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Target Corporations, Hostile Horizontal Takeovers and Antitrust Injury Under Section 16 of the Clayton Act After Cargill

BRENT W. HUBER*

INTRODUCTION

Targets of a hostile corporate takeover often seek a preliminary injunction under section 16 of the Clayton Act to enjoin the acquisition by alleging that it would violate section 7 of the Act. In Cargill, Inc. v. Monfort of Colorado, Inc., the United States Supreme Court held that private plaintiffs must demonstrate a threat of "antitrust injury" to obtain standing under section 16 of the Clayton Act.

The federal circuits have split over the application of the Cargill Court's antitrust injury requirement in target standing cases. The Second Circuit recently held that a target corporation's loss of independent decision-making constituted antitrust injury. Courts in other federal circuits have held that targets did not demonstrate antitrust injury because the acquired target corporation would ultimately benefit from any anticompetitive effects of

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   Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

Id.


   No person shall acquire, directly or indirectly, the whole or any part of the stock and no person shall acquire the whole or any part of the assets of another person where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id. Although section 7 originally applied to corporations only, it includes unincorporated entities as well. See H. Hovenkamp, Economics and Federal Antitrust Law § 11.1, at 293 (1985).


4. Id. at 113.

the acquisition. This split among the federal circuits promises to generate much controversy in the takeover field and has resulted in inconsistent adjudications of targets' antitrust claims. This Note contends that a target corporation should be allowed to establish antitrust injury in rare instances when the target can demonstrate an anticompetitive harm both to itself and to competition. Part I briefly outlines the pertinent jurisprudential history of antitrust law and the implications of the federal courts' emphasis on economic efficiency. Part II traces the origins of the antitrust injury requirement and its relationship to the doctrine of antitrust standing. Part III focuses on the antitrust injury requirement of section 16, analyzes the reasoning in three recent decisions that have considered target standing under section 16 and examines the rationale for denying standing to targets.

This Note rejects both the per se rule against target standing and any rule that effectively grants all targets standing under section 16. This Note argues that no black-letter rule of standing can ensure that targets' section 16 claims for injunctive relief will be properly adjudicated. Target corporations can demonstrate a threat of antitrust injury only when a fact-sensitive analysis reveals that the target has alleged an anticompetitive harm to both itself and competition in the relevant market. A finding that a target corporation has established antitrust injury should not always be dispositive of the standing question because, in some cases, other standing factors may be relevant.

I. SECTION 7 ANTITRUST JURISPRUDENCE

James K. Baker, the chairman of Arvin Industries, hurriedly scheduled a lunch date with his long-time friend, Robert Garton. Chairman Baker was worried. A few days earlier Arvin Industries had received a letter from the infamous Belzberg family threatening a hostile takeover. Baker knew he


7 Burnup & Sims and Burlington held that targets in the Fourth and Eleventh Circuits, respectively, did not have standing under section 16. Burnup & Sims, 688 F Supp. at 1534; Burlington, 666 F Supp. at 805. After Consolidated Gold Fields, targets in the Second Circuit may have standing. See Consolidated Gold Fields, 871 F.2d at 258. The post-merger combinations in Consolidated Gold Fields and Burlington would have controlled approximately one-third of their respective markets. Compare Consolidated Gold Fields, 871 F.2d at 255 with Burlington, 666 F Supp. at 804 (listing the market shares of the corporations in the respective cases).

had to act quickly. He hoped to convince his long-time friend in the Indiana Senate, Robert Garton, to introduce the sort of anti-takeover legislation necessary to save Arvin Industries and its home, Columbus, Indiana, from wrenching change.9

Before news of this takeover bid spread, Columbus and Arvin Industries had enjoyed a "long, cozy relationship."10 With its "tree-lined streets and gingerbread storefronts,"11 Columbus is comfortably nestled in the hills of southern Indiana.12 Arvin employs approximately 2,000 of the 30,000 residents of Columbus. Hundreds of Columbus children attend a pair of schools that Arvin donated to the town in the 1950s. In the summers, these children play in a 70-acre wooded youth camp, another Arvin donation.13

When Columbus needed a new superintendent of schools a few years ago, Arvin executives helped in the nationwide search. Later, the company donated money to lure the top prospect to southern Indiana. When Shirley Lyster, an English teacher at Columbus North High School, called Chairman Baker for help in finding Homer in an out-of-print George Herbert Palmer translation, Arvin printed a special edition for her.14

When the Belzbergs loomed over Columbus, however, the town's residents feared that a takeover would shatter their cozy relationship with Arvin.15 The Belzbergs, a powerful Canadian family, were notorious takeover artists. Their rise began in 1919 when Abraham Belzberg migrated to Canada from Poland and built a successful used furniture business. Abraham's three sons, Samuel, William and Hyman, later moved the family into the real estate, banking and energy business. By the mid-1970s, the family's flagship company, First City Financial Corporation, oversaw an empire worth billions of dollars. In the early 1980s, the Belzbergs earned a reputation for showing up on the doorsteps of large American companies, brandishing minority shareholdings in the companies and threatening a hostile takeover.16 The Belzberg's advances threw the town of Columbus and Arvin's management into a turmoil. Residents feared that Arvin's personality would change overnight if the Belzbergs bought the company. Brooke Tuttle, an official at the Columbus Chamber of Commerce, explained, "[t]here's a kind of attitude you get from an out-of-town owner—the focus is on the bottom line ... ."17 Reports circulated that Abraham Belzberg's grandson, Marc, was calling Arvin as often as three times a day, vowing to launch a hostile

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9. See id. at 12, col. 4.
10. See id. at 12, col. 2.
11. Id. at 1, col. 6.
12. See id. at 12, col. 2.
13. See id. at 12, col. 1.
14. Id. at 12, col. 2.
15. See id.
16. Id. at 1, col. 6.
17. Id. at 12, cols. 2-3.
tender offer for Arvin. This takeover bid was a threat that Chairman Baker felt only a new law could remedy. Thus, Baker turned to his long-time friend and Indiana Senator, Robert Garton, for help. Because Garton was the President of the Indiana Senate, Baker thought Garton could help enact the sort of anti-takeover measure that could save Arvin and Columbus from a bitter defeat.18

A few months later, the Indiana legislature passed a major anti-takeover statute that was officially labeled "emergency legislation."19 "Armed with this leverage, Arvin 'managed to repel the Belzbergs' takeover bid, and the two settled.'20

Such accounts abound in corporate takeover lore. The fear, passion and sheer desperation that are fueled by takeover artists such as the Belzbergs often find their way into the legislation governing corporate takeovers. As a result, the antitrust laws and other legal havens of takeover targets bear the marks of the emotional debate surrounding hostile corporate takeovers.

Section 7 of the Clayton Act was enacted in 1914 and prohibits acquisitions or mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."21 After a spate of major corporate acquisitions, Congress amended section 722 in 1950 to arrest the "rising tide of economic concentration"23 and limit the perceived abuses of corporate power. Senator Estes Kefauver, co-sponsor of the amendment, summarized congressional concerns when he protested that the "trend of great corporations to increase their economic power is the antithesis of meritorious competitive development. Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years."24 In United States v. E.I. du Pont de Nemours
& Co.,\textsuperscript{25} the Supreme Court characterized this amendment to section 7 as a prophylactic measure, intended to arrest the perceived evils of intercorporate relationships in their "incipiency."\textsuperscript{26} The principal evil at which this amendment was directed was the erosion of competition accomplished by the "cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act."\textsuperscript{27}

In \textit{Brown Shoe Co. v. United States}\textsuperscript{28} the Supreme Court held that a shoe manufacturer's acquisition of a large shoe retailer violated section 7 of the Clayton Act. The Court, mirroring Senator Kefauver's concerns about the protection of small businesses, reasoned:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.\textsuperscript{29}

The Court's reasoning in \textit{Brown Shoe} is significant. Although the Court recognized that the protection of small businesses may result in inefficiencies and impose higher costs on consumers, the Court believed Congress had determined that the protection of small, locally owned businesses was more important.

Since \textit{Brown Shoe}, the Supreme Court's concern for small businesses has faded. In the 1970s, notions of economic efficiency and consumer welfare gained prominence in the Court's antitrust jurisprudence. Antitrust scholars have noted that the term "power" dominated the antitrust opinions of the Warren Court in the 1960s whereas the terms "efficiency" and "market assets. Bok, \textit{Section 7 of the Clayton Act and the Merging of Law and Economics}, 74 \textit{Harv. L. Rev.} 226, 234-35 (1960). In addition, Bok noted:

\textit{[T]he curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency. To be sure, there were allusions to the need for preserving competition. But competition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.}}

\textit{Id. at 236-37.}

\textit{25. 353 U.S. 586 (1957).}

\textit{26. Id. at 597.}

\textit{27. United States v. Von's Grocery, 384 U.S. 270, 283 (1966) (Stewart, J., dissenting). Congress sought to reach the "process of concentration" that was thought to be outside the scope of the Sherman Act. See Brown Shoe, 370 U.S. at 317 & n.32.}

\textit{28. 370 U.S. 294 (1962).}

\textit{29. Id. at 344.}
impact” dominated the Burger Court’s antitrust opinions during the 1970s.\(^\text{30}\) Although little consensus exists among scholars concerning the reasons for this shift in policy, some commentators assert that the accelerating inflation, lower productivity, growing balance of payments deficit and increasing global competition that characterized the national economy in the 1970s prompted this policy shift.\(^\text{31}\) Many scholars and national policymakers now argue that antitrust policy should accent the efficiencies to be gained from mergers\(^\text{32}\) on the theory that, inter alia, size and power may be necessary to compete with foreign firms.\(^\text{33}\)

Throughout this evolution in its antitrust jurisprudence, the Supreme Court has consistently maintained that the antitrust laws protect “competition.”\(^\text{34}\) However, in the Court’s recent antitrust opinions, which strongly emphasize economic efficiency and consumer welfare,\(^\text{35}\) the jurisprudential conception of “competition” differs significantly from the “competition” envisioned by the Brown Shoe Court. Rather than protecting the viability of small, locally owned businesses, the Court’s pro-competitive antitrust

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31. See Fox, supra note 30, at 1143.

32. The Department of Justice Merger Guidelines now reflect these views. See U.S. Dep’t of Justice Merger Guidelines, 49 Fed. Reg. 26,824-37 (June 29, 1984). These guidelines state in part: “Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets.” Id. at 26,827 “The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers.” Id. at 26,834.


34. See Brown Shoe, 370 U.S. at 344 (“It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.”); Brunswick Co. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (emphasis in original) (quoting Brown Shoe, 370 U.S. at 320) (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 115 (1986) (emphasis in original) (quoting Brunswick, 429 U.S. at 488) (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”).

At least one commentator has argued that competition remains as the “fundamental goal of the antitrust laws.” Note, supra note 30, at 1040-41.

policy now seeks primarily to protect price competition and other essentially "economic" goals.\textsuperscript{36}

As the Brown Shoe Court recognized, however, a pro-competitive policy can promote non-economic goals as well as economic goals. The economic goal of a pro-competitive policy is to maximize consumer welfare through the efficient allocation of scarce resources and the progressive development of new productive methods and products that put these resources to better use. At the same time, however, a pro-competitive policy can also promote non-economic goals that are commonly valued. Competition can disperse wealth, limit the power and size of businesses, broaden entrepreneurial opportunities and substitute the impersonal forces of the marketplace for the exploitation, coercion and prejudices of private individuals or groups.\textsuperscript{37}

Thus, a pro-competitive antitrust policy that essentially excludes these non-economic goals could be criticized for having a rather limited jurisprudential notion of competition in the marketplace.

Some scholars have labeled these non-economic goals "populist" because they are concerned primarily with concentrations of wealth and power rather than the efficient allocation of resources.\textsuperscript{38} In many instances these populist goals comport with economic goals because an efficient market is often a

\begin{quote}
\textsuperscript{36} See, e.g., Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("[T]he [antitrust laws were] enacted to assure customers the benefits of price competition."). In Cargill, the Court reiterated that "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." Cargill, 479 U.S. at 116 (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), cert. denied, 469 U.S. 1036 (1984)).


\textsuperscript{38} As Professors Areeda and Turner explain:

\begin{quote}
The root populist concern for the dispersal of "economic power" and prevention of bigness are more social and political than economic. The symbols are those of Jeffersonian democracy in which small, local, responsible, and individually-owned enterprises are contrasted with large, politically irresponsible, absentee-owned, and possibly corrupt giants capable of crushing smaller businessmen and individuals and of subverting democratic government. In the Jeffersonian world, economic power is held in check; the virtues of sturdy independent entrepreneurship are maximized; and political democracy is thought easiest to preserve.

*Id.* ¶ 109b, at 22. Professor Fox, a proponent of populist goals, argues that antitrust law should be concerned with more than economic efficiency:

The claim that law should be allocatively efficient is derived from a conception of all goals as either allocative or distributive. If we concentrate first on increasing the size of the pie—and only secondarily on how it is distributed, the claim goes, society will be wealthier and therefore all people will stand to gain; and if society is not satisfied with the resulting distribution of wealth, it can redistribute wealth in direct ways.

People do care about ends other than increasing their nation's wealth. People are willing to sacrifice the abstraction of prospective increased aggregate wealth for more personal benefits. People care about their opportunities, their relative rewards, interpersonal fairness, and mutual respect.

\end{quote}
less concentrated market. Only when efficiencies dictate that a larger, more efficient firm displace smaller, less efficient firms will the economic and populist goals of antitrust law diverge. In these instances, a court must make a normative choice between the underlying economic and populist goals of section 7.

In Brown Shoe, the Supreme Court made such a normative choice. The Court recognized that the protection of small businesses could result in inefficiencies and could impose higher costs on consumers. The Court chose the populist goal of protecting small, locally owned businesses over the economic goal of consumer welfare because Congress, according to the Court, “resolved these competing considerations in favor of decentralization.”

In recent decisions, however, the Supreme Court has all but reversed itself by focusing primarily on economic efficiency and consumer welfare. Even so, the Court has never adopted the “Chicago School” argument that consumer welfare is the only legitimate goal of section 7. Were the Court to adopt this view, the Court would effectively reverse Brown Shoe and hold that concerns about wealth distribution, political power, entrepreneurial opportunity and other populist goals are not cognizable under section 7. By emphasizing antitrust’s economic goals without excluding populist goals or reversing Brown Shoe, the Court has created an uneasy tension between the underlying goals of section 7. This tension between the varied, and

39. Populist values are often served by a policy that promotes economic efficiency because an efficient market is often a market that is not unduly concentrated. When several firms share a market, these firms arguably will possess less individual economic or political influence. See I P. Areeda & D. Turner, supra note 37, ¶ 110, at 23.

40. Economies of scale in production or distribution reduce the number of firms necessary to supply most efficiently any given demand. The economies of vertical integration may displace small suppliers or distributors. Also, firms with superior business acumen may drive other firms out of the market. In each of these instances, a more concentrated market is more efficient. See id. ¶ 103, at 8.

41. See Brown Shoe, 370 U.S. at 344; see also supra notes 28-29 and accompanying text.

42. See cases cited supra note 35. In Matsushita, the Court held that plaintiffs making antitrust claims that made “no economic sense” could not survive a motion for summary judgment without coming forward “with more persuasive evidence to support their claim than would otherwise be necessary.” Matsushita, 475 U.S. at 587.

43. See, e.g., R. Bork, The Antitrust Paradox 51 (1978) (“The only legitimate goal of American antitrust law is the maximization of consumer welfare”). Professor Easterbrook, Judge of the Court of Appeals for the Seventh Circuit, contends:

Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income. Judges have no metric, and we ought not attribute to Congress a decision to grant judges a political power that lacks any semblance of “legal” criteria. Interpersonal utility comparisons join the theory of the second-best on the scrap pile of useless truths, not only because no one knows who gets how much utility from how much money but also because judges aren't very good at moving money around.

TARGETS AND ANTITRUST INJURY

sometimes conflicting, goals of section 7 of the Clayton Act plays an
tegral role in the development of antitrust standing doctrine.

II. ANTITRUST STANDING

The Clayton Act provides two remedies for the private enforcement of
section 7. Section 4 authorizes the award of treble damages to persons who
suffer injury in their business or property because of a violation of the
antitrust laws.\textsuperscript{44} Section 16 authorizes the grant of injunctive relief to any
person threatened with loss or damage by an antitrust violation.\textsuperscript{45} The
document of antitrust standing, however, narrows the class of private persons
who are entitled to relief under these provisions.

The doctrine of antitrust standing is distinct from constitutional standing
and more restrictive. A plaintiff's showing of actual or threatened harm
satisfies the constitutional standing requirement of injury in fact for purposes
of the "case or controversy" clause of article III of the
Constitution.\textsuperscript{46} To
obtain antitrust standing, however, a plaintiff must also be a "proper
party" to bring a private antitrust action.\textsuperscript{47}

A. Section 4 Damages and Antitrust Injury

The antitrust injury requirement originated in the doctrine of antitrust
standing, which the federal courts first developed to limit the broad language
of section 4 of the Clayton Act.\textsuperscript{48} Section 4, literally construed, grants a
right to recover treble damages to all persons who suffer injures caused by
antitrust violations.\textsuperscript{49} The federal courts have concluded that Congress did
not intend to confer a right to recover treble damages on all persons

\textsuperscript{44} Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1988)). Section 4 of the Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained." \textit{Id.}


\textsuperscript{48} \textit{See} Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) (citations omitted) ("I concede that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. Courts have therefore developed various tests of antitrust 'standing,' not unlike the concept of proximate cause in tort law, to define that point."); Berger & Bernstein, \textit{An Analytical Framework for Antitrust Standing}, 86 \textit{Yale L.J.} 809, 810-45 (1977) (discussion of the historical development of antitrust standing doctrine).

tangentially affected by antitrust violations\(^\text{50}\) and have imposed prudential standing requirements to prevent duplicative recoveries,\(^\text{51}\) financial ruination of defendants\(^\text{52}\) and a deluge of litigation.\(^\text{53}\)

A prudential standing test that captures these objectives has eluded the federal courts. The tests articulated by the courts of appeals include the "direct injury" test,\(^\text{54}\) the "target area" test,\(^\text{55}\) the "zone of interests" test\(^\text{56}\) and the "balancing test."\(^\text{57}\) The Supreme Court discarded these mechanical tests in \textit{Associated General Contractors of California v. California State Council of Carpenters}\(^\text{58}\) and adopted a more flexible, fact-sensitive approach to antitrust standing under section 4 of the Clayton Act. The Court drew an analogy between the federal courts' struggle to articulate a precise antitrust standing test and the common law courts' struggle to define proximate cause. In both contexts, the Court noted, "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."\(^\text{59}\) To resolve this problem, the Court consolidated several of the rudimentary aims of section 4 in a series of factors that are to be considered in evaluating plaintiffs' standing. These factors include: the causal relationship between the injury.

\textbf{50.} \textit{McCready}, 457 U.S. at 477; State of Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) ("The courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.").

\textbf{51.} \textit{See, e.g., Standard Oil Co.}, 405 U.S. at 263-64.

\textbf{52.} \textit{See, e.g., Jeffrey v. Southwestern Bell}, 518 F.2d 1129, 1131 (5th Cir. 1975).

\textbf{53.} \textit{See, e.g., Calderone Enters. v. United Artists Theatre Circuit}, 454 F.2d 1292, 1295 (2d Cir. 1971) ("[I]f the floodgates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."). \textit{cert. denied}, 406 U.S. 930 (1972).

\textbf{54.} This test grants standing to those plaintiffs whose injuries are considered a "direct" or "proximate" result of the antitrust violation. \textit{See Volasco Prods. v. Lloyd A. Fry Roofing}, 308 F.2d 383, 394-95 (6th Cir. 1962), \textit{cert. denied}, 372 U.S. 907 (1963); \textit{Productive Inventions v. Trico Prods.}, 224 F.2d 678, 679 (2d Cir. 1955), \textit{cert. denied}, 350 U.S. 936 (1956).

\textbf{55.} This test requires that the plaintiff be in the "target area" of the economy endangered by the antitrust violation. \textit{See Pan-Islamic Trade Corp. v. Exxon Corp.}, 632 F.2d 539, 546-47 (5th Cir. 1980), \textit{cert. denied}, 454 U.S. 927 (1981); \textit{Engine Specialties v. Bombardier Ltd.}, 605 F.2d 1, 17-19 (1st Cir. 1979), \textit{cert. denied}, 446 U.S. 983 (1980); \textit{Southwestern Bell}, 518 F.2d at 1131.


\textbf{59.} \textit{id.} at 536 (footnote omitted).
and the antitrust violation,\textsuperscript{60} the directness or indirectness of harm,\textsuperscript{61} the speculative nature of the injury,\textsuperscript{62} whether the antitrust litigation can be kept within judicially manageable limits\textsuperscript{63} and whether the injury is of the type the antitrust laws were intended to prevent.\textsuperscript{64} The Court required that each standing question under section 4 be analyzed "in light of" these factors.\textsuperscript{65}

The final standing factor in \textit{Associated General Contractors}—whether the injury is of the type the antitrust laws were intended to prevent—had been articulated as \textit{antitrust injury} six years earlier in \textit{Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.}\textsuperscript{66} The plaintiffs in \textit{Brunswick}, operators of bowling centers, challenged a large bowling equipment manufacturer's acquisition of four bowling centers that competed with the plaintiffs. At the time of the proposed acquisitions, these four bowling centers were in default on several loans and the bowling industry was declining rapidly.\textsuperscript{67} Because the acquired bowling centers would have gone bankrupt but for the acquisitions, the acquisitions would have \textit{increased} the number of competitors in the post-acquisition market. Thus, instead of increasing the concentration in the bowling market, the acquisitions had the effect of decreasing concentration.\textsuperscript{68} Plaintiffs alleged that these acquisitions violated section 7 of the Clayton Act and sought treble damages under section 4.

Plaintiffs' theory of injury was that, but for the acquisitions, their profits would have increased when the bowling centers went bankrupt.\textsuperscript{69} The Court rejected this theory, insisting that the antitrust laws "were enacted for 'the protection of \textit{competition}, not \textit{competitors}.""\textsuperscript{70} The Court required that the plaintiffs demonstrate antitrust injury to recover treble damages under section 4:

\begin{quote}
[Plaintiffs] must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove \textit{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.\textsuperscript{71}
\end{quote}

\begin{itemize}
\item \textsuperscript{60} Id. at 537.
\item \textsuperscript{61} Id. at 540-42.
\item \textsuperscript{62} Id. at 542-43.
\item \textsuperscript{63} Id. at 543-45.
\item \textsuperscript{64} Id. at 538-40.
\item \textsuperscript{65} Id. at 536 & n.33.
\item \textsuperscript{66} 429 U.S. 477 (1977).
\item \textsuperscript{67} See id. at 480-81.
\item \textsuperscript{68} Because the acquisitions effectively decreased the concentration in the market, the acquisitions posed no threat to the populist goals of antitrust law. \textit{See supra} notes 37-40 and accompanying text.
\item \textsuperscript{69} \textit{Brunswick}, 429 U.S. at 481-85.
\item \textsuperscript{70} Id. at 488 (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).
\item \textsuperscript{71} Id. at 489 (emphasis in original).
\end{itemize}
Because the plaintiffs' threatened lost profits in *Brunswick* would have resulted from revitalized or increased competition, rather than from any harm to competition, the Court concluded that it would be "inimical to the purposes of these laws to award damages."\(^7\)

**B. Section 16 Injunctions and Antitrust Injury**

The Supreme Court extended the *Brunswick* Court's antitrust injury requirement to section 16 injunctive actions in *Cargill, Inc. v Monfort of Colorado, Inc.*\(^3\) In *Cargill*, Monfort, a meat processor, sought to enjoin a prospective merger between two of its larger rivals, alleging that the merger would violate section 7.\(^7\) This merger would have increased the defendants' market share to 20.4% in the cattle slaughter and beef production markets.\(^7\)

The defendants, Cargill and Excel, moved to dismiss, alleging that the plaintiff had failed to demonstrate a threat of antitrust injury under *Brunswick*. Cargill and Excel appealed the trial court's denial of this motion to dismiss, but the Court of Appeals for the Tenth Circuit affirmed.\(^7\) The Supreme Court reversed, holding as a matter of law that a private plaintiff seeking injunctive relief under section 16 must demonstrate a threat of antitrust injury.\(^7\)

The *Cargill* Court considered two theories of antitrust injury. First, Monfort alleged that it would lose profits after the acquisition if Excel lowered its prices to a level at or near Excel's costs, thereby "squeezing" Monfort's profit margin.\(^7\) Relying on *Brunswick*, the Court reiterated that lost profits resulting from increased competition are not cognizable antitrust injuries under section 7. The Court read *Brunswick* to hold 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."\(^7\) "'[I]t is in the interest of competition[,]'" the Court concluded, "'to permit dominant firms to engage in vigorous competition, including price competition.'"\(^8\)

Monfort's second theory of injury was that "Excel would attempt to drive Monfort out of business by engaging in sustained predatory pricing."\(^8\)

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72. Id. at 488.
73. 479 U.S. 104 (1986).
74. See id. at 103-07
75. Id. at 106-07 n.2.
77 Cargill, 479 U.S. at 113 (citing Brunswick, 429 U.S. at 489).
78. Id. at 114.
79. Id. at 116.
80. Id. (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), cert. denied, 469 U.S. 1036 (1984)).
81. Id. at 117
The Court found that predatory pricing is capable of inflicting antitrust injury because its purpose of eliminating competition harms both competitors and competition. In so doing, the Court declined the invitation of the government, appearing as amicus, to adopt a per se rule that would deny all competitors standing to challenge prospective mergers on a predatory pricing theory. However, the Court refused to consider Monfort's theory because Monfort had neither raised nor proved a claim of predatory pricing at trial. Because Monfort failed to make the requisite showing of threatened antitrust injury, the Court declined to consider the merits of Monfort's section 7 claim.

The Court's reasoning in Cargill illustrates the subtle yet significant shift that has occurred in antitrust decision-making since the 1960s. Instead of using section 7 to reduce concentration in the post-acquisition market as it did in Brunswick, the Court allowed an acquiror to increase the amount of concentration in the post-acquisition market on the theory that it is "in the interest of competition" to permit dominant firms to engage in vigorous price competition. In so doing, the Court ignored the potential conflict between the populist and economic goals of section 7. By concluding that section 7 does not require the federal courts to protect small businesses from the rigors of competition, the Cargill Court all but reversed Brown Shoe, which held that the protection of small businesses was more important than economic efficiency and consumer welfare. Simply put, the Cargill Court viewed section 7 primarily as a vehicle for promoting economic goals. The Court's antitrust injury requirement for section 16 is simply a judicial tool for effectuating this policy.

The Court's rationale for extending the antitrust injury requirement to section 16 largely rests on the premise that sections 4 and 16 provide

82. Id. at 117-18. The Court distinguished predatory pricing and price cutting. Price cutting, unlike predatory pricing, is aimed at increasing market share. Predatory pricing is aimed at eliminating competitors, reducing competition and ultimately earning supracompetitive profits. See id.

83. See id. at 120-21. The government requested that the Court consider whether competitors could ever obtain standing on a predatory pricing theory, arguing that "[t]here are important reasons why the Court should take the further step of ruling that an allegation of threatened future predatory pricing is never sufficient to give a competitor standing to challenge an acquisition." Brief for Amicus Curiae the United States and the FTC in Support of Petitioners at 10, Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (No. 85-473). The government's argument was that (1) predatory pricing schemes are rarely tried or successful, (2) competitors' motives for bringing such suits are suspect and create a presumption that a merger is procompetitive, (3) allowing competitor suits to block mergers would delay mergers and therefore frustrate efficient mergers and (4) post-merger suits for actual predatory pricing injuries are a sufficient means of enforcing section 7. See id.

84. Cargill, 479 U.S. at 122.

85. See supra text accompanying note 68.

86. See supra notes 37-40 and accompanying text.

87. See supra note 41 and accompanying text.
complementary remedies for a single set of antitrust injuries.\textsuperscript{88} The Court acknowledged the differences between antitrust standing to seek treble damages under section 4 and injunctive relief under section 16. It noted that standing under section 16, unlike section 4, poses no threat of multiple lawsuits or duplicative recoveries because """"one injunction is as effective as 100, and . . . 100 injunctions are no more effective than one.""""\textsuperscript{89} Moreover, the Court hinted that some standing factors, although relevant for section 4, may not be relevant for section 16.\textsuperscript{90} The Court also reaffirmed its position, taken in \textit{Associated General Contractors}, that a showing of antitrust injury per se will not always be sufficient to confer standing under section 4 because antitrust injury is but one of several factors to be considered in the analysis.\textsuperscript{91} The Court did not state, however, whether a showing of antitrust injury per se will always be sufficient to confer standing under section 16.

Thus, after \textit{Cargill}, target standing under section 16 is uncertain. \textit{Cargill} establishes, as a matter of law, that a showing of antitrust injury is essential for section 16 standing. However, whether a target corporation can satisfy this requirement is uncertain. Even if a target could demonstrate a threat of antitrust injury, it is uncertain how many of the other standing factors listed in \textit{Associated General Contractors}\textsuperscript{92} may apply to the section 16 standing analysis for targets, or how much weight, if any, the federal courts should give these factors. To resolve some of this ambiguity, Part III of this Note examines the narrower question: whether target corporations should be permitted to demonstrate antitrust injury

\section*{III. The Target Corporation and Antitrust Injury}

For section 16 standing, the Supreme Court's rule in \textit{Cargill} requires target corporations to demonstrate threatened antitrust injury—an injury of the type the antitrust laws were intended to prevent and an injury that flows from the unlawful nature of the defendant's acts.\textsuperscript{93} Under this rule, the target plaintiff must allege a section 7 violation and an injury that flows

\begin{itemize}
  \item \textsuperscript{88} \textit{See Cargill}, 479 U.S. at 113. The Court reasoned that it would be anomalous to grant private plaintiffs injunctions against threatened injuries for which they could not be compensated if the injuries actually occurred. \textit{Id.} at 112.
  \item \textsuperscript{89} \textit{Id.} at 111 n.6 (quoting Standard Oil, 405 U.S. at 261).
  \item \textsuperscript{90} According to the Court, the standing analysis under § 16 will not always be identical to the standing analysis under § 4. The Court explained that """"because standing under § 16 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 are not relevant under § 16."""" \textit{Id.} at 111 n.6.
  \item \textsuperscript{91} \textit{Id.} at 110 & n.5.
  \item \textsuperscript{92} For a list of these standing factors, see supra notes 60-64 and accompanying text.
\end{itemize}
from that violation, or the federal courts should deny the target standing.

This Note argues that a target corporation can establish antitrust injury when the target can demonstrate an anticompetitive harm to itself and to competition. This Note examines when a target can demonstrate antitrust injury, analyzes three recent cases that have considered target standing under section 16 and considers whether the federal courts should confer standing on all targets or, in contrast, whether the courts should adopt a per se rule against target standing under section 16. This Note rejects both of these polar rules, concluding that no mechanical, black-letter rule will ensure that targets' claims are properly adjudicated.

In seeking to enjoin a hostile tender offer under section 16, target corporations typically cite a litany of injuries, including impairment of employee recruitment, morale and performance, dislocation of management, loss of trade secrets, disruption and uncertainty in the business affairs of the corporation and irreversible changes in shareholder composition. Such injuries, however, do not constitute cognizable antitrust injuries because they do not flow from the defendant's anticompetitive acts. Instead, these injuries are concomitants of any corporate reorganization, whether caused by a merger or other change in corporate control. Such "harm"s occur regardless of the anticompetitive effects of the acquisition and therefore do not per se constitute an antitrust injury to the target. To establish antitrust injury under Cargill, the target must demonstrate an anticompetitive injury that threatens both the target and competition in the relevant market.

Most federal courts have traditionally recognized the need to limit target standing under section 16 and have viewed target suits under section 16 with suspicion. Both before and after Cargill, however, the federal courts have split on the question of target standing. Of the three federal courts that have considered target standing after Cargill, only one court has found that the target demonstrated a threat of antitrust injury.

94. See Note, supra note 30, at 1050-51 & n.78.
96. See supra note 30, at 1051.
98. See infra notes 111-15 and accompanying text.
The first post-\textit{Cargill} case considering target standing under section 16, \textit{Burlington Industries v Edelman},\textsuperscript{99} held that a target did not demonstrate a threat of antitrust injury.\textsuperscript{100} In \textit{Burlington}, a denim manufacturer sought to enjoin a takeover, claiming that the acquisition would lessen competition in the denim industry. The plaintiff, Burlington, cited as antitrust injuries the potential loss of employees, possible diversion of customers to other businesses, loss of trade secrets and loss of financial information.\textsuperscript{101} Relying on \textit{Cargill}, the court dismissed the complaint, holding that Burlington had not alleged an antitrust injury because even if there were "a lessening of competition, the plaintiff company [would] not suffer any injury that flows from the lessening of competition."\textsuperscript{102} The court reasoned that Burlington would become, after the acquisition, "a part of the very entity it claims will have a supracompetitive advantage, \textit{i.e.}, it suffers no antitrust harm."\textsuperscript{103} In short, the court reasoned that Burlington would benefit from the very effect that it claimed rendered the acquisition unlawful. Denying targets standing under section 16, the court concluded, "makes imminent [sic] sense when one views the purposes behind the antitrust laws."\textsuperscript{104}

Although this reasoning seems effectively to adopt a per se rule against target standing, the court later equivocated. The court warned that "a court should not interfere with a tender offer \textit{unless the target company dispels the inference of disingenuousness} by showing that the alleged antitrust violation would expose it to readily identifiable harm."\textsuperscript{105} The \textit{Burlington} court, however, did not provide any examples of "identifiable harm" that could constitute an antitrust injury.\textsuperscript{106}

The second post-\textit{Cargill} case to consider target standing under section 16, \textit{Burnup & Sims, Inc., v Posner},\textsuperscript{107} relied heavily on \textit{Burlington}. In \textit{Burnup & Sims}, a tender offeror moved to dismiss a target's section 7 challenge to a takeover attempt.\textsuperscript{108} The \textit{Burnup & Sims} court dismissed the target's claim in cursory fashion, concluding that "[t]he suit must be understood in its true sense, an attempt by the incumbent management to defend their own positions, not as an attempt to vindicate any public interest."\textsuperscript{109} The court also reasoned that the shareholders of target corporations would be deprived

\textsuperscript{100}. \textit{Id.}
\textsuperscript{101}. \textit{Id.} at 805.
\textsuperscript{102}. \textit{Id.} at 804-05. The acquisition would have resulted in a post-acquisition combination that controlled 33.2\% of a denim market comprised of five manufacturers. \textit{Id.} at 803-04.
\textsuperscript{103}. \textit{Id.} at 805 (emphasis in original) (quoting \textit{Carter Hawley}, 587 F Supp. at 250).
\textsuperscript{104}. \textit{Id.}
\textsuperscript{105}. \textit{Id.} at 805-06 (emphasis added).
\textsuperscript{106}. \textit{See id.}
\textsuperscript{107}. 688 F Supp. 1532 (S.D. Fla. 1988).
\textsuperscript{108}. The Court did not expressly state whether the plaintiff sought an injunction under § 16 of the Clayton Act. \textit{See id.} at 1534-35.
\textsuperscript{109}. \textit{Id.}
of the tender offer premium if the federal courts would permit targets to "create their own peculiar subjective and possibly suspect 'public interest' . . . ." 110 Unlike the Burlington court, the Burnup & Sims court adopted what is, in effect, a per se rule against target standing under section 16.

In contrast to the Burlington and Burnup & Sims courts, the Second Circuit found that a target had demonstrated a threat of antitrust injury in Consolidated Gold Fields PLC v. Minorco, S.A. 111 In Consolidated, the most recent case involving target standing after Cargill, a majority of the court held that the target plaintiff had demonstrated antitrust injury and granted the target standing to challenge the takeover under section 16. 112 The plaintiff target, the second largest gold producer in the western world, sought to enjoin a takeover attempt by Minorco, the largest gold producer in the western world. The post-acquisition combination would have controlled 32% of the western world's gold production market. 113 The Consolidated court, unlike the Burnup & Sims court, rejected the argument for a "per se rule." Even though the target plaintiff may ultimately have derived some economic benefit from the takeover, the Consolidated court found that the target would "have lost one of the vital components of competition—the power of independent decision-making as to price and output." 114 This loss of independent decision-making and the right to compete, the court concluded, constituted cognizable antitrust injuries. 115

A. The Consolidated Rule

The decisions in Consolidated, Burnup & Sims and Burlington illustrate the confusion that reigns in target standing cases under section 16. Unlike the Burnup & Sims court's per se rule against target standing, the Consolidated court's rule effectively enables every target that is threatened with a loss of control to demonstrate a threat of antitrust injury. The dissent recognized this, arguing that "the loss of independence which occurs in every merger is not the type of loss that the 'antitrust laws were intended to prevent.'" 116 The majority countered, reasoning that even if the total market share of the combining corporations were only two percent, "the target would still have standing . . . but it would lose on the merits." 117

110. Id. The Burnup & Sims court also relied heavily on Easterbrook & Fischel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155 (1982).
111. 871 F.2d 252 (2d Cir.), cert. dismissed, 110 S. Ct. 29 (1989).
112. Id. at 255.
113. See id. at 254-55.
114. Id. at 258.
115. See id. at 258-60.
116. Id. at 264 (Altimari, J., concurring in part and dissenting in part) (quoting Brunswick, 429 U.S. at 489).
117. Id. at 258 n.5 (emphasis in original).
this reasoning the majority equated antitrust injury with antitrust standing by assuming that all targets that demonstrate antitrust injury will necessarily have section 16 standing. Thus, the Consolidated court's rule, in contrast to the Burnup & Sims court's per se rule against target standing, effectively confers section 16 standing on all target corporations.

In adopting this rule, the Consolidated court failed to appreciate how targets can thwart takeovers without prevailing on the merits. As Judge Friendly explained:

Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.\[118\]

Many commentators recognize that targets often seek temporary injunctions to effectively extend the tender offer beyond the twenty-day period required by the securities laws.\[119\] Even when the target has little hope of obtaining a preliminary injunction, some courts may delay the tender offer by issuing a temporary restraining order.\[120\] Delay in a tender offer affords management more time to defeat the bid by implementing defensive measures or locating a "white knight."\[121\] These tactics increase the risk and expense of the offer, which often causes the offeror to abandon the takeover attempt.\[122\] Thus,

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120. Rosenzweig, supra note 119, at 123 & n.46; see, e.g., Scientific Computers, Inc. v. Edudata Corp., 599 F Supp. 1092 (D. Minn.) (denying a target's motion for a preliminary injunction, following the earlier grant of a temporary restraining order after finding that prior disclosure violations had been remedied), aff'd in part and dismissed in part, 746 F.2d 429 (8th Cir. 1984).
121. A white knight is a friendly acquiror who rescues the target corporation from the clutches of a hostile bidder. L. Solomon, D. Schwartz & J. Bauman, CORPORATIONS 1065 (1988). During Mobil's attempted takeover of Marathon Oil in 1981, it was reported that Marathon asked Texaco to be a white knight. Reports speculated that Texaco leaked this news to undercut the credibility of Marathon's antitrust arguments against Mobil, the potential acquiror, thereby lessening the likelihood that the Marathon litigation would produce an antitrust precedent injurious to a possible future tender offer by Texaco for a smaller competitor. See Metz, Texaco Chief Says Firm Was Approached By Bankers, Others on Marathon's Behalf, Wall St. J., Nov. 19, 1981, at 2, col. 3.
122. Rosenzweig, supra note 119, at 123-24. One empirical study conducted by Kidder, Peabody & Co. and Michigan Law Professor Michael Rosenzweig indicated that litigation is the single most effective defense used by targets to preserve their independence. This study examined a sample of fifty-three defeated hostile tender offers between 1973 and 1985 in which the target remained independent for at least one year. Target management employed defensive measures in forty-five of these cases; thirty-nine of which included litigation against the bidder. In twenty-two of these thirty-nine cases, the bidder was defeated. No other defensive measure was as successful. Id. at 127-29 & nn.71-75.
even if a target corporation ultimately loses on the merits, the target can often thwart the takeover.

Allowing targets to thwart takeovers is problematic because corporate takeovers can serve as a useful mechanism for disciplining inefficient managers. As Professor Manne has argued, the market for capital assets is also a market for corporate control in which one firm can either replace the ineffective managers of another firm or increase the productive efficiency of both firms by merging. When the managers of a target corporation delay a hostile tender offer, the target's managers frustrate this market for corporate control and deprive society of the benefits of these procompetitive efficiencies. Although some scholars have complained that Manne and other market proponents have neglected other means of disciplining inefficient managers, few, if any, commentators dispute that corporate takeovers play a legitimate and useful role in a market economy.

In short, the Consolidated court failed to account for the beneficial role of takeovers in the market and the ability of target corporations to thwart takeovers without prevailing on the merits. By effectively granting section 16 standing to all targets, the Consolidated court's rule allows target corporations to frustrate the market for corporate control and deprive society of the benefits of productive efficiencies.

If the Consolidated rule has a redeeming factor, it is that the rule recognizes that the antitrust laws can promote non-economic or populist goals as well as economic goals. The Consolidated rule holds that a "loss of independent decision-making" and the "right to compete" are cognizable antitrust injuries. Neither of these injuries necessarily involve a threat to the economic goals of promoting efficiency and consumer welfare. Thus, if an efficiency-enhancing takeover threatens populist goals, a target could

125. One of these critics, Professor Coffee, does not dispute that the market has a disciplining effect on inefficient managers. However, he does believe this effect has been exaggerated and that market proponents have neglected the role corporate fiduciary duties can play in disciplining management. Coffee, Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance, 84 COLUM. L. Rev. 1145 (1984).
126. The majority in Consolidated conceded that its rule would confer standing on all targets. See supra notes 117-18 and accompanying text. Because the majority concluded that antitrust injury is the only § 4 factor to be considered in the § 16 standing analysis, a showing of antitrust injury is sufficient for § 16 standing under the Consolidated rule. See infra note 128 and accompanying text. The majority made no effort to limit its rule to the specific facts of the case and seemed to analyze the antitrust injury question as if only two solutions existed: (1) adopt a per se rule against all target standing under § 16, or (2) construct a rule that effectively granted all targets standing under § 16. See Consolidated, 871 F.2d at 258-60.
127. For a discussion of the economic and populist goals of antitrust, see supra notes 37-40 and accompanying text.
conceivably allege a cognizable antitrust injury. However, because the Consolidated court concluded that antitrust injury is the only factor to be considered in the section 16 standing analysis, every target of a takeover attempt will have section 16 standing, even though many takeovers pose no threat to either the economic or populist goals of section 7. The Consolidated rule, therefore, could force many benign takeovers to run a gauntlet of antitrust litigation that cannot be justified on either economic or populist grounds.

By granting standing to all targets who will suffer a "loss of independent decision-making," the Consolidated rule permits targets to use section 16 to ward off corporate takeovers that pose no threat to the goals of antitrust law. Congress did not enact section 16 of the Clayton Act to be used as a routine defensive measure to thwart takeovers that serve a legitimate and essential role in disciplining inefficient corporate managers in a market economy. For a target to properly establish antitrust injury after Cargill, the target must allege an anticompetitive injury that threatens both the target and competition in the relevant market. This antitrust injury inquiry is rigorous and properly requires the federal courts to engage in a careful, fact-sensitive analysis of each case.

B. The "Per Se Rule"

The Burnup & Sims court recognized the practical realities and problems surrounding targets' section 16 suits for injunctive relief and adopted what is, in effect, a "per se rule" against target standing. In adopting this per se rule, the Burnup & Sims court embraced the sort of mechanical, inflexible approach to standing that the Supreme Court condemned in Associated General Contractors. This rule requires the federal courts to ignore the

128. In the Jeffersonian model, such a takeover would presumably have to involve "politically irresponsible corrupt giants capable of crushing smaller businessmen and of subverting democratic government." See I P Areeda & D. Turner, supra note 37, ¶ 109b, at 22. The Supreme Court has not yet articulated any bright-line tests that clearly delineate when a particular takeover poses a threat to such populist goals. Even if a target corporation could demonstrate antitrust injury on a populist theory, other standing factors, such as the need to keep the litigation within manageable limits, may militate against granting the target standing. See infra notes 140-42 and accompanying text.

129. See Consolidated, 871 F.2d at 259 & n.6. The Consolidated court misread Cargill as holding that "these other factors relevant to [a] section 4 standing analysis are not relevant under § 16." Id. at 259 n.6 (quoting Cargill, 479 U.S. at 111 n.6). The precise holding of Cargill was that "because standing under § 16 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 are not relevant under § 16." Id. (emphasis added). Thus, Cargill did not rule out the possibility that other § 4 standing factors may be relevant under § 16.

130. See supra notes 58-59 and accompanying text.
potential anticompetitive effects of an acquisition. The per se rule also fails to comport with the Supreme Court's prior holdings that the injunctive remedy for section 16, "like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Nonetheless, every federal court that has examined whether a target corporation can demonstrate antitrust injury after Cargill has considered the per se rule.

There are two justifications for the per se rule. First, as Professors Easterbrook and Fischel argue, target corporations are poor "private attorneys general" because they are beneficiaries, not victims, of any subsequent antitrust violation. They contend that takeovers benefit target corporations because the target, as a part of the post-merger combination, will a fortiori always benefit from any violation of section 7. By definition, therefore, targets cannot suffer any cognizable antitrust injury from the takeover. Second, these commentators argue, as did the Burnup & Sims court, that granting targets standing allows management to pursue its own conception of the "public interest," which may be detrimental to the target's shareholders who seek the premium from the tender offer.

The first justification for this rule—that target corporations are beneficiaries of any subsequent antitrust violation—rests on a faulty assumption. The proponents of the per se rule argue that an acquired target corporation can never suffer cognizable anticompetitive harm from a takeover because the target will merge with the acquiring firm that it alleges will enjoy a supracompetitive advantage. The assumption underlying this argument is that, in a successful takeover, targets must merge with the acquiring firm. This assumption is unwarranted. An acquiror can obtain de facto control in a partial acquisition without merging with the target. Moreover, in these partial acquisitions, a target corporation can suffer a cognizable antitrust injury without benefitting from any subsequent antitrust violation.

Bidders generally acquire a target by obtaining over fifty percent of the target's voting stock and merging with the target. However, a bidder can

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131. In Cargill the Court expressly rejected the United States' invitation to adopt a per se rule denying competitors standing to challenge acquisitions on predatory pricing theories. Cargill, 479 U.S. at 121. The Court explained, "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." Id.


133. See Consolidated, 871 F.2d at 258-59; Burnup & Sims, 688 F Supp. at 1534-35; Burlington Indus., 666 F Supp. at 804-05.


135. See id. at 1156-71.

136. See id. at 1171-78.

137. See Note, supra note 30, at 1053-54.
often exert significant influence over a target's managerial decisions by purchasing as little as fifteen or twenty percent of the target's voting stock without merging with the target. In these situations, a partial acquisition has occurred rather than a complete takeover. The target remains an "independent" competitor in the relevant market, but the target is subject to the acquiror's de facto control, and the target's assets are not combined with those of the acquiring firm. Because the target remains a competitor of the acquiror and the acquiror exerts influence over the target's managerial decisions, the acquiror may cause the target to reduce output, raise prices, retard innovation, pull competing products off the market or otherwise impair the target's competitiveness in a manner that benefits the acquiror without benefitting the target.

In the context of a partial acquisition, therefore, a target could suffer anticompetitive harm from an antitrust violation without realizing any supracompetitive benefits.

When a target corporation can allege an anticompetitive injury in a partial acquisition, the target has essentially demonstrated antitrust injury because the injury will accrue to the target plaintiff and competition. A showing of antitrust injury, however, is not necessarily sufficient for section 16 standing because some of the other factors delineated in Associated General Contractors may apply. These factors, such as the need to keep the litigation within manageable limits and the speculative nature of the injury, may militate against granting some target corporations standing under section 16. Even so, the need to limit the federal courts' intrusion into corporate

138. Id. at 1053-54. In its analysis of a § 7 violation of the Clayton Act in United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957), the Supreme Court assumed that du Pont had a substantial influence over General Motors even though du Pont owned only 23% of General Motors' shares. See id. at 588; see also United States v. General Dynamics Corp., 415 U.S. 486, 489 (1974) (parties stipulated that 34% of target company's shares amounted to "effective control"); Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 695 (2d Cir. 1973) (19% stock interest sufficient basis for control); Vanadium Corp. of Am. v. Susquehanna Corp., 203 F Supp. 686, 693-94 (D. Del. 1962) (de facto control can be obtained with 19.7% of target's stock).

139. See 1 P AREEDA & D. TURNER, supra note 37, ¶ 1203c, at 318-20. If the acquiring company is represented on the board of directors of the target, the acquiror may obtain sensitive information. Either company may lose some of its zeal to compete with the other when both are represented on the same board. Even if the acquiror is unable to elect a majority of the board, the acquiror may be able to amass a holding that is large enough to provide a nucleus for opposing or antagonizing management. See id., F & M Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 818 (2d Cir. 1979) (per curiam) (a 29% interest probably enables an acquiror to appoint directors on a target corporation's board of directors and gain "access to the confidential trade information of one of its leading competitors"). An acquiror need not acquire de facto control of a target corporation to violate the antitrust laws. See, e.g., Denver & Rio Grande W R.R. v. United States, 387 U.S. 485, 501 (1967) ("A company need not acquire control of another company in order to violate the Clayton Act.").

140. For a list of these factors see supra notes 60-64 and accompanying text. It is uncertain, after Cargill, how many of these factors may apply to target standing under § 16, or how much weight the federal courts should give these factors in their analysis. See supra notes 92 & 129 and accompanying text.
affairs and prevent targets from frustrating takeovers that discipline inefficient managers does not justify denying target corporations standing in every case. Partial acquisitions can be anticompetitive. By adopting the per se rule against target standing, the federal courts will effectively prevent target corporations from enjoining these anticompetitive takeovers.

In addition to the failure to account for anticompetitive partial acquisitions, the per se rule also undermines the private enforcement of section 7 of the Clayton Act. Only the government and private plaintiffs enforce section 7. In recent years, the Antitrust Division of the Justice Department and the Federal Trade Commission have undergone significant budget cuts and have challenged few corporate acquisitions. Thus, as the Consolidated court argued, denying targets standing “would substantially impair [the private] enforcement of the antitrust laws [because] . . . . [t]he government, with its limited resources, cannot be relied upon as the sole initiator of enforcement actions.”

The Supreme Court has long recognized that the “purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.” Competitors of the target corporation lack the incentive to enjoin an anticompetitive acquisition in an oligopolistic market because the acquisition will increase concentration in the post-acquisition market, thereby enabling the remaining competitors in the post-acquisition market to engage more easily in collusive, anticompetitive behavior. Because consumers seldom suffer sufficient damage to justify the time, cost and effort of seeking a section 16 injunction, consumer enforcement actions are rare. Also, less incentive exists for private plaintiffs to enforce section 7 through a section 16 injunctive action because, unlike under section 4, plaintiffs cannot recover treble damages. Targets, however, do have an


142. Consolidated, 871 F.2d at 260.


145. See Consolidated, 871 F.2d at 260.
incentive to protect their own interests and, therefore, are viable "private attorneys general" for section 16.

Nonetheless, Professors Easterbrook and Fischel argue that target corporations lack the "appropriate incentives" to efficiently enforce section 16 and adequately represent their shareholders.146 As an analytical matter, whether the target's motivation is to protect the job security of its management is irrelevant.147 If the federal courts carefully apply the Cargill Court's antitrust injury test to the particular facts of each case, the courts will thwart target management's routine attempts to invoke section 16 as a means of resisting a takeover or gaining leverage in the negotiation process. By requiring plaintiffs to establish antitrust injury, the Supreme Court has, in effect, greatly restricted targets' use of section 16 as a defensive ploy. Moreover, the shareholders of the target possess no legitimate claim to the premium of a tender offer that will, if successful, result in an antitrust violation. Simply put, even though the interests of the target may be more "private" than "attorney general," the federal courts are sophisticated enough to apply the antitrust injury test to the particular facts of each case and ensure that the target plaintiff adequately and efficiently represents the public interest.148

By rejecting the per se rule against target standing under section 16, the federal courts will be able to preserve both the economic and non-economic, or populist, goals of section 7. The Supreme Court's reasoning in Cargill suggests that the Court considers economic efficiency and consumer welfare the primary goals of section 7.149 By allowing targets to demonstrate antitrust injury and granting targets standing in acquisitions that threaten efficiency and consumer welfare, the federal courts can preserve these economic goals that underlie section 7. Similarly, by allowing targets to demonstrate antitrust injury and granting targets standing when a particular acquisition threatens populist goals, the federal courts can guard against inordinate concentrations of wealth and political power.

In short, the federal courts should allow target corporations to demonstrate antitrust injury. By rejecting the per se rule, the federal courts will not enshrine any particular economic theory in antitrust law or exclude other legitimate objectives of section 7 that are commonly valued. Because target corporations can suffer antitrust injury without realizing any benefits from an antitrust violation, targets should be permitted to enforce section 16 as "private attorneys general." Until the Supreme Court clearly delineates the underlying goals of section 7, the federal courts' analysis of targets'

146. See Easterbrook & Fischel, supra note 134, at 1166-78.
147. The Consolidated court found that the question of Gold Fields' motivation for bringing the suit was irrelevant to the question of standing. Consolidated, 871 F.2d at 259.
148. See Note, supra note 30, at 1057.
149. See supra notes 85-87 and accompanying text.
section 16 claims will necessarily involve a balancing of the varied, and sometimes conflicting, objectives of section 7.

CONCLUSION

The federal courts should not permit target corporations to use section 16 of the Clayton Act as a routine ploy to thwart hostile takeovers that pose no threat to antitrust concerns. Corporate takeovers play a legitimate and essential role in disciplining inefficient management in a market economy. By requiring that private plaintiffs demonstrate a threat of antitrust injury, the Supreme Court has effectively limited target corporations' routine use of section 16 as a defensive ploy. Antitrust injury is a rigorous test that requires the federal courts to engage in a careful, fact-sensitive analysis. Because of the varied and often competing interests in corporate takeovers, no black-letter rule of standing will ensure that target corporations' section 16 claims are properly adjudicated. Rather, only a multi-factored, fact-sensitive approach, which requires the federal courts to balance the relevant standing factors delineated in Associated General Contractors, will ensure that targets' claims are properly adjudicated. Until the Supreme Court clearly delineates the underlying goals of section 7, the adjudication of section 16 will necessarily involve a balancing of the varied, and sometimes conflicting, objectives of section 7.