Private Merger Challenges: A Critical Supplement to Government Enforcement [top]

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Introduction

Over the years, private enforcers have played a valuable role in preventing anticompetitive conduct, supplementing a governmental enforcement regime that cannot challenge all illegal behavior. Today, private parties continue to challenge anticompetitive mergers, helping to maintain a competitive balance in the economy. Although there is a general impression that the doctrine of antitrust injury bars almost all private antitrust merger challenges, the reality is that many private challenges, even by competitors, remain a viable option if properly pled and, with treble damages and cost-shifting statutes,[1] potentially a very profitable one.

Private merger challenges are a vital part of the enforcement regime as envisioned by Congress in enacting the Clayton Act. As Justice Stevens stated, writing for a unanimous Supreme Court in California v. American Stores, the Clayton Act "manifests a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability. . . . Private enforcement of the Act was in no sense an afterthought; it was an integral part of the Congressional plan for protecting competition . . . [within] a statutory scheme that favors private enforcement."[2]

Private merger enforcement actions have been a crucial backstop to government enforcement not only in periods of relatively lax merger enforcement such as the Reagan-Bush Administrations, but even in relatively aggressive periods such as the Clinton era. The government lacks the resources and sometimes lacks the information to challenge all competitively problematic mergers. Moreover, sometimes the government may simply have made the wrong assessment and the courts, after more extensive litigation, have decided that apparently benign mergers are actually far more problematic. Government enforcement, which typically results in consent decrees instead of litigation, ends up writing the courts out of creating the law of Section 7, contrary to the scheme envisioned by Congress.

People often fail to appreciate the important role of private merger enforcement. In some cases such as AlliedSignal, Inc. v. B.F. Goodrich Co.[3] or Atlantic Coast Airline Holdings v.

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[1] Prevailing plaintiffs are authorized to recover attorney's fees in antitrust actions, see American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel, 456 U.S. 556 (1982).

[2] California v. American Stores, 495 U.S. 271, 284-85 (1990).

[3] 183 F.3d 568 (7th Cir. 1999). AlliedSignal's challenge came the day after the $2.06 billion deal was cleared by the FTC. The Department of Defense also had approved the merger. The defendants claimed that the court should defer to the judgment of the federal agencies, but the Seventh Circuit rejected that claim observing that there is no reason to believe that "the

Mesa Air Group,[4] customers or targets have been able to fend off mergers even though the Department of Justice or FTC failed to act. In some cases, such as Bon-Ton Stores, Inc. v. May Department Stores Co.,[5] private parties are joined by state enforcement officials. In other cases such as Union Carbide Corp. v. Montell N.V.,[6] private parties were able to secure more extensive relief than that secured by the government. In fact, private parties can secure damages for violations of Section 7. The reality is that government inaction or even consent agreements are not the end of the day on the legality of a merger.

However, as in other areas of antitrust law, the doctrine of antitrust injury serves to siphon off less than meritorious claims permitting only certain parties to challenge an anticompetitive merger. This article examines the current antitrust injury jurisprudence to explain the circumstances where a private party will be permitted to launch a merger challenge.

Private party suits are explicitly permitted by Section 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ."[7] Despite (or perhaps because of) the simplicity of this directive, the extent to which courts have allowed private parties to bring antitrust suits has varied significantly over the years, leading at times to disagreement and confusion among the circuits.[8] According to one commentator, the conflict between the self-interested agenda of private antitrust enforcers and the public importance of competition goals presents "as demanding and challenging a task as any that confronts the judiciary."[9]

The Supreme Court first attempted to modernize private plaintiff standing law in 1977 with Brunswick Corp. v. Pueblo Bowl-O-Mat, an extraordinarily influential decision that introduced the concept of "antitrust injury."[10] Over the next thirteen years, this doctrine was further set forth in a series of four additional Supreme Court cases: Blue Shield of Virginia v. McCready,[11] Associated General Contractors of California., Inc. v. California State Council of Carpenters,[12] Cargill, Inc. v. Monfort of Colorado, Inc.,[13] and Atlantic Richfield Co. v. USA Petroleum Co.[14] While these cases answered many important questions, they also have left unresolved some key issues pertaining to the nature of antitrust injury, and this has led to divergences among the different circuits over the past decade and a half.

This article focuses on the ability of private plaintiffs, in particular customers, competitors and tender offer targets, to challenge mergers

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failure of either the FTC or the Department of Defense to object to the merger should be regarded as conclusive of its legality." Id. at 575.

[4] 295 F. Supp. 2d 75 (D.D.C. 2003).

[5] 881 F. Supp. 860 (W.D.N.Y. 1994).

[6] 944 F. Supp. 1119 (S.D.N.Y. 1996).

[7] Clayton Act, 15 U.S.C.A. §§ 12-27 (West Supp. 1997).

[8] For a historical recapitulation, see, generally, Kevin D. Gordon, Private Antitrust Standing: A Survey and Analysis of the Law After Associated General, 61 WASH U. L. Q. 1069 (1984).

[9] Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 MICH. L. REV. 1, 2 (1995).

[10] 429 U.S. 477 (1977).

[11] 457 U.S. 465 (1982).

[12] 459 U.S. 519 (1983).

[13] 479 U.S. 104 (1986).

[14] 495 U.S. 328 (1990).

under Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act.[15]

Brunswick and Cargill

The modern era of antitrust injury analysis begins with Brunswick. Brunswick, a large manufacturer and seller of bowling equipment, purchased bowling alleys in a number of locations, including three cities where Treadway's subsidiaries operated alleys. Treadway claimed that Brunswick's acquisition was anticompetitive and filed suit under Section 7 of the Clayton Act. The main question addressed by the case was whether a competitor could sue for treble damages in a Section 7 suit, where the damages claim was premised on the amount of profits the plaintiff company would have earned had the acquisition not taken place and the acquired companies had gone out business.

The Third Circuit ruled in Treadway's favor, but the Supreme Court reversed, holding that Section 4 of the Clayton Act provides a damage remedy only for "antitrust injuries," which it defined as injuries that are "of the type the antitrust laws were designed to prevent and that flow[] from that which makes defendants' acts unlawful."[16] Treadway experienced no antitrust injury because whatever harm Brunswick created by purchasing the parties' competitors and preventing them from failing was unconnected to the rationale for the antitrust liability rule at issue. The Court went on to explain that "[e]very merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons."[17] Because some of these injuries would result whether or not the merger is deemed unlawful, permitting compensation for all injuries would "authorize damages for losses which are of no concern to the antitrust laws."[18]

In the years immediately following Brunswick, the courts disagreed as to whether the antitrust injury standard that had been laid out in Brunswick (a damages claim case) also pertained to pleas for injunctive relief. Courts in the Second and Seventh Circuits allowed private plaintiffs to bring suits for equitable relief without referencing the Brunswick decision,[19] while courts in the First, Ninth and Tenth Circuits disagreed, concluding that a plaintiff must demonstrate antitrust injury in suits for both injunctive relief and damages.[20]

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[15] Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (West Supp. 1997). For an extensive discussion of the subject, see ABA Antitrust Section, Private Litigation Under Section 7 of the Clayton Act: Law and Policy (1989). This article deals solely with antitrust injury doctrine, which is but one facet of the standing requirement in antitrust cases. One case has described the standing requirement in antitrust cases as encompassing five factors: (1) the motive of the defendant—whether it specifically intended to cause the plaintiff harm; (2) whether the plaintiff's injury is "an injury of the type the antitrust laws were intended to prevent" as required under Brunswick; (3) the directness of the causal connection between the violation and the injury; (4) the extent to which abstract speculation underlies the allegations of injury and of their causation by defendant's antitrust violations; and (5) the risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover. See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1363 (9th Cir. 1986).

[16] Brunswick, 429 U.S. at 489.

[17] Id. at 487.

[18] Id.

[19] See, e.g., Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 (2d Cir. 1981); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982).

[20] See Cent. Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1186-87 (10th Cir. 1983); ADM Corp. v. Sigma Instruments, Inc., 628 F.2d 753 (1st Cir. 1980); Carter Haw-

With Cargill,[21] the Supreme Court expanded the Brunswick antitrust injury test to limit actions for injunctive relief. Monfort, the fifth largest U.S. beef packer, sought to enjoin a merger between Cargill/Excel and Spencer Beef, the second and third largest beef packers. Monfort claimed that it would be harmed by the increase in the defendants' market share, which would allow the combined company to lower prices to consumers and would also lead to higher prices paid to ranchers.

Monfort prevailed before the district court and the Tenth Circuit. The district court enjoined the proposed merger, holding that Monfort's allegation of "price-cost 'squeeze'" that would "severely narro[w]" Monfort's profit margins constituted an allegation of antitrust injury.[22] It also held that Monfort had shown that the proposed merger would cause this profit squeeze to occur, thus violating Section 7 of the Clayton Act. The Tenth Circuit affirmed, finding that Monfort's allegation of a "price-cost squeeze" constituted an injury in the "form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers."[23]

Cargill posed an important challenge for the Court. On the one hand, the Reagan Administration Antitrust Division and the Business Roundtable argued that the Court should adopt a rule prohibiting any private merger challenge brought by a competitor. The Supreme Court refused to go that far. Rather, the Court explicitly concluded that a competitor would have standing to challenge a merger if it could allege a "credible threat of injury from below-cost pricing."[24] The Court noted that while predatory pricing may be rare, "it would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur."[25] In this case, Monfort failed to meet that standard.[26]

Cargill clarified that antitrust injury analysis must be undertaken prior to allowing challenges of injunctions. However, a number of open questions remain as to how Cargill should be interpreted in certain situations. Three current issues are: (1) under what circumstances may consumers challenge a merger for antitrust reasons, (2) when do competitors have standing to challenge a merger, absent a provable threat of predatory pricing, and (3) whether tender offer targets have standing to challenge a merger for antitrust reasons.

Customer Standing

Perhaps the least controversial issues are posed by merger challenges by customers. Customers are the segment most likely to suffer antitrust injury from an anticompetitive merger, since they would pay the monopolistic prices, or suffer the loss of quality or innovation, that

ley Hale Stores, Inc. v. The Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984).

[21] 479 U.S. at 104.

[22] See Monfort of Colo., Inc. v. Cargill, Inc., 591 F. Supp. 683, 691-92 (D. Colo. 1983).

[23] Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 575 (10th Cir. 1985).

[24] 479 U.S. at 118.

[25] Id. at 122.

[26] Professors Krattenmaker and Salop explain how the Supreme Court's analysis was short-sighted and Cargill's post-merger conduct could fit into a raising rivals cost strategy. Krattenmaker and Salop, Analyzing Anticompetitive Exclusion, 56 Antirust L.J. 71, 73-74 (1987).

antitrust laws are meant to prevent. As one court has observed "consumers have usually been the preferred plaintiff in private antitrust litigation."[27] However, there have been relatively few consumer challenges to mergers because individual customers tend not to have a large enough stake in the matter to justify the investments of an antitrust lawsuit.[28]

Cases Where Customer Standing Has Been Granted

In Nelson v. Monroe Regional Medical Center,[29] the plaintiffs, an eighteen year-old woman and her mother, alleged that a merger between the Monroe Clinic and the Monroe Medical Center—the only two health care facilities in Monroe, Wisconsin—had allowed those providers to monopolize the market for medical services in Monroe and its environs, in violation of Sections 1 and 2 of the Sherman Act. The plaintiffs claimed antitrust injury because the merged facility, which had cared for plaintiffs in the past, refused to treat them post merger, except on an emergency basis, in retaliation for their having previously filed a malpractice action against one of the clinic's physicians. This forced the plaintiffs to travel to another city to receive care. The district court dismissed the plaintiffs' claim on grounds that that they had failed to show antitrust injury.[30]

On appeal, the Seventh Circuit reversed the district court, because the denial of care to the plaintiffs constituted an output reduction, which was exactly the type of antitrust injury that one would expect from an anticompetitive merger. The court observed "[m]onopolists are more likely to turn away prospective clients because they do not feel the same competitive pressure to serve all comers."[31] According to a concurring opinion, the plaintiffs suffered "the very essence of antitrust injury. Although perhaps not a matter of major moment in dollars and cents, the merger and the

[27] Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1167 (W.D. Ark. 1995) (citing 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 370 (rev. ed. 1995)).

[28] Although customer standing may pose practical difficulties because no individual customer may have the interest or resources to challenge a merger, one alternative may be a challenge by an association of customers. In the past associations have been held to possess standing to challenge mergers. See, e.g., Appraisers Coalition v. Appraisal Inst., 845 F. Supp. 592 (N.D. Ill. 1994). Associations can generally sue for injunctive relief on behalf of their members. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); American Chiropractic Ass'n v. Trigon Healthcare, 151 F. Supp. 2d 723 (W.D. Va. 2001). According to the Supreme Court in Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977), associations have standing to bring suit on behalf of their members when: (1) the members would otherwise have standing to sue for themselves; (2) the interests the association seeks to protect are "germane to the organization's purpose;" and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. at 343. Of course, as the first factor of the above test suggests, an association must show that its members have suffered an antitrust injury, but "individualized proof" of antitrust injury to all members of the association is not necessarily required. See Appraisers Coalition, 845 F. Supp. 592 at 601-02. According to the D.C. Circuit, it is enough if just one member of the association would otherwise have standing. See City of Waukesha v. EPA, 320 F.3d 228, 235-37 (D.C. Cir. 2003) (per curiam); Consumer Fed'n of America v. FCC, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (granting standing in unsuccessful challenge to FCC approval of cable television company merger).

[29] 925 F.2d 1555 (7th Cir. 1991).

[30] See id. at 1562.

[31] Id. at 1564.

related refusal to deal strike at the very heart of the evils addressed by the antitrust laws."[32]

AlliedSignal, Inc. v. B.F. Goodrich Co.[33] involved a customer challenge to the proposed merger of B.F. Goodrich and Coltec Industries in the aircraft landing gear market.[34] AlliedSignal, which both competed with B.F. Goodrich and purchased B.F. Goodrich products, alleged a number of harms from the merger. First, AlliedSignal had contracted to prepare joint bids on landing systems with Coltec under a Strategic Alliance Agreement and was afraid that B.F. Goodrich would have access to proprietary information shared under that agreement if the merger was allowed. Second, AlliedSignal feared higher prices for the wheels and brakes that it purchased from B.F. Goodrich. Last, the plaintiff feared that B.F. Goodrich could leverage its dominant post-merger position to favor its own wheels and brakes over AlliedSignal's in the formation of integrated landing systems.[35]

Initially, B.F. Goodrich asserted that arbitration was necessary because the joint bidding contract between AlliedSignal and Coltec contained an arbitration clause, and antitrust injury in this case was dependent on the parties failing to abide by that contract.[36] The court firmly rejected this arbitrability argument, noting that antitrust injury could result from B.F. Goodrich charging uncompetitive prices, even if the joint bidding agreement were still in effect.

B.F. Goodrich also challenged AlliedSignal's antitrust standing, arguing that AlliedSignal's claim was based only on B.F. Goodrich and AlliedSignal's competition in the sales of wheels and brakes.[37] Without addressing the issue of competitor standing, the court dismissed this argument, holding that AlliedSignal possessed standing to sue because it would be affected by the merged entity's anticompetitive pricing as a purchaser of B.F. Goodrich's wheels and brakes (AlliedSignal would integrate the wheels and brakes with landing gear and brake control systems to form a complete landing system).[38] Soon after the Seventh Circuit's decision upholding the preliminary injunction, B.F. Goodrich and Coltec reached a settlement with AlliedSignal and proceeded with the merger.

Finally, in the more recent case of Reilly v. The Hearst Corp., a newspaper subscriber brought suit to prevent the acquisition of a morning paper by the publisher of an afternoon paper, which would be followed by the planned closure of the afternoon paper.[39] The court held that the subscriber had standing to challenge a proposed merger that would "cause injury to competition for readers among economically viable newspapers."[40] The court also mentioned that there would be two other possible bases of antitrust standing to challenge the transaction: plaintiffs could allege

[32] Id. at 1568 (Cudahy, J., concurring).

[33] 183 F.3d 568 (7th Cir. 1999). AlliedSignal's challenge came the day after the $2.06 billion deal was cleared by the FTC. The Department of Defense also had approved the merger. The defendants claimed that the court should defer to the judgment of the federal agencies, but the Seventh Circuit rejected that claim observing that there is no reason to believe that "the failure of either the FTC or the Department of Defense to object to the merger should be regarded as conclusive of its legality." Id. at 575.

[34] See id. at 570.

[35] See id. at 571.

[36] See id.

[37] See id. at 576.

[38] See id.

[39] See 107 F. Supp. 2d 1192 (N.D. Cal. 2000).

[40] Id. at 1195.

antitrust injury as advertisers or as competing publishers.[41] Advertiser standing was in fact granted in the newspaper merger case Community Publishers, Inc. v. Donley Corp., due to the threat of the dominant newspaper raising its rates.[42]

Cases Where Customer Standing Has Been Denied

City of Pittsburgh v. West Penn Power Co., on the other hand, is a case where standing to challenge a merger was denied, although the precedential value of the case is limited because it involved regulated utilities.[43] The City of Pittsburgh filed suit against West Penn Power and Duquesne Light Company, alleging that the two companies entered into a pre-merger agreement in restraint of trade and that their proposed merger would substantially lessen competition or tend to create a monopoly. The City claimed that an agreement between Allegheny Power and Duquesne Light to withdraw Allegheny Power's application before the Pennsylvania Public Utility Commission to provide electric service to two Redevelopment Zones within the City violated Section 1 of the Sherman Act, and that the proposed merger violated Section 7 of the Clayton Act.

The court dismissed for lack of antitrust injury, claiming that the City's "inability to choose to buy from either Allegheny Power or Duquesne Light for the Redevelopment Zones is an injury visited upon it by the regulated nature of utility services, not caused by an agreement between Duquesne Light and Allegheny Power to withdraw Allegheny Power's application to be able to compete."[44] The court stressed that the Public Utility Commission did not allow for competition between the two utilities in the Redevelopment Zones. Importantly, however, the Third Circuit did not question the fact that under proper circumstances a consumer could prove antitrust injury stemming from a proposed merger. The Third Circuit's decision has been vigorously criticized for short-circuiting the factual analysis by simply declaring that antitrust law does not protect potential competition, without further examination.[45]

Competitor Standing

The most controversial issues, as in Brunswick and Cargill, surround the standing of competitors. In some respects that is appropriate since rivals may have an incentive to challenge a merger that may make a merger more competitive. On the other hand, a competitor may be in the best position to challenge an anticompetitive merger because it has the industry knowledge, experience, and commitment to pursue a challenge. It probably also has greater resources and a greater stake in challenging a merger than do consumers.

[41] See id.

[42] See 892 F. Supp. 1146, 1167 (W.D. Ark. 1995).

[43] 147 F.3d 256 (3d Cir. 1998).

[44] Id. at 266.

[45] See Ronald Davis, Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury, 70 ANTITRUST L. J. 697 (2003). The opinion can be contrasted with the district court opinion in Square D Co. v. Schneider, 760 F. Supp. 362 (S.D.N.Y. 1991), which states, in reference to the granting of standing in Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989), that it "does not read [the Gold Fields opinion] as turning on the presence of actual, as opposed to potential, competition between the acquiror and the target . . . the reasoning of Judge Newman [in Gold Fields] would apply with equal force to the loss of potential competition." Square D, 760 F. Supp. at 364.

Cases Where Competitor Standing Has Been Granted

As noted earlier, Cargill sets a difficult standard for competitor plaintiffs to meet, explicitly granting standing only in cases where a rival can allege predatory pricing. In fact, certain courts have interpreted the Cargill mandate relatively broadly, allowing claims to go forward that allege market foreclosure more than predatory pricing.

One of the first cases to interpret Brunswick's antitrust injury requirement for competitors of a merging firm was Heatransfer v. Volkswagenwerk A.G.[46] Heatransfer was an independent supplier of automobile air conditioners that filed suit when Volkswagen of America ("VWoA"), one of the largest air conditioning customers in the market, acquired Delanair, a competing air conditioner supplier, thus foreclosing Heatransfer from competing for Volkswagen's business. The Fifth Circuit ruled that Heatransfer did suffer an antitrust injury and awarded treble damages. According to the court, "by acquiring Delanair, VWoA virtually precluded any of the competitors in the Volkswagen air-conditioning unit market from openly competing with the VWoA company. . . . It was to VWoA's advantage to deal as much as possible with VPC/Delanair to the exclusion of other competitors and competition. Such a consequence is surely an antitrust injury that reflects 'the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'"[47]

More recently, two post-Cargill cases that have allowed for competitor standing are R.C. Bigelow, Inc. v. Unilever N.V.[48] and Bon-Ton Stores, Inc. v. May Department Stores Co.[49] Bigelow involved a challenge by Bigelow, the smallest of the three firms in the herbal tea market, against a proposed merger of the two largest firms: Celestial Seasonings (with a 52% market share) and Lipton (with a 32% market share). The district court dismissed for failure to allege antitrust injury, but the Second Circuit reversed, reasoning that the large market share of the combined firm would be likely to eliminate competition by, among other things, reducing Bigelow's access to supermarket shelf space.[50] The Bigelow court distinguished the facts of its case from those in Cargill by emphasizing that it was dealing with a preliminary injunction (as opposed to a permanent injunction) and that the case against the Lipton/Celestial Seasonings merger was much stronger than was the case against the Cargill/Spencer Beer merger.

The Bigelow court explicitly declined to follow Phototron Corp. v. Eastman Kodak Co.,[51] an earlier Fifth Circuit decision which held that on an application for a preliminary injunction, competitors must "supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured."[52] Rather, the Bigelow court held that "a demonstrated probability at the preliminary injunction stage that a merger will adversely affect competition in the relevant market is sufficient

[46] 553 F.2d 964 (5th Cir. 1977).

[47] Id. at 985 (quoting Brunswick, 429 U.S. at 489).

[48] 867 F.2d 102 (2d Cir. 1989).

[49] 881 F. Supp. 860 (W.D.N.Y. 1994).

[50] Bigelow, 867 F.2d at 111.

[51] 842 F.2d 95, 100 (5th Cir.), cert. denied, 486 U.S. 1023 (1988).

[52] Id. at 102.

in order to survive a motion for summary judgment."[53]

Since Bigelow, courts in the Second Circuit have shown a greater likelihood to grant injunctions in merger cases. One example of this is Bon-Ton v. May, where the court stated that "[d]oubts as to the necessity of issuing a preliminary injunction should be resolved in favor of granting the injunction."[54] Bon-Ton, an upstate New York department store chain, challenged May's acquisition of twelve department stores in the Rochester area, claiming that by acquiring the anchor stores in two of the only available mall sites in the area, May would significantly raise Bon-Ton's entry barriers in the market. The district court accepted Bon-Ton's challenge, noting that elevated entry barriers were sufficient to satisfy the antitrust injury requirement, as Bon-Ton's injury stemmed from the same anticompetitive behavior that would cause higher prices to consumers.

One recent case of particular interest is Union Carbide Corp. v. Montell N.V.,[55] where Judge Scheindlin of the Southern District of New York granted standing to a plastic technology licensor to challenge a merger between the licensor's co-venturer and its competitors. The merger had been investigated by the FTC and resolved with a consent decree. The court premised standing on the licensor's allegations that its competitors' goals were to restrict output, increase prices, limit introduction of advanced technology, realize supra-competitive profits and harm competition.[56] While the defendants countered that the plaintiff would actually benefit from any lessening of competition, the court rejected this argument without comment, noting only that United Carbide had adequately alleged that any harm it had suffered was the result of the defendants' actions.[57] Ultimately, after considerable pretrial litigation, the case was settled with Carbide securing relief more extensive than that in the FTC decree.

Outside of the Second Circuit, courts have been less likely to grant standing for competitors to challenge mergers, but there have been successful challenges. For example, in Fricke-Parks Press v. Fang,[58] the court granted standing for the plaintiff's Sherman Act challenge to a merger between two rival publishers. Fricke-Parks Press, a commercial printer, challenged an agreement whereby Hearst (the publisher of the San Francisco Examiner) transferred $66 million and other assets to Exin (a commercial printer and newspaper publisher) in exchange for Exin's support of the Examiner's acquisition of the San Francisco Chronicle from the Chronicle Publishing Company. Fricke-Parks alleged that the asset transfer was an illegal conspiracy to divide markets, allowing Hearst to dominate the newspaper market, while Exin would use the proceeds from the agreement to underbid in the commercial printing market, in order to drive Fricke-Parks out of business. The court allowed the claim to proceed, noting that Fricke-Parks alleged injuries that "properly reflect the anticompetitive effect of a division or allocation of markets."[59]

[53] Bigelow, 867 F.2d at 109.

[54] Bon-Ton, 881 F. Supp. at 878 (citing Consolidated Gold Fields, 871 F.2d at 261).

[55] 944 F. Supp. 1119.

[56] See id. at 1149.

[57] See id. at 1150.

[58] 149 F. Supp. 2d 1175 (N.D. Cal. 2001).

[59] Id. at 1181.

In Community Publishers, Inc. v. DR Partners,[60] also a newspaper merger challenge, the court granted standing where the competitor plaintiff's profits as a purchaser of newspaper advertising were threatened by the challenged acquisition of one leading local daily newspaper by a competing paper. Standing was granted for two reasons. First, the court saw antitrust injury in a prospective "must buy" phenomenon, whereby the merged papers would have such a dominant market share that a monopolistic increase in the combination's advertising rates would soak up all of the region's available advertising revenue and harm the plaintiff. Second, the court concluded that the merger gave the incentive to the defendant to terminate a news and advertising sharing arrangement with the plaintiff.

Cases Where Competitor Standing Has Been Denied

With the exception of Fricke-Parks Press, which was really more about illegal market division than predatory pricing, there have yet to be any competitor merger challenges that successfully allege a textbook predatory pricing threat, the one type of proof explicitly endorsed by the Cargill court. This is unsurprising, perhaps, given the difficult test for predatory pricing that the Supreme Court promulgated in 1993.[61] There have been a few cases that have challenged a merger on the grounds that the combined company would engage in predatory pricing tactics, only to fail in some aspect of their proof.

For example, in Pool Water Products v. Olin Corp.,[62] the plaintiffs, Aqua Tri and Pool Water Products, alleged that a competitor, Olin and Superior Pool Products, illegally acquired a dry chemical manufacturer, among other anticompetitive activities. The plaintiffs alleged that the acquisition was part of an unlawful scheme to acquire a dominant position in the market by driving prices down, and subsequently raising prices to recoup funds through a predatory pricing scheme. The court denied standing because of the weaknesses of the plaintiff's recoupment argument; while the defendants did drive prices down, they "were never able to raise prices to supracompetitive levels."[63]

The court also dismissed the importance of the plaintiff's decrease in market share, stating that "a decrease in profits from a reduction in a competitor's prices, so long as the prices are not predatory, is not an antitrust injury . . . [a]bsent proof of predation, it is immaterial whether the price reduction is the result of illegal price setting, illegal mergers and acquisitions, collusion, price discrimination or any other antitrust violation."[64] A similar result was reached in Phototron Corp. v. Eastman Kodak Co.,[65] where the competitor-plaintiff failed to prove a likelihood of predatory pricing.

The Third Circuit concluded that there was no antitrust injury in Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co.[66] Alberta Gas, a producer of methanol, asserted that Du Pont unlawfully eliminated potential competition when it acquired Conoco, which had been planning a major methanol production project prior to being acquired. As part of the planned

[60] 139 F.3d 1180 (8th Cir. 1998).

[61] See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 940 (1993).

[62] 258 F.3d 1024 (9th Cir. 2001).

[63] Id. at 1035.

[64] Id.

[65] 842 F.2d 95 (5th Cir. 1988).

[66] 826 F.2d 1235 (3d Cir. 1987).

methanol production project, Conoco apparently planned to buy large quantities of methanol from existing producers such as Alberta Gas to resell as a method of stimulating demand. Alberta Gas claimed that Du Pont's acquisition caused this program to be abandoned, and it therefore lost the methanol sales it would have made to Conoco, and methanol prices were lower than they would have been if the demand stimulation program had been implemented.

The Third Circuit rejected this argument on antitrust injury grounds, asserting that even if the merger were illegal and plaintiffs would be injured in the manner claimed, the injuries stemming from the cancellation of the demand stimulation plans do not "flow 'from that which makes the defendants' acts unlawful,'" because they had nothing to do with increased market power in the methanol-producing industry.[67] The court also held that any foreclosed methanol sales to Conoco would be too de minimis to constitute a Section 7 violation.[68]

Observations

Although Cargill appeared to articulate a very limited role for competitor challenges to mergers, the courts have shown some flexibility in granting standing. This is appropriate since competitors may possess the specialized knowledge of their industry, and frequently the resources, to challenge a merger effectively. Moreover, there is a broader range of conduct other than simply predatory pricing that may ultimately harm the competitive process and lead to higher prices or less innovation. As Professor Brodley has observed "the incentive incompatibility of competitors is exaggerated and . . . such firms confronted with market exclusion or higher costs, may realistically be threatened from collusive mergers."[69]

One example of the mistakes that arise from a too restrictive approach to standing is in network industries such as ATM and debit card networks. In 1988, an ATM network, Cashstream, challenged the merger of two rival ATM networks, MAC and Cashstream in The Treasurer, Inc. v. Philadelphia National Bank.[70] The merger gave MAC close to a monopoly in the Pennsylvania market. The district court held that the plaintiff was not injured because the merger did not effect its ability to enter into the Pennsylvania market and there was no evidence that the merger would enable MAC to raise prices.

The court was wrong on both accounts. Soon after the merger, recognizing that it could not effectively compete, Cashstream relented and was acquired by MAC. Six years later, the DOJ brought a monopolization claim against MAC alleging in part that it charged supracompetitive prices to smaller financial institutions.[71]

What the court missed is that in network industries competitors must cooperate and interconnect, and that provides the opportunity for predatory conduct that can both harm rivals and competition. For example, in the WorldCom/Sprint merger, the DOJ challenged the merger of two Internet backbone providers

[67] See id. at 1240.

[68] See id. at 1236.

[69] See supra, note 9, at 50.

[70] 682 F. Supp. 269 (D.N.J.), aff'd mem., 853 F.2d 921 (3d Cir. 1988).

[71] United States v. Electronic Payments Services, Inc., No. 94-208 (D. Del. Apr. 21, 1994), 59 Fed. Reg. 24,711 (May 12, 1994), 59 Fed. Reg. 44,757 (Oct. 14, 1994).

(IBPs).[72] All IBPs must interconnect with one another, and Sprint and MCI competed in providing those interconnection services. DOJ's concern was that the merger would provide the combined entity with the incentive and ability to charge higher prices and provide a lower quality of interconnection services. In addition, the combined entity would have the incentive and ability to impair the ability of its rivals to compete by, among other things, raising its rivals' costs and/or degrading the quality of its interconnections to its rivals. In economic terms, the network would secure market power and ultimately facilitate a "tipping" of the Internet backbone market that would result in a monopoly. This appears to be what happened in the MAC/Cashstream merger.

Two other types of anticompetitive theories are worth further examination. First, as Professor Brodley has suggested, a competitor may have standing where a merger may facilitate collusion by enhancing the ability of the merged firm to punish rivals either by raising their costs or by placing them at a competitive disadvantage. As he observes, "although some fringe firms may thrive for a time under a regime of collusive prices, no permanent sanctuaries exist for potential targets of exclusionary strategies. When a cartel group has exclusionary capability, the fringe firm faces an ever present risk of market exclusion. The risk can be particularly acute for the maverick firm—the firm with low costs, high excess or divertible capacity, superior innovation, an ability to disguise output increases or other factors that make it a disruptive or competitive influence in the market."[73] Thus, Professor Brodley suggests that courts should be particularly sympathetic to those competitors who can show economic characteristics that make them a particular target for cartel punishment or predatory exclusion, especially where the firm is a maverick.

A second approach to refining the assessment of standing would be to consider the role of potential entrants. A merger may create anticompetitive problems by increasing entry barriers or increasing the costs of those firms that seek to enter into a concentrated market. The current approach to standing fails to account for the potential for exclusionary actions that keep potential entrants out of the market. Such situations may include the power to withhold access to an indispensable input which the merger may consolidate within a single firm or a small number of firms.

Tender Offer Targets

In the years since Cargill, there has been considerable debate and divergence among the courts and commentators on the issue of standing for the target of a tender offer to challenge its merger on antitrust grounds. Much of this debate boils down to questions regarding whether a target's loss of independence can be considered an antitrust injury and the significance (or insignificance) of the motive of an antitrust plaintiff. It is likely that the Supreme Court will have to step in and resolve the issue of whether tender offer targets can suffer an antitrust injury.

Cases Where Standing Has Been Granted

Consolidated Gold Fields PLC v. Minorco, S.A.[74] is the leading case granting standing to a tender offer target. The case involved a Sec-

[72] United States v. WorldCom, Inc., (D.D.C. June 27, 2000).

[73] See supra, note 9, at 52.

[74] 871 F.2d at 257-60.

tion 7 claim by the leading U.S. gold producer against a bid to acquire controlling interest by the dominant South African gold producer. The plaintiff claimed antitrust injury because the bidder would, if victorious, favor its own wholly owned South African production at the expense of production in its partially owned U.S. subsidiary. The Second Circuit ruled in favor of the plaintiff, finding that its antitrust injury was due to the ability of "outside corporate forces to cause it to restrain its own competitiveness."[75] In so ruling, the Gold Fields court interpreted Cargill to allow for standing where the target's "loss of independence is causally linked to the injury occurring in the marketplace, where the acquisition threatens to diminish competitive forces."[76] The court emphasized that it is in the public interest for tender offer targets to have the ability to effectively enforce the antitrust laws: "[c]onsumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction. The target of a proposed takeover has the most immediate interest in preserving its independence as a competitor in the market."[77]

The Gold Fields decision was applauded by Professor Joseph Brodley in an influential 1996 article. According to Brodley, the target of a tender offer should normally have standing to challenge an anticompetitive takeover on antitrust grounds because the transaction would threaten three possible forms of antitrust injury:

> (1) collusion-induced output reduction harmful to the target and its constituents in both partial and full acquisitions of shares; (2) possible loss of trade secrets, confidential information, and other intellectual property injuring the target's competitive viability if the merger is not consummated; and (3) termination of its corporate existence in contravention of a merger law intended to preserve the independence of firms threatened by anticompetitive acquisitions.[78]

Cases Where Standing Has Been Denied

Other circuits have chosen not to allow standing for tender offer targets, reasoning that even if the level of competition decreases due to the merger, the target company does not suffer any antitrust injury, because after the transaction is complete, it will be "part of the very entity it claims will have a supercompetitive advantage."[79] In Anago, Inc. v. Tecnol Medical Products, Inc., the Fifth Circuit explicitly declined to follow the Second Circuit's lead, stating that it preferred to "narrowly interpret the meaning of antitrust injury."[80]

The Anago court disagreed with the Second Circuit in two respects. First, it argued that the Second Circuit's emphasis on a causal relationship between the loss of independence and the alleged antitrust violation did not comport with the precedent from Brunswick. Next, it claimed that the loss of independent decision making was not the "type of injury meant to be

[75] Id. at 257.

[76] Id. at 258.

[77] Id. at 260. The Southern District relied on the Gold Fields decision to deny a motion to dismiss a target's antitrust claim in Square D Co. v. Schneider, stating simply that they were bound to follow the Gold Fields holding as the law of the Second Circuit. 760 F. Supp. 362, 364 (S.D.N.Y. 1991).

[78] See supra, note 9, at 81.

[79] Carter Hawley Hale Stores, Inc. v. The Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984).

[80] 976 F.2d 248 (5th Cir. 1992).

prevented by the antitrust laws."[81] This was partly based on precedent from the Phototron decision, which established that the meaning of antitrust injury should be narrowly construed.[82]

In Burlington Industries Inc. v. Edelman,[83] the Fourth Circuit affirmed a district court decision denying standing to a tender offer target. According to the district court's opinion, "the type of injury about which a target . . . complains—potential loss of employees, possible diversion of customers to other businesses, and loss of trade secrets and financial information—are not injuries that occur because of the potential lessening of competition attending the merger. Rather, these injuries occur because of a change in corporate control."[84]

The district court in Burlington emphasized the importance of proper motive or lack thereof for the tender offer target, stating that "a court should not interfere with a tender offer unless the target company dispels the inference of disingenuousness by showing that the alleged antitrust violation would expose it to readily identifiable harm."[85] The facts of Burlington showed a particular strong inference of disingenuousness, as the plaintiff had previously indicated a desire to acquire the defendant, which would have created the same combination that it now claimed would unlawfully diminish competition.[86]

The issue of standing for tender offer targets was addressed most recently in Atlantic Coast Airline Holdings v. Mesa Air Group.[87] Atlantic Coast operated a regional air carrier under the United Express and Delta Connection brands. Like many regional airlines it was heavily dependent on a code-sharing arrangement with a major airline, and its arrangement was with United. On July 28, 2003, Atlantic Coast announced that it would transform itself into a low-fare airline based at Dulles Airport, in anticipation of United's rejection of their code-sharing agreement. In response, Mesa Air, a rival regional air carrier, announced an unsolicited tender offer for Atlantic Coast with the stated purpose of keeping Atlantic in its role as a United Express carrier. The offer was made pursuant to a memorandum of understanding (MOU) whereby United agreed that if Mesa successfully acquired Atlantic Coast or replaced its Board with members that wished to stay with United, then Atlantic Coast could retain its status as a United Express carrier (instead of establishing a low-fare airline).

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[81] Id. at 250-51.

[82] See Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95 (5th Cir. 1988). The Anago decision was followed within the Fifth Circuit by the district court in Moore Corp. Ltd. v. Wallace Computer Services, Inc., 907 F. Supp. 1545, 1566 (D. Del. 1995). The Moore court gave three reasons for declining to allow standing for tender offer targets: (1) any alleged injury suffered by a merger target would be "inherent to the merger process rather than flowing from any anticompetitive effect of the merger;" (2) the target and its shareholders would ultimately benefit from increased prices or decreased competition stemming from the merger; and (3) that courts have found that targets may bring disingenuous antitrust suits whose motive is to prevent loss of control by management rather than anything antitrust-related. Id. at 1566.

[83] 1987 WL 91498 (4th Cir. Jun. 22, 1987).

[84] Burlington Industries Inc. v. Edelman, 666 F. Supp. 799 (M.D.N.C. 1987).

[85] Id. at 805-06.

[86] For another opinion that questions the motives of management, see Burnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534 (S.D. Fla. 1988) (observing that an antitrust suit by a tender offer target "must be understood in its true sense, an attempt by the incumbent management to defraud their own positions, not as an attempt to vindicate any public interest").

[87] 295 F. Supp. 2d 75 (D.D.C. 2003).

Atlantic Coast sought a preliminary injunction against the tender offer under both Section 7 of the Clayton Act and Section 1 of the Sherman Act (among other claims).[88] Atlantic Coast alleged both a collusion-induced reduction in output from the acquisition as well as antitrust injury stemming from its impending loss of independence.

The D.C. District Court dismissed the less important Section 7 claim for lack of antitrust injury.[89] In dismissing the Section 7 claim, the court declined to choose between the Second Circuit's Gold Fields analysis and the Fifth Circuit's analysis in Anago, instead claiming that Atlantic Coast would not have standing under either mode of analysis. The court decided that unlike in Gold Fields, there would be no loss of independent decision-making here, as the Atlantic Coast shareholders would have the opportunity through a consent solicitation to determine whether to elect Mesa nominees to the Board, thereby giving them the deciding voice as to whether or not the acquisition should take place.[90]

The court, however, accepted that Atlantic Coast had demonstrated antitrust injury for the Section 1 claim, finding that Atlantic Coast was able to show antitrust injury because it did not require a hostile takeover to take effect.[91] Rather, Atlantic Coast's Section 1 challenge of United's MOU with Mesa fulfilled antitrust standing requirements because the MOU would not benefit Atlantic Coast if it kept Atlantic Coast from launching its low-price airline.[92] The agreement would rather be effecting "the type of injury the antitrust laws were designed to prevent."[93] After the District Court preliminarily enjoined Mesa's proposed exchange offer and shareholder consent solicitation, the Department of Justice announced that it had opened an investigation into the takeover bid. Soon afterwards, the takeover bid collapsed, with United canceling its MOU with Mesa.

Conclusion

As in all areas of antitrust law, private enforcement plays a vital role in merger enforcement. Antitrust injury thresholds appropriately limit certain types of claims and plaintiffs, but anticompetitive mergers can be successfully challenged on antitrust grounds by private plaintiffs in a number of circumstances. Although the state of the case law varies by circuit (and in some areas has not yet been fully drawn out in the era after Brunswick and Cargill), private parties should keep in mind that the antitrust laws remain a powerful weapon against anticompetitive mergers even when government agencies stay on the sidelines.

[88] The D.C. Corporation Counsel and Commonwealth of Virginia filed an amicus brief in support of Atlantic Coast's challenge, arguing that a preliminary injunction was necessary to give time for the D.C. and Virginia antitrust enforcement agencies to review the legality of the transaction.

[89] Atlantic Coast, 295 F. Supp. 2d at 89.

[90] See id.

[91] See id. at 90.

[92] See id. The court later found that the United MOU would have the effect of cutting off potential competition to United from the low cost airline. See id. at 93. The competition of a low cost airline would have led to an estimated passenger loss to United valued at half a billion dollars over two years. See id. at 80.

[93] Id. at 90 (citing Andrx Pharm., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 813 (D.C. Cir. 2001)).