Duke Law Journal Online

VOLUME 68 APRIL 2019

Note

COLLATERAL DAMAGE: PRIVATE MERGER LAWSUITS IN THE WAKE OF SECTION 2'S CONTRACTION

PAUL F. BRZYSKI†

ABSTRACT

For over 100 years, the Clayton Act has ostensibly prohibited anticompetitive mergers and acquisitions. Yet, as fears of market concentration and market power grow, it seems high time for a boost in enforcement. Armed with statutory causes of action for injunctive relief and treble damages, private plaintiffs could provide that needed boost. However, these plaintiffs face an unexpected hurdle to enforcing the merger laws: section 2 of the Sherman Act.

This Note argues that the narrowing of liability under section 2 over the past three decades has had a collateral impact on private plaintiffs'—especially rival firms'—ability to satisfy the antitrust injury requirement to challenge an anticompetitive merger. The 1986 Supreme Court decision in Cargill, Inc. v. Monfort of Colorado, Inc. *requires plaintiffs to allege that newly merged firms will act anticompetitively in a way that injures the plaintiffs. To make such allegations successfully, plaintiffs must rely on accepted theories of antitrust liability, which will*

† Duke University School of Law, J.D. expected 2019; College of William & Mary, B.A. 2014. Thank you to Professor Barak Richman for guidance throughout this process, Professor Christopher Sagers at Cleveland-Marshall College of Law for invaluable feedback on an early draft, and my colleagues on the *Duke Law Journal* for their hours of work editing this piece. All errors are my own.

often sound in the predatory behaviors prohibited by section 2. But as section 2 has shrunk, so too has the ability to challenge the merger.

INTRODUCTION

Disdain for market power has deep roots in American history.[1] Market power has a corrosive effect on society. It exacerbates inequality[2] and makes society more exclusive.[3] And when taken too far, market power even erodes democracy.[4] Alarmed by the degree of market power wielded by monopolists in the late nineteenth and early twentieth centuries,[5] Congress passed two landmark antitrust laws—the Sherman Antitrust Act of 1890[6] and the Clayton Act of 1914.[7] The Sherman Act has only two short sections, the second of which (hereinafter, "section 2") is devoted to preventing monopolistic unilateral behavior.[8] Put differently, section 2 prohibits anticompetitive behavior by a single firm.[9] In addition to the Sherman Act's general prohibitions on anticompetitive conduct, section 7 of the Clayton Act specifically prohibits business combinations—mergers and acquisitions—that "substantially lessen competition" or "tend to

1. *Cf., e.g.*, FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 18 (3d ed. 1990) (arguing that "[l]imiting the power of both government bodies and private individuals to make decisions that shape people's lives was a fundamental goal of the men who wrote the U.S. Constitution" and citing James Madison as an example).

2. *See* Jason Furman & Peter Orszag, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 2–3 (Oct. 16, 2015) (unpublished manuscript), http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf [https://perma.cc/4RBK-5C2F] (explaining different ways increased rents can impact inequality); *see also* Eric Posner & Glen Weyl, *The Real Villain Behind Our New Gilded Age*, N.Y. TIMES (May 1, 2018), https://www.nytimes.com/2018/05/01/opinion/monopoly-power-new-gilded-age.html [https://perma.cc/3M32-L2GJ] ("Market power both reduces growth and increases inequality.").

3. Daron Acemoglu & James A. Robinson, *Is This Time Different? Capture and Anti-Capture of U.S. Politics*, 9 ECONOMISTS' VOICE, no. 3, Mar. 2012, DOI: 10.1515/1553-3832.1902, PDF at 2 (noting that monopoly "exclud[es] people from profitable economic opportunities").

4. *See* Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSP., Summer 2017, at 113, 113 (stating that large corporations have "enough money to capture . . . a majority of the elected representatives").

5. *See* LAWRENCE A. SULLIVAN, WARREN S. GRIMES & CHRISTOPHER L. SAGERS, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 5 (3d ed. 2016) ("Chief among [the goals of the Sherman Act] was to prevent the high prices associated with monopoly and cartel activity . . . .").

6. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended in scattered sections of 15 U.S.C.).

7. Clayton Act of 1914, ch. 323, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C.).

8. 15 U.S.C. § 2 (2012).

9. *Id.* § 1.

create a monopoly."[10] Contemplating vigorous enforcement and compensation to those injured by violations, the antitrust laws provide a private right of action as part of their remedial scheme, allowing injured firms to sue for both damages and injunctive relief.[11]

In theory, mergers can benefit consumers by generating efficiencies through economies of scale and vertical integration.[12] But mergers also risk harming competition and consumers by giving firms increased power in the marketplace to raise prices, control the inputs of production, and stifle competitors.[13] The effect of mergers in the U.S. has been, at best, a mixed bag, suggesting that the U.S. has gone too far in its embrace of business combinations.[14] There is compelling empirical evidence that frequent mergers have led to increased market concentration—the degree to which a small number of firms control a relevant market. And economic theory suggests that increased market power accompanies higher levels of market concentration.[15]

One recent study found that market concentration increased in 75 percent of industries in the U.S. over the last twenty years.[16] Unsurprisingly, firm profitability increased in industries in which market concentration increased, but only as a result of a firm's ability to "extract higher profit margins" through price markups, rather than as a result of increased efficiency.[17] Another recent paper measured the merger and acquisition ("M&A") effects in U.S. manufacturing industries and found an increase in price markups with "little

10. *Id.* § 18.

11. *Id.* §§ 15(a), 26.

12. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 668–70 (5th ed. 2016) [hereinafter HOVENKAMP (5th ed. 2016)] (explaining how the competitive dynamics of mergers have the potential to be both efficiency-enhancing and anticompetitive).

13. *See id.*

14. *See* Robert Pitofsky, *Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 233, 233–34 (Robert Pitofsky ed., 2008) [hereinafter CHICAGO SCHOOL] (summarizing Baker & Shapiro, *infra* note 35, as arguing that the antitrust enforcement in the U.S. had been inadequate).

15. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 3 (2010) ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power . . . ."); *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 109–10 (1st ed. 1994) [hereinafter HOVENKAMP (1st ed. 1994)] (explaining how market share can be used as a proxy for market power, all else equal).

16. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, REV. FIN. (forthcoming) (manuscript at 2), https://ssrn.com/abstract=2612047 [https://perma.cc/CKX3-WZN4].

17. *Id.* at 3.

evidence" of "efficiency gains."[18] Other analyses demonstrate similar results.[19] Further, increased market concentration is not just bad for consumers; it hurts workers as well. More concentrated industries carry a lower labor share of output,[20] which is the part of "economic output that accrues to workers as compensation in exchange for their labor."[21]

Against this empirical backdrop, it is critical to identify and remove impediments to robust enforcement of the merger laws. In the context of private suits, one barrier to effective enforcement is the connection between the antitrust injury doctrine and section 2 of the Sherman Act drawn by the Supreme Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*[22] In addition to meeting the general requirements for Article III standing, private plaintiffs must also satisfy a set of special, prudential standing doctrines created by the Supreme Court, collectively known as "antitrust standing."[23] One such requirement is that a plaintiff must demonstrate that they suffered an "antitrust injury."[24] An antitrust injury is an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[25] That is, the plaintiff's theory of injury must derive directly from the anticompetitive characteristics of the defendant's conduct.[26]

---

18. Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 5 (Fin. & Econ. Discussion Series Divs. of Research & Statistics & Monetary Affairs Fed. Reserve Bd., FEDS Working Paper No. 2016-082, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852716 [https://perma.cc/484T-VNFL].

19. *See, e.g.*, *Corporate Concentration: The Creep of Consolidation Across America's Corporate Landscape*, ECONOMIST (Mar. 24, 2016), https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration [https://perma.cc/UJ33-8W6S] (noting increased market concentration in the U.S.); Orley C. Ashenfelter, Daniel Hosken & Matthew C. Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers* 18 (Nat'l Bureau of Econ. Research, Working Paper No. 19939, 2014), https://ssrn.com/abstract=2403663 [https://perma.cc/H4JB-74UL] (surveying forty-nine academic studies that review merger effects and noting that thirty-six of them "find evidence of merger induced price increases").

20. Simcha Barkai, *Declining Labor and Capital Shares* 8 (2017) (unpublished Ph.D. dissertation, London Business School), http://home.uchicago.edu/~barkai/doc/BarkaiDecliningLaborCapital.pdf [https://perma.cc/WD64-EJCU].

21. Michael D. Giandrea & Shawn A. Sprague, *Estimating the U.S. Labor Share*, BUREAU LAB. STAT. (Feb. 2017), https://www.bls.gov/opub/mlr/2017/article/estimating-the-us-labor-share.htm [https://perma.cc/6RKK-8V2F].

22. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

23. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 812–13 (listing the three antitrust standing requirements: (1) that the plaintiff suffered an injury, (2) that the injury is an "antitrust injury," and (3) "that [the] injur[y] w[as] caused by the antitrust violation").

24. *See infra* Part II.

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

26. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990).

In *Cargill*, the Court established a narrow antitrust injury standard for a competitor-plaintiff challenging a rival firm's anticompetitive merger. Instead of asking whether the merger itself reduced competition in a way that might injure the plaintiff, the Court focused its antitrust injury analysis on the hypothesized post-merger conduct of the new entity, asking whether the new entity would itself act anticompetitively.[27]

By focusing the antitrust injury inquiry on the speculated conduct of the merged entity, the Court effectively forced a plaintiff challenging a merger to identify two antitrust violations in order to have standing. First, the plaintiff must allege that the merger is anticompetitive; and second, the plaintiff must allege that the new firm will act anticompetitively in a way that injured or will injure the plaintiff.[28] Because the second theory of injury will turn on the conduct of the new firm—a single entity—a competitor-plaintiff will often rely on section 2 of the Sherman Act.[29]

However, in the thirty years since *Cargill* was decided, the Court has significantly narrowed the scope of section 2 liability. Today, it is very difficult for a firm to seek refuge in the antitrust laws against a rival firm that is acting anticompetitively.[30] In three cases,[31] the Court has cast doubt on a competitor-firm's ability to seek redress in the antitrust laws by all but eliminating a duty to deal with one's rivals, narrowing the definition of predatory pricing, and generally viewing claims of monopolistic behavior skeptically.[32]

By narrowing the scope of anticompetitive behavior under section 2, the Court has decreased plaintiffs' ability to show that post-merger firms will act anticompetitively. This has effectively cut out competitors from the statutory right of action to challenge anticompetitive mergers.[33] In light of this doctrinal narrowing, mounting evidence that business combinations are frequently anticompetitive, and rising levels of market concentration in the U.S., the Court should overturn the *Cargill* decision.

---

27. *Cargill*, 479 U.S. at 114–15; *see also infra* Part II.A (discussing *Cargill*).

28. *See infra* text accompanying note 55; *infra* Part II.B.

29. *See infra* Part IV.

30. *See infra* Part III.

31. Pac. Bell Telephone Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 442 (2008); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

32. *See infra* Part III.B.

33. *See infra* Part IV.

This Note proceeds in five parts. Part I reviews the merger enforcement landscape in the U.S., noting decreased levels of public enforcement. Part II discusses the *Cargill* decision and antitrust injury in the merger context. Part III reviews section 2 and examines the three cases since *Cargill* that narrow antitrust liability, focusing in particular on a competitor's new inability to use section 2 to protect itself. Part IV analyzes the interaction between section 2 and the antitrust injury doctrine, discussing how the narrower scope of section 2 collaterally impacts private merger challenges. Finally, Part V argues that the Court should both overrule the *Cargill* decision and reexamine the antitrust injury doctrine covering mergers.

I. THE MERGER ENFORCEMENT LANDSCAPE

With the rise in market concentration and its associated effects, it is worth asking why the nation's most powerful antitrust enforcers, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), have not been more aggressive in enforcing the Clayton Act's prohibition against anticompetitive mergers.[34] Enforcement of the merger laws by the FTC and DOJ has notably declined since the Reagan administration.[35] This Note acknowledges the decline in enforcement and suggests three potential explanations. First, antitrust law is becoming increasingly international; the FTC and DOJ now have the difficult job of policing international price cartels.[36] Second, general resource constraints caution against bringing lawsuits where the government might lose. Third and finally, merger challenges have been treated more skeptically by the courts, a possible indication that substantive merger law has changed.[37]

---

34. *See* F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* CHICAGO SCHOOL, *supra* note 14, at 30, 36 (noting the "significant backtracking in antitrust precedents and enforcement").

35. Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* CHICAGO SCHOOL, *supra* note 14, at 235, 244–51; Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28, 29–30 (2012).

36. JOHN M. CONNOR, GLOBAL PRICE FIXING 419–24 (2d ed. 2007).

37. For examples of where the courts have been overly critical of merger challenges, see Jonathan S. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST, no. 3, Summer 2008, at 29, 32 (first citing United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990); and then citing United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1106 (N.D. Cal. 2004)). *See also* SULLIVAN ET AL., *supra* note 5, at 467 ("[T]he law of merger and acquisition has become much more permissive in the past few decades . . . .").

In light of the Clayton Act's strong statutory authorization for private enforcement,[38] private merger lawsuits could be part of the solution to addressing increased market concentration. And yet, private challenges to mergers are infrequent.[39] The prevailing attitude among practitioners is that private antitrust lawsuits represent only a slight risk during merger negotiations.[40] Depending on the plaintiff's status as a market participant (competitor, consumer, etc.), the two major concerns with private party enforcement are scope and incentives. The language of the Clayton Act is quite broad, granting a private right of action to "[a]ny person"[41] injured by an antitrust violation. Accordingly, courts worry about overenforcement, excessively complex litigation, and an endless number of potential plaintiffs.[42] There is also a fear that competitors will abuse the antitrust laws for selfish ends,[43] challenging mergers when they anticipate that the merged entity will gain an efficiency advantage.[44]

---

38. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 129 (1986) (Stevens, J., dissenting) ("Effective enforcement of the antitrust laws has always depended largely on the work of private attorney generals, for whom Congress made special provision in the Clayton Act itself."); *see also* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement*, 94 MICH. L. REV. 1, 11 (1995) ("The antitrust statutes contain exceptionally powerful private remedies, comparable in scope and effect to the remedies available under public enforcement.").

39. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 671 (noting "the relatively small number of merger cases brought by private plaintiffs"); *see also* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 916 (2d ed. 2011) ("[P]rivate parties rarely seek to challenge a merger that the agency has cleared."); SULLIVAN ET AL., *supra* note 5, at 479 ("Neither the states nor private plaintiffs have ever been especially prominent in merger enforcement . . . ."); Org. for Econ. Co-operation and Dev. [OECD], *Working Party No. 3 on Co-operation and Enforcement: Relationship Between Public and Private Antitrust Enforcement*, at 6, DAF/COMP/WP3/WD(2015)11 (June 9, 2015), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)11&docLanguage=En [https://perma.cc/598E-T3DF] ("Private merger litigation is possible, but unusual.").

40. *Cf.* M. Sean Royall & Adam J. Di Vincenzo, *When Mergers Become a Private Matter: An Updated Antitrust Primer*, 26 ANTITRUST, no. 2, Spring 2012, at 41, 41 (observing that "antitrust merger challenges launched by private parties . . . [are] infrequent and often unsuccessful").

41. 15 U.S.C. §§ 15(a), 26 (2012).

42. *Cf.* Illinois Brick Co. v. Illinois, 431 U.S. 720, 739–41 (1977) (describing joinder of all the potential lawsuits as "impractical" in a case that limited enforcement of the antitrust laws to indirect purchasers).

43. *See* Brodley, *supra* note 38, at 48 ("Some commentators have joined the negative chorus, asserting that competitors in antitrust cases are almost always wrongly motivated.").

44. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners, Cargill Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (No. 85-473), 1986 WL 727374, at *9–12.

Although consumers are the ideal plaintiffs to bring suits challenging anticompetitive mergers,[45] the stark reality is that their individual interests are simply too small to warrant litigation.[46] Moreover, consumers are often concerned with short-term price decreases, whereas the price increase following a merger may occur only over a longer time horizon.[47] Thus, rival firms are better situated than consumers to challenge mergers as private plaintiffs—holding a competitive stake in a specific market makes them more attentive to the impact of a merger.[48]

Fears about competitors as plaintiffs are overblown for several reasons. First, because horizontal mergers increase concentration and thus the potential for collusion,[49] a competitor challenging a horizontal merger between rivals might fear retaliation for refusal to participate in the collusive behavior.[50] Additionally, competitors might also reasonably fear that a vertical merger will exclude them from vital upstream inputs or downstream markets, perhaps eventually forcing them out of business.[51] Given the narrowing of section 2 liability,[52] such fears are not without merit. Because rival firms possess the financial incentives and industry knowledge to mount viable challenges to anticompetitive mergers,[53] and because private enforcement is part of the antitrust laws' remedial scheme, obstacles should be cleared away. One of these obstacles, discussed below, is the antitrust injury framework laid out in the Supreme Court's decision in *Cargill*. In tandem with the Court's increasingly narrow interpretation of section 2, the *Cargill* decision hinders private enforcement by making it difficult to satisfy antitrust standing requirements.

45. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115, 2117 (2015) ("Consumers, by contrast, are, in some sense, the perfect antitrust plaintiffs. They are the intended beneficiaries of the competitive markets that antitrust policy seeks to encourage . . . .").

46. *See* Brodley, *supra* note 38, at 36–37 (describing how consumers lack both the sufficient monetary incentive to justify litigation and the understanding of the industry to pursue litigation).

47. *Id.*

48. *See id.* at 47 ("As compared with other business litigants, competitors are generally the best-placed firms to pursue merger litigation.").

49. *See* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1603 (1969) ("Collusion is more difficult in a market that has a large number of sellers than in one with relatively few . . . .").

50. Brodley, *supra* note 38, at 49.

51. *See infra* Part IV.

52. *See infra* Part III.

53. *See* Brodley, *supra* note 38, at 50 (providing extensive analysis of the capabilities, incentives, and considerations of competitors as plaintiffs to challenge mergers).

II. A FAILED APPROACH TO MERGER ANTIRUST INJURY

Private antitrust plaintiffs must show an antitrust injury—one derived directly from the anticompetitive aspects of the defendant's conduct.[54] When a competitor-plaintiff challenges a merger involving its rival, the Court has held that the question of antitrust injury is not whether the merger is anticompetitive, but rather whether the *post-merger firm* will behave in a way that is anticompetitive. As a result, the plaintiff must essentially allege two antitrust violations: (1) the anticompetitive merger and (2) speculated anticompetitive conduct of the new firm.[55] Frequently, this second theory will be brought under section 2 of the Sherman Act,[56] which prohibits anticompetitive unilateral conduct by making it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States."[57] Using section 2 makes sense, given that the plaintiff, who has to consider how the new, merged firm will act, will rely on theories of anticompetitive behavior that involve a single firm.

A. The Creation of Antitrust Injury for Mergers

The genesis of the Court's antitrust injury doctrine involved a challenge to an acquisition. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[58] the plaintiffs, operators of bowling alleys, sued for damages for lost income when the defendant, the nation's largest bowling alley operator, acquired failing bowling alleys within the plaintiff's market.[59] Rather than close the beleaguered alleys, the defendant kept them open, depriving the plaintiffs of the increased profits and market power they would have enjoyed had the alleys been shuttered.[60] In deciding the case, the Court reasoned that the purpose of the antitrust laws is to protect competition. And by saving the failing bowling alleys, the acquisition actually *preserved* competition by maintaining the number of market participants. Thus, the plaintiffs did not suffer an injury for which the antitrust laws would provide relief.[61] The Court held that, in

54. *See supra* note 26 and accompanying text.
55. *See infra* Part II.B.
56. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 671 ("Nevertheless, in the relatively small number of merger cases brought by plaintiffs, the underlying rationale is most often exclusionary practices such as predatory pricing." (citation omitted)).
57. 15 U.S.C. § 2 (2012).
58. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).
59. *Id.* at 479.
60. *Id.* at 481.
61. *Id.* at 488.

order to bring a valid claim, a plaintiff must show an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[62]

In 1986, the Court, in a seminal moment, extended the antitrust injury doctrine to injunctive lawsuits challenging mergers in *Cargill, Inc. v. Monfort of Colorado, Inc.*[63] The nation's fifth largest beef packer, Monfort, sued to enjoin a merger between the second and third largest beef packers.[64] The Court began its analysis by comparing the difference in language between sections 4 and 16 of the Clayton Act.[65] On one hand, section 4 sets out the private right of action for damages under the antitrust laws and requires a plaintiff to allege an actual injury to "business or property."[66] On the other hand, section 16 provides the right of action for an injunctive suit, which requires only a "threatened" injury.[67] The Court held that both provisions require the showing of an injury or threatened "injury of the type the antitrust laws were designed to prevent."[68]

The Court then rejected both of Monfort's alleged threatened antitrust injuries that would result from the merger.[69] As for the first theory, Monfort argued that the merger would increase the efficiency of the merged firm, thus enabling it to lower prices and gain additional market share.[70] In turn, Monfort would have to lower its own prices and, therefore, would suffer an injury in the form of lost profits.[71] The Court rejected this theory. Relying on *Brunswick*, the Court stated that this argument amounted to a complaint of increased price competition—a type of business behavior the antitrust laws were enacted to preserve.[72]

Monfort's second theory was that the merged firm would engage in predatory pricing—valuing goods below cost in order to drive its

---

62. *Id.* at 489.

63. Cargill Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 106–07 (1986); *see also* Brodley, *supra* note 38, at 5 ("The *Cargill* decision is notable . . . because the Court applied the antitrust injury doctrine to a merger injunction action.").

64. *Cargill*, 479 U.S. at 106–07.

65. *Id.* at 110–11 (citing 15 U.S.C. §§ 15, 26 (2012)).

66. *Id.* at 111 (citing 15 U.S.C § 15(a)).

67. *Id.*

68. *Id.* (citation omitted).

69. *Id.* at 114.

70. *Id.*

71. *Id.* at 115.

72. *Id.* at 115 (citing Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

competitors out of business.[73] The Court found that the allegation of predatory pricing was a viable theory of antitrust injury but ultimately rejected the plaintiff's claim because it had not properly alleged a credible threat of predatory pricing and therefore did not have standing.[74]

In a dissent joined by Justice White, Justice Stevens criticized the majority for what he perceived as an ill-advised approach to antitrust injury for injunctive suits challenging mergers.[75] Specifically, the dissent criticized the Court for focusing entirely on the alleged post-merger behavior of the new, merged entity instead of the more proximate question of whether the merger itself would damage competition.[76] In Stevens's view, "[w]hen the proof discloses a reasonable probability that competition will be harmed as a result of a merger, [the Court should] also conclude that there is a reasonable probability that a competitor of the merging firms will suffer some corresponding harm in due course."[77]

The dissent distinguished *Brunswick* in several ways. First, *Brunswick* dealt with a damages claim under a separate section of the Clayton Act where the plaintiff must prove an actual injury.[78] Second, and more critically, the facts of the merger were completely different. *Brunswick* involved an acquisition that buoyed competition by keeping suppliers open, thereby denying the plaintiffs the market power that they would have accrued absent the merger.[79] In *Cargill*, by contrast, the merger reduced the number of market participants and therefore reduced competition. The dissent also focused closely on the specific language and legislative history of sections 7 and 16 of the Clayton Act, which revealed Congress's intent to provide a broad scope of injunctive relief.[80] The dissent concluded by observing that Congress's intent to have vigorous private enforcement was reaffirmed just ten years before *Cargill*, when Congress authorized recovery of plaintiff's attorney's fees.[81] Taken as a whole, the dissent expressed confidence that

---

73. *Id.* at 117. *Predatory Pricing*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "predatory pricing" as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run").

74. *Cargill*, 479 U.S. at 119.

75. *Id.* at 122–29 (Stevens, J., dissenting).

76. *Id.* at 122–23.

77. *Id.* at 128–29.

78. *Id.* at 128.

79. *Id.*

80. *Id.* at 125–26.

81. *Id.* at 129.

Congress wanted anticompetitive mergers enjoined, and that the Court had no business erecting additional barriers obstructing that goal.[82]

B. The Trouble with Antitrust Injury in Merger Suits

The Court's decision in *Cargill* largely divorces the question of antitrust injury from the existence of an illegal merger. A merger might "substantially lessen competition" or "tend to create a monopoly" and, therefore, be illegal.[83] Yet *Cargill* only permits private plaintiffs to challenge the illegal merger if they can sufficiently allege that the post-merger firm will act in an anticompetitive way that injures them.[84] The Court has consistently maintained this antitrust injury approach in other areas of antitrust law; even if there is an antitrust violation, and even if the plaintiff is injured indirectly by the violation, the plaintiff will not have standing unless the injuries flow directly from the characteristics of the violation that make it illegal.[85] The reasons for this doctrine are understandable—it helps align private remedies with the underlying goals of antitrust[86] and ensures that antitrust laws are not being used, as in *Brunswick*, to compensate businesses for losses resulting from competition.[87]

The particular problem with the antitrust injury framework, in the merger context, is that it effectively asks the plaintiff to allege *two separate* antitrust violations by the defendant. A plaintiff must allege not only that the merger is anticompetitive, but also that the merged entity is likely to violate antitrust laws in a way that harms the plaintiff. The Court in *Cargill* may not explicitly have held that the plaintiff needed to identify by name an antitrust violation that the merged entity would commit; however, the practical effect of the decision is to force

82. *Id.* at 122–29.

83. 15 U.S.C. § 18 (2012).

84. *See Cargill*, 479 U.S. at 115–19 (explaining that the competitor-plaintiff did not allege an antitrust injury sufficient to challenge an anticompetitive practice because it did not sufficiently allege a credible claim of future predatory pricing by the merged firm).

85. For cases analyzing the antitrust injury in, for example, price-fixing schemes, see *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (holding that even though the defendant's conduct violated substantive antitrust law as an illegal price-fixing scheme, the competitor-plaintiff did not suffer an antitrust injury because the plaintiff's injuries did not flow from the anticompetitive aspects of the defendant's conduct); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (explaining that even if there was a conspiracy to fix prices between Japanese television manufacturers, plaintiffs, who were American television manufacturers, would not have suffered an antitrust injury because they would have benefitted from the conspiracy).

86. John E. Lopatka & William H. Page, *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829, 832 (2001).

87. *Id.*

courts to compare the alleged post-merger conduct against theories of Sherman Act violations.[88] Indeed, the lower courts, when analyzing competitor standing in merger lawsuits, compare alleged post-merger conduct against recognized antitrust violations.[89]

This subsequent violation can be alleged under a collusive or unilateral theory in violation of sections 1 or 2, respectively.[90] But in either case, the ability to challenge the merger's competitiveness depends on the scope of liability for the subsequent antitrust violation.[91] And for section 2, the scope of liability has been dramatically narrowed.

III. IN THE SHADOW OF *CARGILL*: A CHANGE IN SECTION 2 JURISPRUDENCE

Prior to the late 1980s, the Court embraced a broader theory of how firms can run afoul of section 2. In the years following *Cargill*, however, the Court has tightened liability for monopolistic conduct under section 2. In three particular cases, the Court has cast a shadow of skepticism over a competitor-firm's ability to seek refuge under the antitrust laws for highly aggressive conduct by its rival.

A. *Robust Section 2 Liability in the Pre-*Cargill *Era*

Section 2 of the Sherman Act prohibits anticompetitive unilateral conduct by making it illegal to "monopolize, or attempt to monopolize

88. *Cargill*, 479 U.S. at 122–23 (Stevens, J., dissenting) (describing the Court's approach as "deny[ing] relief unless the plaintiff can prove a violation of the Sherman Act").

89. *See, e.g.*, Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1035 (9th Cir. 2001) (denying standing to a competitor suing for damages after a merger because the plaintiffs could not show that the below-cost prices charged met the standard for predatory pricing); R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 111 (2d Cir. 1989) (holding that a competitor had standing to enjoin a merger where it was alleged that the merged firm would have monopoly power and would eliminate competition by foreclosing downstream channels to the plaintiff); Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 100–01 (5th Cir. 1988) (denying standing because the plaintiffs had only alleged that the merged firm would sell below cost, not that it would act predatorily); Novation Ventures, LLC v. J.G. Wentworth Co., LLC, 156 F. Supp. 3d 1094, 1102 (C.D. Cal. 2015) (denying standing because plaintiff did not adequately plead facts that the merged entity foreclosed the plaintiff from competing in the market); Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 320 (D.D.C. 2011) (holding the plaintiffs had standing to enjoin a merger after alleging that the merged firm's monopsony power would allow it to foreclose the market to inputs).

90. *See* ELHAUGE & GERADIN, *supra* note 39, at 12 (explaining that section 1 of the Sherman Act addresses anticompetitive and collusive agreements between market participants while section 2 of the Sherman Act addresses anticompetitive conduct by a single firm).

91. *See infra* Part IV.

. . . any part of the trade or commerce among the several States."[92] Monopolization has been interpreted to require that a firm have "monopoly power in the relevant market" and engage in some conduct that is considered anticompetitive.[93] These two elements, power and conduct, present challenges. The market power element is difficult because it is not always clear what constitutes the relevant market.[94] Once the market is defined, though, both economic theory[95] and evidence[96] strongly suggest that market power is more likely to exist in highly concentrated markets. The conduct element has also been particularly perplexing for courts because it is often difficult to distinguish between normal competitive business practices—which are encouraged in a free market system—and anticompetitive ones.[97]

Because distinguishing between normal business competition and anticompetitive practices is challenging, many of the Court's section 2 cases have involved attempts by firms to exclude rivals from the market.[98] Until recently, the Court used a broader interpretation of section 2 liability in these cases.[99] Indeed, *Cargill* was decided just one year after *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[100] which represented this more robust interpretation.[101]

The suit at issue involved four ski mountains in Colorado.[102] The defendant owned three of the four mountains, having acquired one

92. 15 U.S.C. § 2 (2012).

93. ELHAUGE & GERADIN, *supra* note 39, at 265.

94. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956) (analyzing whether the relevant market was defined as cellophane or more broadly as "flexible packaging materials").

95. *See, e.g.*, *supra* note 15 and accompanying text; HOVENKAMP (5th ed. 2016), *supra* note 12, at 109–10 (explaining how market share can be used as a proxy for market power, all else equal); ELHAUGE & GERADIN, *supra* note 39 at 997–1002 (defining how horizontal mergers can allow a firm to exercise market power).

96. *See supra* notes 16–21 and accompanying text (reviewing empirical studies that demonstrate market power exists in concentrated markets).

97. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 9 (2008) ("Competitive and exclusionary conduct can look alike . . . making it hard to distinguish conduct that should be deemed unlawful from conduct that should not.").

98. ELHAUGE & GERADIN, *supra* note 39, at 345.

99. *See* Robert Pitofsky, *Chicago School and Dominant Firm Behavior*, *in* CHICAGO SCHOOL, *supra* note 14, at 107 ("One of the most remarkable developments in recent years is hostility to section 2 enforcement by conservative scholars and in language in judicial decisions.").

100. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

101. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–10 (2004) (describing *Aspen Skiing* as "at or near the outer boundary of § 2 liability" and as a "limited exception" where liability can be imposed for refusal to deal with competitors).

102. *Aspen Skiing*, 472 U.S. at 587–90.

from a separate company,[103] while the plaintiff owned the fourth.[104] The two companies originally coordinated to create an "all-Aspen ticket" that gave guests a convenient way to ski all four mountains, allocating revenues between the companies accordingly.[105] The option was widely popular among consumers.[106] After taking a series of steps to reduce cooperation, however, the defendant eventually discontinued participation in the "all-Aspen Ticket" altogether.[107] The plaintiff's revenues declined sharply as a result of not being able to offer its guests convenient access to all four mountains.[108]

The Court affirmed a jury verdict finding the defendant liable for illegal monopolization under section 2.[109] In reaching its decision, the Court used a deferential standard of review and was keen to not disturb the jury's conclusions.[110] Routinely referring to the defendant as "the monopolist," the Court admonished business strategies that were not based on either improving goods or lowering costs.[111] The Court ultimately found it critical that the defendant offered no legitimate business decision for the refusal to deal except for the "perceived [negative] long-run impact on its smaller rival."[112]

At the time *Cargill* was decided, the Court may have understood *Aspen Skiing*—then a fresh decision—as preserving a broad scope conception of section 2 liability. Instead, *Aspen Skiing* was a high-water mark.

B. Strangling Section 2

Since *Aspen Skiing* and *Cargill*, the Court has issued a series of decisions that greatly narrow liability under section 2. Because the Court takes so few antitrust cases, each case casts a wide shadow and

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 591 ("By 1977, multiarea tickets accounted for nearly 35% of the total market.").

107. *Id.* at 593–94.

108. *Id.* at 594–95.

109. *Id.* at 611.

110. *Id.* at 604–05.

111. *See id.* at 605 ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."); *see also id.* at 596 (quoting the trial court's instructions to the jury to distinguish "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other" (citation omitted)).

112. *Id.* at 611–12.

holds outsized influence.[113] Thus, in just three cases, the Court has dramatically limited the scope of liability under section 2. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[114] the Court made predatory pricing harder to prove. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[115] the Court confined *Aspen Skiing* to its facts and spoke strongly of the virtues of unbridled competition with little regard for the traditional worries of monopoly power. And finally, in *Pacific Bell Telephone Company v. Linkline Communications, Inc.*,[116] the Court employed formalist reasoning to reject price-squeezing as an antitrust violation. These decisions, taken together, greatly narrow the scope of liability under section 2.

In *Brooke Group*, the Court affirmed a decision to set aside a jury verdict that found liability for predatory pricing during price wars in the tobacco industry.[117] Predatory pricing can be measured using different metrics,[118] but, at its core, predatory pricing occurs when a firm prices below its costs in order to force a rival out of business. By lowering prices in the short term, the firm will be able to raise prices in the long run with less competition.[119] Because the predatory firm must forgo some short-term profits—and take on the risk that the scheme will fail—the Court has come to believe that "predatory pricing schemes are rarely tried, and even more rarely successful."[120] Furthermore, courts have been extremely hesitant to find liability for predatory pricing as lower prices are beneficial to consumers and often result from vigorous price competition.[121] The *Brooke Group* Court continued to enforce the rule that a plaintiff must show that the

113. *See* R. Hewitt Pate, Assistant Attorney General, Antitrust Div., U.S. Dep't Justice, Antitrust Law in the U.S. Supreme Court, Address at British Institute of International and Comparative Law Conference (May 11, 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court [https://perma.cc/GYZ5-5L7H] ("Because there are so few Supreme Court antitrust decisions each year . . . and because each one sets precedent that will govern the application of the antitrust laws in the lower courts for decades to come each decision is an event of major significance for antitrust enforcers and the antitrust bar.").

114. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

115. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

116. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2008).

117. *Brooke Grp.*, 509 U.S. at 212.

118. *Compare id.* at 222 & n.1 (using average variable cost as the measure for predatory pricing), *with* Commission Decision 2001/354/EC of 20 March 2001, 2001 O.J. (L 125) 1 (using long-run incremental cost as a measure for predatory pricing).

119. *See* text accompanying *supra* note 73 (defining predatory pricing).

120. *Brooke Grp.*, 509 U.S. at 226 (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)).

121. *See* ELHAUGE & GERADIN, *supra* note 39, at 353 (noting that "competitive price-cutting is among the most desirable business activities").

defendant set prices below its variable cost,[122] but the Court added a more onerous requirement that the plaintiff must prove that the defendant firm have a "dangerous probability" of recouping its lost short-term profits.[123]

One commentator has called the belief that predatory pricing is rarely attempted as "contrary to fact"[124] and indicated that data shows "selective price predation is a recurring phenomenon . . . used effectively to eliminate young rivals and to deter potential entry into noncompetitive markets."[125] Moreover, the Court in *Brooke Group* ignored the fact that a dominant firm can still operate profitably during a predatory pricing scheme because its scale allows it to produce at lower costs than a market entrant.[126] The dominant firm can price below its young competitor's costs, but still above its own, and thereby force its rival out of business while still operating profitably.[127]

In addition to erecting the "dangerous probability" standard, the Court's willingness to affirm the district court's decision to throw out a jury's finding of predatory pricing after a 115-day trial is striking.[128] Such a move raises a serious question of exactly how much evidence will be needed to make out a predatory pricing claim. Indeed, in dissent, Justice Stevens took the majority to task for rejecting so much evidence, arguing that the majority's "conclusion rest[ed] on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence."[129]

The Court further narrowed section 2 in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[130] As part of their statutory obligations under the 1996 Telecommunications Act, incumbent local exchange carriers ("LECs") were obliged to allow competitors to access their local networks,[131] with these obligations regulated and monitored by the Federal Communications Commission ("FCC") and state regulators.[132] The plaintiff, a customer in the local

122. *Brooke Grp.*, 509 U.S. at 222 & n.1.
123. *Id.* at 224.
124. Eleanor M. Fox, *The Efficiency Paradox*, *in* CHICAGO SCHOOL, *supra* note 14, at 82.
125. *Id.*
126. ELHAUGE & GERADIN, *supra* note 39, at 383.
127. *Id.*
128. *Brooke Grp.*, 509 U.S. at 243; *id.* at 254 (Stevens, J., dissenting).
129. *Id.* at 254 (Stevens, J., dissenting).
130. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
131. *Id.* at 401–02.
132. *Id.* at 403–05.

New York City market, alleged that Verizon was failing to meet its statutory obligation to provide rivals local access and doing so "on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs."[133] The basis for the antitrust claim was a theory of liability under section 2 for an illegal refusal to deal.[134]

In finding no liability under section 2, the Court went to great lengths to narrowly confine the precedential value of *Aspen Skiing*.[135] Declaring that "*Aspen Skiing* is at or near the outer boundary of § 2 liability," the Court distinguished *Aspen Skiing* by highlighting that the defendant ski company passed up on short-term profits, had a prior course of dealing with its rival, and was denying its rival a product that it already provided to customers at the retail level.[136] The Court seized on these criteria to label *Aspen Skiing* as a "limited exception."[137]

A final case that narrows section 2 liability, and makes *Trinko*'s impact very clear, is *Pacific Bell Telephone Company v. Linkline Communications, Inc.*[138] In *Linkline*, the Court held that *Trinko* forecloses a "price-squeeze" theory of liability, absent a duty to deal with the competitor.[139] A price squeeze occurs when a firm with market power sells necessary component goods to a rival and also competes with that rival in a downstream market.[140] The firm with market power can "squeeze" the margins of its competitor by raising component prices while simultaneously lowering prices on the downstream product.[141]

In *Linkline*, plaintiffs were independent internet service providers ("ISPs") that competed with AT&T in the retail internet market in California.[142] The ISPs did not own all of the requisite infrastructure to provide internet to their customers and, therefore, leased a necessary upstream component from AT&T.[143] Plaintiffs alleged that AT&T

133. *Id.* at 404.

134. *Id.* at 409.

135. *Id.* at 408–11.

136. *Id.* at 409–10.

137. *Id.* at 409. The Court also used the "already-providing-the-service-to-other-customers" logic to distinguish *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372–74 (1973), an earlier case that indicated a duty to deal with competitors under certain circumstances. *Id.* at 410.

138. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009).

139. *Id.* at 449–51.

140. ELHAUGE & GERADIN, *supra* note 39, at 476.

141. *Id.*

142. *Linkline*, 555 U.S. at 442–43.

143. *Id.* at 443.

raised prices on the input component while simultaneously lowering prices for its retail internet prices.[144] This had the effect of "squeezing" the ISPs' profits because they were forced to lower their own retail internet prices while paying more for the input service.[145] The Court treated *Trinko* as dispositive and held that, absent a duty to deal, a price squeeze is not an acceptable theory of liability under section 2.[146] According to the Court, if there is no duty to deal under *Trinko*, then there accordingly was no "duty to deal under terms and conditions that the rivals find commercially advantageous."[147]

The significance of these three cases is not necessarily in their specific dispositions. Modern antitrust law is a highly fact-specific, contextual discipline in which the particular industry, market structure, market concentration, barriers to entry, and product are all relevant.[148] The impact of these opinions comes from the language employed by the Court to describe section 2 as exceptionally permissive of aggressive unilateral behavior.[149] Both *Trinko* and *Linkline* spoke in sweeping terms of a firm's freedom to deal, even if at great costs to competitors. Of *Trinko*, for example, one commentator noted that "[n]owhere in [the Court's] opinion is there an expression of concern about the traditional evils of dominance or monopoly power."[150] This language has influenced lower courts' application of section 2.[151] As

144. *Id.* at 443–44.

145. *Id.*

146. *Id.* at 449.

147. *Id.* at 449–50.

148. *See, e.g.*, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186, 191 (2010) (embracing a functionalist approach to determining when there is a single entity); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 879, 881–82 (2007) (overruling a nearly 100-year precedent in favor of applying the rule of reason, which is a balancing test for determining "whether a practice restrains trade" in violation of section 1 of the Sherman Act, to price maintenance agreements); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4, 24–25 (1979) (applying the rule of reason to certain price agreements among competitors); *see also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 49–60 (2010) (applauding the 2010 merger guidelines' embrace of the various complexities of specific markets).

149. *See* Harvey J. Goldschmid, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, *in* CHICAGO SCHOOL, *supra* note 14, at 125 (expressing concerns that the Court's language "seriously undermines the traditional policy underpinnings of section 2").

150. *Id.*

151. *See, e.g.*, *In re* Adderall XR Antitrust Litig., 754 F.3d 128, 134–36 (2d Cir. 2014), *as corrected*, (June 19, 2014) (relying heavily on *Trinko* and describing *Aspen Skiing* as a "narrow exception"); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072–74 (10th Cir. 2013) (citing *Linkline* and *Trinko* for the proposition that purely unilateral conduct has a strong presumption of legality and that there is a "general rule protecting unilateral conduct").

discussed above, *Brooke Group* was significant because the Court was willing to look past a jury verdict supported by an extensive record.[152] Taken together, these decisions send a strong message to lower courts to be extremely skeptical of section 2 claims.

Several beliefs animate these three decisions. Permeating each is a view that vigorous competition between rivals benefits consumers, along with a corresponding fear that imposing liability for aggressive unilateral conduct will result in false-positives. In the predatory-pricing context, the overriding concern is chilling aggressive price competition, which benefits consumers and is a cornerstone of the market system.[153] In the refusal-to-deal context, courts worry that forcing a firm to share with its rivals will discourage investment in "economically beneficial" assets or, perversely, "facilitate the supreme evil of antitrust: collusion."[154] Moreover, there are also concerns about judicial administrability of liability rules in the antitrust context.[155]

These section 2 cases dramatically narrow the scope of liability for unilateral conduct, especially when it comes to challenges by competitors. Because of serious and legitimate concerns about discouraging vigorous competition between rivals, competitors have few viable avenues to allege a section 2 claim. But perhaps unintended by the Court is the corresponding impact these decisions have had on a rival firm's ability to challenge anticompetitive mergers.

IV. ANTITRUST INJURY AS INEXTRICABLY INTERTWINED WITH SECTION 2

The narrowing of section 2 has had collateral consequences for enforcement of the merger laws. *Cargill* forces merger challengers to speculate on and allege a theory of anticompetitive conduct by the combined firm.[156] And the theories of anticompetitive behaviors most used by merger challengers to make this showing are theories under

152. *See supra* note 128 and accompanying text.

153. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) ("[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; . . . mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (alteration and second omission in original) (quoting Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 122 n.17 (1986))).

154. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).

155. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 452–55 (2009); *Trinko*, 540 U.S. at 411–13.

156. *See supra* Part II.

section 2.[157] Recall, the Court in *Cargill* accepted predatory pricing as a viable theory of antitrust injury.[158] In the wake of *Brooke Group*, however, it is difficult to see how a plaintiff can make out a successful claim under a predatory-pricing theory.[159] Indeed, *Brooke Group*'s skepticism of predatory-pricing claims has impacted the lower courts' standing analysis.[160]

The effect of section 2's narrowing is especially pronounced and potentially damaging in the context of a competitor's ability to challenge an anticompetitive vertical acquisition. This is driven by the elimination of liability under a theory of a unilateral refusal to deal. Before *Trinko*, the prevailing view was that there *were* circumstances where a refusal to deal with a rival was grounds for a section 2 claim.[161] Even if those situations were generally limited, the language and impact of *Trinko* nonetheless makes clear that these exceptions are extremely narrow and, in all likelihood, need to all but replicate the facts of *Aspen Skiing*.[162] As it stands now, a rival can acquire necessary upstream inputs or downstream revenue sources with the specific intention of choking off its rival. If the rival wants to challenge the vertical acquisition before it occurs, or recover damages after the fact, it must allege both that the merger itself is illegal and that the rival will suffer an antitrust injury as a result of the defendant's post-acquisition

---

157. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 671 ("Nevertheless, in the relatively small number of merger cases brought by private plaintiffs, the underlying rationale is most often exclusionary practices such as predatory pricing.").

158. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 118 (1986) ("Predatory pricing is thus a practice . . . capable of inflicting antitrust injury.").

159. *See* Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 96 (2015) ("The Court has formulated a predatory pricing test that has made it virtually impossible for plaintiffs to bring successful claims.").

160. *See, e.g.*, Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1035 (9th Cir. 2001) (refusing to find standing for aggressive pricing because "[a]bsent proof of predation, it is immaterial whether the price reduction is the result of illegal price setting, illegal mergers and acquisitions, collusion, price discrimination or any other antitrust violation. . . . '[S]o long as they are above predatory levels, they do not threaten competition'" (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993))).

161. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 261 (2003) (writing in 2003 that "every federal circuit court has interpreted this general monopolization standard to impose an antitrust duty to deal with rivals when sharing is feasible and a monopolist has developed a product that is so superior that it is 'essential' for rivals to compete and cannot practicably be duplicated"). *But see* HOVENKAMP (1st ed. 1994), *supra* note 15, at 264–65 (concluding that "[r]eading *Aspen* to create a *new* obligation to deal where no arrangement had existed before is a significant extension of its holding").

162. *See* James A. Keyte, *The Ripple Effects of* Trinko*: How It Is Affecting Section 2 Analysis*, 20 ANTITRUST 44, 47 (2005) (reviewing post-*Trinko* decisions and noting that "[a]s these cases reflect, *Aspen* has now effectively been limited to its facts").

conduct. But, because there are so few exceptions to the general no-duty-to-deal rule (other than the exact facts of *Aspen Skiing*), it is unclear how the plaintiff can show an antitrust injury.

The case of *SureShot Golf Ventures, Inc. v. Topgolf International, Inc.*,[163] a recent case out of the Fifth Circuit, illustrates this problem well. Founded in 2000, Topgolf is the dominant virtual golf simulation company in the United States.[164] In 2014, SureShot Golf Ventures started as a competitor to Topgolf.[165] Topgolf had developed its own proprietary ball-tracking technology, whereas SureShot licensed a ball-tracking software called Protracer from a third party.[166] SureShot sued Topgolf after Topgolf acquired Protracer and refused to agree to provide SureShot access to the software once its current five-year license expired.[167] SureShot alleged that Topgolf acquired Protracer to prevent SureShot from competing in the market, bringing monopolization and attempted monopolization claims under the Sherman Act as well as an unlawful acquisition claim under section 7 of the Clayton Act.[168]

In its motion to dismiss, Topgolf attacked SureShot's lawsuit on several fronts. First, Topgolf argued that SureShot's claim was unripe, as it had not yet been denied access to Protracer.[169] Next, Topgolf cited to *Trinko* for the proposition that it has no duty to deal with SureShot.[170] And most critically, when specifically addressing the unlawful acquisition claim, Topgolf argued that "[f]or the same core reason that SureShot cannot plausibly allege anticompetitive effects *for its [s]ection 2 claims*, it also cannot plausibly allege anticompetitive effects for its [s]ection 7 and [s]ection 1 claims: Access to the Protracer Range System is not necessary for competition."[171]

The district court dismissed the suit.[172] First, the court held that SureShot lacked Article III standing because, given that Topgolf had

163. SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., No. 17-20607, 2018 WL 4927554 (5th Cir. Oct. 9, 2018) (per curiam), *aff'g and modifying* No. CV H-17-127, 2017 WL 3658948 (S.D. Tex. Aug. 24, 2017).

164. *Id.* at *1.

165. *Id.*

166. *Id.* at *2.

167. *Id.*

168. *Id.*

169. Defendant's Motion to Dismiss and Brief in Support at 5, SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., 2017 WL 3658948 (S.D. Tex. Aug. 24, 2017) (No. 4:17-cv-127).

170. *Id.* at 8.

171. *Id.* at 22 (emphasis added).

172. SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., No. CV H-17-127, 2017 WL 3658948, at *6 (S.D. Tex. Aug. 24, 2017).

not yet denied access to Protracer, SureShot's injuries were wholly speculative.[173] The court also held that SureShot lacked antitrust standing on the theory that, had a different company—a third party—acquired Protracer, SureShot would still have suffered the same injury.[174] Finally, the court found that SureShot failed to plead that the acquisition would "substantially lessen competition or tend to create a monopoly."[175]

On appeal, the Fifth Circuit affirmed the dismissal of the suit, agreeing that SureShot's claim was unripe.[176] But, because it held that there was no subject-matter jurisdiction, the Fifth Circuit did not address the question of whether SureShot had properly alleged an antitrust injury.[177]

The *SureShot* case exemplifies the failure of *Cargill*'s post-merger inquiry. Both the district court and the court of appeals directed their entire analysis toward one issue: whether there was a real threat that the post-merger firm would do something anticompetitive. There was no mention as to whether the merger, as its own unique event, was damaging to competition. To be sure, this was a suit for damages,[178] and the Clayton Act's language that a plaintiff be "injured in his business or property" calls for greater concreteness.[179] But, importantly, both courts' Article III holdings focused on post-merger conduct, suggesting that *Cargill*'s approach has also influenced how the courts think about constitutional standing in antitrust cases. In other words, it seems unlikely that SureShot would have had both Article III and antitrust standing to seek an injunction prior to the acquisition, even though the Clayton Act only requires a showing of "threatened loss or damage."[180]

While perhaps justifiable under the Court's constitutional standing doctrines, such an outcome should be alarming for those who think that the Clayton Act's private right of action is not a dead letter. If an antitrust plaintiff does not have standing to sue based on the

173. *Id.* at *4.

174. *Id.* at *5.

175. *Id.*

176. SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., No. 17-20607, 2018 WL 4927554, at *5 (5th Cir. Oct. 9, 2018).

177. *Id.* at *5 n.3 ("Because the case is not ripe, we find it unnecessary to analyze whether SureShot alleged a cognizable antitrust injury as required for antitrust standing.").

178. Plaintiff's Original Complaint at 14, SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., 2017 WL 3658948 (S.D. Tex. Aug. 24, 2017) (No. 4:17-cv-127).

179. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109–10 (1986) (citing 15 U.S.C. § 15).

180. 15 U.S.C. § 26 (2018).

allegations in *SureShot*—that, in response to the existence of a budding competitive threat, a larger rival used its resources to purchase a critical upstream component to deny the plaintiff access and force it out of business—then the opportunities for private enforcement are, indeed, slim.[181]

A competitor could challenge a merger by alleging that the post-merger firm will facilitate collusion among rival firms that could retaliate against the plaintiff for choosing not to collude.[182] This remains a viable theory under section 1. But a plaintiff alleging injury under a cartel retaliation theory faces its own challenges, including a line of cases adopting the theory that competitors actually benefit from higher degrees of market concentration and, therefore, do not suffer injuries sufficient for standing.[183] Still, of the few private merger lawsuits that are actually brought, most are brought by competitors, and most rely on theories of single firm conduct.[184] Thus, the post-*Cargill* doctrinal narrowing of section 2 liability—which effectively prohibits private-merger lawsuits by competitors—is concerning.

V. REMOVE THE *CARGILL* BARRIER TO ENFORCEMENT

The Court should overrule *Cargill* and reconsider the antitrust injury doctrine for private merger lawsuits. In *Cargill*, the majority failed to respond to Justice Stevens' criticism of the majority's focus on the post-merger behavior. Up until consummation, a merger represents the height of cooperative, or collusive, behavior. Horizontal mergers are, at their core, decisions to completely agree on prices, output, and market division, all of which are separately illegal under

181. Plaintiff's Original Complaint at 4–11, SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., 2017 WL 3658948 (S.D. Tex. Aug. 24, 2017) (No. 4:17-cv-127).

182. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 672 (describing requirements for a "collusion-facilitating" challenge to a merger); *see also* Brodley, *supra* note 38, at 51–52 (describing the "cartel punishment" theory of competitor antitrust injury).

183. *See, e.g.*, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 583 (1986) ("[As defendants'] competitors, respondents stand to gain from any conspiracy to raise the market price."); Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 319–20 (D.D.C. 2011) (denying standing because an increase in market concentration was presumed to benefit the competitor-plaintiff).

184. *See* HOVENKAMP (5th ed. 2016), *supra* note 12, at 671 ("Nevertheless, in the relatively small number of merger cases brought by private plaintiffs, the underlying rationale is most often exclusionary practices such as predatory pricing.").

section 1 of the Sherman Act.[185] So why focus totally on the post-merger conduct?

If market concentration in the U.S. is reaching dangerous levels,[186] the goal should be to review the competitive merits of a given merger and not be overly concerned with procedural technicalities. Having identified the problem posed by the interaction of the antitrust injury doctrine and section 2, it is time to begin thinking about a way forward. A few possibilities are contemplated below.

One way to review the merits of more mergers is to resurrect Justice Stevens' dissent in *Cargill*. Recall that his approach asks the reviewing court to do a first pass of the merger itself.[187] Under such an approach, if there is a "reasonable probability" that competition will be injured by the merger, then "there is a reasonable probability that a competitor of the merging firms will suffer some corresponding harm in due course."[188] The specific harm resulting from the merger could be conceptualized as the loss of the opportunity to compete with one's rivals in a competitive marketplace. Alternatively, if a merger causes a rival firm to adjust its business operations to account for a new firm, the concrete harm to the rival could be the change in operations that the merger induced. In the context of vertical mergers, like in *SureShot*, another option is to create an exception to the no-duty-to-deal rule for circumstances in which the rival gained its anticompetitive advantage through an illegal merger. Because it is axiomatic that possession of monopoly power is permissible when gained "as a consequence of a superior product, business acumen, or historic accident,"[189] then monopoly power achieved or maintained through a competition-destroying vertical merger falls outside of those categories and warrants a specific exception to the general no-duty-to-deal rule.

In suggesting that the Court overturn a thirty-year-old precedent, it is necessary to address the question of stare decisis. Although cases should not be overruled simply because they were wrongly decided, this case presents an ideal candidate for reconsideration. The considerations for overruling prior decisions, according to *Planned*

185. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927).

186. *See supra* notes 16–21 and accompanying text.

187. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 128–29 (1986) (Stevens, J., dissenting).

188. *Id.*

189. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

Parenthood v. Casey,[190] are: (1) whether there has been a dramatic change in factual circumstances; (2) whether a development in "related principles of law" necessitates a change; (3) whether the previous rule has become unworkable; and (4) whether there has been widespread reliance on the old rule, such that a change would cause "special hardship."[191]

The factual realities of mergers and acquisitions have changed since *Cargill*.[192] There is now an additional thirty years of empirical evidence suggesting that mergers should be treated more skeptically. The old Chicago School assumptions about efficiency returns have not been borne out in the data.[193] In the past, a prevailing assumption motivating skepticism of merger challenges was the fear of chilling efficient integration. But empirical data indicates that those fears are overblown.[194] Moreover, there is simply more market concentration in the United States than there was 1986, and the FTC and DOJ have more on their plates.[195] These factual realities support revisiting *Cargill*.

Part III discussed the doctrinal narrowing of section 2, which is a "related principle[] of law."[196] It is unclear whether, in the wake of *Aspen Skiing*, the Court in *Cargill* believed that section 2 jurisprudence would take a different path. Perhaps not. But regardless, section 2 has fundamentally changed in a way that has bearing on the *Cargill* framework for antitrust injury. This change provides support for revisiting the decision.

Whether the *Cargill* framework has become practically unworkable depends on one's view of the virtues of private lawsuits challenging potentially anticompetitive mergers. For those who are

190. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

191. *Id.* at 854–55.

192. *See supra* notes 16–21 and accompanying text.

193. *See* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 406 (Basic Books 1978) (stating that antitrust law "should abandon its concern with such beneficial practices as small horizontal mergers [and] all vertical and conglomerate mergers"). The Chicago School generally redirected the focus of antitrust law towards economic welfare, and away from concerns about size and protecting small businesses. In the context of mergers, the Chicago School saw far too much concern with market concentration, fears about size, and protecting small firms, and not enough concern with the economic welfare benefits that could accrue to consumers through mergers. *See* Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust*, *in* CHICAGO SCHOOL, *supra* note 14, at 12–23 (giving an overview of the Chicago School's influence on antitrust law).

194. *See supra* notes 12–21 and accompanying text.

195. *See supra* note 16 and accompanying text.

196. *Casey*, 505 U.S. at 855.

distrustful of private attorneys general, there might not be a problem with the status quo. That said, the Clayton Act explicitly provides for private enforcement of the antitrust laws, including laws preventing illegal acquisitions.[197] While the courts certainly can, and do, interpret statutes in ways that balance a host of atextual concerns, they are simply not authorized to read explicit provisions out of a statute's text.[198] *Cargill*'s focus on post-merger conduct has become practically unworkable because it creates an insurmountable standard for a private right of action that contemplates relief for "any" injured person.[199]

It is difficult to imagine how reversing *Cargill* would result in exceptional hardship for any firm. Antitrust injury requirements are procedural hurdles for private plaintiffs to get into court. So, to the extent these rules influence firms' primary conduct, they do so only as part of the calculus in assessing litigation risk associated with pursuing a merger. In this sense, traditional reliance interests are not implicated because firms have not conformed their behavior around any substantive rule. Moreover, if the new antitrust injury rule was to be applied retroactively to mergers already consummated, the remedy for any successful litigation would be damages. Courts are reluctant to undo a merger after the fact.[200]

Finally, stare decisis applies with less force in antitrust.[201] The Court has been willing to overturn antitrust decisions even if they are much older than *Cargill* in recognition that the economic assumptions underlying the previous decisions no longer hold up.[202] Mergers should be no different, and thus *Cargill* should be overruled.

---

197. *See supra* text accompanying note 38.

198. Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted.") (internal quotations omitted).

199. 15 U.S.C. §§ 15, 26 (2012).

200. *See* FTC v. Univ. Health, Inc., 938 F.2d 1206, 1217 n.23 (11th Cir. 1991) ("[I]ndeed, once an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'").

201. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (describing how the Sherman Act is a common law statute and thus, stare decisis applies with less force); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 38 (1966) (reviewing the legislative history of the Sherman Act and concluding that "[t]here can hardly be any question that the discretion delegated to the courts by the Sherman Act was that of determining the consumer interest in particular cases and assessing legality accordingly").

202. *See, e.g.*, *PSKS*, 551 U.S. at 900 ("*Stare decisis*, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects.").

CONCLUSION

Since 1914, mergers and acquisitions that substantially lessen competition or "tend to create a monopoly" have been unlawful. In the face of increased market concentration, market power, and concerning evidence about the effects of mergers and acquisitions, it is time to find and remove obstacles to effective enforcement of these merger laws. One area that is ripe for reform is the antitrust injury doctrine for merger lawsuits established by the *Cargill* decision, and, more specifically, that decision's interaction with section 2 of the Sherman Act.

Instead of simply asking whether the merger itself is anticompetitive, the *Cargill* decision asks a plaintiff to allege that the post-merger firm will itself act anticompetitively in a way that injures the plaintiff. To demonstrate this injury, plaintiffs must rely on accepted theories of antitrust liability. And because the additional theory of liability is aimed at the conduct of the new entity, plaintiffs will often assert a theory of anticompetitive behavior under section 2. However, in the time since *Cargill* was decided, the Court has dramatically narrowed the scope of liability under section 2. This narrowing has had the collateral effect of prohibiting competitor-plaintiffs from being able to demonstrate an antitrust injury to challenge a merger. In light of this doctrinal narrowing of section 2, *Cargill* should be overruled.