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Recommended Citation

Frank H. Easterbrook & Daniel R. Fischel, "Antitrust Suits by Targets of Tender Offers," 80 Michigan Law Review 1155 (1982).

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ANTITRUST SUITS BY TARGETS OF TENDER OFFERS

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Managers of firms subject to unwanted tender offers have devised many strategies for defeating or delaying the bids. Some of these devices may violate state rules because they use the target's resources to preserve the managers' jobs. Others do not work against determined bidders.

One of the most effective defensive strategies is to invoke the aid of courts. The target argues that the acquisition proposed by the bidder would violate the antitrust laws.¹ If the court enjoins the acquisition, even the most determined bidder must surrender. The managers of Grumman and Marathon defeated strong bids by LTV and Mobil in just this way.¹ And the strategy appears immune from complaints by shareholders. What could be objectionable about action by a target's management that protects shareholders from the consequences of an antitrust violation while simultaneously vindicating the public's interest in vigorous antitrust enforcement?

We explore in this Article the basis and consequences of the target's suit under the antitrust laws.² We approach the question from the perspective of federal antitrust law and state corporation law.

We argue in Part I that the target is a singularly poor "private attorney general" because it is a beneficiary, not a victim, of any violation. An antitrust suit thus must be understood as an attempt by managers to defend their own positions, not as an attempt to vin-

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The authors thank Douglas G. Baird, Walter J. Blum, Dennis W. Carlton, Gregg A. Jarrell, William M. Landes, Anthony I. Ogus, A. Mitchell Polinsky, Richard A. Posner, James A. Rahl, Andrew M. Rosenfield, J. Gregory Sidak, and the participants in the Faculty Workshop of the University of Pennsylvania Law School for helpful comments on earlier drafts.

1. See *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

2. We extend the brief discussions that appear elsewhere in the literature. 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 346b (1978); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192-94 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEXAS L. REV. 1, 36-39 (1978). See also Sidak, *Antitrust Preliminary Injunctions in Hostile Tender Offers*, 30 KAN. L. REV. — (1982) (emphasizing relative error costs).

dicating the public interest. In the jargon of antitrust, the target is not a victim of "antitrust injury" and therefore is not entitled to sue for damages or an injunction. We proceed in Part II to study the consequences of defense for shareholders. We show there that shareholders are entitled, under state law, to any benefits that flow from tender offers; managers are not free to pursue their own conceptions of the public interest to the detriment of investors.

I. ANTITRUST INJURY

A. *The Role of Antitrust Sanctions*

We start from the proposition that antitrust sanctions, whether damages or injunctions, are designed to deter offenses and to compensate those who suffer injury. They are not, however, designed to deter all offenses or compensate all injuries, else there would be no limit to the severity of fines and no limit to the category of parties entitled to bring suit. Violators are not hanged or stoned; well-meaning people cannot sue unless they suffer injury; and even those who suffer injury in fact must show that the injury flows from that which makes the acts in question unlawful. This is the "antitrust injury" requirement of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*³

The developing economic treatment of optimal penalties explains these and related rules concerning sanctions. The principal task in designing remedies is to establish the optimal level of violations. Thus, in the law of contracts, damages remedies depend on the loss to the party suffering by the breach. If the cost of performance has risen so that the promisor would lose more than the promisee gains, the promisor may elect to pay damages rather than perform the contract.⁴ Nonperformance is desirable in such circumstances, and the contracting parties would provide for nonperformance if they could negotiate contracts that covered all contingencies. In the law of nuisance, damages measures allow some level of noise or soot without remedy, and damages for higher levels are calibrated to permit a desirable amount of the otherwise obnoxious conduct to continue.⁵

3. 429 U.S. 477 (1977).

4. See Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980).

5. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-10 (1972); Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980). See also Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). There is a delicate interplay between damages and injunctions in the law of nuisance, see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 738-48 (1973), but we postpone discussion of this problem to Part I-C.

Things are much the same in the antitrust law if one assumes, as we do, that the antitrust laws are designed to protect competition and maximize the allocative efficiency of the economy.⁶ Antitrust violations then are forbidden in the same sense that breaches of contract are forbidden: The law establishes a price for the violation, and people then must decide how to respond to the schedule of penalties. Some antitrust violations are efficient, just as some breaches of contract are efficient. One has only to think of an action (say, a merger or the building of a new plant by a monopolist) that, although creating or augmenting the firms' market power, also enables the firms to reduce substantially the costs of production.⁷ An optimal schedule of penalties allows "efficient violations" to take place, while it deters other violations.

A court could, in principle, determine whether the benefits of a merger or other conduct exceed the losses and draw the line of prohibition accordingly. Two scholars have argued that courts should do just this for mergers.⁸ But a complete cost-benefit calculus, like the design of industry structure, is beyond the ability of courts. The amount of savings to be had from a merger is uncertain; resolution of the uncertainties is too much to expect, even if courts could obtain

6. There has been substantial dispute over the years about the purposes of the antitrust laws, but recent cases, including *Brunswick* and, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20 (1979); *National Socy. of Professional Engineers v. United States*, 435 U.S. 679, 689-90 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.21 (1977), have concluded that efficiency is the appropriate goal of antitrust. See 1 P. AREEDA & D. TURNER, *supra* note 2, at ¶¶ 103-113, and R. BORK, *THE ANTITRUST PARADOX* 50-89 (1978), for compelling arguments that efficiency is the only appropriate goal.

7. *Brunswick* may have been such a case, as a large manufacturer of pinsetting equipment acquired some bowling establishments, and a rival establishment complained that the acquisition would cause it to lose money. The court of appeals' finding of liability was based in part on its conclusion that Brunswick might obtain some cost savings. *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262, 268 (3d Cir. 1975). This supports our reading of the case. It is possible, however, to interpret *Brunswick* as a case in which the complaining establishment lost the market power it would have obtained had the other establishments gone out of business; parts of the Court's opinion say that a firm cannot recover under the antitrust laws for loss of the profits available from a reduction in competition. 429 U.S. at 488. But this cannot be the best interpretation. If the other establishments would have gone out of business but for the acquisition, then under the failing company doctrine there would have been no violation of the antitrust laws. The Supreme Court decided the case on the assumption that the acquisitions were unlawful, which means that it must have assumed that the other establishments would have stayed in business no matter what. (Neither the Supreme Court nor the court of appeals remarked on the inconsistency between plaintiffs' damages theory and the theory of liability. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1132 & n.34 (1976).)

8. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1979); Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977) (discussing earlier writings). Williamson calls for qualitative rather than quantitative consideration of economies.

the data at reasonable cost (and they cannot do even this).⁹ Courts decline to attempt such an expensive and speculative task, just as courts refuse to allow a promisor to defend a breach-of-contract suit by saying that the cost of performance has increased.

The difficulties with an efficiencies defense in antitrust do not mean, however, that cost reductions are irrelevant. They operate in antitrust, as in contract and tort law, by putting the defendants to a choice: defendants may continue their conduct and face the risk of paying damages, or they may avoid liability by desisting (or never setting out on a questionable course). If damages are calibrated by the harm done to consumers, divided by the probability of detection,¹⁰ firms can decide for themselves whether the savings justify the conduct. If they do, the firms will carry on, and if not, not. A system of damages based on harm done enables the firms, which have the best access to information, to decide whether a course of conduct yields savings that exceed any harms.¹¹ The court needs to ascertain only the cost side of the cost-benefit calculus.

Even if a court could determine the total costs and benefits of particular courses of conduct, identifying those that produce net gains in efficiency, it still would want to label some efficiency-creating acts as violations. This is not paradoxical. A given practice with allocative losses but offsetting gains produces prices higher than those prevailing under competition. If courts label these practices as violations, customers obtain damages in the amount of the overcharge, and such overcharge-based recoveries reduce the substitution

9. Robert Bork relies on this point in opposing an efficiencies defense in antitrust. R. BORK, *supra* note 6, at 124-29.

10. The trebling of damages in antitrust takes account of the fact that many violations, especially concealable ones such as price fixing, escape detection.

11. This is an application of Gary Becker's seminal work on crime. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). The approach has been applied to antitrust cases explicitly in, e.g., R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 221-27 (1976); R. POSNER & F. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS 542-72 (2d ed. 1981); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 318-33 (1981); 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).

Sanctions that do not eliminate all violations have some benefits in addition to those mentioned in the text. They reduce the total costs of enforcement; the cost of stamping out the last violation may far exceed the losses imposed by that violation. They also reduce the risk that antitrust law imposes on firms, risk that may be a dead-weight loss. See Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980); Polinsky & Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979). We do not develop these points further, however, because they do not advance or undermine any of the arguments concerning suits by targets. We also do not consider the possibility of criminal sanctions, which are imposed almost exclusively in price-fixing cases, where typically there are no efficiency gains.

that is the source of the welfare loss from monopolies. The allocative (deadweight) loss of monopoly occurs when purchasers, confronted with a price for a product that exceeds its marginal cost, buy less of it and substitute something else — a something else that either costs more to produce or gives less satisfaction per dollar spent. The ability of purchasers to recover damages measured by the amount of the overcharge (divided by the probability of detection) acts as a price reduction. If the damages are properly computed, they offset the monopoly price increase and its allocative distortions. Purchasers treat the monopolized product as if it came with a cents-off coupon equal to the expected damages recovery. If the process works flawlessly — a big if, to be sure — there will be no cutback to output, no allocative efficiency loss.¹² Society will realize all of the productive efficiency gains attributable to the merger or other business practice.

B. *Antitrust Injury and Optimal Sanctions*

The Supreme Court's cases on antitrust remedies generally conform to the approach we have described.¹³ Consider *Brunswick*, the Court's best-known antitrust damages case. In *Brunswick*, a seller in a market affected by a merger sought treble damages, arguing that the firms participating in the merger attracted business that the plaintiff otherwise would have enjoyed. The Supreme Court held that the plaintiff could not collect damages, despite the existence of

12. See Landes & Posner, *supra* note 11, for a demonstration that this process works even if only the direct purchaser can recover damages. The direct purchaser would treat its expected recoveries as a cost reduction and price its output accordingly. See also Landes & Posner, *An Economic Theory of Intentional Torts*, 1 INTL. REV. L. & ECON. 127, 131-32 (1981) (showing that the award of damages in tort cases prevents the taking of inefficient precautions by potential victims).

The utility of damages in preventing substitution diminishes, of course, as it becomes more difficult for buyers to estimate the likelihood of antitrust recovery. Thus commercial buyers of large quantities may be in a position to make the appropriate estimates and adjustments, while consumers of small quantities would not.

13. For example, purchasers may recover from sellers for the full overcharge, whether or not they passed on that overcharge, but they may not recover for noneconomic losses. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (consumers may recover the full overcharge); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (no recovery for nonspecific injury to "the economy" or "the quality of life"); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487-94 (1968) (recovery not defeated or diminished by proof that the purchaser "passed on" some of the overcharge to its customers). See also *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (only actual, antitrust injury is compensable); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (only direct purchasers may recover); *Montreal Trading, Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 1634 (1982) (buyers discouraged by higher prices may not recover for the lost purchases). But see *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (allowing an employee of a purported violator to collect damages for his discharge even though he suffers none of the anticompetitive effects of the violation; the dissenting judge relies on *Brunswick* and earlier cases rejecting claims by employees).

injury inflicted on it by the merger, because the kind of injury involved was not related to the reasons why the merger might be held unlawful. Mergers are unlawful, the Court pointed out, when they tend to reduce competition and create higher prices and lower output. The plaintiff in *Brunswick* was not the victim of higher prices; as a rival in the market, it would have gained by higher prices. It suffered from an excess of competition, as it saw things, and although it was surely injured, it could not trace the injury to "that which made the acquisitions unlawful."¹⁴

In other words, *Brunswick* establishes that the antitrust laws do not provide a remedy for all dislocations caused by unlawful conduct.¹⁵ A firm cannot recover, say, for losses caused by an increase in productive efficiency attributable to a merger or for other consequences that are beneficial to competition but nonetheless tied to an otherwise unlawful bundle of acts.¹⁶ The plaintiff must establish that it suffers injury and that the injury flows from that which makes the acts unlawful — in economic terms, that the plaintiff's injury is part of or flows directly from the allocative efficiency loss of monopoly.

The antitrust injury rule of *Brunswick* implements the optimal damages approach we described above. By confining recoveries to the losses caused by the inefficient aspects of the defendant's conduct, the *Brunswick* approach induces firms to compare productive efficiency gains against the welfare losses. The prospective defendant will disregard, as it should, any private losses that may be associated with social gains. It will proceed on the questionable course of conduct only if the available welfare gains exceed the welfare losses.

The antitrust injury standard makes it easy to dispose of many antitrust claims.¹⁷ A damages claim by the target of a tender offer is

14. 429 U.S. at 488. As the Court summarized its holding, a plaintiff may recover only when the injury reflects "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489. The latter category presumably includes exclusionary practices.

15. See also Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980). One qualification is necessary. The Court has held, without explanation, that rivals may recover for lost profits in exclusionary practices cases. This is not always an optimal damages remedy, although recovery by rivals may be justified to the extent they serve as proxies for injured purchasers and to the extent the lost profits reflect part of the allocative loss from monopoly. Easterbrook, *supra* note 11, at 326-33.

16. In addition to *Brunswick*, see, e.g., *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3029 (1981); *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372, 1391-92 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1981); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 291-98 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

17. For applications, see Easterbrook, *supra* note 11; Page, *supra* note 15, at 489-503.

among the easiest. The target is a beneficiary, not a victim, of any antitrust injury. If the prospective merger between bidder and target would increase the resulting firm's market power to an unacceptable degree, both bidder and target share in the monopoly profits thus produced. The target's shareholders receive their portion as the premium price offered by the bidder. No plausible theory of damages allows a recovery when the plaintiff has only gains to show for the violation. And the gains from increased monopoly power are the full measure of the target's consequences: because section 7 of the Clayton Act applies only to acquiring firms, the target's shareholders receive the profits without any risk of liability.¹⁸

Targets nonetheless assert that they will be injured by a takeover, and some courts have agreed with them. They maintain, for example, that the tender offer will change the identity of their shareholders, imperil the status of valued managers, threaten ongoing projects, disclose trade secrets, and commingle assets so that the restoration of competition will be more difficult.¹⁹ We may grant that all of these assertions are true. So what? Unless these dislocations are part of the allocative efficiency loss of monopoly, neither legal nor economic principles suggest that the target may complain.

One group of the asserted injuries identifies dislocations common to all tender offers. Any acquisition opposed by the target's managers will produce an unwelcome change in the identity of shareholders, imperil the managers' job security, put projects favored by today's managers in jeopardy, and so on. The existence of these dislocations has nothing to do with any antitrust problem. Quite the contrary, these dislocations may well be the source of substantial cost savings, as the bidder takes over and makes improvements in the way the target is run. Such dislocations are common to all tender offers, those that do and those that do not present antitrust problems.

18. See 15 U.S.C. § 18 (1976). One court has held that the acquired firm may be joined as a defendant even though it committed no wrong, and it has raised the possibility of rescission as a remedy for the acquiring firm's acts. *United States v. Coca-Cola Bottling Co.*, 575 F.2d 222 (9th Cir.), *cert. denied*, 439 U.S. 959 (1978). The court made it clear, however, that such a remedy would be used only as a last resort and then only when shareholdings were closely held. No court has ordered rescission in any antitrust case.

The acquired firm's managers also bear no exposure. They avoid personal liability unless they participate in some post-acquisition violation. They could not be responsible for the merger itself if they publicly announce their opposition to it. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-65 (1978); *United States v. Wise*, 370 U.S. 405, 416 (1962).

19. For a comprehensive list, see the complaint in *Marathon Oil Co. v. Mobil Corp.*, Verified Complaint at 21-24, [1981-82] 5 Trade Reg. Rep. (CCH) ¶ 64,379 (N.D. Ohio). The Second Circuit's decision to enjoin the LTV offer for Grumman relied on several of these "injuries," including concerns that the offer would "disrupt Grumman's business" or lead to liquidation of Grumman's (money-losing) nonaerospace components. See 665 F.2d at 15-16.

For the reasons we have developed, cost reductions are not a proper source of complaint, even when these savings accompany an increase in monopoly power. And if, as is possible, a given acquisition produces no cost savings, dislocations of this sort still are not an appropriate basis of legal complaint, any more than they would be in the absence of an antitrust problem. If the buyer is mistaken in thinking that it can realize cost savings, it pays the price of its error without the need for legal intervention.²⁰ These dislocations are not "legal" injury both because they may be symptoms of cost reductions and because there is no need for intervention to cause the parties to bear all appropriate costs. They do so automatically.

A second group of injuries states potential legal wrongs, but wrongs unrelated to antitrust. Theft of trade secrets, for example, is a recognized legal wrong. But it is an implausible wrong in a tender offer case because the bidder will not have access to the secrets until it has acquired the target, and then it can use its secrets as it will. The value of the trade secrets to the target already is reflected in the price of the target's stock; when the bidder acquires the stock it pays for the secrets and can hardly steal what it has purchased. If the transfer of secrets to the bidder nonetheless may be characterized as a legal wrong to the target, that wrong cannot be connected with harm to competition.²¹ The bidder's use of the target's trade secrets will enable the bidder to be more, not less, effective in competing with third parties. It is not a source of allocative efficiency loss from monopoly.

We do not mean that antitrust and innovation are unrelated. There is a long-standing and unresolved dispute among economists whether higher concentration increases or decreases the amount of innovation. Our point, rather, is that the bidder's use of existing knowledge developed by the target cannot decrease competition unless it suppresses a process that competes with the bidder's own and that formerly had influenced price. This may occur in some cases, and when it does it is a legitimate source of objection to the acquisition. But it is not captured by a cry that the bidder will obtain and use unspecified trade secrets, and at all events the target, which would reap part of the gain from the suppression of competition, does not suffer any of the injury.

20. See Easterbrook, *supra* note 11, at 278-80.

21. See *A.D.M. Corp. v. Sigma Instr., Inc.*, 628 F.2d 753, 754 (1st Cir. 1980) (the sale of proprietary assets of the target "is . . . lacking the essential connection between injury and the aims of the antitrust laws necessary to give . . . standing" for the target to bring an antitrust suit). See also Note, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329, 342 n.49 (1981).

This leads immediately to the final category of harm, which involves plausible antitrust injury. The target may allege that it will be hard to disestablish any merger effected after a successful bid and observe that this difficulty augments the allocative loss of the merger. New mergers are notoriously hard to undo.²² It is possible to argue, with fair support, that unless a merger is enjoined (or a hold separate order entered) before consummation, we may as well forget about attempting to disestablish the resulting firm. Congress relied on these concerns in enacting the premerger notification rules of the Hart-Scott-Rodino Act in 1976; the statute gives antitrust enforcement agencies the opportunity to act before the merger takes place.²³

But although the difficulty of arranging effective divestiture is cause for concern, it is hard to see why it entitles the target to bring suit. The target suffers no injury. As we have pointed out, it is a substantial beneficiary to the extent the combination obtains monopoly profits.²⁴ Although the assets spun off in a divestiture may be "weakened" as a competitive force, this is not equivalent to saying that the target corporation has been harmed by the acquisition-and-divestiture. The "weakness" of the assets presumably allows the firms in the market to continue to charge a price higher than that prevailing under competition (otherwise there is no antitrust worry about the problems of divestiture), and these monopoly profits can be shared by bidder and target. Some of the target's assets will remain in the bidder's corporate shell, but the target has no entitlement to keep the same structure forever, and even if carved into pieces suffers no injury (antitrust or otherwise) so long as the sum of the value of the pieces exceeds the value of the firm under the old organization. If, perchance, the bidder cannot obtain a high value for the "weakened" assets, only the bidder suffers; the target's shareholders were long since compensated. The difficulty of undoing an anticompetitive merger may support relief at the behest of someone who

22. See R. POSNER, *supra* note 11, at 80-89; Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. L. & ECON. 43 (1969); Pfunder, Paine & Whittemore, *Compliance With Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19 (1972). See also Easterbrook, *Breaking Up Is Hard to Do*, 5 REGULATION 25 (Nov.-Dec. 1981).

23. See *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981); *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980); cf. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982) (courts exercise traditional equitable powers in suits by antitrust agencies).

24. The Second Circuit thought that the "two competitors might be expected to prefer the advantages of diminished competition. But in reality it is only the resulting entity that would enjoy such advantages." *Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 16 (2d Cir. 1981). This overlooks the fact that much of the anticipated benefit of the combination is paid, in advance, to the target's shareholders as a premium over the market price of the shares.

would be injured, but it provides little support for a suit by one of the beneficiaries.

The target might argue, though, that it is entitled to recover as a participant in the violation that has not received its appropriate share. But here, too, the argument falls short. Although the Supreme Court has restricted the scope of the *in pari delicto* defense, so that even those who participate in a violation may recover damages from coconspirators, it has not abolished the requirement that there *be* cognizable damages to recover as a precondition of suit.²⁵

It may be helpful to re-emphasize the linchpin of the argument to this point: The only purpose of the antitrust laws is to maximize the allocative efficiency of the economy. This is the source of the Court's conclusion in *Brunswick* that only "antitrust injury" — the injury that represents or directly flows from a reduction in allocative efficiency — is compensable in damages. The claim of a target to bring an antitrust suit depends on a different view of antitrust. If, for example, antitrust had created a substantive entitlement for firms to "remain whole," regardless of the consequences for resource allocation, then surely the target could sue to enforce that right. Standing depends on the theory of liability. But because the theory of liability depends on identifying a reduction in allocative efficiency, and damages depend on tying the allocative loss to the plaintiff's injury, the target may not recover.

C. *The Relation Between Damages and Injunctions*

Our discussion so far has proceeded as if damages were the only available remedy. They plainly are not; targets seek injunctions, not damages. The Supreme Court hinted in *Brunswick* that injunctions might be governed by rules other than the "antitrust injury" standard,²⁶ and the courts of appeals have since been unable to agree on how the antitrust injury rule, and the hint in *Brunswick*, apply to

25. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *but see* *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 995 (9th Cir. 1980). Justice White's concurrence, necessary to the majority in *Perma Life*, emphasized the requirement that the plaintiff show antitrust injury. 392 U.S. at 144-47.

26. 429 U.S. at 491 (Pueblo may seek equitable relief on remand). It is difficult to know what to make of this, for the Court could not have meant to authorize a divestiture order. Divestiture is unavailable in private suits, *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir. 1975), and if, as the opinion indicated, the merger was beneficial to competition, an order of divestiture would have been as "inimical to the purposes of these [antitrust] laws," 429 U.S. at 488, as an order to pay damages. It seems likely, then, that the Court meant to hold open the possibility of an injunction against any exclusionary practices made possible by the merger, practices that might cause Pueblo to suffer antitrust injury.

injunctions sought by targets of tender offers.²⁷ The target's claim to an injunction appears, at first glance, to be stronger than its claims to damages. Even if it is not injured, the target possesses the information, and the target's managers the incentive, to enforce the antitrust laws. Targets are admirable private attorneys general — or so it may appear. We argue that appearances are deceiving.

1. *Statutory Construction*

Section 16 of the Clayton Act, which authorizes district courts to grant injunctions, tells courts to use common-law standards.²⁸ It provides that courts may issue injunctions “under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity”²⁹ Although courts exercising their common-law powers have some flexibility in interpreting the Clayton Act, they are not free to alter the remedial scheme established by Congress in 1914 in order to produce some system they prefer³⁰ — for example, one under which courts would exercise their maximum powers under article III of the Constitution so that any colorably interested person could obtain an injunction.³¹ The statute explicitly links injunctions to threatened

27. In two cases before *Brunswick* the Second Circuit held that the target of a tender offer would not be permitted to seek either damages or an injunction. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 866-70 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (injunction) (pointing out that the bidder's interest lies in furthering the target's welfare); *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 757-59 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (damages) (pointing out that any anticompetitive effects would not be felt by the target). Another case, by announcing that an antitrust plaintiff must show that it is within the “zone of interests” protected by the antitrust laws, apparently foreclosed such suits. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1145 (6th Cir. 1975). After *Brunswick*, one court squarely held that the interests of a target lie outside the protection of the antitrust laws, a rationale equally applicable to damages and injunctions (although the case involved only damages). *A.D.M. Corp. v. Sigma Instr., Inc.*, 628 F.2d 753, 754 (1st Cir. 1980). Another court held that the *Brunswick* antitrust injury test applies in suits for injunctions, although in some slightly weaker form. *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205 (3d Cir. 1980). How much weaker the court did not say. But in two cases that do not even cite *Brunswick*, the Second and Sixth Circuits have allowed targets to seek injunctions against tender offers. *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981) (distinguishing *Cargill* by limiting its holding to conglomerate [i.e., as the court saw it in *Grumman*, harmless] mergers; reasoning that a target may obtain an injunction if it can show that “the threat to the public interest from the loss of competition is serious and not likely to be undone by a divestiture in the event the acquisition is found to be unlawful after it has occurred”); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982) (not mentioning the problem, although it had been briefed).

28. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

29. 15 U.S.C. § 26 (1976).

30. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), holds that courts must respect the remedial scheme that Congress supposed it was enacting in 1914 and may not add new features (such as contribution) that they now find desirable.

31. See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (allowing uninjured “testers” to bring a housing discrimination suit; the Court relied on a clear statutory

"loss or damage," words that conjure up an antitrust injury requirement of the sort recognized in *Brunswick*. The injunction may be used to ward off impending injury, but it is impossible to interpret the statute as authorizing suits by anyone who takes an interest in the subject. The interested person must be an (irreparably) injured person as well.

This is enough to establish that the target is not entitled to relief: It does not suffer any of the irreparable, antitrust injury that might be caused if the conduct in question is indeed a violation. We also think that the common-law restrictions on injunctions incorporated in section 16 promote an optimal level of antitrust enforcement. This conclusion rests on two considerations, one that we offer with confidence and the other more tentatively: First, the target's managers have the wrong incentives; second, injunctions are generally less desirable remedies because they impede the commission of "efficient violations."

2. *The Target's Managers Lack the Appropriate Litigation Incentives*

Our discussion of optimal damages assumed that plaintiffs would be willing to settle for the authorized damages or some lesser amount; if they did not, they would bear the risks of losing the case but gain nothing. No matter what happened, the (putative) defendant could elect between going forward (with the risk of paying optimal damages) or desisting from questionable conduct. This decision would not be influenced by the identity or number of the plaintiffs.

At least as an initial matter, rights to injunctions and rights to damages have the same deterrent force. A party with the right to obtain an injunction may compromise the litigation for a sum greater than its loss but less than the loss to the defendant from desisting. When the defendant's gains from the questionable conduct exceed the plaintiff's losses, the parties can settle the claims and allow the conduct to proceed, just as damages allow it to proceed. The parties could strike these bargains even after injunctions were issued. One can show that if courts decide legal questions without error and determine at no cost the gains to be had from enjoining (or permitting) a given course of conduct, there is no practical difference between injunctions and damages remedies.³² In either event all

design affording extensive rights to litigate); *Havens Realty Corp. v. Coleman*, 101 S. Ct. 1114 (1982) (same).

32. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Polinsky, *supra* note 5, at 1106-12.

efficient business combinations would take place, and inefficient ones would be deterred by the legal rule.

Bargaining costs are not zero, however, and parties do not always bargain cooperatively. An injunction will be the end of the matter in some cases: the parties will be unable to bargain around the decree, even if such bargaining would improve their joint welfare. The bargaining problem is difficult if more than one party is entitled to an injunction. The defendant will be unwilling to settle the case with the first plaintiff, because some other plaintiff could seek (and obtain) the same kind of injunction; the defendant's deal with the first plaintiff would not allow it to continue its planned course of conduct. In practice, then, an injunction may frustrate the system of optimal compliance that is facilitated by a system of damages. The bargaining problem is doubly difficult if one or more of the parties with rights to injunctions has incentives that differ from the rest. This party may be unwilling to settle the case for a sum that approximates its share of the damages.

When the parties may have conflicting interests, their strategies will not take into account the costs they impose on each other, and bargaining may become hopelessly embroiled. That is the case here. The managers of a target firm and the customers of that firm's products do not have congruent interests with respect to the merger; similarly, the interests of managers and investors in the targets are not congruent. An injunction valuable to managers (who preserve their offices) may be detrimental to both shareholders (who lose the premium) and customers (who lose the combination of cost savings and damages to which they would otherwise be entitled).³³ The potential plaintiffs may fight among each other for the lion's share of the gains from permitting (or prohibiting) a given transaction, and in the process they may either dissipate the gains or prevent their realization. If the target's managers have the right to obtain injunctions, then, we may expect to encounter greater difficulty in bargaining to an optimal solution.

Targets of tender offers are poor plaintiffs for a further reason. Because, as we have emphasized, the targets suffer none of the allocative welfare loss from monopoly, the incentives of the managers lead them *away* from settlements that benefit consumers.³⁴ They

33. If the merger indeed augments monopoly power in violation of the antitrust laws, the customers would obtain damages equal to the eventual overcharge, and they (or others in society) would obtain the benefit of any production cost savings attributable to the merger. And if the merger does not augment monopoly power, the customers would obtain through price reductions some of the benefits of the merger.

34. Thus, as one court put it: "Our primary concern is that we have before us [in actions

bargain to maximize the gains from the violation (some of which they may appropriate in salary and perquisites),³⁵ not to force bidders to pursue only efficient combinations. The targets' managers have no concern for the consumers; under standard corporation law the managers' loyalty runs to investors, at the expense of noninvestors.³⁶ The managers could be motivated to bring the suit even if it were clear that the cost savings of a combination would overwhelm any increase in monopoly power. Or they could insist on settlements in amounts exceeding the gains of the transaction to the bidder, thus blocking efficient combinations. The managers' assertion that they sue as Good Samaritans is not credible, and if it were credible it would condemn managers under state law, for the reasons we discuss in Part II.

3. *The Relative Efficiency of Damages and Injunctions*

Although we are confident that the target's managers, given their unusual incentives, are the wrong parties to seek injunctions, we think it appropriate to sketch, if only tentatively, the appropriate relationship between damages and injunctions in antitrust law on the assumption that those entitled to injunctions desire the socially optimal outcome.

We assume for now that the standard for issuance of injunctions in antitrust law is not significantly different from, say, the standard in nuisance law. In either case the plaintiff seeks relief against a long-lasting course of conduct that harms many widely scattered people, each with a relatively small stake. Section 16 refers to the customary powers of courts of equity. These make antitrust injunctions depend on the usual equitable inquiries: irreparable injury, the absence of an adequate remedy at law, a favorable balance of the

seeking antitrust injunctions] a plaintiff who adequately represents the interests of the 'victims' of the antitrust violation." *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 211 (3d Cir. 1980). The court declined to award injunctive relief to a middleman on the basis of assertions that the practice in question had harmed small businesses; the court concluded that the plaintiff had interests adverse to those of the businesses it purported to represent.

35. The difficulty of bargaining may explain why managers usually do not sell their acquiescence in a takeover proposal in exchange for explicit payments to themselves. There are too many actors. It is hard to agree on a division of the spoils, and there is a significant chance that one dissatisfied manager (or any shareholder who learns of the deal) would blow the whistle on such outright pocketing of the gains.

36. Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance. See Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Katz, *Responsibility and the Modern Corporation*, 3 J.L. & ECON. 75 (1960). We put to one side laws concerning violence or other acts thought to be *malum in se*.

equities (an injunction will not issue if the harm to the defendant would substantially exceed the gain to the plaintiff, a rule fortified in preliminary injunction cases by the possibility that the court's initial assessment may prove mistaken). The traditional conditions are designed to make injunctions a remedy of last resort, indeed to make injunctions unavailable despite injury in many cases.³⁷ Many scholars have questioned the placement of injunctions at the bottom of the list of remedial priorities, arguing that they should be more freely available because they are so effective and avoid the nasty problems often involved in computing damages and distributing them to injured parties.³⁸ In some respects these arguments have prevailed; injunctions appear to be the instruments of choice in civil rights cases. We suspect, although we do not seek to prove, that these arguments are not compelling in economic cases.

We have mentioned the principal difficulty in the use of injunctions: It is hard to bargain to an optimal solution when many parties possess their own rights to injunctions, each of which would be a sufficient cause for the defendants to abandon their plans. When there are many potential plaintiffs the bargaining problems may be insuperable.³⁹ Bargaining costs include not only the time and expense of transacting with many parties but also the additional costs created by holdouts. One or more potential plaintiffs may elect to behave strategically, withholding assent to any given offer in the hope of receiving a better one, of appropriating to himself as much of the total gain from the transaction as possible. When the remedy is damages, in contrast, no one's holdout can frustrate the progress of efficiency-increasing projects.

It is, of course, possible that injunctions themselves could command defendants to follow the socially best course. But for the reasons we discussed in Part I-A, it is unlikely that courts will issue optimal orders when they cannot determine the costs defendants will incur and the gains forgone in complying with their decrees — that is, all the time. The traditional rules of equity, under which injunc-

37. See, e.g., *Sampson v. Murray*, 415 U.S. 61, 88-92 (1974) (loss compensable in money is not irreparable even if want of funds pending adjudication would cause great distress); *Ciechon v. City of Chicago*, 634 F.2d 1055, 1057 (7th Cir. 1980).

38. The best example is O. FISS, *THE CIVIL RIGHTS INJUNCTION* 38-67, 74-85 (1978). For an effective critique of Fiss's reasoning, see Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEXAS L. REV. 1065 (1979).

39. See Polinsky, *supra* note 5, at 1106-12. See also Calabresi & Melamed, *supra* note 5. For variations of this theme in contract cases, see Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979).

tions are extraordinary remedies, may well be reasonable accommodations to these and the other problems we have identified.

We do not mean to say that injunctions have no role in antitrust cases. They do, as Congress contemplated they would. But they function to fulfill the traditional roles. In suits by the United States or the FTC, the plaintiff presumably has made (or can make) a reasonably accurate calculation of the costs and benefits of the merger. If the government makes a mistake in bringing the suit, it is relatively easy for the parties to bargain, either before or after an injunction has been entered. Antitrust suits by the government are part of a process of cooperative negotiation that begins before the complaint is filed and continues until the suit is dismissed (perhaps after a voluntary accommodation by the defendant), the defendant wins, or structural relief has been carried out. The relief phase often lasts longer than the determination of the merits and entails careful negotiation designed to maximize social welfare.⁴⁰

Suits by consumers can serve a similar function. Because no one consumer can capture very much of the value of the litigation, such cases generally proceed as class actions in name or in fact; the joint litigation spreads the costs of the suit among the prospective beneficiaries. When a suit is brought before the merger is consummated, and thus before a court could determine either the plaintiffs' losses from the merger or the defendants' losses from complying, an injunction may induce the parties to bargain. And because the plaintiffs or, more accurately, their lawyers, act as a class, the bargaining may take place at relatively low cost. (Low relative to the cost of, say, determining damages in litigation after a merger has been consummated.) The plaintiffs' action in their self-interest is reasonably consistent with the social interest in avoiding monopoly, because the plaintiffs in such a suit are the actual or potential victims of the monopoly overcharge.

Things are otherwise when one of the plaintiffs does not suffer the harm that is the source of the objection to monopolies. There is no convincing reason to conclude that bargaining initiated by such a plaintiff would move society closer to the optimal outcome. This is one explanation, perhaps the most important one, of why a plaintiff does not have standing just because he professes interest; he must also suffer actual injury of the sort the statute was designed to prevent.⁴¹ Even "good" enforcers with knowledge of the facts and phil-

40. We bypass here the question whether this kind of negotiation achieves its objectives, given the incentives of the government's agents.

41. Another reason for limiting the class of plaintiffs is to ensure that those who *are* injured

osophical commitments that ensure dedicated representation of the interests they espouse are turned away if they suffer no injury to themselves. This actual injury approach informs the definition of a case or controversy under article III,⁴² of "prudential" standing doctrines emphasizing the "zone of interests" protected by a statute or constitutional rule,⁴³ of the "representativeness" requirement in class actions, and of the traditional rules of equity alike. The principle is no less applicable in antitrust cases.

II. ANTITRUST DEFENSES AND THE FIDUCIARY DUTY OF MANAGERS

If we are correct that managers lack the authority to obtain relief under the antitrust laws, we need not worry about whether their status as agents of the investors permits them to apply for such relief. But if we are wrong about antitrust and equitable principles, the question remains whether managers violate their fiduciary duties by pursuing antitrust claims. Courts that have faced this question have assumed without analysis that managers' state law duty allows, even requires, them to file antitrust suits if federal law holds out the prospect of relief against the takeover.⁴⁴ It is not true, however, that there is a legal duty to enforce every legal right. Managers may decline to enforce legal rights, because enforcement may cost the firm more than nonenforcement.⁴⁵ Managers may contract, explicitly or implicitly, to forego enforcement of legal rights. We show in this

will have the appropriate incentives to bring suit, without diminution in recoveries or increased litigation costs as a result of the interference of third parties.

42. *E.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 102 S. Ct. 752 (1982). See Brilmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297, 306-15 (1979); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

43. See *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981) (applying the "zone of interests" test in an antitrust case; plaintiff must show that its interests are those protected by the antitrust laws); *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 102 S. Ct. 752, 760 (1982) (describing the "zone of interests" test as a generally applicable prudential principle of standing).

44. See *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 102 S. Ct. 658 (1981); *Chemetron Corp. v. Crane Co.*, [1977-2] Trade Cas. ¶ 61,717 (N.D. Ill. 1977).

45. Managers justifiably waive legal rights when shareholders' wealth is increased by not litigating. *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263 (1917); *Swanson v. Traer*, 249 F.2d 854, 858-59 (7th Cir. 1957). This principle underlies the option of directors to dismiss derivative litigation brought to enforce a legal right of the firm (and of disinterested directors to dismiss derivative litigation even when the managers and other directors are the defendants). *Burks v. Lasker*, 441 U.S. 471 (1979); *Abramowitz v. Posner*, 672 F.2d 1025 (2d Cir. 1982); *Auerbach v. Bennett*, 47 N.Y.2d 619, 631, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 927 (1979). *But cf.* *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (the ability of managers to dismiss derivative litigation is subject to unspecified limits to be devised in particular cases). *Zapata* is criticized in Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware Corporation Law*, 76 NW. U. L. REV. 913 (1982). It

Part that, because shareholders' wealth is highest if managers do not pursue antitrust litigation, there is an implicit contract between managers and investors not to enforce any federal rights the firm may have.

A. *Antitrust Suits and Shareholders' Wealth*

We have maintained elsewhere that the fiduciary duties in corporate law provide a standard form contractual clause governing the agency relationship between investors and managers.⁴⁶ The existence of fiduciary duties increases investors' wealth by preserving the gains available from the division of labor — the delegation of authority from investors to skilled managers — while limiting managers' ability to further their interests at the expense of investors. Because it is too costly to anticipate and contract for every contingency, courts supply a flexible fiduciary principle that approximates the bargain the parties would have struck were negotiation and enforcement costless. This fiduciary principle supplements market remedies, such as adjustments in salary or changes in career prospects, that induce managers to act in investors' interests. Whether the fiduciary duty of targets' managers requires, permits, or precludes antitrust litigation depends, therefore, on whether investors would contract for managers to file such suits. We think investors would not; antitrust litigation undercuts shareholders' desires to maximize their wealth. The tender offer *is* one of the market's constraints on managers' behavior, and investors are unlikely to contract away such a powerful constraint.

The case is clearest when a bidder makes a cash tender offer, at a premium, for all of the target's shares. Because the shareholders receive cash, they do not care whether the takeover may later be held unlawful. They can take their premium and invest it free of antitrust risk. Managers' attempts to thwart the tender offers deprive shareholders of the premium and give them nothing in return.

The problem is more complicated if the bidder seeks less than 100% of the shares, or if the offer includes stock or other securities instead of cash. Some of the target's shareholders then would have investments in firms with an antitrust exposure as a result of the takeover, and they might conceivably suffer injury if the firm were penalized under the antitrust laws or required to divest assets at a

is defended, albeit by confession and avoidance, in Veasey, *Judicial Review of Business Decisions*, 37 BUS. LAW. 1247, 1260-73 (1982).

46. Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. — (1982); Easterbrook & Fischel, *supra* note 2, at 1170.

loss.⁴⁷ It might appear necessary for managers to bring antitrust suits if the losses to these shareholders threatened to exceed the gains to the investors who received cash.

The possibility is more apparent than real. The investors easily can avoid any risk of loss. So long as they receive securities of the bidder (or the firm resulting from the merger) valued in the market at more than the price of the securities they surrendered, they can sell the securities and receive cash from other investors who are willing to bear the antitrust risks.⁴⁸ Although there is every reason to think that the market would value these risks accurately — the exposure to antitrust litigation would be well known, and the market price of widely held securities would be set, as always, by the trades of well-informed investors among themselves — it does not matter here whether the market prices the securities efficiently. Investors would care only about the prices, efficiently arrived at or not, they could receive. Because all of the tender offers of concern here involve a substantial premium relative to the pre-offer price,⁴⁹ investors who wish to avoid antitrust risk do not lose. They can sell their securities at a profit. Managers' resistance to tender offers consequently harms shareholders even when the bidder seeks less than all securities.⁵⁰

47. Whether they would in fact suffer injury is another matter altogether. The best available evidence indicates that securities of firms subject to adverse antitrust actions do not do poorly in the market. Although the challenge causes a decline in the price of shares, the decline does not take back all of the gains obtained on the announcement of the acquisition. Eckbo, *Horizontal Mergers, Collusion, and Stockholder Wealth*, 37 J. FIN. ECON. — (1982); Ellert, *Mergers, Antitrust Law Enforcement and Stockholder Returns*, 31 J. FIN. 715 (1976); Stillman, *Examining Antitrust Policy Towards Horizontal Mergers*, forthcoming in 37 J. FIN. ECON. — (1982).

48. This requires the investor to disinvest from the firm of his choice, but this is a consequence of tender offers in general and does not flow from antitrust risks in particular. The market contains many other investments with risk and return characteristics similar to those a particular person may sell as a result of a tender offer.

49. Tender offers commonly involve substantial premiums, and the nonacquired shares of the target firm continue to sell at a premium even after the bidder has purchased the shares it sought. See, e.g., Bradley, *Interfirm Tender Offers and the Market for Corporate Control*, 53 J. BUS. 345, 345-47, 361-65 (1980). If antitrust exposure created a substantial risk of loss, the price of the offered package would fall below that of the target's existing securities. In that event there would be no need to worry about litigation: shareholders would retain their shares, and the offer would fail.

50. The fiduciary principle may require managers of the target to refrain from speaking as well as litigating. Suppose managers have some information about a new product or plan that would, if developed, place the target in competition with the bidder. This information would not ordinarily come to light in a tender offer because new product information is not part of the required filings under either the Williams Act or the Hart-Scott-Rodino Antitrust Improvements Act. Managers' revelation of the information might flag an antitrust problem not previously perceived, thus reducing the value of the target's securities. The argument for revelation is strongest if managers fear that the antitrust problem, once recognized, would decrease the value of securities not acquired by the bidder; that raises a problem of equal treatment of shareholders. But we have argued elsewhere that investors unanimously prefer whatever sys-

B. *Suits To Trigger Auctions*

The effect of filing an antitrust suit cannot be fully analyzed without considering the possibility that the litigation is a ploy to obtain a higher price by affording time for an auction, or at least a negotiation, to develop. We doubt, however, that managers are free to use the courts in this manner. Such suits have no antitrust purpose and probably amount to abuse of process.⁵¹ We are unaware of any case in which a target's managers justified antitrust litigation on this basis.

Perhaps antitrust suits could be justified as efficient abuse of process if they actually set off auctions, thereby causing the target's assets to move to higher-valuing users.⁵² It is questionable, though, whether managers can use litigation to increase the price paid for the target's shares. Suits generally are designed to stifle bids altogether — a target that alleges that an acquisition would violate the antitrust laws would be hard pressed to change course if the bidder were to raise the price. Targets that initiate antitrust litigation frequently are not acquired by anyone. And although some firms, such as Conoco and Marathon, have been acquired after they commenced antitrust litigation, the suits served in each instance to prevent an acquisition by the high bidder and to discourage bids by other firms in the same industry as the initial bidder. In the final bidding for Conoco, Mobil's bid exceeded DuPont's by \$10 per share; Mobil's bid for Marathon exceeded U.S. Steel's by \$1 per share; and there is no reason to suppose that Mobil (or some other firm) would not have offered more but for the costs and risks imposed by the litigation.

It is possible that the antitrust litigation buys the time necessary for an auction to develop, but this is unlikely. The delays imposed by the Williams Act are more than sufficient to this end, especially so

tem maximizes their expected gains, even if the gains are distributed unequally. Easterbrook & Fischel, *Corporate Control Transactions*, *supra* note 46. If that is so, then the fiduciary principle calls for managers' silence. Once again, investors can protect their own interests by selling their securities in the market.

51. The initiation of legal proceedings to obtain objectives other than the judgment ostensibly sought in the proceedings is tortious abuse of process. RESTATEMENT (SECOND) OF TORTS § 682 (1978); Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715, 732-35 (1973). We doubt that rules of immunization such as the *Noerr-Pennington* doctrine would cover the use of an antitrust suit to set off an auction. For a general discussion of the *Noerr-Pennington* doctrine, see Fischel, *Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977).

52. It is important to distinguish gains in the efficient employment of assets from mere transfer payments. In many cases auctions would produce only the latter. See Easterbrook & Fischel, *supra* note 2, at 1175, 1188-90.

because the initial bidder must supply potential rivals with substantial information in its statutory disclosures.⁵³ A rule that sets off an auction but invariably makes a casualty of the first bidder, moreover, does not encourage more auctions in the future. It instead conduces to fewer first bids. As we now discuss, even if antitrust suits sometimes lead to a higher price being paid for the target's shares, the higher price today comes at the expense of shareholders' wealth tomorrow.

Shareholders' wealth is greatest under a legal rule that maximizes the sum of today's price and the likely price to be paid under some future value-increasing action such as a tender offer, where each outcome is discounted by its probability. A legal rule allowing managers to file antitrust suits reduces both components of value. It makes bids less likely (by penalizing first bidders), and in all probability does not significantly increase the sums paid when bids occur beyond what would be realized in naturally occurring auctions. Thus the value of the future gains falls. Simultaneously the value realizable today falls. Outsiders find it less profitable to monitor the behavior of managers. The agency costs of management rise, as the managers have less incentive to operate firms efficiently. We have argued before that shareholders' expected wealth is greatest if managers do not engage in defensive tactics, and the standard-form contract supplied by the fiduciary principle should recognize this.⁵⁴ Investors would interdict defenses, including auctions, if they could do so at reasonable cost, and legal rules should implement this result.

C. *Implications of Corporate Social Responsibility*

We consider a final argument: that the corporation has a "social responsibility" to avoid complicity in illegal conduct, no matter the cost to investors. The firm has a duty, the argument runs, to behave in a lawful and ethical manner. Although failure to pursue antitrust litigation may not violate the law, it would offend a sense of ethical

53. This is not to say that, all things considered, the Williams Act is beneficial. We have repeatedly criticized it in other writings.

54. We develop this in detail in Easterbrook & Fischel, *supra* note 2. See Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981). Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. L. & ECON. 371, 398-403 (1980), supply data establishing that defense decreases the number of offers. For arguments that defense for the purpose of triggering an auction should be encouraged, see Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 868-75 (1981); Gilson, *Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. — (1982). We reply to these arguments in Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. — (1982).

conduct to which managers are entitled to conform, even at the expense of shareholders' well-being.

The argument has a powerful rhetorical appeal, but here at least the rhetoric is empty. As we have observed,⁵⁵ a corporation subject to a tender offer does not commit an offense by failing to resist the bid. Only the bidder violates the statutes. The social responsibility argument thus must be that managers not only have a duty to avoid acting unlawfully themselves but also may act, in the corporation's name and at shareholders' expense, to prevent others from acting unlawfully. On this reasoning, managers of a construction firm should refuse a lucrative contract to build a new plant for IBM if they thought IBM might use the facility to monopolize the manufacture of some computer part. Only the most extreme advocates of "corporate social responsibility" adopt such a position.

We need not canvass the arguments for and against corporate social responsibility — a phrase with as many meanings as it has proponents — to conclude that managers may not draw the cloak of "responsibility" around their efforts to fend off acquisition bids. However desirable "responsibility" may be in principle, the statement of such an open-ended objective offers no standards against which to assess managers' conduct. The managers' assertion that "social responsibility" calls for antitrust litigation is in many cases too transparent an excuse for self-protection. When managers face the sort of conflict that every tender offer presents, a conflict between investors' interests and managers' continued employment, it is altogether too easy for managers to find — to their delight — that some ethical principle enables them to take the high road of defending against the acquisition.⁵⁶

55. See text at note 18, *supra*.

56. The managers of Marshall Field seem to have gone out of their way to prove this point. When Carter Hawley Hale (CHH), another retailer, approached Field in 1977, its managers quickly obtained a legal opinion stating that the acquisition would be unlawful because CHH had one store in Chicago. This was so serious, the opinion stated, that the problem could not be cured by divestiture of CHH's Chicago store. Field then instituted antitrust litigation and took other measures to defeat CHH's \$42 offer. Yet when, in 1982, a group of investors led by Carl Icahn started to purchase shares of Field, threatening to obtain a majority (or to wage a proxy fight for control), Field's managers promptly sought a White Knight from among other large retailers, all of which operated stores in Chicago. Batus, the suitor favored by Field's managers, owned stores in several cities in common with Field, including one right across the street from a large Field store in Chicago. The Batus offer of \$30 per share was worth less than half of CHH's bid. (Cash of \$42 received on, say, April 1, 1978, and invested at an average rate of 12%, available from several almost riskless — and some tax-free — investments, would have been worth some \$67.87 by April 1, 1982.) Field's managers, it has been widely reported, were amenable to the Batus offer because that firm has a history of not replacing the managers of newly acquired subsidiaries. The managers had tenure on their minds, for they obtained new long-term employment contracts in connection with the acquisition. And although the managers deny that self-protection was the motive for all of this, it is hard to grasp any other

We do not deny that managers legitimately may seek to obtain objectives defined by ethical considerations. Statutes and regulations may be based wholly on ethics or distributive justice rather than wealth maximization, and they bind managers and investors alike.⁵⁷ But these principles bind, to the extent they bind, because they are embedded in positive law. They cannot be derived from any notion that doing business as a corporation is a "privilege" for which society may demand some ethical repayment not specified in positive law. Corporations are not privileges; a corporation is no more than a convenient name for a nexus of contractual relationships among people.⁵⁸ Only people have moral obligations; corporations can no more be said to have moral obligations than does a building, an organization chart, or a contract.

When the corporation is properly seen as a summary of a set of contractual relationships, it becomes difficult, probably impossible, to say that the agents (managers) may take it on themselves to define the responsibility of the firm. Responsible agents do their principals' bidding, thus carrying out the pledge by which they obtained their positions.⁵⁹ If there is to be responsibility — that is, if firms are to undertake beneficent but wealth-reducing actions not commanded by statute — the investors are the appropriate parties to make that decision. One would expect that some investors would opt for "responsibility" and others not; firms (and investors) would sort themselves out according to their taste for responsible conduct. Such a process of sifting would be impeded if managers have the authority to decide for themselves, free of constraint by their principals, whether and

explanation of their curious about-face concerning the antitrust implications of the acquisition. (The FTC, in approving the Batus acquisition subject to limited divestiture because of an overlap in Milwaukee, must think that there was no antitrust problem at all in the CHH bid.)

The history of the CHH offer is recounted in *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 102 S. Ct. 658 (1981). For details of the Icahn purchases and the Batus offer, see, e.g., N.Y. Times, Mar. 17, 1982, p. 29, col. 3 (Midwest ed.), or any Wall Street Journal during March 1982.

57. As we have argued in Part I, however, managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so. See Engel, *supra* note 36. See also Easterbrook & Fischel, *supra* note 2, at 1191.

58. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980). For another use of the nexus-of-contracts way of looking at the corporation, see Fischel, *supra* note 45. See also R. HESSEN, IN DEFENSE OF THE CORPORATION (1979), for a demonstration that all of the features we usually associate with corporations may be obtained by contract without regard to corporate law.

59. See, e.g., *United Mine Workers v. Robinson*, 102 S. Ct. 1226, 1233-34 (1982); *Broad v. Rockwell Intl. Corp.*, 642 F.2d 929, 955-60 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 506 (1981).

how much of the principals' wealth should be sacrificed to the public welfare.⁶⁰

We doubt that the investors, as claimants to the firm's income stream, and managers, as their agents, have any moral obligation to sacrifice profitable opportunities so that someone else does not violate the law. Firms that behave as Good Samaritans bestow benefits on others but do not receive equivalent gains in return. This is a common justification for legislation, which preserves some proportionality of sacrifice. So long as investors lawfully may hire agents to maximize the investors' wealth, the investors have the right to expect that managers will be dedicated to their interests alone. Legislatures may command managers to act in "responsible" ways, and they often do, but then the problem of voluntary responsibility disappears. Legislatures also could free managers from duties to maximize profits for shareholders, but none have done so. Managers do not now have a duty to relinquish profitable opportunities for the investors to pursue the managers' own notions of the public interest; precisely the opposite is true. Faithful agents pursue their principals' conception of the public (or private) interest.

CONCLUSION

We have examined targets' antitrust suits from the perspective of federal antitrust law and state corporate law, each time considering both traditional legal principles and the insights afforded by economics. Because both antitrust law and corporation law govern consensual economic relations in markets, this seems an especially appropriate implement for the analysis. Although the conclusions we have reached are not beyond question — we have employed some assumptions about probable costs of bargaining and the likely effect on the number of bids of rules penalizing first bidders — we think the assumptions reasonable. The legal and economic arguments coalesce in suggesting that antitrust suits by targets of tender offers are offensive to legal principles and harmful to the welfare of shareholders and the economy.

60. For a critical treatment of one popular suggestion that agents act responsibly at the expense of investors, see Langbein & Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980).