Antitrust Preliminary Injunctions in Hostile Tender Offers

Joseph Gregory Sidak

Reprinted from

KANSAS LAW REVIEW

Vol. 30, No. 4, Summer, 1982

Kansas Law Review

ANTITRUST PRELIMINARY INJUNCTIONS IN HOSTILE TENDER OFFERS

*Joseph Gregory Sidak**

TABLE OF CONTENTS

* A.B. 1977, A.M., J.D. 1981, Stanford University. Law Clerk to Hon. Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit. The author wishes to thank the following persons, who have generously commented on various drafts of this Article over the past year: William F. Baxter, Frank H. Easterbrook, Daniel R. Fischel, Henry J. Friendly, H. Douglas Galt, Ronald J. Gilson, Richard A. Posner, Antonin Scalia, David M. Spector, and Malcolm E. Wheeler. The Mobil Corporation retained Lexecon, Inc. in October, 1981 to analyze legal and economic aspects of Mobil's tender offer to shareholders of the Marathon Oil Company. Although most of this Article was written before that time, some portions are based on a report that the author prepared with Frank Easterbrook for Mobil while the author was a consultant at Lexecon.

I. INTRODUCTION

A routine defensive tactic of targets of hostile tender offers is to seek a preliminary injunction under section 16 of the Clayton Act[1] on the ground that the offeror's acquisition of the target's stock would effect a merger violating section 7 of the Act.[2] In a frequently quoted sentence from *Missouri Portland Cement Co. v. Cargill, Inc.*,[3] Judge Friendly succinctly explained why an antitrust preliminary injunction "spells the almost certain doom of a tender offer":[4]

> Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.[5]

---

[1] 15 U.S.C. § 26 (1976). Section 16 entitles a private party to sue for either preliminary or permanent injunctive relief "against threatened loss or damage by a violation of the antitrust laws under the same conditions and principles as injunctive relief . granted by courts of equity . " *Id.*

[2] *Id.* § 18. Grumman recently used this defensive tactic to block LTV's hostile tender offer. *See* Grumman Corp. v. LTV Corp , 665 F.2d 10 (2d Cir. 1981); *see also* Marathon Oil Co. v Mobil Corp., 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981); Complaint in Conoco Inc v Mobil Corp., No. 81-1694 (D.D.C., filed July 22, 1981); Metz & Paul, *Mobil Weighs Sweetening Bid for Conoco Amid Rumors Seagram Also Plans Raise*, Wall St. J., July 23, 1981, at 2, col. 3.

[3] 498 F 2d 851 (2d Cir.), *cert. denied*, 419 U S 883 (1974).

[4] 498 F 2d at 870; *see also* FTC v. Exxon Corp., 636 F.2d 1336, 1343-44 (D C. Cir. 1981). Although the Second Circuit in Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 (2d Cir 1981), acknowledged this concern articulated by Judge Friendly in *Missouri Portland Cement*, it gave the issue no weight: "We need not assess the parties [*sic*] conflicting claims as to the reality of renewing the tender offer in the event that a permanent injunction is denied upon a plenary trial." The result, of course, was entirely predictable. *See LTV Drops Bid for Grumman, Cites Opposition*, Wall St. J., Nov. 17, 1981, at 4, col. 1.

In 1977, the ABA Antitrust Section wrote: "In all reported cases but one where preliminary relief has been granted prohibiting the offeror from proceeding with a tender offer on the basis of alleged Section 7 violations, the offer has been withdrawn and a full trial on the merits has not been held." ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT 34 (1977) [hereinafter cited as ABA MONOGRAPH], *see also* Raybestos-Manhattan, Inc. v. Hi-Shear Indus., Inc , 503 F. Supp. 1122, 1136 (E.D.N.Y 1980), 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 329 (1978) [hereinafter cited as 2 P. AREEDA & D TURNER]; Note, *Target Company Defensive Tactics Under Section 7 of the Clayton Act*, 4 CONN L. REV. 352, 387-88 (1971); Note, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N Y.U. L. REV 771, 771-72 (1965)

In contrast, Judge Friendly has noted that a court "imposes no serious impediment to cash tender offers" when it temporarily enjoins a tender offer only for as long as it takes the offeror to cure disclosure defects that might violate § 14(3) of the Williams Act, 15 U.S.C. § 78n(e) (1976). Prudent Real Estate Trust v. Johncamp Realty, Inc., 599 F.2d 1140, 1148 (2d Cir. 1979). Judge Friendly has emphasized that a Williams Act injunction would suffice "if it extends only until [the offeror] makes the necessary corrections and allows a reasonable period for withdrawal of stock already tendered " *Id.* at 1149; *see also* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 870-71 (2d Cir.), *cert denied*, 419 U.S. 883 (1974); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 133 (1977) [hereinafter cited as E. ARANOW, H. EINHORN & G. BERLSTEIN]. Judge Friendly, however, may have understated the tactical value of a securities injunction in repelling a hostile tender offer. *See* MITE Corp. v. Dixon, 633 F.2d 486, 494 (7th Cir. 1980), *aff'd sub nom.*, Edgar v. MITE Corp., 102 S. Ct. 2629 (1982) (state tender offer statute).

A Williams Act injunction could enhance the efficiency of capital markets if the additional disclosures contained information that investors had not already impounded into the price of the target's shares. *See* J. LORIE & M. HAMILTON, THE STOCK MARKET: THEORIES AND EVIDENCE 79-97 (1973). However, such mandatory disclosure could be inefficient in the long run, for it will reduce the return to offerors who acquired the information originally and therefore will result in less search for information regarding desirable targets.

[5] 498 F.2d at 854; *cf.* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 191 (1973) ("the grant of [a preliminary] injunction in a merger or acquisition case may have the same practical effect as that of a final one").

The litigation costs that an antitrust injunction imposes on an offeror, though substantial,[6] seem unlikely to exceed the offeror's risk-adjusted expected benefit from the takeover. Rather, delay seems to be the more determinative tactical result of an antitrust injunction.[7]

For several reasons, the possibility of delay tends to discourage a potential offeror from ever making a tender offer. First, it increases uncertainty for the offeror because the longer the acquisition is deferred, the more likely it is that intervening events will widen the dispersion of the offeror's possible returns from the takeover.[8] Second, regardless of how narrow or broad the dispersion of possible returns from a takeover, delay also reduces the takeover's expected value to the offeror because even benefits that are certain to accrue to the offeror must be discounted to their present value if deferred. Third and most important, delay enables the target to search for a white knight[9] and enables other firms to free-ride on the offeror's efforts to identify an attractive target.[10] Thus, the original offeror bears greater uncertainty as to the final tender price necessary to acquire the target, and the target's shareholders bear greater uncertainty over whether the antitrust laws will prevent them from ultimately tendering their shares to the higher original bidder.[11]

---

[6] *See* Metz, *Merger Masters: Outside Professionals Play an Increasing Role in Corporate Takeovers*, Wall St. J., Dec. 2, 1980, at 1, col. 6.

[7] In *Missouri Portland Cement* Judge Friendly concluded that the district court erred when it asserted that a preliminary injunction would impose on the offeror a hardship amounting to "merely 'inconvenience and financial loss of what would amount to processing a new tender offer,'" especially, Judge Friendly noted, because the target would have "the strongest motivation for footdragging" in proceeding to a trial on the merits 498 F.2d at 870 (quoting Missouri Portland Cement Co. v. Cargill, Inc., 375 F Supp. 249, 258 (S D N Y 1974)). In contrast, in Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. (CCH) ¶ 61,717 (N.D. Ill 1977), the court refused to acknowledge that "cognizable harm [can] come to the target by restraining it from engaging in an acquisition which may well result in either a private or governmental antitrust action being brought against it." *See also* Grumman Corp v LTV Corp., 527 F. Supp. 86, 104-05 (E D N Y), *aff'd*, 665 F.2d 10 (2d Cir. 1981). This view is misguided because it naively presupposes that in the haste of an interlocutory hearing a court can better assess potential § 7 violations and breaches of fiduciary duty than can the offeror's management, investment bankers, and counsel before undertaking the tender offer. The *Chemetron* court posited that the offeror's "insistence on proceeding [with its tender offer] in the face of the strong evidence showing a potential Section 7 violation cannot be in the best interests of its shareholder" 1977-2 Trade Cas. (CCH) ¶ 61,717. This analysis is inappropriate for the same reason that the business judgment rule is a legal fiction: "courts are ill-suited to review the wisdom of complex business judgments" Gilson, *A Structural Approach to Corporations The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 823 & n.12 (1981) [hereinafter cited as Gilson].

Federal courts have held state tender offer statutes unconstitutional on the ground that the Williams Act preempts state laws that enable a target to delay an offer significantly. *See* MITE Corp v Dixon, 633 F.2d 486, 490-99 (7th Cir. 1980), *aff'd sub nom*. Edgar v. MITE Corp., 102 S Ct 2629 (1982), Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1274-81 (5th Cir. 1978), *rev'd on other grounds sub nom* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

[8] This argument rests on the generally accepted economic assumption that corporate managers are risk averse. *See generally* K. ARROW, *The Theory of Risk Aversion*, in ESSAYS IN THE THEORY OF RISK-BEARING 90 (1970). The offeror faces considerable uncertainty even if no delay occurs. *See* Petzinger, *Troubled Couplings: To Win a Bidding War Doesn't Ensure Success of Merged Companies*, Wall St. J., Sept. 1, 1981, at 1, col. 6.

[9] *See, e.g.*, Cole, *Marathon, in Court, Slows Mobil Bid*, N.Y. Times, Nov. 3, 1981, at D1, col. 3; Shao, *Newmont Files Antitrust Action to Block Gold Fields From Raising Its 8.1% Stake*, Wall St. J., Oct. 16, 1981, at 18, col 2; *see also* Dodosh, *Mobil Set Back as Order It Won Is Altered, Freeing U.S. Steel to Pursue Marathon Bid*, Wall St J, Nov. 30, 1981, at 3, col. 2; Nag & Rotbart, *U.S. Steel Moves to Rescue Marathon Oil from Mobil; Bid May Just Be Opener of Far Wider Takeover Battle*, Wall St. J., Nov. 20, 1981, at 3, col. 1, *Socal, Pennzoil Say They Turned Down Approaches Seeking Bids for Marathon*, Wall St. J., Nov. 5, 1981, at 8, col 1

[10] *See* Smiley, *Tender Offers, Transactions Costs and the Theory of the Firm*, 58 REV ECON. & STATISTICS 22 (1976).

[11] In the Conoco takeover, for example, Mobil made the highest bid, thereby indicating it could put Conoco's assets to a higher-valued use than could DuPont or Seagram. Yet, few Conoco shareholders tendered to Mobil, presumably because their perceived probability that a Mobil-Conoco merger would

Part II of this Article presents an economic framework for evaluating the costs and benefits of issuing antitrust preliminary injunctions in hostile tender offers. Using this framework, part II concludes that it is unlikely that issuing such an injunction ever would enhance social welfare and that a court therefore never should grant one, even when the tender offer would merge the corporate control of two competitors. Consequently, part III advocates that Congress deny targets of hostile tender offers standing to sue for preliminary injunctions under section 16 of the Clayton Act. Part IV shows how this economic prescription can be reconciled with existing law.

II. An Economic Framework for Evaluating Motions for Antitrust Preliminary Injunctions in Hostile Tender Offers

Courts have adopted inconsistent standards for issuing antitrust injunctions in tender offers. The Third Circuit requires a target to show both "a reasonable probability that it will prevail at final trial on the charge of a § 7 violation" and "irreparable harm if an injunction pendente lite is not granted."[12] In the Sixth Circuit, a target must show, in addition to these two elements, that the injunction is in the public interest and that the target lacks an adequate legal remedy.[13] In the Second Circuit, a target seeking a preliminary injunction must also show irreparable harm. In addition, the target must show either a likelihood of success on the merits, or the existence of sufficiently serious questions going to the merits to make them fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.[14] District courts in the

pass antitrust scrutiny implied a lower expected value per share for Mobil's offer than for DuPont's. *See* Metz & Timberlake, *DuPont Apparently Wins the Fight for Conoco as Mobil Appeal Denied*, Wall St. J., Aug. 5, 1981, at 3, col. 1.

During the Marathon Oil takeover battle, speculation arose that Texaco revealed that it had been approached as a potential white knight by Marathon in order to undercut the credibility of Marathon's antitrust arguments against Mobil, thereby lessening the likelihood that the Marathon litigation would produce an antitrust precedent injurious to a possible future tender offer by Texaco for a smaller competitor. *See* Metz, *Texaco Chief Says Firm Was Approached By Bankers, Others on Marathon's Behalf*, Wall St J , Nov. 19, 1981, at 2, col. 3.

12 Allis-Chalmers Mfg Co v White Consol. Indus., Inc., 414 F.2d 506, 510-11, 515 (3d Cir. 1969), *cert. denied*, 396 U S 1009 (1970), Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp 468, 473 (E D Pa. 1978); Boyertown Burial Casket Co. v. Amedco, Inc , 407 F Supp. 811, 814-15 (E.D Pa 1976), Boyertown Burial Casket Co. v. Walco Nat'l Corp , 344 F. Supp 1357, 1359 (E.D. Pa. 1972); Maryland Cas Co v American Gen. Ins. Co., 232 F. Supp 620, 621 (D.D.C 1964) Recently one district court in the Third Circuit has considered in addition to these two factors (3) "whether other parties interested in the proceedings would be substantially harmed by the grant of the injunction," and (4) "whether the public interest would be served by granting the relief sought." Crane Co. v. Harsco Corp., 509 F. Supp. 115, 118 (D. Del. 1981). It is not clear, however, that *Harsco* was a conjunctive test like the cases cited above.

A motion for an antitrust preliminary injunction in a hostile tender offer is an especially apt example of an interlocutory hearing for which a subsequent trial on the merits is unlikely. Professor Fiss has argued that in such hearings due process requires at a minimum that the plaintiff seeking an interlocutory injunction show both "a likelihood of succeeding on the ultimate merits" and "that the defendant would cause irreparable injury unless immediately enjoined." O. FISS, THE CIVIL RIGHTS INJUNCTION 47-48 (1978); *see also id.* at 28-29, 45-48; Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1203 (2d Cir. 1978).

13 Marathon Oil Co v. Mobil Corp , 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir 1981).

14 Grumman Corp v. LTV Corp., 527 F. Supp. 86, 104 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2d Cir 1981). Prior to *Grumman*, a requirement of irreparable harm was not expressly stated for the second branch of the test if there were sufficiently serious questions going to the merits to make them fair ground for litigation, a balance of hardships tipping decidedly in favor of the party requesting the preliminary relief, and "loss or damage" pursuant to § 16. *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *see also* Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d

Seventh Circuit require a target to show, in addition to irreparable harm and a probability of success on the merits, that "the threatened injury to the plaintiff outweighs the threatened injury the injunction may inflict on the defendant" and that "the granting of a preliminary injunction will not disserve the public interest."[15] Other courts have either applied some variant of one of these four tests[16] or have applied no explicit test at all.[17]

Cir. 1973); Hamilton Watch Co. v. Benrus Watch Co., 144 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953); Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978); Mulligan, *Forward—Preliminary Injunction in the Second Circuit*, 43 BROOKLYN L. REV. 831 (1977) A number of decisions in the Second Circuit announced after *Missouri Portland Cement*, however, have required a showing of irreparable harm for a preliminary injunction. *See* Buffalo Forge Co v. Ampco-Pittsburgh Corp, 638 F.2d 568, 569 (2d Cir. 1981), Union Carbide Agricultural Prods Co v. Costle, 632 F.2d 1014, 1017 (2d Cir 1981), Jacobson & Co v Armstrong Cork Co., 548 F.2d 438, 441 n 3 (2d Cir 1977); Triebwasser & Katz v American Tel. & Tel Co, 535 F.2d 1356, 1359 (2d Cir. 1976), Conoco, Inc v Seagram Co., 517 F Supp. 1299, 1302 (S.D.N Y 1981); *see also* Mulligan, *supra*, at 832-33; *cf.* Raybestos-Manhattan, Inc. v Hi-Shear Indus, Inc, 503 F. Supp. 1122, 1126 (E.D.N.Y. 1980) (dictum). *Grumman* apparently now requires a showing of irreparable harm under either branch of the Second Circuit test.

District courts in the Fourth and Fifth Circuits have used the Second Circuit test. Pargas, Inc. v. Empire Gas Corp, 423 F. Supp. 199, 207 (D Md.), *aff'd per curiam*, 546 F 2d 25 (4th Cir. 1976), Texasgulf, Inc. v. Canada Dev Corp., 366 F. Supp 374, 410 (S D Tex 1973) The Ninth Circuit has used it in a Robinson-Patman case, William Inglis & Sons Baking Co v ITT-Continental Baking Co., 526 F 2d 86, 88 (9th Cir. 1975).

Three district courts in the Third Circuit either have praised or applied the Second Circuit test or have stated in dicta that it is consistent with the more rigorous Third Circuit test Copperweld Corp. v. Imetal, 403 F. Supp. 579, 586-87 (W.D. Pa. 1975) (on basis of prediction that Third Circuit would adopt Second Circuit test, court applied test with requirement of irreparable injury), Elco Corp. v. Microdot, Inc, 360 F. Supp. 741, 747 (D Del 1973) (dictum, Second Circuit test not inconsistent with Third Circuit authority); American Smelting & Ref. Co. v Pennzoil United, Inc, 295 F. Supp. 149, 152, 155, 157 (D. Del. 1969) (applying Second Circuit test as articulated in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)); Vanadium Corp. v. Susquehanna Corp, 203 F. Supp. 686, 697 (D. Del. 1962) (citing *Hamilton Watch*); American Medicorp, Inc. v. Humana, Inc., 415 F Supp. 589, 595-96 (E.D. Pa. 1977) (Second Circuit test more flexible than standard applied in Third Circuit; courts should apply test under which the burden of proof for the target's showing of success on the merits varies inversely with the relative irreparable harm the target will suffer), *see also* United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 537 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir 1963) (departing from two-part test when deciding government motion for preliminary injunction under § 15 of the Clayton Act).

[15] Harnischfeger Corp. v. Paccar, Inc, 474 F. Supp. 1151, 1152 (E.D. Wis.) (citing Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Prods., 545 F.2d 1096 (7th Cir. 1976)), *aff'd mem.*, 624 F 2d 1103 (7th Cir. 1979); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 944 (N.D. Ill 1982), *aff'd mem.*, No 82-1305 (7th Cir Mar. 5, 1982); Chemetron Corp. v. Crane Co, 1977-2 Trade Cas (CCH) ¶ 61,717 (N.D. Ill. 1977). The Seventh Circuit test parallels the general test for a preliminary injunction. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (1973) [hereinafter cited as 11 C. WRIGHT & A. MILLER]; O. FISS, INJUNCTIONS 168 (1972)

The Seventh Circuit test, although ostensibly more rigorous than the Second or Third Circuit test, has been applied the least rigorously. Although the wording of the Seventh Circuit test suggests that the target must satisfy all four elements, the district court's application of the test in *Chemetron* demonstrates that once the target establishes a reasonable likelihood of success on the merits, it may receive a preliminary injunction merely by making a colorable showing on the remaining three elements 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,928, 72,930; *cf.* Harnischfeger Corp v Paccar, Inc., 474 F Supp. at 1152 (probability of success on the merits presents "really the critical question" in court's decision to grant preliminary injunction under Seventh Circuit's four-part test). Ironically, however, the *Chemetron* court said that "the Second Circuit has recognized a more relaxed standard in tender offer cases." 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,927.

[16] When ruling on a motion for a temporary restraining order to block a tender offer on antitrust grounds, one district court in the Fifth Circuit added a "balancing of equities" element to the conventional two-part Third Circuit test, thereby creating a test identical to that which Areeda and Turner identify as the prevailing test for preliminary injunctions in all varieties of antitrust cases. *Compare* Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F Supp. 910, 913 (N.D. Tex. 1976) *with* 2 P. AREEDA & D TURNER, *supra* note 4, ¶ 329.

[17] *See* Emhart Corp. v. USM Corp., 527 F.2d 177 (1st Cir. 1975); Filtrol Corp. v. Slick Corp., 1970 Trade Cas. (CCH) ¶ 73,035 (C.D. Cal. 1969), *aff'd per curiam*, 428 F.2d 826 (9th Cir. 1970).

A. Type I and Type II Errors

This plethora of tests suggests that courts are unsure what antitrust preliminary injunctions are supposed to accomplish in hostile tender offers.[18] Any test is susceptible to two kinds of errors. A false positive, or type I, error occurs when the test enjoins a tender offer that, far from causing social harm, would be competitively neutral or efficiency enhancing. A false negative, or type II, error occurs when the test fails to enjoin behavior that would cause social harm.[19] Each type of error imposes a social cost. Yet, perhaps because these transactions are measured in billions of dollars rather than millions, courts hearing motions for antitrust preliminary injunctions in hostile tender offers have evidenced the common misconception that social welfare is maximized by a test intended to minimize type II errors alone. To the contrary, the optimal test for an antitrust preliminary injunction in a hostile tender offer is not one that minimizes the incidence of either type I or type II errors alone, but one that minimizes the sum of the social costs from incidences of both types of errors.

It is useful to analyze on the one hand the opportunity cost to society of foregoing a beneficial tender offer due to a type I error, and on the other hand the injuries to the public and to the target that would flow from a hostile tender offer not enjoined due to a type II error. This analysis will show that none of the alleged injuries from a type II error provides a justification for preliminarily enjoining a tender offer. Therefore, any test for issuing a preliminary injunction in a hostile tender offer seems likely to cause only type I errors and never type II errors.

B. The Social Cost from a Type I Error

Antitrust injunctions in tender offers impose a significant social cost. The market for capital assets is also a market for corporate control in which one firm can replace the ineffective managers of another[20] or increase the productive efficiency[21] of both firms by merging control over their collective assets. By using an antitrust preliminary injunction to thwart a hostile tender offer, a target's management arguably breaches its fiduciary duty to its shareholders[22] and, for pub-

[18] Professor Leubsdorf has concluded with respect to preliminary injunctions in general that the "dizzying diversity of formulations [of the standard for preliminary injunctions] unaccompanied by any explanation for choosing one instead of another, strongly suggests that the phrases used by the courts have little impact on the result in particular cases." Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV 525, 526 (1978) [hereinafter cited as Leubsdorf].

[19] Professors Joskow and Klevorick introduced this approach to assessing antitrust rules in *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 223 (1979). *See also* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV 263, 318-19 (1981); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J LEGAL STUD. 257, 262-63 (1974); Hay, Book Review, 31 VAND. L. REV 427, 439-40 (1978) (reviewing K ELZINGA & W. BREIT, THE ANTITRUST PENALTIES (1976)).

[20] *See* Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON 110 (1965); *see also* ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION 195-231 (R. Posner & K Scott eds 1980) One district court in the Seventh Circuit has stated perversely that a court weighing irreparable harm to the various parties with interest in the tender offer "must consider" explicitly "the interests of the target company's management in preventing the tender offer from ever being made . . . ." Harnischfeger Corp. v. Paccar, Inc , 474 F. Supp. 1151, 1153 (E.D. Wis.), *aff'd mem.*, 624 F.2d 1103 (7th Cir. 1979).

[21] Productive efficiency "refers to the effective use of resources by particular firms" and encompasses, among other phenomena, economies of scale or of specialization of function. R. BORK, THE ANTITRUST PARADOX 91 n.* (1978) [hereinafter cited as R BORK]

[22] *See* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) [hereinafter cited as Easterbrook & Fischel]; Gilson, *supra* note 7. Therefore,

licly traded corporations, frustrates these important functions of capital markets.

By impeding the sale of the target's shares and by restricting the exercise of the voting rights accompanying those shares, an antitrust preliminary injunction immediately reduces society's wealth by preventing the capital assets of targets from being allocated to their highest-valued uses.[23] To the extent that it reduces the likelihood that an offeror will even make a bid, it also affects the distribution of income by denying the shareholders of current and potential targets the windfall of a tender offer.[24] By making a tender offer less likely to be consummated, the issuance of such injunctions also reduces society's wealth in a less immediate sense by insulating the managers of any public corporation—whether currently perceived to be a likely tender offer target or not—from the threat that the control of their corporation may be contested in the marketplace if they do not perform efficiently and maximize the value of their stockholders' shares.[25]

The inconsistency between standards for issuing antitrust preliminary injunctions in tender offers aggravates the problem of type I errors. This inconsistency increases uncertainty for potential offerors, no doubt inducing some to abandon offers before they are ever announced. Similarly, this inconsistency increases uncertainty for the target's shareholders once the tender offer has been made, no doubt inducing some, as in the case of Mobil's bid for Conoco, not to tender to the highest bidder. Neither by parsing the language of section 16 nor by reading

---

any incumbent manager trying to prove that preserving his job would best serve the corporation would have to prove the unlikely proposition that the tender offer would not increase the target's share price as much as he could during the same period *But see* Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), *cert. denied*, 102 S. Ct. 658 (1981).

[23] Empirical evidence establishes that the offeror earns its shareholders a competitive return of five to ten percent from the tender offer, whereas the target's shareholders receive gains of fourteen to fifty percent. *See* Bradley, *Interfirm Tender Offers and the Market for Corporate Control*, 53 J Bus 345 (1980) [hereinafter cited as Bradley]; Dodd, *Merger Proposals, Management Discretion, and Stockholder Wealth*, 8 J. FIN. ECON. 105 (1980); Dodd & Ruback, *Tender Offers and Shareholder Returns*, 5 J. FIN ECON. 351 (1977) [hereinafter cited as Dodd & Ruback]; Ellert, *Mergers, Antitrust Law Enforcement and Stockholder Returns*, 31 J. FIN. 715 (1976); Kummer & Hoffmeister, *Valuation Consequences of Cash Tender Offers*, 33 J. FIN. 505 (1978).

In theory, it would violate the Coase Theorem for the capital assets of targets not to arrive ultimately at their highest-valued use. *See generally* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). It is unclear why, in practice, Mobil could not ultimately acquire Conoco's assets from DuPont if Mobil truly could put them to a higher-valued use. *Cf.* King & Metz, *Mobil Wins Rounds in Offer for Marathon As Judge Temporarily Halts U.S. Steel Bid*, Wall St. J., Nov. 25, 1981, at 2, col. 3 (Mobil acquired $15 million in U.S. Steel common stock after U.S. Steel announced a tender offer for Marathon Oil that competed with Mobil's initial bid for Marathon). One possible explanation for why the Coase Theorem would be violated in practice is that the possibility of an antitrust preliminary injunction raises the offeror's information costs and therefore reduces the return for acquiring information regarding attractive takeover candidates.

[24] *Cf* Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J.L. & ECON. 371 (1980) (delay created by Williams Act regulations has harmed shareholders of would-be targets by deterring tender offers). This argument should not be confused with the empirical finding that, once a tender offer is announced, the target's shareholders realize a significant capital gain even if the offer fails. *See* Bradley, *supra* note 23, at 348; Dodd & Ruback, *supra* note 23.

When assessing the effect of the injunction on the public interest, one court concluded that "while [the target's] shareholders are entitled, as a general proposition, to the price that robust bidding in the market place would bring them, they are not entitled to that price if the cost is an unlawful acquisition" of the target by the offeror Chemetron Corp. v. Crane Co , 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,933 (N.D. Ill. 1977): *accord* Grumman Corp. v. LTV Corp , 665 F 2d 10, 16 (2d Cir 1981), Elco Corp. v. Microdot, Inc., 360 F Supp 741, 755 (D. Del. 1973); *see also* Gulf & W. Indus., Inc. v Great Atl. & Pac. Tea Co , 476 F.2d 687, 698 (2d Cir 1973) (target's "shareholders . . . have no inherent right to proceed with an unlawful tender")

[25] *See* Easterbrook & Fischel, *supra* note 22, at 1164. Before becoming Assistant Attorney General, William F. Baxter argued that "in the horizontal merger context . . . over-enforcement is not costless . . . [because] [i]t has a tendency to deter corporate takeovers which should occur if the capital markets are to continue to exert a salutary discipline on an inefficient management in many of the target companies." Baxter, *How Government Cases Get Selected—Comments From Academe*, 46 ANTITRUST L.J. 586, 587 (1977).

a circuit's own decision articulating the standard for an antitrust preliminary injunction can an offeror or a shareholder of the target safely guess how a district judge will rule. Thus, type I errors result not only from clearly stated (but economically misguided) standards for preliminary injunctions, but also from the uncertainty arising from inscrutable standards that do not necessarily have any bias against hostile tender offers.

C. Harm to Consumers from a Type II Error

It is incorrect to presume that courts serve "the public interest" when they preliminarily enjoin tender offers on antitrust grounds. Economic theory and evidence suggest the contrary. Even though Judge Friendly stated in *Missouri Portland Cement* that motions for antitrust preliminary injunctions in tender offers "require a balancing of public and private interest," the two determinants of the public interest that he emphasized are objectives of either antitrust law or corporate law: the efficiency of "the market for capital assets" and the promotion of "mergers that are procompetitive in their facilitation of entry and expansion."[26] Thus, Judge Friendly seemed to recognize that the substantive law of section 7 of the Clayton Act already embodies a concern for the public interest by protecting consumer welfare, and that to preliminarily enjoin a hostile merger on antitrust grounds would be unlikely to enhance either productive efficiency in the manufacture and distribution of goods and services or market efficiency in the valuation and sale of capital assets.[27]

1. Conferral of Market Power

From an economic perspective, a hostile tender offer could harm the public interest only if the acquisition would confer on two merged competitors the mar-

---

[26] Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 854 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (quoting Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1318 (1965)) *Compare* Harnischfeger Corp. v. Paccar, Inc., 474 F. Supp. 1151, 1153 (E D Wis 1979) (with respect to the public interest requirement for an antitrust preliminary injunction in a tender offer, "the public interest is clearly set forth by section 7 of the Clayton Act") *with* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969) (quoting Hecht Co. v. Bowles, 321 U S 321, 330 (1944)) ("availability [of section 16 injunctions] should be 'conditioned by the necessities of the public interest which Congress sought to protect' ").

[27] Judge Friendly unquestionably knew when writing *Missouri Portland Cement* that the Second Circuit had held in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953), that "private harm to [the target] as a condition of granting injunctive relief under Section 16 *need not be at all the same* as the public harm condemned by Section 7." (emphasis added). Yet Judge Friendly ignored this language and instead quoted the more ambiguous language from the corresponding portion of the district court's *Hamilton Watch* opinion: "right thinking suggests a distinction between the private harm constituting the irreparable damage which is the primary concern of Section 16, and the lessening of competition in the relevant 'line of commerce' which constitutes the public harm with which Section 7 is primarily concerned." 114 F. Supp. 307, 317 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953), *quoted in* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 870 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). Judge Friendly interpreted the district court's more malleable language to mean that the concern for public harm embodied in § 7 corresponds in preliminary injunction cases to the requirement that the target show a reasonable probability of success on the merits. 498 F.2d at 870 ("With respect to public harm a target company must demonstrate a probability of success which, as previously held, [the target] did not do here."). Similarly, Judge Friendly interpreted Gulf & W Indus., Inc. v. Great Atl & Pac. Tea Co , 476 F.2d 687, 698-99 (2d Cir. 1973), to hold that "[t]he public interest in barring the acquisition . [is] a direct function of the strength of the plaintiff's antitrust and securities claims." *Id.* at 868 n.35. In this manner, Judge Friendly avoided reconciling the Second Circuit's language in *Hamilton Watch* with his strong suggestion in *Missouri Portland Cement* that § 16 requires a target to show irreparable harm cognizable under § 7.

ket power to price above marginal cost.[28] If the merged firms were then to charge supracompetitive prices, the resulting deadweight loss would, by definition, be an uncompensable social harm.[29] Of course, whether the horizontal merger could increase or decrease social welfare would depend not merely on whether deadweight loss would arise, but on whether the deadweight loss would exceed the efficiency gains attributable to the takeover.[30] Even if a takeover of Conoco by Mobil would have conferred on those firms appreciable market power over the energy industry, any subsequent injury to consumers would not have required preliminary injunctive relief, as Conoco asserted.[31] This possible harm to purchasers of petroleum products would be neither irreparable by money damages[32] nor imminent at the time of the tender offer.[33] Any harm that might accrue to the public interest certainly would not all occur immediately, but would occur continuously over time as some consumers would pay higher prices and others would switch to cheaper substitutes. Therefore, at the time of the motion for preliminary injunction, a court considering the effect on the public interest of temporarily enjoining the tender offer would have to discount this deadweight loss (minus efficiency gains) to its present value.[34] To consider the injunction's effect on "the public interest" without balancing these opposing consumer welfare effects would be to ignore that such an injunction may chill so-

---

[28] "Market power" refers to the ability of a single firm (or a group of firms acting jointly) to restrict output and thereby increase price above the competitive level without losing so many sales as to make the price increase unprofitable. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) [hereinafter cited as Landes & Posner]. A merger could increase market power in three ways. First, the firm resulting from the merger might be able to raise prices by restricting output, whereas neither of the merger partners could have done so before the merger That is, the merger might create a dominant firm. Second, the acquisition of a competitor by an existing dominant firm might increase the latter's market power. Third, a merger might increase the likelihood of collusion and supracompetitive pricing by reducing the number of firms in the industry and hence the difficulty of collusion.

[29] *See* Note, *Rethinking Antitrust Damages*, 33 STAN. L. REV 329, 332-34 (1981) [hereinafter cited as Note].

[30] *Id.* at 334, 347-50; *see also* R. BORK, *supra* note 21, at 108; Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON REV 18, 21-22 (1968).

[31] *See* Complaint at 30, Conoco Inc v. Mobil Corp., No. 81-1694 (D.D.C, filed July 22, 1981)

[32] *See* Optivision, Inc v. Syracuse Shopping Center Assoc, 472 F. Supp 665, 685 (N D N Y 1979) ("The ability to compute monetary damages establishes that the [§ 16] harm which plaintiff would suffer is not irreparable in nature."); *see also* Jackson Dairy, Inc. v H P Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979), Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359-60 (2d Cir. 1976); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 380 F Supp 441, 445 (S.D.N.Y. 1974); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10, at 108 (1973), 11 C WRIGHT & A. MILLER, *supra* note 15, § 2948.

[33] *See* New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d Cir. 1977) (irreparable harm for a preliminary injunction must, as a general equitable principle, be "not remote or speculative but . . . actual and imminent"). Unfortunately, the *Nuclear Regulatory Commission* court ignored Judge Friendly's *Missouri Portland Cement* decision and said in dicta that the harm that arises from not being able to "unscramble the eggs" after a tender offer is "certain and imminent," not merely "possible." *Id* Other courts have similarly held that imminence of injury is an essential requirement for a preliminary injunction. *See* General Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir 1971); Crowther v. Seaborg, 415 F 2d 437, 439 (10th Cir 1969), Holiday Inns, Inc. v. B & B Corp., 409 F 2d 614, 618 (3d Cir. 1969)

[34] Still, this discounted value by itself would not indicate whether allowing the tender offer to continue would disserve the public interest because it only considers type II errors. Rather, the proper social welfare calculus would be whether (1) the discounted value of the difference between the deadweight loss and the efficiency gains that would accrue until a court could decide the merits of the § 7 claim would exceed (2) the foregone efficiency gains caused by inadvertently deterring other tender offers that would confer no market power on the merged entity. To measure these economic variables almost certainly exceeds the competence of any court. Moreover, this social welfare calculus also leads a court to the delphic task of separating in an interlocutory hearing (1) the effects on the public interest of the offeror's possible § 7 violation from (2) the effects on the public interest of a denial of a preliminary injunction blocking the tender offer.

cially valuable business conduct.[35]

This analysis assumes heroically that such an economic balancing test is not too complex to receive fair and thoughtful consideration in the hasty adjudication of an interlocutory hearing. But even if such a test is not too complex, a preliminary injunction is unnecessary because damages can adequately embody this welfare tradeoff. An offeror will rationally expect that any post-acquisition horizontal price fixing will prompt its customers to sue for antitrust damages. If those damages are optimally calibrated—which is to say, if they are set (before adjusting for the probability of detection) at a level that induces the merged firm to produce at an output level at which its efficiency gains equal or exceed any deadweight loss engendered by its enhanced market power[36]—then the damage award renders preliminary injunctive relief wholly unnecessary. In other words, the threat of subsequent antitrust damages for exploiting newly acquired market power can deter any hostile tender offer that would on balance impair social welfare by enabling the merged firm to create deadweight loss larger than the merger's efficiency gains.[37]

2. *The "Merger Wave" Fallacy*

During the recent Conoco and Marathon Oil tender offer battles, Conoco and Marathon each supported its motion for a section 16 preliminary injunction against Mobil's offer by arguing in part that Mobil's acquisition of the smaller oil company would trigger a wave of mergers injurious to the public interest.[38] Even assuming *arguendo* that a merger wave could harm consumers, no basis in economic theory exists for the proposition that, by itself, one firm's tender offer will affect an unrelated firm's decision to bid for a different target. Rather, the decision depends on whether the unrelated offeror's management expects the merged corporation to have a higher value than both the target and offeror considered as separate corporations. Of course, a tender offer conveys information that one set of firms has assets particularly complementary to those of a different set of firms. When similar tender offers match firms from the same two sets, it is not because of any corporate domino effect, but because, as the Antitrust Division plainly understands,[39] new information has made the market for corporate control more

[35] Professor Bork has argued that the chilling effect of overbroad antitrust rules should face the close judicial scrutiny afforded prior restraints in the marketplace for ideas. R. BORK, *supra* note 21, at 424. This argument is especially applicable to vague judicial incantations of "the public interest" that impose a chilling effect in the marketplace for corporate control.

[36] *See* Note, *supra* note 29, at 347-50.

[37] There now exists empirical support for the commonly held view that antitrust damages can deter horizontal price-fixing. *See* Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981).

[38] Complaint at 13, Conoco Inc. v. Mobil Corp., No. 81-1694 (D D.C., filed July 22, 1981) ("the Mobil acquisition of Conoco, if allowed to proceed, would tend to trigger additional oil company acquisitions that would further reduce competition in the integrated oil business"); Complaint at 16-17, 20, Marathon Oil Co. v. Mobil Corp., 530 F Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981).

Although the "merger wave" argument is new to tender offer preliminary injunction hearings, it has been, Professor Bork observes, "the standard, Mark I, all-weather antitrust hobgoblin . . . prophesied freely at least since the debates on the Sherman Act in 1890, always on the basis of overwhelming current trends, and it never comes to pass" R BORK, *supra* note 21, at 202; *see also In re* Jim Walter Corp., 90 F T C 671 (1977); G. BENSTON, CONGLOMERATE MERGERS: CAUSES, CONSEQUENCES, AND REMEDIES 5-7 (1980).

[39] Less than a month after DuPont's takeover of Conoco, Assistant Attorney General Baxter testified to Congress that a perceived merger wave would "not in itself [be] a cause for altered antitrust enforcement standards" because such altered standards "could impair existing capital market mechanisms for ensuring

efficient.

Even if a particular takeover started a domino effect of horizontal mergers within an industry, no reason exists to believe that the trend would not be self-restraining. Obviously, the most attractive takeover candidates will be bid away first, leaving as subsequent takeover candidates firms that are marginally less attractive and therefore, less likely to receive takeover bids. At some point, a takeover of the best remaining potential targets in an industry will fail to yield the potential offeror as high an expected return as that available from some alternative investment having equal risk. At that point, the "merger wave" would stop.

Another reason exists to believe that a "merger wave," once begun, would be self-restraining. Each takeover of a competitor will push an industry closer to the threshold where one additional horizontal merger would significantly increase the likelihood that any subsequent horizontal merger, hostile or friendly, would be prohibited. And, as the probability increases that a horizontal takeover will be barred on antitrust grounds because it increases market power appreciably, it becomes less probable that another tender offer will even be made for a competitor.[40] At some point the probability that the government will successfully challenge the merger becomes so great that the expected return to the offeror from the takeover will be less than the transactions cost necessary to effect the takeover. Thus, far from creating an endless domino effect of unrestrained concentration, a "merger wave" spawned by tender offers for horizontal competitors would have a natural tendency to abate as soon as the industry approached a level of concentration above which horizontal collusion would begin to be a reasonable concern.

D. Harm to the Target Corporation from a Type II Error

In *Missouri Portland Cement* Judge Friendly emphasized that the "loss or damage" pleaded under section 16 must be suffered by the target "as a corporation, as distinguished from its management."[41] As a matter of economics, injury to the corporation would arise from a decline in its present value as reflected in a decline in the rate of return computed from dividends and the capital appreciation of the corporation's shares. Thus, on the basis of empirical economic evidence, the proposition that a tender offer injures a target is implausible because targets experience, on average, an appreciation in their stock prices anywhere from four-

that assets are put to their most productive use." *Merger Policy: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm.*, 97th Cong., 1st Sess. — (Aug. 26, 1981) (testimony of William F. Baxter). Baxter said further: "I do not believe that we should depart in any way from . . . [evaluating a merger solely on the basis of its competitive consequences] in response to the number of mergers that may occur at any given time, or perceived trends in aggregate concentration measures that are unrelated to any assessment of competition within particularly realistically-defined markets." *Id.*

[40] *See* Austin, *Gulf Oil Eagerly but Cautiously Inches Closer to Acquiring an Energy Concern*, Wall St. J., Nov. 23, 1981, at 3, col 2

[41] 498 F.2d at 867; *accord* Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D N Y), *aff'd*, 594 F.2d 851 (2d Cir. 1978), *see also* Raybestos-Manhattan, Inc. v. Hi-Shear Indus, Inc., 503 F. Supp 1122, 1134, 1136 (E.D.N Y 1980), *cf* American Medicorp, Inc. v. Humana, Inc., 445 F. Supp. 589, 595 (E.D. Pa. 1977) (antitrust preliminary injunction would deny target's shareholders "the opportunity to express their own views about where they want their money to go"); Copperweld Corp. v. Imetal, 403 F. Supp. 579, 608 (W.D. Pa. 1975) (the target's shareholder is "[i]n essence the party with the paramount interest" in a motion for an antitrust preliminary injunction in a tender offer, and his "right to deal with *his* property in the market place should [not] be abridged") (emphasis in original).

teen to fifty percent.[42] This economic evidence is consistent with the conclusion compelled by close analysis of the legal merit to targets' claims of irreparable harm.

The irreparable harm that a target alleges essentially falls into three categories. First, there are "injuries" that are common to all tender offers. These injuries have nothing to do with the antitrust laws and probably are not even injury in fact, for the target could be equally affected by any lawful transaction. Second, there are injuries that have no relationship to the antitrust laws but may be peculiar to certain tender offers, such as the claim that the offeror will acquire the target's valuable trade secrets. For these claims there may be injury in fact, but there is no antitrust injury. Third, there are plausible claims of antitrust injury, such as the claim that it would be difficult to divest the target from the offeror to reestablish competition if the acquisition should be declared unlawful. For claims in this third category the problem is that the *target* does not suffer the injury in question; the injury falls on consumers, if it falls anywhere. None of these three categories of harm supports the issuance of a preliminary injunction under section 16.

1. Injuries Common to All Tender Offers

a. Change in Shareholder Composition

One target recently complained that a tender offer would "irretrievably" change the composition of its shareholders from investors to speculators.[43] This argument fails because it has nothing to do with the acquisition or exploitation of market power—the only behavior to which the antitrust laws are properly addressed. Even if risk arbitrage[44] somehow could harm the target, this harm would not be an antitrust injury because no causal relationship exists between the likelihood of risk arbitrage and the competitive consequences of a tender offer. A competitively neutral tender offer could induce risk arbitrage as easily as an anticompetitive tender offer could. This absence of a causal relationship between the alleged harm and the alleged antitrust violation implies that the target is not entitled to an injunction under section 16 on the ground that the composition of its shareholders will change.

Nothing in the antitrust laws gives a target, as a public corporation, the legal right to complain about the investment behavior of the owners of its publicly traded shares. Moreover, even if such a right existed, the target's alleged injury could be compensated by money damages. The only rationale for granting injunctive relief is that no market exists by which to measure the diminution in value of the legal rights in question. But courts consider the national stock exchanges to be the best examples of markets that quickly impound new information and beliefs regarding the value of the fungible goods traded there.[45] Thus,

---

[42] *See supra* note 23.

[43] Complaint at 21-22, Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N D Ohio), *aff'd*, 669 F.2d 378 (6th Cir 1981)

[44] Risk arbitrage refers to the activities of speculators who buy securities from risk averse investors and subsequently sell them to investors who value those securities more. The presence of such speculators in a market enhances the market's efficiency by serving "the salutary purpose of enabling rapid adjustments of prices to current values." R. POSNER, ECONOMIC ANALYSIS OF LAW 333-34 (2d ed. 1977).

[45] Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 361-62 (2d Cir. 1979); Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-48 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977).

because damages could be easily measured for traded securities, it would never be necessary as a matter of equity to allow injunctive relief to prevent injury that might result from fluctuations in stock prices.

b. Disruption of Business Relations and Employee Morale

A target might claim that a tender offer will cause irreparable harm by disrupting its relations either with vendors and vendees or with employees.[46] This claim probably does not constitute injury in fact because any tender offer, lawful or not, can disrupt the target's normal operations; such disruption need not result from an anticompetitive merger. Moreover, this claim does not constitute antitrust injury because section 7 was not intended to facilitate vendor-vendee transactions or to ensure harmonious labor relations. The Supreme Court has emphasized that a plaintiff is not entitled to relief under the antitrust laws merely because a merger "has the potential for producing economic readjustments that adversely affect some persons."[47] If these readjustments of business or employee relations deserve any remedy, it is under state law for tortious interference with contractual relations. And, to the extent that the target can establish any harm under state law, that harm is compensable by money damages.

2. Injuries Peculiar to Some Tender Offers, But Lacking Any Antitrust Content

a. Disclosure of Trade Secrets

A target may claim that through a successful tender offer the offeror will gain access to the target's trade secrets and therefore will acquire a competitive advantage over the target if the merger is subsequently held to be unlawful.[48] This argument is irrelevant if the offeror acquires one hundred percent of the target's stock because then the offeror alone would own the trade secrets. Even if the offeror acquired less than one hundred percent of the target's shares this argument would fail for two reasons. First, as at least one appellate court has recognized, any officer of the offeror who becomes a member of the target's board of directors can simply excuse himself from discussions that might pose a conflict of interest.[49] Second, as soon as investors know that the target owns valuable trade secrets—and indeed it will be in the target's interest to publicize this fact—the price of the target's stock will be bid up until it reflects the present value of the profits from those trade secrets. Thus, in an efficient capital market the offeror

---

[46] *See* Grumman Corp. v. LTV Corp., 665 F.2d 10, 15-16 (2d Cir 1981): Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 869 n.36 (2d Cir.), *cert. denied*, 419 U S 883 (1974); Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 320-21 (N.D. Ohio), *aff'd*, 669 F 2d 378 (6th Cir. 1981).

[47] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S 477, 487 (1977).

[48] Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 314 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953). Marathon and Conoco recently raised this allegation against Mobil's tender offers. Complaint at 23-24, Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir 1981), Complaint at 31, Conoco Inc. v. Mobil Corp., No 81-1694 (D.D.C., filed July 22, 1981); *see also* Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 (2d Cir 1981), Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 516 (3d Cir. 1969), *cert. denied*, 396 U S. 1009 (1970); Crane Co. v. Harsco Corp., 509 F. Supp. 115, 126 (D. Del. 1981); American Medicorp, Inc v. Humana, Inc , 445 F Supp. 589, 594 (E.D. Pa. 1977); Boyertown Burial Casket Co. v. Amedco, Inc., 407 F. Supp 811, 814, 821 (E.D. Pa. 1976); Elco Corp. v. Microdot, Inc., 360 F. Supp. 741, 754 (D. Del 1973) (offeror's creditor, whose sister company competed with target, could gain access to target's "competitive information").

[49] Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F 2d 1195, 1205 (2d Cir 1978); *see also* Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D N Y), *aff'd*, 594 F.2d 851 (2d Cir. 1978).

must pay the target's shareholders the fair market value of the competitive advantage that the trade secrets confer. And, in a partial tender offer the offeror must bid a price that reflects what the target could have received for licensing the trade secret exclusively to the offeror. That an offeror will acquire competitively advantageous trade secrets through a tender offer simply means that the offeror must bid a higher price, all other things held constant.

Furthermore, even if the target did suffer injury in fact from the disclosure of its trade secrets, that injury would have nothing to do with any interest protected by federal antitrust law. Instead, the target's remedy would lie with state trade secret law. Indeed, it is well-established law that such potential injury to intellectual property does not give rise to a remedy under antitrust law.[50] More fundamentally, this argument is inconclusive on economic grounds in the sense that the offeror's misappropriation of trade secrets would increase competition and consumer welfare in the short run, although it could dull long-run incentives for investment in product or process innovation.[51]

b. Unwilling Complicity in an Antitrust Violation and Litigation Expenses

A target may claim that its shareholders have been harmed by litigation arising from the tender offer and may be subjected to treble damage liability if the acquisition ultimately is held to be unlawful.[52] These arguments are specious. First, a target faces no possible antitrust liability. Only an offeror can face possible antitrust liability, because section 7 applies only to acquiring firms.[53] Second, even if a target could face antitrust liability, it would not need to block the merger to avoid incurring damages or litigation expenses. In a partial tender offer the target can demand indemnification or the court can issue an injunction to that effect sua sponte;[54] and, as at least one appellate court has recognized, in a complete tender offer the offeror assumes the entire burden of a section 7 suit because the target no longer exists as a separate entity.[55]

---

[50] *See, e.g.*, A.D.M. Corp. v. Sigma Instr., Inc., 628 F.2d 753, 754 (1st Cir 1980) (sale of proprietary assets as a result of officer's disloyalty "is . . . lacking the essential connection between injury and the aims of the antitrust laws necessary to give . . . standing" under the antitrust laws); *see also* Note, *Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act*, 58 TEX. L REV 415 (1980).

[51] *See* Note, *supra* note 29, at 342 n.49.

[52] *See* Gulf & W. Indus , Inc v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 698 (2d Cir. 1973) Marathon Oil and Conoco recently made this same allegation against Mobil. *See* Complaint at 23-24, Marathon Oil Co. v. Mobil Corp., 530 F. Supp 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (2d Cir. 1981); Complaint at 31, Conoco Inc. v. Mobil, No. 81-1694 (D D.C., filed July 22, 1981); *see also* Missouri Portland Cement Co v Cargill, Inc., 498 F.2d 851, 869 (2d Cir), *cert. denied*, 419 U.S. 883 (1974); Copperweld Corp. v. Imetal, 403 F. Supp. 579, 588 (W.D. Pa. 1975)

[53] *See* 15 U.S.C. § 18 (1976); Easterbrook & Fischel, *supra* note 22, at 1193 & n.93. It seems implausible that after United States v. United States Gypsum Co., 438 U.S. 422 (1978), a target of a hostile tender offer could be viewed as conspiring with the offeror to restrain trade in violation of § 1 of the Sherman Act.

It seems even more implausible that the target's directors could be held to have violated § 8 of the Clayton Act, 15 U.S.C. § 19 (1976), by engaging in an unlawful interlocking directorate with the offeror. But even if they could, the target could suffer no injury, for the sanction would not be damages but an injunction. *See, e g* , SCM Corp. v. FTC, 565 F.2d 807 (2d Cir. 1977).

[54] *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 869 (2d Cir), *cert. denied*, 419 U.S. 883 (1974); *cf.* Grumman Corp. v. LTV Corp., 533 F Supp. 1385 (E.D.N.Y. 1982) (tender offer target may be awarded attorney's fees); Harnischfeger Corp v Paccar, Inc., 503 F. Supp. 102, 105 (E.D. Wis. 1980) (awarding target attorney's fees because it succeeded on its motion for an antitrust preliminary injunction).

[55] If consummation of the transaction is barred, shareholders of the to-be-acquired corporation will bear subsequent decline in value of the stock from the acquisition price. If the transac-

3. Cognizable Antitrust Injury Suffered by Someone Other Than the Target

a. Antitrust Injury

A target's claim of antitrust injury relies on the incongruous argument that to the extent that the completed tender offer would affect market power, it would, in Judge Friendly's words, make the target "not too weak but too strong."[56] A successful hostile tender offer might give the merged corporation greater productive efficiency, a result that benefits both the target and consumers. Even under the "deep pocket" theory of conglomerate mergers,[57] the target still benefits from the capital infusion that follows its takeover by a rich offeror.[58] And if the tender offer will produce a horizontal merger, the reduction in actual or potential competition might give the merged corporation market power to charge consumers prices exceeding marginal cost,[59] again a result that benefits the target.[60]

b. "Unscrambling the Eggs"

Targets routinely assert, and courts routinely conclude, that denying the injunction would cause the target corporation irreparable harm because of the "difficulty, if not the impossibility of 'unscrambling the scrambled eggs' if plaintiff should prevail on the merits or if a subsequent government action results in an order of divestiture."[61] This reasoning is faulty on three counts. First, it ignores that a court simply could condition its denial of the injunction on the issuance of a hold-separate order lasting beyond the date for tendering shares.[62]

> tion is consummated but divestiture is later ordered, any costs resulting from divestiture will be borne by the acquiring company, which, as generally the instigator of the transaction, is often viewed as the more appropriate party to bear any loss resulting from an antitrust violation

FTC v. Exxon Corp., 636 F.2d 1336, 1343-44 n.26 (D.C. Cir. 1981).

[56] 498 F.2d at 867. Judge Friendly noted that the target "insists that the right way for [the offeror] to compete in the cement business in [the target's] territory is by direct entry or toe-hold acquisition, either of which presumably would take business away from [the target] rather than bring more to it " *Id.*

Some courts require that an antitrust plaintiff be within the "zone of interests" in order to have standing to sue for antitrust relief. *See* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981); Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). Tender offer targets are quite clearly in the class of potential *offenders*, as they frequently assert. *See supra* notes 52-55 and accompanying text. Thus, as Frank Easterbrook has pointed out to the author in private correspondence, it is incongruous that a target, as a putative antitrust offender, simultaneously could hold an antitrust claim within the zone of interests.

[57] *See* FTC v. Procter & Gamble Co., 386 U S 568 (1967).

[58] 2 P AREEDA & D TURNER, *supra* note 4, ¶ 346b.

[59] *See* Landes & Posner, *supra* note 28, at 972-74, *see also* Comment, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U CHI. L. REV. 156 (1972).

[60] 2 P. AREEDA & D TURNER, *supra* note 4, ¶ 346b; ABA MONOGRAPH, *supra* note 4, at 56. In Grumman Corp v. LTV Corp , 665 F.2d 10, 16 (2d Cir. 1981), the Second Circuit acknowledged that "[i]f free to combine, two competitors might be expected to prefer the advantages of diminished competition " But the court followed this statement with the *non sequitur* that "in reality it is only the resulting entity that would enjoy such advantages." *Id.*

[61] Chemetron Corp v. Crane Co., 1977-2 Trade Cas. (CCH) ¶ 61,717 (N.D. Ill. 1977); *see also* Grumman Corp. v. LTV Corp., 665 F.2d 10, 16 (2d Cir. 1981); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 869 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). Marathon Oil and Conoco recently made the same allegations against Mobil's tender offers. *See* Marathon Oil Co. v Mobil Corp., 530 F. Supp 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981); Complaint at 30, 31, Conoco Inc. v. Mobil Corp., No 81-1694 (D D C , filed July 22, 1981).

[62] Judge Friendly observed in *Missouri Portland Cement*, that the "difficulty in 'unscrambling' the assets could readily be met by a temporary injunction against their being scrambled." 498 F 2d at 869 (citing FTC v. PepsiCo, Inc , 477 F.2d 24 (2d Cir. 1973)). Several courts recently have declined to issue antitrust preliminary injunctions against mergers proceeding under hold-separate orders. *See* FTC v. Weyerhaeuser Co., 665 F.2d 1072 (D.C. Cir. 1981); FTC v. Exxon Corp., 636 F.2d 1336, 1344 (D.C. Cir. 1981).

Second, although this reasoning suggests why consumers—or their representatives, the Antitrust Division and the Federal Trade Commission—might have a cause of action for preliminary injunctive relief, it does not indicate why the target would have any cognizable antitrust injury. To the extent that such relief is ineffective, the target is the beneficiary. Third, this argument rests on the fundamental misconception that to restore vigorous competition in an industry after an anticompetitive merger a court must distribute assets between the two entities precisely according to the distribution of assets that existed before the merger. In other words, the difficulty of "unscrambling the scrambled eggs" is relevant only if a court's approach to divestiture as an antitrust remedy places greater emphasis on cosmetically preserving the appearances of the two former competitors than on spinning off two or more viable economic entities that are of the minimum efficient scale[63] to be able to price competitively.

E. Summary

Of all the injuries that targets claim in support of their motions for antitrust preliminary injunctions, none is an irreparable injury to the target proximately caused by an antitrust violation. Furthermore, any possible harm to consumers is neither imminent, nor nonspeculative at the time of the interlocutory hearing, nor lacking a satisfactory damage remedy. Thus, the denial of an antitrust preliminary injunction to block a tender offer seems unlikely ever to produce a type II error. On the other hand, the desirability of such an injunction to the incumbent manager is precisely that its issuance will impose a type I error by preventing the capital markets from serving as a market for corporate control, leaving incumbent management in control. In short, antitrust preliminary injunctions are likely only to impose type I errors in hostile tender offers.

From an economic perspective, courts maximize social welfare by tinkering with a legal rule until its formulation produces the smallest social cost from the combined occurrences of type I and type II errors. But if it is true that an antitrust preliminary injunction produces only type I errors and never can produce type II errors, then the socially optimal rule is different: tender offer targets never should receive antitrust preliminary injunctions.

III. DENYING TENDER OFFER TARGETS STANDING TO SUE FOR ANTITRUST PRELIMINARY INJUNCTIONS

Congress could end the misuse of antitrust preliminary injunctions by targets of hostile tender offers by denying targets standing under section 16. Of course, it is conceivable that courts could replace the inconsistent standards for issuing such injunctions and could construe the "loss or damage" provision of section 16 to require a showing of antitrust injury within the meaning of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[64] The Supreme Court held in *Brunswick*, a merger case brought under section 7, that although section 4 of the Clayton Act allows private treble damages for injuries to business or property arising from "anything prohibited in the antitrust laws," the plaintiff must nonetheless "prove *antitrust*

---

[63] *See* F SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 84, 87 (2d ed 1980).

[64] 429 U.S. 477 (1977).

injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[65] Thus, simply by applying the rationale of *Brunswick* to tender offers, courts in effect could end the use of the antitrust preliminary injunction as a defensive tactic.

A judicial solution to this problem seems distant, if not unlikely, for realistically only the Supreme Court could bring all circuits into conformity with a single test for issuing antitrust preliminary injunctions in tender offers. The Court, however, probably never will have the chance to decide this issue. The typical offeror probably would have too little incentive to appeal the issuance of an antitrust preliminary injunction to the Court because the injunction almost certainly would defeat the takeover bid before the Court could decide the case.[66] Perhaps an offeror would have an adequate incentive to exhaust its appeal before the Court if it were confident that it would be a recurring offeror and not a possible target. But this determination may be difficult. Shortly after DuPont's recent takeover of Conoco, speculation arose that DuPont would itself be the target of a subsequent tender offer by Seagram;[67] two months later, speculation arose that Mobil would make a tender offer for Seagram, thereby acquiring Seagram's twenty percent interest in DuPont.[68] Similarly, when Mobil appeared destined to lose to U.S. Steel in the takeover battle for Marathon Oil, Mobil began purchasing stock in U.S. Steel.[69]

Of course, even if a recurring offeror did petition for certiorari after an injunction effectively had defeated the tender offer, the Court nonetheless might rule the appeal moot.[70] On the other hand, the Court might hear the case under its relaxed mootness standards typified by *Roe v. Wade*.[71] Even then the Court might

---

[65] *Id.* at 498 (emphasis in original). Rather than being merely "causally linked to an illegal presence in the market," antitrust injury must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 486-87, 489; *see also* J. Truett Payne Co v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981). *See generally* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976), Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980) [hereinafter cited as Page]

[66] In addition, an appeal to the Supreme Court would be a public good in the sense that the new precedent would be new information which an unlimited number of businessmen could simultaneously consume, but toward which the appellant offeror would be unable to demand that these incidental beneficiaries of the precedent contribute.

Possibly, the district court could deny the target's request for an antitrust injunction, and the target could ask the appellate court for an expedited appeal Then if the appellate court affirms the denial of injunction, the target could appeal to the Supreme Court The Court might grant an expedited appeal to resolve the issue, especially if the circuits were evenly split. The Court could enjoin the merger, but allow the offeror to continue acquiring shares, requiring it to put the shares in an escrow account. *See infra* note 78 and accompanying text. Thus the tender offer would proceed, and the question of the use of an antitrust injunction to thwart a takeover would come before the Court for resolution.

[67] *See* N.Y. Times, Aug 27, 1981, at 23, col. 1.

[68] *See* Metz, *Why Seagram Is So Alluring*, N.Y. Times, Nov. 3, 1981, at D8, col. 1.

[69] King & Metz, *Mobil Wins Round in Offer for Marathon as Judge Temporarily Halts U.S. Steel Bid*, Wall St. J., Nov 25, 1981, at 2, col. 3.

[70] In other words, the offeror could not satisfy "[t]he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated" Roe v. Wade, 410 U.S 113, 125 (1973); *see, e.g.*, Missouri Portland Cement Co v Cargill, Inc., 498 F.2d 851, 855 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (six months elapsed between announcement of tender offer and issuance of appellate decision).

[71] 410 U.S. 113 (1973). Although the petitioner in *Roe* was no longer pregnant when the Court heard her case, the Court refused to dismiss her appeal as moot, observing that if the termination of "the normal 266-day human gestation period . . . makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Id.* at 125. In a similar manner, tender offers, and the defensive tactics they evoke, present issues " 'capable of repetition, yet evading re-

refrain from deciding the merits of the case to avoid usurping Congress' legislative authority under article I of the Constitution, for although the federal courts have broad discretion to fashion a body of substantive antitrust common law,[72] the Supreme Court has deferred to Congress on antitrust procedure, especially recently.[73] Whether or not a compelling constitutional basis exists for the Court's professed deference to Congress on antitrust procedure, it may nonetheless be the law that the federal courts may not interpret section 16 as broadly as they interpret sections 1 and 2 of the Sherman Act.[74]

Just because the Court is unlikely to articulate a preliminary injunction standard for hostile tender offers does not mean that Congress' only alternative is to deny targets antitrust standing. Congress could amend section 16 to require that the plaintiff's threatened "irreparable loss or damage" be *antitrust* injury, just as section 4 after *Brunswick* restricts damages to antitrust injury.[75] Of course, this

---

view,'" *id.* (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)), because once a court issues an injunction in a tender offer the takeover battle is likely to be resolved in a matter of days. Thus, like the pregnancy in *Roe*, an offeror's appeal from the issuance of an antitrust preliminary injunction would arguably "provide . . . a classic justification for a conclusion of nonmootness." *Id.*; *see* Edgar v MITE Corp., 102 S. Ct. 2629 (1982). *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV L. REV. 373 (1974). The Court's relaxed mootness standard in *Roe* has evoked sharp criticism. *See* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1578-80 (9th ed. 1975).

[72] *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978); Berkey Photo, Inc. v. Eastman Kodak Co, 603 F.2d 263, 272 (2d Cir 1979), *cert. denied*, 444 U S 1093 (1980); United States v. Associated Press, 52 F Supp. 362, 370 (S.D N Y 1943) (Hand, J.), *aff'd*, 326 U S 1 (1945).

[73] *See* Texas Indus, Inc v Radcliff Materials, Inc., 451 U S 630, 642-46 (1981), Hawaii v Standard Oil Co., 405 U.S. 251 (1972), Zenith Radio Corp. v. Hazeltine Research, Inc, 401 U S 321 (1971), Perma Life Mufflers, Inc. v International Parts Corp., 392 U.S. 134 (1968). This deference coincidentally has come at a time when Justice Rehnquist and Professor Ely have given the unlawful delegation doctrine of Panama Ref Co v Ryan, 293 U.S. 388 (1935), renewed currency. *See* Industrial Union Dep't. v. American Petroleum Inst, 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring); J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980); *see also* American Textile Mfrs. Inst., Inc v Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting). The Supreme Court extended the doctrine to the judiciary in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See also* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957)

In *Texas Industries* the Court held that without explicit congressional authorization federal courts cannot infer a right of contribution among antitrust defendants. The Court emphasized that although it has read §§ 1 and 2 of the Sherman Act, like § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), "not only as granting jurisdiction over defined areas of . law but also as vesting in the courts the power to develop a common law . . . within that jurisdiction," 451 U S. at 642-43, "[i]t does not necessarily follow . . that Congress intended to give courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act." *Id.* at 643. The Court stated that "[i]n contrast to the sweeping language of §§ 1 and 2 of the Sherman Act, the remedial provisions defined in the antitrust laws are detailed and specific " *Id.* at 644. It then listed five examples of remedial provisions that had greater detail and specificity than § 1 or 2. *Id.* at 644-45. Not surprisingly, § 16 of the Clayton Act was absent from the list.

[74] The language of § 16 provides that a private plaintiff may receive injunctive relief "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity " 15 U.S.C. § 26 (1976) The *Texas Industries* Court, however, listed "the remedial provisions in this merger field" as provisions that it considered to be "quite detailed," and, therefore, less susceptible to broad judicial interpretation 451 U.S. at 645 Therefore, courts may owe Congress a heightened degree of deference when construing § 16 in merger cases.

[75] Congress could instruct courts simply to inquire (1) whether the target has a reasonable probability of proving at trial that the consummated tender offer would violate § 7, and (2) whether the target's shareholders would suffer immediate antitrust injury from the § 7 violation that could not be compensated by money damages. Congress also could accompany the addition of a cognizable-injury requirement to § 16 with a revision of the Hart-Scott-Rodino Act so that different premerger notification procedures apply to hostile tender offers than to friendly mergers. For example, Congress could revise § 16 to require that a court may not hear a target's motion for an antitrust preliminary injunction until the statutory premerger waiting period has expired or has been terminated prematurely by the Antitrust Division or the Federal Trade Commission. Then, during the target's interlocutory hearing, the government's decision

amendment would affect more business transactions than merely tender offers and more injunctive relief than merely preliminary injunctions. But such an amendment would be flawed even if Congress limited its scope to hostile tender offers, for it is difficult, if not impossible, to imagine any case in which a target could prove antitrust injury. Thus, this amendment would send courts looking for antitrust injury that logically cannot exist.[76]

The most expedient way for Congress to end the abuse of antitrust preliminary injunctions by tender offer targets is to deny them standing under section 16. Congress could do so by stipulating that section 16 does not apply to mergers subject to section 18a(a) of the Clayton Act, the provision of the Hart-Scott-Rodino premerger notification amendments that governs tender offers.[77] A less preferable alternative would be to amend section 16 so that any hostile tender offer would be immune to an antitrust preliminary injunction, subject perhaps to the condition that the offer proceed under a hold-separate order lasting beyond the date for tendering shares.[78] This procedure would not reduce the uncertainty of whether the antitrust laws would prevent the shareholder from tendering his shares to the highest bidder. It would, however, shift this risk from the target's shareholder to the offeror, which would be efficient in the sense that an offeror relying on expert advice could better assess the antitrust risks of a tender offer than could the target's shareholders. In addition, by reducing delay this procedure would reduce the uncertainty to the offeror that a white knight will free-ride on the offeror's efforts to identify the most desirable takeover candidate. The reduction in this second form of uncertainty would make tender offers more likely to occur.

But it would be a mistake to overstate the likelihood that a legislative remedy to this problem is on the horizon. Just as a thwarted offeror may be reluctant to appeal to the Supreme Court because it is unsure whether it might one day be the target of another corporation's hostile tender offer, so also will the typical corporation be unwilling to lobby for an amendment of section 16 when it is uncertain whether it might one day be an offeror or a target. The only corpora-

---

not to contest the merger would create a rebuttable presumption that the consummated tender offer would not violate § 7.

[76] *Cf. Private Enforcement of Antimerger Laws*, in ABA MONOGRAPH, *supra* note 4, at 81, 89 (remarks of James T Halverson, former director of FTC Bureau of Competition) (advocating that, instead of denying targets standing under § 16, courts should apply the Third Circuit's two-part test).

[77] 15 U S C § 18a(a) (1976). In 1976, a leading antitrust practitioner succinctly stated that a rule that would automatically deny a target standing because "it could not possibly win the case" would rest on "the rationale that certain plaintiffs logically can be said to be able to show every element necessary for a Section 7 . . . violation . . . but . . . the underlying policies of the law are such that the court feels that this particular kind of plaintiff is seeking redress for an injury which is beyond the scope of a particular antitrust law, the violation of which he is now . . . seeking an injunction to prevent." *Private Enforcement of Antimerger Laws*, in ABA MONOGRAPH, *supra* note 4, at 85 (remarks of David Berger). *See also* E. ARANOW, H. EINHORN & G BERLSTEIN, *supra* note 4, at 150.

[78] *See* 15 U S.C. § 18a(b)(2) (1976); FTC v Weyerhaeuser Co., 665 F.2d 1072, 1075 n.7 (D.C. Cir. 1981); United States v. Northwest Indus., Inc , 301 F. Supp. 1066, 1098-1100 (N.D. Ill. 1969); *see also* ICM Realty v. Cabot, Cabot & Forbes Land Trust, 378 F. Supp. 918, 928 (S.D.N.Y. 1974) ("In view of [the offeror's] hold-separate agreement, the balance of hardships does not tip decidedly in [the target's] favor."); ABA MONOGRAPH, *supra* note 4, at 35-36 The Antitrust Division and the Federal Trade Commission in effect could implement this reform simply by giving early merger clearance to any hostile tender offer.

One student note advocates, to the contrary, that courts issue automatic preliminary injunctions in all merger cases. Note, *"Preliminary Preliminary" Relief Against Anticompetitive Mergers*, 82 YALE L.J. 155 (1972). This note was written before *Brunswick*, before the Hart-Scott-Rodino Act, and before *Missouri Portland Cement*. Its thesis relies on notions of market power that have long since been discredited. *See, e.g.*, Landes & Posner, *supra* note 28. Its conclusion, therefore, does not merit serious consideration.

tions that would clearly favor such legislation would be those so large that they consider themselves immune from the threat of a takeover, and it seems improbable that Congress would enthusiastically consider legislation sponsored by big companies to assist them in swallowing smaller companies. After all, were there not a populist resentment toward hostile tender offers, there would be no state antitakeover statutes.[79] Thus, the eventual solution to this problem may be a clumsy one in which the federal courts of appeal move only glacially toward the socially optimal rule of denying targets standing under section 16.

IV. RECONCILING THE DENIAL OF STANDING WITH CURRENT CASE LAW

Denying targets standing under section 16 can be reconciled with current law. The Supreme Court's rationale in *Brunswick* for requiring a showing of antitrust injury under section 4 is identical to Judge Friendly's rationale for determining three years earlier in *Missouri Portland Cement* that the target's allegations of irreparable harm were not cognizable under section 16. By discerning that a target's shareholders can suffer no harm from a tender offer and by refusing to find the injury suffered by the target's management to be cognizable under section 16, Judge Friendly anticipated the Supreme Court's rule in *Brunswick* that antitrust rights and remedies do not arise simply because a "merger . . . has the potential for producing economic readjustments that adversely affect some persons."[80]

The Third Circuit has made clear in *Schoenkopf v. Brown & Williamson Tobacco Corp.* that *Brunswick* is not limited to damage claims under section 4, but applies equally to claims for injunctive relief under section 16.[81] Although the court

---

[79] *See, e.g.*, ILL ANN STAT ch. 121½, §§ 137 51- 70 (Smith-Hurd 1981).

[80] 429 U S at 487, *cf* Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS LAW 1433, 1438 (1977) (*Missouri Portland Cement* "basically told the District Courts never grant a preliminary injunction on antitrust grounds") Although in Blue Shield of Va v. McCready, 102 S. Ct. 2540 (1982), the Supreme Court apparently expanded the scope of *Brunswick*, neither the majority nor the four dissenting justices qualified this language in *Brunswick* regarding the adverse readjustments that might be caused by mergers.

[81] 637 F.2d 205, 210-11 (3d Cir. 1980). One court involved in the Kennecott Copper proxy fight has said that for the purposes of § 16 "[t]he loss or damage . . . must be of the sort contemplated by the Clayton Act." Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 963 (S.D.N.Y), *aff'd in part and rev'd in part*, 584 F.2d 1195 (2d Cir. 1978). Unfortunately, however, the precedential value of this statement is weakened by the court's subsequent determination that possible disclosure of trade secrets constituted cognizable injury under § 7 of the Clayton Act 449 F. Supp. at 965; *see also* Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 38-39 (1978) [hereinafter cited as Fischel].

The one case that rejects the adoption of antitrust injury as a requirement under § 16 rests on fallacious legal and economic reasoning. In a 1977 decision, the Northern District of Illinois expressly held that *Brunswick* does not extend to § 16 preliminary injunctions in hostile tender offers. Chemetron Corp. v. Crane Co, 1977-2 Trade Cas. (CCH) ¶ 61,717 (N.D. Ill. 1977). In *Chemetron* the offeror combined the reasoning of *Brunswick* and *Missouri Portland Cement* to argue that no antitrust preliminary injunction should issue:

> Relying on *Brunswick* . . . , defendant asserts that plaintiff must show an antitrust injury. This plaintiff has failed to do, urges defendant, because plaintiff has failed to show that it will suffer any injury by reason of the alleged substantially lessened competition. Thus, urges defendant, plaintiff's competitive position will be enhanced: the antithesis of antitrust injury.

Id. at 72,931 (citation omitted). The court rejected this argument, reasoning that *Brunswick* was inapposite because the target "does not seek damages for a lessening of competition" but "seeks to prevent that lessening of competition" to avoid becoming "an unwilling participant in the incipient Section 7 violation." *Id.* at 72,932. The court's reasoning is unpersuasive for reasons discussed earlier because the tender offer in *Chemetron* was for all outstanding shares. *Id.* at 72,926.

Even less persuasive in the *Chemetron* court's attempt to distinguish *Missouri Portland Cement* on the ground that the Second Circuit's "admonition" that courts not allow themselves to be "used as a tactical weapon in takeover battles . . . was given in light of the court's conclusion that plaintiff's Section 7 claim acknowledged a lower threshold for standing to sue for injunctive relief than for damages under the Clayton Act, it would "not extend a carte blanche to those unaffected and untouched by the substantive violation."[82] The court concluded that to "ensure . . . that in fashioning relief we appropriately address and remedy the actual violation rather than simply correct an incidental injury,"[83] "some causal nexus" must exist between the antitrust remedy and the plaintiff's injury, a relationship that the plaintiff in *Schoenkopf* could not establish because it "actually *benefited* from the defendants' presumably illegal practices."[84]

On first impression, denying standing to targets under section 16 might appear inconsistent with *Illinois Brick Co. v. Illinois*,[85] the Supreme Court's 1977 decision that established that only direct purchasers may sue for unlawful overcharges even though subsequent purchasers in the chain of manufacturer or distribution ultimately suffer the injury. Professor Page has suggested that "[t]he concept of antitrust injury defines the kinds of harms that should be compensable in order to maintain the efficient level of [antitrust] deterrence" and that "[t]he function of antitrust standing should be complementary: to limit recovery to the plaintiff or class of plaintiffs who are in the best position to impose the deterrent penalty on the defendant."[86] Distinguishing antitrust standing from injury in this fashion, one could say that the Court in *Illinois Brick* limited damage recovery to direct purchasers because they are the plaintiffs with access to the best information to detect price-fixing and, therefore, can best impose a deterrent penalty on the defendant.[87] Thus, it is inconsequential that the most efficient private enforcer does not bear the brunt of the antitrust injury for which he can assert a

was frivolous." *Id.* at 72,932. More correctly, in *Missouri Portland Cement* the Second Circuit explicitly rejected as "rather unimpressive" the claim that potential § 7 litigation could irreparably injure the target. 498 F 2d at 869. Thus, the Second Circuit itself already has rejected as frivolous the *Chemetron* court's rationale for distinguishing *Brunswick* as inapplicable to § 16.

The *Chemetron* court also quoted *Missouri Portland Cement* out of context in an attempt to reconcile its own holding with the Second Circuit's contradictory reasoning in that case. The *Chemetron* court contended that the Second Circuit "contemplated that an injunction could be granted if 'the antitrust violation was fairly clear *or* the potential damage to the corporation decisively outweighed that to the would-be acquirer.' " 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,932 (quoting 498 F.2d at 870) (emphasis added by *Chemetron* court) In fact, however, the *Missouri Portland Cement* court made this statement not with respect to § 16 specifically, but with respect to the legislative history of the Celler-Kefauver amendments to § 7 of the Clayton Act. 498 F.2d at 870. By suggesting that this statement, standing alone, defined the minimum requirements for an antitrust preliminary injunction, the *Chemetron* court ignored the Second Circuit's holding that the irreparable-harm requirement of § 16 must be part of any test for issuing an antitrust preliminary injunction in a hostile tender offer *Id.* at 870. In any event, the *Chemetron* court phrased its misstatement of *Missouri Portland Cement* in terms of a purely discretionary rule. *See* 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,932 ("injunction *could* be granted") (emphasis added). Thus, the *Chemetron* court's incorrect reading of *Brunswick* and *Missouri Portland Cement* renders *Chemetron* unreliable precedent.

[82] 637 F.2d at 210.

[83] *Id.*

[84] *Id.* at 210, 211 (emphasis in original).

[85] 431 U.S. 720 (1977).

[86] Page, *supra* note 65, at 500. The Seventh Circuit recently adopted this precise rationale in Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir 1982)

[87] The Court acknowledged that its "rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations," but nonetheless concluded that antitrust deterrence "is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." 431 U.S. at 746, *see* Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U CHI L. REV. 602 (1979). *See also* Blue Shield of Va. v. McCready, 102 S Ct 2540, 2546 (1982) (*Illinois Brick* limited standing to "the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble damage remedy was intended to promote").

remedy. Similarly, even though a target suffers no antitrust injury from an anticompetitive tender offer, it arguably should be allowed standing because it has the strongest incentive of any potential plaintiff to discover a section 7 violation in the market in which it sells. In this sense it is irrelevant that the target views the injunction solely as a defensive tactic, because consumers become the incidental beneficiaries of the target's self-interest.[88] Indeed, the Second Circuit appears to have followed precisely this reasoning in *Grumman Corp. v. LTV Corp.*[89] when it stated that "even though the true concerns of the [target acting as] 'private attorney general' may be more 'private' than 'attorney general' . . . the target company is entitled to fend off its suitor."[90]

Grumman is fundamentally flawed because the rationale of *Illinois Brick* is inapposite to hostile tender offers. Although the target's management may have the greatest incentive to find a section 7 violation, that incentive is intrinsically linked to the objective of impairing the efficiency of the market for corporate control in order to thwart the takeover. Thus, a target's motion for an antitrust preliminary injunction can advance the objectives of antitrust law only by offending the objectives of corporate law and disrupting the efficiency of capital markets.[91] This reasoning is consistent with the Third Circuit's "primary concern" in *Schoenkopf*: a rule of standing for section 16 that does not require "[p]roximity between the plaintiff's injury and the antitrust violation" cannot ensure that the plaintiff will "adequately represent . . . the interests of the 'victims' of the antitrust violation."[92] The Third Circuit concluded that, notwithstanding "the need to aggregate claims which would not otherwise be adjudicated, a plaintiff must be denied standing under section 16 if "[t]he inappropriateness of [the plaintiff's] supposed representation of the 'victims' of the defendants' presumed antitrust violation is evidenced" by a requested relief that "is self-interested and, at best, only superficially addresses the [antitrust]

---

[88] In Copperweld Corp. v. Imetal, 403 F. Supp. 579, 588 (W D Pa 1975) the court conceded that, "[f]rom a purely competitive standpoint," the tender offer "most probably will not hurt" the target. Nonetheless, the court rejected the offeror's argument that the target lacked standing under § 16 because it concluded that a § 16 case "is not a Section 4 Clayton Act case whereby only one who is injured in his business is permitted to seek treble damages" but instead "permits *any* corporation to sue for injunctive relief against threatened loss." *Id.* (emphasis in original). *But cf.* ABA MONOGRAPH, *supra* note 4, at 49 ("The private party [enforcing § 7 of the Clayton Act] . . . is primarily motivated by a perceived need for protection or by the prospect of gain. Its principal concern is not the public interest, although the action could affect the public interest—beneficially or adversely."); *id.* at 29 ("The target's motive for suit is likely to have nothing to do with competition.").

[89] 665 F.2d 10 (2d Cir 1981)

[90] *Id.* at 11. The Second Circuit concluded that its "focus is therefore not upon Grumman's motivation for bringing this suit, but upon the adequacy of its preliminary showing that the proposed takeover will violate § 7." *Id.* Citing *Grumman* and *Marathon* as authority, a district court in the Seventh Circuit recently said that the "private right of action [in § 16] to obtain injunctive relief against an unlawful acquisition extends to the target of a hostile takeover bid." Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982), *aff'd mem* , No 82-1305 (7th Cir. Mar. 5, 1982) The *Whittaker* court, however, denied the target's motion for a preliminary injunction.

[91] Of course, when it is expedient to do so, the target will make a defensive merger to create intentional antitrust problems. *See Mobil Begins $5.1 Billion Offer for Marathon Oil Co., But Target Concern Appears to Be Ready to Fight Bid*, Wall St. J., Nov 2, 1981, at 3, col. 1; *see also* Anaconda Co. v. Crane Co., 1975-2 Trade Cas. (CCH) ¶ 60,596 (S.D.N.Y. 1975), A FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 28-32 (1978). That a target is an inappropriate representative for consumers is apparent from the instances when the target, while arguing that the tender offer violates § 7, simultaneously seeks a white knight that directly competes with the offeror. *See, e.g.*, Metz, *Texaco Chief Says Firm Was Approached By Bankers, Others on Marathon's Behalf*, Wall St. J., Nov. 19, 1981, at 2, col. 3.

[92] 637 F.2d at 210.

problem."[93]

The relevance of *Schoenkopf* to hostile tender offers is clear. Managers have a duty under state law to maximize the returns of their shareholders. Therefore, they could not lawfully cut prices to less than the level prevailing in the market on the supposition that consumers are paying too much and consequently deserve relief at the expense of shareholders. Such corporate altruism is no more credible when a target's managers reject the premium offered for the target's shares in order to protect nonshareholder consumers. The usual assumption of both antitrust law and corporate law is that managers attempt to maximize, not minimize, profits. Thus, some motive other than altruism toward nonshareholders must underlie the invocation of the antitrust laws by the target's management. Because this act of feigned altruism compromises the interests of the target's shareholders, in light of *Schoenkopf* the act makes the target's managers an unacceptable representative of the real victims of the supposed antitrust violation. *Schoenkopf* implies that in hostile tender offers the party with the greatest incentive to find a section 7 violation—the target's management—must nonetheless be denied the status of private attorney general because the nature of management's self-interest gives it an incentive to enforce section 7 only when an antitrust suit is likely, on balance, to reduce social welfare.

Scholars and at least one appellate court have adverted favorably, if only briefly, to this conclusion that targets should be denied standing. Endorsing the conclusion of Professors Areeda and Turner, the First Circuit recently announced in *A.D.M. Corp. v. Sigma Instruments, Inc.* that the interests of a target in defeating a tender offer "are outside of section seven's protection."[94] Similarly, Professors Easterbrook and Fischel conclude that a target suffers no antitrust injury and that its motivation in using section 7 to resist a takeover offends the interests of stockholders and consumers; consequently, they recommend that a target's management should leave the job of enforcing the antitrust laws to the Department of Justice.[95]

Indeed, the conclusion that a target's management should be barred from posing as a private attorney general is independently compelled by principles of efficient antitrust enforcement. The elaborate premerger notification procedures administered by the Department of Justice and the Federal Trade Commission make private enforcement by targets redundant.[96] If a close correspondence ex-

---

[93] *Id* at 211. Similarly, Judge Friendly stressed in *Missouri Portland Cement*, Congress did not intend "to endow incumbent management of a target company with the power to block free trade in its securities unless the anti-trust violation was fairly clear or the potential damage to the corporation decisively outweighed that to the would-be acquirer." 498 F 2d at 870 (interpreting Celler-Kefauver amendments to § 7 of Clayton Act) Given that Judge Friendly recognized that granting a target an antitrust preliminary injunction "spells the almost certain doom of a tender offer," *id.*, it seems unlikely that he expected any target to be able to show that its potential injury would outweigh the offeror's.

[94] 628 F 2d 753, 754 (1st Cir. 1980) (citing 2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 346). Although *Sigma* was a suit for damages, this fact did not affect the First Circuit's conclusion that a target's interests are outside the antitrust laws. *See also* Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1255-56 (N.D. Ohio 1977); Mesa Petroleum Co. v Aztec Oil & Gas Co , 406 F. Supp. 910, 916 (N.D. Tex. 1976) (court had "serious questions with regard to the standing of [the target] to level these [§ 7] charges"). The *Sigma* court reached this conclusion even though it acknowledged that § 16 had a lesser standing requirement than § 4. 628 F 2d at 754, *see supra* note 88.

[95] Easterbrook & Fischel, *supra* note 22, at 1192-93; *see also* Fischel, *supra* note 81, at 38-39. Easterbrook and Fischel reiterate this argument in *Antitrust Suits by Targets of Tender Offers* (forthcoming in MICH. L. REV. 1982).

[96] The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390

ists between prosecutorial discretion and the goal of consumer welfare maximization,[97] private enforcement by targets will not confer any social benefit that government enforcement alone cannot confer, for it seems quite unlikely that enforcement of section 7 by targets is necessary to augment the government's antitrust enforcement budget.[98] In short, a target's antitrust litigation expenditures are a pure social deadweight loss.[99]

V. CONCLUSION

To issue an antitrust preliminary injunction to the target of a hostile tender offer is to allow antitrust remedies to be used not for maximizing consumer welfare but for impairing the ability of capital markets to function efficiently as a market for corporate control. In this sense, such an injunction offends the objectives of corporate law by assisting incumbent managers who resist a takeover at

---

(1976), requires the offeror to notify the Federal Trade Commission and the Antitrust Division of the tender offer, 15 U.S.C. § 18a(a) (1976), and to refrain from consummating the tender offer until 15 days after both agencies' receipt of that premerger notification, provided that the agencies may extend the waiting period an additional 10 days. *Id.* §§ 18a(b)(1)(B), 18a(e)(2), *see also* 16 C.F.R. § 801.30 (1978). The Act also provides the agencies expedited procedures for seeking a preliminary injunction. 15 U.S.C. § 18a(f) (1976). The agencies together may terminate the waiting period prematurely. *Id.* § 18a(b)(2); *see also* 16 C.F.R. § 803.11 (1978). *See generally* FEDERAL TRADE COMMISSION, PREMERGER NOTIFICATION COMPLIANCE GUIDE (corrected ed. Nov. 20, 1979); 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS § 7.2 (1978). In the Conoco takeover battle the Antitrust Division in effect killed Mobil's tender offer merely by requesting further information of the competitive consequences of a Mobil-Conoco merger after it had already given clearance to tender offers by DuPont and Seagram.

Contrary to one decision before the Hart-Scott-Rodino Act, it now seems inconsequential that denial of a target antitrust injunction will frustrate "the Court's jurisdiction to determine the important question of public interest whether [the offeror's] actions and threatened actions do or would violate the antitrust laws." Filtrol Corp. v. Slick Corp., 1970 Trade Cas. (CCH) ¶ 73,035, at 88,051 (C.D. Cal. 1969), *aff'd per curiam*, 428 F.2d 826 (9th Cir. 1970). Professor Leubsdorf has challenged the logic of this judicial assertion in preliminary injunctions generally. Leubsdorf, *supra* note 18, at 545; *see also* Lunkenheimer Co. v. Condec Corp., 268 F. Supp. 667, 674 (S.D.N.Y. 1967) ("Department of Justice and Federal Trade Commission . . . remain available to scrutinize the [merger] and take steps if defendant's acquisition should seem more baleful than now appears"); Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 ANTITRUST L.J. 587, 588, 589-90 (1973). *But cf.* Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 699 (2d Cir. 1973) (target would "perform a vital public service" by "assuming . . . role . . . of a private attorney general"); Grumman Corp. v. LTV Corp., 527 F. Supp. 86 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2d Cir. 1981).

[97] *Cf.* ANTITRUST & TRADE REG. REP. (BNA) No. 1025, at AA-2, AA-3 (July 30, 1981) (interview with Assistant Attorney General William F. Baxter) ("We use the resources of the [Antitrust] Division to bring those cases which yield the largest payoffs in terms of realized consumer surplus over and above the costs of bringing and prosecuting the cases.").

[98] Even before the premerger notification procedures took effect, former Assistant Attorney General Donald F. Turner concluded that "there is little if any indication that resource limitations in the [Antitrust Division and Federal Trade Commission] preclude suit against any significant merger that the enforcement agencies deem to be unlawful, or even against some pretty insignificant mergers." *Private Enforcement of Antimerger Laws*, in ABA MONOGRAPH, *supra* note 4, at 75, 77, *see also id.* at 78 (remarks of Donald F. Turner) ("if the government agencies who know of the case or the prospective case decline to prosecute, the odds are very long that the case against the merger is weak indeed").

[99] A target's claims for an antitrust preliminary injunction skirt the boundaries of ethical conduct when the target, like Marathon, has searched for a white knight among the offeror's direct competitors. Yet, in the absence of an award of punitive damages, a successful offeror could never receive full compensation for tortious abuse of process because it would be suing the corporation in which it had just acquired a controlling percentage. The same reasoning would apply to collecting the target's injunction bond. *See* Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 243-45 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976). Although a successful offeror could sue the target's officers, indemnification agreements might insulate them from paying damages and would thus thrust the burden of liability back on the target corporation, already substantially owned by the offeror. And, although the offeror could sue the target's counsel for violating the Code of Professional Responsibility, it seems unlikely that an offeror would ever prevail. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109 (1981); *see also* CAL. BUS. & PROF. CODE § 6067 (West 1962).

the expense of their fiduciary duty to shareholders. This socially costly misuse of antitrust preliminary injunctions requires that Congress or the federal courts deny targets standing under section 16 of the Clayton Act.