12-1-1999

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NOTES

STILL ALIVE: ANTITRUST INJURY REMAINS A PART OF THE STANDING INQUIRY UNDER SECTIONS 4 AND 16 OF THE CLAYTON ACT DESPITE THREE RECENT APPELLATE COURT DECISIONS

Heather K. McShain*

Is something wrong
She said
Of course there is
You're still alive
She said
Do I deserve to be
Is that the question
And if so, . . . if so
Who answers?
Who answers?
I . . . I . . . I'm still alive.¹

I. INTRODUCTION

In May of 1994, Seattle rock band Pearl Jam took on Ticketmaster. One of the most popular bands of the '90s—with domestic

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* J.D., Notre Dame Law School, 1999; Clerk for the Honorable William Lee, Chief Judge, N.D. Indiana.
¹ Eddie Vedder of Pearl Jam, Alive, on Ten (Sony Music Entertainment, Inc. 1991).
album sales reaching nearly 200 million—Pearl Jam was on the verge of launching a major concert tour. At a time when ticket prices for live concerts were selling for as much as $100, three Pearl Jam's popularity clearly placed it in a position to charge comparably exorbitant prices. It was thus poised to rake in record profits, a position not to be taken lightly in a notoriously unpredictable, flighty industry riddled with here today, gone tomorrow acts. However, Pearl Jam chose not to focus on profit margins but on making its concerts accessible to all of its fans, deciding to limit ticket prices to eighteen dollars nation-


3 See Peter Howell, Eddie and the Dreamers in a Jam: It Didn't Have to Be Like This, TORONTO STAR, July 4, 1995, at C7 ("When [Pearl Jam] launched its war against Ticketmaster last summer, rock fans were being gouged by bands like the Eagles, which were demanding upwards of $100 per ticket, with stiff service charges of between $3.50 to $7.50.").

4 Testifying before the Information, Justice, Transportation and Agriculture Subcommittee of the House Committee on Government Operations on June 30, 1994, band members Stone Gossard and Jeff Ament explained,

[M]any of Pearl Jam's most loyal fans are teenagers who do not have the money to pay $50 or more that is often charged today for tickets to a popular concert. Although, given our popularity, we could undoubtedly continue to sell-out our concerts with ticket prices at that premium level, we have made a conscious decision to that we do not want to put the price of our concerts out of the reach of many of our fans. Moreover, we do not want to be responsible for teenagers, who may be influenced by peer pressure, to feel that they must see Pearl Jam perform, spending more money for that concert ticket than they can really afford. All of the members of Pearl Jam know what it is like to not have a lot of money, and we recognize that a teenager's perceived need to see his or her favorite band in concert can often be overwhelming.

Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theater Ticket Handling Charges and Other Practices, Hearings Before the Information, Justice, Transportation, and Agriculture Subcomm. of the House Comm. on Government Operations, 103rd Cong., 2d Sess. 11 (1994) [hereinafter Antitrust Hearing]; see also Craig Marks, The Road Less Traveled, SPIN MAG., Feb. 1997. Pearl Jam manager Kelly Curtis explained,

[We were] trying to keep our ticket prices low . . . and we were finding that in a lot of cases, the service charge was changing randomly. Sometimes it would be five bucks, sometimes it would be eight, and we didn't understand why. And the response was a very cocky Fred Rosen [president of Ticketmaster] saying, "If you guys are stupid enough not to make what you're worth, then I'm going to make what you're worth." They wouldn't even print their service charge on the tickets. It looked like we were charging, say, twenty-six bucks for a ticket, when we were really only charging eighteen.

Id. (quoting Kelly Curtis).
In line with their plan, Pearl Jam wanted to also limit any service charges imposed on the sale of its tickets to ten percent of the ticket price, and to have that service charge separately identified on the ticket itself.\footnote{See Howell, \textit{supra} note 3, at C7.}

Enter Ticketmaster. Ticketmaster would not agree to the $1.80 service charge cap that Pearl Jam wanted.\footnote{See \textit{id.} (referring to the band as “Eddie and the Dreamers”). Thus, with the separately identified service charge, concert goers would not pay above $20 per ticket, and the tickets themselves would clearly identify for the purchasers that $18 was the actual ticket price for the Pearl Jam concert, with the additional $1.80 tacked on as a service charge.} While Pearl Jam had no obligation to deal with Ticketmaster, the structure of the touring industry revealed that, in effect, Pearl Jam had little choice in the matter. In planning a tour, Pearl Jam’s agent would enter into an agreement with a promoter for a particular show or shows; the promoter would then contract with a particular venue. Ticketmaster held contracts with the majority of both promoters and venues across the country, under which Ticketmaster possessed the \textit{exclusive} right to distribute tickets for their shows, controlling approximately two-thirds of the ticket-distribution market.\footnote{See \textit{U.S. Drops Ticketmaster Case, but N.Y. Plans Antitrust Inquiry}, \textit{Patriot Ledger}, July 6, 1995, at 26 (“Two-thirds of the nation’s 10 million concert arena seats are governed by exclusivity contracts between Ticketmaster and arena managers, according to the industry newsletter Pollstar.”).} In return, the promoters and venues received kickbacks from a portion of the service charges Ticketmaster collected.\footnote{See \textit{id.} The contracts are commonly “three- to five-year deals, which typically divvy up service fees among Ticketmaster, promoters, and venues.” Linda Himelstein & Ronald Grover, \textit{Will Ticketmaster Get Scalped?}, \textit{Bus. Wk.}, June 26, 1995, at 64 (“In May [of 1995], Ticketmaster won the contract for the Alamodome in San Antonio by advancing the city $100,000, installing $150,000 worth of box-office equipment, and promising to spend $300,000 a year promoting events.”).} Performers, such as Pearl Jam, received no portion of the service charges. Thus, Pearl Jam’s hands were tied: the venues able to accommodate Pearl Jam and/or the promoters working with such venues were bound by Ticketmaster to deal with Ticketmaster exclusively, and Ticketmaster would not agree to the ten percent service charge. In effect, Ticketmaster

had the power to exercise virtual control to the exclusion of the views of performers over the level of service charge imposed on tickets for that band’s concert that \textit{were} sold anywhere but at the box office. ... By locking up all of the suitable venues and promoters with arrangements of this type, Ticketmaster \textit{had} effectively

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\textit{Bus. Wk.}
thwarted competition and left most bands without any meaningful alternative for distributing tickets.\(^\text{10}\)

Pearl Jam boycotted Ticketmaster, losing millions of dollars on, and eventually canceling midway through, its 1994 tour as a result because so few “non-Ticketmaster” venues were available to them, most of which were small and obscurely located.\(^\text{11}\) In May of 1994 Pearl Jam officially asked the Department of Justice to investigate Ticketmaster,\(^\text{12}\) which prompted the filing of various lawsuits across the country by concert goers against Ticketmaster.\(^\text{13}\) Eventually resulting in a single, consolidated complaint, the plaintiffs, as individuals and as a class, brought an action under section 4 of the Clayton Act, alleging nationwide antitrust violations by Ticketmaster which caused supra-competitive prices for concert tickets.\(^\text{14}\) The Eastern District of Missouri dismissed the case, holding that plaintiffs lacked “antitrust injury.”\(^\text{15}\) The Eighth Circuit affirmed the district court’s ruling,\(^\text{16}\) and the Supreme Court denied certiorari in January of 1999.\(^\text{17}\)

If the primary goals of the antitrust laws are enhancement of competition and consumer welfare, then the district court, the Eighth Circuit, and the Supreme Court achieved a troubling result, all thanks to this concept of “antitrust injury.” The merits of the plaintiff’s sub-

\(^{10}\) As Gossard and Ament explained,

[T]he Ticketmaster service charge [had] in at least one case been reported to have gone as high as $15 dollars per ticket. An informal survey of the service charge being imposed by Ticketmaster on the events currently being advertised in Los Angeles shows that they range from a low of $3.50 for a ticket to an ice skating show at the Forum to $6.25 for a ticket to see either ZZ Top or Phil Collins at the Forum or Janet Jackson at Irvine Meadows to a high of $7.25 for a ticket to see the Eagles at the Rose Bowl. On top of that, Ticketmaster imposes an additional charge of $2.00 or more per order if the tickets are ordered by phone.

\(^{11}\) See Seanna Browder, Ticketmaster Gets Pearl Jammed, Bus. Wk., Oct. 7, 1996, at 6; see also Kot, supra note 2, at 7 (explaining that working with non-Ticketmaster ticket agencies to sell tickets “meant scheduling concerts at parks and fairgrounds, which opened up a Pandora’s box of logistical security and sanitation difficulties”).

\(^{12}\) See Chuck Phillips, Pearl Jam vs. Ticketmaster: Choosing Sides, L.A. Times, June 8, 1994, at 1 (describing the controversy as a “holy war” between Pearl Jam and Ticketmaster).


\(^{14}\) See id.

\(^{15}\) Id. at 1278.


\(^{17}\) See Campos, 119 S. Ct. at 865.
stantive allegations were never even explored by the courts, and Tick-etmaster's domination continued. Why? Along with other standing requirements which must be met in order to maintain a suit under section 4,18 antitrust injury combines to form what can be explained as "generalized" standing requirements—a checklist plaintiffs must meet in order to bring a suit under section 4.19 Analogous to any

18 At least one author notes that "[u]nfortunately, the courts have never been able to create an intelligible theory of private antitrust standing capable of being applied across the full range of potential cases. The law remains haphazard and inconsistent." Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 543 (1994). However, while uniformity of the requirements does exist, application and interpretation of such requirements, which this Note addresses, has been less than uniform and clear. See, e.g., Harry G. Holz, The Robinson-Patman Act: Standing and Antitrust Injury, The Defenses, Discrimination in Promotional Allowances and Services, The Brokerage Provision, 777 PLI/Corp. 289, 294 (1992). Holz summarizes that beyond the antitrust violation, the following must occur:

1) In addition to showing competitive injury generally, the plaintiff must show that it suffered actual injury due to defendant's conduct, and that the conduct was the material cause of the injury.

2) The plaintiff must show that the injury alleged is not too remote or duplicative of the recovery of a more directly injured person (standing).

3) The plaintiff must show that the injury is of the type that the antitrust laws were intended to prevent and flows from that which makes the defendants' acts unlawful (antitrust injury).

4) The plaintiff must show that the damages claimed measure the injury in a reasonably quantifiable way.

Id. Professor Joseph Bauer labels as "prerequisites for maintenance" the following: The plaintiff must demonstrate that it in fact suffered injury. It must show that the antitrust violation was the proximate cause of the injury suffered. It must show that this injury caused harm to its "business or property." It must show that the injury was of the kind that the antitrust laws are intended to protect, ie, that the harm was an "antitrust injury." It must show that among all potential plaintiffs, it was a person whose harm was sufficiently "direct" or who was an anticipated "target" of the antitrust violation, as to have "standing" to maintain the action. Finally, if the plaintiff was an "indirect purchaser" from the defendant, it may be denied the right to recover, in favor of a "direct purchaser" higher up the distributional chain.


The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to
standing requirement, without the presence of antitrust injury a plaintiff cannot maintain a suit under section 4 regardless of whether a defendant did in fact violate the antitrust laws. Thus, without a qualified plaintiff, the courts did not need to address the substantive issue of Ticketmaster's alleged antitrust violations.

This Note explores the private enforcement of the antitrust laws, specifically delving into this concept of "antitrust injury" and the relationship of antitrust injury to the other standing requirements. It examines three recent appellate court cases, all of which reached in-
correct results on the issue of antitrust injury. Part I explores the section 4 action, highlighting the development of the antitrust injury requirement by the Supreme Court. Part II then examines the Ticketmaster case, concluding under the Supreme Court case of Blue Shield v. McCready\(^\text{21}\) that Campos and his class had standing to bring their claim for treble damages. Part III covers City of Pittsburgh v. West Penn Power Co.\(^\text{22}\) and concludes that the Third Circuit erroneously ruled on the merits of the plaintiff's antitrust allegations by skipping over the initial inquiry of antitrust injury. As a result, the Third Circuit incorrectly held that the plaintiff did not suffer antitrust injury. Part IV examines the Second Circuit case of George Haug Co. v. Rolls Royce Motor Cars, Inc.\(^\text{23}\) and concludes that the court labeled its holding in terms of "antitrust injury" but in reality dismissed the plaintiff's case for failure to adequately allege his antitrust claims. All three cases reached incorrect results on the issue of antitrust injury, revealing that courts, including the Supreme Court, are incorrectly interpreting and applying the established guidelines governing antitrust injury analysis and in some cases skipping the inquiry altogether.

II. Section 4 of the Clayton Act & the Requirement of "Antitrust Injury"—A Hurdle Every Plaintiff Must Meet in Order to Enforce the Antitrust Laws

In 1977, the Supreme Court decided the landmark case of Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.\(^\text{24}\) and unveiled the concept of "antitrust injury" to the world, forever changing the focus of private antitrust litigation. The Court would have the opportunity to address the issue on six more occasions. What ultimately resulted was a standing inquiry that every private plaintiff must survive before a court addresses the substance and merits of the actual antitrust violations alleged by that plaintiff.

A. Section 4 of the Clayton Act

The treble damages remedy of section 4 of the Clayton Act allows enforcement of the antitrust laws by private persons. As a matter of precision, however, a plaintiff does not allege a claim under section 4. Rather, the language of section 4 "implicitly incorporates" sections 1 and 2 of the Sherman Act,\(^\text{25}\) sections 3 and 7 of the Clayton Act,\(^\text{26}\) and

\(^{22}\) 147 F.3d 256 (3d Cir. 1998).
\(^{23}\) 148 F.3d 136 (2d Cir. 1998).
the Robinson-Patman Act.\textsuperscript{27} Thus, section 4 does not "itself provide the benchmark for illegality, and the existence of illegal conduct is not an element of the 'standing' inquiry."\textsuperscript{28}

Section 4 simply states that

any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.\textsuperscript{29}

Congress conceived section 4 in line with the two, broad fundamental purposes of the antitrust laws themselves: to preserve competition and to protect consumers.\textsuperscript{30} While a literal reading of the statute appears to encompass every harm relating to antitrust violations,\textsuperscript{31} from 1899 to 1939 private antitrust actions were rare.\textsuperscript{32} From 1939 to 1977, however, a lowering of procedural burdens for antitrust plaintiffs resulted in a surge of private antitrust litigation.\textsuperscript{33} Then, in 1977,

\begin{footnotes}
\item[28] J. KINTNER & BAUER, supra note 18, § 78.1, at 2 n.8.
\item[30] See DiResta et al., supra note 19, at 214-15 ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948))).
\item[31] See Jacobson & Greer, supra note 29, at 275 (noting that from 1899 to 1939, "only 157 treble damage actions were recorded, with only 14 recoveries by plaintiffs, totaling less than $275,000").
\item[32] See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (eliminating the defense that plaintiff suffered no harm from an increased price if the increase was passed along to its customers); Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464 (1962) (making it difficult for a defendant to prevail on summary judgment); Radiant Burners, Inc. v. People's Gas, Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (establishing that there was no requirement that a plaintiff demonstrate any "public harm"); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (relaxing standard for proving damages); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (establishing per se rule); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (leading to the establishment of a per se rule); Jacobson & Greer, supra note 29, at 276-77. As a result, from "1945 to 1949, there were 399 private cases. From 1950 to 1954, the
the Supreme Court decided the landmark case of *Brunswick v. Pueblo Bowl-O-Mat, Inc.*,34 responding to this expansion in private litigation and introducing the concept of "antitrust injury," ultimately changing the focus of all private antitrust litigation.

**B. The Introduction of the Concept of Antitrust Injury—Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.**

In the 1960s, the bowling industry went into a major decline. As a result, Brunswick, one of the two largest manufacturers of bowling equipment in the country,35 acquired numerous defaulting bowling centers, thereby hoping to produce positive cash flow.36 Treadway Companies brought a section 4 suit against Brunswick, alleging that Brunswick's acquisition and operation of bowling centers in the three markets in which Treadway also operated "might substantially lessen competition or tend to create a monopoly."37 Treadway sought treble damages for the "reasonably expectable profits" that Treadway would have made had Brunswick not also been a competitor in those three markets, i.e. if Brunswick had instead allowed those acquired centers to close.38

Eventually, the Supreme Court held that in order for Treadway to recover treble damages resulting from an alleged antitrust violation

[they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust injury*, which is to say injury of the type the antitrust laws were intended to pre-
vent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be “the type of loss that the claimed violations . . . would be likely to cause.”

Refusing to divorce section 4 from the primary goals of the antitrust laws, it was not enough for Treadway to merely prove a loss of profits due to its decreased market share because Brunswick acquired the defaulting bowling centers instead of letting them fail. Treadway needed to prove “antitrust injury,” which it was unable to do. Following Brunswick’s acquisition of the centers, Treadway faced a rejuvenated and aggressive competitor, and the harm which Treadway suffered resulted from an increase in competition, exactly what the antitrust laws were intended to protect and preserve. As the Court explained, even if the plaintiffs were injured “by reason of” the unlawful acquisitions by Brunswick, they were not injured “by reason of” what made the acquisitions unlawful. Because Treadway had not suffered antitrust injury, it could not maintain a claim for treble damages under section 4.

C. Brunswick Merely Got the Ball Rolling—The Development of “Antitrust Injury”

With Brunswick, in a mere forty-one words, the Court changed the focus of every private plaintiff’s case under section 4. But the Court did not stop there. The Court has addressed the issue of antitrust injury six more times since 1977. Considered in chronological order, the following discussion briefly traces the Supreme Court’s development of the concept of antitrust injury.

1. J. Truett Payne Co. v. Chrysler Motors Corp.

In 1981, the Court further elaborated on Brunswick in J. Truett Payne Co. v. Chrysler Motors Corp., holding that a plaintiff is not entitled to treble damages under section 4 simply by showing a violation

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39 Id. at 489 (emphasis added) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)).
40 See Brunswick Corp., 429 U.S. at 485–87.
41 See Brunswick Corp., 429 U.S. at 485–87.
of the antitrust laws—a violation does not equate with the presence of “antitrust injury.” Mere proof of price discrimination under section 2(a) of the Robinson-Patman Act by Chrysler against one of its car dealers did not establish antitrust injury—rather, to “recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.” Thus, “automatic damages” did not exist.

2. Blue Shield v. McCready

The Court in Blue Shield v. McCready addressed the relationship between the “indirect purchaser” doctrine and antitrust injury. The Court held that, in the absence of a risk of duplicative recovery—one of the goals of the “indirect purchaser” doctrine—a plaintiff was not barred from bringing a claim under Section 4 where the plaintiff was a “necessary and foreseeable” victim of the defendant’s antitrust violations. Once the hurdle of the “indirect purchaser” doctrine was cleared, the Court then held that antitrust injury existed because the

43 Id. at 562 (emphasis added). Specifically, the plaintiffs had alleged a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Section 2(a) required only proof that an injury may result. To have equated a violation of Section 2(a) with the presence of antitrust injury would have, in effect, established a theory of “automatic damages.”


45 Established primarily through three Supreme Court cases, the theory is that [t]he direct customer from a person which violated the antitrust laws may successfully assert a claim for treble damages against its supplier; the defendant is precluded from asserting that any higher price, or overcharge, resulting from its illegal conduct was in turn “passed on” to the plaintiff’s customers. The other side of the coin from this proposition is that in most cases, a person who paid an inflated price because of the antitrust violation, but who did not deal directly with the defendant, i.e., the “indirect purchaser,” will be foreclosed from bringing the action, although it in fact suffered some “injury.”


There is debate regarding whether the indirect purchaser doctrine is really a standing requirement. “In both Illinois Brick and McCready the Supreme Court stated that the question of which persons have been injured for purposes of section 4 is ‘analytically distinct’ from the question of which persons have sustained injuries too remote to give them standing to sue for damages.” Holz, supra note 18, at 305. But many courts continue to treat indirect purchaser inquiries as matters of standing. See id. at 306 (quoting Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990)); Schwimmer v. Sony Corp., 637 F.2d 41 (2d Cir. 1980); Chatham Brass Co. v. Honeywell, Inc., 512 F. Supp. 108 (S.D.N.Y. 1981)).

46 See Blair & Harrison, supra note 19, at 1547.
injury suffered by the plaintiff-consumers was so "inextricably intertwined with the injury the conspirators sought to inflict" as to justify recovery under section 4.47

3. Associated General Contractors of California, Inc. v. California State Council of Carpenters

In 1983, the Supreme Court decided Associated General Contractors of California, Inc. v. California State Council of Carpenters,48 which produced a "laundry list" of standing inquiries, including antitrust injury. The Court held that the plaintiff in Associated General, a labor union, had not suffered antitrust injury—not only was the labor union neither a competitor nor a consumer, but it could actually be harmed by uninhibited competition.49 Further, the Court noted that "better" plaintiffs existed—namely the actual members of the union who lost profits due to the defendants' alleged conspiracy to avoid contracts with union members.50 What resulted from the opinion was a list of factors used by the Court to determined that the union was not injured by reason of a violation of the antitrust laws under section 4:

[T]he Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, [were] insufficient as a matter of law. Other relevant factors—the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of

47 McCready, 475 U.S. at 484.
49 See id. at 539 ("[A] union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.").
50 See id. at 540-41. The Court noted that if "there is substance to the Union's claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right," suggesting perhaps that no victims existed. Id. at 542 n.47.

Arguably, Associated General backtracks from McCready insofar as the union was denied standing because the intended victims of the alleged boycott were the contractors and subcontractors themselves who stood to lose contracts, rather than the union that represented them. However, unlike McCready, in Associated General the employees, rather than the union, constituted the "more direct" victims of the alleged boycott. Perhaps what Associated General establishes, then, is not a weakening of McCready's "inextricably intertwined" language, but rather, only that a weaker presumption of standing exists when plaintiffs are not the immediately intended victims of the alleged antitrust violation. If so, an exploration of the factors analyzed by the Court in Associated General may bolster a plaintiff's case or destroy it.
damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union’s antitrust claim.\textsuperscript{51}


In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,\textsuperscript{52} the Court held that antitrust injury did not exist when the defendants’ alleged conspiracy among plaintiffs’ competitors resulted in higher prices than would have resulted in a purely competitive environment.\textsuperscript{53} In effect, the plaintiff could not recover damages under section 4 for “any conspiracy by [defendants] to charge higher than competitive prices in the American market” or “for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output.”\textsuperscript{54} While such conduct violated the Sherman Act, under the standard set in *Brunswick* such behavior potentially benefitted plaintiffs as competitors by making supracompetitive pricing more attractive.\textsuperscript{55} Thus, plaintiffs did not suffer antitrust injury.

\textsuperscript{51} *Id.* at 545. A criticism of the Court’s opinion also arises in light of these factors. It would have been enough for the Court to determine that under *Brunswick*, plaintiffs failed to prove antitrust injury—the union’s alleged injury did not adequately reflect the anticompetitive effect of the alleged conspiracy. Instead, the Court went forward with its analysis, appearing “to integrate antitrust injury into a multifactor analysis of entitlement to sue under the antitrust laws, which, the Court acknowledged, was inherently imprecise.” *Id.* As a result, this “multi-factored balancing analysis introduced by *Associated General* appeared to provide a license to the lower courts to engage in imprecise, outcome-oriented decision making.” Jacobson & Greer, *supra* note 29, at 292–93. The result has been a number of confused decisions in the lower courts. Perhaps the most instructive aspect of the Court’s analysis in *Associated General* is the realization that all of these “standing” requirements are intertwined, often making it difficult for a court to precisely identify exactly what prerequisite for maintaining a suit under section 4 is absent.

\textsuperscript{52} 475 U.S. 574 (1986).

\textsuperscript{53} *See id.* at 584.

\textsuperscript{54} *Id.* at 583. The Court also mentioned that Zenith and NUE could not recover antitrust damages “based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations’ economies.” *Id.* at 582.

\textsuperscript{55} *See id.* at 583 (conceding that while such behavior potentially benefitted Zenith and NUE as competitors of the defendant, such behavior did harm competition).

In *Cargill, Inc. v. Monfort Colorado, Inc.*, the Court extended the antitrust injury requirement to injunctions sought under section 16 of the Clayton Act. In contrast to the injury required under section 4, however, the Court identified two distinctions regarding antitrust injury under section 16, the first that there may be a smaller showing of the amount of injury under section 16 than that which is needed for damages under section 4. Additionally, while section 4 required proof of injury that had already occurred, section 16 allowed injunctive relief for merely threatened injury. Beyond those two minor distinctions, the Court held the inquiry under section 16 consistent with that required by section 4. However, the Court still held that antitrust injury was not present in the plaintiff's claim: a competitor did not suffer antitrust injury for purposes of section 16 even though the proposed merger of two of the plaintiff's competitors may reduce the plaintiff's profits due to threatened price competition.

6. *Atlantic Richfield Co. v. USA Petroleum Co.*

The Court's most recent discussion of antitrust injury is in *Atlantic Richfield Co. v. USA Petroleum Co.*, in which an independent retailer of gasoline brought a section 4 action against an oil company for maximum price fixing. The Court held that in the absence of evidence of predatory pricing, a finding of antitrust injury could not be sustained. In effect, the plaintiff suffered no antitrust injury due to alleged lower prices produced by the vertical restraint because, so long as prices stayed above a predatory level, any loss which the plaintiff suffered did not result from anticompetitive behavior. The Court stated, "A firm complaining about the harm it suffers from nonpredatory price competition 'is really claiming that it [is] unable to raise prices.'" Thus,

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56 479 U.S. 104 (1986).
58 See *Cargill*, 479 U.S. at 122. It is important to note that in *Cargill* the Court held that the plaintiff did not show the potential for antitrust injury. In so doing, "the Court expressly left open the possibility that a competitor who challenges an acquisition may pass the section 16 antitrust injury test by alleging that the new firm is likely to engage in predatory conduct." Blair & Harrison, *supra* note 19, at 1550–51 (emphasis added).
60 Id. at 337–38 (quoting Blair & Harrison, *supra* note 19, at 1554); see id. at 337 (explaining that a competitor "may not complain of conspiracies that, for example,
the Court affirmed earlier antitrust decisions in three ways: antitrust injury requires that the plaintiff sustain a loss from anticompetitive behavior; a per se antitrust violation does not equate to antitrust injury; and if anyone is suited to bring a section 4 claim for vertical, maximum price fixing, it is not a competitor, but rather the consumers or the defendant's own dealers.61

D. Antitrust Injury Currently

From the above discussion of antitrust injury, along with the other prerequisites needed to maintain a suit for treble damages, it would appear that district courts have a very well-defined and straightforward job ahead of them. However, a reading of any antitrust case reveals how very fact-specific antitrust law is. Additionally, as Parts II, III, and IV of this Note reveal, difficulty in applying and interpreting the standing requirements, along with the confusion that arises from the overlapping of such requirements, has resulted in some troubling and incorrect decisions.

III. CAMPOS v. TICKETMASTER CORP. AND ANTITRUST INJURY

A. The Eighth Circuit's Take on Campos

1. Background

Following a long procedural history,62 plaintiffs in Campos brought a section 4 action seeking treble damages, asserting that Ticketmaster

[v]iolated § 1 of the Sherman Act by engaging in price fixing with various concert venues and promoters and by boycotting the band Pearl Jam; that Ticketmaster violated § 2 of the Sherman Act by

set maximum prices above market levels, or that set minimum prices at any level" (quoting Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8 (1986)).

61 See Holz, supra note 19, at 299 (1992). Holz notes that the Court "declined to dilute the antitrust injury requirement here because it found that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price fixing." Id. at 299–300; see also Roger D. Blair & John E. Lopatka, The Albrecht Rule After Khan: Death Becomes Her, 74 NOTRE DAME L. REV. 123, 135–141 (1998).

62 In 1994, the Judicial Panel on Multidistrict Litigation transferred 16 cases to the Eastern District of Missouri. In all 16 suits, the plaintiff was either an individual or group of individuals who had purchased tickets from Ticketmaster. The district court consolidated the 16 cases for pretrial proceedings, dismissing 11 of the cases. The plaintiffs in the remaining five then filed a consolidated complaint against Ticketmaster. See In re Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272, 1275 (E.D. Mo. 1996).
monopolizing, or attempting to monopolize, the market for ticket distribution services; and that Ticketmaster violated § 7 of the Clayton Act by acquiring its competitors.\textsuperscript{63}

The plaintiffs argued that as a result, Ticketmaster possessed the control to extract "supracompetitive" fees from concert goers.\textsuperscript{64} Ticketmaster in turn argued that plaintiffs lacked standing to sue under section 4 due to their inability to show a "direct link to the market to give them antitrust standing based on an antitrust damage."\textsuperscript{65}

The district court dismissed the suit on two alternative theories, one of which was antitrust injury. At the direction of the Eighth Circuit, the district court found the antitrust injury prong of the Associated General test dispositive\textsuperscript{66} and held that plaintiffs failed to suffer antitrust injury. The Eighth Circuit directed that for the district court to find antitrust injury, a mere causal connection would not suffice: "The [plaintiffs] must have been the target of the anticompetitive activity, not one who has merely suffered indirect, secondary, or remote injury."\textsuperscript{67} Applying what appeared to be the "indirect purchaser" doctrine, as opposed to antitrust injury analysis,\textsuperscript{68} the district court held that the concert venues and promoters, rather than the purchasers of the tickets, were the more appropriate plaintiffs, because the promoters and venues were not only targets of Ticketmaster's alleged antitrust behavior but were also consumers of Ticketmaster's product and as a result suffered the direct loss due to Ticketmaster's alleged antitrust behavior.\textsuperscript{69} Thus, in effect, the court determined that the plaintiffs were too indirect to have suffered antitrust injury.

In the alternative, even if the antitrust injury element was not dispositive, the district court held that plaintiffs lack standing because they "fail[ed] other elements of the [Associated General] test."\textsuperscript{70} Specifically, damages would be "speculative" and apportionment "complex" because ticket prices depended upon the demand of the featured artist and there would be additional difficulty in properly

\textsuperscript{63} Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168 (8th Cir. 1998), cert. denied, 119 S. Ct. 865 (1999); see also In re Ticketmaster, 929 F. Supp. at 1276.

\textsuperscript{64} Campos, 140 F.3d at 1169.

\textsuperscript{65} In re Ticketmaster, 929 F. Supp. at 1276.

\textsuperscript{66} See id. at 1277 ("The Eighth Circuit has recognized that the antitrust injury element of the Contractors test is potentially dispositive in a standing analysis." (quoting Lovett v. General Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992))).

\textsuperscript{67} Id. (quoting Lovett, 975 F.2d at 520).


\textsuperscript{69} See In re Ticketmaster, 929 F.Supp. at 1277.

\textsuperscript{70} Id. at 1277.
identifying members of the class because many tickets were often charged to one credit card account. Additionally, the district court noted the risk of duplicative recovery, as the concert venues and promoters could quickly follow plaintiffs’ lead, “transforming treble damages against Ticketmaster into an exponential award.”

2. The Eighth Circuit Majority

The Eighth Circuit affirmed the district court’s dismissal of the plaintiffs’ claim for damages under section 4, holding that plaintiffs were indirect purchasers under *Illinois Brick Co. v. Illinois* and thus were barred from collecting treble damages. The court’s discussion of the indirect-purchaser doctrine spanned three pages of its opinion, with the court concluding that “[t]he plaintiffs’ inability to obtain ticket delivery services in a competitive market [was] simply the consequence of the antecedent inability of venues to do so.” In other words, the venues themselves had to pay the service fees first to obtain Ticketmaster’s services, and the ticket buyers in turn bought from the venues, constituting “derivative dealing[,] . . . the essence of indirect purchaser status.”

The court, however, reversed the district court’s ruling that plaintiffs lacked standing to seek injunctive relief under section 16 of the Clayton Act. The court relied on *Cargill*, noting that a plaintiff who lacked standing to sue under section 4 may still have standing to seek injunctive relief under section 16 for the threat of antitrust injury thanks to the lack of risk of duplicative recovery and tracing problems.

3. The Wrong Result

The Eighth Circuit and the district court reached the incorrect result in *Campos*. Perhaps the most confusing aspect of both opinions stems from the intermingling of two different maintenance requirements: the indirect purchaser doctrine and antitrust injury. The district court jumped from “direct loss” language to its conclusion that

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71 Id. at 1277–78.
72 Id. at 1278.
73 431 U.S. 720 (1977); see also *Blue Shield*, 457 U.S. at 465 (providing an explanation of the indirect purchaser doctrine).
75 Id.
76 See id. at 1172 (citing *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 111 n.6 (1986)).
plaintiffs did not suffer antitrust injury because the venues were the consumers and suffered the direct loss.\textsuperscript{77} While the Eighth Circuit affirmed the district court's dismissal of the section 4 claim, the holding turned on the indirect purchaser doctrine, without a mention of antitrust injury. The Eighth Circuit then quickly reversed the district court on the issue of standing under section 16, explaining briefly that since indirect purchaser status does not bar a section 16 claim, the "pleadings establish[ed] antitrust standing to seek injunctive relief."\textsuperscript{78} So was antitrust injury present?

B. McCready and Campos—A Better Duo

The error in both the district and the appellate courts' analyses did not result from the use of the Associated General factors—the case, while not factually analogous to Campos,\textsuperscript{79} was instructive and identified the standing factors courts must consider under section 4. Nor was the indirect purchaser doctrine an inappropriate consideration in a claim for treble damages. However, both courts reached incorrect results on both issues. Following the Supreme Court's analysis in \textit{Blue Shield v. McCready},\textsuperscript{80} Campos and his class were not barred by the indirect purchaser doctrine and they sufficiently alleged antitrust injury to maintain their suit for treble damages.

1. \textit{Blue Shield v. McCready} Up Close

In \textit{McCready}, McCready and her class received medical insurance under a prepaid group health plan purchased by their employers from Blue Shield. Blue Shield provided coverage for psychotherapy services performed by psychiatrists but not for psychologists unless such psychologist was under the supervision of a physician.\textsuperscript{81} McCready and her class obtained treatment from clinical psychologists who were not under the supervision of physicians, and thus, McCready and her class were ineligible for reimbursement under the

\textsuperscript{77} See \textit{In re Ticketmaster}, 929 F. Supp. at 1277.
\textsuperscript{78} Campos, 140 F.3d at 1172.
\textsuperscript{79} Associated General involved a labor union that itself did not suffer antitrust injury and did not constitute a consumer nor a competitor. See Associated General Contractors of California, Inc., 459 U.S. 519 (1983). The individual union members were more likely to have suffered antitrust injury because they lost profits and work under the defendants' alleged coercion of third parties to hire non-union contractors and subcontractors. However, the factors which the Court identified in its analysis are instructive on the issue of antitrust standing, including one which raises the inquiry of whether a plaintiff suffered antitrust injury. See \textit{id}.
\textsuperscript{80} 457 U.S. 465 (1982).
\textsuperscript{81} See \textit{id} at 468.
plan. The complaint alleged a section 1 violation of the Sherman Act—that the defendants had engaged in an unlawful conspiracy “to exclude and boycott clinical psychologists from receiving compensation under the Blue Shield plans” and that Blue Shield’s failure to reimburse had been “in furtherance of the alleged conspiracy.”

Writing for the majority, Justice Brennan first addressed the concern that McCready and her class were indirect purchasers and thus were barred from recovery under section 4. With regard to McCready and her class, the Court explained that a risk of duplicative recovery was not present because these subscribers were not reimbursed by Blue Shield. Therefore, McCready and her class suffered the loss, since the psychologists received payments directly from the subscribers and the employers (as purchasers of the plans) experienced no financial loss themselves. The Court found no risk of duplicative recovery, concluding that McCready and her class’s claim withstood this limitation placed upon section 4 recovery.

In the absence of a risk of multiple liability, the Court “framed the McCready standing issue in terms of how remote the plaintiff may be before falling outside the scope of section 4 coverage,” looking to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful and in providing a private remedy under § 4.

This first inquiry dealt with the issue of remoteness. The Court made clear that the availability of section 4 did not depend upon the intent of the conspirators, but “[w]here the injury alleged [was] so integral an aspect of the conspiracy alleged, there [could] be no question that the loss was precisely ‘the type of loss that the claimed violations . . . would be likely to cause.’” McCready and her class, “although neither competitor[s] nor literally consumer[s], [were] foreseeable and necessary victim[s] of the reimbursement agreement. The harm, thus, was not so fortuitous or incidental as to fall outside the protection of section 4.”

82 Id. at 470 (internal quotations omitted).
83 See id. at 472–75.
84 See id. at 475–76.
85 Blair & Harrison, supra note 19, at 1547.
88 Blair & Harrison, supra note 19, at 1547.
The Court then explored the second issue which dealt with the requirement of antitrust injury. Defendant argued that since McCready did not pay higher rates for psychiatric services or claim resultant elevated psychologist rates, there was not antitrust injury to McCready. However, the Court determined that the defendant's suggestions did not exhaust the possibilities under section 4 and held that McCready and her class did suffer antitrust injury: McCready "could seek the services of a psychiatrist, in which case the anticompetitive impact would have been felt by psychologists, or she could make use of a psychologist and forgo reimbursement. [McCready and her class] chose the latter route, leading to a higher net cost of psychological services."89 Thus, "[a]lthough McCready was not a competitor of the conspirators, the injury she suffered [these higher net costs] was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market,"90 constituting antitrust injury under section 4. McCready was thus free to pursue her action for treble damages.

2. The Effect on Campos

The McCready analysis is instructive on three levels when analyzing Campos. First, the McCready case quickly dismisses the Eighth Circuit's conclusion that Campos and his class were barred from bringing suit under the indirect purchaser doctrine. The Court in McCready held that due to the absence of duplicative recovery, McCready and her class could maintain their suit for treble damages. Similarly, there was no risk of duplicative recovery in Campos. Unlike the traditional "chain of distribution" scenario,91 the venues and promoters did not purchase tickets from Ticketmaster subject to a service charge and then resell those tickets to concert goers, passing on a portion of the service charge. Rather, the venues and promoters voluntarily entered into contracts with Ticketmaster, paid no portion of the service charge, and even received a portion of the service charge from Ticketmaster. Thus, just like the employers and psychologists in McCready, the venues and promoters suffered no injury, and just like McCready and her class who paid for their treatment, the plaintiffs in Campos bore the entire service charge. With this risk of duplicative recovery eliminated, the indirect purchaser doctrine lost its very purpose, and the Eighth Circuit wrongly applied the doctrine, incorrectly barring Campos and his class from pursuing their claim.

89 Id. at 1548.
90 McCready, 457 U.S. at 483–84 (emphasis added).
91 See id. at 465 (providing an explanation of the indirect purchaser doctrine).
With that hurdle cleared, the *McCready* Court next focused on remoteness. Similar to *McCready*, the exorbitant service charges imposed by Ticketmaster clearly resulted in "the type of loss that the claimed violations . . . would be likely to cause." McCready and her class were neither competitors nor consumers, yet the Court still found them within the scope of section 4 because McCready and her class were *foreseeable and necessary victims*. In *Campos*, the plaintiffs clearly constituted consumers of Ticketmaster's ticket distribution and information network, not the venues and promoters who bore no portion of the overcharge and, in some cases, received some portion of the overcharge in the form of a kickback.

If anything, *Campos* presented an even stronger case for treble damages, given that the concert goers had no choice in ticket distributors' services. As the dissent in *McCready* highlighted, "The fact that [McCready] voluntarily elected to spend money for services not covered by his insurance policy would have no greater legal significance than a similar voluntary decision by a person who was not a Blue Shield subscriber." Similarly, the venues and promoters voluntarily entered into exclusive contracts with Ticketmaster. It was the concert goers who had no choice in which ticket-distribution services they used. If McCready and her class, who willingly sought uncovered treatment from psychologists (arguably the target of the alleged conspiracy), were not too remote, then clearly the purchasers of tickets bearing service charges imposed by Ticketmaster constituted even "more" foreseeable and necessary victims of antitrust violations. Campos and his class were not so fortuitous or incidental as to fall outside the protection of section 4.

Lastly, *McCready* held that the plaintiffs suffered antitrust injury. Even though the conspiracy was aimed at the psychologists and the psychotherapy market, the higher net costs for psychological services


93 *See id.* at 479.

94 *Id.* at 494 (Stevens, J., dissenting). In effect, McCready had three options: go to a psychiatrist, go to a psychologist under the supervision of a physician, or go to a psychologist and pay for it. In the case of the plaintiffs in *Campos*, there really was no choice since the promoters and venues chose Ticketmaster, and Ticketmaster had the exclusive right to distribute tickets for those venues.

One could argue that Campos and his class, too, had an option—purchase tickets at the box office and avoid service charges. However, geographical distance could prove this quite difficult and inconvenient. Additionally, given that popular shows are selling out in less than an hour over the phone using Ticketmaster, the box office is not a viable option in many cases.
resulting from McCready and her class’s decision to seek uncovered treatment were so “inextricably intertwined” with the true target of the conspiracy that the plaintiffs suffered antitrust injury. As such, Campos and his class then clearly suffered antitrust injury. Ticket purchasers were the target of Ticketmaster’s antitrust violations—no other conceivable target existed. Thus, at the very least, the excess fees paid by Campos and her class were so “inextricably intertwined” with the injury Ticketmaster aimed to inflict that they suffered antitrust injury. No “jump” needed to be made in Campos as was required in McCready—from the defendants’ targets of psychologists and the psychotherapy market to the seekers of treatment from those professionals in that market. In Campos, the plaintiffs were the target—they bore the entire service charge. Thus, Campos and his class suffered antitrust injury under McCready and Brunswick: Ticketmaster’s alleged antitrust violations eliminated competition and injured consumers. It is difficult to imagine a stronger scenario demonstrating antitrust injury.

3. What Campos Accomplished

As Judge Arnold aptly pointed out in his dissent, the “unhappy result of the holding in [Campos] is that it is now likely that no one can bring a section 4 suit against Ticketmaster.” Additionally, the Supreme Court seemed to accept this statement with its denial of certiorari. Again, the district court and the Eighth Circuit were justified in relying upon Associated General’s analysis; however, factually, the cases were very different. The district court’s holding that Campos failed not only on the issue of antitrust injury but also on the other maintenance requirements was wrong. And, specifically, conclusions regarding indirect purchasers and antitrust injury by both the district and the appellate courts were wrong under McCready. “[T]he one aspect of McCready that is clear is the Court’s primary concern with whether or not the plaintiff’s injury was of the type that the substantive antitrust provision was intended to forestall and thus within the core of Congressional concern in prohibiting the activity and providing a private remedy.” Clearly, Campos and his class’s allegations of Ticketmaster’s domination of the market and the resultant service charges borne by concert-going consumers met the threshold requirements of antitrust injury and the other maintenance requirements, and thus deserved advancement to the next stage of inquiry into the substance of Ticketmaster’s alleged antitrust violations.

96 Chouai, supra note 30, at 1033.
IV. *City of Pittsburgh v. West Penn Power Co.*—
Another Mistake?

A. The Third Circuit Was Clearly in the Dark

1. Background

In 1996, the City of Pittsburgh (City) sought to revitalize several urban areas (Redevelopment Zones), transforming them into industrial, commercial, and residential areas. At that time, Allegheny Power and Duquesne Light were the only two utility companies authorized to provide electric service in Allegheny County, which encompassed the Redevelopment Zones. Only Duquesne Light was certified to actually service the Redevelopment Zones. The City hoped that the introduction of competition would help the progress of the Redevelopment Zones, but Pennsylvania state law afforded utility companies natural monopolies. In order for a utility company to operate in a certain geographic area, the utility had to obtain certification from an independent administrative agency, the Pennsylvania Public Utility Commission (PUC) which approved rates and areas of operation. A new provider could enter another’s service area only if it demonstrated that “the area’s certificated utility [was] providing inadequate service to customers in the proposed new territory.” Nevertheless, the City went ahead and solicited bids for electric utility providers in the Redevelopment Zones, with Allegheny Power offering a lower bid than Duquesne.

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98 The Pennsylvania Legislature passed the Electricity Generation Customer Choice and Competition Act, 66 PA. CONS. STAT. ANN. § 2801 (West Supp. 1999), to gradually introduce competition within the “retail generation function of the electric utility industry,” but not the transmission and distribution of electricity, *West Penn Power*, 147 F.3d at 260 & n.7. As such, the Third Circuit noted that while the statute will introduce some competition among electric service providers in Pennsylvania, it does not *entirely* displace the regulatory function of the PUC. Because [the Act] did not alter the statutory requirement that Allegheny Power petition the PUC to amend its certificate, that Act’s passage does not alter our analysis in this case.

*Id.* at 260 (emphasis added).

99 *West Penn Power*, 147 F.3d at 260.

100 See *id.* at 261.
The City also filed a "Petition for Support of Choice for Retail Electric Service Within Certain Redevelopment Zones Within the City of Pittsburgh" with PUC in late 1996, contesting Duquesne Light's exclusive rights within the Redevelopment Zones; Allegheny Power later filed its own application with PUC.101 Both the City and Allegheny Power sought competition in the Redevelopment Zones. Duquesne Light opposed both petitions. In early 1997, an administrative law judge held prehearing conferences and consolidated the City's petition and Allegheny Power's application.

In April of 1997, Duquesne Light and Allegheny Power announced their intention to merge, with Allegheny Power withdrawing its PUC application.102 As a result, the City brought suit against Duquesne and Allegheny, alleging violations of section 1 of the Sherman Act and section 7 of the Clayton Act, and seeking an injunction of the proposed merger under section 16 and damages under section 4 as a result of "expending significant efforts to bring competition to the Redevelopment Zones; paying higher, non-competitive rates for electric utility service generally; and losing the opportunity to have lower electric service charges."103

The district court dismissed the City's suit for treble damages due to a lack of antitrust injury. The court found that the alleged antitrust violations did not lessen competition: because there had been no competition in the Redevelopment Zones prior to initiation of the City's suit, "neither the proposed merger nor the withdrawal of Allegheny Power's application ha[d] lessened the competition within the City or the choices of utility companies available to the City."104 In other words, the City's position had not changed: because "defendants' agreement not to compete [had] not caused any change in the market or any other anticompetitive effects, it [precluded] a finding that the City [had] been injured."105

101 See id. at 260–61.
102 See id. at 261. Under the terms of the premerger agreement, "the two utilities agreed that they would not file any applications with the government without prior consultation and would not make any changes with respect to rates without first consulting each other." Id.
103 Id. at 262.
104 City of Pittsburgh v. West Penn Power Co., 993 F. Supp. 332, 336 (W.D. Pa. 1998). This appears to have been a decision made on the merits. Even the Third Circuit phrased the district court's dismissal as a "finding" resting upon the "allegations of the complaint," thus looking at the merits of the case itself, not simply a standing requirement." City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998).
The court also dismissed the City's suit for injunctive relief under section 16 for lack of antitrust injury. While admitting that the mere threat of loss was sufficient to confer standing for purposes of injunctive relief, the court held that "the threat of a loss [was] necessarily contingent upon possession of that which [was] threatened"—since there was no competition before there was nothing to lose. Further, the threat of loss was too speculative since PUC never approved the City's petition for or Allegheny's application to provide service to the Redevelopment Zones.

2. The Third Circuit Majority

The Third Circuit affirmed the district court, holding that the City failed to establish the "necessary antitrust injury and causal connection between the alleged antitrust violation and its injury." Combining its discussion of causation and injury, the court specifically held that the lessening of competition resulted not from the defendants' proposed merger but from the regulatory nature of the utilities industry itself. The court explained that there was no lessening of competition because the status quo was maintained: "[T]he utilities' purported antitrust violation [could] only be said to have been competition-neutral and as such, [was] not actionable."

Specifically regarding the alleged Sherman Act violation, the Third Circuit held that "[s]ince the realization of competition [was] in the hands of regulators there [was] no way that the City [could] show that competition would have occurred absent the concerted activity between the two utilities." Similarly, the court dismissed the claim under section 7 of the Clayton Act. "The only 'actual competition' that the City allege[d] in its complaint [was] the competition to be able to provide electric power to the Redevelopment Zones, which

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106 Id. at 337.
107 See id. Plaintiff relied on Blue Shield v. McCready, 457 U.S. 465 (1982). The district court found the case unhelpful: "Because McCready had, in fact, already suffered an injury[,] the case does not bear on the question before this Court of whether or not plaintiff's prospective injuries are speculative or not." West Penn Power, 993 F. Supp. at 337.
108 West Penn Power, 147 F.3d at 269.
109 See id. at 265 ("[I]n this case, we find that determining whether antitrust injury is present necessarily involves examining whether there is a causal connection between the violation alleged and the injury.").
110 See id. at 266.
111 Id. at 266.
112 Id. at 267.
[did] not constitute actual competition." Lastly, regarding injunctive relief under section 16 of the Clayton Act, the Third Circuit concluded that, while injunctive relief existed for threatened loss, "[t]he presence of the regulatory scheme and need for approval in connection with the choice of utilities to serve the Redevelopment Zones [cut] the causal chain and convert[ed] what might have been deemed antitrust injury in a free market into only a speculative exercise." In other words, the City could show no impending harm because it had lost nothing due to the proposed merger, and the withdrawal of Allegheny Power's application revealed that an injunction would accomplish nothing.

According to the court, there was no competitive process due to the regulatory restraints imposed on the market—the submission of bids and filing of petitions did not equate to actual competition. Additionally, the introduction of competition into the market depended upon PUC approval, which Allegheny Power never obtained. Since the regulatory nature of the utilities industry was not one of the evils which the antitrust laws intended to address and snuff out, the Third Circuit held that the City failed to adequately allege antitrust injury.

B. West Penn Power in a Different Light

The Third Circuit incorrectly affirmed the district court's dismissal for lack of antitrust injury and it incorrectly concluded that the alleged antitrust violations did not lessen competition, which was clearly a decision on the merits. In doing so, the court skipped the antitrust injury inquiry. But competition clearly existed before the proposed merger of Allegheny Power and Duquesne Light, and their proposed merger did sustain a finding of antitrust injury.

113  Id.
114  West Penn Power, 147 F.3d at 267–268. The court reached this conclusion based on the record's lack of any indication that there was a likelihood that PUC would grant Allegheny Power's application or that the PUC proceedings were mere formalities. The court further reasoned that the City's petition, Allegheny's application, and Duquesne's response all "make clear that PUC proceedings to amend Allegheny Power's certificate were already being vigorously contested." Id. at 268.
115  See id. at 266. "Without demonstrating that there was competition, a plaintiff cannot show that the defendants' actions have had or will have anticompetitive effects." Id. at 267.
1. As Bright As Day, Duquesne and Allegheny Were Competitors

The Third Circuit not only skipped the standing analysis and made a decision on the merits, but in doing so it erroneously concluded that the defendants were never competitors. The Third Circuit used a literal definition of competition—Allegheny Power and Duquesne Light as service providers in the same area and at the same time. But the court failed to consider the "competitive process" which existed under the statutory scheme and the potential for competition that was never realized when Allegheny withdrew both its application and its bid to service the Redevelopment Zones. Allegheny Power and Duquesne Light were actual competitors under the statutory structure itself. First, prior to and at the time of the suit, Allegheny Power and Duquesne Light were in direct competition for both PUC's approval to service the whole of Allegheny County and for PUC's acceptance of their bids to service the Redevelopment Zones. Further, PUC guidelines allowed a provider to service an already-certified area upon a determination that the certified utility was providing inadequate service. The entire structure of the regulations was best described as a competitive process, and no rule existed "that the parties must be in head-to-head competition in the relevant market (as opposed to head-to-head competition for the relevant market) before the antitrust laws [would] apply." Thus, it was in Allegheny Power's and Duquesne Light's best interests to keep abreast of and find ways to "one-up" each other's charges and level of service, not only for purposes of impressing PUC when applying for initial certification but also if either utility chose to challenge the other's performance in an already-certified area of Allegheny County.

Additionally, the actual sequence of events leads to the inference that Allegheny Power and Duquesne Light were competitors. The Third Circuit observed that Duquesne Light's responses (filed with PUC following Allegheny Power's application and the City's petition) made "it clear that PUC proceedings to amend Allegheny Power's certificate were . . . vigorously contested" by Duquesne Light. The reasonable conclusion to be drawn is that these two companies were

116 See id. at 265. The Third Circuit couched this as a "key" fact, but it was in fact a conclusion—again, the court incorrectly made a decision on the merits and not on the initial inquiry of antitrust injury.
117 Id. at 267. The Third Circuit shot down this description because in its opinion "the competitive process [did] not even exist because of regulatory restraints." Id.
118 See id. at 260.
119 Id. at 271 (Heany, J., dissenting) (quoting Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)).
120 Id. at 268.
competitors—the threat felt by Duquesne Light prompted it to "vigorously contest," later compelling it to enter into merger negotiations with Allegheny Power.

The City's request for bids to service the Redevelopment Zones also leads to the same conclusion. Allegheny Power and Duquesne Light submitted separate bids, characterized by the Third Circuit as "significantly different."121 In its application, Allegheny Power expressly stated that "its prices would be substantially lower than Duquesne Light Company's."122 Again, the two utilities were competing for the position of service provider. Even if the City selected only one utility for the Redevelopment Zones, Duquesne Light and Allegheny Power were competitors, each trying to convince PUC that it offered the higher level of service for the cheaper price. Thus, not only did the Third Circuit erroneously rule on the merits, but it also reached the wrong conclusion—clearly, Duquesne Light and Allegheny Power were indeed competitors.

2. Out of the Dark and Into the Light—Plaintiffs Adequately Alleged Antitrust Injury

Under Brunswick and its progeny, the City adequately alleged antitrust injury, at least for purposes of section 16, and arguably for purposes of section 4 as well. On the most basic level, the City alleged that Allegheny Power and Duquesne Light conspired to deprive the City of an opportunity to obtain less expensive electricity. By couching its holding in terms of antitrust injury, the Third Circuit in effect held that Allegheny Power and Duquesne Light's behavior was not of the type which the antitrust laws aspired to prevent.

However, the antitrust laws seek to protect consumers and to promote and preserve competition. The proposed merger eliminated all choice from both the initial process of choosing utility companies and possibly from within the same service area—when the only two PUC-certified utility providers merged, a monopoly resulted in Allegheny County. The merger robbed the City of two competitors for PUC certification, irrespective of whether the PUC or the Pennsylvania legislature would ever allow two utilities to operate in the same certified area. Specifically, there would be no competition even regarding bids proposed for serving the Redevelopment Zones. Additionally, the po-

121 Id. at 261.
122 Id. at 270 (Heaney, J., dissenting). Allegheny Power explained in its application to PUC that "[i]t [was] certain that the potential for developing new, incremental electrical load in the Redevelopment Zones [would] be enhanced substantially if electricity prices therein [were] as low as possible." Id.
potential for competition within the Redevelopment Zones disappeared, as well as for all of Allegheny County. Clearly, this was the type of behavior which the antitrust laws sought to prevent, and it flowed from the defendants' conduct rather than from the regulatory scheme.

Specifically, under the Clayton Act, mergers which substantially lessen competition or tend to create monopolies are prohibited. Here, where Allegheny Power and Duquesne Light were the only two utility companies which could have provided service to the Redevelopment Zones, the proposed merger clearly lessened competition and created a monopoly.123

There was also a restraint of trade under the Sherman Act.

The merger agreement destroyed the City's opportunity to obtain less expensive electricity. A factfinder might well determine that this opportunity was more than speculative; it was real enough to cause Allegheny Power to file its application; it was real enough to cause Duquesne Light Company to oppose the application; and it was real enough to convince Allegheny Power and Duquesne Light Company that a merger was the most effective way of avoiding competition. In short, "the injury alleged by [the City] was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause."124

If the goal of the antitrust injury requirement is to make sure that the behavior alleged is of the type which the antitrust laws were intended to prevent,125 then it is hard to imagine what the antitrust laws were intended to prevent if not behavior that not only lessens, but also eliminates all competition and consumer choice. If these facts do not fulfill the requirements for section 4, then, at the very least, antitrust injury existed for purposes of injunctive relief under section 16, barring the merger and requiring that Allegheny Power either reinstate its application with or reapply to PUC for certification within the Redevelopment Zones.126

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123 See id. at 271 (Heaney, J., dissenting).
124 Id. (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).
126 See Jacobson & Greer, supra note 29, at 283 (suggesting that the threshold is lower for section 16).
V. **George Haug Co. v. Rolls Royce Motor Cars, Inc.: Another Court Mistaken**

A. **The Second Circuit Ran Right Over Antitrust Injury**

1. **Background**

In *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, plaintiff George Haug Co. (Haug) sold and serviced Rolls Royce cars as an authorized parts and service dealer in Manhattan. Defendant Rolls Royce Motor Cars, Inc. (Motor Cars) imported, sold, and distributed Rolls Royce cars and parts and "controlled the market for parts with respect to its automobiles known as the 'after market parts.'" In 1996, Haug filed suit against Motor Cars alleging a conspiracy between Motor Cars and one of Haug’s competitors, Carriage House Motor Cars, Ltd. (Carriage House), to "drive [Haug] out of the business of repairing and servicing Rolls Royce automobiles as an authorized service center, to restrain trade and to monopolize trade for parts and services, and to discriminate against [Haug] so as to prevent [Haug] from competing effectively." The Southern District of New York dismissed the suit, holding that Haug failed to adequately allege antitrust injury. The district court noted that Haug alleged injury to itself, but that damage to

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127 148 F.3d 136 (2d Cir. 1998).
128 See id. at 138.
129 Id.
130 Id. Specifically, Haug alleged that Rolls Royce officials were paid commercial bribes to [drive Haug out of business]. In furtherance of the conspiracy, the amended complaint further asserted that preferences were given by Rolls Royce to Carriage House consisting of more favorable credit and price terms to Carriage House with respect to parts; payment of the rent of Carriage House; allowing Carriage House a price differential and allowing Carriage House a more favorable basis for reimbursements for warranty work; and also enabling Carriage House to offer customers free work paid for by Rolls Royce while requiring Haug to charge similarly situated customers.

Id.


132 See id. at *2 ("[Haug] has alleged its own business losses, loss of future income from allegedly having been ‘forced out of business,’ and loss from its ‘inability to sell its parts and goodwill.’").
Haug was insufficient "unless it [was] accompanied by cognizable
damage to competition in the relevant market."\textsuperscript{133}

Regarding the alleged violations of the Sherman Act, Haug made
two arguments in an effort to adequately allege antitrust injury. First,
Haug alleged that prior to its termination, Haug and Carriage House
accounted for eighty percent of the market of repairs on Rolls Royce
cars and that Haug's termination thus eliminated competition.\textsuperscript{134}
The district court, however, determined that nothing in the complaint
convinced it that Haug's elimination from the market resulted in a
decrease of available service outlets.\textsuperscript{135} Further, the district court
noted that if Haug argued that Motor Cars' actions resulted in 100% of
the market concentration, such a "result would be an exclusive dis-
tributorship between [Motor Cars] and Carriage House," which is
legal under the Sherman Act.\textsuperscript{136}

Haug next alleged that its elimination gave Carriage House "an
advantage over other Rolls Royce dealers in selling new cars because
"consumers would believe that they would have to go to Carriage
House for warranty work and would probably not receive good treat-
ment if they bought their Rolls Royces from a dealer other than Car-
riage House."\textsuperscript{137} The district court found the claim speculative
because Haug never sold new automobiles—therefore, since Haug
was never a new car dealer, it lacked standing to assert antitrust injury
suffered by new car dealers.\textsuperscript{138}

The district court also held that Haug failed to allege antitrust
injury under the Robinson-Patman Act. The court concluded that the
harm which Haug suffered due to price discrimination alone was in-
adequate to assert antitrust injury—again, the court required suffi-
cient allegations of injury to the market.\textsuperscript{139}

2. Second Circuit Majority

The Second Circuit affirmed the district court's dismissal of
Haug's Sherman Act claims, reasoning that Haug failed to adequately
allege antitrust injury. It agreed with the lower court's conclusion that
Haug failed to adequately allege antitrust injury because Haug did not
plead its own market share for repair and servicing of Rolls Royces or

\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{See id.}
\textsuperscript{135} \textit{See id. at *3.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{See id.}
\textsuperscript{139} \textit{See id. at *4.}
the market share absorbed by Carriage House resulting from Haug’s termination. Thus, no facts existed from which the court could conclude that there was a decrease in Rolls Royce service outlets resulting from Haug’s termination. The Second Circuit additionally emphasized that Haug had no standing to assert antitrust injury on behalf of Rolls Royce Dealerships because Haug was never a dealership.

B. The Second Circuit’s Mistake in George Haug Co.—Following the Supreme Court’s Lead in Atlantic Richfield

The Second Circuit erroneously jumped to the merits of Haug’s antitrust claims and incorrectly held that Haug had not suffered antitrust injury, making a mistake similar to the one made by the majority in Atlantic Richfield. The most apparent flaw in the Second Circuit’s decision arose from its requirement that for purposes of antitrust injury “the challenged action [must have] had an actual adverse effect on competition as a whole in the relevant market; to prove it [had] been harmed as an individual competitor [would] not suffice.” In other words, Haug’s status as a competitor, without allegations of loss to the entire market, was not enough to meet the antitrust injury requirement. However, Haug suffered antitrust injury. What the Second Circuit labeled as “antitrust injury” really addressed whether Haug adequately alleged and proved his antitrust claims.

1. Atlantic Richfield in Detail

The majority in Atlantic Richfield Co. v. USA Petroleum Co. made the same mistake as the Second Circuit. In Atlantic Richfield, USA Petroleum, a discount-gasoline retailer, brought suit against Atlantic Richfield (ARCO), a gasoline refiner, alleging that ARCO imposed maximum resale price maintenance on those competitors of USA Petroleum which sold ARCO’s gasoline. Specifically, USA Petroleum

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141 See id.
142 Id. at 139 (quoting Capital Imaging v. Mohawk Valley Med. Assoc., Inc., 996 F.2d 537, 543 (2d Cir. 1993)).
144 USA Petroleum alleged that ARCO imposed the maximum resale prices on dealers when ARCO adopted marketing strategies aimed at competing with independents such as USA Petroleum. These strategies included ARCO “[making] available to its dealers and distributors such short-term discounts as ‘temporary competitive allowances’ and ‘temporary volume allowances,’ and it reduced its dealers’ costs by, for example, eliminating credit card sales.” Id. at 332. Such strategies resulted in ARCO increasing its sales and market share. See id.
alleged that ARCO and its co-conspirators eliminated competition among ARCO-brand dealers, resulting in a fixed, artificially low price for gas. This agreement in turn harmed the independent, non-ARCO discounter-retailers such as USA Petroleum because consumers obviously wanted the cheapest gasoline, and USA Petroleum lost money.

The Supreme Court held that USA Petroleum did not suffer antitrust injury. The Court explained that, as a competitor, USA Petroleum's lost business and profits resulted only from its competitors' lower, but not \textit{predatorily} lower, prices. Thus, such a price war constituted competition, exactly what the antitrust laws work to \textit{preserve}\textsuperscript{145}—"[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury."\textsuperscript{146} In effect, "a firm that complains about the harm it suffered from [non-predatory price] competition . . . is really claiming that it was unable to raise prices."\textsuperscript{147}

2. A Defect in \textit{Atlantic Richfield}

The Court in \textit{Atlantic Richfield} most likely reached a sound \textit{final} result,\textsuperscript{148} but incorrectly labeled its holding in terms of "antitrust injury." Arguably, the Court reached the merits of USA Petroleum's claims and skipped the initial, and required, inquiry regarding antitrust injury. In so doing, the Court produced a deceptive holding that spoke in terms of "antitrust injury" when in fact the court did not look at the issue of antitrust injury at all.

Justice Stevens noted in his dissent in \textit{Atlantic Richfield} that the "Court undermine[d] the enforceability of a substantive price-fixing violation with a flawed construction of section 4, erroneously assuming that the level of a price fixed by a section 1 conspiracy [was] relevant to legality and that all vertical arrangements conform[ed] to a single model."\textsuperscript{149} Clearly, ARCO's price-fixing arrangement was unlawful per se, so the only issue was whether USA Petroleum, as the targeted competitor, could challenge the pricing scheme. The reason

\textsuperscript{145}See \textit{id.} at 337 ("A competitor may not complain of conspiracies that set minimum prices at \textit{any} level." (quoting Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8 (1986))).

\textsuperscript{146}\textit{Atlantic Richfield Co.}, 495 U.S. at 340.

\textsuperscript{147}Blair & Harrison, \textit{supra} note 19, at 1554.

\textsuperscript{148}See Jacobson & Greer, \textit{supra} note 29, at 305 (noting that by "basing its decision on antitrust injury grounds, the [\textit{Atlantic Richfield}] Court unnecessarily delayed the demise of \textit{Albrecht} seven more years, giving the precedent additional time to do more damage in the lower courts").

\textsuperscript{149}\textit{Atlantic Richfield Co.}, 495 U.S. at 346 (Stevens, J., dissenting).
why the majority denied USA Petroleum standing—stemming from the fact that USA Petroleum was merely a competitor of ARCO in the vertical arrangement—was flawed because the antitrust laws also work to protect competitors where competition is threatened.\(^\text{150}\)

The majority in \textit{Atlantic Richfield} accepted that the price-fixing scheme violated section 1 per se, but it "den[ied] USA standing to challenge the arrangement because it [was] neither a consumer nor a dealer in the vertical arrangement, but only a competitor of ARCO: [t]he antitrust laws were enacted for ‘the protection of competition, not competitors.’"\(^\text{151}\) But such a proposition should not "be read to deny all remedial actions by competitors. When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of protecting competition."\(^\text{152}\) The Court itself in \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.} established that illegal coordination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."\(^\text{153}\) Further, the Court in \textit{Brunswick} said that "competitors may be able to prove antitrust injury before . . . competition is thereby lessened."\(^\text{154}\) USA Petroleum suffered antitrust injury for purposes of bringing a section 4 suit. This \textit{was} antitrust injury, and the predatory price-level distinction should have come into play only later upon an examination of the merits.

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\(^{150}\) See \textit{id.} (Stevens, J., dissenting). Justice Stevens noted two flaws with the majority's opinion. Regarding the first flaw, he argued that section 1 is unrelated to the level of the administered price at any particular point in time. A price fixed by a single seller acting independently may be unlawful because it is predatory, but the reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal. \textit{Id.} at 353 (Stevens, J., dissenting). Further, the Court established in \textit{United States v. Trenton Potteries Co.}, 273 U.S. 392, 397 (1927), that reasonableness of price is no defense to price-fixing.

Regarding the second flaw, the dissent argued that the vertical characterization “[did] not limit its potential consequences to a neat category of injuries,” given the fact that the exact same consequences in the context of a horizontal conspiracy would constitute antitrust injury. \textit{Atlantic Richfield Co.}, 495 U.S. at 355 (Stevens, J., dissenting). Additionally, the majority’s “treatment of vertical maximum-price-fixing arrangements necessarily assumes that all such conspiracies have the same competitive consequences.” \textit{Id.} at 357 (Stevens, J., dissenting).

\(^{151}\) \textit{Id.} at 352 (Stevens, J., dissenting) (quoting \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 320 (1962)).

\(^{152}\) \textit{Id.} at 352–53 (Stevens, J., dissenting).


3. *George Haug Co. and Atlantic Richfield—Two Wrongs Do Not Make a Right*

*Atlantic Richfield*’s holding clearly was about whether the plaintiff adequately alleged or proved ARCO’s antitrust claims—"the real problem was not antitrust injury. It was that [Atlantic Richfield], in fact, had done nothing wrong. If indeed it set vertical price ceilings, that conduct [was] usually procompetitive—as the Supreme Court recently recognized in overruling *Albrecht* in *State Oil Co. v. Khan*."

Similarly, Haug sufficiently alleged antitrust injury. However, the Second Circuit jumped to the merits of Haug’s antitrust claims and incorrectly dismissed the case. As a result, the Second Circuit achieved a result that undermined what the antitrust laws sought to protect (competition) and defeated the purpose of having standing requirements at all. That Haug was a "competitor" should not have precluded Haug from adequately alleging antitrust injury. Forcing competitors out of business hurts competition. When Haug went out of business, competition was greatly reduced—eighty percent of the market was originally serviced by only Carriage House and Haug, and the elimination of Haug left consumers in that portion of the market with very little choice. While choice still existed, competition was still harmed, and Haug suffered antitrust injury. Unfortunately, the Second Circuit failed to appreciate the purpose of antitrust injury and produced an opinion that merely added to the confusion regarding private enforcement of the antitrust laws under section 4.

**VI. Conclusion**

The Eighth, Third, and Second Circuits all reached incorrect results on the issue of antitrust injury. The *Campos* decision left no one to challenge Ticketmaster’s practices since the decision barred the concert goers, the only logical (and eligible under *McCready*) plaintiffs, from pursuing a suit for treble damages. Under *McCready*, Campos and his class suffered antitrust injury, and their allegations of Ticketmaster’s antitrust violations deserved a closer look. *West Penn Power Co.* glossed over and inadequately addressed the issue of antitrust injury. Again, the plaintiff suffered antitrust injury, and its claims against Allegheny Power and Duquesne Light should have been examined after the prerequisites for standing were analyzed. Fi-

155 Jacobson & Greer, *supra* note 29, at 303; see also Blair & Lopatka, *supra* note 58, at 135-41.
nally, Haug followed the lead of the Court in *Atlantic Richfield* and also produced a holding that spoke in terms of "antitrust injury," when in reality the holding really had little to do with antitrust injury and everything to do with the substance of the antitrust violations alleged by Haug. Haug suffered antitrust injury for purposes of the standing analysis, but the standing requirement was skipped, and the court's decision instead rested on the merits.

To true Pearl Jam fans, no concert could possibly be complete without the song *Alive* off the band's first album, regardless of whether Ticketmaster did or did not distribute the tickets. Serious fans consider the song a staple in the group's repertoire. Likewise, when the "group" of Supreme Court Justices decided *Brunswick* in 1977, they too created a "staple"—antitrust injury became a required element in the list of standing inquiries under sections 4 and 16 of the Clayton Act. *Brunswick* and its progeny teach that private parties deserve a remedy under the antitrust laws only for those practices which harm competition and consumers—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." At the same time, the standing inquiries protect defendants from liability for practices which Congress did not intend to sanction and monitor under the antitrust laws. The plaintiffs in *Campos*, *West Penn Power Co.*, and *Haug* did suffer antitrust injury. In dismissing their claims, the Eighth, Third, and Second Circuits not only hurt the plaintiffs involved in these cases, but they also chipped away at the very foundation of the antitrust laws themselves. Because antitrust injury is a prerequisite for bringing suit under sections 4 and 16, there is no excuse for the courts' unpreparedness and incorrect conclusions—the issue of antitrust injury as a standing requirement always arises. Courts must realize and understand this, or defendants' anti-competitive behavior will remain unchecked, and plaintiffs will continue to be left with no recourse. Something was "wrong" with the Eighth, Third, and Second Circuits' treatment of antitrust injury, and all courts need to learn from those errors in order to prevent repetition. If anything positive is to come of the mistakes made in *Campos*, *West Penn Power Co.*, and *Haug*, it will hopefully be a realization that antitrust injury is indeed "still alive."

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157 *Brunswick Corp.*, 429 U.S. at 489.