STANDING ON SHAKY GROUND: THE STRANGELY ELUSIVE DOCTRINE OF ANTITRUST INJURY

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I. INTRODUCTION

Once upon a time, within living memory, the main issues in a private antitrust case were (a) did the defendant violate the antitrust laws? and (b) was the plaintiff injured in its business or property as a result of the defendant’s violation?¹ No longer. From 1977 through 1990 the Supreme Court, building on prior developments in the lower courts,² constructed a complex body of case law elaborating on what the word “injury” means in a Clayton Act Section 4³ context, and when such “injury” is or is not deemed to occur “by reason of anything forbidden in the antitrust laws.”

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¹ See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (“[T]o state a claim upon which relief can be granted under [the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.”).

² From the inception of the private antitrust action, courts have expressed concern about over-extending a right of action to indirectly injured plaintiffs, but the extent to which the modern cases discussed in this article were actually anticipated by prior law is a matter of debate. See John F. Hart, Standing Doctrine in Antitrust Damage Suits, 1890–1975: Statutory Exegesis, Innovation, and the Influence of Doctrinal History, 59 Tenn. L. Rev. 191 (1992) (arguing that the Supreme Court has distorted the historical record). Be that as it may, everyone, including Professor Hart, agrees that by the time the Supreme Court stepped to the plate in 1977, the lower courts had begun to develop significant doctrinal limitations on the private right of action. For a circuit-by-circuit survey of these now superseded tests, see Kevin D. Gordon, Private Antitrust Standing: A Survey and Analysis of the Law After Associated General, 61 Wash. U. L.Q. 1069 (1984). Commentators used terms like “decisional morass” to describe this developing body of law. See id. at 1070 & n.6 (collecting sources critical of the confusion and inconsistency among the circuits).

³ 15 U.S.C. § 15. Section 4 of the Clayton Act, which establishes the private right of action for damages for antitrust violations, provides in pertinent part that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . .” In Reiter v. Sonotone Corp., 442 U.S. 330 (1979), the Supreme Court endorsed antitrust actions by consumers and construed the “business or property” language broadly, to encompass any form of economic injury, as distinguished from, say, compensation for pain and suffering. Subsequent cases have generally adhered to this broad interpretation. See ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 841–44 (5th ed. 2002) (ALD) (collecting cases).
This body of law may be divided into three related parts:

(1) the doctrine of antitrust injury, which requires that a plaintiff’s theory of damages (the difference between the plaintiff’s position in a but-for world where the violation did not take place and a real world where the violation did take place) correspond to an economic effect that the statute or case law rule invoked as the basis for liability aims to prevent—not an economic effect as to which antitrust law is indifferent, or, even worse, an economic effect that antitrust promotes, such as aggressive non-predatory competition;4

(2) the Illinois Brick5 doctrine, under which antitrust claims based on an anticompetitive overcharge belong exclusively to the first entity to pay the overcharge; and, finally,

(3) the factor-based tests of standing laid out in Associated General Contractors that may, on occasion, bar private plaintiffs even though they meet the antitrust injury and Illinois Brick tests; these tests emphasize prudential considerations such as the burden on the judicial system that would result if the private right of action were available to remotely injured plaintiffs.

This article deals with the first of these, the doctrine of antitrust injury, a concept that the lower courts have often found difficult to understand and apply.

It is common ground that the effect of the new antitrust injury and standing jurisprudence on antitrust litigation has been profound.6 Similarly, it is common ground, more or less, that far too many of the lower court decisions leave far too much to be desired.7 There is, however, very little other common ground among commentators, who have widely diverse opinions about the causes of the present unsatisfactory state of

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affairs, and how to fix it. Some fault both the Supreme Court and the lower courts for insufficient rigor in the use of Chicago School principles to filter out undesirable or inappropriate plaintiffs. Some of these commentators advocate reinterpreting or reimagining doctrines such as antitrust injury in light of Chicago School principles. Others argue for even more drastic changes in current law, such as forbidding all private antitrust litigation by competitors.

At the other end of the spectrum from the Chicago School, some view the whole antitrust standing enterprise with alarm, pointing to decisions that have unduly limited the private right of action. Still others have a more nuanced view, blaming the Supreme Court for confusing the federal judiciary, and evaluating some antitrust standing cases as unsatisfactory.

In my own opinion, the doctrine of antitrust injury, as set forth in Brunswick, McCready, AGC, Cargill, and ARCO, when understood and applied correctly, is a salutary limitation on the private right of action. But the purpose of this article is not to contribute to the debate about the correctness of the Supreme Court’s decisions, much less to propose radical legal changes, but instead to review the law of antitrust injury in the Supreme Court and the federal courts of appeal, clarify the issues, and separate the wheat—the limited number of real antitrust injury issues

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that arise from time to time in private litigation—from the analytical chaff that serves only to confuse litigants and courts.

The article focuses on antitrust injury, and addresses *Illinois Brick* and the standing factors of *AGC* only incidentally, (a) because of space limitations, (b) because most standing decisions turn (or at least purport to turn) on antitrust injury rather than the indirect purchaser doctrine or the *AGC* factors, and (c) because most courts have not had any particular difficulty grasping and applying *Illinois Brick* or *AGC*. Due to space limitations, the analysis here is almost entirely devoted to cases at the appellate level.

Part II of this article takes a careful look at the five Supreme Court cases that addressed antitrust injury.

The courts experience difficulties of several distinct kinds in applying the doctrine of antitrust injury. For all too many courts, that difficulty begins with a lack of understanding of what antitrust injury is: not knowing the right question to ask, they have trouble giving the right answer. In Part III we specify exactly what antitrust injury is. In so doing, we dissect *Brunswick*’s multiple efforts to define antitrust injury, look at how several appellate courts have faced the issue, and get at the true meaning of antitrust injury by examining how courts have frequently mistaken something else for antitrust injury, including:

- what is missing when the facts set forth in the complaint do not disclose a colorable antitrust violation, or
- injury in fact by another name, or
- statutory “injury to business or property,” or
- what is missing when there is a colorable antitrust violation and a colorable case that the plaintiff was injured, but the violation was not a material cause of the injury (the injured-while-standing-near-an-antitrust-violation scenario), or, finally,
- injury that could not possibly have been caused by anything other than an antitrust violation.

The last of these five errors is especially insidious, and we examine in some detail an unfortunate series of cases in the Sixth Circuit that have embraced that particular mistake.

Having clarified, in Part III, the question posed by the doctrine of antitrust injury, we go on in Part IV to see whether there are any universally applicable answers to that question. We revisit what the five key Supreme Court cases taught about how to fill in the sentence, “A plaintiff
suffers antitrust injury when . . .” or “A plaintiff never suffers antitrust injury if . . .”

There are many cases in which the court senses that something is badly wrong with the plaintiff’s claim—perhaps the facts alleged do not make out a violation, or the causal relationship between the violation and any alleged injury is murky—but, for whatever reason, is unable or unwilling to address the lack of merit directly. There is a strong temptation to enunciate some unsound purported generalization about antitrust injury as a ratio decidendi for dismissal. On occasion, the court will just make up a novel generalization on the spot, as in Indeck Energy Services, Inc. v. Consumers Energy Co.,12 an unpublished decision in which the court wove out of whole cloth a requirement that an excluded competitor must show that it would have sold at a lower price or produced a superior product in order to suffer antitrust injury. In other circumstances the questionable proposition about antitrust injury may be traced to ideological exuberance (see the Seventh Circuit cases discussed in Part IV.B.) or to an understandable, yet misguided, instinct to “simplify” the law by adopting rules of thumb (see Part IV.C., discussing the ill-conceived “customer or competitor” “rule”).

Although this article argues that the term “antitrust injury” is greatly overused in the lower courts, there remain a number of circumstances, such as suits by tender offer targets, that raise legitimate—and legitimately debatable—questions about the doctrine’s application. These scenarios are addressed in Part V.

II. SUPREME COURT JURISPRUDENCE: THE FIVE KEY CASES

A. Brunswick

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,13 a unanimous opinion written by Justice Marshall, was not particularly controversial at the time it came down, and few today would question that it was rightly decided, essentially for the right reasons. Questions remain, however, at least in the minds of many, as to the scope and implications of its holding—implications that have turned out to be much more sweeping than was seen at the time of the decision.14

1. The Opinion

The plaintiffs in Brunswick, three bowling centers, sued a bowling equipment manufacturer on the theory that its acquisitions of several

12 250 F.3d 972 (6th Cir. 2000) (unpublished; text at 2001-1 Trade Cas. (CCH) ¶ 73,274).
14 See Page & Blair, supra note 9, at 113–14.
other bowling centers were illegal under a theory of vertical or conglomerate “entrenchment” (i.e., the acquired entities might somehow lessen competition by virtue of their “deep pocket” parent, which dwarfed competing firms in the markets served by the acquired entities). The plaintiffs, competitors of the acquired firms, argued that, but for the acquisitions, the acquired entities would have gone out of business, thus increasing the market shares and the profits of the plaintiffs. These lost profits were claimed as damages resulting from the allegedly illegal acquisitions.

The conglomerate “entrenchment” theory of liability under Section 7 of the Clayton Act has now fallen into well-merited desuetude. The Court, however, did not question the plaintiffs’ theory of liability, but simply assumed arguendo that the plaintiffs were right on the merits, and that the acquisitions in question did violate Section 7 of the Clayton Act. Nevertheless, because Section 7 is a prophylactic statute, intended to arrest anticompetitive effects in their incipiency, “proof of liability establishes only that injury may result,” not that injury has actually resulted from the challenged acquisition. As the Court explained,

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. . . . [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 is condemned. This holding . . . would authorize damages for losses which are of no concern to the antitrust laws.

In fact, observed the Court, the plaintiffs were not seeking damages simply for “economic readjustments” that may have fortuitously caused some “adverse effect,” nor were they merely claiming damages that were “of no concern to the antitrust laws.” Worse than that,

The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced.

15 429 U.S. at 486.
17 See ALD, supra note 3, at 368–69.
18 The Court overlooked the point that, if the plaintiffs were right on the facts, then the acquisitions would actually have been lawful, under the failing company defense. See Areeda & Hovenkamp, supra note 6, ¶ 337a n.6.
19 Brunswick, 429 U.S. at 487 (emphasis added; footnote omitted).
It is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes “injury” within the meaning of § 4. And it is quite clear that if respondents were injured, it was not “by reason of anything forbidden in the antitrust laws”: while respondents’ loss occurred “by reason of” the unlawful acquisitions, it did not occur “by reason of” that which made the acquisitions unlawful.

We therefore hold that [for] 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. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be “the type of loss that the claimed violations . . . would be likely to cause.”

In the footnote to this passage the Court explained, in high dictum, that competitors injured by truly predatory activity suffer antitrust injury, even though consumer injury flowing from such behavior has not yet occurred:

The short-term effect of certain anticompetitive behavior, predatory below-cost pricing, for example, may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished.

2. Brunswick’s Teaching

a. What is Antitrust Injury?

Brunswick taught that in private litigation we must go beyond the question whether the defendant violated the law to ask the next question: Why was the defendant’s conduct violative of the antitrust laws? To learn whether there is antitrust injury, we must first fill in the blank in the sentence, “The merger [or the agreement in restraint of trade, or the unilateral business practice, or whatever] was illegal because . . .” The answer to the fill-in-the-blank question identifies the effect—or effects, because there may be more than one—with which the antitrust rule invoked by the plaintiff is concerned. We must compare that effect with the ad damnum clause in the complaint to determine whether the effect that gave rise to the plaintiff’s damage is or is not one of the effects

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20 Id. at 488–89 (citation and footnote omitted).
21 Id. at 489 n.14. The observation in the last sentence is best understood to convey that if competitors have already been driven from the market, and consumers have already suffered from higher prices, the case for calling the challenged activity “predatory” is stronger than if no consumer injury has yet occurred.
forbidden by the rule of law that the plaintiff invoked to support its claim on liability.

b. “Too Much” Lawful Competition

Brunswick described two circumstances in which the source of the plaintiff’s injury would not match the blank in the sentence, “This behavior was illegal because . . .”

First, a plaintiff might complain about “too much” or “too vigorous” competition. In other words, a careful examination of the plaintiff’s theory of damages might show a but-for world (i.e., the world as it would have been but for the conduct of which the plaintiff complains) in which there is less competition than in the real world—a circumstance that would benefit the plaintiff—and that the claimed cause of the increase in competition is the behavior that is alleged to violate the law. In this scenario, the plaintiff is economically prejudiced because the behavior claimed to violate the law has resulted in a more competitive environment than would otherwise have existed, causing the plaintiff to lose sales it would have made but for the claimed violation.

But it is the goal of antitrust to promote competition, not to reduce competition. Thus, Brunswick held, a private antitrust plaintiff may never be heard to seek damages for injury resulting from “too much” or “too vigorous” non-predatory competition.

c. Predatory Competition

In footnote 14 the Court was careful to distinguish between predatory and non-predatory competition, and to clarify that if a competitor is injured by business tactics that meet the law’s strict test of predation (and that threaten long-run injury to consumers), the injury counts as antitrust injury—that is, injury that the laws aim to prevent—even though the consumer injury has not yet occurred.

d. Antitrust-Neutral Injury

The Court referred to a second circumstance where a plaintiff would lack standing, namely, an action seeking damages for “economic adjustments [resulting from an otherwise illegal transaction or practice] that adversely affect” individual persons or businesses, but that have no

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22 It is, of course, permitted to complain about that insidious form of competition that the courts term “predatory.” The doctrine of antitrust injury kicks in when the competition of which the plaintiff complains is aggressive but non-predatory and, hence, lawful.

23 “Behavior” in this context might mean entering into a merger agreement, adopting a particular pricing strategy, or entering into an agreement that restrains trade, i.e., limits the commercial freedom of the parties to the agreement.
adverse effect on competition as a whole and, hence, are “of no concern to the antitrust laws.”

Although the Court did not elaborate on the point, the problem with the incidental injury cases—the former distributor plaintiffs, the suppliers whose business relationships were lost, the fired employees—is not merely that antitrust is indifferent to their fate. Any time an injured party has a complaint that can survive judgment on the pleadings, that party has a legal stick to hold over the head of the defendant. Giving that stick to the former distributors and the terminated suppliers would give them a means to interfere with business operations in ways that might well be inimical to efficiency. Such a result is not antitrust-neutral: it is affirmatively inconsistent with the goals of antitrust law.

e. General Goals of Antitrust vs. Goals of Specific Antitrust Statutes or Case Law Rules

Because of Brunswick’s particular facts and allegations, it was appropriate that the Court spoke about the general goals of antitrust law. No antitrust rule or statute aims to prevent competition as such. Yet competition as such—“illegal market presence”—was the source of the plaintiff’s complaint, and the plaintiff’s injury. In later cases the Court refined the concept of antitrust injury, going beyond global thinking to look closely at the purposes of a particular statute (Section 7 of the Clayton Act, in Cargill) or a particular case law rule (the then per se rule condemning maximum vertical price fixing, in ARCO).

f. Four Formulations of “Antitrust Injury”

Regrettably, Brunswick’s message was obscured, at least to some degree, by the fact that the term “antitrust injury” is anything but self-defining, and the Court “defined” it in a prolix and somewhat confusing fashion. It was not helpful that the Court employed four different verbal formulae in an apparent effort to identify this new legal creature, “antitrust injury”:

(i) injury “of the type the antitrust laws were intended to prevent,”
(ii) injury “that flows from that which makes the defendants’ acts unlawful,”
(iii) injury that “reflect[s] the anticompetitive effect either of the violation or of anticompetitive effects made possible by the violation,” and
(iv) injury amounting to “‘the type of loss that the claimed violations . . . would be likely to cause.’”

Part III, infra, examines these formulations in some detail.

24 Brunswick, 429 U.S. at 487.
25 429 U.S. at 489, quoted supra at text accompanying note 20.
B. McCready

Unlike *Brunswick, Blue Shield of Virginia v. McCready* was controversial when decided and remains controversial today. The case is especially beloved by antitrust plaintiffs pursuing novel and creative theories—perhaps too novel and too creative—whose parting plea as they leave the courtroom is invariably, “But my claim is ‘inextricably linked’ with the violation, à la McCready!”

To the extent there was any colorable objection to standing in *McCready*, the true ground of the objection was remoteness (absence of proximate cause), not antitrust injury. But both sides of the case, as well as the Supreme Court and the lower courts, failed to draw the distinction clearly between antitrust injury concerns and remoteness concerns. The opinion must be read very carefully indeed.

1. The Opinion

Ms. McCready was a Blue Shield subscriber (through a plan financed by her employer) who needed mental therapy. She, and the class she purported to represent, alleged that Blue Shield had entered into an agreement with a society of psychiatrists, in violation of Section 1 of the Sherman Act, to deny reimbursement to Blue Shield subscribers treated by clinical psychologists rather than by psychiatrists—the point of the alleged agreement being to disadvantage clinical psychologists competitively vis-à-vis psychiatrists. The plaintiff’s theory of injury was that, having elected to be treated by a psychologist, she was denied reimbursement for the money she paid out of her own pocket to her psychologist. That sum was her measure of damages.

In a 5–4 decision written by Justice Brennan the Court ruled that the complaint should not be dismissed. Calling to mind prior authorities taking an expansive view of the purpose and scope of the Clayton Act damages claim, the Court said that “in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives.”

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27 More precisely, the alleged agreement denied reimbursement to a psychologist unless his or her bill was submitted through a psychiatrist. The Court assumed *arguendo* that there was such an agreement and that it violated the Sherman Act. In another case presenting the same substantive claim, *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980), the Fourth Circuit had found merit in the claim.
29 457 U.S. at 473.
There are, however, said the Court, two exceptions.\(^{30}\) First, as in *Illinois Brick*, a claim may be barred where there is “the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction . . . .”\(^{31}\) “But,” the Court hastened to add,

permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist’s bills; her injury consists of Blue Shield’s failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield’s refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield’s actions on McCready’s employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan’s failure to pay benefits.\(^{32}\)

In a footnote to this passage the Court added that allowing the claim would create no need for the courts to disentangle the claims of competing plaintiffs, nor was there any problem with unduly speculative damages.\(^{33}\)

Second, and analytically distinct from the issue of duplicative damages, said the Court, is the question whether the injury is too remote from (that is, not proximately caused by) the violation. “It is reasonable to assume,” Justice Brennan wrote, “that congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action . . . .”\(^{34}\)

The Court broke this remoteness issue down into subparts. First, “petitioners argue that because the alleged conspiracy was directed . . . at psychologists, and not at subscribers . . . only psychologists may maintain suit.”\(^{35}\) Rejecting that logic, the Court mixed proximate cause and antitrust injury in its threefold response. First, the “harm to McCready and her class was clearly foreseeable”\(^{36}\) by defendants (whether or not they affirmatively desired to harm people like McCready). Second, “Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal

\(^{30}\) *Id.*

\(^{31}\) *Id.* at 474–75.

\(^{32}\) *Id.* (footnote omitted).

\(^{33}\) *Id.* at n.11.

\(^{34}\) *Id.* at 476.

\(^{35}\) *Id.* at 478.

\(^{36}\) *Id.* at 479.
ends. . . . [Harm to McCready] was a necessary step in effecting the ends of the alleged illegal conspiracy.37 And third, McCready’s loss was precisely the type of loss that the claimed violation would be likely to cause.

The defendants also argued that McCready’s claim should be barred inasmuch as “she was not an economic actor in the market that had been restrained,”38 the market for the purchase and sale of group health insurance plans. But the Court, citing a Ninth Circuit case embracing the “target area” test of antitrust standing, rejected that contention as well, on the ground that the injury to competition lay in the market for psychotherapy, not the market for insurance:

As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was “within that area of the economy . . . endangered by [that] breakdown of competitive conditions resulting from Blue Shield’s selective refusal to reimburse. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973).39

Finally, the defendants invoked Brunswick and urged the absence of antitrust injury, arguing that there was no anticompetitive overcharge: Ms. McCready’s psychologist provider had not been driven from the market as a result of the alleged scheme, there was no claim that she paid more than her psychologist’s services were worth, and, because she chose not to see a psychiatrist, there was no claim that anyone overpaid a psychiatrist who enjoyed a favored position in the market as a result of the scheme.40

Putting it another way, the defendants thought it was extremely helpful to their position that neither psychologists nor psychiatrists had collected any “overcharge.” Implicit in that defense argument was the assumption that a private antitrust plaintiff may only be heard to vindicate antitrust’s interest in price competition, not antitrust’s interest in consumer choice—hence, only the payment of an anticompetitive overcharge counts as antitrust injury.41

37 Id.
38 Id. Defendants apparently argued further that standing should be limited to McCready’s employer, in its capacity as purchaser from the alleged conspirator, and that her claim was barred by an intervening cause, to wit, her employer’s failure to object to a policy denying coverage for care by psychologists. Id. at 479–80 & n.16.
39 Id. at 480–81.
40 Id. at 481.
41 Addressing the objection that Ms. McCready was not “in” the market where the violation occurred, the Areeda & Hovenkamp treatise asserts that she was “like a purchaser from a cartel at cartel prices,” in that, if and when the conspiracy succeeds, psychiatrists drive out psychologists, psychiatrists raise prices to monopoly levels, insurance costs more,
“Brunswick,” Justice Brennan responded, “is not so limiting.”42 The majority alluded to the Brunswick dictum characterizing as antitrust injury the lost profits a competitor victimized by predatory pricing might suffer, even though it had not yet been driven from the market—injury that it evidently saw as analogous to the out-of-pocket expenditures Ms. McCready had to pay as a consequence of the alleged effort to drive psychologists from the market.43 The Court concluded,

[McCready] alleges that Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists for the psychotherapeutic services they required and that the heart of its scheme was the offer of a Hobson’s choice to its subscribers. Those subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. In the latter case, the antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably—though indirectly—by the customers of the competitors in the form of suppressed competition in the psychotherapy market; in the former case, as it happened, the injury was borne directly by the customers of the conspirators. McCready did not yield to Blue Shield’s coercive pressure, and bore Blue Shield’s sanction in the form of an increase in the net cost of her psychologist’s services. Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready’s injury “flows from that which makes defendants’ acts unlawful” within the meaning of Brunswick, and falls squarely within the area of congressional concern.44

In dissent, Justice Stevens argued that one is “injured” within the meaning of the Clayton Act only when one pays more for a product or a service than it is worth.45 He assumed, without developing the argument, that an out-of-pocket cost incurred as a consequence of reduced consumer choice cannot be antitrust injury.

Justice Rehnquist’s dissent was joined by Justice O’Connor and Chief Justice Burger. He wrote,

and Ms. McCready’s employer’s insurance costs rise, she will pay more for insurance indirectly, in the form of lower take-home pay. Areeda & Hovenkamp, supra note 6, ¶ 339f. Areeda’s & Hovenkamp’s effort to find an “overcharge” is a strained and unpersuasive explanation of the result in McCready. A consumer in a market who is merely threatened with the prospect of an anticompetitive price increase at some point in the future has no claim for past damages. McCready’s claim for damages was based not on a prospective overcharge but on a present denial of consumer choice.

42 McCready, 457 U.S. at 483.
43 See id. at 482–83 (citing Brunswick, 429 U.S. at 489 n.14).
44 457 U.S. at 483–84 (emphasis added).
45 Id. at 492–94.
McCready alleges no anticompetitive effect upon herself. She does not allege that the conspiracy has affected the availability of the psychological services she sought and actually obtained, nor does she allege that the conspiracy affected the price of the treatment she received. She does not allege that her injury was caused by any reduction in competition between psychologists and psychiatrists, nor that it was the result of any success Blue Shield achieved in its “boycott” of psychologists. She seeks recovery solely on the basis that Blue Shield’s reimbursement policy failed to alter her conduct in a fashion necessary to foreclose psychologists from obtaining the patronage of Blue Shield’s subscribers.46

As with Justice Stevens, the nub of Justice Rehnquist’s disagreement with the majority was his insistence that only an overcharge counts as antitrust injury, not a mere reduction in consumer choice.

Finally, ridiculing the majority’s “inextricably intertwined” language, Justice Rehnquist observed, “Although the Court may view itself as successfully deciding this case on its particular facts, it has wholly failed to provide any sort of reasoned basis for its decision.”47

2. McCready’s Teaching

McCready taught, first, that protecting price competition is not antitrust’s only value, nor is an overcharge the only form of antitrust injury that consumers may suffer; and second, that a party may, in an appropriate case, have antitrust standing even though she is neither a competitor of the antitrust violators nor a customer paying an overcharge to the violators.48

Both are eminently sound propositions. McCready was rightly decided, but the case continues to confuse and perplex because it marked an

46 Id. at 489.
47 Id. at 492.
48 Professor William Page has heavily criticized McCready, writing:

The object of the antitrust injury doctrine is to insure that the size of the penalty for an antitrust violation corresponds to the reduction in efficiency attributable to the violation. Under McCready, the opposite is the case. If the boycott was entirely unsuccessful and subscribers continued to purchase psychologists’ services as if they are fully reimbursed, the damages would be largest. If, on the other hand, the boycott was entirely successful and the psychologists are driven from the market, the damages to subscribers would be zero. This disparity flouts the rationale of optimal deterrence and demonstrates that the subscribers did not suffer antitrust injury. Page, supra note 8, 37 STAN. L. REV. at 1501 (emphasis added). However, Cargill and ARCO, decided subsequent to this 1986 article, lend no support to the proposition stated in the italicized passage. Perhaps the world would be a better place if they did. But as things stand, the purpose of the antitrust injury rule is only to guard against wrongly motivated plaintiffs by requiring that a plaintiff suffer an injury of the kind the relevant antitrust rule aims to prevent. An additional purpose—to constrain the total amount of the penalty paid by the wrongdoer to all plaintiffs—is not to be found in the Supreme Court cases.
intermediate stage in the evolution of legal doctrine, in which antitrust injury was not yet clearly distinguished from proximate cause. The key to understanding the case lies in the long passage quoted above. In the first four sentences the Court explained, clearly and to the point, how the kind of economic loss the plaintiff suffered flowed from the wrongdoers’ attempt to limit consumer choice, a value protected by the rule of law the plaintiff invoked. Read in the context of *Brunswick, Cargill, and ARCO*, that is the language of antitrust injury.

In the next sentence, the one about “inextricably intertwined” injury, the Court switched gears, perhaps inadvertently, to refute a defense argument along the lines, “Yes, there might have been an antitrust value involved, but there was no proximate cause.” The Court’s response to that argument was, in substance, “What in the world do you mean when you claim there was no proximate cause? Ms. McCready’s injury was essential to the violation. How can you get more proximate than that?”

Thus, read in context, the term “inextricably intertwined” is best limited to “those whose injuries are the essential means by which defendants’ illegal conduct brings about its ultimate injury to the marketplace.” The Court was distinguishing those who might suffer some incidental injury from a violation—what *Brunswick* had called “economic readjustments that adversely affect some persons”—from persons whose injury was essential to the success of the violation. Plaintiffs in the latter category, *McCready* suggested, ipso facto suffer injuries proximately caused by the violation.

And do they likewise ipso facto suffer antitrust injury? Based on *Brunswick, Cargill, and ARCO*, the correct answer is no, they suffer antitrust injury if, and only if, the “effect” that gives rise to their damages (i.e., the economic situation that makes them better off in the but-for world than in the real world) is an effect intended to be prevented by the statute or rule they invoke. In *McCready* the economic situation that gave rise to the plaintiff’s damages was the illegal denial of consumer choice. Consumer choice is a value promoted by the rule of law Ms. McCready invoked. Therefore, her out-of-pocket payments to a clinical psychologist, money she lost because of that denial of consumer choice, were antitrust injury.

Ms. McCready passed the antitrust injury test not because her injury was an essential part of the violation but rather because the damages

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49 Areeda & Hovenkamp, *supra* note 6, ¶ 339f.
she claimed were occasioned by the loss of consumer choice, a value protected by the antitrust rule she invoked. 50

C. AGC

In Associated General Contractors of California, Inc. v. California State Council of Carpenters, 51 the Court did much to clarify the distinction between antitrust injury and proximate cause, left somewhat murky by McCready, and to explain and elaborate on the meaning of McCready. Most importantly, the Court developed an authoritative, factor-based test of antitrust standing to address questions of remoteness and similar “prudential” considerations going beyond the concerns of the antitrust injury doctrine. This test was intended to replace competing simplistic formulae then prevailing in the circuit courts.

1. The Opinion

The plaintiffs in AGC, construction unions, made allegations that were at the same time complex and amorphous. The unions’ complaint charged that defendant Associated General Contractors, a trade association made up of general contractors, illegally, but successfully, “coerced” customers (landowners who needed construction services), as well as competing general contractors and its own members, to give some of their business to non-union contractors. In consequence, the targets of the alleged coercion did less business than they otherwise would have done with union firms, to the prejudice of the plaintiff unions.

Justice Stevens, who had dissented in McCready, wrote the opinion for the eight-justice majority, determining that the complaint should have been dismissed for want of standing. He began by saying, “We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws,” 52 explaining that “[c]oercive activity that prevents its victims from making free choices between market alternatives is inher-

50 To illustrate how injury might be “inextricably linked” to a violation and yet not amount to antitrust injury, consider the hypothetical case of a monopolist that firebombs its competitor’s plant in order to preserve or extend its monopoly. Assume the victimized competitor rented the plant from an unrelated landlord, and that the landlord foolishly failed to take out fire insurance. So the landlord has some out of pocket costs to rebuild the plant, and, as in McCready, the injury to the landlord is “inextricably linked” to the violation. But does the landlord suffer antitrust injury? The correct answer is no, because it is not the office of the Sherman Act to prevent losses due to arson, where the party suffering the economic effects of arson paid no anticompetitive overcharge, suffered no loss of consumer choice, can invoke no other value within the purview of the antitrust laws, and is protected by rules of law outside the scope of antitrust that specifically address its unjust loss.


52 Id. at 528.
ently destructive of competitive conditions and may be condemned even without proof of its actual market effect.”

In high dictum, much favored by antitrust defendants, the Court mused on the plaintiffs’ pushing the envelope in respect of notice pleading:

Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of Conley v. Gibson, 355 U.S. 41, 47–48 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Anyway, the Court hastened to add, if the contractors illegally coerced someone, that did not automatically give a claim to everyone suffering some indirect effect of that coercion. It conceded that prior cases urged an extensive reading of Section 4 of the Clayton Act, but asserted that “In each of these cases, however, [including McCready] the actual plaintiff was directly harmed by the defendants’ unlawful conduct.”

The Court looked to legislative history and other sources of legal learning to find support for the view that antitrust law, like tort law, properly takes proximate cause into account in declining to award damages to remotely injured victims of a violation. Moreover,

In both situations [common law claims and antitrust] the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

And, speaking of overly simple black letter rules, said the Court, some circuits had focused on the directness of injury, some on the “target area” the defendant aimed at, and one on the “zone of interests” protected by

53 Id. The proposition, which purported to depend on Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), seemed quite expansive, and appeared to contrast with the narrow view of antitrust injury espoused in Judge Stevens’s McCready dissent.

54 459 U.S. at 528 n.17.
55 Id. at 529.
56 Id. at 530 (emphasis added).
57 Id. at 536 (footnote omitted).
antitrust. But in the future, “[i]n our view, courts should analyze each situation in light of the factors set forth in the text infra.”

What, then, are these factors? The majority began by referring to two circumstances it said might point toward standing. First, the complaint did allege (though just barely) (a) an antitrust violation and (b) injury to the plaintiff that would not have occurred but for the violation. In addition, the complaint alleged that the defendant intended to harm the plaintiff.

But apart from but-for causation and intent, as the Court saw it, the plaintiff unions were pretty much out of luck. First, unlike the situation in McCready, where the plaintiff was a “consumer of psychotherapeutic services [who] had been injured by the defendants’ conspiracy to restrain competition in the market for such services,”

[i]n this case . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union’s interests would be served or disserved by enhanced competition in the market. As a general matter, a union’s primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.

Hence, “In this case, particularly in light of the longstanding collective bargaining relationship between the parties, the Union’s labor-market interests seem to predominate [over any interest in promoting competition], and the Brunswick [antitrust injury] test is not satisfied.”

The Court’s observations on antitrust injury are hard to follow. If Justice Stevens literally meant that the unions, clearly and unambiguously, lacked antitrust injury, then it would seem to follow that there was no need to consider additional factors, because antitrust injury is a sine qua non of private antitrust litigation. Indeed, Cargill, the next Supreme Court case on antitrust injury, took pains to resolve any doubt as to whether antitrust injury is essential, not just desirable.

Some lower courts, overlooking Cargill’s clarification of antitrust injury as a prerequisite to all private antitrust litigation, list antitrust injury as only a factor for consideration. That has sometimes proved confusing,

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58 Id at n.33.
59 Id. at 537.
60 Id. at 538.
61 Id. at 539.
62 Id. at 540.
63 E.g., Sullivan v. Tagliabue, 25 F.3d 43 (1st Cir. 1994).
as we will see in Part IV, infra. But no case, at least at the appellate level, has purported to find standing in the absence of antitrust injury. Going to the other extreme, in Todorov v. DCH Healthcare Authority, Judge Tjoflat observed that the AGC Court could have stopped when it found no antitrust injury, from which he unpersuasively concluded that “the discussion of factors beyond antitrust injury in Associated General is best viewed as dicta.”

But the best explanation—the one that is most logical, best fits the context of the opinion, and best comports with other authorities—is that the Court really meant to say something like, “We are doubtful whether there was antitrust injury here, but we are not entirely sure. Even if a claim cannot be dismissed for clear want of antitrust injury, it is still appropriate to examine the claim in light of Brunswick’s policies, and, if the plaintiff is found not to be clearly aligned in interest with the goals of antitrust, to count that as a factor against standing, to be considered together with other pertinent factors.” Areeda and Hovenkamp sum it up by saying that the AGC Court “seemed doubtful” about the presence of antitrust injury.” That seems right on the mark.

“An additional factor,” over and above antitrust injury, the Court continued, “is the directness or indirectness of the asserted injury.” The Court noted the multi-link alleged chain of causation: AGC to landowners, landowners to subcontractors, subcontractors to workers, workers to union. Justice Stevens drew a sharp contrast with the situation in McCready, where there was direct injury. Similarly, here, if the immediate victims of the alleged illegal coercion brought suit, they, like McCready, would have a claim.

An action on their behalf would encounter none of the conceptual difficulties that encumber the Union’s claim. The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a

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64 921 F.2d 1438, 1451 n.20 (11th Cir. 1991).
65 Areeda & Hovenkamp, supra note 6, ¶ 355d.
66 AGC, 459 U.S. at 540. Unlike Justice Brennan in McCready, who did not draw a crystal clear distinction between antitrust injury and proximate cause, the Court is now taking pains to clarify the difference.
67 Id. at 541 n.44. The Court added, “We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.” Id.
remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.\(^{68}\)

Moreover, the Court continued, “Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union’s damages claim is also highly speculative.”\(^{69}\) Furthermore, “The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits.”\(^{70}\) In sum,

We conclude, therefore, that the Union’s allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors—the nature of the Union’s injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union’s alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union’s antitrust claim.\(^{71}\)

2. AGC’s Teaching

\(AGC\) placed the absolute prohibition on private actions by plaintiffs without antitrust injury in the context of a set of policies, such as the policy against duplicative recovery, the policy against letting antitrust violations go unpunished, and the policy against unduly speculative damages, that may come into play in order to block a claim even though the antitrust injury requirement is satisfied.

D. Cargill

In the nineteen years since \(AGC\) the Supreme Court—evidently of the view that it said what it had to say, as well as it knew how to say it—has had no occasion to revisit the factors and public policies that go into a finding of “standing” under \(AGC\). Antitrust injury, however, has remained elusive, at least to some. After announcing the antitrust injury doctrine in \(Brunswick\), applying it in \(McCready\)’s novel circumstances, and extensively explaining \(McCready\) in the \(AGC\) opinion, the Court found it necessary once again, in 1986, to go over the same ground in \(Cargill, Inc. v. Monfort of Colorado, Inc.\).\(^{72}\)

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\(^{68}\) Id. at 541–42.

\(^{69}\) Id. at 542.

\(^{70}\) Id. at 543 (footnote omitted).

\(^{71}\) Id. at 545.

\(^{72}\) 479 U.S. 104 (1986).
1. The Opinion

Excel, a subsidiary of Cargill and the country’s second-largest beef packer, agreed to acquire Spencer Beef, the third-largest. Although the deal was not a merger to monopoly, the combined market shares of the merging parties (both on the selling side of the market and on the buying side, for the purchase of cattle) were high enough to make Dr. Herfindahl sit up and take notice. Moreover, the deal was part of a marked trend toward concentration in the beef-packing business—and of a marked trend of beneficence toward horizontal mergers in the Reagan Administration.

The plaintiff, Monfort, the fifth-largest competitor in the beef-packing business, sued to block the transaction, claiming a violation of Section 7 of the Clayton Act. To prove its case on the merits, the plaintiff relied heavily on the adverse presumption that arises from significant increases in concentration. The plaintiff also claimed that the combined operation, as a consequence of multi-plant efficiencies, would probably reduce the price of beef to consumers, and, at the same time, result in higher prices for cattle paid to farmers. Monfort asserted that the resulting cost-price squeeze would be highly detrimental to its own business. Although Monfort did not claim that it feared for its own continued corporate existence, it did assert that the merger would likely drive out other, smaller players in the beef-packing business.

The district court entered a permanent injunction against the deal, and the Tenth Circuit affirmed. In a 6–2 opinion, the Supreme Court reversed. Writing for the majority, Justice Brennan began by holding that, just as antitrust injury is necessary to a claim for damages, a threat of antitrust injury is an essential prerequisite to a claim for injunctive relief: “A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.” The Court thus took the occasion to resolve any lingering doubt AGC might have left as to whether antitrust injury is a necessary condition to any private antitrust action.

74 See generally ALD, supra note 3, at 333–38.
75 591 F. Supp. 683 (D. Colo. 1983), aff’d, 761 F.2d 570 (10th Cir. 1985).
76 479 U.S. at 110 n.5.
77 Id. However, “because standing under [Clayton Act] § 16 [injunctive relief] raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 [damages] are not relevant under § 16.” Id. at 111 n.6.
And was antitrust injury present in the case at bar? No, said the Court, it was not.

Monfort argued that *Brunswick*’s rule applies only to loss from continuing competition—at the same level of competitive intensity prevailing before the challenged acquisition. By contrast, the plaintiff urged, *Brunswick* did not bar actions for injury due to *increased* competition. The Court, however, did not buy the suggested distinction between continued lawful competition and increased lawful competition:

*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for “[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.” . . . The logic of *Brunswick* compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.78

In short, said the Court, “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 merely to increased competition does not constitute such injury.”79

The Antitrust Division, as amicus curiae, urged not only that Monfort lacked antitrust injury but also that, to guard against future self-serving Section 7 claims by competitors, the Court should adopt a blanket prohi-

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78 Id. at 116 (citation omitted). The plaintiff also contended that it was threatened with predatory pricing, but the Court determined that “Monfort neither raised nor proved any claim of predatory pricing before the District Court.” Id. at 119 (footnote omitted).

Sullivan and Grimes vigorously criticize *Cargill* for extending the antitrust injury requirement to actions seeking injunctive relief and for failing to recognize that “a price-cost squeeze could . . . be a strategic tool to enforce a scheme of oligopolistic pricing, deterring competitive initiatives by the plaintiff”—a shortcoming they attribute to rigid Chicago School thinking. SULLIVAN & GRIMES, supra note 11, at 920. However, concerns about anticompetitive disciplinary pricing are best addressed by a post-merger action for damages, not the far more drastic remedy of an injunction before the merger. Such a damages case—where a putative David would undertake to prove that it was trying to lower prices but suffered disciplinary retaliation at the hands of a Goliath, created by an illegal merger—would put David’s litigation goals in alignment with those of consumers. Such a case would be different from the *Cargill* scenario, where the feared cost-price squeeze was the consequence of Goliath’s economies of scale.

79 479 U.S. at 122.
bition on such claims, even where they properly allege threatened predatory pricing. This the Court refused to do:

[PR]edatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur. 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.\(^{80}\)

Justice White joined Justice Stevens’ dissent.\(^{81}\) The dissenters emphasized the broad scope of Section 7 of the Clayton Act, its prophylactic nature, and Congress’s concern to protect small business:

[GI]ven the statutory purposes to protect small businesses and to stem the rising tide of concentration in particular markets, a competitor trying to stay in business in a changing market must have standing to ask a court to set aside a merger that has changed the character of the market in an illegal way. Certainly the businesses—small or large—that must face competition in a market altered by an illegal merger are directly affected by that transaction. Their inability to prove exactly how or why they may be harmed does not place them outside the circle of interested parties whom the statute was enacted to protect. . . .

The concept of “antitrust injury,” which is at the heart of the treble-damages action, is simply not an element of a cause of action for injunctive relief that depends on finding a reasonable threat that an incipient disease will poison an entire market.\(^{82}\)

In essence, the dissenters viewed “competition” not as a process of vigorous competitive rivalry but rather as a state in which there are numerous players, none of which enjoys a decisive advantage over any other. But time has passed by that point of view, thus effectively rendering obsolete the dissenters’ heartfelt plea that an antitrust court should not look too closely at the nature of the injury claimed by a smaller competitor, to see whether it arises from the efficiency of the combined enterprise.\(^{83}\)

2. Cargill’s Teaching

The antitrust bar commonly thinks of Cargill as one of a series of Supreme Court cases that defined predation strictly,\(^{84}\) thus affording a

\(^{80}\)Id.

\(^{81}\)Justice Blackmun did not take part in the case.

\(^{82}\)Id. at 127–28.

\(^{83}\)On the evolution of the role of efficiency in merger enforcement see ALD, supra note 3, at 345–48.

wide, though not unlimited, scope for aggressive competition by even
the largest players in a market. For our analytical purposes, however,
_Cargill_ leaves us with two important points: First, as we have seen, _Car-
gill_’s footnote 5 removed any doubt as to whether antitrust injury is
essential in all antitrust cases. Second, _Cargill_, while fully consistent
with _Brunswick_, marked a significant point in the evolution of the doctrine
of antitrust injury. The plaintiff’s claim in _Brunswick_ was so egregious
that the absence of antitrust injury could be detected in a moment’s
reflection on the goals of antitrust as a whole. In _Cargill_, by contrast,
to determine whether antitrust injury was present it was necessary to think,
in a more focused way, about the purposes of a particular antitrust
statute—Section 7 of the Clayton Act.

Putting it another way, after _Cargill_, in order to address antitrust injury,
we need to supplement the general question, “This conduct violates the
antitrust laws because [fill in the blank correctly]” with the more specific
question, “This transaction violates Section 7 of the Clayton Act because
[fill in the blank correctly].”

E. ARCO

Amazingly, four years after _Cargill_, the Court, perceiving that the lower
courts had still not grasped its message about antitrust injury, felt it
necessary in _Atlantic Richfield Co. v. USA Petroleum Co._ to take yet another
pass at explaining the concept.

_Brunswick_, _Cargill_, and _ARCO_, were all actions brought by competitors
of the defendants. _Brunswick_ and _Cargill_ each involved purportedly illegal
mergers that were said to facilitate business practices that, while prejudi-
cial to the interests of plaintiffs, were lawful in and of themselves. _ARCO_,
by contrast, addressed a business practice that was then understood to
be illegal per se. _ARCO_ showed that, in order to detect antitrust injury,

85 Joseph Brodley has criticized _Cargill_ as highly detrimental to merger enforcement, a
mistake based on failure to see that “perfect purity of incentives by self-interested enforcers
is an impossible and self-defeating illusion.” Joseph F. Brodley, _Antitrust Standing in Private
Merger Cases: Reconciling Private Incentives and Public Enforcement Goals_, 94 MICH. L. REV. 1,
Competitor Plaintiff_, 82 IOWA L. REV. 127 (1996), endeavored to rebut Brodley’s views. The
implications of _Cargill_ were also explored in _ABA Section of Antitrust Law, Monograph
No. 16, Private Litigation Under Section 7 of the Clayton Act: Law and Pol-
86 _AGC_, properly understood, did not hold that antitrust injury is a mere factor for
consideration in the standing inquiry, not an essential prerequisite. But if it had so held,_
_Cargill_ would have overruled it in that regard.
it may sometimes be necessary to look very carefully at the purposes behind not just a particular statute, but a particular rule of case law as well.

1. The Opinion

The plaintiff, USA Petroleum, owned a chain of independent gasoline stations doing business on a low margin, “discount” basis. ARCO, the defendant, decided to increase its retail market share by lowering the retail price of its gasoline, and, to that end, allegedly entered into vertical price-fixing agreements with its dealers, capping the retail price they could charge. At the time, maximum price fixing was understood to be illegal per se.88 The plaintiff, distressed that ARCO brand-name gasoline was now selling at the same price as its less prestigious brand—and that its brand was losing sales—brought an antitrust claim seeking damages for the profit on the sales it would have made but for the illegal agreement to suppress the retail price of ARCO gasoline. Crucially, however, the plaintiff’s original claim of below-cost, predatory pricing was withdrawn.

The plaintiff argued that any damages flowing from a per se violation should ipso facto be seen as antitrust injury. But the Court, in a 7–2 opinion per Justice Brennan (who had written the majority opinion in Cargill as well), elected instead to examine closely the policy rationales underlying the rule of Albrecht to determine whether they were consistent with damages suits by competitors. Put another way, what market effects did the per se rule against agreements capping the retail price seek to eliminate or to counteract? And did the plaintiff’s injury flow from one of the forbidden effects? (Fill in the blank: “Maximum resale price maintenance is per se illegal because . . .”)

According to the majority, this examination disclosed that the rule against agreements capping the retail price was intended to allow downstream dealers the freedom to find their own place in the market.89 More specifically, advocates of the rule against price capping by agreement saw a risk that the maximum retail price might be fixed too low for a dealer to furnish related services consumers desired. In addition, by effectively limiting dealers’ ability to engage in non-price competition, capping the retail price might channel distribution through a few large

88 Maximum vertical price fixing—capping the resale price—was held per se illegal in Albrecht v. Herald Co., 390 U.S. 145 (1968), which was overruled in 1997, long after ARCO, in State Oil Co. v. Khan, 522 U.S. 3 (1997). Under current law as laid down in Khan, maximum vertical price-fixing agreements are subject to the rule of reason. When they might actually be unlawful under the rule of reason is something of a mystery. See Ronald W. Davis, Capping the Resale Price: What Can We Do with Khan?, Antitrust, Spring 1998, at 33.

89 495 U.S. at 336.
dealers. Finally, advocates of the Albrecht rule argued, it is sometimes hard in practice to distinguish maximum vertical price fixing from minimum price fixing, a practice whose adverse competitive effects are easier to see; thus, one has to be tough on maximum RPM in order not to let minimum RPM slip through the antitrust net.

In short, said the Court, maximum vertical price fixing is “unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors.” In fact, if Albrecht’s concerns were applicable to the facts at bar, ARCO brand stations would have lost sales, not gained sales, as plaintiff alleged. “In sum,” wrote Justice Brennan, plaintiff “has not suffered ‘antitrust injury,’ since its losses do not flow from the aspects of vertical, maximum price fixing that make it illegal.”

More generally, competitors may never be heard to complain of artificially low prices unless they are predatory, because it is only predatorily low prices that threaten injury to competition. The same antitrust injury bar against claims by competitors applies whether or not such non-predatory price competition arises from an agreement, rather than a unilateral business decision—even a per se illegal agreement.

The majority took care to guard the purity of the antitrust injury doctrine against misguided attempts to conflate it with proximate cause, rejecting the Ninth Circuit’s assertion that both Brunswick and Cargill could be distinguished from ARCO on the ground that, in the former, there was only an “attenuated or indirect” relation between the violation and the injury. On the contrary, Justice Brennan implied, in all three cases, the injury was direct. The problem with the claim in each case was not want of proximate cause, but rather that plaintiffs were pursuing goals inimical to competition.

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90 Id.
91 Id.
92 Id.
93 Id. at 337.
94 Id. at 339–40. The Court’s discussion was consistent with the Brunswick dictum on predatory pricing. See Brunswick, 429 U.S. at 489 n.14 (where there is true predation (not just uncomfortably aggressive price cutting), a competitor’s lost profits do count as antitrust injury, even though the predatory practice temporarily benefits consumers).
95 495 U.S. at 340–41.
96 Id. at 341–46.
97 Id. at 341 n.11. The majority also referred to one of the AGC factors, the existence of other classes of plaintiffs ready and able to litigate and thus to deter antitrust violations, as additional support for the result it reached. Id. at 345. Read in context, the Court’s brief discussion of this factor does not indicate confusion between antitrust injury and standing, or between antitrust injury and proximate cause; the Court was only observing that rigorous insistence on antitrust injury will not harm antitrust enforcement. The Court
Once again, as in *Cargill*, Justice White joined Justice Stevens’s dissenting opinion. Justice White’s lengthy dissent argued, in essence, that the majority took too restrictive a view of the concept of predation—and exhibited too narrow a conception of the purposes of the antitrust laws:

The Court, in its haste to excuse illegal behavior in the name of efficiency, has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, and that private actions not only compensate the injured, but also deter wrongdoers.

2. *ARCO’s Teaching*

In terms of substantive antitrust law, *ARCO* reinforces a number of other authorities standing for the proposition that no antitrust rule or statute is intended to protect competitors from aggressive but non-predatory competition.

In terms of the doctrine of antitrust injury, *ARCO* teaches that it may sometimes be necessary to focus on a particular rule of case law to ascertain what effects that rule is intended to prevent. It is a simple and straightforward lesson, but one that, all too often, the lower courts have failed to grasp.

**III. THE MEANING OF ANTITRUST INJURY**

Very simply, the doctrine of antitrust injury requires a court to examine not only whether the acts the defendant allegedly committed violate the law but also why they violate the law. The doctrine, in other words, directs a court to examine, in a proper case, what economic effects the case law rule or statute in question seeks to prevent. (Professor William Page rightly refers to this examination as a reinterpretation of substantive legal rules. Having examined the purposes of the relevant rule, the court must then consider the damages claimed by the plaintiff, to determine whether the injury flows from one of the condemned effects. If so, there is antitrust injury; if not, there is no antitrust injury.

The doctrine instructs the courts to perform this task (when the question is properly presented) but gives no explicit guidance as to how they are to perform it. There is, nevertheless, no huge mystery about how to

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98 Id. at 346–61.
99 Id. at 359.
do the job—which, after all, is just a special case of the familiar judicial task of statutory interpretation. *Cargill* and *ARCO* each looked to legislative history, precedent, learned commentary, and logic. These, one would suppose, remain the right tools to use.101

A. *Brunswick*’s Definitional Formulae

*Brunswick* has bequeathed us an embarrassment of definitional riches in respect of antitrust injury. Not content with only one definition, Justice Marshall gave us several:

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be “the type of loss that the claimed violations . . . would be likely to cause.”102

Each component is worth a brief examination.

The first definition offered is, with one qualification, the clearest and the most precise: “injury of the type the antitrust laws were intended to prevent.” The qualification comes from the doctrine’s later evolution in *Cargill* and *ARCO*, which changed the focus away from antitrust law as a whole, toward the particular antitrust statute or case law rule invoked by the plaintiff. Thus, without any abridgement or change in meaning, this first definition would be more precise if revised to read:

*A plaintiff suffers antitrust injury if a purpose of the statute or rule invoked by the plaintiff is to prevent injury of the kind the plaintiff claims as damages in the litigation.*

The second part of the first sentence—“and that flows from that which makes defendants’ acts unlawful”—sounds like a definition, not of antitrust injury, but rather of injury in fact. Indeed, the phrase has proved to be a trap for the unwary, causing some courts to speak as if

101 Once the definition of antitrust injury is established, the question naturally arises: Is there some phrase that comes trippingly to the tongue, some golden thread that ties all the relevant law into one seamless cloth, that will allow us to understand in an instant—without devoting undue cerebral energy to the matter—whether antitrust injury is present or absent in a particular set of facts? Can we, in other words, go beyond the definition of antitrust injury to set forth some generalization that tells us when antitrust injury is present? Or, on the contrary, must we continually pull out from our toolbox those old, familiar implements—legislative history, precedent, learned commentary, and logic—to do the job anew, each and every time the question is raised? These are interesting questions. We consider them in Part IV below.

102 429 U.S. at 488–89 (citation and footnote omitted).
antitrust injury were merely another name for injury in fact. But the Court was not thinking of injury in fact. Rather, the Court recognized that antitrust rules do not arbitrarily condemn behavior, but instead forbid certain kinds of behavior based on certain adverse effects that may flow from that behavior. “That which makes defendants’ acts unlawful” is, thus, some specific form of economic effect. The doctrine of antitrust injury requires that the plaintiff’s injury result from the occurrence of the condemned effect.

In fact, the two parts of the first sentence say the same thing, the first time clearly—“injury of the type the antitrust laws were intended to prevent”—and the second time less precisely.

In the second definitional sentence Justice Marshall wrote, “The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” Here the Court evidently had in mind, for example, an illegally predatory practice that at the same time causes antitrust injury to the excluded competitor (“the anticompetitive effect . . . of the violation,” i.e., the illegal loss of the opportunity to compete) and antitrust injury to consumers (the monopoly overcharge made possible by the predatory activity). The Court apparently wished to be clear that, in that circumstance, both kinds of injury count as antitrust injury.

103 Of course, if a court determines that the plaintiff suffered no actual injury in consequence of the acts alleged in the complaint, and if the judge dashes off an opinion dismissing the complaint, speaking loosely of “absence of antitrust injury,” no great harm is done. Far worse is that the phrase under consideration, read out of context by those unmindful of the point of Brunswick, Cargill, and ARCO, has led not a few courts into what we may call the trap of the Irrelevant Hypothetical. The trap of the Irrelevant Hypothetical is the fallacious proposition that any time one can construct a counterfactual hypothetical in which (a) the facts are changed such that there is no antitrust violation, yet (b) the plaintiff still suffers damage similar to the injury it actually suffered as a result of the violation, there is no antitrust injury.

The proposition is fallacious for two reasons. First, such a hypothetical can always be created. Therefore, conscientiously applied, the Irrelevant Hypothetical leads ineluctably to the conclusion that no plaintiff ever suffers antitrust injury. It wipes out all private antitrust litigation. See Jacobson & Greer, supra note 11, at 301.

Not surprisingly, no court has actually taken the Irrelevant Hypothetical to its absurd but “logical” conclusion, namely, that no private plaintiff ever suffers antitrust injury. Some, however, have employed the notion as a sort of magician’s rabbit in the hat, to be pulled out whenever instinct dictates that the defendant ought to win the case but one cannot think of a good reason why. (In Part III.D.5., infra, we will examine the tragicomic results of the Irrelevant Hypothetical in the jurisprudence of the Sixth Circuit.)

Second, the Irrelevant Hypothetical leads a court away from the whole point of the antitrust injury exercise, as laid out in Brunswick, Cargill, and ARCO, which is to determine the intended purpose of the statute or rule invoked by the plaintiff.

Douglas Floyd reads the second Brunswick formulation “literally” as limiting the first formulation by denying standing to intermediary victims, and then criticizes the limitation. Floyd, supra note 8, at 13. By contrast, I read the second formulation merely as an effort,
Finally, in an ill-considered effort to put some icing on the cake, the Court wrote that antitrust injury “should, in short, be ‘the type of loss that the claimed violations . . . would be likely to cause.’” Read in context, the observation is not objectionable. A problem can arise, however, where the claim before the court is novel or unexpected, and the court takes the doctrine of antitrust injury as a license to reject the claim merely because of its novelty—or because the complaint does not describe a fact pattern that immediately leaps to the judicial mind when someone mentions the word “antitrust.” Granted, if the plaintiff standing before the court presents a novel and creative claim, of a type never before advanced in one hundred years of private antitrust litigation, surely a high level of scrutiny is warranted. But at the end of the day the question is not whether the claim is novel but instead whether the effect on which the plaintiff bases its claim for damages is or is not an effect intended to be prevented by the rule or statute invoked. And that should be a straightforward question, at least in the overwhelming majority of cases.

B. APPELLATE COURT GLOSSES ON THE DEFINITION OF ANTITRUST INJURY

In *Jack Walters & Sons Corp. v. Morton Building, Inc.* Judge Posner gave an admirable précis of the antitrust injury doctrine:

There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff’s animals, which were being transported on the deck of the defendant’s ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable. Similarly, although the plaintiff in *Brunswick* would not have been hurt if there had been no acquisition, the acquisition did not hurt it in the way that the framers of the antitrust laws had in mind.

Similarly, in *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.* the Seventh Circuit cogently defined antitrust injury as “injury to an interest protected by the antitrust laws and attributable to the antitrust violation.”

The Ninth Circuit has become fond of the term “causal antitrust injury,” a phrase that refers at the same time to injury in fact and injury

not wholly successful, to explain the first formulation—which would better have been left to stand on its own.

105 737 F.2d 698, 709 (7th Cir. 1984).

106 Id. at 708–09.

107 998 F.2d 391, 395 (7th Cir. 1993).
within the contemplation of the relevant statute or rule. For example, in Rebel Oil Co. v. Atlantic Richfield Co.\textsuperscript{108} the court explained that causal antitrust injury, is an element of all antitrust suits brought by private parties seeking damages under Section 4 of the Clayton Act. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977). Under Section 4, private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. \textit{Id.} To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant’s behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. \textit{Atlantic Richfield Co. v. USA Petroleum, Inc.}, 495 U.S. 328, 334 (1990). If the injury flows from aspects of the defendant’s conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant’s conduct is illegal \textit{per se}. See \textit{id.}

\textbf{C. Applying Antitrust Injury: Some Instructive Examples}

A few examples will illustrate the correct and incorrect application of the antitrust injury doctrine and show the kinds of difficulties the courts have had in applying the concept.

In Rebel Oil, the court not only defined antitrust injury correctly but also applied the concept properly. On the one hand, the court ruled, where a defendant lacked market power, injury to a competitor due to lost sales occasioned by predatory (below-cost) pricing did not amount to antitrust injury sufficient to support a claim of attempt to monopolize. That is because, as prior authority had made clear, it is not the function of the rule against attempts to monopolize to protect competitors against below-cost pricing in circumstances that are unlikely to result in ultimate consumer injury. On the other hand, where the evidence might show that the defendant had sufficient power to enforce oligopoly pricing, there was standing to assert a primary line price discrimination under the Robinson-Patman Act.\textsuperscript{109} Both of the contrasting rulings were correct. Each was based on application of the basic tools of analysis of precedent and legislative history.

\textit{Rebel Oil} required the Ninth Circuit to think carefully and draw subtle distinctions, but the Third Circuit’s task in \textit{Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.}\textsuperscript{110} was truly Herculean, in view of the unusual nature of the claim. There the plaintiff’s theory of liability was that DuPont, a major methanol producer, unlawfully eliminated

\begin{footnotesize}
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\item \textsuperscript{108} 51 F.3d 1421, 1433 (9th Cir. 1995).
\item \textsuperscript{110} 826 F.2d 1235 (3d Cir. 1987).
\end{itemize}
\end{footnotesize}
potential competition when it acquired Conoco. Conoco allegedly had
been planning a major coal gasification project that would have produced
methanol in substantial amounts. One might have thought that the
plaintiff, a methanol producer itself, would have been overjoyed to see
the demise of a major new player in its market. But the plaintiff sued,
claiming that Conoco’s business plans, squelched as a result of the
acquisition, involved an interim program to purchase massive amounts
of methanol. “In order to have a market in place when manufacture
began, Alberta asserts that Conoco planned to purchase large quantities
of methanol from a number of producers in the interim [before its coal
gasification plant came on stream, several years down the road]. Conoco
would then sell this methanol on the merchant market to stimulate
additional demand.”

The plaintiff claimed damages from the abandonment of this “demand
stimulation program” in that (a) it lost methanol sales it would have made
to Conoco and (b) Conoco’s aborted methanol demand stimulation
program would have driven methanol prices higher, enhancing the plain-
tiff’s profits on sales to firms other than Conoco. In a two to one decision,
the court found lack of antitrust injury. The court’s discussion of the
plaintiff’s unusual claim meandered past a number of points but ulti-
mately grasped the nettle: “From the consumer’s standpoint, the develop-
ment that Alberta anticipated and the basis for its claim—an increase
in methanol price—would prove distinctly disadvantageous.”

It is not, in other words, a purpose of Section 7 of the Clayton Act to
protect business plans that lead to higher consumer prices. Thus, where
a plaintiff’s theory of damages rests on a but-for world where consumer
injury would have been greater than in the real world of which the
plaintiff complains, there is no antitrust injury.

111 Id. at 1237. The court did not explain why Conoco might have done such a thing,
nor is the business reasoning underlying the claimed “demand stimulation program”
readily apparent.

112 Id. at 1243. Along the way the court fell into the Hypothetical Trap, observing that
the same injury would have occurred when the acquisition caused Conoco to abandon
its demand stimulation program, whether or not the acquisition was illegal. Id. at 1241.
The statement was true but irrelevant. If a purpose of Clayton Act § 7 were to prevent
mergers that threatened high profits earned by competitors, then the effect on the plaintiff
in the case under discussion would have amounted to antitrust injury. But, of course, § 7
has no such purpose.

More defensible was the court’s concern over the counterintuitive nature of the lawsuit:
if the long-run effect would be to reduce competition in the methanol market, why was
the plaintiff suing, when it would benefit from decreased competition? See id. The court
may have suspected that the plaintiff’s real concern was the increased efficiency its competi-
tor might enjoy following the merger.
Far less satisfactory was the Third Circuit’s reasoning in *City of Pittsburgh v. West Penn Power Co.*, where the city sought injunctive relief against the planned merger of two electric utilities. The utilities had agreed in advance of the merger that one of them would withdraw its pending application to the Public Utility Commission to provide service in portions of the city, an application that would have permitted limited competition between the two, to the benefit of the city in its capacity as purchaser of electric power. The court erroneously held, in a two to one opinion, that antitrust injury was absent where the competitive relationship was only potential, and contingent on the approval of the Commission, receipt of which was not a foregone conclusion.

This case showed a regrettable tendency in the Third Circuit jurisprudence to confuse antitrust standing with issues going to the merits. At a preliminary injunction hearing the utilities could have argued that Commission approval of the pending petition would have been unlikely, and the merger would consequently have left competition where it stood—and the court could have given whatever weight it chose to that argument in determining the merger’s likely effect on competition. But it was wrong to try to short-circuit that essential factual analysis by blandly denying that antitrust law protects potential competition as well as actual competition. And it was erroneous to assert that a customer lacks standing to challenge a merger of companies A and B merely because, in the past, the customer has always done business with A, never with B. The court used a non-self-defining term, antitrust injury, as a cover for murky thinking.

**D. What Antitrust Injury Is Not**

Having examined what antitrust injury is and how a real antitrust injury analysis operates, to complete the picture we must look at what antitrust injury is not. Despite the misconceptions held by too many courts, antitrust injury is not another term for

- an essential element in establishing liability under the rule of reason, or, more generally,
what is missing when the facts set forth in the complaint do not disclose a colorable antitrust violation,

• injury in fact,

• statutory “injury to business or property,”

• what is missing when there is a colorable antitrust violation and a colorable case that the plaintiff was injured, but the violation was not a material cause of the injury—we may term this the injured-while-standing-near-an-antitrust-violation scenario—or, finally,

• injury that could not possibly have been caused by anything other than an antitrust violation.

1. Mistaking Antitrust Injury for an Element of Liability

The analytical error at issue here arises most often in the paradigm case where Dr. Smith loses his hospital privileges amid accusations of irascibility and malpractice, and tries to make an antitrust case out of it. Depending on where Dr. Smith’s hospital is located—and on the cleverness of his attorney—he may be able to allege something that resembles (if you do not look at it too closely) a monopolized market and exclusion by competitors for anticompetitive motives.

As we have already seen from dictum in Brunswick, Cargill, and ARCO, a competitor excluded from a market by monopolistic practices suffers antitrust injury. On the other hand, many situations other than “monopolistic practices” result in market “exclusion.” Our hypothetical Dr. Smith’s claim is very likely to be meritless: there may well be legitimate business reasons for the loss of privileges, and, in any event, few markets for medical services are so thin that the exclusion of one physician makes a difference to competition as a whole in that market. But antitrust injury is not the key to the problem of how to dispose of Dr. Smith’s meritless antitrust complaint. The key is to recognize the absence of a properly alleged antitrust violation.

The Fifth Circuit grasped the point in Doctor’s Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.116 There the plaintiff was injured because of its exclusion from a preferred provider organization (PPO, a form of managed care entity) and its replacement in the PPO by one of its competitors, misfortunes it characterized as illegal group boycott and monopolization—without, however, providing a basis to link the physician’s injury to consumer injury. The court found the claim meritless, and added a thoughtful discussion chastising the district court for think-

116 123 F.3d 301 (5th Cir. 1997).
ing that the absence of merit had anything to do with antitrust injury. By contrast, exclusion from a PPO and loss of competitive benefits would have counted as antitrust injury if there had been a violation of the law. The court distinguished between (a) “classical” fact patterns, such as the market exclusion claims in the case before it, where “standing should not become the tail wagging the dog,” and (b) atypical fact patterns, where it might be useful to assume arguendo a violation and then ask if the plaintiff has standing. 117

But a later panel of the same circuit promptly forgot the point. In Patel v. Midland Memorial Hospital and Medical Center 118 an antitrust case founded on loss of hospital privileges was dismissed on the merits and because of purported want of antitrust injury. This panel ignored the sound, if colloquially phrased, advice of the Doctor’s Hospital of Jefferson panel: where a hospital exclusion case with a classical fact pattern is easily dismissed on the merits, worrying about standing is “barking up the wrong tree.”

Other circuits have likewise wrestled with the relation between antitrust injury and merits, with mixed results. For example, Brader v. Allegheny General Hospital 119 was a typical staff privileges case. Depending on who was telling the story, Dr. Brader’s loss of staff privileges came about either from a personal dispute, medical incompetence, or a conspiracy in restraint of trade. Deeming itself bound by prior Third Circuit authority that “the mere exclusion of a single physician from a market is sufficient, in the right circumstances, to establish a Sherman Act violation,” 120 the court declined to dismiss the complaint. Having reached that decision, the court correctly reasoned that it would not be appropriate to dismiss on “antitrust injury” grounds either. The panel took issue with the Seventh Circuit’s observation that “[a] staffing decision does not itself constitute an antitrust injury.” 121

In a subsequent hospital staff privileges case, Matthews v. Lancaster General Hospital, 122 the court affirmed summary judgment for defendants on the merits (apparently because it believed there was no antitrust conspiracy), and on antitrust injury as an alternative ground (apparently because it did not believe that there was any consumer injury, even if

117 Id. at 306.
118 298 F.3d 333 (5th Cir. 2002).
119 64 F.3d 869 (3d Cir. 1995).
120 Id. at 874 (citing Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991)).
121 64 F.3d at 876 (quoting BCB Anesthesia Care, Ltd. v. Passavant Mem. Area Hosp. Ass’n, 36 F.3d 664, 669 (7th Cir. 1994)).
122 87 F.3d 624 (3d Cir. 1996).
there had been an antitrust conspiracy). The alternative holding was unnecessary. The nature and scope of the so-called per se group boycott rule are in doubt, but invoking antitrust injury is not justified merely to avoid an ambiguous and unsatisfactory rule of substantive antitrust law. Far better to treat group boycott claims in the health care industry under the rule of reason, and to be highly skeptical of claims of injury to competition. It makes more sense to hold, “the restraint was reasonable because there was no showing of consumer injury,” than to hold, “we haven’t got a clue about whether the restraint was reasonable or unreasonable, but there was no consumer injury, so there was no antitrust injury to the excluded doctor.”

In a third hospital staffing case, Angelico v. Lehigh Valley Hospital, Inc., the Third Circuit got the analysis right, observing that it was error to “incorporat[e] the issue of anticompetitive market effect into [the] standing analysis, confusing antitrust injury with an element of a claim under section 1 of the Sherman Act.” To the extent Dr. Angelico alleged that he was “shut out of competition for anticompetitive reasons,” the injury he suffered was antitrust injury. (There may well be a need to look behind the bare allegations, to see if there is anything anticompetitive in the actual facts, but that is not properly viewed as an antitrust injury question.)

In sum, antitrust injury is not an element of liability under the Sherman Act or any other antitrust statute. Rather, antitrust injury is an issue that only comes into play as and when it appears that all the elements of liability have been adequately alleged.

If a plaintiff tries to make an antitrust case by alleging that the defendant spat in the street, it would be ridiculous for the court to respond, “Now I know that spitting in the street is not an antitrust violation. But suppose it were. What would be the anticompetitive effect of spitting in the street, and has this plaintiff demonstrated any such effect?” To try to answer a question in that form is to undertake a fool’s errand.

123 Id. at 641.
124 See ALD, supra note 3, at 122.
125 184 F.3d 268 (3d Cir. 1999).
126 Id. at 275 n.2.
127 Id. at 274. The court remanded for further consideration of whether there was an adequate claim of injury to competition in a relevant market.
128 See Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51 (1st Cir. 2003) (anticompetitive exclusion claim might not stand up on the merits—there might, for example, be procompetitive justifications for the exclusion—but the excluded plaintiff was a proper party to pursue the claim).
Two cases with similar fact patterns, *McDonald v. Johnson & Johnson*\(^{129}\) and *Turner v. Johnson & Johnson*,\(^{130}\) illustrate the failure to distinguish between merits and antitrust injury. In both cases the plaintiffs had sold their stock in a company to Johnson & Johnson subject to an earnout provision, and they had been disappointed in the amount they received under the earnout, allegedly because of the defendant’s suppression of competition among the various products it controlled. In each case the court, after a certain amount of analytical to-ing and fro-ing, found no standing. It would have been better to recognize that there is no antitrust violation in suppressing competition among one’s own products. Because there is no rule forbidding the challenged conduct, it is not productive to ponder what purpose would be served by such a rule, were it to exist.

Likewise instructive by way of negative example is *Nelson v. Monroe Regional Medical Center*,\(^{131}\) which presented an unusual set of facts. The plaintiffs were a teenager who lived in a rural community and needed frequent medical care, and the girl’s mother. Their problem was that, following a merger to monopoly of local medical centers, the combined entity refused to provide further nonemergency medical care to either plaintiff, apparently because of a previous malpractice complaint against a physician employed by the clinic. As in *McCready*, the economic injury lay not in high prices paid to the alleged monopolist but in out-of-pocket expenses: the mother lost time at work and had travel-related expenses incurred in seeking alternative medical care for the daughter, when the monopolist refused treatment. The court reasoned that the plaintiffs were proper champions of consumer interests and that the plaintiffs were injured by a “reduction in output”:

Monopolists are more likely to turn away prospective clients because they do not feel the same competitive pressure to serve all comers. . . . A clinic in a more competitive marketplace might have preferred to let bygones be bygones, opting for the insurance payments and other remuneration it would receive for treating Bowman and Nelson and accepting the risk that they would again sue for malpractice. Monroe Clinic’s failure to do so in a marketplace rendered non-competitive by its merger with a competitor is an injury that can be said to be directly caused by an absence of competition, the kind of injury the antitrust laws were intended to prevent and redress.\(^{132}\)

*Nelson* illustrates how things can go wrong when a court skips right to antitrust injury without thinking carefully about whether there was

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\(^{129}\) 722 F.2d 1370 (8th Cir. 1983).

\(^{130}\) 809 F.2d 90 (1st Cir. 1986).

\(^{131}\) 925 F.2d 1555 (7th Cir. 1991).

\(^{132}\) Id. at 1564–65.
violation in the first place. To speak of “reduction in output” resulting from the defendant’s presumptively illegal monopoly was disingenuous word play.\textsuperscript{133} The essence of the claim was that the defendant abused its monopoly power by refusing to deal, not for an anticompetitive reason—the refusal did not enhance barriers to entry, increase prices, or aid an effort to leverage monopoly power into an adjacent market—but rather for an unethical, perhaps even an unconscionable, reason. The court seemed to assume, without discussion, that one who possesses an illegally acquired monopoly may never refuse to deal without a legitimate business reason. That, however, is not the law; the problem with the decision is that it renders antitrust courts the moral policemen of monopolists.

Antitrust injury was a red herring; if the defendant had owed the plaintiffs a duty not to refuse to deal, then of course economic loss arising from breach of that duty would be antitrust injury. The real question was the existence of any duty to deal in the first place.

2. Injury in Fact

It is elementary that a plaintiff lacks standing to seek damages if it has not been injured. This rule has nothing to do with the doctrine of antitrust injury, but is instead a matter of constitutional law and the first principles of jurisprudence.\textsuperscript{134} Nevertheless, plaintiffs routinely seek damages for supposed antitrust violations even though they can demonstrate no actual injury, and courts all too often inaccurately purport to dismiss for want of antitrust injury. For example, in \textit{Davric Maine Corp. v. Rancourt},\textsuperscript{135} the court said there was no antitrust injury where the plaintiff failed to demonstrate any actual effect flowing from the defendant’s alleged unlawful activity. In \textit{Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.}\textsuperscript{136} the Seventh Circuit said that price fixing by two rivals would not cause antitrust injury to a third-party competitor when it really meant that there would be no injury at all.

3. Injury to “Business or Property”

In addition to the fundamental requirement of injury in fact as a prerequisite to a case seeking damages, there is a statutory requirement, under Section 4 of the Clayton Act, that the injury must be to “business or property.” This test—which is quite distinct from the case law require-

\textsuperscript{133} Any “reduction in output” was de minimis, and would have had no effect on market prices.

\textsuperscript{134} \textit{See}, e.g., \textit{Story Parchment Co. v. Paterson Parchment Paper Co.}, 282 U.S. 555 (1931).

\textsuperscript{135} 216 F.3d 143, 149 (1st Cir. 2000).

\textsuperscript{136} 61 F.3d 1250 (7th Cir. 1995).
ment of antitrust injury—is easy to meet, provided the plaintiff’s injury is of an economic nature. 137

It is exceptional, but not unheard of, for an antitrust plaintiff to fail the business or property test. Where the injury is of a non-economic nature, sometimes the court correctly spots the statutory issue. An amusing example from the Fifth Circuit was McCormack v. National Collegiate Athletic Ass’n,138 which grew out of the NCAA’s one-year suspension of Southern Methodist University’s football program for violation of rules on benefits awarded to student athletes. Plaintiffs—respectively, football players threatened with loss of benefits as a consequence of the NCAA rules, cheerleaders aggrieved by their lost opportunity to cheer during the suspension period, and alumni addicted to football—sued, claiming that the rules were a conspiratorial restriction on the employment rights of football players. The court correctly ruled that the cheerleaders and alumni suffered no economic injury, hence no statutory injury to “business or property.” 139 Believing that the university itself would have been the best (most directly injured) plaintiff, the court had some reservations about the football players’ standing, under AGC, but sensibly ruled that the case was best disposed of by assuming arguendo the existence of standing140 and going on to find that any restraints were reasonable.

Sometimes a court misidentifies the “business or property” issue as a matter of antitrust injury. For example, in Steele v. City of Bemidji141 the Eighth Circuit discerned no antitrust injury from the plaintiff’s disappointment that various places of business refused to stock his free political newspaper or to let him distribute it on their premises. The correct analysis, of course, was that (a) a business owner does not violate the antitrust laws by refusing to hand out political literature, and (b), in any event, the injury was to plaintiff’s political expression, not his “business or property.”

4. Material Causation

A real antitrust case requires not only a colorable violation and economic injury to the plaintiff but also a relationship between the two. More precisely, the violation must be a material and a substantial cause of the injury.142 The material causation requirement long antedates the

138 845 F.2d 1338 (5th Cir. 1988).
139 Id. at 1341–42.
140 845 F.2d at 1342.
141 257 F.3d 902 (8th Cir. 2001).
142 See ALD, supra note 3, at 840.
antitrust injury requirement, and the two are distinct, yet courts regularly confuse the two.

*International Raw Materials, Ltd. v. Stauffer Chemical Co.*,143 for example, was a pseudo-standing case, in which the court extensively, but superfluously, analyzed the law of standing when it should have focused on causation. The plaintiff, a marine terminal operator whose business was storing soda ash and other products and then loading them onto ships, sued the defendants, which were members of a lawful soda ash export cartel organized under the Webb-Pomerene Act.144 The *casus belli* was the association’s decision that its members would negotiate jointly for the purchase of terminal operator services, the outcome of these joint negotiations being that someone other than the plaintiff got the business. Joint procurement is a restraint of trade subject to scrutiny under the rule of reason, but the plaintiff either waived or never asserted any such straightforward rule of reason claim.145 Instead, the plaintiff relied on various arcane arguments, all of which the court rejected, to the effect that the defendants were not entitled to rely on Webb-Pomerene immunity and were therefore in violation of the Sherman Act. Such a hypothetical violation, of course, might adversely affect competition in the soda ash business. The plaintiff stretched to argue that there was somehow an anticompetitive spillover from the soda ash market into the terminal services market.

The Third Circuit could and should have stopped by ruling simply that there was no causal nexus between the claimed violation and the plaintiff’s injury (loss of business opportunity in the terminal business). The plaintiff was merely, one might say, injured-while-standing-somewhere-in-the-vicinity-of-an-antitrust-violation.

Instead, the panel felt it necessary to engage in an extensive discussion of standing precedents. The court (erroneously, or at least misleadingly) observed that antitrust injury and antitrust standing are now “collapsed” into “one broad inquiry,”146 and that

> Because [the plaintiff] is neither a competitor nor a consumer in the relevant market [i.e., the soda ash market], it must allege a significant causal connection between the alleged soda ash conspiracy and the alleged anticompetitive effects in the terminalling market such that

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143 978 F.2d 1318 (3d Cir. 1992).
145 See 978 F.2d at 1327 n.11.
146 Id. at 1328.
the harm to the terminalling market can be said to be “inextricably intertwined” with the alleged soda ash cartel.\footnote{Id. (citations to McCready and other authorities omitted).}

The panel seems to have assumed, improperly, that the “inextricably intertwined” language in McCready is a separate legal test, rather than a mere figure of speech signifying proximate cause. Where there is no causation at all, one does not worry about proximate cause. The court was wrong to think that McCready had any bearing at all on the case before it. All the court had to do was apply the rule that where the claimed violation is not the cause of the plaintiff’s injury, there is no claim for damages.

5. Injury that Could Not Possibly Have Been Caused by Anything but an Antitrust Violation

A series of five cases from the Sixth Circuit\footnote{This subsection is an extended and updated treatment of issues raised by Jacobson & Greer, supra note 11, at 299–303. See also In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 650–58 (E.D. Mich. 2000) (straining to read the Sixth Circuit line of cases discussed below as not supporting any “necessary predicate” test of antitrust injury).} provides a case study in how not to think about antitrust injury. These cases provide further illustrations of the need to “unpack” sometimes confusing claims about liability, injury, and causation before determining that there is any genuine antitrust injury issue. They show, moreover, how one appellate court misled itself into developing a “rule” about antitrust injury that makes no sense.

In the first of these cases, Axis, S.p.A. v. Micafil, Inc.,\footnote{870 F.2d 1105 (6th Cir. 1989).} the plaintiff, an Italian maker of armature winding machines, wanted to enter the U.S. market but was blocked by the refusal of U.S. patentees to license key patents. In 1985 the plaintiff tried to buy a U.S. armature winding machine maker that possessed the relevant patent licensees, an acquisition that would have afforded Axis its long-sought vehicle for U.S. entry. But the owner of the U.S. target rebuffed Axis and sold instead to another U.S. competitor. That deal reduced the number of U.S. market participants from four to three, and was thus prima facie unlawful.

Axis sued seeking (a) an injunction requiring the purchaser to license its patents to Axis, or (b) divestiture (so Axis could snap up the target business), and/or (c) damages for sales that it would have made in the United States had it been able to purchase the U.S. target.

The parties engaged in an extensive theological debate about whether the claimed injury was antitrust injury. Both the district court and the
Sixth Circuit bought into the debate, and both concluded the answer was no. But the question of antitrust injury was largely beside the point, as we see if we look carefully at Axis’s three sources of claimed injury.

First, if antitrust law had created a duty to license the key patents, Axis would have suffered antitrust injury by reason of the breach of that legal duty. The problem with the claim for compulsory license was not want of antitrust injury; it was that it did not state a claim for relief.¹⁵⁰

Second, antitrust law does not impose a duty to sell one’s business to a particular purchaser, just because the would-be purchaser wants to buy the business, or just because such a purchase might benefit competition. If there were any such duty, then surely the party to whom it was owed would suffer antitrust injury by its breach. The problem with Axis’s case, once again, was not absence of antitrust injury; it was absence of a valid theory of liability.

Third, Axis asked for divestiture, a claim that would arguably have been justified insofar as Axis suffered antitrust injury arising from the identity of the firm that did purchase the business. Addressing that claim, the court was at pains to point out that Axis was neither a consumer threatened with high prices nor a competitor threatened with predatory activity. True enough, but the vital point was that Axis suffered no injury at all if U.S. buyers had to pay more as a consequence of the merger. So Axis’s divestiture claim did not pose a real question of antitrust injury, inasmuch as the antitrust violation was not a material and substantial cause of Axis’s injury. In fact, the antitrust violation was not in any way, shape, or form a cause of Axis’s injury. Like the plaintiff in Stlauffer, above, Axis was merely injured while standing somewhere in the vicinity of an antitrust violation.

There was, however, one real antitrust injury question in the case, and the court did not handle it correctly. Clayton Act complaints without number have included the charge that a given merger is illegal because, among other things, it increases barriers to entry into the relevant market. If one of the purposes of Clayton Act Section 7 is to prevent mergers that increase barriers to entry, it follows that a party injured by that very effect suffers antitrust injury. Whether Axis could show any actual prejudice flowing from the merger it challenged may not have been an easy question. But it surely was no answer for the Sixth Circuit to conclude

¹⁵⁰ On whether there is an unqualified right, or only a qualified right, to refuse to license patents, see ALD, supra note 3, at 284–86. The issue is controversial, but its resolution has nothing to do with antitrust injury. It would make no sense for a court to find that A had an antitrust duty to license to B, but that B suffered no antitrust injury by reason of the failure to fulfill that duty.
that the entry barrier effect of such a facially unlawful merger was not antitrust injury because the target company did not dominate the U.S. market.\(^{151}\) The market position of the target is relevant to the merits but not to the validity of Axis’s pleading of antitrust injury, where (a) the merger was properly alleged to be illegal, (b) there was a proper allegation that the merger led to increased barriers to injury, one of the economic effects intended to be prevented by the rule Axis invoked, and (c) Axis pleaded economic injury flowing from that economic effect.

The plaintiff in the next case, *Hodges v. WSM, Inc.*,\(^{152}\) had been engaged in transporting tourists between the Nashville airport and the Opryland resort until one of the defendants, Opryland’s owner, decided that its patrons should make exclusive use of its own shuttle service. To that end, the defendant forbade the plaintiff to enter its property, thereby abruptly ending Mr. Hodges’s involvement in the Opryland transport business.

Three things are immediately apparent. First, if the plaintiff had a ghost of a chance of making an antitrust case out of these facts, that chance would lie in asserting an “essential facilities” claim.\(^{153}\) Second, it would have been extremely difficult on these facts to make out a real essential facilities claim. But, third, if the plaintiff *did* have a valid essential facilities claim, the doctrine of antitrust injury would not stand in his way. Who, other than the excluded business entity, would be the principal beneficiary of an essential facilities theory of liability?

The plaintiff, however, chose not to assert that Opryland was an essential facility within the antitrust case law, but rather claimed to find a “conspiracy,” in the nature of “market division,” between Opryland and some of the plaintiff’s competitors, who were said to have “agreed” not to transport passengers to Opryland in exchange for its agreeing to rent needed transportation equipment from them. The claimed conspiracy made no sense. As long as Opryland had the right to exclude competing transport operators from its property, it had the right to exclude all of them, not just some. There was no need for the anticompetitive “consideration” implied in the allegation of “conspiracy,” and, therefore, there was no point to the fanciful “agreement” alleged in the complaint. All that happened was that Opryland decided to keep all the transportation business for itself, and, to meet the new demand it had created for its own services, Opryland rented some extra equipment from those who

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\(^{151}\) 870 F.2d at 1111.

\(^{152}\) 26 F.3d 36 (6th Cir. 1994).

no longer needed the equipment. The case did not turn on antitrust injury, but rather on the plaintiff’s endeavor to construct a conspiracy from blue smoke and mirrors.

The court, however, glossed over the patent lack of merit in the plaintiff’s allegations, and mistakenly thought the key to the case was a purported “analogy” between the facts at bar and the facts in Axis, namely, that in Axis, the injury arose from the lawful refusal to license patents, whereas in Hodges the injury arose from the lawful exercise of real property rights. In each case, the court reasoned, the defendant was simply exercising its property rights, and exercising property rights cannot give rise to antitrust injury. What the court did not see was that if there had been a real antitrust claim based on the essential facilities doctrine, the exercise of property rights would not have been lawful per se, and plaintiff’s injury would indeed have been antitrust injury.

As a sort of parting coda, the court added, “[b]ecause plaintiffs did not allege, nor could they, that the illegal antitrust conduct was a necessary predicate to their injury or that defendants could exclude plaintiffs only by engaging in the antitrust violation, it was appropriate to dismiss the case . . .” The court thus compounded its analytical error by introducing the trap of the Irrelevant Hypothetical.

In the next case, Valley Products Co. v. Landmark, the Sixth Circuit sank further into the mire of the Irrelevant Hypothetical by elevating “necessary predicate” from a throwaway line to a fundamental rule of law. The plaintiff was a company engaged in making the miniature bars of soap and bottles of shampoo one finds in hotel rooms. Essential to its business, of course, was the right to use hotel trademarks. The defendant, a hotel and motel franchisor that owned the Ramada, Days Inn, and other trademarks, decided to adopt a “Preferred Vendor Program,” under which only two companies—not including the plaintiff—would be allowed to use the relevant trademarks, in exchange for payment of a fee to the trademark owner. Disappointed at being cut out of its chosen business, the plaintiff sued, invoking the rule against tying as set forth in Siegel v. Chicken Delight, Inc.

154 26 F.3d at 39 (emphasis added).
155 See supra notes 103 & 112.
156 128 F.3d 398 (6th Cir. 1997).
157 448 F.2d 43 (9th Cir. 1971) (holding that the Chicken Delight trademark was a “tying product” in which the trademark owner had market power; “tied” products included packaging bearing the trademark; franchisor unlawfully “tied” the trademark to the franchisees’ purchase of the “tied” products).
The Sixth Circuit heavily criticized *Chicken Delight*,\(^{158}\) and there is indeed doubt about the continuing validity of the case.\(^ {159}\) Curiously, however, instead of ruling that the complaint did not describe a violation of the antitrust laws, the court engaged in a rambling discussion of *Brunswick, AGC*, and its own pseudo-standing cases, *Axis* and *Hodges*, supra, concluding:

> We do not believe that the plaintiff in the case at bar can pass the “necessary predicate” test. The loss of logoed amenity sales suffered by Valley upon cancellation of its vendor agreement flowed directly from the cancellation [of the contract, and concomitant loss of the right to use the trademarks], as we see it; the sales losses would have been suffered as a result of the cancellation whether or not [the defendant] had entered into the alleged tying arrangements with the franchisees.\(^ {160}\)

But the court’s hypothetical, far from deciding the case, was in fact irrelevant to any issue in the proceeding. *Of course*, the plaintiff could have lost its contract rights in a lawful manner, just as the victim of price fixing would have suffered the “same” injury if the price had been set without an unlawful agreement, and just as the victim of monopolistic dirty tricks would “only” have had a claim under the law of torts, were the defendant not a monopolist. But, far from being a *ratio decidendi*, these observations lack any legal relevance.

The plaintiff in *Valley Products* claimed to be a seller of “tied” products suffering injury resulting from an unlawful “tie.” The court was unwilling to rule outright that the tying claim was meritless. Nor was the court willing or able to articulate some rationale why a customer victimized by the tie asserted in the complaint might have a claim, yet the plaintiff, an injured seller in the tied product market, would not have a claim.\(^ {161}\) The bottom line, then, is that the court *did* effectively rule on the merits of the tying allegation,\(^ {162}\) but disguised that ruling with irrelevant citations to *Brunswick, AGC, Cargill*, and *ARCO*, and the invocation of a chimerical “necessary predicate rule.”

\(^{158}\) 128 F.3d at 404–05.

\(^{159}\) See ALD, supra note 3, at 156 & n.1054.

\(^{160}\) 128 F.3d at 404.

\(^{161}\) Any such supposed distinction between the antitrust injury of buyers and the antitrust injury of sellers would be illogical. Tying and exclusive dealing “arrangements can be illegal because they foreclose rival suppliers from access to customers and thus lessen rivals’ strength or even ruin them. The sales lost by foreclosed suppliers thus matches the rationale for finding a violation and therefore constitutes antitrust injury. Accordingly, such suppliers have standing to challenge illegal tying and exclusive dealing.” *Areeda & Hovenkamp*, supra note 6, ¶ 358a (footnotes omitted).

\(^{162}\) If trademark law always trumps tying claims by competitors, presumably it also trumps claims by customers coerced to accept the tie. That leaves no one to complain, effectively legalizing the practice, unless the government sues.
In the fourth case in this unhappy series, Watkins & Son Pet Supplies v. Iams Co., the plaintiff, a pet supply distributor that had been selling Iams products—indeed, selling them to the exclusion of other brands, in exchange for a 2 percent price break—was aggrieved when Iams decided to change to an exclusive territorial system and, in the process, terminated its business relationship with the plaintiff and awarded its territory to a competitor. The plaintiff alleged a variety of conventional contract and tort claims, all of which were found meritless, and some tagalong antitrust allegations as well. As the court understood these allegations, they were threefold.

First, the court was willing to “assume[e] *arguendo* that Iams violated the Clayton Act [Section 3] by offering Watkins a 2% price discount in return for Watkins’ agreement to sell Iams products exclusively.” The assumption was sound: there is a conceivable, though improbable, set of facts that would make such an arrangement an antitrust violation. The problem with the claim was lack of injury: there is no indication that the plaintiff even claimed damages flowing from its pre-termination 2 percent price-break deal.

Second, the court cited the bogus “necessary predicate rule” of *Valley Products* to squelch the plaintiff’s antitrust claim “[t]o the extent Watkins is claiming that it suffered an injury as a result of termination of its distributorship.” The citation was unnecessary and inapposite. Choosing A over B as one’s exclusive distributor for a territory is not an antitrust violation at all, because whether A is chosen or B is chosen, competition remains the same. There was no predicate antitrust violation. Even if the “necessary predicate rule” were a valid legal rule defining antitrust injury, there would have been no occasion to invoke it because there was no antitrust violation to begin with.

Finally, the court correctly saw that there was no antitrust violation in the fact that someone other than the plaintiff became Iams’s exclusive

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163 254 F.3d 607 (6th Cir. 2001).
164 Significantly, Watkins did not claim that its termination had anything to do with failure to live up to an illegal vertical price-fixing arrangement, a Robinson-Patman violation, or anything comparable. Likewise, there was apparently no claim that Watkins was “coerced” into taking the 2% discount in exchange for selling only Iams products, prior to the termination of business relations.
165 Clearly, the antitrust claims were weak, fallback arguments, and the court’s instinct to treat them with the back of the hand cannot be faulted. That said, our purpose here is to try to untangle the analysis.
166 *Id.* at 616.
167 *Id.*
distributor, nor was there any violation in respect of the terms on which Iams did business with the other distributor.\textsuperscript{169}

In the fifth and final (as of this writing) case in the “necessary predicate” series, \textit{Conwood Co. v. United States Tobacco Co.},\textsuperscript{170} the Sixth Circuit affirmed a verdict in favor of a smaller firm complaining of a series of dirty tricks by its monopolist competitor. (The defendant was said to have taken unauthorized advantage of the “category captain” position status it had with many retailers to remove the plaintiff’s displays and hide its products under the counter, and to engage in other chicanery detrimental to the plaintiff’s snuff business.) The defendant argued “that its conduct was not the ‘necessary’ predicate of any injury Conwood suffered, and thus Conwood cannot recover under the antitrust laws,”\textsuperscript{171} with a prominent citation to \textit{Valley Products}. Without, however, delving into the “logic” of \textit{Valley Products}, the \textit{Conwood} court simply reiterated some of the bad acts the defendant was said to have done and asserted that because the plaintiff’s injury arose from those acts, the “necessary predicate” defense was unavailable.

Under \textit{Valley Products’} logic, the defendant should have won, on the ground that a “category captain” with a low market share might have inflicted the self-same business torts as those inflicted by a high market share “captain.” But with a low market share, there would have been no antitrust violation, only a tort case. So, the court might have reasoned, the antitrust violation was not a “necessary predicate” of the plaintiff’s injury, and the defendant ought to defeat the Sherman Act Section 2 claim. In order to reach the right result in \textit{Conwood}, the court was compelled to ignore that “logic.” \textit{Valley Products’} “reasoning,” taken to its logical conclusion, would lead to the abolition of the antitrust private right of action. \textit{Conwood} gave an unprincipled reason to reject an unprincipled rule, thus proving that two wrongs can sometimes make a right.

Despite the Sixth Circuit’s analytical challenge, in the majority of these cases the party that should have won the case was the party that actually did win the case. But even where the right party wins a case, analytical confusion resulting in harmless error is regrettable because it can mislead a subsequent court into deciding for the wrong party. In \textit{Hodges} the right party, the defendant, won the case because the complaint described lawful business activity, not an antitrust violation. But the court gave the wrong reason to award victory to the defendant: the court assumed there

\textsuperscript{169} 254 F.3d at 616.

\textsuperscript{170} 290 F.3d 768 (6th Cir. 2002), \textit{cert. denied}, 123 S. Ct. 876 (2003).

\textsuperscript{171} \textit{Id.} at 790.
was a violation, but it further assumed, in error, that any antitrust violation effected through the exercise of rights under the law of real property is immune from attack, and hence that the plaintiff lacked a “necessary predicate.” This mistake in Hodges apparently misled the Valley Products court into deciding the case for the wrong party.

IV. PROPOSITIONS ABOUT ANTITRUST INJURY

Part III shows how a court, faced with a suggestion of absence of antitrust injury, must carefully “unpack” the issues, asking itself, Did the defendant enter into a transaction or engage in other behavior that violates antitrust law? Does it appear that the plaintiff has suffered actual injury (of an economic nature)? Did the defendant’s illegal behavior cause the injury, or was the plaintiff merely injured, for some other reason, while standing near an antitrust violation? And, if there was some causal relationship between the illegal behavior and the injury, was the antitrust violation a material and substantial cause of the plaintiff’s loss?

Only if it appears that all these questions deserve an affirmative answer—if, at the pleading stage, they have been properly alleged, and, at the summary judgment stage, there is evidence to support them—might it become appropriate to pose the question of antitrust injury: Does the way in which the plaintiff proposes to measure its damages reveal that it was injured by an effect intended to be prevented by the statute or rule the plaintiff has invoked to establish liability?

Having properly identified the nature of the antitrust injury inquiry, one is naturally inclined to ask whether the current state of the law permits us to articulate general propositions about antitrust injury. That is to say, can we accurately fill in the blank in the proposition “Antitrust injury is always present when . . .” or in the proposition “Antitrust injury is never present if . . .”? Is there some golden thread—some simple maxim that may be employed without painful ratiocination—to decide questions of antitrust injury?

In Part IV we consider the issue of generalizations about the nature of antitrust injury, first reviewing the Supreme Court authorities discussed in Part II, and then considering additional cases from the appellate courts.

A. Supreme Court Teachings

Neither explicitly nor by fair implication do the Supreme Court authorities supply any single proposition about antitrust injury that will apply to all cases, apart from the admonition to look to the purposes of the
antitrust laws in general and the purposes of the relevant statute or rule, in particular. The Supreme Court authorities do, however, permit some important generalizations that will serve to resolve many antitrust injury questions. Antitrust injury

- never arises from “too much” or “too aggressive” lawful competition—“lawful” meaning aggressive competition permitted by today’s Sherman Act Section 2 standards—and, a fortiori,

- never arises from a competitor’s mere presence in the market, without more, even though there may be a colorable claim that the competitor’s presence is somehow “illegal,” but

- may arise where a competitor employs illegally aggressive tactics that are condemned under today’s Sherman Act Section 2 standards, thus threatening to discipline competitive behavior by the plaintiff or drive it from the market—and may arise, moreover, even if the consumer injury that will ultimately result from the predatory behavior has not yet occurred, and

- may accrue as a result of loss of non-price competition, even if there has been no loss of price competition and no anticompetitive overcharge, but

- never occurs as a result of commercial dislocation that is merely incidental to an antitrust violation, i.e., that flows from an effect with which the antitrust law are not concerned and which is accordingly not properly termed anticompetitive.

1. Injury from Competition as Such

Brunswick established that injury from competition as such—so-called “illegal presence in the marketplace”—is not antitrust injury, in that no antitrust statute or rule is intended to protect against lawful competition. After Brunswick few have been foolhardy enough to predicate an antitrust complaint on a competitor’s alleged illegal presence in the marketplace. That, however, did not dissuade the plaintiff in Dial A Car, Inc. v. Transportation, Inc.,172 which interpreted the regulations of the D.C. Taxicab Commission to forbid two of its competitors from operating in the District of Columbia. Based on the allegedly illegal market presence of its competitors, the plaintiff sued for attempt to monopolize. The plaintiff tried to bolster its illegal market presence theory by spinning a tale about how the defendants, competing with the plaintiff today on a low cost basis, might some day in the distant future drive it out of business

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172 82 F.3d 484 (D.C. Cir. 1996).
and then raise prices. The court correctly saw that *Brunswick* forbids plaintiffs from asserting injury based on illegal market presence. As to the claimed fear of future predation, the plaintiff simply had no basis for the allegation.

The ease with which the D.C. Circuit disposed of the plaintiff’s claim in *Dial A Car* exemplifies how the courts have taken on-board *Brunswick*’s message. Similarly, in *Campus Center Discount Den, Inc. v. Miami University* the Sixth Circuit readily grasped that there was no antitrust injury when a university decided to go into the retail business in competition with the plaintiff and, in consequence, the plaintiff lost some business.

2. “Too Much” Non-Predatory Competition

*Cargill* and *ARCO* expanded on *Brunswick* by establishing that antitrust claims based on a defendant’s being “too efficient” or “too large” or “too aggressive” do not give rise to antitrust injury (except in the case of illegal predation or exclusion, as discussed below). By and large, the courts have understood the message. See, for example, *N.W.S. Michigan, Inc. v. General Wine & Liquor Co.* (competitor suffered no antitrust injury due to the defendant’s ability to engage in low but non-predatory pricing as the result of a quirk in state liquor regulation); *Pool Water Products v. Olin Corp.* (competitor lacked standing to assert injury from low but above-cost pricing made possible by allegedly illegal acquisition); *Anti-Monopoly, Inc. v. Hasbro, Inc.* (affirming dismissal on antitrust injury and other grounds of a vague complaint boiling down to the allegation that plaintiff’s competitor engaged in aggressive competition); *Stamatakis Indus., Inc. v. King* (“conspiracy” with potential customers to take their business away from their old supplier does not produce antitrust injury); and *Abcor Corp. v. AM International, Inc.* (vigorous competition on the merits does not cause antitrust injury).

3. Injury from Unlawful Predatory or Exclusionary Activities

*Brunswick, McCready, Cargill,* and *ARCO* all indicated in dictum that the injury suffered by a competitor from unlawful predatory or exclusionary

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173 114 F.3d. 1186 (6th Cir. 1997) (unpublished; text at 1997-1 Trade Cas. (CCH) ¶ 71,826).
174 2003-1 Trade Cas. (CCH) ¶ 73,956 (6th Cir. 2003) (not for publication).
175 258 F.3d 1024 (9th Cir. 2001).
176 130 F.3d 1101 (2d Cir. 1997) (per curiam).
177 965 F.2d 469 (7th Cir. 1992).
178 916 F.2d 924 (4th Cir. 1990).
179 Part V.B., *infra,* discusses the post-*Cargill* disharmony among the circuits as to exactly what a third-party competitor must show to establish standing to challenge a merger.
activity is antitrust injury (provided that all the elements of an attempt to monopolize or other pertinent claim are established), even though the monopolistic scheme has not yet ripened to the point where consumers have suffered injury. In Part III.D.1., supra, we saw how some courts, searching for a quick fix to a plethora of thinly pleaded hospital staff privilege cases, have improperly invoked the term “antitrust injury.” Outside that factual context, however, the courts have, by and large, understood that an unlawfully excluded competitor does suffer antitrust injury.

For example, in Multiflex, Inc. v. Samuel Moore & Co.\textsuperscript{180} the plaintiff was the victim of alleged trade defamation and other unsavory practices employed by the defendant, its competitor, in an unsuccessful attempt to maintain the defendant’s monopoly. In such a circumstance, the Fifth Circuit correctly declared, the test of antitrust injury “is whether the ‘dangerous probability of success,’ [of monopolization] \textit{if it had materialized}, would have caused the type of market damage the antitrust laws seek to prevent.”\textsuperscript{181} If so, the plaintiff may seek damages for the wounds it suffered, even though the attempt to monopolize did not succeed, and even if the plaintiff, despite the unlawful practices, managed to survive and prosper.

Now and again, however, an overly creative court misses the boat. A serious analytical error permeated the court’s ruling in Indeck Energy Services, Inc. v. Consumers Energy Co.,\textsuperscript{182} where the plaintiffs, co-generation systems operators, sued the local public utility and its affiliate, alleging that a variety of allegedly wrongful business practices contributed to the utility’s monopoly. The court ruled,

> In this case, an examination of the antitrust standing factors leads to the inescapable conclusion that the district court appropriately dismissed Indeck’s cause of action against the defendants. Significantly, the only harm allegedly suffered by Indeck was in the company’s capacity as a competitor in the marketplace, not as a defender of marketplace competition. \textit{Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative.} The record in this appeal presents no indication that \textit{competition} itself was harmed by any act of the defendants. Consequently, the antitrust damages alleged by Indeck

\textsuperscript{180} 709 F.2d 980 (5th Cir. 1983). For another example, see Conwood Co. v. United States Tobacco Co., discussed supra Part III.D.5.

\textsuperscript{181} 709 F.2d at 994.

\textsuperscript{182} 250 F.3d 972 (6th Cir. 2000) (unpublished; text at 2001-1 Trade Cas. (CCH) ¶ 73,274).
are too indirect and speculative to justify assertion of federal antitrust jurisdiction over this matter. 183

Contrary to the proposition stated in the italicized sentence, a competitor excluded through unlawful monopolistic practices is not required to show that its product was better or cost less than that of the monopolist. The court, which offered no citation, made up the requirement out of whole cloth. 184 If in fact the plaintiff was excluded from the market, or faced a threat of exclusion, then the case properly turned on whether the defendant monopolist’s practices were lawful and justified or were instead predatory or exclusionary, and thus threatened injury to consumers. Thus, the real issue in the case had nothing to do with standing. 185

Another troublesome case was the Eleventh Circuit’s decision in Todorov v. DCH Healthcare Authority. 186 The plaintiff was a highly successful neurologist. To diagnose his patients properly, Dr. Todorov frequently had CT scans performed at a large local hospital, DCH, whose own procedures (consistent with various state, federal, and other regulatory requirements) called for each CT scan to be given an official interpretation by a radiologist. Dr. Todorov generally made his own independent assessment of the CT scan results, in effect duplicating the services of the official radiologists, but received payment only for the neurology work he did. Wanting to increase his income, the plaintiff applied for recognition as an official radiologist at DCH, which would have let him bypass the current providers of that service and receive insurance reimbursement both for reading the CT scans and for neurological treatment. DCH denied the application. 187

The Eleventh Circuit found, not surprisingly, that all of this did not add up to an antitrust case. The court, however, did not rely solely on

183 2001-1 Trade Cas. at 90,408 (first emphasis added; second in original).
184 In the Sixth’s Circuit’s later opinion in Conwood, supra, the court alluded to no requirement that the plaintiff’s snuff had to taste better, or cost less, than the defendant monopolist’s snuff.
185 In Midwest Gas Services, Inc. v. Indiana Gas Co., 317 F.3d 703 (7th Cir. 2003), the Seventh Circuit considered a claim that the district court had dismissed for want of standing based on the Indeck rationale criticized in the text. The Seventh Circuit was polite to the Sixth, but reversed in part, correctly holding that one who alleges its anticompetitive exclusion from a market has standing. The court also held, unexceptionably, that there is no standing to challenge a business combination that does not injure competition and no standing to challenge low but non-predatory pricing.
186 921 F.2d 1438 (11th Cir. 1991).
187 At some point in the process doubt was expressed over the plaintiff’s competence to read a CT scan. But the real reason for the denial appears to have been concern that expanding the category of official radiologists to include physicians practicing in other specialties would endanger efficiency and put the hospital at risk of noncompliance with various regulatory provisions.
the merits, but made an alternative ruling based on lack of standing, erroneously conceiving that answering the question of antitrust injury required “an economic analysis of the market for administering CT scans of the head at DCH.”188 This analysis revealed, at least to the satisfaction of the court, the following conclusions:

First, if Dr. Todorov were granted privileges, he would reap the radiologists’ supercompetitive [sic] price and thus some profit in the short run. Second, if competition ensued, consumers—the patients who purchase the CT scans of the head—would benefit because of the lower prices brought about by the competition. Finally, Dr. Todorov eventually would either be driven from the market or reach some agreement with the radiologists to fix prices. By conspiring in this way, Dr. Todorov would reduce the chance that he would be driven from the market by competition and he could share the supercompetitive revenue or some portion of it, with the radiologists; this, of course, would not benefit consumers.189

Thus, without a scintilla of evidence, the court concluded

• that despite all the pressures from many sources to contain health care costs, the DCH radiologists were in fact charging supracompetitive prices,

• that the fee insurance companies would be willing to pay for CT scan reading bore a relation to the number of physicians authorized to perform that service officially at DCH,

• that Dr. Todorov’s entry into the market might drive down prices in the short run,

• that Dr. Todorov could not last in the market on a long-run basis without entering into a criminal conspiracy,

• that he would in fact enter into such a conspiracy, and

• that consumers would therefore not benefit in the final analysis by Dr. Todorov’s market entry.

Based on this economic shaggy dog story, the court concluded, “Dr. Todorov’s alleged damages equal the profits he would have garnered had he been able to share a part of the radiologists’ supercompetitive [sic], or monopoly, profits. This is not antitrust injury.”190

188 Id. at 1452.
189 Id. at 1453 (footnote omitted).
190 Id. at 1453–54. An omitted footnote extended the “economic analysis” by ruminating as to whether Dr. Todorov might have been a more efficient provider than the incumbent competitors, whether a viable antitrust claim could have been limited to lost competitive profits rather than lost supracompetitive profits, and whether, if such a claim had been made, it would have been unduly speculative.
The *Todorov* court’s approach to antitrust injury was wrong. First, economic analyses are often relevant to antitrust liability, to causation, and to determining the amount of damages. But if there *is* liability, if there *is* causation, and there *are* measurable damages, then economic analysis ends and a legal, not an economic, inquiry begins: to wit, does the statute or rule invoked by the plaintiff have among its purposes preventing the effect the plaintiff claims as damages?

Second, excluded competitor and predatory practices cases almost always arise in markets that are not functioning competitively. Indeed, the reason the plaintiff is trying so hard to get in, or to stay in, is to earn higher than competitive profits, often by pricing just under the monopolist’s price umbrella. *Pace* Judge Tjoftl in *Todorov*, competition is promoted when as many competitors as possible are allowed to compete for those “supracompetitive profits.”191 *Todorov* reinterpreted the doctrine of antitrust injury in a way that would erase the law of predation from antitrust jurisprudence—a result the Supreme Court has consistently resisted, even as it has pruned and limited the concept of predation so as to preserve aggressive competition that benefits consumers.192

4. Injury to Non-Price Competition

In Part II’s discussion of *McCready* we saw that antitrust injury may arise from economic prejudice resulting from loss of consumer choice, not just price competition. Courts continue to stumble now and then over antitrust’s role in protecting non-price competition. For example, in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*,193 the Third Circuit panel expressed concern that concerted suppression of an innovative product might not be an antitrust violation at all.

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191 Jacobson and Greer have a different view. They approve of *Todorov* but would allow suits where the excluded competitor shows not only illegal exclusion but also an intent to behave competitively. Jacobson & Greer, *supra* note 11, at 287, 293–94. Of course, if the plaintiff claims damages for lost opportunity to engage in criminal price fixing, a court would have no trouble in rejecting the claim. But, to the extent that one thinks a competitor excluded by unlawful means must show, in addition, that it would not have priced under a monopolist’s price umbrella, and would not have consciously paralleled its competitors’ pricing in an oligopoly, such an additional requirement for standing seem unrealistic, unwise, and inconsistent with the Supreme Court authorities.

192 In a later Eleventh Circuit ruling on a hospital staffing dispute dressed in antitrust garb, *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1545 n.10 (11th Cir. 1996), the court wisely ruled, “Because we believe Dr. Levine has failed to prove any anticompetitive results resulting from the defendants’ behavior . . . we . . . decide this case on the merits rather than on standing.” The court quoted a passage from *Areeda & Hovenkamp, supra* note 6, at 360f, decrying the tendency of courts to speak of standing when absence of any threat to competition defeats the claim on the merits.

193 171 F.3d 912, 925 & n.7 (3d Cir. 1999).
By and large, however, the courts have received the message about the need to protect competition on factors other than price. The dispute in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, for example, arose out of a hospital’s investment in a durable medical equipment (DME) business and its related efforts to “channel” discharged patients toward the favored DME supplier, to the detriment of the plaintiff, a competitor of the hospital’s DME partner. The court of appeals determined that the plaintiff’s allegation of market exclusion was actionable under Sections 1 and 2 of the Sherman Act. “The district court’s failure to recognize antitrust injury in this case,” said the Eleventh Circuit, “stems from its failure to recognize the defendant’s anticompetitive acts as such.” The court saw that the prejudice to the competitor’s interest was linked to an overall injury to competition that disadvantaged consumers. It accepted that pure deprivation of consumer choice, unaccompanied by any monetary injury to consumers, past or threatened, would serve to establish an antitrust violation.

To like effect, see the Second Circuit’s decision in *Trinko v. Bell Atlantic Corp.* There, a class of users of local telephone services provided by AT&T complained that alleged illegal monopolistic practices by the incumbent local telephone company made AT&T unable to provide top-quality services, to the detriment of its customers. The court accepted the plaintiff’s argument that standing should be found under *McCready*.

5. Injury from Mere Commercial Disruption

No antitrust statute or rule creates a vested right to go on doing business, in perpetuity, in a way that is familiar, comfortable, or profitable. Nothing in the antitrust laws protects against one’s competitor (or customer or supplier) adopting innovative ways of doing business, nor does antitrust afford any remedy for mere commercial disruption. As *Brunswick* made clear, “fortuitous” losses that “are of no concern to the antitrust laws” are not actionable.
Typical examples of incidental injury include *Serpa Corp. v. McWane, Inc.* 199 (distributor that lost its business relationship as the result of an allegedly illegal merger did not suffer antitrust injury); *G.K.A. Beverage Corp. v. Honickman* 200 (distributors that lost their business relationships with a firm as a result of an allegedly unlawful acquisition could not claim antitrust injury); and *Fischer v. NWA, Inc.* 201 (lack of antitrust injury barred challenge to merger of two large airlines, where damages arose from the plaintiff’s incidental commercial injury—its termination as a provider of regional connecting flight service for the defendant—because its services were no longer needed after the merger).

The idea of incidental injury is not difficult to grasp, yet on rare occasions a court will make a bad call. The plaintiffs in *Adams v. Pan American World Airways, Inc.* 202 were former employees of Laker Airways, who alleged that competitor airlines conspired to drive Laker out of business. The D.C. Circuit rightly saw that the first issue was antitrust injury, but waffled, ruminating about whether more competition or less competition in output markets was better for “suppliers such as plaintiffs.” It ultimately concluded that the plaintiffs had met the antitrust injury test of *Brunswick.*203 The court, however, went on to balance the AGC factors and determined that the plaintiffs lacked standing.

The court’s dictum finding antitrust injury was not well considered. Group boycotts and similar practices are not unlawful because of their incidental effects on suppliers, including suppliers of labor. Because their injury was merely incidental and had nothing to do with the legality of the practices in question, the plaintiffs’ claims fell squarely within *Brunswick*’s high dictum about commercial disruption that might be incidental to an antitrust violation, and should have been rejected for want of antitrust injury.

*Sullivan v. Tagliabue* 204 also illustrates the concept of incidental injury—and the interplay between the concept of incidental injury and the issue of proximate cause under *Associated General Contractors*. As in *Adams, supra*, a misunderstanding about antitrust injury, which could have led

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199 199 F.3d 6 (1st Cir. 1999).
200 55 F.3d 762 (2d Cir. 1995).
201 883 F.2d 594 (8th Cir. 1989).
203 *Id.* at 27.
204 25 F.3d 43 (1st Cir. 1994).
to a victory for the wrong party, was saved by an examination of the AGC factors.

The plaintiff, Charles Sullivan, was the son of William Sullivan, former owner of the Boston Patriots, a National Football League team. The plaintiff was the former owner of the Stadium Management Corporation, which owned the stadium where the Patriots played. Charles Sullivan claimed that his father’s effort to sell a 49 percent interest in the Patriots to an investment banking firm, which would in turn have sold the interest to the public, was blocked by an NFL rule requiring other owners to approve a sale to a company not involved in the business of professional football. This rule, the plaintiff asserted, violated the Sherman Act’s rule of reason. But for the NFL’s invocation of the purportedly illegal rule, the plaintiff said, the investment banking firm would have used part of the proceeds of the sale to the public to fund a loan to improve the stadium and pay off its debts, and the Patriots would have agreed to extend their lease on the stadium for another twenty years. Instead, as the indirect result of the allegedly illegal NFL rule, the proposed transactions never took place and the stadium had to be sold at a disappointing price.

The court correctly sided with other authorities holding that consumer or competitor status is not a prerequisite to standing in all cases, and it was right in rebuffing the plaintiff’s efforts to wrap himself in McCready. (Hurting the plaintiff’s stadium was in no way essential to any alleged anticompetitive goals embraced by the NFL owners.) With McCready out of the way, the court was prepared to view the plaintiff’s injury as merely incidental to a possible antitrust violation, thus not antitrust injury. It should have stopped right there, and dismissed the case. Instead, the court expressed unjustified doubt as to whether “antitrust injury” was essential to every private antitrust case, or only one AGC factor to be considered together with others. Because of that doubt, it went on to consider those other factors, relying in essence on the indirect and remote nature of plaintiff’s injury, speculative damages, and the fact that the purposes of the antitrust laws had been served by an antitrust verdict obtained by the plaintiff’s father, a much more directly injured party. In short, the court reached the right result on standing, but by an unnecessarily tortuous route.

205 Id. at 49. See discussion infra Part IV.C.
206 Id. at 48–50.
207 Id. at 47 n.9. In fact, however, Cargill had resolved any lingering doubt on that score. 479 U.S. at 109 n.5.
6. Summary

In sum, despite the occasional glitch, the appellate courts have generally followed the limited number of generalizations about antitrust injury that one may glean from the Supreme Court cases: no antitrust injury from illegal market presence, no antitrust injury from aggressive but lawful competition, and no antitrust injury from commercial disruption unrelated to the purposes of the antitrust laws; but antitrust injury may flow from reduction of non-price competition as well as price competition, and a party threatened with market exclusion by truly unlawful monopolistic activity may suffer antitrust injury even where the related consumer injury has not yet accrued.

B. The Seventh Circuit’s Take on Antitrust Injury

The Seventh Circuit has made some attempt (and then partly backed away from the attempt) to employ generalizations about antitrust injury in order to conform case law principles to the understanding of the Chicago School of economic analysis. Although these generalizations go beyond what may be fairly read from Supreme Court holdings, some would contend that these propositions merely develop the law in a logical way.

In a 1984 decision, Jack Walters & Sons Corp. v. Morton Building, Inc.,\textsuperscript{208} the Seventh Circuit, per Judge Posner, held that a dealer that was unlawfully pressured to put a cap on its resale price suffered no antitrust injury:

\begin{quote}
In the present case, even if Morton did violate the prohibition against fixing its dealers’ prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. . . . Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation.
\end{quote}

The case was decided before ARCO,\textsuperscript{209} but anticipated its reasoning, though in a different factual scenario. In ARCO the plaintiff was a third-

\textsuperscript{208} 737 F.2d 698, 709 (7th Cir. 1984). In Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989), the Seventh Circuit followed Jack Walters and anticipated ARCO’s result in a third-party competitor context, holding that injury due to non-predatory pricing cannot be antitrust injury; indeed, the court specifically took issue with the Ninth Circuit decision in ARCO that the Supreme Court reversed in ARCO. See generally Donald J. Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Clev. St. L. Rev. 179 (1989) (comparing the approaches of the Seventh and Ninth Circuits).

\textsuperscript{209} See supra Part II.E.
party competitor, whereas in Jack Walters the plaintiff was a distributor directly “victimized” by illegal pressure to cap its resale price. Conscientious application of ARCO’s reasoning, however, would seem to imply that that is a distinction without a difference: in both cases the plaintiff is operating at the retail level; in both cases the plaintiff wants to sell on the high side; in both cases that desire to charge high prices is frustrated by an illegal agreement other dealers have made with their supplier to cap the resale price at a non-predatory level; and in both cases the plaintiff’s theory of damages assumes a lawful but-for world in which there would have been less price competition than in the real world. Such a theory of damages flies in the face of antitrust policy, which favors low prices, not high prices, as long as the low prices are non-predatory.

Two years later, in Local Beauty Supply, Inc. v. Lamaur Inc.,210 the Seventh Circuit addressed a variation on the theme of the impact of the doctrine of antitrust injury on the claims of dealers prejudiced by presumptively unlawful vertical restraints. Here, the plaintiff was a distributor that had been terminated for violating its supplier’s allegedly unlawful distribution restraints. And, unlike the situation in Jack Walters, the nature of the alleged unlawful restraint was minimum resale price maintenance, the “bad cholesterol” of RPM.

The court analyzed the facts this way:

The damages claimed by Local do not present the type of injury that the antitrust laws were intended to remedy. In its complaint, Local attempts to recover lost profits from sales of Lamaur products. Local claims that its termination was a result of Lamaur’s desire to maintain prices and pacify local distributors because Local was undercutting the fixed prices. Local was admittedly sub-jobbing. Sub-jobbing is selling at low prices to discounters who then resell to the consumers. In this way Local could avoid additional costs of advertising and promotion and “free ride” off of the other full-service distributors’ efforts. Thus Local’s market (discounters) and profits were a direct result of the maintained prices. Local was profiting from the antitrust violation itself. . . . Because Local’s interests are disserved by enhanced competition (it loses its discounting market), its injury is not the type the antitrust laws were intended to prevent.211

In short, “Because the only asserted injury in this case is damages from the inability to continue profiting from the anticompetitive acts that

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210 787 F.2d 1197 (7th Cir. 1986). The opinion was by Judge Cummings; Judge Easterbrook joined in the opinion.
211 Id. at 1202–03 (footnote omitted).
comprise the antitrust violation, we hold that they are not recoverable under § 4 of the antitrust laws.”

In the abstract, and devoid of context, the proposition that one may not base a claim for damages on the assumption that others will continue to violate the law seems reasonable. One must take note, however, of the subtlety of what the Seventh Circuit was up to. Despite its use of terms like “violation” and “anticompetitive,” the court’s sympathies lay with the defendants, whose behavior—involving a high level of advertising and promotion, high prices, and steps to prevent free riding—plainly seemed procompetitive to the court, despite the defendants’ alleged violation of what the court deemed to be an ill-considered per se rule against resale price maintenance. The court’s lips said “no, no” to defendants’ conduct, but its eyes said “yes, yes.” It disingenuously termed the defendants’ conduct “anticompetitive” when what it really mean was that, as in Jack Walters, the defendants’ conduct was proconsumer and therefore did not give rise to antitrust injury.

The court gave the game away when it denied the plaintiff’s request for injunctive relief. Observe that the plaintiff did not ask for an order directing the supplier to continue to provide goods, so that the plaintiff could continue to free ride on other dealers’ high prices. Instead, the plaintiff asked for the court to do away with the whole illegal distribution structure. The court’s rejection of this prayer on the ground that there was no threat of antitrust injury cannot be explained on any ground other than an attempt to use the concept of antitrust injury to gut the rule against minimum resale price maintenance.

In Isaksen v. Vermont Castings, Inc. the Seventh Circuit followed Lamaur. In the earlier case the plaintiff had balked at raising its prices,

212 Id. at 1201. Without citing Lamaur or referring to its policy rationale, in Pace Electronics, Inc. v. Canon Computer Systems, Inc., 213 F.3d 118 (3d Cir. 2000), the Third Circuit reached the opposite result, holding that a dealer terminated for refusing to abide by a per se illegal minimum resale price maintenance agreement suffers antitrust injury.

213 For an interesting discussion of the doctrine of antitrust injury in relation to measure of damages, raising issues going beyond the scope of this article, see Maxwell M. Blecher & James Robert Noblin, The Confluence of Muddy Waters: Antitrust Consequential Damages and the Interplay of Proximate Cause, Antitrust Injury, Standing and Disaggregation, 13 St. John’s J. LEGAL COMMENT. 145 (1998).

214 Judge Posner pretty well said as much in Isaksen, infra. Compare the Supreme Court’s later decision in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), limiting the circumstances in which terminating a dealer for refusing to maintain prices is unlawful but preserving the per se rule in such limited circumstances. It is hard to reconcile that preserved per se rule with the Seventh Circuit’s earlier decision in Lamaur.

215 787 F.2d at 1204.

216 825 F.2d 1158 (7th Cir. 1987).
as the supplier demanded, and had been terminated. In the latter, the story the jury bought was that the dealer reluctantly agreed to abide by an illegal minimum price-fixing agreement, and sought damages for the profits it would have made if it had not been coerced into the illegal agreement but had nonetheless still gone on discounting.

Judge Posner recognized—while deploring—the per se rule against vertical price fixing, expatiated on the legitimacy of the defendant’s business policies and on the absence of any real injury to competition, and observed,

A further wrinkle is that if Isaksen’s profits before he knuckled under to Vermont Castings’ pressure were due in part to his taking a free ride on other dealers, who provided valuable point-of-sale services that he did not provide, he could not use those profits as his benchmark in calculating the loss of profits that was caused by his raising his prices later under pressure from Vermont Castings. The prevention of free riding is not, as yet anyway, a defense to a charge of resale price maintenance; but neither is being prevented from taking a free ride on another dealer’s efforts a form of antitrust injury compensable by a damage award. See Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1202 (7th Cir. 1986); cf. Jack Walters & Sons Corp. v. Morton Building, Inc., supra, 737 F.2d at 709.

The jury pulled the figure of $100,000 out of a hat in which Isaksen’s expert witness had done the usual magic tricks; but as there was no evidence of how much the antitrust violation, as distinct from unrelated market forces, contributed to Isaksen’s losses, or of how much of the loss was an antitrust injury as distinct from a purely private loss from being deprived of the opportunity to take a free ride on competing dealers, the expert’s efforts to translate his losses into a present-value figure were irrelevant. We do not allow antitrust plaintiffs or any other plaintiffs to obtain damage awards without proving what compensable damages were actually suffered as a result of the defendant’s unlawful conduct. . . .

So the damage phase of the trial must be retried.217

Lamaur and Isaksen rest on alternative propositions about antitrust injury: (1) the inability to profit from an antitrust violation is not antitrust injury, and (2) lost profits derived from free riding on others’ promotional efforts is not antitrust injury. Neither proposition rests, or indeed purports to rest, on anything said in the five Supreme Court cases on antitrust injury. Both propositions are debatable, particularly if intended as universal propositions, admitting of no exceptions. Pygmies in a market often take advantage of the price umbrella held over their heads by the giant in the industry. Insofar as the industry giant might have done something illegally anticompetitive to create or

217 Id. at 1165.
maintain its power, the price umbrella is, to that extent, an illegal monopoly price. If the giant then tires of the pygmy’s competition and engages in successful exclusionary activity, is it a defense to the pygmy’s suit for lost going-concern value that “you are only trying to claim profits you failed to earn because of another’s antitrust violation”? Such a result would fly in the face of the Supreme Court’s admonition that antitrust injury does flow from anticompetitive exclusion from a market, a proposition that the lower courts routinely apply. It cannot be the law that if a monopolist illegally obtains monopoly power, it is immunized from any and all claims of predatory activity directed against weaker competitors by the argument, “You are just trying to gain a part of my illegal monopoly, so you lack antitrust injury.”

A weaker, and more defensible, version of the Seventh Circuit’s antitrust injury rule would be that the doctrine of antitrust injury forbids an antitrust plaintiff to use a measure of damages in which the but-for world involves continued antitrust violations and such continued antitrust violations are essential to the plaintiff’s damages.

Consider Isaksen. Judge Posner directed that the damages case be retried, but on what assumptions? Presumably, on the assumption that all dealers would set their resale prices wherever they wished, not on the assumption that everyone except the plaintiff would continue to charge resale prices artificially inflated by an illegal agreement, thus holding a price umbrella over the plaintiff’s head. On the face of things, that seems like a just approach. Even so, is the proposition italicized above one that is good for all times and all cases? 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.

Much more problematic is the purported rule that loss of profits derived from free riding on others’ promotional efforts is not antitrust injury. The Supreme Court, after all, still adheres to the per se rule against minimum vertical price fixing, a position totally at odds with Judge Posner’s embrace of that practice in Isaksen.

Consider this hypothetical variation on the facts in Isaksen. The supplier lawfully engages in persuasion, urging dealers to charge suggested resale prices and to use the margin they earn to promote the product and provide services to consumers. Everyone but Isaksen makes a lawful, unilateral business decision to accept the supplier’s advice. Isaksen dis-

\footnote{218 See Part IV.D.3., supra. In Todorov, supra, 921 F.2d at 1453–54, the Eleventh Circuit went even further and held that the inability to share in monopoly or supracompetitive profits—presumably, even lawful monopoly or supracompetitive profits—is not antitrust injury.}
counts, thereby free riding on others’ efforts. The supplier threatens to cut Isaksen off but relents when Isaksen enters into an unlawful formal agreement to maintain resale prices. Isaksen later repents of its illegal agreement and sues, seeking (1) damages for the lost profits it would have made while discounting, (2) a declaratory judgment providing that it need not abide by its agreement, and (3) injunctive relief permitting the supplier to go on lawfully recommending business strategy to its dealers but forbidding it to coerce resale price maintenance in an illegal way.

The damages claim in the hypothetical is not subject, as in Jack Walters, to the objection that it depends on a world in which others are acting illegally. But it does violate the purported rule against claims predicated on loss of ability to free ride. To apply that purported rule is essentially to deny the continued viability of the per se rule against minimum vertical price-fixing agreements. Similarly, to deny the requested injunction would seem inconsistent with the state of the substantive law.  

Two later cases show the Seventh Circuit doing some rethinking of its use of antitrust injury. In Chicago Professional Sports Limited Partnership v. National Basketball Ass’n Judge Easterbrook took a surprisingly tentative approach to the question of antitrust injury. Affirming a permanent injunction sought and won by the Chicago Bulls and by a TV “superstation” complaining of an NBA rule that limited sales of TV rights to superstations, the court mused on whether the ball club and the TV station have a real interest in promoting competition, but speculated that the TV station might indeed be “a good proxy for the ultimate consumers.” Judge Easterbrook cited Isaksen and Lamaur for the proposition that antitrust injury “requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.”

219 With regard to the request for a declaratory judgment in the hypothetical, note that United Food & Commercial Workers Local Union v. Food Employers Council, Inc., 827 F.2d 519 (9th Cir. 1987), held that a party to an agreement it claims to be illegal may seek a declaratory judgment of illegality even though it might lack standing to seek damages for the antitrust violation. That is the correct result: neither the doctrine of antitrust injury nor any other legal principle should bar a party from seeking a declaratory judgment as to the legality of an agreement into which it has entered.  

220 961 F.2d 667 (7th Cir. 1992).  

221 Id. at 670.  

222 Id. The definition was imprecise. Read literally—as Judge Easterbrook surely would not mean it to be read—it would allow the plaintiffs to claim damages from merely incidental injury. Another ambiguity in the generalization is whether the reduction in output or increase in price must already have occurred, or merely be threatened. If the former, the rule would forbid actions by parties threatened with predation, contrary to Supreme Court dictum.
In *Khan v. State Oil Co.*, without giving an inch on policy grounds, the Seventh Circuit backed away from its tendency to employ antitrust injury in order to gut antitrust doctrines still embraced by the Supreme Court. Judge Posner reflected on how the Supreme Court might still entertain the mistaken (in his view) belief that distributor autonomy is an antitrust desideratum, and thus might believe that a distributor with actual injury from an unlawful agreement to cap the resale price ipso facto suffers antitrust injury. While he urged the Supreme Court—successfully, as it turned out—to overturn the substantive rule declaring maximum RPM a per se violation, he declined either to anticipate the change in the substantive law or to use antitrust injury doctrine as an indirect means to accomplish the same goal. By continuing to adhere to the per se rule against resale price maintenance, the court mused, the Supreme Court

must think that preventing intrabrand price competition harms an interest protected by the antitrust laws even if the restriction increases competition viewed as a process for maximizing consumer welfare and even if a restriction that had similar effects but was not an explicit regulation of price would be lawful. If this is what the Court believes—and it does appear to be the Court’s current position, though not one that is easy to defend in terms of economic theory or antitrust policy—the Court may also think that interfering with the freedom of a dealer to raise prices may cause antitrust injury.

Judge Posner’s reasoning was sound. Significantly, while the Supreme Court in *Khan* warmly accepted Judge Posner’s invitation to revisit the per se rule on maximum resale price maintenance, it simply overruled the old rule of liability, rather than employing the antitrust injury concept to achieve a similar result in a roundabout way. In *Khan*, the Seventh Circuit’s effort to use the concept of antitrust injury as a vehicle to rewrite the substantive law had come to a dead end.

C. The “Rule” Limiting Antitrust Injury to Customers or Competitors

In *Associated General Contractors* the Court expressed doubt as to whether the plaintiff union had suffered antitrust injury:

[i]n this case . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union’s interests would be served or disserved by enhanced competition in the market. As a general matter, a union’s primary goal is to enhance

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224 93 F.3d at 1364.
the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.225

Thus, “In this case, particularly in light of the longstanding collective bargaining relationship between the parties, the Union’s labor-market interests seem to predominate [over any interest in promoting competition], and the Brunswick [antitrust injury] test is not satisfied.”226

The Court’s point was not that competitors and customers are the only kinds of plaintiffs whose interests can be aligned with competition. Its point was that the interests of labor unions, unlike the interests of customers and competitors, are not typically promoted by a competitive marketplace. Thus, as the AGC Court saw it, the plaintiff was situated more like the plaintiffs in Brunswick, whose interests were out of sync with the antitrust laws, than like the plaintiff in McCready, whose goal was to promote consumer choice, an antitrust value. To discover in AGC a flat rule limiting antitrust injury only to customers or competitors, one has to disregard the context—and misread the quote.

Regrettably, some courts, especially in the Third and Ninth Circuits, have been misled in this regard. A seminal source of error was Bhan v. NME Hospitals, Inc.,227 in which the court addressed a patently meritless claim that a single hospital had violated the antitrust laws by refusing to permit nurse anesthetists to perform anesthesia services. Rather than addressing the lack of substance in the case, the court focused myopically on the supposed rule of AGC “that the injured party be a participant in the same market as the alleged malefactors,”228 engaged in an extended but bootless discussion as to whether anesthesiologists and nurse anesthetists are in the same relevant market, and concluded that they are; hence, the plaintiff had standing.229 The court’s wholly mistaken approach thus

225 459 U.S. at 539. This discussion in AGC came immediately after references to Brunswick and McCready, so one might reasonably suppose the Court thought its allusion to the plaintiff’s non-customer and non-competitor status was an issue of antitrust injury. On the other hand, some who embrace the erroneous limitation of standing strictly to customers and competitors may think of that rule as deriving from AGC’s concern over permitting claims by indirectly injured parties (i.e., the question of proximate cause). This article’s scope is limited to antitrust injury, and does not undertake to analyze antitrust issues relating to proximate cause; however, because of the ambiguity as to whether concern over non-customers and non-competitors derives from antitrust injury or from proximate cause considerations, the subject is covered here.

226 Id. at 540.

227 772 F.2d 1467 (9th Cir. 1985).

228 Id. at 1470 (citing AGC, 459 U.S. at 539).

229 The case may usefully be contrasted with Exhibitors’ Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986). There, where competing theater chains entered into
resuscitated a case that should have been put out of its misery for lack of substantive merit.

Three years later, in an en banc decision, *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*,\(^{230}\) the Ninth Circuit relied on *Bhan* to find that, along with other AGC factors, it counted heavily against the plaintiff’s standing that it was not a participant in the relevant market, despite its stated intentions to enter that market.

In *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*,\(^{231}\) the Ninth Circuit reached the right result for the wrong reason. The plaintiffs, who believed that the defendants’ yellow pages advertising structure was “byzantine” and highly confusing to advertisers, offered to advertisers the combined service of consulting on yellow pages advertising design and placement of advertising with the publishers. At length, reversing a policy of many years’ standing, the defendants decided to refuse to accept advertising from the plaintiffs, evidently without offering any plausible legitimate reason for the refusal to deal—a decision that was highly prejudicial to the plaintiffs’ businesses. The district court thought that the plaintiffs lacked standing. The appellate court properly reversed, but was wrong to agonize over AGC factors, and especially wrong in straining to find that the plaintiffs were “competitors” of the defendants, and thus could fit into the bogus “customer or competitor” rule of standing. *If* the defendants’ refusal to deal with the plaintiffs was in fact a violation—the real issue in the case—then of course the targets of the refusal would have standing to challenge the violation. Conversely, *if* the refusal to deal were not a violation—if the defendants had a right under the antitrust laws to integrate forward vertically and to perform for advertising customers the functions that the plaintiffs had heretofore been performing—then the question of standing would be moot, for there would be no claim on the merits.\(^{232}\)

an allegedly illegal “split” agreement, thereby reducing competition in renting films to the detriment of film distributors, the incidental disruption caused by the fact that one of the theater chains no longer needed its purchasing agent was properly held not to be antitrust injury. The court referred to *Bhan*, but did not pretend that *Bhan*’s pseudo “rule”—which was clearly applicable—served to decide the case. Instead, the court considered other factors suggested by AGC and similar authorities, including the fact that the distributors, as the victimized parties, were the proper plaintiffs to challenge the defendants’ activities.

\(^{230}\) 890 F.2d 139 (9th Cir. 1989) (en banc).

\(^{231}\) 951 F.2d 1158 (9th Cir. 1991).

\(^{232}\) *Yellow Pages Cost Consultants* may be compared to *Go-Video, Inc. v. Matsushita Holding Corp.*, 15 F.3d 1085 (9th Cir. 1994) (unpublished; opinion at 1994 WL 5492), which likewise reached the right result for the wrong reason, though this time the plaintiff was found to lack standing. The plaintiff, which made dual VCRs, challenged a Japanese electronics company’s acquisition of a movie studio on a variety of grounds, some quite surprising, such as the alleged likelihood that the deal would result in fewer movies critical of Japan.
In a relatively recent case, *American Ad Management, Inc. v. General Telephone Co. of California*, the Ninth Circuit finally backed away from the competitor or customer “rule” that had marred earlier opinions. The plaintiffs, in business as authorized selling agents for yellow pages advertisers—an earlier opinion had found them to be agents rather than competitors of yellow pages publishers—challenged an alleged agreement engineered by the yellow pages publishers’ trade association to limit certain discounting practices by the plaintiffs. The court declared that “Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained,” but went on to explain that persons other than customers and competitors—including indirect purchasers, potential entrants, supplier, licensors, landlords, and dealers—may be “market participants,” and denied that, in the Ninth Circuit, standing is limited strictly to customers and competitors, a rule that would, as it recognized, contravene Supreme Court precedent. The court then examined other AGC factors, and found standing.

As the Ninth Circuit was struggling to rid itself of Bhan’s blighted legacy, the Third Circuit was signing on to the customer-or-competitor error. In *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, the plaintiff, a company engaged in pharmaceutical marketing, secured a contract from the defendant, a well-known pharmaceutical manufacturer, to promote one of the manufacturer’s products to nursing homes, in exchange for a commission on sales. This marketing arrangement aroused the ire of another category of intermediaries, “consulting pharmacists,” who sold the remainder of the manufacturer’s line to nursing homes. The manufacturer gave in to the consulting pharmacists’ pressure and decided not to use the plaintiff’s services after all. The plaintiff sued, claiming “conspiracy” between the manufacturer and the consulting pharmacists.

The claim flew in the face of legions of cases holding that a manufacturer’s use of one party rather than some other to market its products is not an antitrust violation. Regrettably, instead of relying on that rich

The complaint failed not only to show antitrust injury but also any injury in fact. It was wrong, however, for the court to rely on a legally erroneous requirement that a plaintiff “must have business or property interests in the allegedly affected market.”

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233 190 F.3d 1051 (9th Cir. 1999).
234 Id. at 1057. The court did not explain, or identify the source of, this purported “requirement”; it did say that McCready’s “inextricably intertwined” test was a narrow exception to the claimed general rule.
235 Id. at 1058.
236 118 F.3d 178 (3d Cir. 1997).
vein of authority, the panel held that the claim was barred by the doctrine of antitrust injury, relying on *Bhan* to rule erroneously that only competitors or customers suffer antitrust injury. The court then engaged in an extensive discussion, painfully elucidating the obvious but irrelevant truth that drug manufacturers and drug promoters operate in different relevant markets. Although the court rightly intuited that something was badly amiss with the plaintiff’s case, it would have done much better to face up to what was missing, namely, a real antitrust claim.

By contrast, in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, another Third Circuit panel declined to repeat its error in *Barton & Pittinos* and indicated that, while consumers and competitors are generally the most appropriate antitrust plaintiffs, others may have standing in certain circumstances (not found to be present in the case at bar).

Subsequently, in *Carpet Group International v. Oriental Rug Importers Ass’n, Inc.* the Third Circuit backed further away from the rigid customer or competitor standing “rule” of *Barton & Pittinos*. The plaintiff’s business insight was that U.S. wholesalers of oriental rugs were charging such high markups that there was money to be made by organizing trade shows at which manufacturers would display their wares to retailers and deal directly with them, cutting out the middlemen. The middlemen, allegedly, were displeased by this turn of events and, acting in concert, took various steps to sabotage the plaintiff’s trade shows. The defendants relied on *Barton & Pittinos* to argue that the plaintiff was not their “competitor,” and hence lacked standing. The court responded, however, that *Barton* “arguably rests on an overstated premise,” and “may in some circumstances lead to results that conflict with Supreme Court and other precedent.”

In other words, *Barton* was wrong.

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238 171 F.3d 912 (3d Cir. 1999).
239 Id. at 926 n.8.
240 227 F.3d 62 (3d Cir. 2000).
241 Id. at 76.
242 In *Sanner v. Board of Trade of the City of Chicago*, 62 F.3d 918 (7th Cir. 1995), the Seventh Circuit missed falling into the customer-or-competitor trap. There the plaintiff complained that the Board of Trade had adopted, in violation of the Sherman Act, a regulation that required holders of long positions in soybean futures to liquidate and that, when they did so, both the futures market and the cash market suffered a precipitous decline. The defendant strenuously argued that cash sellers lacked standing inasmuch as they were in a “different” market from the one where the injury occurred, to wit, the futures market. The court analyzed the case under *AGC, McGready*, and other authorities, focusing heavily on the Board’s alleged intent to influence the cash market, and found that cash sellers did have standing.
D. Summary

A review of the jurisprudence of antitrust standing in the appellate courts suggests that the only generalizations about antitrust injury that reliably stand up are those derived from the Supreme Court cases and identified in Part IV.A. The Seventh Circuit’s effort to reenvision antitrust injury in light of strict Chicago School thinking has not panned out. As Judge Posner intuited in the Seventh Circuit’s State Oil opinion—and as borne out by the Supreme Court’s disposition of that case—the key to the question of vertical maximum resale price maintenance lay in the content of the substantive rule, not in a generalization about antitrust injury. And the efforts by certain panels in the Ninth and Third Circuits to draw bright lines on antitrust injury inconsistent with Supreme Court precedent have come to be recognized as a blind alley.

V. UNDECIDED QUESTIONS ABOUT ANTITRUST INJURY

In the discussion thus far we have reviewed many cases in which the court claimed to see antitrust injury as key to the decision, when the doctrine had no application at all—either there was no violation, or there was no injury, or there was violation and injury but the violation did not cause the injury, or the court employed an unreliable, if not clearly erroneous, generalization about antitrust injury to dispose of a case that should have been dealt with on other grounds. The cases we have specifically examined are the tip of an iceberg of error.

Genuine issues of antitrust injury do not often arise. And where they do arise, they are typically easy to deal with, based on an understanding of the history and purpose of the rule invoked by the plaintiff. For example, in George Haug Co. v. Rolls Royce Motor Cars Inc.,243 the Second Circuit, looking to the basis of the history and purpose of the rule on secondary-line liability, held that a plaintiff alleging secondary-line injury from price discrimination in violation of the Robinson-Patman Act need only show competitive injury to itself, not to competition as a whole, in order to prove antitrust injury, because it was the intent of the Robinson-Patman Act precisely to prevent competitive injury to small firms flowing from discrimination by suppliers.244

What then is left? Are there any real issues of antitrust injury left to debate? The answer is yes; genuine unresolved questions include at least the following:

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243 148 F.3d 136 (2d Cir. 1998).
244 Id. at 143–44. The court thus joined the majority of courts that have concluded that antitrust injury for secondary-line Robinson-Patman purposes is different from antitrust injury in a Sherman Act case. See generally ALD, supra note 3, at 479 nn.154–55.
whether the target of an unsolicited tender offer is threatened with antitrust injury by reason of its impending competitive extinction,

the nature and quality of the evidence of threatened predatory or exclusionary behavior that a third-party competitor must show in order to challenge a merger or acquisition,

whether a whistleblower employee terminated for refusal to participate in an antitrust violation suffers antitrust injury (and other analogous cases),

the existence and scope of any rule forbidding the calculation of antitrust injury based on an assumption that others will violate the antitrust laws,

whether there is any blanket rule against antitrust injury by members of a cartel, and

whether one who competes for a monopoly position and loses by reason of unlawful predatory or exclusionary activity suffers antitrust injury.245

A. Tender Offer Targets

There is a conflict among the circuits as to whether threatened extinction as an independent economic actor counts as antitrust injury and thus gives standing to targets of unsolicited tender offers. In a relatively early Tenth Circuit case, Central National Bank v. Rainbolt,246 a bank and the bank’s chairman challenged as anticompetitive an effort by another individual, who had other banking interests, to buy a controlling interest in the bank’s stock. The decision predated Cargill, but was subsequent to AGC. Without, however, citing Brunswick, McCready, or AGC, the court held that the bank’s antitrust claim should be dismissed for want of standing. There was no evidence that the new owner would use his controlling interest to the detriment of the plaintiff; the fact that he might change business policies was neither here nor there; and any use of common control to reduce competition or raise entry barriers would redound to the benefit of the bank. In essence, the court appears to have perceived no injury in fact,247 and the plaintiff evidently did not make the argument that its injury stemmed from loss of independent decision-making power.

245 See also Part IV.B. supra, addressing the circumstances in which middlemen suffer antitrust injury in consequence of their compliance with (or their defiance of) unlawful vertical restraints.

246 720 F.2d 1183 (10th Cir. 1983).

247 Id. at 1187. The court easily concluded that injuries suffered by the bank’s original chairman were merely incidental to the claimed violation.
The Second Circuit took quite a different approach in *Consolidated Gold Fields PLC v. Minorco, S.A.* There the central issue was whether the target of an unsolicited tender offer that may violate the antitrust laws may seek injunctive relief. Ruling two to one in the affirmative, the panel hung its hat on the proposition that if limitation of competitive freedom caused by an antitrust violation is antitrust injury, then *a fortiori* extinction of competitive rivalry caused by an antitrust violation affords standing.

It is hard to quarrel with that general proposition; the best way of formulating the salient question is whether there are good reasons to create an exception to the general proposition in a tender offer context. The court in *Minorco* said no. First, many argue that when target company management directs the firm to file an antitrust action, the motivation is management’s desire to keep its perks, not to preserve competition. The court recognized that reality, but asserted that antitrust injury turns on what the antitrust laws were intended to prevent, not on subjective issues of motivation. Also rejected—because the “antitrust laws ensure the right to compete”—was the argument that unwilling targets “benefit” by being gobbled up by firms that will then enjoy enhanced market power. Finally, the dissent, falling into what we have called the Hypothetical Trap, argued there was no antitrust injury because the same “injury”—loss of independence—would have occurred whether or not the acquisition was lawful. The majority cogently responded, however, that a “litigant need not have a winning case to have standing.”

In *Anago, Inc. v. Tecnol Medical Products, Inc.* the Fifth Circuit disagreed with the Second Circuit’s decision in *Consolidated Gold Fields*, and

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248 871 F.2d 252 (2d Cir. 1989).
249 *Id.* at 258. Many cases, including *Brunswick*, *Matsushita*, *Cargill*, and *ARCO*, could be cited in support of the general proposition, as applied in the context of illegal monopolistic practices.
250 *Id.* at 259. The Second Circuit’s rejection of the relevance of assumed target company management motivation is analogous to the Supreme Court’s rejection in *Cargill* of the argument that third-party suits are so likely to be tainted by improper motivation that even claimed fear of predatory behavior should not be a basis on which to sue. But one could argue—and many do—that the improper motivation argument is so strong in a tender offer context that the case against standing is overwhelming.
251 *Id.* at 258.
252 *Id.* Consolidated Gold Fields, the direct tender offer target, held a 49.3% stake in another gold company, Newmont Mining, which also sued, claiming to fear that the transfer into hostile hands of almost half of its stock could lead to influence or control in ways that would injure competition. The court held that Newmont had standing. The author was one of the counsel for Newmont in this action.
253 976 F.2d 248 (5th Cir. 1992). The court cited its decision in *Phototron*, discussed *infra*, for the proposition that “this court narrowly construes the meaning of antitrust injury.” *Id.* at 251. In fact, however, *Phototron* was an easy and straightforward application of Supreme Court precedent. Nor does the antitrust standing jurisprudence of the Fifth
joined with a number of other courts in holding that targets of unsolicited tender offers lack antitrust injury and hence have no standing to seek preliminary injunctive relief. The court’s reasoning was sparse. Illogically, the panel seemed to say that if illegal market presence does not afford antitrust injury, à la Brunswick, then illegal market absence does not give rise to antitrust injury either.254 But the conclusion does not follow from the premise.

“[W]e are not convinced,” the court added, “as is the Second Circuit, that the loss of independent decision making is the type of injury meant to be prevented by the antitrust laws.”255 But the panel offered no reason to disagree with the Second Circuit in this regard; it simply stated that it did disagree.256

The issue of tender offer standing is a vexed question, and the Supreme Court, presumably, will ultimately resolve it. The reasons to doubt that tender offer litigation contributes in a positive way to antitrust enforcement are strong and persuasive—beginning with the fact that more money per share typically persuades a reluctant target to abandon its opposition to the takeover. This tendency to turn coat on antitrust does not reflect moral turpitude on management’s part. It reflects, rather, the signal importance of protecting shareholder interests. But, at the same time, the tendency of tender offer targets to abandon their antitrust claims when the price is right demonstrates the huge disconnect between management’s role in protecting shareholders and its role in protecting the public against anticompetitive transactions.

The points made by the Second Circuit have never been refuted: if involuntary competitive extinction is antitrust injury in a predatory pricing or other Sherman Act Section 2 litigation, as it surely is, then involuntary competitive extinction is antitrust injury in a Clayton Act Section 7 context as well. The correct approach to the policy dispute is to recognize that the doctrine of antitrust injury does not block suits by tender offer targets, but that prudential considerations may well do so. These prudential considerations are analogous to the concerns that the Supreme Court deemed sufficient in Illinois Brick to block suits by indirect purchasers, even though there is violation, injury, a causal relation between violation

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Circuit as a whole support the statement that it has an unusually narrow view of antitrust injury.

254 Id. at 250.

255 Id. at 251–52.

and injury, and the antitrust laws intend to prevent the very injury of which the indirect purchaser plaintiff complains.

B. Third-Party Competitor Merger Challenges

In a relatively straightforward application of the holding and spirit of Cargill, the Fifth Circuit found that a third-party competitor lacked standing to seek a preliminary injunction against the merger of two competitors in Phototron Corp. v. Eastman Kodak Co. Plaintiff’s claimed fear of predatory pricing was unsubstantiated, and, as in Cargill, the remaining parade of horribles it brought before the court amounted only to aggressive but lawful competition. To like effect, see Pool Water Products v. Olin Corp. (competitor lacked standing to assert injury from low but above-cost pricing made possible by allegedly illegal acquisition).

By contrast, in R.C. Bigelow, Inc. v. Unilever N.V. the Second Circuit held that where a horizontal merger will produce a combined firm with such a large market share that monopoly power may be inferred, a competitor plaintiff’s petition for a preliminary injunction is not barred by the antitrust injury doctrine. In other words, nothing more than the prospect of having to compete against a monopolist is required to show a substantial likelihood of proving antitrust injury at a trial on the merits. The court took issue with Phototron and distinguished Cargill on the grounds that (a) Cargill involved a permanent injunction, whereas the case before it involved only a preliminary injunction, and (b) the case against the merger here was much stronger on the merits.

Bigelow’s reasoning is difficult to follow. First, the court did not assert that firms with a monopolistic share of market generally predate against their competitors, nor would there be any basis for such an assertion. Yet Cargill seemed to make legitimate fear of predatory conduct a precondition to standing in a Clayton Act Section 7 case brought by a competitor. Second, the Second Circuit correctly understood the general concept of antitrust injury (the effects that a particular antitrust statute or rule aims to prevent) but resisted the Cargill majority’s view that having to

257 842 F.2d 95 (5th Cir. 1988).
258 258 F.3d 1024 (9th Cir. 2001).
259 867 F.2d 102 (2d Cir. 1989).
260 The court disagreed with the contrary ruling of the Fifth Circuit in Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95 (5th Cir. 1988). This conflict among the circuits remains unresolved. See ALD, supra note 3, at 846 n.61. Indeed, in a later case, a district court within the Second Circuit declined to follow Bigelow, reasoning that it had been overruled by ARCO. Remington Prods., Inc. v. North Am. Philips Corp., 755 F.2d 52, 57–58 (D. Conn. 1991).
261 See 867 F.2d at 110.
compete against a larger competitor is not, in and of itself, among the effects that Clayton Act Section 7 is intended to forestall. The Bigelow panel referred to the possibility that the combined firm might reduce the plaintiff’s access to supermarket shelf space—262—as if vigorous competition for shelf space by a dominant firm were ipso facto anticompetitive. In sum, Bigelow represented an effort to limit Cargill to its facts but without any principled reason for doing so.

Community Publishers, Inc. v. DR Partners263 from the Eighth Circuit, like Bigelow in the Second Circuit, is the unusual case where a plaintiff may have received an “antitrust injury” break it did not deserve. Among the plaintiffs challenging a newspaper acquisition—and successfully achieving rescission, in an action consolidated with a case brought by the Antitrust Division—was a smaller competitor of the combined entity. Despite Cargill, the appellate court predicated antitrust injury only on findings that the competitor’s “profits were threatened in various ways by the anticompetitive aspects of the challenged acquisition.”264 The court of appeals referred the reader to the findings of the district court,265 which in turn explained the source of injury in greater detail but failed to disclose any basis for a well-grounded fear of predation.266

This lineup of the Fifth and Ninth Circuits versus the Second and Eighth represents a debate between those who are willing to accept Cargill at face value and those who still, despite Cargill’s embrace of efficiency and aggressive competition by the large and powerful, instinctively feel there is something wrong on antitrust grounds with a giant in a field of pygmies.

C. Whistleblower Employees and Other “Inextricably Linked” Injury

As we saw in Part IV.A.5., supra, despite erroneous dictum in a D.C. Circuit case,267 it is clear that loss of employment flowing from an antitrust violation is mere incidental injury, and the doctrine of antitrust injury denies standing to terminated employees. But what if an employee is

262 Id. at 111. Restricted access to shelf space continues to be a complaint by smaller suppliers to the supermarket industry, but determining which forms of restrictions are anticompetitive is a very problematic exercise. See generally Ronald W. Davis, A Mystery Wrapped in an Enigma: Slotting Allowances and Antitrust, Antitrust, Spring 2001, at 69.
263 139 F.3d 1180 (8th Cir. 1998).
264 Id. at 1183.
266 See also ALD, supra note 3, at 846 n.61 (collecting pertinent district court cases).
terminated because of refusal to participate in an antitrust violation, or, even worse, in order to clear the way to make a violation effective?

The plaintiff in *Ostrofe v. H.S. Crocker Co.*\(^{268}\) said he was dismissed from his position as sales manager because he refused to fix prices, rig bids, and allocate markets. The Ninth Circuit thought that the legal policy in deterring antitrust violations strongly supported standing, and permitted him to proceed. It distinguished *Brunswick* on the ground that Mr. Ostrofe’s loss did not arise from increased competition. Moreover, the court reasoned, if Congress cared enough about how people do their jobs to impose criminal penalties for antitrust violations, it is a short step to infer congressional concern with employment opportunities for those who refuse to disobey the law.\(^{269}\)

The Supreme Court remanded *Ostrofe* for further consideration in light of *AGC*.\(^{270}\) On remand,\(^{271}\) a 2–1 majority adhered to the prior decision, but emphasized an interesting factual twist: Ostrofe’s loss of employment came after complaints by his employer’s co-conspirators, giving the situation the air of a group boycott in respect of his employment. The court analogized the plaintiff’s case to *McCready*—and went on to rule, in the alternative that, if it had read *McCready* too broadly, Ostrofe’s problem raised the question left open in *AGC* footnote 44: “whether the direct victim of a boycott, *who suffers a type of injury unrelated to antitrust policy*, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.”\(^{272}\) The majority thought this question should be answered in the affirmative. Justice Kennedy, dissenting, observed (unpersuasively) that *AGC*’s note 44 was murky and did not apply to the case at bar and (much more persuasively) that the purpose of the rule against price fixing products is not to preserve employment opportunities for those involved in the making and selling of those products.

Fourteen years later, however, in *Vinci v. Waste Management, Inc.*,\(^{273}\) the Ninth Circuit distinguished *Ostrofe* almost to the vanishing point, holding that an employee who claims he was dismissed because he refused to participate in an antitrust violation has standing only if he “is an ‘essential participant’ in an antitrust scheme, the dismissal is a ‘necessary means’ to accomplish the scheme, and the employee has the greatest incentive to

\(^{268}\) 670 F.2d 1378 (9th Cir. 1982).

\(^{269}\) Id. at 1387–88.

\(^{270}\) 460 U.S. 1007 (1983).

\(^{271}\) 740 F.2d 739 (9th Cir. 1984).

\(^{272}\) 459 U.S. at 540 n.44 (emphasis in Ninth Circuit quote).

\(^{273}\) 80 F.3d 1372 (9th Cir. 1996).
challenge the antitrust violation.”

In *Murcott v. Best Western International, Inc.* the Ninth Circuit reaffirmed the need for a plaintiff to satisfy all three requirements in order to maintain an *Ostrofe* type of claim.

The Seventh Circuit has declined to accept *Ostrofe*. The plaintiff in *In re Industrial Gas Antitrust Litigation* claimed he was terminated as a senior executive because he solicited new business in violation of an illegal customer allocation scheme. Disagreeing with *Ostrofe*, the Seventh Circuit held the plaintiff lacked standing. The court reasoned that even where the employee is an antitrust whistleblower, the purpose of the Sherman Act is not to protect employment, hence loss of employment is not antitrust injury. Other courts have reached the same result by application of the proximate cause factors of *AGC*.

The better position is to deny standing. Antitrust does not give people a vested interest in continued employment. Antitrust whistleblowing deserves no more favorable treatment that other varieties of whistleblowing. The terminated employee should rest content with relevant contract, tort, and statutory remedies for wrongful termination.

Outside the terminated employee context, however, plaintiffs whose injuries are “inextricably linked” to a violation, à la *McCready*, may well suffer antitrust injury. For example, the plaintiff in *Crimpers Promotions, Inc. v. Home Box Office, Inc.* an unsuccessful entrant into the business of organizing trade shows for program producers and cable TV operators, brought suit under Sections 1 and 2 of the Sherman Act. The claim was that HBO and Showtime, fearing that plaintiff’s endeavors would lead to a more competitive market for the sale of cable TV programming, conspired to bring about a boycott of the plaintiff’s trade show. The Second Circuit, per Judge Friendly, rightly saw a fairly close analogy to *McCready*, and held that the plaintiff had standing to pursue its claim that its demise was essential to the defendants’ alleged anticompetitive scheme. The court rejected defense arguments that *AGC* had somehow altered *McCready*.

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274 Id. at 1376.
275 127 F.3d 1105 (9th Cir. 1997) (unpublished; text at 1997 WL 669897).
276 681 F.2d 514 (7th Cir. 1982).
277 Id. at 519.
278 E.g., Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989). The majority position is to deny standing to the terminated whistleblower. See ALD, supra note 3, at 866 n.147 (collecting cases).
279 724 F.2d 290 (2d Cir. 1983).
D. Antitrust Injury Assuming Others Will Violate the Law

As we have seen, Todorov in the Eleventh Circuit and Lamaur and Isaksen in the Seventh Circuit appear to stand for the general proposition that a claim of antitrust injury may not be based on the assumption that others will violate the antitrust laws. Although the proposition is not illogical, as discussed in Part IV.B., supra, there may be good reason to apply it with caution and due regard for case-specific facts.

E. Members of a Cartel


280 857 F.2d 55 (2d Cir. 1988).

281 Id. at 67.

282 Id. at 67–68. The decision was correct, but the panel did not bother to unpack the defendants’ contentions on standing—or the reasons why those contentions were wrong: (a) insofar as the defendants were urging the absence of injury in fact, the issue was unsuitable for resolution as a “matter of law”; whether or not the plaintiffs suffered any actual injury flowing from the antitrust violation was a matter of factual proof; (b) insofar as the defendants were arguing that the only “effect” of a cartel is to raise prices, they were wrong as a matter of economics and business reality; as the court observed, a cartel also interferes with a member’s “freedom to compete”; (c) insofar as the defendants were arguing that antitrust protects only a buyer’s right to buy in a competitive market, not a competitor’s freedom to sell free of illegal restrictions, they were flying in the face of abundant antitrust learning. The defendants, by the way, apparently did not argue, and the court did not address, whether the plaintiffs’ “involvement” in the challenged restrictions was so “complete” as to establish the disfavored defense of in pari delicto. See generally ALD, supra note 3, at 910–14.
By contrast, in *Blackburn v. Sweeney*283 the Seventh Circuit held that it is not the purpose of the per se rule against cartels to award treble damages to a plaintiff who entered into a cartel agreement that turned out to be disadvantageous, and who seeks antitrust damages flowing from the fact that he observed the terms of his illegal agreement and in consequence made less money than he would have made if he had not observed it. And in *Todorov* the Eleventh Circuit went further, appearing to hold that a lost opportunity to make supracompetitive profits, whether through legal or illegal means, is never antitrust injury.284

There is no clear conflict among the circuits here, and indeed these three cases can be reconciled with one another. They do, however, serve to remind us that the doctrine of antitrust injury is not fully settled in respect of circumstances where the plaintiff is itself in violation of the law, or arguably seeks to take some advantage of a violation of antitrust law.

F. Competition for a Monopoly

As the Seventh Circuit saw it, *Fishman v. Estate of Wirtz*285 presented a stark policy question as to the purpose of the rule invoked by the plaintiff, namely, that Sherman Act Section 2 does not permit the use of monopoly in one market (here, control of the natural monopoly sports stadium market) to gain a monopoly in another market (the presentation of live professional basketball in Chicago). Judge Easterbrook, dissenting, saw no consumer interest at stake in the alleged impairment of competition in bidding for ownership of the franchise.286 The majority, however, believed that a purpose of the rule was to protect competition for a monopoly, even if no consumer interest were at stake—a proposition, by the way, that they were not willing to accept. Accordingly, the majority ruled, one who was unlawfully deprived of the right to bid for a monopoly position suffered antitrust injury.287

283 53 F.3d 825 (7th Cir. 1995).
284 921 F.2d at 1453–54.
285 807 F.2d 520 (7th Cir. 1986).
286 Id. at 563–68. Judge Tjoflat’s broad proposition about supracompetitive profits in *Todorov* is, of course, consistent with Judge Easterbrook’s view in *Fishman.* See supra note 187 and accompanying text.
287 807 F.2d at 532–40. Dictum in a dissenting opinion in a later case, *Banks v. NCAA*, 977 F.2d 1081, 1097 (7th Cir. 1992), discerned a “split in this circuit” as to “whether harm to consumers is the *sine qua non* of antitrust injury”; cases such as *Chicago Professional Sports Ltd. Partnership, supra,* were cited as providing an affirmative answer. Dictum in *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510, 1515 (7th Cir. 1992), tried to bridge the “split” by announcing that “[i]n most instances, consumer injury must be demonstrated before antitrust violations can be found.”
Though the issue seldom arises, one must regard it as an open question whether dirty pool played by one rival in order to keep another rival from gaining a monopoly position counts as antitrust injury in circumstances where there is bound to be a monopoly in any event and the interests promoted by antitrust will not be impacted, one way or another, by which rival wins the monopoly position.

VI. CONCLUSION

With a few notable exceptions, the appellate courts have successfully employed the doctrine of antitrust injury to filter out the kinds of private cases the Supreme Court intended to block: cases claiming damages for “illegal market presence,” for non-predatory price competition, or for “too much competition” generally. And the appellate courts have frequently acquitted themselves well in dealing with the limited number of legitimately debatable antitrust injury open issues, such as standing by tender offer targets, as identified in Part V.

Regrettably, however, the term “antitrust injury” is egregiously overused in a variety of contexts where it does not belong, to the confusion of the litigants and the court, not to mention future courts and litigants attempting to wrestle with erroneous precedent. In *Key Enterprises* the Eleventh Circuit observed that “The district court’s failure to recognize antitrust injury in this case stems from its failure to recognize the defendant’s anticompetitive acts as such.”288 That particular mistake, however, is the exception, not the rule. Much more common is the reverse: failing to recognize a plainly bogus antitrust claim as such. These are actions where the court intuits that something is fishy about the claim but—whether from intellectual timidity or some other cause—declines to address the merits and instead asserts, inappositely, that there is “no antitrust injury.” Cases of this ilk are legion: this article has done no more than scratch the rough surface of the law.

Sometimes, in such cases, the court’s discussion makes perfectly clear its confusion of antitrust injury and merits (or its misidentification of antitrust injury as an element of liability). And in many other cases it is apparent that the court has, similarly, confused want of antitrust injury with want of injury at all, or with absence of causation, or absence of material causation. Antitrust injury is not the appropriate rubric with which to get rid of the plaintiff who was merely injured-while-standing-next-to-an-antitrust-violation, but perhaps no great harm comes from the confusion.

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Much more insidious than that simple confusion, however, are the significant number of cases in which the court enunciates some unsound purported generalization about antitrust injury as a ratio decidendi for dismissal (typically, where dismissal on other grounds, such as absence of any violation at all, would have been in order). The problem with all such unsound generalizations is that, while they may serve as a convenient, if slipshod, way of getting rid of today’s undeserving plaintiff, they create unfortunate case law that may exclude tomorrow’s deserving plaintiff—or, at the very least, create a difficult situation for the conscientious district court that has to find a way of “distinguishing” the erroneous precedent.

For these reasons we must conclude that, at present, those who try to find logic and consistency in the far too abundant body of antitrust injury jurisprudence stand on shaky ground indeed.