at 476-77 ("An 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." (internal quotation marks omitted)); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id.; *see also* *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) ("[G]eneralized grievances brought by concerned citizens . . . are not cognizable in the federal courts."); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id.

33. The Supreme Court has interpreted portions of the Clayton Act expansively in light of the broad language used by Congress. For example, the Supreme Court in *Pfizer Inc. v. Gov't of India*, held that "any person" included a foreign sovereign. 434 U.S. 308, 313-14 (1978). In *Reiter v. Sonotone Corp.*, the Court interpreted the phrase "property" broadly because of the statute's broad language and remedial purpose. 442

provision from becoming a means of litigating generalized grievances and attenuated injuries.³⁴ On the other hand, the Court must give full effect to Congress' remedial intent.³⁵ Because of this need to balance, the antitrust standing doctrine incorporates the notion of antitrust injury to limit the class of injuries that are actionable under the statute.³⁶ Certain injuries standing alone, such as an increase in prices, might not be enough for antitrust injury purposes.³⁷ The antitrust injury analysis requires that courts examine the injury sustained, the purpose of the antitrust laws creating the cause of action, and the causal link between the two.³⁸

A. What the Antitrust Law were Meant to Protect Against: Early Supreme Court Decisions

To determine whether an antitrust injury exists, one must understand what protections antitrust laws were meant to afford. The

U.S. 330, 338 (1979). The Court has also noted that the statute should not be construed to allow any person to recover for the ripple effects of anti-competitive behavior. *See McCready*, 457 U.S. at 465.

34. *See Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (noting that while Article III standing ensures that the plaintiff has been injured, antitrust injury goes further by ensuring that the proper plaintiff is before the court).

35. *See Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 331 n.1 (1990) ("Section 4 of the Clayton Act is a remedial provision that makes available treble damages to 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.'"); *see also* Matthew R. Dorsett, *Diamonds Are a Cartel's Best Friend: The Rise and Fall of Anticompetitive Business Practices Within De Beers's International Diamond Cartel*, 16 *IND. INT'L & COMP. L. REV.* 145, 162 n.158 ("The Clayton Act also contains the primary remedial provisions of the antitrust laws.").

36. *See* 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 (1998) (noting that antitrust injury facilitates a standing inquiry that limits the class of plaintiffs that can sue to those within the "zone of interests" of the antitrust laws).

37. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 n.10 (1977) (holding that the acquisition of bowling allies that would have gone out of business if not acquired did not confer standing on the plaintiffs because the injury did not result from a lessening of competition, but from the maintenance of competitive levels).

38. *See Associated Gen. Contractors of Cal.*, 459 U.S. at 535 (noting that proximate cause is the crux of the standing analysis and that courts have often resolved such issues with common law causation doctrines).

scope of standing under the antitrust laws changes when viewed as a means of maximizing economic efficiency, rather than as a vehicle to favor small business over large conglomerates, or to protect the end consumer.³⁹ If courts focus on promoting efficiency, then market inefficiencies can give rise to suit under the Clayton Act's injunctive relief and trebling provisions.⁴⁰ However, under a small business protection rationale, a transaction beyond a certain size could sufficiently threaten small business to warrant judicial intervention.⁴¹ Likewise, under the consumer protection model, parties all the way down the vertical supply chain could have standing to sue, creating the threat of duplicative recovery.⁴² Not only could ultimate consumers sue due to the higher price forced upon them by anti-competitive conduct, middlemen could sue, too.⁴³

No single policy successfully encapsulates the purposes of the antitrust laws.⁴⁴ Economic efficiency is certainly a large part of the

39. See 3 PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 720c (1978); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 386-87 (Basic Books 1978).

40. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 10.3b (3d ed. 2005).

41. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 272-73 (1966) (holding that a 7.5% market share was adequate to condemn a grocery store merger under section 7 of the Clayton Act); see also *id.* at 283-84 ("Another, more generalized, congressional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy.").

42. See *Ill. Brick v. Illinois*, 431 U.S. 720 (1977) (rejecting the offensive use of "passing on" theory); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (rejecting a "passing on" defense).

43. See *Ill. Brick*, 431 U.S. at 737.

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id.

44. See BORK, *supra* note 39, at 427 (stating that the antitrust laws have been justified as a means of promoting consumer welfare); RICHARD A. POSNER, *ANTITRUST LAW* 27 (2d ed. 2001) (expressing that the antitrust laws are also a means of ensuring economically efficient markets); Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" as a Factor in Merger Policy*, 85 N.C. L. REV. 149, 193-94 (2006) (asserting that, to some extent, the antitrust laws probably reflect an attempt to accomplish several regulatory goals).

statutory scheme, but so is consumer protection. Nevertheless, a court must first determine whether the antitrust laws are meant to shield the party from the injury they sustained.⁴⁵ Often, a consumer protection approach gives rise to the threat of duplicative recovery,⁴⁶ while the economic efficiency rationale gives rise to the possibility of remedying attenuated injuries dispersed throughout the entire economy.⁴⁷ Rather than elucidate what the antitrust laws mean in every case, the Supreme Court applies a case by case approach.⁴⁸

Two Supreme Court decisions elaborate what the antitrust laws were meant to prevent within the context of the antitrust injury requirement: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*⁴⁹ and *Blue Shield of Virginia v. McCready*.⁵⁰ The two cases, taken together, present two underlying principles of the antitrust injury requirement. First, the antitrust laws are not meant to shield a party from competition.⁵¹ Second, the antitrust laws are meant to redress injuries resulting from anticompetitive behavior.⁵² The simultaneous need to redress injury and foster competition have forced the court to focus on the causal nexus between the purpose of the antitrust laws and the injury asserted to determine whether antitrust injury exists.

45. See *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 334 (1990) (“Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” (internal quotation marks omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).

46. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972) (“Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State’s economic health—a task extremely difficult ‘in the real economic world rather than an economist’s hypothetical model.’”).

47. See *id.* In other contexts, injuries dispersed across the national economy pose similar remedial problems. See *Hanover Shoe*, 392 U.S. at 489.

48. See Ronald W. Davis, *Standing On Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 758 (“Prudence might well indicate that it is best to proceed on a case-by-case basis, eschewing for the moment this particular generalization about antitrust injury.”). Cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

49. 429 U.S. 477 (1977).

50. 457 U.S. 465 (1982).

51. See *Brunswick*, 429 U.S. at 489.

52. See *McCready*, 457 U.S. at 472.

I. Brunswick Corp v. Pueblo Bowl-O-Mat: The Antitrust Laws Do Not
Protect Against the Forces of Competition

The *Brunswick* decision was one of the first Supreme Court cases to announce the rule that the injury sustained must be of a type that the antitrust laws were meant to prevent.⁵³ Further, *Brunswick* stands for the proposition that injury-in-fact resulting from competitive forces is, by itself, never sufficient to meet the antitrust injury requirement.⁵⁴

In *Brunswick*, the Court dealt with a merger that was the product of a sharp decline in the bowling industry.⁵⁵ Brunswick was one of the two largest producers of bowling equipment.⁵⁶ The bowling centers to whom Brunswick sold equipment began to suffer from an industry-wide decline.⁵⁷ As a result, Brunswick could either foreclose on the bowling equipment it had sold to the bowling centers, or it could buy out the bowling centers and operate them to recoup the debt.⁵⁸ Naturally, Brunswick chose the latter.⁵⁹ After all, there would not be much of a market for repossessed bowling equipment in the midst of an industry slump.

A competing company that operated bowling centers brought suit, claiming that the acquisitions violated section 7 of the Clayton Act,⁶⁰ and sued for both treble damages under section 4⁶¹ and injunctive relief under section 16 of the Act.⁶² The Third Circuit sided with the plaintiffs,⁶³ noting that if the bowling centers were not acquired by Brunswick they would have gone out of business, allowing the competing bowling alleys a greater share of the market.⁶⁴

53. *Brunswick*, 429 U.S. at 489.

54. *See id.* at 488.

55. *Id.* at 479.

56. *Id.*

57. *Id.*

58. *Id.* at 479-80.

59. *Id.* at 480.

60. 15 U.S.C. § 18 (2006).

61. *Id.* § 16.

62. *Id.* § 26; *Brunswick*, 429 U.S. at 480-81.

63. *See NBO Indus. Treadway Co. v. Brunswick Corp.*, 523 F.2d 262, 272-73 (3d Cir. 1975).

64. *Brunswick*, 429 U.S. at 482-84; *see also NBO Indus. Treadway*, 523 F.2d at 272-73.

The Supreme Court reversed, noting that the Third Circuit's "holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so."⁶⁵ In particular, the Court recognized that every merger would force certain economic readjustments, which under the Third Circuit's reasoning would make virtually every causally related injury actionable,⁶⁶ even injuries that the antitrust laws were not meant to prevent.⁶⁷ The Court continued, noting that the antitrust laws only condemn mergers "when they may produce anticompetitive effects."⁶⁸ The Third Circuit requires only a showing that the plaintiffs are worse off after the merger.⁶⁹ This means all injuries resulting from the merger would be actionable, regardless of the reasons for condemning the merger.⁷⁰ In the Court's words, such a rule would make recovery "entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws."⁷¹

Applied to the facts of the *Brunswick* case, the injury sustained by the plaintiffs would not be enough to bring an action under the remedial provisions of the antitrust laws.⁷² The plaintiff asserted that Brunswick prevented the bowling centers from going out of business, in essence precluding the plaintiffs from expanding their market share by virtue of less competition.⁷³ Justice Marshall, writing for the *Brunswick* court, summarized that "it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws': while [the] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful."⁷⁴ Thus, the merger itself might have been an unlawful attempt to monopolize the industry, and the injury to the competing bowling centers might have

65. *Brunswick*, 429 U.S. at 487.

66. *Id.*

67. *Id.* ("[U]nder the Court of Appeals' holding, once a merger is found to violate § 7, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned.").

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.*

72. *See id.* at 489 ("We therefore hold that [for] the plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market.").

73. *See id.* at 488 ("The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced.").

74. *Id.* at 488.

been causally related, but the injury was not sustained because of an effect that the antitrust laws were meant to prevent; the injury was the effect of an increase in competition.⁷⁵

2. Blue Shield of Virginia v. McCready: The Antitrust Laws Redress
Anticompetitive Harm

While the *Brunswick* decision stands for the proposition that the antitrust laws are not meant to insulate competitors from competition, the *McCready* decision stands for the Clayton Act's broad remedial purpose.⁷⁶ Blue Shield, the defendant in that case, would only reimburse patients for psychotherapy administered by a psychiatrist,⁷⁷ but not by a psychologist, unless billed through a physician.⁷⁸ McCready, a patient, was denied reimbursement for psychotherapy administered by a psychologist and brought a class action suit against the insurance provider, alleging an unlawful conspiracy to restrain trade under section 1 of the Sherman Act.⁷⁹ The Sherman Act prohibits parties from entering into relationships that unreasonably restrain trade.⁸⁰ To redress the Sherman Act claims, the plaintiffs sought treble damages under section 4 of the Clayton Act.⁸¹

After the district court held that McCready lacked standing,⁸² the Fourth Circuit reversed and remanded.⁸³ The Supreme Court affirmed, and in doing so noted the broad remedial purpose of the Clayton Act's treble damages provision.⁸⁴ The Act protected "all who are made victims of the forbidden practices by whomever they may be perpetrated."⁸⁵ The Court also noted that "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's

75. *Id.*

76. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 472-73 (1982).

77. *Id.* at 468.

78. *Id.*

79. *Id.* at 468-70.

80. 15 U.S.C. § 1 (2006) (Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States").

81. *Id.* § 15.

82. *See* McCready v. Blue Shield of Va., 649 F.2d 228, 230 (4th Cir. 1981).

83. *Id.* at 232.

84. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

85. *Id.*

economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.”⁸⁶

Nevertheless, the Court ultimately predicated its holding that McCready had standing on the remedial purpose of the Clayton Act.⁸⁷ Although individuals should not be permitted to bring suit for injuries sustained by the economy as a whole,⁸⁸ a plaintiff need not wait until driven from the market before suing.⁸⁹ The Court concluded that it was “unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims.”⁹⁰

In upholding McCready’s standing, the Court rejected the argument that since McCready’s employers paid for the insurance, not McCready, the plaintiff had no standing.⁹¹ Although McCready was not a competitor, the injury suffered was inextricably intertwined with the anticompetitive conduct.⁹² That is, the insurance company inflicted its injury on the psychologist by denying reimbursement to the patient.⁹³

The *McCready* case provides important insight into the nature of the antitrust injury inquiry. Three principles are at work: the purpose of the antitrust laws, the need to remedy injuries, and the causal nexus between the injury and the antitrust laws. If any one of these policies is evoked to a greater extent than another, a court will find antitrust injury. In *McCready*, two principles were quite pronounced. First, the patients denied reimbursement demonstrated sufficient need to remedy the injuries they sustained.⁹⁴ Second, the health care providers violated antitrust law by denying the patients’ reimbursement claims.⁹⁵ The policies of remedying causally air-tight injuries became more important than abstract pronouncements about what the antitrust laws were meant to prevent.

86. *Id.* at 476-77.

87. *Id.*

88. *See id.*

89. *Id.* at 482 (“Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not ‘prove an actual lessening of competition in order to recover. [Competitors] may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.’” (citation omitted)).

90. *Id.* at 485.

91. *Id.* at 480-81.

92. *See id.* at 484.

93. *See id.*

94. *See id.*

95. *See id.* at 484-85.

B. The Rule that Emerges

Brunswick underscores that antitrust laws are not intended to insulate competitors from the forces of competition,⁹⁶ while *McCready* demonstrates the importance of the Clayton Act's remedial purpose and the importance of the causal nexus between the policies behind the act and the injury sustained.⁹⁷ In the aggregate, the antitrust injury requirement ensures that standing is not conferred on too broad a class; that is, it is not conferred on a class of individuals that are only injured by the (sometimes brutal) forces of competition.

The antitrust laws do have an important remedial purpose.⁹⁸ Although a narrow standing doctrine ensures that courts are not overburdened by dockets full of claims for the redress of attenuated injuries predicated on the ripples of generalized economic harm, a court should not lose sight of its purpose: to vindicate rights and to redress injury.⁹⁹ Regardless of whether the purpose of the antitrust laws is economic efficiency or consumer protection, federal claims must implicate concrete cases and controversies. *McCready* makes it clear that where an injury is so causally related to the breach of the antitrust laws, it must be redressed, and the antitrust laws must be interpreted to remedy such injuries.¹⁰⁰

96. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) ("The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of competition not competitors.'") (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

97. See *McCready*, 457 U.S. at 477 ("[T]he unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective.").

98. See *id.*

99. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that indirect harm does not necessarily preclude an individual from standing); *Marbury v. Madison*, 5 U.S. (Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

100. See, e.g., *McCready*, 457 U.S. at 477.

C. The Antitrust Injury Requirement and Section 16 of the Clayton Act

Many of the cases discussing the antitrust injury requirement involve treble damage actions under section 4 of the Clayton Act.¹⁰¹ Private enforcement is integral to a court's ability to invoke equitable power and enjoin a potentially anticompetitive transaction.¹⁰² Thus, section 16 of the Clayton Act authorizes a court to grant injunctive relief to "any person, firm, corporation, or association"¹⁰³ to remedy "threatened loss or damage by a violation of the antitrust laws"¹⁰⁴ The breadth of the provision's language is as staggering as the treble damage provision in section 4, which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue"¹⁰⁵

However, notable differences exist between the language of section 16 and section 4 that may make the antitrust injury requirement slightly different. Most notably, section 16 talks of "threatened loss or damage,"¹⁰⁶ while section 4 does not.¹⁰⁷ Section 4 recognizes injuries to "business or property,"¹⁰⁸ but section 16 makes no such qualification.¹⁰⁹ These differences point to the possibility that the remedial scope of section 16 might be broader. However, the scope of section 4 is, on its face, broader than section 16 because section 4 allows suit for "anything forbidden in the antitrust laws."¹¹⁰ If section 4 lends sanction to broad remedial interpretations of the provision,¹¹¹ then the absence of such a provision in section 16 may imply that a tighter causal nexus is required for injunctive relief than for treble damages. Ultimately, the differences

101. See Jonathan L. Disenhaus, *Competitor Standing to Challenge a Merger of Rivals: The Applicability Of Strategic Behavior Analysis*, 75 CAL. L. REV. 2057, 2057 (1987) ("Few private plaintiffs sought to enjoin illegal mergers through the standing granted them by section 16 of the Clayton Act.").

102. See *id.* at 2058-59.

103. 15 U.S.C. § 26 (2006).

104. *Id.*

105. *Id.* § 15.

106. *Id.* § 26.

107. See *id.* § 15.

108. *Id.*

109. See *id.* § 26.

110. *Id.* § 15.

111. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (noting the broad remedial purpose of the Clayton Act); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977) (noting that the injury must be of the type the antitrust laws were meant to protect against).

are not determinative, and it is difficult to conclude which provision merits broader construction.

Ignoring the textual differences between the provisions, the Supreme Court has held that both sections 16 and 4 require antitrust injury.¹¹² Courts, however, have interpreted section 16 more broadly than section 4 by allowing suit for injunctive relief for anticompetitive conduct that has simply threatened loss or injury, absent actual injury.¹¹³ That section 16 has no business or property qualification, as in section 4, bolsters this interpretation, implying that threatened injury need not manifest itself as actual injury before a court can hear a case for injunctive relief.

The Supreme Court faced the issue of parity between sections 4 and 16 in *Cargill, Inc., v. Monfort of Colorado, Inc.*¹¹⁴ The fifth largest beef packer, Monfort,¹¹⁵ brought suit to enjoin a merger between two of its competitors, the second and third largest meat packers in the market.¹¹⁶ Monfort brought suit under section 16 of the Clayton Act,¹¹⁷ alleging that if the merger was consummated it would violate section 7 of the Clayton Act,¹¹⁸ which prohibits mergers that substantially lessen competition or tend to create a monopoly.¹¹⁹

Monfort theorized that the size of the merged entity would allow it to engage in a “price-cost squeeze.”¹²⁰ By lowering prices to cost or just above cost, a competitor’s profit margins would fall, slowly driving the competitor out of business.¹²¹ Monfort conceded that its “operations were as efficient as those [of its merging competitors and that] only below-cost pricing could remove Monfort as an obstacle.”¹²² The Court

112. *See Cargill, Inc., v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986) (“We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due to merely increased competition does not constitute such injury.”).

113. *See id.*

114. *See id.* at 111.

115. *Id.* at 106.

116. *Id.*

117. 15 U.S.C. § 26 (2006).

118. *Cargill*, 479 U.S. at 107.

119. *See* 15 U.S.C. § 18 (2006).

120. *See Cargill*, 479 U.S. at 108.

121. *See id.* at 114-15.

122. *Id.* at 115 n.10.

used this concession to conclude that absent an allegation of below-cost pricing, Monfort would not sustain antitrust injury.¹²³

The Court then turned to whether Excel, the surviving competitor after the companies merged, engaged or was likely to engage in predatory pricing.¹²⁴ The Court defined predatory pricing as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.”¹²⁵ Noting the pernicious effect of predatory pricing,¹²⁶ the Court scoured the record for an allegation of the practice and found none, leading to a reversal of the Second Circuit’s contrary decision.¹²⁷

In *Cargill*, the Supreme Court resolved whether the antitrust injury requirement extended to injunctive relief under section 16 of the Clayton Act.¹²⁸ The Court, confronting the issue of granting injunctive relief based on speculative claims of injury that may result from post-merger actions,¹²⁹ weighed the risk of frustrating competition against the possibility of an anticompetitive transaction.¹³⁰ The Court rejoined that it would make little sense to deny a party standing to challenge a transaction just because the anticompetitive conduct rarely occurs.¹³¹ The likelihood of predatory conduct would largely depend on the likelihood that the predatory firm could recoup the losses sustained while engaging in predatory pricing.¹³² However, the Court also recognized that the mechanism a firm would use to engage in predatory pricing is the same mechanism that a firm would use to compete—they would lower prices.¹³³ Although predatory pricing is difficult to assume, the Court nevertheless refused to deny standing to the plaintiffs simply because the defendants were unlikely to engage in the anticompetitive conduct.¹³⁴

123. *See id.*

124. *See id.* at 118-20.

125. *Id.* at 117.

126. *See id.*

127. *Id.*

128. *See id.*

129. *Id.* at 121.

130. *Id.*

131. *See id.*

132. *See id.* at 122 n.17 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).

133. *Id.*

134. *See id.* at 122.

The Court ultimately held that “a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury.”¹³⁵ This brought the requirements for injunctive relief in line with the antitrust injury requirement articulated by *Brunswick* and *McCready*—a causal nexus must exist between the injury and the purpose of the antitrust laws, and injury sustained from the effects of competition alone are never enough to confer standing.

D. The Problem With Finding Antitrust Injury Before the Transaction Is Consummated

Without the benefit of hindsight to assess the causal connection between an actual injury and the antitrust violation at issue, a court must speculate about the potential effects of a transaction.¹³⁶ Further, the prophylactic nature of the antitrust laws makes it more difficult to minimize the speculative analysis. For example, section 7 of the Clayton Act prohibits mergers that lessen competition or tend to create monopolies.¹³⁷ Acts that focus on stifling competition can also plausibly point to the natural effects of competitive behavior.¹³⁸

In the case of a merger that has not yet been consummated, there is no surefire way of knowing how a company will use its post-merger market power. Typically, the threat of antitrust injury will stem from what a merged entity can do, rather than what it is likely to do. The potential for anticompetitive behavior becomes the primary means of evaluating the merits of a section 7 claim.¹³⁹ Predatory pricing is a prime example of behavior in which a merged entity could engage.¹⁴⁰

135. *Id.*

136. *See Matsushita*, 475 U.S. at 588 (“A predatory pricing conspiracy is by nature speculative. Any agreement below the competitive level requires the conspirators to forgo profits that free competition would offer them.”).

137. *See* 15 U.S.C. § 18 (2006).

138. *See Cargill*, 479 U.S. at 122 n.17 (citing *Matsushita*, 475 U.S. at 589).

139. *See Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 16 (2d Cir. 1981); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981); *Whittaker Corp. v. Edgar*, 535 F. Supp. 933, 945 (N.D. Ill. 1982).

140. *See Daniel A. Crane, The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 62 n.252 (2005) (“Theoretically, consumers could sue for an injunction against attempted monopolization through predation, but the likelihood that consumers would seek equitable remedies in cases without damages is remote.”).

However, firms rarely profit from engaging in below-cost pricing,¹⁴¹ namely because it may not be economically feasible for the merged entity to recoup its costs.¹⁴² Nevertheless, plaintiffs will still likely argue that a defendant will engage in such conduct after it merges.

The Supreme Court, however, has refused to make an inference one way or the other in its antitrust summary judgment jurisprudence when the evidence points both ways.¹⁴³ When the evidence is “consistent with permissible competition as [well as] with illegal conspiracy,”¹⁴⁴ a court cannot “exclude the possibility”¹⁴⁵ that the anticompetitive conduct was the result of independent action. Likewise, when a court speculates about what a firm will do after merging, the improbability of predatory pricing, coupled with the plausibility of competitive conduct using the same economic mechanism, makes it difficult for a court to assess the potential consequences of a transaction.

In sum, the antitrust injury requirement becomes difficult to evaluate before the consummation of a transaction, simply because the antitrust laws are drafted broadly enough to encapsulate both innocent and pernicious economic behavior.¹⁴⁶ What differentiates the two is the injury it inflicts. If the injury has not yet occurred, a court may have a difficult time distinguishing between what the antitrust laws proscribe and what is in fact allowed, thus chilling the competitive forces it intends to foster.¹⁴⁷

141. See *Areeda & Turner*, *supra* note 20, at 699 (noting that formulaic condemnation of below cost and predatory pricing provides little insight into the effects and likelihood of such practices).

142. See *Matsushita*, 475 U.S. at 594-95 (“[P]redatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed.”); BORK, *supra* note 39, at 149-55.

143. See *Matsushita*, 475 U.S. at 588.

144. *Id.* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

145. *Id.*

146. This problem is precisely why summary judgment proceedings in antitrust laws pose special problems. Courts must make determinations of conspiracy or market power in violation of antitrust laws without complete information. Moreover, courts must analyze market behavior that can plausibly be framed as competitive. Thus, courts have required that the evidence “tends to exclude the possibility” that the economic behavior was legitimate. See *Monsanto*, 465 U.S. at 764.

147. See *Areeda & Turner*, *supra* note 20, at 699 (“Extreme care [should] be taken in formulating [antitrust] rules [on predatory pricing], lest the threat of litigation, particularly by private parties, materially deter legitimate, competitive pricing.”).

III. DOES SIZE ALWAYS POSE A THREAT OF ANTITRUST INJURY?

Federal courts have often recognized the threat of consolidated economic power.¹⁴⁸ They have gone to such great lengths as to favor small ventures over large ones.¹⁴⁹ Yet, not all aggregations of economic power should be regarded as a market evil to be extinguished. Since the prospect of achieving high market share motivates firms to succeed and innovate,¹⁵⁰ this tension between condemning firms with high market share and nurturing the incentive to innovate makes defining a rule for enjoining high-concentration mergers rather difficult. On one hand, the probability that a merged entity with a controlling market share will abuse its position, even if miniscule, may be too large a risk when multiplied by the magnitude of potential harm. On the other hand, a mechanical rule that enjoins mergers which cause a concentrated market may create a strain of arbitrariness in antitrust jurisprudence.¹⁵¹

The problem compounds when private enforcement is involved. A competitor may have standing to enjoin a merger that concentrates the merging companies' market shares, even if such merger poses little risk

148. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) (noting that concentrations of market share are likely to lessen competition); *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 (1962) ("Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 324 (1897) ("[I]t is not material that the price of an article may be lowered. It is in the power of the combination to raise it . . .").

149. See *Trans-Missouri Freight*, 166 U.S. at 324.

[I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be into a mere servant or agent of a corporation for selling commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and but to obey orders issued by others.

Id.

150. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers.").

151. See Robert F. Nostramo, *Re-Opening the Door to Antitrust Standing: R.C. Bigelow, Inc., v. Unilever N.V.*, 64 ST. JOHN'S L. REV. 166, 177-78 (1989) (arguing that the rule counters the trend away from mechanical condemnation of concentration of economic power in antitrust jurisprudence).

of abuse. In particular, low barriers to entry may prevent firms with significant market share from charging monopoly prices. Without considering the entire market climate, the rule governing injunctions could mechanically inhibit most mergers.

A. The R.C. Bigelow Rule

In *R.C. Bigelow, Inc. v. Unilever N.V.*,¹⁵² the Second Circuit announced a rule that equates market share to the threat of antitrust injury.¹⁵³ In that case, the merger in question would have bestowed 84% of the herbal tea market share upon one company.¹⁵⁴ A competitor with 13% of the market share brought suit under section 16 of the Clayton Act to enjoin the merger, claiming that the merger would violate section 7 of the Clayton Act.¹⁵⁵

The court found the requisite antitrust injury to enjoin the merger,¹⁵⁶ relying on *United States v. Philadelphia National Bank*.¹⁵⁷

[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.¹⁵⁸

The court reasoned that firms with a large market concentration could too easily abuse their power.¹⁵⁹ Thus, the court announced that the large market share created a presumption that the merger should be enjoined,¹⁶⁰ and unless the market data painted an inaccurate picture, the

152. 867 F.2d 102 (2d Cir. 1989).

153. See Nostramo, *supra* note 151, at 177-78.

154. *R.C. Bigelow*, 867 F.2d at 104.

155. *Id.*

156. *Id.*

157. 374 U.S. 321 (1963).

158. *Id.* at 363.

159. *R.C. Bigelow*, 867 F.2d at 108 (“Whether a proposed merger would substantially lessen competition or tend to create a monopoly is determined through findings, for example, ‘that the relative size of the acquiring corporation ha[s] increased to such a point that its advantage over competitors threaten[s] to be ‘decisive.’” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 321 n.36 (1962))); see also H.R. Rep. No. 81-1191, at 8 (1950).

160. *R.C. Bigelow*, 867 F.2d at 108 (“While market share data alone does not create

presumption would stand.¹⁶¹ The court cited potential for abuse and damage to the market in holding that such mergers should be enjoined.¹⁶² The rule articulated by the *R.C. Bigelow* court essentially stipulated that undue market share automatically confers the required antitrust injury to support a competitor's standing.¹⁶³

The *R.C. Bigelow* court purported to apply the *Cargill* test, which issues a section 16 injunction only after a showing of threatened antitrust injury.¹⁶⁴ However, condemning mergers simply because of size runs counter to the prevalent stance taken by other federal courts. The Fifth Circuit, for example, expressed that "the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law,"¹⁶⁵ using *Cargill* as the basis for its proposition that market concentration alone was not enough to confer standing.¹⁶⁶

Many other courts agree with the Fifth Circuit's interpretation of *Cargill*,¹⁶⁷ mainly because of the Supreme Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*,¹⁶⁸ which held that the per se illegality of an offense alone did not create a presumption of antitrust injury.¹⁶⁹ In *Atlantic Richfield*, the Court held that even a horizontal

an irrebutable presumption of illegality . . . such a presumption can be overcome only by evidence that the market share data gives an 'inaccurate account of the acquisition[']s] probable effects on competition.'" (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975))).

161. See *id.* ("[U]nless defendants meet their burden of rebutting this presumption, the merger must be enjoined.").

162. *Id.* (citing *Phila. Nat'l Bank*, 374 U.S. at 363).

163. See Nostramo, *supra* note 151, at 177-78 ("By equating a substantial market share with a threat of antitrust injury, the *R.C. Bigelow* court has reverted back to the mechanical rules thought to have been finally eliminated by *Cargill*.").

164. See *R.C. Bigelow*, 867 F.2d at 109-10.

165. *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988).

166. See *id.*

167. See, e.g., *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1167 (W.D. Ark. 1995) (rejecting *R.C. Bigelow* as contrary to Supreme Court precedent); *O.K. Sand & Gravel, Inc. v. Martin Marietta Corp.*, 819 F. Supp. 771, 791 (S.D. Ind. 1992) (noting that the reasoning in *R.C. Bigelow* conflicts with a subsequent Supreme Court decision that refused to presume antitrust injury based on the per se illegality of the alleged conduct).

168. 495 U.S. 328, 342-43 (1990); see also *Cnty. Publishers*, 892 F. Supp. at 1167 ("No violation of the antitrust laws, even if per se or presumptive, can ever create a presumption of antitrust injury. This point was made clear by the Supreme Court in *Atlantic Richfield Co.* . . .").

169. See *Cnty. Publishers*, 892 F. Supp. at 1167-68.

price fixing scheme,¹⁷⁰ which has been classified as a “hardcore offense,”¹⁷¹ was not enough to create a presumption of antitrust injury.¹⁷² Instead, the *Atlantic Richfield* Court requires that each plaintiff show that it has sustained an injury of the type that the antitrust laws were meant to prevent, and that the injury flows from conduct that violates those laws.¹⁷³ Thus, a position that presumes that a merger poses a threat of antitrust injury, just by examining the resultant market share, is a presumption of the sort the Supreme Court in *Atlantic Richfield* disavowed.¹⁷⁴

Many courts began to interpret the *R.C. Bigelow* case as creating a presumption of illegality, pitting the Second Circuit’s decision against the Supreme Court’s opinion in *Atlantic Richfield*.¹⁷⁵ Even courts within the Second Circuit were forced to choose between following the *R.C. Bigelow* decision or the Supreme Court. In *Remington Products, Inc. v.*

170. *Atl. Richfield*, 495 U.S. at 340. A horizontal price fixing scheme is when two competitors agree to fix prices or restrict output.

171. See Margaret Bloom, *The U.S. and E.U. Move Towards Substantial Antitrust Convergence on Consumer Welfare Based Enforcement*, 19 ANTITRUST 18, 19 (2005) (“Hardcore restrictions, such as price fixing, output limitation, and allocation of markets or customers, are almost always prohibited, irrespective of the parties’ market power.”); Jeremy M. Suhr, *Keeping the Door Ajar for Foreign Plaintiffs in Global Cartel Cases after Empagran*, 105 MICH. L. REV. 779, 784 n.38 (2007) (“Although national competition laws certainly differ in many respects, prohibitions against price-fixing and ‘hardcore’ cartels are nearly universal.”); Hanns Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A Trips Perspective*, 7 J. INT’L ECON. L. 401, 422 (2004) (noting that price fixing is a hardcore antitrust offense).

172. See Jacobson & Greer, *supra* note 36, at 282-83 (“As the Court explained in *ARCO* [*Atlantic Richfield*], irrespective of the substantive theory, a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.” (internal quotation marks omitted) (quoting *Atl. Richfield*, 495 U.S. at 344)).

173. See *Atl. Richfield*, 495 U.S. at 341-42.

We also reject respondent’s suggestion that no antitrust injury need be shown where a per se violation is involved. The per se rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act.

Id.

174. See *id.*

175. See, e.g., *Remington Prods., Inc. v. N. Am. Philips Corp.*, 717 F. Supp. 36, 49 (D. Conn. 1989) (“In the instant case it appears that NAPC controlled 55% of the electric shaver industry subsequent to the merger. Although this is not as high as the market share in *Bigelow*, it is sufficient to establish a presumption of illegality.”).

North American Philips Corp.,¹⁷⁶ for example, the court indicated that *Atlantic Richfield* called into question the *R.C. Bigelow* court's reasoning. In holding that the injury asserted in *Remington* stemmed from an increase in competition rather than from a violation of section 7 of the Clayton Act, the court essentially ignored the Second Circuit's emphasis on market share.¹⁷⁷

B. An Alternative Interpretation of Cargill

Courts that differ with the *R.C. Bigelow* approach take a more stringent position toward the threshold required for injunctive relief. *Phototron Corp. v. Eastman Kodak Co.*¹⁷⁸ offers a prime example. The Fifth Circuit noted two possible approaches to the merger injunction problem.¹⁷⁹ It could either focus on the defendant's past to determine if the merged firm would engage in anticompetitive behavior, or it could assume that the defendant would engage in anticompetitive behavior simply because it is in a position to do so.¹⁸⁰ The latter approach corresponds to the rule in *R.C. Bigelow*.

The Fifth Circuit chose not to assume how the merged entity would behave after the merger.¹⁸¹ Instead, the *Phototron* court interpreted *Cargill* conservatively, noting that standing would only exist if the plaintiffs established that the defendant engaged in predatory pricing.¹⁸² Under the *Phototron* approach, *Cargill* limits a plaintiff's ability to seek an injunction before suffering harm to cases where monopolistic intent is clearly inferable.¹⁸³ Requiring predatory pricing ensures that the court does not enjoin a false positive, namely because the predatory pricing immediately parses high market share cases from monopolization cases.¹⁸⁴

176. 755 F. Supp. 52, 57-58 (D. Conn. 1991).

177. *Id.*

178. 842 F.2d 95 (5th Cir. 1988).

179. *Id.* at 99.

180. *Id.*

181. *See id.* at 100 (“[T]he notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.”).

182. *Id.* at 102 (“[C]ompetitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured.”).

183. *See id.* at 100.

184. High market share may be the benign result of producing a superior product or taking advantage of efficiencies unavailable to other competitors. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1996) (“[Plaintiff must show] the willful

The plaintiff, Phototron, argued that Kodak operated its wholesale facilities at substantially reduced profit margins, if not below cost.¹⁸⁵ Phototron argued that if it sold its goods at the same price, it could not make a profit.¹⁸⁶ This argument assumes that the costs for the two firms were equal,¹⁸⁷ a presumption rejected by the Fifth Circuit.¹⁸⁸ Instead, the court held that the plaintiffs must show that the defendants sold below its own costs, not below the plaintiff's costs.¹⁸⁹ Thus, the court refused to make assumptions about the market and about how the defendant operated its business.

The plaintiff argued that the merger created a threat of monopolistic behavior, and that “[t]he competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market.”¹⁹⁰ The Fifth Circuit disagreed and, quoting Justice Stevens’ dissent in *Cargill*, it would not issue an injunction upon the mere showing of “a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete.”¹⁹¹ The Fifth Circuit concluded that “the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.”¹⁹²

The *Phototron* court articulated a stringent approach to injunctions under section 16 of the Clayton Act, requiring a substantial likelihood of injury for an injunction to issue.¹⁹³ The *Phototron* rule, unlike the rule in *R.C. Bigelow*, does not require the court to assume anything about the defendant’s conduct after the transaction is consummated. This rule eliminates many of the false positives that the *R.C. Bigelow* rule might

acquisition or maintenance of . . . power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 385 (1956) (“It could not be said that this immense increase in use was solely or even largely attributable to the superior quality of cellophane or to the technique or business acumen of du Pont . . .”).

185. *Phototron*, 842 F.2d at 99.

186. *See id.*

187. *See id.* at 100 (“Phototron must present some evidence that Kodak or Colorcraft has sold photofinishing services below *its* cost.”).

188. *Id.* at 99-100.

189. *Id.*

190. *Id.* at 100.

191. *Id.* (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 123 (1986) (Stevens, J., dissenting)).

192. *Id.*

193. *Id.* at 102 (“[C]ompetitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured.”).

enjoin, and when compared to the lax standard in *R.C. Bigelow*, reduces the chilling effect on transactions in highly concentrated markets.

IV. TOWARDS A BETTER RULE

A. *The Problem With Presumptions*

The *Atlantic Richfield* decision brought the validity of the *R.C. Bigelow* rule into question.¹⁹⁴ However, the precedent remains, standing as an extreme pole for what is required to establish antitrust injury under section 16 of the Clayton Act.¹⁹⁵ The broad proposition that “[m]arket share data . . . constitutes sufficient evidence, in and of itself, of antitrust injury to a competitor . . .”¹⁹⁶ seems to support the premise that a merger that creates a large enough market share will be enjoined, regardless of the economic effect.

This proposition causes several problems. The *R.C. Bigelow* rule fails one of the most important purposes of the standing doctrine: to distinguish between monopolistic and efficient actions.¹⁹⁷ If competitive forces cause high market share, the plaintiffs would lack standing to challenge the transaction.¹⁹⁸ Hence, the court in *Atlantic Richfield* reasoned that “[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.”¹⁹⁹ The antitrust laws were not meant to discourage the competitive conduct of larger entities.²⁰⁰

R.C. Bigelow-like presumptions turn the standing doctrine of antitrust injury on its head. To impute the harms of anticompetitive conduct on firms of a particular size converts the antitrust injury doctrine into an evaluation of the merits of the case. To decide that the plaintiff will most likely engage in anticompetitive behavior, simply

194. See, e.g., *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1167 (W.D. Ark. 1995); *Remington Prods., Inc. v. N. Am. Philips Corp.*, 755 F. Supp. 52, 57-59 (D. Conn. 1991).

195. At the other extreme lies the *Phototron* rule requiring a substantial likelihood of injury. See *supra* notes 192-94 and accompanying text.

196. *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 111 (2d Cir. 1989).

197. See *Nostramo*, *supra* note 151, at 178.

198. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

199. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986)).

200. See *id.* at 340-41.

because of its size, requires a court to decide an entire monopolization case. A court must decide what the relevant market is, determine whether any barriers to entry exist, and ascertain the likelihood that the defendant will engage in anticompetitive conduct.²⁰¹ Standing, in large part, depends on who brings the suit, rather than who is being sued.²⁰² The inquiry should be whether the individual bringing suit is sufficiently endangered by the merger to be in a position to seek its injunction.

A merger's purpose clearly affects whether the defendant faces any threat of antitrust injury. Courts struggle to separate the notion of threat from an evaluation of the merits of the case.²⁰³ However, the focus of the inquiry need not remain on the merits. Assuming that the doctrine is a filter preventing the wrong plaintiff from bringing antitrust claims,²⁰⁴ the proper time to evaluate the merits would be later in an antitrust proceeding, when more market data can be ascertained.

To argue sufficient antitrust injury, one must show a violation of the antitrust laws to be so probable that a specific antitrust injury is bound to occur.²⁰⁵ The analysis requires a showing of three elements:²⁰⁶

201. Such an inquiry is common to both monopolization claims and section 7 claims alleging an anticompetitive merger. *See* *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (noting that a product market must be defined in a monopolization claim by including reasonable substitutes for a product); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956) (noting that market definition is a precursor to a monopolization claim); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.11 (1997) (defining the relevant market in a section 7 claim as one in which a party can impose a "small but significant and nontransitory increase" in price).

202. The Supreme Court has focused on the plaintiff's injury as opposed to the defendant's conduct. The Court also considers the ability to remedy the injury, the causation between the injury and the violation of the antitrust laws, and whether the plaintiff is the best party to sue for those injuries. *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-37 (1983).

203. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

204. *See* *Associated Gen. Contractors*, 459 U.S. at 536-37.

205. *See* *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986). In order to determine whether a causal nexus exists between the alleged antitrust violation and the alleged injury, courts do not address the probability of the plaintiff's argument that the antitrust laws have been violated. *See id.* One of the reasons why allegations of predatory conduct are so problematic in the antitrust injury context is that predatory schemes are rare and difficult to execute. *See* *Areeda & Turner*, *supra* note 20, at 699 ("That predatory pricing seems highly unlikely does not necessarily mean that there should be no antitrust rules against it. But it does suggest that extreme care be taken in formulating such rules, lest the threat of litigation, particularly by private parties,

(1) The antitrust laws must likely be violated should the transaction occur,²⁰⁷ or, in a section 7 case, that a merger is likely to create a monopoly or lead to predatory pricing;²⁰⁸ (2) The injury suffered must be of the kind that the antitrust laws were meant to prevent;²⁰⁹ (3) Causation must exist between the injury and breach of the antitrust laws.²¹⁰

To argue a causal nexus, one must speculate upon what the effects of the merger would be, if consummated.²¹¹ Granting an injunction prior to the occurrence of a transaction²¹² necessarily involves speculation about the effects of the transaction and the prospective application of the antitrust laws.²¹³ The *R.C. Bigelow* presumption, however, requires a court to make too many unwarranted inferences. It is one thing to conclude that an increase in price would be the natural effect of a merger that creates a concentrated market; it is another to assume that a merged entity would begin to charge monopoly rents or engage in predatory pricing. Even if a price increase is likely, applying the *R.C. Bigelow* presumption would require a court to assume that the increase arises from a decrease in competition, which is not always the case.²¹⁴ A court may speculate about the likely effects of the merger, but cannot make assumptions that direct the inquiry one way or the other. To do so would be to reduce the antitrust injury requirement to an injury-in-fact requirement.²¹⁵

The two assumptions inherent in *R.C. Bigelow* analysis demonstrates that such a rule erodes the causal nexus required to sustain

materially deter legitimate, competitive pricing.”); *Matsushita*, 475 U.S. at 588-89.

206. *Cf. Cargill*, 479 U.S. at 118-22.

207. *See id.*

208. *See* 15 U.S.C. § 18 (2006).

209. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

210. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 109-10 (2d Cir. 1989).

211. *Cf. Matsushita*, 475 U.S. at 588 (noting that a determination that a firm would engage in predatory pricing is inherently speculative).

212. *See id.*

213. *See id.*

214. Prices can increase for a variety of reasons, such as an increase in the cost of production, or the sudden loss of some market efficiencies.

215. Although both the injury-in-fact requirement and the antitrust injury requirement require some form of causation and redress, the antitrust injury doctrine requires causation to tether the injury to the purpose of the laws creating the cause of action.

an injunction. First, the court must assume that the merged entity will increase prices or engage in predatory conduct.²¹⁶ Beneath a presumption that the merged entity will increase prices is yet another assumption that another firm will not simply lower its prices and capture market share, or that another firm will not enter and compete with the firm directly.²¹⁷ Specifically, a court must assume sufficient barriers to entry into the relevant market exist to ensure that the merged company can maintain its price increase.²¹⁸ In the alternative, the court must assume that the market share left for competitors after the merger is insufficient to maintain competitive forces.²¹⁹ For example, a competitor with thirty percent of the market share can probably compete with the merged company. Absent predatory pricing, the merged company will be forced to keep pace with price competition. A market share of ninety-five percent, however, will likely preclude the competitor from directly competing with the merged company on price.²²⁰ Such a market share, however, will not preclude market entry to capture the market share that the merged company loses when it increases prices.

One must presuppose a lot about the relevant market to assume that the merged company will increase prices. First, assumptions about the

216. See, e.g., *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 110 (2d Cir. 1989) (distinguishing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 (1989)).

217. Cf. *Areeda & Turner*, *supra* note 20, at 698-99 (“[A] firm can anticipate monopoly profits for only so long as its monopoly prices do not attract new entry.”).

218. See *id.*

219. If demand is sufficiently high and the small share competitor has enough capacity to meet a substantial portion of the outstanding demand, the competitor might capture a larger share by producing more, bringing down the price of the good and undermining the monopolist’s attempt to charge monopoly prices.

220. A 95% market share would make it difficult for a rival firm to compete on price because it is unlikely that a newcomer can produce enough output to offset the price set by the dominant firm. See *Cargill*, 479 U.S. at 119.

In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors’ goods at a higher price, and the competitors will not be driven out of business.

Id. Even if the newcomer can produce adequate output to undercut the dominant firm, the dominant firm’s prices, brand strength, consumer loyalty, and product innovation may still pose a substantial barrier to price competition. Cf. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 303 n.35 (1966) (noting that firms that fall below a 20% market share may still be unlawful where serious barriers to entry exist).

strength of barriers to entry or the durability of the competition speaks to the merits of the case.²²¹ Showing that the market possesses sufficient barriers to entry or that competition has been stifled goes to the heart of the substantive claims.²²² Second, to assume predatory pricing, the court must believe that the merged company can recoup its costs after it has eliminated competition.²²³ For a predatory pricing scheme to work, there must not be a competitor in the relevant market that can sustain predatory competition for a protracted period of time.²²⁴ Additionally, at some price point a product substitute might become more viable.²²⁵ For example, if widget A sells for \$5 and widget B sells for \$10, and both widgets can be used for a similar purpose, a consumer may switch to widget B if widget A increases in price to \$10.50.²²⁶ If the substitute sells below the monopoly price, the merged company cannot charge monopoly prices.

Some cases may present facts that warrant such assumptions, some may not; therein lies the problem with the *R.C. Bigelow* presumption. All mergers will be treated as pernicious mergers and will be enjoined if they possess only one of the indicia of danger—market share concentration. However, the ability to increase prices depends on both market share and barriers to entry in the relevant market. To exclude other factors by mechanically enjoining high market share transactions would create too many false positives and chill high market share mergers, regardless of their potential efficiencies.

221. Central to a claim of monopolization under section 2 of the Sherman Act is whether barriers-to-entry exist in the relevant market. *See* *United States v. U.S. Steel Corp.*, 251 U.S. 417, 456 (1920).

222. *See id.*

223. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (“The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator’s losses and to harvest some additional gain.”).

224. *See Areeda & Turner*, *supra* note 20, at 698 (“[A predator must have] greater financial staying power than his rivals . . .”).

225. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (“Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.”).

226. For example, in the *du Pont* case, the court noted that at some point users of cellophane wrapping may switch to another cellulose-based wrapping material, or even to tin foil, if the cost of cellophane becomes prohibitive. *See id.* at 400-01.

B. Probability and Predation: Difficulties in Determining the Likelihood of Predatory Pricing Before It Happens

A court might struggle to accurately predict whether a transaction will give rise to predatory conduct, or even whether a transaction poses a threat of such anticompetitive behavior. Many commentators have expressed doubt as to the rationality of predatory pricing.²²⁷ Even if one were to concede that there might be some reason to engage in predatory pricing, defining the conduct is itself an intractable problem.²²⁸ Spotting conduct that is improbable and difficult to define before it occurs must necessarily be more difficult than identifying it after it occurs.

Two problems with predatory pricing appear when issuing an injunction. First, it might never be worth it for a firm to engage in predatory pricing.²²⁹ Further, it might only be rational to engage in predatory pricing if some rare market conditions exist.²³⁰ Second, defining what constitutes predatory pricing is problematic,²³¹ even the straightforward definition of pricing below cost does not address which cost to use.²³² Thus, it is difficult to identify predatory pricing once it has occurred, let alone to determine whether predatory pricing will occur if a transaction is consummated.

1. The Low Probability of Predation: Is Pricing Rational Conduct?

Ideally, a rule governing injunctive relief in antitrust cases should reflect the probability of harm.²³³ A rule that enjoins transactions in

227. See, e.g., Areeda & Turner, *supra* note 20, at 699 (“The prospects of an adequate future payoff, therefore, will seldom be sufficient to motivate predation. Indeed, proven cases of predatory pricing have been extremely rare.”); BORK, *supra* note 39, at 144-55.

228. See *infra* notes 253-62 and accompanying text.

229. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90 (1986).

230. K. Craig Wildfang, *Predatory Conduct Under Section 2 of the Sherman Act: Do Recent Cases Illuminate the Boundaries?*, 31 J. CORP. L. 323, 327 (“[T]here is general agreement with the conclusion that successful predatory pricing is a relatively rare occurrence, and that there are relatively few markets in which the natural and artificial entry barriers are great enough to sustain a sufficient recoupment period of monopoly prices to warrant serious antitrust concern.”).

231. See *infra* notes 253-62 and accompanying text.

232. See *infra* notes 253-62 and accompanying text.

233. The standard test for injunctive relief examines both the magnitude of the harm that will occur if the court refuses to enjoin certain conduct and the probability of the

proportion to their probability of anticompetitive effect will yield the fewest false positives. Thus, the probability of the conduct being alleged should play a central role in a court's antitrust inquiry. If a court determines injunctive relief based on the probability of harm occurring, then a predatory pricing claim should be difficult to enjoin.²³⁴

The primary criticism of predatory pricing as rational economic behavior is that success depends on a series of improbable events.²³⁵ To assume that a firm will engage in predatory conduct is not just to assume the effects of such conduct, but the existence of other preconditions.²³⁶ The string of assumptions required to reach a conclusion of predatory conduct has led courts to require "a dangerous probability of actual monopolization" resulting from the alleged predation.²³⁷ To assume that a firm with market dominance will abuse its high market share and engage in predation not only assumes that the firm is willing to do so, but also that it is in a position to do so successfully.

Success, however, is often improbable.²³⁸ To successfully drive a competitor out of the market, a firm must be certain that it can recoup the costs of predation.²³⁹ It must recoup not only the amount below the cost at which it sold its goods, but also the forgone profits.²⁴⁰ During the predation period, a firm undergoing such behavior must not only manage to eliminate most of its competition, but must also erect

plaintiff succeeding on the merits of the case. *See Pharm. Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 670 (2003). Courts do this by examining the balance of hardships, the irreparability of the harm, and its imminence. *Id.* A rule governing antitrust injunctions should be no different. If a court presumes that a firm will engage in improbable conduct, it is divorcing the injunctive relief analysis from its purpose—protection against imminent and irreversible harm.

234. Although the probability of predation is slim, this does not mean there should not be a rule prohibiting such conduct. *See Areeda & Turner*, *supra* note 20, at 699. The low probability, however, should counsel against assuming that it will occur in most cases.

235. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90 (1986).

236. For a firm to make predation work, the market must be such that the predator can expect to recoup its costs. *See id.* at 589.

237. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (quoting *Sports Inc. v. McQuillan*, 506 U.S. 447, 455 (1993)).

238. *See Matsushita*, 475 U.S. at 589-90; *Areeda & Turner*, *supra* note 20, at 699; BORK, *supra* note 39, at 144-55.

239. *See Matsushita*, 475 U.S. at 590.

240. *See Areeda & Turner*, *supra* note 20, at 698.

sufficient barriers to entry to prevent a new competitor from moving into the market and capturing market share.²⁴¹

Nevertheless, improbable does not mean impossible.²⁴² Some commentators have noted circumstances in which predatory pricing might be worthwhile, albeit difficult to execute.²⁴³ While there may be few rational economic reasons to engage in predation, there may be some strategic reasons to do so.²⁴⁴ A firm may choose to use predation as a means of signaling to competitors in another market.²⁴⁵ By subjugating its competition in one market, a predator may be able to create a fear of retaliation in another market, deterring its competitors from engaging in aggressive competition.²⁴⁶ If the net gain from controlling the second market is greater than the loss sustained in the first market, predatory conduct might not only be a feasible tactic, but a rational one.

To fashion a rule that prevents predation where it is most probable, a court may have to view predatory pricing as communication rather than profit-maximizing behavior.²⁴⁷ A show of force in one market to subordinate competitors in another market is a prime example of signaling.²⁴⁸ Another potential motivation for signaling through predation is to send competitors false messages.²⁴⁹

A competitor may lower prices below its costs to create the illusion that market conditions are unfavorable for entry.²⁵⁰ Such signaling assumes incomplete market information, such that competitors do not have an accurate picture of market conditions in a market they have not

241. *See id.* at 698-99.

242. *See id.* at 699.

243. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 939-42 (1979); F.M. Scherer, *Predatory Pricing Under Section 2 of the Sherman Act*, 89 HARV. L. REV. 868 (1976).

244. *See* Posner, *supra* note 244, at 939-40.

245. *See id.*

246. *Id.* at 940 (“If [a predator] sells below cost in one market, his losses there are an investment that will be recouped with interest in his other markets in the form of more timid competition from the rivals in those markets.”).

247. *See* Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

248. Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2299-302 (2000).

249. “Cost signaling,” a common example, intentionally misrepresents market conditions. *See id.* at 2248.

250. *See id.*

yet entered. Inductively, one can assume that the plausibility of predation as a signaling tactic depends largely on the amount of information potential competitors have about the relevant market.

The two possible explanations for predatory conduct described above can guide a rule for injunctions. First, a predator must be likely to recoup its predation costs.²⁵¹ It can do so if it is either signaling to bar a competitor from entering in order to achieve some profit-maximizing end, or if it is likely to drive out competition from the relevant market and erect the necessary barriers to entry to charge monopoly prices. For a court to find that signaling is likely, it will examine, among other things, the alleged predator's incentives and its exposure to other markets. The likelihood of gaining market share depends on whether the predator has successfully driven competitors from the market in the past, whether it is likely to be able to maintain monopoly prices long enough to recoup its losses, and whether it can successfully deter competitors from entering the market and engaging in price competition.²⁵²

A court must consider all these factors prior to enjoining a transaction. Having a high market share is a precondition to both charging monopoly prices and to signaling, but it does not necessarily guarantee that a firm will engage in predation for either purpose. Maintaining congruence between the probability of injunctive relief and the probability of anticompetitive effect requires a court to consider far more than market share. The *R.C. Bigelow* rule is too mechanical to condemn anticompetitive behavior while still fostering and preserving competition. A presumption of antitrust injury based on a rigid market share will condemn anticompetitive and procompetitive behavior alike.

2. Problems Defining Predatory Pricing

Even post-merger it is difficult to determine if a merged company has engaged in predatory pricing, since no clear definition of predatory pricing exists.²⁵³ The main determination courts must make is whether a

251. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90 (1986).

252. See Areeda & Turner, *supra* note 20 at 698-99.

253. The United States Courts of Appeals differ on what measure of cost should be used to determine if a firm is engaging in predatory pricing. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 n.1 (1993) (noting the disagreement among circuit courts over the appropriate measure of cost in predation cases). The Supreme Court left this issue unresolved. See *id.*

firm has engaged in pricing below costs.²⁵⁴ Fixed costs remain constant regardless of output, while variable costs increase or decrease with changes in output.²⁵⁵ To measure a firm's costs for the purpose of predation, the variable cost per increase in unit output, called the marginal cost,²⁵⁶ is the most important metric.²⁵⁷ Typically, marginal cost rises as a plant reaches capacity.²⁵⁸

Measuring a firm's marginal cost is difficult, so simply comparing the price of goods to marginal cost becomes problematic.²⁵⁹ While using marginal cost as the benchmark for determining whether a firm has engaged in predatory pricing would be ideal, it is difficult to determine what it costs a firm to produce and sell its last unit of goods.²⁶⁰ Average variable cost, which is "the sum of all variable costs divided by output," is another option, but this metric is also imperfect.²⁶¹ Average variable cost will not reveal if the firm's rationale for engaging in predation is strategic, rather than purely economic.

Regardless of which definition of cost one adopts, the necessary data to compute cost is often unavailable because the transaction has not yet occurred. The costs of a merged company might be much lower than the costs of each company by itself because the merger might have created production efficiencies.²⁶² Therefore, absent data about what costs will be after a merger, cost predictions may be inaccurate. Determining whether a firm has engaged in predatory pricing when a court has complete information is difficult enough; doing so while speculating about a firm's post-transaction costs risks inaccuracy.

254. Most scholars agree that predatory pricing is the pricing of goods below some measure of cost. *See, e.g.,* Areeda & Turner, *supra* note 20, at 699; Bravo & Siciliani, *supra* note 20, at 258; Foer, *supra* note 20, at 1319 ("The illegal act of predatory pricing is defined as setting one's prices below an appropriate measure of cost, with the ability to later raise prices sufficiently to recapture the investment made in below-cost pricing.").

255. Areeda & Turner, *supra* note 20, at 700.

256. *Id.*

257. *See id.*

258. *Id.*

259. *See id.* at 716-17.

260. *See id.* at 700-02.

261. *See id.* at 700.

262. A merger may yield benefits resulting from economies of scale in production, or from joint marketing efforts by the individual firms. *See* F.M. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 159-67 (Houghton Mifflin 3d ed. 1990).

A court will have to make potentially erroneous assumptions about market conditions and about the efficiencies of the proposed transaction. It will not only have to assume that a post-transaction entity can charge a monopoly price, but that the data could support a finding of predatory or monopoly pricing. In other words, the court must both make assumptions about a firm's costs and decide on a definition of cost, without necessary market information.

One cannot decide whether a firm is signaling without understanding a firm's motives within the relevant market. To properly signal to an adjacent market that the predator will not tolerate aggressive price competition, competitors must know definitively that the predator is selling goods below cost. Thus, the predator must not only price below its costs, but below what the competitors believe to be the general cost of doing business. Sometimes this cost can be difficult to determine. Other times the cost will be readily ascertainable by the competition because the price of raw materials may govern the ultimate price of the good. Essentially, the purpose of the predatory conduct will determine which metric of cost is appropriate.

V. CONCLUSION

The decision to grant injunctive relief is a difficult one because a court has little choice but to speculate about what would happen if it does not act. Often, the line between legal and illegal conduct in antitrust law is a thin one. A high market share may mean that a firm is operating at levels of efficiency at which its competition cannot compete, or it may mean that it has a superior product. It can also mean that the firm is in a position to abuse its power over the market to secure a dominant position and charge monopoly prices. Before a merger or any affirmative conduct by the dominant firm, a court only has the market share and other concentration metrics, such as the Herfindahl-Hirschman Index, upon which to rely.²⁶³ These metrics are often

263. The Herfindahl-Hirschman Index is a quantitative means of calculating market concentration. It is obtained by adding the square of all the market shares in a relevant product market. *See Ark. Elec. Energy Consumers v. F.E.R.C.*, 290 F.3d 362, 370 n.6 (D.C. Cir. 2002) ("The Herfindahl-Hirschman Index refers to a measurement of market concentration that 'is calculated by summing the squares of the individual market shares of all the participants.'" (citing U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.5 (1997))). Courts will sometimes rely on the Herfindahl-Hirschman Index to determine how many competitors make up the majority

indeterminate and agnostic about whether a firm is likely to employ anticompetitive tactics.

A rule like that in *R.C. Bigelow* enjoins a transaction based on the market share and concentration metrics alone. As a result, the antitrust injury requirement is effectively reduced to an injury-in-fact requirement. The doctrine can no longer function as a parsing mechanism, separating perniciously dominant positions from benign ones. By presuming the existence of antitrust injury, a court must presume quite a bit about the market the firm is in, and the effect on the market after the transaction is consummated. A court must assume that a firm can recoup its losses, erect sufficient barriers to entry, and engage in price competition. If a firm cannot seal off the market, it cannot recoup its losses by charging monopoly prices.

The most problematic assumption that a court can make is that a firm will engage in predatory pricing once it has secured a dominant position in the market. Predatory pricing is highly unlikely to occur because it is a difficult tactic to pull off. Not only must a firm recoup its losses from pricing goods below its costs, it must also have the staying power to outlast its competition. Even in cases in which a firm may be using the predatory conduct as a signaling mechanism, it is incredibly difficult to define and identify predatory pricing, particularly when it has not yet happened.

A more defensible approach to antitrust injury will make as few presumptions as possible. The most proactive method of avoiding unwarranted assumptions about a firm and the market is to avoid mechanical antitrust injury rules. In particular, a court should never presume the existence of antitrust injury and should always examine the causal nexus between the purposes of the antitrust laws and the injury asserted rather carefully. There is no substitute for carefully examining the injury and the likelihood that the injury was caused by something the antitrust laws were meant to prevent. A mechanical condemnation of high market share mergers by injunction cannot succeed. Such a rule risks discouraging innovation and stifling merger activity.

of the relevant market. *See id.* at 369-70.