Antitrust - Being a Player against a Monopoly - How Plaintiffs Can Pass Go and Collect $200: The Third Circuit's Requirements for Consumer Standing under Sections 4 and 16 of the Clayton Act

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ANTITRUST—BEING A PLAYER AGAINST A MONOPOLY—HOW PLAINTIFFS CAN PASS GO AND COLLECT $200: THE THIRD CIRCUIT’S REQUIREMENTS FOR CONSUMER STANDING UNDER SECTIONS 4 AND 16 OF THE CLAYTON ACT

I. INTRODUCTION

Antitrust laws prevent the monopolization of industries by fostering competition that results in the protection of consumers’ interests. Without antitrust laws, monopolies would have the effect of eliminating alternative manufacturers or sources of a product, forcing consumers to pay inflated prices or cause consumers to do without a product all together. In 1914, Congress passed the Clayton Act to “properly control . . . the great industrial corporation that really has power—the power to arbitrarily control prices and thus exact unjust profits from the people.”

The Clayton Act represents a means for private parties to bring antitrust lawsuits and recover damages or obtain an injunction. Private enforcement of antitrust laws is important in helping to ensure that antitrust


2. See Graff, supra note 1, at 221 (“Prior to the enactment of antitrust laws, huge monopolies had formed and taken control of many markets . . . . Consumers . . . had to pay the excessive prices set by the [monopolies] or do without these products.” (citing E. KINTNER, PRIMER ON THE LAW OF MERGERS 144 (1973))).


4. 51 Cong. Rec. 9265 (1914) (statement of Rep. Morgan); see also Hawaii v. Standard Oil Co., 405 U.S. 251, 261-64 (1972) (discussing probability that congressional intent of antitrust laws was to create free enterprise system).

violations do not go undetected. Textually, the remedial provisions of the Clayton Act are very broad. However, judicial decisions have restricted the ability of private parties to bring suit.

Section 4 of the Clayton Act ("Section 4" or "§ 4") grants recovery for treble damages. Section 16 of the Clayton Act ("Section 16" or "§ 16") provides for injunctive relief. The standing requirements for Sections 4 and 16 seem similar on their face; however, federal courts have recognized differences in the requirements based on the specific remedy each section provides.

This Casebrief explains the Third Circuit's approach to establishing consumer's antitrust standing under Sections 4 and 16 of the Clayton Act. First, Part II discusses the development of antitrust standing under Sections 4 and 16 of the Clayton Act in the United States Supreme Court and the United States Court of Appeals for the Third Circuit. Part III explains how a consumer can establish antitrust standing under the current


7. For an example of relevant Clayton Act provisions, see infra notes 19, 31 and Graff, supra note 1, at 225.


9. See Clayton Act § 4 (stating that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue thereof . . . and shall recover threefold the damages by him sustained").

10. See Clayton Act § 16 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . .").

11. See Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980) (recognizing differences between § 4 and § 16 standing requirements); Mid-West Paper Products Co. v. Cont'l Group, Inc., 596 F.2d 573, 590-91 (3d Cir. 1979) (stating lesser standard applies to § 16 because no risk of duplicative recoveries). For a further discussion of the differences between § 4 and § 16, see infra notes 31-75 and accompanying text.

12. For a discussion of the development of antitrust, see infra notes 15-75 and accompanying text.
Third Circuit approach to Section 4 and Section 16 of the Clayton Act. Finally, Part IV highlights several points in recent Third Circuit cases that reveal the current Third Circuit standing requirements under Sections 4 and 16 of the Clayton Act.

II. OVERVIEW OF ANTITRUST CONSUMER STANDING REQUIREMENTS

"The question of standing is a threshold inquiry in all actions." Antitrust standing requirements, however, are distinct from standing requirements as a constitutional doctrine and therefore pose an additional obstacle for plaintiffs to overcome. The Supreme Court has emphasized that the main purpose of giving private parties remedies for antitrust violations is not merely to provide relief, but rather, to help enforce the laws. Consequently, Congress has made bringing an antitrust case very attractive for private parties, providing the possibility of treble damages, injunctions, costs of suit and reasonable attorney's fees.

13. For a discussion of the current antitrust standing approach in the Third Circuit, see infra notes 76-144 and accompanying text.
14. For a discussion of recent Third Circuit cases discussing standing requirements, see infra notes 145-50 and accompanying text.
15. City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 264 (3d Cir. 1998); see also 54 AM. JUR. 2D Monopolies, Restraints of Trade, and Unfair Trade Practices § 400 (1996) (noting that "the standing inquiry determines whether the plaintiff is entitled to have the court decide the merits of the dispute").
16. See Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983) ("[T]he focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine."); City of Pittsburgh, 147 F.3d at 264 (describing antitrust standing as balance between encouraging private actions and deterring overly vigorous enforcement); see also Huber, supra note 5, at 634 (noting additional obstacles for plaintiffs to overcome in antitrust cases); 54 AM. JUR. 2D Monopolies, Restraints of Trade, and Unfair Trade Practices § 401 (1996) (noting additional standing requirements in antitrust cases). For further discussion of antitrust standing requirements, see infra notes 19-37 and accompanying text.
A. Standing Considerations for Section 4 of the Clayton Act: Supreme Court Precedent

Section 4 of the Clayton Act grants individuals bringing private antitrust actions the right to recover treble damages. Much of the language of Section 4 was taken from the language of the Sherman Act. The Sherman Act was Congress' original plan designed to create an "effective remedy for consumers who were forced to pay excessive prices by the giant trusts . . . that dominated certain interstate markets."

The United States Supreme Court first established an antitrust standing requirement in *Brunswick Corp. v. Pueblo Bowl-O-Mat.* In *Brunswick,* the Court established the antitrust-specific standing requirement of "antitrust injury." According to *Brunswick,* "antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

19. See Clayton Act § 4 (providing for treble damages). Section 4 of the Clayton Act states in relevant part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. Treble damages, consequently, are awarded to the plaintiff that are three times the amount of plaintiff's actual injury as found by the jury. See Gilbert's Law Summaries Law Dictionary 337 (1997) (using § 4 of Clayton Act to provide example of statute awarding treble damages).

20. See AGC, 459 U.S. at 530 (referring to Sherman Antitrust Act, ch. 649, § 7, 26 Stat. 210 (1890) (repealed 1955)).

21. Id.; see also Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War,* 76 Notre Dame L. Rev. 257, 297 (2000) (discussing history of § 4 of Clayton Act). Most of the Clayton Act is based upon common law principles because the Sherman Act was created based on such principles. See AGC, 459 U.S. at 531 (discussing history of Clayton Act (citing 21 Cong. Rec. 2456 (1890) (statement of Sen. Sherman)); see also Graff, supra note 1, at 222 (noting Sherman Act was created to establish tougher antitrust laws).

22. 429 U.S. 477 (1977). In *Brunswick,* operators of bowling centers brought an action against the manufacturer of bowling equipment, alleging that the manufacturer's acquisition of bowling centers violated § 7 of the Clayton Act. *Brunswick,* 429 U.S. at 479-80. As a result of the manufacturer's acquisitions, the plaintiffs alleged loss of income and decreased competition. Id. at 480. The United States Supreme Court held that the plaintiffs failed to prove any cognizable damages of the type that antitrust laws were intended to create and ruled for defendants. See id. at 490 (dismissing case for lack of cognizable damages).

23. See id. at 489 (holding that plaintiff must prove "antitrust injury" in order to recover damages). This requirement supplements other antitrust standing requirements that are usually inherent in every case (i.e., the plaintiff must be a "person" and the plaintiff must have suffered an injury). See William F. Dolan, *Developments in Private Antitrust Enforcement in 1999,* 1181 PLI/Corp. 971, 983-85 (2000) (discussing requirements for § 4 standing).

24. *Brunswick,* 429 U.S. at 489. The Court went on to state that antitrust injury should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." Id. (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100,
The Supreme Court has expressly avoided formulating a black letter rule for determining standing in antitrust cases. The Court has, however, developed a multi-factor test for establishing standing under Section 4 in the landmark case Associated General Contractors, Inc. v. California State Council of Carpenters ("AGC"). In AGC, the Court stated its belief that lower courts should analyze each situation on a fact-specific basis in light of various factors. The Court held that the satisfaction of numerous factors does not guarantee a plaintiff standing; instead, each factor must be taken into consideration and weighed according to the facts in each case.

The Supreme Court has made clear that it will not read Section 4 of the Clayton Act "to provide a remedy in damages for all injuries that might 125 (1969)). This requirement of "antitrust injury" created a new requirement for antitrust plaintiffs to meet; no longer was proving causation sufficient. See Jonathon M. Jacobson & Tracy Greer, Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 284-90 (1998) (classifying "antitrust injury" as new standing requirement).

Antitrust injury is made up of two parts: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury that flows from that which makes the defendant's act unlawful. See generally Brunswick, 429 U.S. at 485-89 (establishing two-part antitrust injury test); see also Gulfstream III Assoc's., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429-30 (3d Cir. 1993) (recognizing applicability of Brunswick test in antitrust case).

25. See Mosesso, supra note 21, at 298 (noting Supreme Court's avoidance of black-letter rule for antitrust standing). The closest the Court has come to formulating a black-letter rule was stating that a plaintiff is not entitled to treble damages unless it satisfies a five-factor test tailored to establish entitlement to sue under antitrust laws. See id. at 537-40 (discussing factors and elements related to antitrust claim). The Court held that the union's injury was tenuous and speculative after going through the five-factor test it established; therefore the Union lacked standing to sue under § 4 of the Clayton Act. See id. at 545-46 (stating holding).

26. 459 U.S. 519 (1983). In AGC, a union sued a contractors' association on antitrust grounds, seeking damages under § 4 of the Clayton Act based on an alleged conspiracy to force builders and contractors to use nonunion subcontractors. AGC, 459 U.S. at 521-23. The Court focused on the standing issue, ultimately formulating a five-factor test tailored to establish entitlement to sue under antitrust laws. See id. at 537-40 (discussing factors and elements related to antitrust claim). The Court held that the union's injury was tenuous and speculative after going through the five-factor test it established; therefore the Union lacked standing to sue under § 4 of the Clayton Act. See id. at 545-46 (stating holding).

27. See McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 850 (3d Cir. 1996) (outlining AGC factors applicable in determining standing). The AGC factors are:

1. The causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause that harm); (2) whether the 'nature' of the plaintiff's alleged injury is 'of the type that the antitrust laws were intended to forestall'; (3) the directness of the asserted injury; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation); and (5) the potential for duplicative recovery or complex apportionment of damages.

Id. (citations omitted).

28. See AGC, 459 U.S. at 537 (noting that plaintiff's satisfaction of causation and intent factors are not enough to confer standing).
conceivably be traced to an antitrust violation." The Court’s main purpose behind limiting antitrust standing is to weed out remote and attenuated injuries that would involve massive amounts of evidence and lead to long and complicated proceedings.

B. Standing Considerations for Section 16 of the Clayton Act: Supreme Court Precedent

Section 16 of the Clayton Act allows plaintiffs injunctive relief for antitrust violations. Although the language in Section 16 is similar to Section 4, differences remain regarding standing requirements. Nevertheless, there are also similarities.

The Supreme Court has made clear that the antitrust injury requirement created in *Brunswick* applies to all antitrust cases alike, including Section 16 claims. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, the Court

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29. Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972); accord Blue Shield v. McCready, 457 U.S. 465, 477 (1982) ("Despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.") (citations omitted). Commentators have noted that the limiting of antitrust standing has had the positive effect of reducing strike suits. See Jacobson & Greer, supra note 24, at 274 (noting reduced ability to "extort nuisance settlements").

30. See *AGC*, 459 U.S. at 544 (stating that complexity implicated by indirectness of injury is concern). While the Court did not allow any "indirect injury" claims in *AGC*, it did not specifically rule them out in other situations where there is not a better equipped party to bring suit. See *id*. at 542 & n.47 (noting availability of more interested class of people to bring suit, therefore less justification exists for remote party to bring suit).


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

*Id.*

32. For a discussion of the differences between § 4 and § 16, see infra notes 53-70 and accompanying text.

33. For a discussion of the similarities between § 4 and § 16 see infra notes 34-36 and accompanying text.


35. 479 U.S. 104 (1986). In *Cargill*, a beef packer brought suit under § 7 of the Clayton Act, alleging that the proposed merger between two other beef pack-
established the backbone of Section 16 standing requirements, holding that Section 16 is similar to Section 4 in requiring proof of "antitrust injury." The difference between Section 4 and 16 is that Section 16 requires a lesser burden of proof standard—"threatened" antitrust injury, while Section 4 requires an injury to already have occurred.

C. The Role of Direct Purchaser Status

The distributor of a product is considered a "direct purchaser" because it is the first entity paying for the product. Frequently, direct purchasers are buying from a monopoly and paying a "monopoly overcharge" implicit in the price of the product. The direct purchaser often absorbs part of this overcharge and "passes on" part of the overcharge to the "indirect purchaser." In the end, consumers are the indirect purchasers, who would lead to substantially lessened competition and would possibly create a monopoly. Cargill, 479 U.S. at 106-07. The plaintiff sought to enjoin the merger between two other beef packer companies under § 16 of the Clayton Act. Id. The Court held that the plaintiff's showing a threat of loss from increased competition did not meet the antitrust injury requirement and therefore the Court did not have to decide whether the proposed merger violated § 7. See id. at 122 (discussing holding).

36. See id. at 113 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977)). The Court went on to note, "It would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." Id. at 112. The Court in Cargill relied heavily on its holding in Brunswick to establish § 16 standing requirements. See id. at 116 (finding that Brunswick does not require the Court to protect small businesses from loss of profits under § 16 of Clayton Act).

37. See Atl. Richfield, 495 U.S. at 337-38 (rejecting any theory regarding assumption of damages); Cargill, 479 U.S. at 111 ("For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of 'threatened' loss or damage . . ."). It may also be argued, consequently, that § 16 calls for a lesser showing of damages than § 4 requires. See Heather K. McShain, Still Alive: Antitrust Injury Remains a Part of the Standing Inquiry Under Sections 4 and 16 of the Clayton Act Despite Three Recent Appellate Court Decisions, 75 Notre Dame L. Rev. 761, 774 (1999) (describing injury requirements of § 16 as less rigorous compared to § 4).

38. See Kingsbury, supra note 6, at 477-78 (discussing direct and indirect purchasers of monopoly products).


40. See Kingsbury, supra note 6, at 477-78 (discussing theory of "passing-on"). The "indirect purchaser" is the next link in the vertical supply chain, usually another distributor; this shows how passing-on may occur several times before reaching the final consumer. See id. (discussing indirect purchasers and theory of passing-on within vertical supply chain). Many distributors attempt to use "passing-on" as a defense to charging inflated prices in order to compensate for the monopoly overcharge they paid to the distributor above them in the vertical supply chain. See id. (discussing concept of defensive passing-on). The Supreme Court, however, has rejected this defense, stating that an injury is complete upon charg-
forced to pay inflated prices for products due to this monopoly overcharge.41 Because the monopoly overcharge is divided unequally throughout the passing-on process, uncertainty arises regarding which party may recover under Section 4.42

The Supreme Court addressed this concept of “passing-on” in the context of a price-fixing conspiracy in Illinois Brick Co. v. Illinois.43 The Court held that the passing-on theory does not allow indirect purchasers to pursue claims against firms engaged in price fixing.44 This ruling has been the subject of debate as to whether it stands for all indirect purchaser claims, or just price-fixing situations.45 In subsequent decisions, the Supreme Court and lower courts have indicated that an absolute bar on indirect purchaser recovery is not what Congress intended.46

The Supreme Court noted in Blue Shield of Virginia v. McCready,47 that although indirect purchaser status may seriously hamper any recovery

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41. See Kingsbury, supra note 6, at 478 (noting consumers bear much of overcharge effect in form of higher prices).

42. See Hanover Shoe, 392 U.S. at 492-93 (stating that apportionment of damages among various direct and indirect purchasers would be too complicated). But cf. John Cirace, Apportioning Damages Between Direct and Indirect Purchasers in Consolidated Antitrust Suits: ARC America Unravels the Illinois Brick Rule, 35 Vill. L. Rev. 283, 311-16 (1990) (discussing how it is theoretically possible to calculate monopoly overcharge passed on from purchaser to purchaser).

43. 431 U.S. 720 (1977). In Illinois Brick, the state of Illinois and local government entities alleged damages under § 4 against concrete block manufacturers who were allegedly taking part in a price-fixing conspiracy. Illinois Brick, 431 U.S. at 726-27. The plaintiffs purchased the defendant’s product indirectly through contractors, yet alleged they had suffered injuries under the passing-on theory. Id. at 726. The Court held that the pass-on theory may not be used by plaintiffs to establish injury under § 4 due to the difficulty in ascertaining the exact amount of injury absorbed by any single purchaser. See id. at 746-47 (describing rationale for decision).

44. See id. at 735 (declining to construe § 4 to allow pass-on theory in certain circumstances). The Court’s rationale primarily rested on three reasons: (1) difficulty in calculating the exact amount of damages suffered by the plaintiff, (2) deterrence, rather than compensation was the primary purpose of antitrust damages and (3) precedent called for the rejection of the passing-on theory. See Roger D. Blair & Jeffrey L. Harrison, Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis, 68 Geo. Wash. L. Rev. 1, 1-2 (1999) (discussing rationale of Illinois Brick decision).

45. See Blair & Harrison, supra note 44, at 38-42 (discussing various interpretations of Illinois Brick holding).

46. See id. at 42 (stating that Illinois Brick decision is obsolete). For further discussion on the relevance of indirect purchaser status, see infra notes 47-52 and accompanying text.

under Section 4, it is not an absolute bar. Indirect purchaser plaintiffs, however, may be denied the right to recover in favor of a direct purchaser higher up the distribution chain. The McCready Court discussed this concept as one requiring proximate cause analysis. The Court stated the main factors for evaluating proximate cause are:

(1) . . . the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

D. The Circuits' Interpretation of Supreme Court Precedent

Despite the Supreme Court's holding in Cargill, many lower courts have emphasized that the standing requirements under Section 16 are less stringent than cases under Section 4. Remoteness issues are less relevant in Section 16 cases because of the lack of concern about multiple lawsuits.

48. See id. at 474; see also Illinois Brick, 431 U.S. at 744 (holding indirect purchaser status bars plaintiff's § 4 recovery). The Illinois Brick decision was primarily made on the possibility of duplicative recovery from awarding damages to various direct and indirect purchasers. See id. (noting reasons for holding). This rationale, consequently, has been followed more recently. See, e.g., Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 206-19 (1990) (refusing to allow indirect purchaser any recovery despite incurring one hundred percent of the monopoly overcharge).

49. See McCready, 457 U.S. at 476 (noting that plaintiffs not barred from bringing suit under Section 4 if they are "necessary and foreseeable" victim of alleged antitrust violation). But see UtiliCorp United, 497 U.S. at 219 (refusing to carve out exception to direct purchaser requirement for situations where on one hundred percent of overcharge is passed-on to plaintiff). In McCready, a group health care subscriber brought suit against the health insurer and an organization of Virginia psychiatrists seeking treble damages under section 4. See McCready, 457 U.S. at 467-70. The plaintiff alleged that the insurer's failure to reimburse her for psychologist therapy, while the insurer allowed reimbursement for similar therapy by psychiatrists, was a conspiracy to restrain competition in the psychotherapy market. See id. The Court allowed recovery under section 4 despite indirect purchaser status because the injury suffered by plaintiff was "inextricably intertwined" with the injury defendant's sought to inflict. See id. at 484.


51. See McCready, 457 U.S. at 477-78 (noting proximate cause's significance on antitrust standing requirements).

52. Id. at 478.

53. See, e.g., McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996) (recognizing § 16 standing requirements more expansive than § 4 requirements); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980) (recognizing that "[s]ection 16 has been applied more expansively, both because its language is less restrictive than that of § 4 . . . and because the injunctive remedy is a more flexible and adaptable tool" (quoting Bogus v. Am. Speech & Hearing Assoc., 585 F.2d 277, 288-89 (3d Cir. 1978))).
duplicative recovery and complex apportionment of damages.\textsuperscript{54} Lower courts continue to recognize that "antitrust standing inquiry is not a black-letter rule, but rather, is 'essentially a balancing test comprised of many constant and variable factors . . . ."\textsuperscript{55}

1. \textit{Third Circuit History}

A recent decision by the United States Court of Appeals for the Third Circuit, \textit{In re Warfarin Sodium Antitrust Litigation},\textsuperscript{56} best illustrates the circuit's approach to distinguishing between Section 4 and Section 16 standing requirements.\textsuperscript{57} In \textit{Warfarin}, the Third Circuit recognized the Supreme Court's ruling in \textit{Cargill} as controlling law, noting that "relief sought pursuant to section 4 of the Clayton Act requires proof of loss . . . [where] injunctive relief under section 16 only requires a threat of loss."\textsuperscript{58} The court was careful to note that antitrust plaintiffs under Section 16 must still prove antitrust injury stemming from the \textit{Brunswick} holding—"injury of the type the antitrust laws were intended to prevent. . . ."\textsuperscript{59} The

\textsuperscript{54} See \textit{Cargill, Inc. v. Monfort, Inc.}, 479 U.S. 104, 111 n.6 (1986) (noting that "'one injunction is effective as 100'" (quoting \textit{Hawaii v. Standard Oil Co.}, 405 U.S. 251, 261 (1972))). "Although the requirement [in Section 16 claims] is reduced, plaintiffs whose injuries are too indirect and derivative remain unable to sue even for injunctive relief." Jacobson & Greer, \textit{supra} note 24, at 290 (citing \textit{AREEDA & HOVENKAMP, supra} note 9, ¶¶ 346a, 364c, 378).

\textsuperscript{55} City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 264-65 (3d Cir. 1998) (quoting \textit{Merican, Inc. v. Caterpillar Tractor Co.}, 713 F.2d 958, 964-65 (3d Cir. 1983)); see also \textit{HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE} 543 (1994) ("[u]nfortunately, the courts have never been able to create an intelligible theory of private antitrust standing . . . [and thus,] [t]he law remains haphazard and inconsistent."); McShain, \textit{supra} note 37, at 775 (noting difficulty in applying and interpreting antitrust standing requirements).

\textsuperscript{56} 214 F.3d 395 (3d Cir. 2000).

\textsuperscript{57} See \textit{id.} at 399 (discussing how recovery under § 16 of Clayton Act differs from recovery under § 4 of Act). In \textit{Warfarin}, consumers of a prescription blood-thinning drug brought antitrust class action against the drug's manufacturer, alleging the defendant manufacturer interfered with approval and acceptance of a competitor's generic equivalent of the drug. See \textit{id.} at 396-97. Circuit Judge Mansmann, writing for the Third Circuit, held the plaintiff class was a foreseeable victim, with an injury "inextricably intertwined" to defendant's action and there was no risk of duplicative recovery, therefore standing under § 16 was met. See \textit{id.} at 400-01 (relying on \textit{McNulty}). Consequently, Judge Mansmann also noted that the plaintiff class fit the stereotypical "indirect purchaser mold," which precluded recovery under Section 4. See \textit{id.} at 399.

\textsuperscript{58} \textit{Id.} at 399 (citing \textit{Cargill}, 479 U.S. at 109-11); accord \textit{City of Pitt.}, 147 F.3d at 268 (noting that Section 16 only differs from Section 4 standing because only threat of injury must be proven under section 16); Mid-West Paper Prod. Co. v. Cont'l Group, Inc., 596 F.2d 573, 591 (3d Cir. 1979) (stating that plaintiffs under § 16 must only demonstrate threat of injury).

\textsuperscript{59} \textit{Warfarin}, 214 F.3d at 399 (quoting \textit{Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.}, 429 U.S. 477, 489 (1977)).
Third Circuit has also emphasized that the AGC factors should continue to be used in establishing standing under Section 4.  

Although Section 16 requires only threat of loss, the Third Circuit has taken this requirement seriously. In City of Pittsburgh v. West Penn Power Co., the Third Circuit precluded the plaintiff from establishing standing under Section 16 based on the threat of loss being too speculative. Although a threatened loss existed in City of Pittsburgh, the Third Circuit indicated that the lack of the causation element was decisive.

Similarly, in Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc. ("Steamfitters"), the Third Circuit reaffirmed its position that proximate cause analysis plays a crucial role in antitrust standing analysis. In Steamfitters, the Third Circuit stated its position that "while there may be a causal connection between the conduct of defendants and the injuries alleged by the plaintiffs," the injuries must be connected to conduct of the defendants that violates the antitrust laws. This position,

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61. 147 F.3d 256 (3d Cir. 1998).

62. See id. at 269 (noting plaintiffs failed to establish causal connection). In City of Pittsburgh, the city hoped to revitalize several urban areas by transforming them into commercial and residential areas ("Redevelopment Zones"). See id. at 259-60. At the time of the proposed development only two utility companies were authorized to provide service to the county, and only one was authorized to provide service in the Redevelopment Zones. See id. A Pennsylvania law, however, provided natural monopolies to the utility companies, only allowing a new provider if existing service was inadequate. See id. Soon after the Redevelopment plan was announced, the two utility companies authorized to provide service to the county announced their intention to merge; this gave rise to the complaint which alleged probable rate increases based on the non-competitive environment. See id. The Third Circuit held that the city lacked standing under Sections 4 and 16 because the proposed merger did not lessen competition—because of a regulatory quirk, only one utility company could provide service regardless of the number of companies. See id. at 269.

63. See id. at 268 (denying plaintiff standing because of absence of causal connection between alleged injury and antitrust violation).

64. 171 F.3d 912 (3d Cir. 1999).

65. See id. at 922-32 (discussing antitrust standing issues of remoteness and proximate cause being able to prevent plaintiff to enjoin or remedy violation). In Steamfitters, union health and welfare funds brought suit against tobacco companies to recover the funds' costs of treating their participants with smoking-related illnesses. See id. at 918-19. The plaintiffs claimed that the tobacco companies, by allegedly preventing fund members from obtaining information about safer smoking-related products, defrauded them. See id. The Third Circuit affirmed the district court's decision to dismiss the plaintiff's claim because of the remoteness of plaintiff's injury. See id. at 918.

66. See id. at 926 (stating court's uncertainty whether plaintiff's claim is of type antitrust laws are intended to remedy). The Steamfitters court went on to note some situations that probably would not satisfy the causal connection requirement: a business's decision not to produce a product, all of the businesses in an industry
consequently, was derived from Supreme Court precedent requiring proximate cause analysis in antitrust claims.\(^{67}\) Despite the Supreme Court’s emphasis on proximate cause analysis, it has yet to formulate a decisive rule for the circuits to follow.\(^{68}\)

The Third Circuit has at times alluded to an additional requirement in Section 4 cases. This requirement only allows standing to plaintiffs that prove to be the “most efficient enforcer” of the antitrust laws.\(^ {69}\) In deciding to keep a new product from reaching consumers or a business’s decision to delay introduction of a product. \(\text{See id. at 925-26 n.7 (noting as general rule, businesses may bring their product to market whenever they choose).}\)

\(^{67}\) \text{See id. at 921 (noting that if injury is too remote to satisfy common law concept of proximate cause, claim will lack antitrust standing requirement (citing Blue Shield v. McCready, 457 U.S. 465, 477 (1982))). The Court in McCready stated that “[i]t is reasonable to assume that Congress did not intend to allow sor every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.” Blue Shield v. McCready, 457 U.S. 465, 477 (1982). The Third Circuit went on to note that by the Supreme Court requiring plaintiffs to prove proximate cause to achieve antitrust standing, a plaintiff may prove an antitrust violation, yet still lack standing. See Steamfitters, 171 F.3d at 921 (noting that plaintiffs with remote injuries will lack antitrust standing). The Third Circuit also noted that while causal connection is an important factor to consider, it is not conclusive to establish standing. See id. at 922 (citing McCready, 457 U.S. at 477 n.13; Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536-37 & n.34 (1983); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 (3d Cir. 1983)).}

\(^{68}\) \text{See Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536-37 (stating that it is “virtually impossible” to establish black-letter rule applicable in every case); McCready, 457 U.S. at 477 n.13 (noting that principle of proximate cause is hardly an analytic tool therefore legislative intent is controlling); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 (3d Cir. 1983) (rationalizing that reason Supreme Court has not adopted black-letter rule is because of variety of claims arising under antitrust statutes).}

\(^{69}\) \text{See Huhta v. Children’s Hosp., No. CIV.A.93-2765, 1994 WL 245454, at *1 (E.D. Pa. May 31, 1994) (requiring plaintiff to prove “most efficient enforcer” to gain standing); see also In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1166 (3d Cir. 1999) (focusing on whether plaintiffs were persons antitrust laws were enacted to protect). In Huhta, the plaintiff, a former staff member in a hospital, alleged the hospital and fellow staff members denied him the right to officially interpret diagnostic procedures, thereby depriving him of approximately $200,000 in revenue. See Huhta, 1994 WL 245454, at *1. Plaintiff argues that he alone was the sole individual to suffer harm. See id. at *2. The court, however, agreed with the defendants that the direct victims of the alleged violations were the patients and insurance providers who were consumers of the services. See id. Because the plaintiff was not the “most efficient enforcer,” he was barred from bringing suit. See id. For further discussion of Huhta and its role in the most efficient enforcer requirement, see Jacobson & Greer, supra note 24, at 401-02 n.147-53.}

Other circuits have similarly held the “most efficient enforcer” to be an independent requirement. \text{See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991) (requiring most efficient enforcer of violation to bring claim); Leak v. Grant Med. Ctr., 893 F. Supp. 757, 764 (S.D. Ohio 1995) (noting plaintiffs were not efficient enforcers and lacked standing); Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 999 (N.D. Ga. 1992) (listing efficient enforcer factors and concluding that plaintiff lacked standing).}
The Third Circuit has been lenient in allowing Section 16 standing—recognizing that indirect purchasers may bring suit under Section 16 even when no right to Section 4 damages exists.\textsuperscript{70}

2. \textit{Other Circuits’ Application of Supreme Court Precedent}

The Eighth Circuit has recently formulated a new rule for plaintiff standing under Section 4 of the Clayton Act.\textsuperscript{71} Under this rule, consumers who bear a portion of a monopoly overcharge, due to a previous transaction between the monopolist and another purchaser, are barred from collecting damages under Section 4; however, plaintiffs may still be entitled to an injunction pursuant to Section 16.\textsuperscript{72}

Many states have adopted statutes granting indirect purchasers standing for recovery purposes.\textsuperscript{73} However, the circuits generally have followed the Supreme Court’s guidelines set forth in \textit{AGC} and \textit{Cargill} to determine what satisfies antitrust standing.\textsuperscript{74} Despite the Supreme Court precedent,

\textsuperscript{70} See, e.g., \textit{In re Warfarin Sodium Antitrust Litig.}, 214 F.3d 395, 399 (3d Cir. 2000) (stating that “[i]ndirect purchaser status, however, is not fatal to a plaintiff’s request for injunctive relief under section 16”); \textit{McCarthy v. Recordex Serv., Inc.}, 80 F.3d 842, 856-57 (3d Cir. 1996) (holding plaintiff standing under Section 16 of Clayton Act, however no standing under Section 4 of Act).

\textsuperscript{71} See \textit{Campos v. Ticketmaster Corp.}, 140 F.3d 1166, 1171-74 (8th Cir. 1998) (developing new Section 4 standing requirement). In \textit{Campos}, a group of plaintiffs were concert ticket purchasers. \textit{See id.} at 1168. The plaintiffs alleged that the defendant, a ticket distributor for large scale concert events, entered into exclusive contracts with concert venues and charged a “handling fee” that violated antitrust laws by monopolizing the market on ticket distribution. \textit{See id.} at 1168. As a result of paying this fee, plaintiffs sought treble damages under Section 4 of the Clayton Act and an injunction under Section 16 of the Act. \textit{See id.} at 1169. The United States Court of Appeals for the Eighth Circuit held that plaintiffs were indirect purchasers of the tickets and therefore were precluded from recovery under \textit{Illinois Brick}. \textit{See id.} at 1171-72. \textit{But see Kingsbury, supra} note 6, at 476-77, 492 (criticizing \textit{Campos} opinion).

\textsuperscript{72} See \textit{Campos}, 140 F.3d at 1171-72 (denying plaintiffs standing because of “indirect purchaser” status).

\textsuperscript{73} See \textit{Kingsbury, supra} note 6, at 484 n.98 (providing examples of statutes allowing indirect purchasers standing to recover).

\textsuperscript{74} See, e.g., \textit{Am. Ad Mgmt. v. Gen. Tel. Co.}, 190 F.3d 1051, 1054-55 (9th Cir. 1999) (applying various \textit{AGC} factors to determine standing without creating new factors); \textit{Re/Max Int’l, Inc. v. Realty One, Inc.}, 173 F.3d 995, 1021 (6th Cir. 1999) (applying \textit{AGC} factors to defeat defendants standing defense); \textit{Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.}, 171 F.3d 912, 925-31 (3d Cir. 1999) (analyzing \textit{AGC} factors to determine if plaintiff had standing), \textit{cert. denied}, 528 U.S. 1105 (2000); \textit{Sullivan v. Tagliabue}, 25 F.3d 43, 45 (1st Cir. 1994) (noting right to sue under Section 4 has been judicially limited by “antitrust standing” doctrine of \textit{AGC}); \textit{Nelson v. Monroe Reg’l Med. Ctr.}, 925 F.2d 1555, 1562 (7th Cir. 1991) (stating Supreme Court was unwilling to create bright line standing rule and developed \textit{AGC} factors instead); \textit{Todorov}, 921 F.2d, at 1448 (reiterating common law tort limitations placed on Section 4 and its predecessor); \textit{South Dakota v. Kan. City S. Indus., Inc.}, 880 F.2d 40, 45-46 (8th Cir. 1989) (limiting standing factors); \textit{Adams v. Pan Am. World Airways, Inc.}, 828 F.2d 24, 26 (D.C. Cir. 1987) (discussing requirements for proper plaintiff); \textit{see also Lucas Auto. Eng.’g, Inc. v. Bridgestone/ Firestone, Inc.}, 140 F.3d 1228, 1233 (9th Cir. 1998) (citing \textit{Cargill} as controlling...
most circuit courts have difficulty distinguishing between the concepts of antitrust injury and antitrust standing.\textsuperscript{75}

III. ANALYSIS: WHAT IT TAKES TO ACHIEVE STANDING IN THE THIRD CIRCUIT

Sections 4 and 16 of the Clayton Act are remedial statutes that have the effect of providing additional standing requirements on antitrust plaintiffs.\textsuperscript{76} Supreme Court precedent, however, has consistently stated that the main objective of antitrust laws is to protect consumers.\textsuperscript{77} In order for consumers to gain standing under the Clayton Act, the Third Circuit has focused on evaluating the criteria established in AGC.\textsuperscript{78} (1)
causation of injury by defendant’s conduct;\textsuperscript{79} (2) directness of injury;\textsuperscript{80} (3) the existence of more direct victims of the alleged antitrust violations;\textsuperscript{81} (4) the potential for duplicative recovery or complex apportionment of damages;\textsuperscript{82} and (5) antitrust injury.\textsuperscript{83} At times, however, the Third Circuit has strayed from interpreting AGC so narrowly, opting to apply its own “more succinct” test that evaluates: “(1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant’s acts unlawful.”\textsuperscript{84} Both of these tests, consequently, take the same factors into consideration—namely, the AGC factors.\textsuperscript{85}

\textsuperscript{79} See City of Pittsburgh, 147 F.3d at 265-69 (deciding case based on causation issue); see also AREEDA & HOVENKAMP, supra note 8, \textsection 360b (stating despite Section 16 requiring only threatened injury, there is no reduction in causation element). Causation in this context presupposes that the plaintiff can show that they suffered actual injury; that injury must be due to defendant’s conduct that was the material cause of the injury. See Holz, supra note 77, at 294 (discussing elements of antitrust standing).

\textsuperscript{80} See Steamfitters, 171 F.3d at 922-32 (noting remoteness issue in context of proximate cause). Directness of injury mainly proposes that the injury cannot be attenuated or remote. See Holz, supra note 77, at 294 (defining directness of injury in terms of nexus to defendant’s illegal act).

In McCready, Justice Brennan described the relevant characteristics to evaluate in remoteness issues, “(1) . . . the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful . . . .” Blue Shield of Va. v. McCready, 457 U.S. 465, 478 (1982).

\textsuperscript{81} See Steamfitters, 171 F.3d at 927 (stating interest of more identifiable class of persons would preclude finding of standing of more remote party (quoting Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542 (1983))).

\textsuperscript{82} See id. at 928-29 (noting that plaintiff’s claims may be easily calculated via statistical models); McCarthy v. Recordex Serv. Inc., 80 F.3d 842, 851-52 (3d Cir. 1996) (noting that apportionment of damages problem may preclude recovery).

\textsuperscript{83} See Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 113 (1986) (requiring plaintiff to prove antitrust injury in order to recover under Section 16 of Clayton Act); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (requiring proof of antitrust injury in order for plaintiff to recover damages under Section 4 of Clayton Act). Each of the five requirements listed in text accompanying notes 79-83 involve different legal and policy arguments, therefore, the absence of any requirement in a given case may preclude recovery. See City of Pittsburgh, 147 F.3d at 264-65 (concluding that balance must be struck analyzing numerous factors because no black-letter rule exists).

\textsuperscript{84} Steamfitters, 171 F.3d at 924-25 n.6 (citing Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993)). This two-part test is derived from the Supreme Court’s ruling in Brunswick. See Gulfstream III, 995 F.2d at 429 (stating that Brunswick set forth two-part test to determine antitrust standing).

\textsuperscript{85} See, e.g., Gulfstream III, 995 F.2d at 429-30 (applying two-part test to establish standing yet using AGC factors of proximate cause and directness of injury to satisfy test).
Under the Clayton Act, pleading the correct type of injury can make or break a case. Although a plaintiff may not have standing to pursue a claim under Section 4, that same plaintiff may be entitled to an injunction under Section 16. The Supreme Court has agreed, noting that Sections 4 and 16 are not all that different, referring to the two sections as "complementary." 

The following analysis dissects the Third Circuit requirements for antitrust standing under Sections 4 and 16 of the Clayton Act. The Third Circuit has interpreted Supreme Court precedent as a narrowing view on an otherwise broad remedial statute. Consumers, rather than competitors, seem to be favored under the Third Circuit approach; this preference, however, is not dispositive. Antitrust standing within the Third Circuit, nevertheless, remains an area requiring scrupulous detail. The Third Circuit has held that no black-letter rule exists for antitrust standing. Consequently, this finding favors potential antitrust plaintiffs by allowing some wiggle room.

86. See Blair & Harrison, supra note 44, at 42 (noting that standing can turn on way plaintiff frames complaint); Mosesso, supra note 21, at 299 (stating that "pleading the correct type of injury is central to recovery").

87. See Cargill, 479 U.S. at 110-11 (distinguishing standing requirements of Section 4 compared to Section 16, concluding that plaintiffs lack standing under Section 16, despite Section 16's less stringent standing requirements); accord In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 401-02 (3d Cir. 2000) (granting Section 16 standing but not Section 4 standing because only "threat" of loss could be proven); McCarthy, 80 F.3d at 856 (noting Section 16 standing has applies more expansively than Section 4 based on less threat of duplicative recovery); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980) (distinguishing standing analysis of Section 16 from Section 4 because Section 16 requires lower threshold based on statute's language and less risk of duplicative recovery); Huber, supra note 5, at 638 & n.88-91 (stating how standing analysis under Section 16 is more plaintiff friendly than Section 4 because no threat of duplicative recovery with Section 16); Tefft W. Smith & Hillard M. Sterling, Challenging Competitors' Mergers: A Real Strategic Option, 65 ANTITRUST L.J. 57, 63 (1996) (determining standing analysis differences depending on relief sought).

88. See Cargill, 479 U.S. at 113 ("Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries.").


90. See City of Pittsburgh, 147 F.3d at 266 (noting that city's status as consumer is factor but not dispositive).

91. See Warfarin, 214 F.3d at 399 (stating that antitrust standing must be analyzed based on number of factors, then proceeding to analyze factors); City of Pittsburgh, 147 F.3d at 264 (noting particular significance of antitrust standing requirements).

92. See City of Pittsburgh, 147 F.3d at 264-65 (stating that antitrust standing inquiry is balancing test not black letter law).
A. Applying the Indirect Purchaser Concept

The following hypothetical provides an example of when a consumer may have standing to recover under Section 4 and when he or she may not. Assume that a consumer named Bob wants to get an oil change on his car. Assume that the oil manufacturer is the monopolist. Also assume that Bob has two options: (1) he can buy the oil directly from the manufacturer, and perform the oil change himself, or (2) he can hire the services of a mechanic to perform the oil change.

If Bob opts to have the mechanic do the oil change, Bob would be a direct purchaser of mechanic services and an indirect purchaser of oil, the monopoly product. In this situation, Bob would bear the monopoly overcharge passed on by the mechanic. Under this hypothetical, Bob may be precluded from recovery under Section 4 due to the problems of multiple liability and apportionment of damages. Despite Bob's indirect purchaser status, Bob may still be successful seeking an injunction under Section 16.

1. Indirect Purchaser Influence in the Third Circuit

The Third Circuit may prevent indirect purchaser standing under Section 4 if the injury claimed is too attenuated from the alleged violation. The Third Circuit has inferred that it may require a plaintiff's injury to be "inextricably intertwined" with the injury the defendant sought

93. The hypothetical used in this Casebrief is based in part on a hypothetical by Jill S. Kingsbury. See Kingsbury, supra note 6, at 488-90 (applying indirect purchaser doctrine). Kingsbury's hypothetical focuses on a specific distinction between the hypothetical presented and an Eighth Circuit case. See id. (showing consequences of Eighth Circuit antitrust precedent).

94. For an explanation of the concepts of "direct purchasers," "indirect purchasers" and "monopoly overcharge," see supra notes 38-52 and accompanying text.


96. See Warfarin, 214 F.3d at 401-02 (granting Section 16 standing but not Section 4 standing because only "threat" of loss could be proven); McCarthy, 80 F.3d at 856 (noting Section 16 standing applies "more expansively" than Section 4); Schoenkopf v. Brown & Williamson Tobacco Corp., 657 F.2d 205, 210-11 (3d Cir. 1980) (allowing Section 16 injunction but not Section 4 damages because Section 16 requires lower standing threshold based on statute's language and less risk of duplicative recovery).

97. See Warfarin, 214 F.3d at 400 (discussing Section 4 standing requirements in relation to indirect purchaser doctrine (citing Blue Shield of Va. v. McCready, 457 U.S. 465, 476-78 (1982))). The Court in McCready stated that remoteness of the plaintiff's injury plays a serious role in determining standing under Section 4. See McCready, 457 U.S. at 476-78. The Court went on to note that the alleged violation should also be the type of injury Congress intended prevent. See id.
to inflict in order for a plaintiff to recover under Section 4.\textsuperscript{98} Indirect purchasers in the Third Circuit may also have to prove an additional requirement to be eligible for recovery under Section 4—the absence of duplicative recovery.\textsuperscript{99}

Although the indirect purchaser label may preclude recovery under Section 4, it is not determinative under Section 16.\textsuperscript{100} The Third Circuit has consistently followed the Supreme Court's lead in determining which factors should be considered in allowing injunctive relief under Section 16 instead of treble damages under Section 4.\textsuperscript{101}

B. Third Circuit Application of the AGC Standing Requirements for Section 4

1. Being Mr. or Mrs. Right

A plaintiff may be barred from recovery under Section 4 if he or she is not the proper party bringing suit. The Third Circuit has inferred that a plaintiff must be a "foreseeable and necessary victim" of the antitrust violation to survive the remoteness issue.\textsuperscript{102} This does not require a plaintiff to be a direct purchaser; rather, the plaintiff must be the ultimate target of the monopolistic conspiracy.\textsuperscript{103}

The Third Circuit's approach to indirect purchaser status frustrating Section 4 standing but not Section 16 standing may be summarized as follows:

[1] In contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations—such as the risk of duplicative or ruinous recoveries and the specter of a trial burdened with complex and conjectural economic analyses—that the Supreme Court emphasized when limiting the availability of treble damages. \textit{Warfarin}, 214 F.3d at 400 (quoting \textit{Mid-West Paper Prods. Co. v. Cont'l Group, Inc.}, 596 F.2d 573, 590 (3d Cir. 1979)).

98. \textit{See Warfarin}, 214 F.3d at 400-01 (discussing implications of injury being "inextricably intertwined" with defendant's conduct (quoting \textit{McCready}, 457 U.S. at 484)).

99. \textit{See Warfarin}, 214 F.3d at 400 (noting recovery under Section 4 allowed when there is absence of duplicative recovery (citing \textit{McCready}, 457 U.S. at 484)). It should be noted that \textit{Warfarin} did not decide the issue of damages under Section 4 because the plaintiffs only sought Section 16 injunctive relief. \textit{See id} (stating "the class only seeks Section 16 injunctive relief").

100. \textit{See Warfarin}, 214 F.3d at 399 (stating that indirect purchaser status "is not fatal" to Section 16 claim); \textit{Schoenkopf}, 637 F.2d at 210 (noting Section 16 relief less restrictive than Section 4); \textit{Mid-West Paper}, 596 F.2d at 594 (holding plaintiffs do not have to satisfy direct purchaser requirement as condition for Section 16 recovery).

101. \textit{See Warfarin}, 214 F.3d at 400 (noting that claim for injunctive relief does not present risk of duplicative recoveries or trial burdened with complex economic analyses (quoting \textit{Mid-West Paper}, 596 F.2d at 590)).

102. \textit{See id.} at 400 (noting plaintiffs not barred under Section 4 when they are foreseeable and necessary victims (\textit{citing McCready}, 457 U.S. at 484)).

103. \textit{See id.} at 401 (describing "inextricably intertwined" factor). The court in \textit{Warfarin} summarized its rationale, "Regardless of the existence of the various links of middlemen, if there were no ultimate consumer of [the drug], prices charged for the drug . . . would be irrelevant." \textit{Id}.
2. Careful Calculation of Injury: The Direct Injury & Proximate Cause Factors

A plaintiff may be barred from recovery under Section 4 if the injury suffered is too remote from the alleged violation.\cite{104} More specifically, the Third Circuit may deny a claim if a more directly injured class of persons capable of bringing suit exists.\cite{105} This requirement, often referred to as "directness of injury," is independent from "antitrust injury" under the AGC framework.\cite{106} Third Circuit precedent states that a consumer "cannot obtain damages without showing that he actually paid more than he would have paid in the absence of the violation."\cite{107}

To fully satisfy the "directness of injury" requirement, the plaintiff must prove that the injury suffered is "inextricably intertwined" with the injury the defendant sought to inflict.\cite{108} This factor seems to be linked to another AGC factor—calculating apportionment of damages. The Third Circuit has denied standing when damages are "speculative"—meaning that they would be difficult to calculate.\cite{109} A consumer plaintiff should establish a direct link between the purported antitrust violations and the harm alleged, noting the exact apportionment of damages.\cite{110}

\begin{footnotes}
\item[104] See id. at 400 (citing \textit{McCready}, 457 U.S. at 476-78); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 921 (3d Cir. 1999) (stating that "key problem with plaintiffs' complaint is remoteness of their alleged injury"), \textit{cert. denied}, 528 U.S. 1105 (2000); City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 269 (3d Cir. 1998) (holding that due to lack of causal connection, plaintiff's claim was without merit).
\item[105] See \textit{Steamfitters}, 171 F.3d at 927 ("The existence of an identifiable class of persons . . . diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." (quoting \textit{Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters}, 459 U.S. 519, 542 (1983))).
\item[106] Compare supra note 24 and accompanying text (defining antitrust injury) with \textit{infra} notes 108-10 and accompanying text (describing directness of injury factor).
\item[107] \textit{City of Pittsburgh}, 147 F.3d at 269 (quoting \textit{Areeda & Hovenkamp, supra note 8}, ¶ 370).
\item[108] See \textit{Warfarin}, 214 F.3d at 400 (citing \textit{McCready}, 457 U.S. at 484). In \textit{Warfarin}, the Third Circuit decided that the high price that consumers were forced to pay for a prescription drug was the type of loss the alleged violation would likely cause; therefore, the injury was not remote. \textit{See id.} More specifically, to prove antitrust injury, the Third Circuit cites \textit{Brunswick} as controlling law. \textit{See City of Pittsburgh}, 147 F.3d at 265 (citing \textit{Brunswick} to define "antitrust injury"). The Court in \textit{Brunswick} stated:

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

\item[109] See \textit{City of Pittsburgh}, 147 F.3d at 268-69 (determining there was no way to properly calculate plaintiff's alleged damages).
\item[110] See \textit{Steamfitters}, 171 F.3d at 950-31 (stating that extremely difficult and complex nature of damages outweighs satisfaction of other AGC factors); \textit{City of Pittsburgh}, 147 F.3d at 268-69 (determining there was no way to properly calculate plaintiff's alleged damages).
\end{footnotes}
Establishing directness of injury and ease in calculating damages, however, is not conclusive for establishing antitrust standing; they are merely two factors to be considered. Remoteness of injury may also have an impact on proximate cause analysis. In Steamfitters, for example, the Third Circuit used the remoteness of the plaintiffs' injuries to preclude the finding of proximate cause. The Third Circuit stated that the foreseeability of the plaintiffs could not overcome the remoteness of the plaintiffs' injuries in trying to establish standing.

3. Antitrust Injury—More Than Meets the Eye

"Antitrust injury" in the Third Circuit is defined according to the Supreme Court's definition in Brunswick. The Third Circuit has defined antitrust injury by focusing on the language in Brunswick that states, "[Antitrust] injury flows from that which makes the defendants' act unlawful." In City of Pittsburgh, the Third Circuit interpreted the Brunswick language to direct the court to "look back from the vantage point of the injury . . . rather than to presume antitrust injury wherever there is an

Pittsburgh, 147 F.3d at 268 (denying claim for relief due, in part, to speculative damages that "may never occur").

111. See J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (stating that plaintiff not entitled to recovery simply by showing violation of antitrust laws); City of Pittsburgh, 147 F.3d at 265 (stating that antitrust injury is necessary but not sufficient to confer antitrust standing); Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997) (same).

112. See Steamfitters, 171 F.3d at 921 (stating that remoteness is aspect of proximate cause analysis).

113. See id. at 930 (stating that proximate cause analysis is used to "weed out" indirect claims). It should be noted that the Third Circuit applied each factor established in AGC to plaintiffs' claims in Steamfitters. See id. at 925-30. The Third Circuit specifically mentioned, however, that plaintiffs' claims were the "type of indirect claims that the proximate cause requirement is intended to weed out." Id. at 930 (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

114. See Steamfitters, 171 F.3d at 926-30 (discussing nature and directness of plaintiffs' injuries and concluding remoteness issue trumped all other factors).


116. City of Pittsburgh, 147 F.3d at 266. In City of Pittsburgh, the Third Circuit went on to note that another consideration is whether an agreement exists between competitors that may harm consumers in the marketplace. See id. (discussing antitrust injury requirement). The court then stated, however, that the key sentence in Brunswick deals with whether the injury reflects the defendants' anti-competitive acts made possible by the violation. See id. (quoting Brunswick, 429 U.S. at 489).
agreement or merger that results in harm."\textsuperscript{117} The problem for the plaintiffs in \textit{City of Pittsburgh} was that competition was not possible; therefore, the court held that there was no antitrust injury.\textsuperscript{118} A future plaintiff seeking to claim antitrust injury by proving lessened competition should first make sure that competition is possible.

The antitrust injury requirement seems to overlap with causation in some instances.\textsuperscript{119} Rather than trying to separate these similar concepts, the court has, at times, opted to treat them together.\textsuperscript{120} Because of this, it is critical that plaintiffs plead and satisfy both factors independently, leaving no room for confusion. If one of these requirements is not met in any given case, the Third Circuit will likely end further inquiry to determine standing.\textsuperscript{121}

\textbf{C. Third Circuit Requirements for Consumer Standing Under Section 16}

Potential consumer plaintiffs under Section 16 have a lesser burden of proof than plaintiffs seeking treble damages under Section 4.\textsuperscript{122} Nevertheless, much like constitutional standing, plaintiffs under Section 16 must make an initial showing of entitlement.\textsuperscript{123} The Third Circuit has focused on two main requirements that plaintiffs must satisfy in order to qualify for

\begin{itemize}
  \item \textsuperscript{117} \textit{Id.} at 266.
  \item \textsuperscript{118} \textit{See id.} at 266-67 (stating that because there was no competition, there was no antitrust injury). For further discussion of the facts of \textit{City of Pittsburgh}, see \textit{supra} notes 61-63 and accompanying text.
  \item \textsuperscript{119} \textit{See City of Pittsburgh}, 147 F.3d at 265-66 (grouping casual connection and antitrust injury analysis together). The court in \textit{City of Pittsburgh} went on to note that "[a]s many commentators and courts have noted, the questions of antitrust injury and antitrust standing are difficult to disentangle. We believe that . . . there is no bright line distinction between the two concepts." \textit{Id.} at 265 n.15.
  \item \textsuperscript{120} \textit{See id.} at 265. Despite treating the two requirements as one, the court in \textit{City of Pittsburgh} rationalized its decision to deny standing based on the failure of the plaintiffs to meet either the causation element or the antitrust injury element. \textit{See id.}
  \item \textsuperscript{121} \textit{See, e.g., id.} at 265 (determining that where antitrust injury is not present, further inquiry is unnecessary).
  \item \textsuperscript{122} \textit{See In re Warfarin Sodium Antitrust Litig.}, 214 F.3d 395, 400 (3d Cir. 2000) (noting plaintiffs have fewer standing requirements under Section 16); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980) (stating Section 16 is more encompassing than Section 4); Mid-West Paper Products Co. v. Cont'l Group, 596 F.2d 573, 591 (3d Cir. 1979) (stating lesser burden in Section 16 claims). The Third Circuit, in \textit{Mid-West Paper} stated: [A] claim for injunctive relief does not present the countervailing considerations—such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses—that the Supreme Court emphasized when limiting the availability of treble damages. \textit{Id.} at 590.
  \item \textsuperscript{123} \textit{Compare Perry v. Sindermann}, 408 U.S. 593, 600-01 (1972) (requiring legitimate claim to entitlement for plaintiff to establish standing under procedural due process claim), \textit{with Warfarin}, 214 F.3d at 400 (requiring plaintiff class to make showing of entitlement).
\end{itemize}
injunctive relief;\textsuperscript{124} (1) demonstration of threatened loss or injury cognizable in equity;\textsuperscript{125} and (2) the threatened loss must be the proximate cause of the alleged injury.\textsuperscript{126}

1. Threatened Loss: Not Just Any Threat Will Do

The requirement for proof of threatened loss is a substantially lesser burden to prove than the Section 4 requirement of actual injury.\textsuperscript{127} The Third Circuit cases \textit{Warfarin} and \textit{McCarthy v. Recordex}\textsuperscript{128} stand for the proposition that any consumer being forced to pay inflated prices due to a monopoly overcharge may satisfy this requirement.\textsuperscript{129} Another way to

\begin{itemize}
\item \textsuperscript{124} See \textit{McCarthy v. Recordex Serv., Inc.}, 80 F.3d 842, 856 (3d Cir. 1996) (establishing requirements needed to satisfy Section 16 standing); \textit{Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.}, 171 F.3d 912, 935 (3d Cir. 1999) (citing \textit{McCarthy}, 80 F.3d at 856), \textit{cert. denied}, 525 U.S. 1105 (2000).
\item \textsuperscript{125} See \textit{Warfarin}, 214 F.3d at 400 (outlining Section 16 standing requirements); \textit{Steamfitters}, 171 F.3d at 935 (same); \textit{McCarthy}, 80 F.3d at 856 (same).
\item \textsuperscript{126} See \textit{Warfarin}, 214 F.3d at 400 (discussing causation issue); \textit{Steamfitters}, 171 F.3d at 926, 930 (concluding that plaintiffs' injuries were too remote from defendant's activities to satisfy causal connection requirement); \textit{City of Pittsburgh}, 147 F.3d at 269 (denying plaintiff standing due to lack of causation); \textit{McCarthy}, 80 F.3d at 856 (noting Section 16 standing requirements). In \textit{City of Pittsburgh}, plaintiffs lacked antitrust injury because a regulatory scheme, not the defendant, precluded competition. \textit{See City of Pittsburgh}, 147 F.3d at 269 (describing rationale for decision to preclude standing).
\item \textsuperscript{127} See \textit{Mid-West Paper}, 596 F.2d at 591 (discussing difference between Section 4 and Section 16 standing requirements). In \textit{Mid-West Paper}, the Third Circuit summarized the Section 16 "threatened loss" inquiry as compared to the Section 4 actual loss requirement:

\begin{quote}
In contradistinction to \S 4, \S 16 does not ground injunctive relief upon a showing that 'injury' has been already sustained, but instead makes it available 'against threatened loss or damage ...' [C]ourts have held that for purposes of \S 16 the complainant 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur,' and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under \S 16 has been framed in terms of a proximate cause standard that is 'less constrained' than that under \S 4 . . . .
\end{quote}
\textit{Id.} (emphasis in original).
\item \textsuperscript{128} 80 F.3d 842 (3d Cir. 1996).
\item \textsuperscript{129} See \textit{Warfarin}, 214 F.3d at 400-01 (holding that plaintiffs that are forced to pay inflated prices have standing under Section 16); \textit{accord McCarthy}, 80 F.3d at 845 (same). The plaintiff class in \textit{Warfarin} was awarded standing after alleging that they were being forced to pay inflated prices for a prescription drug due to anti-competitive actions of drug manufacturer. \textit{See Warfarin}, 214 F.3d at 400-01.

In \textit{McCarthy}, an alleged conspiracy between hospitals forced patients to pay inflated prices for photocopies of their hospital records. \textit{See McCarthy}, 80 F.3d at 845. Plaintiffs in \textit{McCarthy} were clients of lawyers who were direct purchasers of photocopies. \textit{See id.} Despite the indirect purchaser status of the plaintiffs, the Third Circuit found the plaintiffs to be sufficiently linked to the conspiracy to satisfy Section 16 standing. \textit{See id.} at 845.\end{itemize}
prove the threat of loss requirement is to plead that a proposed merger will lessen competition and therefore cause price increases.\textsuperscript{130}

In \textit{City of Pittsburgh}, the Third Circuit seemed to place a limit on potential plaintiffs by denying the "lessened competition" argument which was pled to satisfy the threat of loss requirement.\textsuperscript{131} The Third Circuit required the plaintiffs to show both that lessened competition would cause threat of injury, and also that alleged conspirators would have competed if not for the merger.\textsuperscript{132} Regardless of how plaintiffs go about proving the threatened loss, they must prove that they lost, or will lose, something identifiable.\textsuperscript{133}

\section{Proximate Cause}

The threatened loss must also be the proximate cause of the alleged injury.\textsuperscript{134} In \textit{Warfarin}, for example, the defendant acted to prevent competition so the price of its product could remain unreasonably high.\textsuperscript{135} A causal connection existed, linking the defendant's conduct-causing the

\begin{itemize}
\item \textsuperscript{130} See Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 109-10 (1986) (addressing whether proposed merger would satisfy threatened injury requirement); \textit{Warfarin}, 214 F.3d at 400 (framing issue in question to resolve whether defendant's conduct precluded competition and therefore led to inflated prices); \textit{City of Pittsburgh}, 147 F.3d at 267 (recognizing "lessened competition" argument in merger context to prove threat of injury requirement); see also Jacobson & Greer, \textit{supra} note 24, at nn.71-72 (discussing implications of \textit{Cargill} on plaintiffs wishing to pursue claim based on anti-competitive activity). A proposed merger that would substantially lessen competition is in violation of Section 7 of the Clayton Act, but remedies are provided under Section 4 or Section 16 of the Act. See \textit{Clayton Act} § 7, 15 U.S.C. § 18 (1992).
\item \textsuperscript{131} See \textit{City of Pittsburgh}, 147 F.3d at 267 (dismissing "lessened competition" as valid argument to satisfy threat of injury requirement).
\item \textsuperscript{132} See id. (stating that issue turns not on whether conspirators of monopoly did compete "but whether they were going to compete"). In \textit{City of Pittsburgh} only one alleged conspirator had the ability to compete under the statute; therefore the lessened competition claim failed. See id.
\item \textsuperscript{133} See id. at 269 (holding that threatened loss was not satisfied because plaintiff could not prove that it lost anything). In \textit{City of Pittsburgh} the Third Circuit alluded to the fact that the loss does not need to be tangible; a loss of competition will suffice. See id. (implying that proof of loss of competition would have satisfied threat of loss requirement).
\item \textsuperscript{134} See \textit{Warfarin}, 214 F.3d at 400 (discussing causation issue); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 926 (3d Cir. 1999) (concluding that plaintiffs' injuries were too remote from defendant's activities to satisfy causal connection requirement); \textit{City of Pittsburgh}, 147 F.3d at 269 (denying plaintiff standing due to lack of causation); \textit{McCarthy}, 80 F.3d at 856 (noting Section 16 standing requirements); see also AREEDA & HOVENKAMP, \textit{supra} note 8, ¶ 360 (stating that plaintiff must prove threatened loss and demonstrate that alleged loss would be caused by alleged violation). In \textit{City of Pittsburgh}, plaintiffs lacked antitrust injury because a regulatory scheme, not the defendants, precluded competition. See \textit{City of Pittsburgh}, at 269 (describing rationale for decision to preclude standing).
\item \textsuperscript{135} See \textit{Warfarin}, 214 F.3d at 402 (analyzing defendant's motive for alleged anti-competitive actions).
\end{itemize}
high price to the consumers who were forced to pay the high price. If any superseding cause can be linked to the injury, plaintiffs in the Third Circuit will likely lose the proximate cause battle.

The Section 16 proximate cause analysis is just as rigorous as the Section 4 proximate cause analysis. For example, in *City of Pittsburgh*, the Third Circuit denied the plaintiffs antitrust standing because of a lack of causal connection due, in part, to the difficulty in calculating plaintiffs' alleged damages. The Third Circuit has inferred that indirect purchaser status is not the main inquiry here. Rather, the court focused on whether the alleged injury is the type Congress targeted when legislating particular conduct as unlawful under antitrust laws.

Also entangled in the proximate cause analysis is the "antitrust injury" requirement. Plaintiffs under Section 16 must prove the same "antitrust injury" as plaintiffs under Section 4. The Third Circuit has indi-

136. See id. (holding causation element satisfied for Section 16 injunctive relief). *Contra Steamfitters*, 171 F.3d at 930-31 (deciding indirect nature of plaintiffs' injuries precluded standing under Section 16). In *Steamfitters*, Union Health and Welfare Funds brought a class action against defendant tobacco manufacturers to recoup the cost of treating fund participants who suffered from smoking related ailments. *See Steamfitters*, 171 F.3d at 918-19 (discussing facts of case). Plaintiffs alleged that the defendant manufacturers aimed to preclude the marketing of safer tobacco products and defrauded smokers into thinking that the defendants' products were safe. *See id.* Plaintiffs alleged that this action caused health complications to fund participants and cost the funds millions of dollars. *See id.* The Third Circuit held that the defendants could have achieved their alleged aim without existence of the funds, therefore plaintiffs' injuries were too attenuated and lacked causal connection to defendant. *See id. at 935.*

137. See *City of Pittsburgh*, 147 F.3d at 268 (holding that state regulatory scheme severed chain of causation); see also AREEDA & HOVENKAMP, supra note 8, ¶ 363(b) (stating that plaintiffs may not be injured when statute prevents entry of competition into market).

138. See, e.g., *Steamfitters*, 171 F.3d at 935 (holding that because proximate cause was not satisfied for Section 4 standing, it also was not satisfied for Section 16 standing).

139. See *City of Pittsburgh*, 147 F.3d at 268-69 (holding plaintiffs' injury claims were "speculative" because difficult to measure).

140. See *Warfarin*, 214 F.3d at 400-01 (holding direct purchaser classification not required for relief under Section 16).

141. See *Warfarin*, 214 F.3d at 400 (deciding remoteness of injury issue based on Congressional intent).

142. For further discussion of the "antitrust injury" requirement, see supra note 24 and accompanying text.

143. See *Warfarin*, 214 F.3d at 399 (noting that "[a]n antitrust plaintiff proceeding under Section 16 must, however, still demonstrate that the injury in question is 'injury of the type the antitrust laws were intended to prevent . . .'" (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *City of Pittsburgh*, 147 F.3d at 268 (requiring Section 16 plaintiffs to prove antitrust injury as defined under Section 4 precedent). For a discussion of the antitrust injury requirement developed in *Brunswick*, see supra note 24 accompanying text.
cated no lessened burden on Section 16 plaintiffs, still requiring a “direct effect” caused by the antitrust violation. 144

IV. CONCLUSION

Consumers seeking standing under Section 4 of the Clayton Act should be aware that no black-letter rule establishing standing exists. 145 Plaintiffs in the Third Circuit would be best advised to stress the satisfaction of every factor discussed in AGC. 146 Because the AGC factors all carry relative weight depending on the facts of the case, it is possible for plaintiffs to satisfy all but one of the factors and still be denied standing. 147 If a plaintiff is fortunate enough to gain standing under Section 4, Section 16 standing will almost certainly be satisfied as well. 148 Section 16 plaintiffs must otherwise prove their case much like Section 4 plaintiffs, but under a slightly lesser burden. 149 Specifically, Section 16 plaintiffs must establish only a “threat” of injury, whereas Section 4 plaintiffs carry the heavier burden of proving actual injury. 150

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144. See City of Pittsburgh, 147 F.3d at 268 (stating that antitrust injury “must be caused by the antitrust violation—not a mere causal link, but a direct effect” (citing Brunswick, 429 U.S. at 489)).

145. See City of Pittsburgh, 147 F.3d at 265 (quoting Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964-65 (3d Cir. 1983)); see also Hovenkamp, supra note 55, at 543 (stating that “[u]nfortunately, the courts have never been able to create an intelligible theory of private antitrust standing . . . . The law remains haphazard and inconsistent”); McShain, supra note 37, at 775 (noting “difficulty in applying and interpreting [antitrust] standing requirements”).

146. For discussion of the AGC factors, see supra notes 102-21 and accompanying text.

147. See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 929-31 (3d Cir. 1999) (summarizing AGC factors as applied to facts, noting all but one factor were satisfied; however all factors were barely satisfied; therefore they were greatly outweighed by that factor not present), cert. denied, 525 U.S. 1105 (2000).

148. See Steamfitters, 171 F.3d at 935 (citing McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996)); see also Mosesso, supra note 21, at n.373 (describing lessened burden for Section 16 standing requirements).

149. For further discussion of Section 16 standing requirements, see supra notes 122-44 and accompanying text.

150. See Mosesso, supra note 21, at n.373 (stating that certain considerations relevant in determining Section 4 standing are not relevant under Section 16 analysis). For further discussion of “threat” of injury versus “actual” injury, see supra notes 127-33 and accompanying text.