IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3134

WILLIAM D. ERTAG, M.D., et al.,

Plaintiffs-Appellants,

v.

NAPLES COMMUNITY HOSPITAL, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR AMICI CURIAE UNITED STATES OF AMERICA AND FEDERAL TRADE COMMISSION IN SUPPORT OF APPELLANTS

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WILLIAM D. ERTAG, M.D. v. NAPLES COMMUNITY HOSPITAL

No. 95-3134

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit Rule 26.1, the following is an alphabetical list of the District Court Judge, attorneys, persons, associations of persons, firms, partnerships, and corporations, with any known interest in the outcome of this case:

1. Honorable Henry Lee Adams, Jr., United States District Court For the Middle District of Florida;

2. Henry S. Allen, Jr., McBride, Baker & Coles, attorney for plaintiffs-appellants;

3. Patricia M. Allen, McBride, Baker & Coles, attorney for plaintiffs-appellants;

4. American Society of Neuroimaging;

5. Beauregard L. Bercaw, M.D., plaintiff-appellant;

6. Community Health Care, parent entity of Naples Community Hospital;

7. Community Imaging, Inc., a subsidiary of Naples Community Hospital;

8. Kevin D. Cooper, Henderson, Franklin, Starnes & Holt, attorney for defendant-appellee;

9. William D. Ertag, M.D., plaintiff-appellant;

10. Gulf Breeze, Inc., partner of Community Imaging, Inc., in Naples Diagnostic Imaging Center;

11. John B. Huck, McBride, Baker & Coles, attorney for plaintiffs-appellants;

12. Francis D. Hussey, M.D., plaintiff-appellant;

13. Susan M. Lapenta, Horty, Springer & Mattern, attorney for defendant-appellee;

14. John W. Lewis, Henderson, Franklin, Starnes & Holt, attorney for defendant-appellee;

15. Jeffrey J, McCartney, M.D., plaintiff-appellant;

16. Naples Community Hospital, defendant-appellee;

17. Naples Diagnostic Imaging Center, a partnership of Community Imaging, Inc. and Gulf Breeze, Inc.;

18. Naples Radiologists, P.C., a partnership and unnamed coconspirator;

19. North Collier Hospital, an affiliate of Naples Community Hospital;

20. James L. Nulman, Henderson, Franklin, Starnes & Holt, attorney for defendant-appellee;

21. Craig M. Spanjers, Stanley, Wines, Bennett, Murphy, Spanjers & Helms, attorney for plaintiffs-appellants;

22. Eric W. Springer, Horty, Springer & Mattern, attorney for defendant-appellee;

23. Richard R. Winter, McBride, Baker & Coles, attorney for plaintiffs-appellants.

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STATEMENT OF INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

Congress created a dual system of antitrust enforcement. Although the United States and the Federal Trade Commission share principal responsibility for enforcing the antitrust laws, suits by private parties, whether for damages or equitable relief, provide an important adjunct to government enforcement. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); United States v. Borden Co., 347 U.S. 514, 518 (1954). The district court in this case relied on a fundamentally flawed analysis in ruling that Appellants lack standing under the antitrust laws to challenge conduct that prevents them, and others similarly situated, from competing in the relevant market. If affirmed by this Court, the lower court's rationale will seriously impede future meritorious private antitrust suits and thereby undermine effective private

enforcement and/or increase the burden on scarce government enforcement resources. The United States and the Federal Trade Commission thus have a strong interest in the proper resolution of this appeal.

STATEMENT OF ISSUES

Whether the district court erred in holding that Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), precluded Appellants from establishing antitrust injury, and erred in its alternative holding that Appellants, as competitors foreclosed from the market by the unlawful restraint of trade alleged, necessarily were not efficient enforcers of the antitrust laws.

STATEMENT OF THE CASE

A. Nature Of The Case

This is a civil action for damages and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2.

B. Course Of Proceedings

Appellants William D. Ertag, M.D., B.L. Bercaw, M.D., Jeffrey J. McCartney, M.D., and Francis D. Hussey, Jr., M.D. (the "neurologists"), filed this antitrust action against Appellee Naples Community Hospital, Inc. (the "hospital"), on October 23, 1992. Following discovery, the neurologists moved for partial summary judgment, and the hospital moved for summary judgment. The district court, concluding that the neurologists lacked standing to sue under sections 4 and 16 of the Clayton Act, 15 U.S.C. 15, 26, entered final summary judgment in favor of the hospital.

C. Statement of Facts

1. Under Florida law, all patients who receive an MRI must

have an "official" interpretation of the scan prepared for the patient's medical records. See Fla. Admin. Code Ann. R. § 59A-3.160. An MRI generally is ordered by the treating physician, and that physician ordinarily receives from the physician who interprets the MRI a copy of the "official" interpretation. Frequently, however, a treating physician may refer a patient for whom an MRI scan has been requested to a neurologist who, in the course of diagnosing or otherwise evaluating the patient, performs an "unofficial" clinical interpretation of the scan (SDR4-15-Hussey-177, 178). Physicians bill for both these services, and insurers pay for both the neurologic consultation and official scan interpretation (SDR2-12-Parham-96-97; SDR1-4-Ex.33-42, 43 ¶¶ 10-11). Accordingly, insurers pay a neurologist who performs an unofficial interpretation, but not an official interpretation, only for the neurologic consultation.

At Naples Community Hospital, a physician may perform an official MRI interpretation only if the hospital has specifically granted that privilege to the physician (SDR1-9-Ex.379-1). In 1988, three qualified neurologists, including two of the appellants here, sought privileges from the hospital to perform official MRI interpretations (SDR1-9-Exs.18, 128). In January 1989, the hospital, through a resolution of the Executive Committee of its Board of Trustees, denied this request, "adopt[ing] a policy that the official interpretation of MRIs shall be restricted solely to members of the Department of Radiology with proper credentials" (SDR-1-9-Ex.30-7). The undisputed effect of this policy is to preclude other qualified physicians, including Appellants, from performing official MRI interpretations for all patients who receive MRIs at the

hospital.

2. In 1992, the neurologists brought this action against the hospital, alleging, inter alia, three counts under the Sherman Act. First, the neurologists claimed that the hospital, by restricting official MRI interpretations to members of the radiology department, unlawfully tied official MRI interpretation services to the hospital's provision of inpatient hospital neurological services. Even when patients, referring physicians, or insurers prefer to have a neurologist perform the official interpretation either independently or as part of a neurologic consultation, this preference is thwarted, the neurologists insist, by the tie. The hospital, the neurologists further argue, has an economic interest in the tie because precluding neurologists from performing official MRI interpretations reduces the neurologists' incentives to order MRIs, which, in turn, reduces the number of MRIs performed on Medicare inpatients.[1] According to the neurologists, this reduction in the output of MRIs increases the hospital's profits because Medicare reimburses the hospital a flat fee, corresponding to diagnostic related group ("DRG"), for each patient.

Second, the neurologists claimed that the hospital's policy of excluding non-radiologists from performing official MRI interpretations resulted from an agreement among the radiologists and the hospital to exclude neurologists from the relevant market. This, according to the neurologists, constituted a conspiracy to restrain trade in violation of section 1 of the Sherman Act. Finally, the neurologists alleged that in-patient

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[1]Radiologists, unlike neurologists, do not order MRIs (SDR1-3-Vol.1-Ex.3-Ertag-92; SDR1-5-Vol.3-Ex.44-Hussey-96).

MRI interpretation privileges is an "essential facility" that the neurologists must have to compete in the market for official MRI interpretation services, and that the hospital and radiologists conspired to deprive the neurologists of this facility in violation of sections one and two of the Sherman Act.

3. The neurologists subsequently moved for partial summary judgment on their tying claim. The hospital opposed this motion and sought summary judgment on all three counts. It argued primarily that the neurologists' evidence failed to create triable issues of fact on dispositive elements of each count (SDR1-1-5, 21-40; SDR2-13-Reply Memo-5-14; SDR1-11-Memo in Opp.-16-35). The hospital also contended, however, that the neurologists "Lack[ed] Antitrust Standing As A Matter Of Law" (SDR1-1-16; SDR2-13-Reply Memo-3-4; SDR1-11-Memo in Opp.-8-16).

4. The district court denied plaintiffs' motion for summary judgment and granted summary judgment for the hospital, agreeing that the neurologists "lack standing to prosecute this antitrust action." Ertag v. Naples Community Hosp., Inc., No. 92-341-CIV-FTM-25D, slip op. at 4 (M.D. Fla. July 31, 1995). The court observed that, under this Court's decision in Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), the neurologists must demonstrate both "antitrust injury" and that they are "efficient enforcer[s]" of the antitrust laws in order to establish standing. Ertag, slip op. at 4. The neurologists, the court held, established neither.

With respect to antitrust injury, the court understood Todorov to hold that a plaintiff's inability "to share in the alleged restraint of trade" is not a type of injury the antitrust laws were designed to prevent. See id. at 5. The plaintiffs,

according to the court, were in the same position as Dr. Todorov because "[t]he essence of the instant action" is "to share in the alleged monopoly profits being obtained by the radiologists." Id. The court based this conclusion on its assertion, made without any citation to the record, that "[p]laintiffs' purported damages equal the profits they would receive if permitted to share in the alleged restraint of trade created by Defendant." Id.

The court also concluded, apparently in the alternative, that the neurologists are not "efficient enforcers" of the antitrust laws. The court reasoned that "patients, insurers, referring physicians and the government have a more important and direct interest in the alleged anticompetitive conduct. Indeed, the patients are the real victims since any anticompetitive conduct raises the prices for an MRI and potentially lowers the quality of the MRI services they receive. Moreover, the Plaintiffs' damages are speculative and indirect." Id. at 6.

D. Statement Of Scope Or Standard Of Review

This Court reviews de novo the district court's grant of summary judgment. See Adams v. Poag, 61 F.3d 1537, 1542 (11th Cir. 1995). Standing under the Clayton Act presents a question of law, see Todorov, 921 F.2d at 1448 (citing Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1387 (11th Cir. 1990)), and requires the court to "examine the allegations contained in the complaint," id. Although a plaintiff's allegations may, in some circumstances, demonstrate the absence of standing, the standing inquiry may depend on the resolution of underlying genuinely disputed issues of material fact. See, e.g., Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1428 (11th Cir. 1990). In

such circumstances, summary judgment is inappropriate. See, e.g., id. at 1426-28; cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (recognizing that the evidence a plaintiff must adduce to establish Article III standing varies "as any other matter on which the plaintiff bears the burden of proof" "with the manner and degree of evidence required at the successive stages of the litigation").

SUMMARY OF ARGUMENT

Our concern in this appeal is narrow but important; we express no view on the ultimate merits of the plaintiffs' case or the validity of any asserted defense, including whether legitimate concerns for limiting anticompetitive physician self-referrals adequately justified the particular practices challenged.[2] Nevertheless, we believe that the district court's articulated reasons for granting summary judgment reflect a fundamental misunderstanding of the proper role of competitor suits in the scheme of private antitrust enforcement and conflict with the "expansive remedial purpose" of the private damage remedy afforded by the Clayton Act. Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982) (internal quotations omitted).

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[2]Indeed, if granting the neurologists official MRI interpretation privileges would lead to anticompetitive self-referrals, this arguably would provide grounds for disposing of the neurologists' claims fairly early in the litigation, depending on the facts. In the absence of full development of such an argument in light of the summary judgment record, however, we offer no view on any issue other than the specific basis on which the district court denied the neurologists standing.

Accordingly, we file this brief in order to express our view that the district court's erroneous analysis should not become the law of this Circuit.

Private plaintiffs seeking antitrust remedies must establish that they have suffered "antitrust injury" -- injury "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). This Court in Todorov held that an excluded competitor who sought to share in the defendants' alleged supercompetitive profits, but could obtain these profits only by joining in a price-fixing conspiracy following entry, had not suffered antitrust injury. The Court did not hold, however, that would-be competitors never suffer antitrust injury when practices that violate the antitrust laws foreclose their entry into a market.

We are concerned that the district court in this case, whose decision granting summary judgment refers neither to the specific allegations of plaintiffs' complaint nor to the evidence in the summary judgment record, mistakenly believed that Todorov established a general rule, or at least a broad presumption, against finding antitrust injury in suits brought by excluded competitors. Such a misinterpretation, barring antitrust plaintiffs from seeking remedies that promote competition, would conflict with the rationale of the antitrust injury requirement and unjustifiably limit private antitrust enforcement's "important role in penalizing wrongdoers and deterring wrongdoing." Brunswick, 429 U.S. at 485. Accordingly, the district court's decision should not be affirmed on that basis.

The district court's alternative holding that the neurologists were not proper plaintiffs because they, as excluded competitors, suffered an injury less direct than the injury suffered by others, also threatens to erect an unjustifiable barrier to private antitrust enforcement. Competitors may sometimes pursue interests that conflict with the interests of consumers,[3] a reality that persuaded the Supreme Court of the need for an antitrust injury requirement. But a general rule denying standing to excluded competitors whenever there is a possibility that consumers or the government could sue finds no support in the Supreme Court's precedents and ignores the important role that competitor suits play in deterring antitrust violations.

Health care markets are evolving rapidly, and it is essential that courts avoid any temptation to substitute broad generalizations and assumptions about the competitive effects of particular antitrust claims and remedies for precise analysis of the record. As providers and consumers search for more efficient delivery systems, courts must be vigilant against any misuse of the antitrust laws to stifle legitimate cost containment measures or to forestall efficient and pro-consumer innovations. But courts must be equally careful not to restrict unduly the availability of private antitrust remedies that promise to promote competition. This Court consequently should not countenance any rule that broadly bars competitors from pursuing antitrust remedies without regard to the competitive merits of

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[3]See, e.g., Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, 90 Mich. L. Rev. 551 (1991).

the specific claim at issue.

ARGUMENT

THE DISTRICT COURT FAILED TO PROVIDE AN ADEQUATE JUSTIFICATION FOR GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON THE GROUND THAT THE PLAINTIFF NEUROLOGISTS LACK STANDING TO PURSUE THEIR CLAIMS

I. Todorov Does Not Bar An Excluded Competitor Whose Entry Would Benefit Consumers From Establishing Antitrust Injury

1. In Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977), the Supreme Court held that, because the antitrust laws were enacted for "'the protection of competition, not competitors,'" id. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original)), it does not necessarily suffice for a private plaintiff seeking damages under the antitrust laws to prove injury "causally linked" to an antitrust violation. Rather, to establish standing under section 4 of the Clayton Act, 15 U.S.C. 15, antitrust 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." Brunswick, 429 U.S. at 489. The Court in Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113 (1986), extended that requirement to plaintiffs seeking injunctive relief under section 16 of the Clayton Act, 15 U.S.C. 26.

Todorov involved a private antitrust claim that, in the court's view, failed to meet the Brunswick/Cargill test for "antitrust injury." Dr. Todorov sought hospital privileges to administer and to interpret CT scans of the head. Following

denial of this request, he sued the hospital and members of the radiology department, arguing that they had conspired to monopolize the market for CT scans. This Court, in ruling that Dr. Todorov failed to demonstrate antitrust injury, began by observing that Dr. Todorov alleged that the radiologists earned supercompetitive profits as a consequence of the alleged restraint, and that he claimed "damages equal [to] the profits he would have garnered had he been able to share a part of [these] supercompetitive, or monopoly, profits." Todorov, 921 F.2d at 1452, 1453-54.

In the court's view, however, there was little likelihood that Dr. Todorov could earn such supercompetitive profits "at least in the long run" if his entry into the CT scan market resulted in competition. Id. at 1453. Dr. Todorov, in the court's view, would prove a demonstrably less efficient provider of CT scan services than the incumbent radiologists. See id. at 1453 & n.25. Consequently, although Dr. Todorov might "reap the radiologists' supercompetitive price and thus some profit in the short run," id. at 1453, he surely would be driven from the market by competition. See id. Thus, the court reasoned, Dr. Todorov could share in the radiologists' supercompetitive profits only if he "reach[ed] some agreement with the radiologists to fix prices." Id. And, because of his inefficiency, "he would have to ensure that every other physician who was granted radiology privileges also joined the agreement." Id. at 1453 n.26. The court accordingly concluded that Dr. Todorov's claim for supercompetitive profits, an asserted injury dependent on conduct that "would not benefit consumers," id. at 1453, was "not the 'type the antitrust laws were intended to prevent,'" id. (quoting

Brunswick, 429 U.S. at 489). "The antitrust laws," the court explained, "were not enacted to permit one person to profit from the anticompetitive behavior of another." Id. at 1454.[4]

Two crucial circumstances thus were essential to the result in Todorov: first, that Dr. Todorov sought damages premised on the monopoly price currently earned by market incumbents as a result of the alleged antitrust violations; and second, that, as a patently inefficient competitor, he could obtain a portion of the supercompetitive profits sought only if his entry into the market resulted not in competition, but in an illegal industry-wide cartel. In other words, Todorov stands for the proposition that there is no antitrust injury when a plaintiff's entry into the market cannot benefit consumers. See also DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1198-99 (11th Cir.) (explaining that in Todorov the plaintiff was interested in "forestalling competition and maintaining an inflated price" and thus "relied on a monopolistic theory of recovery"), cert. denied, 114 S. Ct. 604 (1993); Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir. 1995) (explaining that Dr. Todorov did "not even argue[] that his exclusion from the market hurt competition . . . but instead sought an injunction so that he could join a virtual monopoly and share in the physicians' supercompetitive profits").

Accordingly, Todorov does not require a foreclosed plaintiff seeking to establish antitrust injury to demonstrate that its

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[4]Having found Dr. Todorov to lack antitrust injury, the court not only denied him standing to seek damages under Clayton Act § 4, but also standing to seek an injunction under Clayton Act § 16. See id. at 1454.

entry would lead to the maximum competition permitted by regulatory barriers; a plaintiff need only show that its entry would increase competition and thereby benefit consumers.[5] Nor does Todorov bar all plaintiffs less efficient than market incumbents from establishing antitrust injury. The court in Todorov viewed the excluded competitor as grossly inefficient. See Todorov, 921 F.2d at 1453 & n.25 (emphasizing the inefficiencies caused by travel and waiting time in concluding that Dr. Todorov's costs greatly exceeded the radiologists'). Only rarely, however, will a summary judgment record permit a court to predict with confidence that a new entrant will fail to survive the degree of competition likely to follow its entry. Cf. 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 373e, at 286 n.60 (rev. ed. 1995) ("[H]igher costs for [a] plaintiff do not preclude price competition so long as prices are

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[5]For instance, an efficient plaintiff might seek to enter a market controlled by an oligopoly enjoying supercompetitive returns. The plaintiff's damage claim might presuppose that the plaintiff would be able to undercut the oligopoly's prevailing prices, but not eliminate oligopoly pricing entirely. Such a damage theory depends neither on the plaintiff's participation in illegal restraints nor on its failure to spur competition. Thus, Todorov would not defeat a claim of antitrust injury. See 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 373e, at 285-86 (rev. ed. 1995) ("But if membership in the group or invalidation of the exclusive arrangement with the hospital left plaintiff free to compete on price, the incremental profits he otherwise would have earned would constitute antitrust injury." (footnote omitted)).

even higher.").[6] And, as the court cautioned in Todorov, 921 F.2d at 1454, even a competitor's ultimately failed entry could benefit consumers by lowering barriers to entry, see id.[7] Consequently, Todorov does not require a plaintiff to establish its ability to compete successfully for an indefinite period as long as its damages are premised on the profits it would earn before exiting the market.

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[6]When a market is cartelized, the prospect of sharing in the monopoly rents attracts new entrants. Because entry is likely to destabilize the cartel and bring down prices, consumers are likely to benefit. Efficient entrants might earn a normal return if entry results in the cartel's destruction, and, as explained above, see supra note 5, might earn a portion of the cartel's supercompetitive profits if the effect of entry is less drastic. If new entrants are not efficient enough to thrive with fully competitive pricing, sunk costs still might be low enough that they can hope to realize sufficient profits before prices fall to make entry worthwhile. And even if sunk costs are high, they may hope that prices, though falling, will not fall to the fully competitive level. In each scenario, consumers benefit from the entry; in each, then, Todorov should not bar a foreclosed competitor from establishing antitrust injury.

[7]Commentators have argued that because a cartel's stability generally decreases as it gains participants, entry could have procompetitive benefits even if the entrant joins a price-fixing cartel. See, e.g., Herbert Hovenkamp, Federal Antitrust Policy § 16.3d, at 551 (1994) (criticizing Todorov and arguing that "[f]ew antitrust rules could be more anticompetitive than one permitting a cartel to exclude potential entrants from its market").

Indeed, far from holding that all claims by excluded competitors run afoul of the antitrust injury requirement, the Court in Todorov expressly noted that the damages claimed by an excluded competitor who could in fact compete successfully with market incumbents could represent competitive profits. Id. at 1454 n.27. And, it observed, Dr. Todorov might have established antitrust injury if he had "limited his damages claim to this small sliver of potential lost profits." Id.

2. The district court below made no apparent effort to determine whether there actually was a conflict between plaintiffs' claims and the interests of consumers. The complaint does not, on its face, support the district court's assertions that the neurologists' claimed damages "equal the profits they would receive if permitted to share in the alleged restraint of trade created by Defendant," and that they "seek to share in the alleged monopoly profits being obtained by the radiologists." Ertag, slip op. at 5.[8] And the court did not even discuss the

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[8]The neurologists sought "actual damages, trebled, suffered as a result of the Defendant's violations of the Sherman Act" (R1-1-15-¶51D). The complaint nowhere intimates that the "actual damages" claimed consisted of the alleged monopoly profits earned by the radiologists; rather, the neurologists claimed "losses of profits they otherwise would have made, in an amount which has not yet been ascertained" (R1-1-12-¶37), and expressly alleged that the restraint precluded the neurologists from "compet[ing] with the Radiologists" (R1-1-12-¶35k). Accordingly, there is no basis for construing the complaint to claim cartel profits. See Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 782-83 (7th Cir. 1994) (refusing to find that the plaintiff's complaint

evidence in the summary judgment record, at least some of which appears to cast doubt on its characterization.[9] In the absence of articulated reasons to conclude that plaintiffs' claim is in conflict with the procompetitive purposes of the antitrust laws, the court's reliance on Todorov as support for its antitrust injury conclusion suggests that the court misinterpreted the case to establish a broad rule limiting the ability of excluded competitors to establish antitrust injury.

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necessarily sought cartel profits although noting that a plaintiff may "plead[it]self out of court").

[9]The neurologists apparently based their lost profits on the number of official MRI interpretations (and other procedures) they would have performed in the absence of the illegal restraint, multiplied by the price they would have charged less incremental costs. The price claimed, at least for non-Medicare patients, was "the lesser of the competitive price or the maximum allowable price" (SDR2-12-Ex.P-11 & Ex.5-11; SDR2-12-Memo in Response-6). This competitive price was calculated, depending on the neurologist, based on the prices charged in the MRI outpatient market or the CT scan market, in which the neurologists compete with the radiologists (SDR1-11-Ex.54-15; SDR-1-11-Ex.55-15; SDR1-11-Ex.56-14-15; SDR1-11-Ex.57-15). Two plaintiffs stipulated that the claimed price would decrease if the radiologists lowered their prices in response to their entry (SDR1-11-Ex.55-15; SDR1-11-Ex.57-15). The neurologists also offered evidence that when permitted to compete against radiologists in interpreting CT scans, they charged lower prices and obtained a significant market share (SDR1-10-Ex.D; SDR-1-11-Vol.V-Ex.106; SDR2-12-EX.L).

As the Supreme Court has emphasized, however, the "treble damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985). An expansive interpretation of Todorov, restricting the ability of excluded competitors to bring suit under the Clayton Act even if the claims advanced further the interest of consumers, cannot be reconciled with Congress' intent to promote private antitrust enforcement, and the district court's grant of summary judgment should not be affirmed on the basis of such a rule.

II. The District Court Erred In Holding That The Neurologists Lack Standing Because They Are Not Efficient Enforcers Of The Antitrust Laws

The district court offered a second reason for its grant of summary judgment in this case: it concluded that the neurologists' claims were barred because they are not "efficient enforcers" of the antitrust laws. However, there is no general requirement, as apparently found by the district court, that antitrust plaintiffs represent the most efficient enforcers available. Nothing in the district court's opinion, moreover, suggests a specific reason to conclude that these plaintiffs should be denied standing.

1. In Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), the Supreme Court observed that "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes

the justification for allowing a more remote party . . . to perform the office of a private attorney general," id. at 542; see also Todorov, 921 F.2d at 1451-52 (discussing the Associated General Contractors factors). Asserting that the neurologists would not "efficiently vindicate the goals of the antitrust laws," primarily because "patients, insurers, referring physicians and the government have a more important and direct interest in the alleged anticompetitive conduct," Ertag, slip op. at 6, the district court below concluded that Associated General Contractors generally bars suits by foreclosed competitors as long as those the court perceives as "the real victims" of the alleged anticompetitive scheme might sue, id. That conclusion is flawed for at least three fundamental reasons.

First, the district court was simply wrong in assuming that its task was to identify the most efficient enforcer of the antitrust laws. An "expansive remedial purpose" underlies Clayton Act section 4. Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982) (internal quotations omitted). The limitations placed on recovery under that section, as the Supreme Court has explained, are guided by traditional common-law qualifications to the precept that "every wrong shall have a remedy." Associated General Contractors, 459 U.S. at 532-35. But common-law concepts of foreseeability, for instance, do not deny recovery to one victim who suffers a foreseeable injury merely because some other victim's injury is more foreseeable.

Similarly, although courts must exclude from the class of potential plaintiffs those whose injuries are too indirect, remote, duplicative, or highly speculative, see SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 43-44 (1st Cir.

1995), the remedial purpose of section 4 of the Clayton Act does not permit courts to deny standing to one class of otherwise proper plaintiffs merely because some other class is perceived as "the real victims," Ertag, slip op. at 6, of the alleged unlawful conduct. Cf. Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1163-64 (9th Cir. 1991) (rejecting the position that consumers' superior interest in furthering competition, and their "more obvious[] antitrust injury," justified denying standing to competitors; under that reasoning "no competitor would ever have standing" (internal quotations omitted)), cert. denied, 504 U.S. 913 (1992).[10]

Second, under Supreme Court precedent, the neurologists' asserted injury is not "indirect." Ertag, slip op. at 6. In

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[10]A number of district court cases indicate to the contrary. See, e.g., Huhta v. Children's Hosp. of Philadelphia, 1994-1 Trade Cas. (CCH) ¶ 70,619, at 72,361 (E.D. Pa. May 31, 1994) (finding the plaintiff physician not "'the most efficient enforcer'" of the antitrust laws), aff'd, 52 F.3d 315 (3d Cir. 1995) (Table); Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 999 (N.D. Ga. 1992) (dicta); Rooney v. Medical Center Hosp., 1994 WL 854372, at *7 (S.D. Ohio Mar. 30, 1994) (dicta) (following Robles); Leak v. Grant Medical Center, 893 F. Supp. 757, 764 (S.D. Ohio 1995) (dicta) (same). These cases generally rely on a misreading of Todorov's dicta, compare e.g., Huhta, 1994-1 Trade Cas. at 72,361 (concluding that patients and insurers are the "direct 'victims' of the alleged antitrust violations") with infra note 14 (discussing the passage apparently relied upon), and we submit that they are unpersuasive.

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), a patient brought a class action suit under the Sherman Act alleging that Blue Cross conspired with certain psychiatrists "'to exclude and boycott clinical psychologists from receiving compensation under' the Blue Shield plans." Id. at 469-70. The Court explained that the plaintiff was forced to choose between receiving reimbursement and treatment by the practitioner she preferred. Id. at 483. If the patient chooses to be treated by the practitioner authorized by the insurer, the Court explained, "the antitrust injury [is] borne in the first instance by the competitors of the conspirators, and inevitably -- though indirectly -- by the customers of the competitors in the form of suppressed competition in the [relevant] market." Id.

McCready establishes that when, as alleged here, consumers suffer injury as a result of competitors' exclusion from the market, the injury to the excluded competitors is "direct" for the purpose of assessing antitrust standing. Consistent with McCready, this Court has recognized that foreclosed competitors have standing to challenge restraints that bar their entry if they can establish antitrust injury. See, e.g., Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991) ("[O]ur Circuit's case law recognizes that [competitors] ha[ve] standing to contest antitrust violations which create barriers to that market."), cert. denied, 113 S. Ct. 295 (1992); see also 2 Areeda and Hovenkamp, supra, ¶ 373a, at 275 (explaining that competitors "have clear standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market"); id. ¶¶ 373d3 & 383a,

at 282, 340 (same).[11] Indeed, the district court's analysis is at odds with the established proposition that "competitors," as well as consumers, "are favored plaintiffs in antitrust cases." E.g., SAS, 48 F.3d at 45; see also id. at 44 ("[T]he presumptively 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who seek to serve that market." (citing Associated General Contractors, 459 U.S. at 538-39)).

Third, the district court erred in asserting, without analysis, that the neurologists should be denied standing because "patients, insurers, referring physicians, and the government" necessarily would bring suit if the neurologists' suit is barred. Consumers (which here include patients, insurers, and, as surrogates for patients, referring physicians), as courts have recognized, often may have suffered insufficient monetary harm "to provide . . . adequate incentive to bring suit." Yellow Pages, 951 F.2d at 1164. And, although the government may bring suit, the treble damage remedy is intended to supplement government enforcement with private enforcement; Congress did not intend courts to bar private plaintiffs merely because the

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[11]See also Municipal Utilities Bd. v. Alabama Power Co., 934 F.2d 1493, 1500 (11th Cir. 1991) (holding that cities precluded by an exclusive territory scheme from competing were efficient enforcers; "[a]lthough the defendants' allegedly anticompetitive conduct would also injure consumers, such conduct would also directly injure the Cities as competitors"), cert. denied, 115 S. Ct. 1096 (1995); Thompson, 934 F.2d at 1571-72 (conferring standing on foreclosed competitors and characterizing their injury as direct).

government could seek an injunction. See, e.g., Herbert Hovenkamp, Antitrust's Protected Classes, 88 Mich. L. Rev. 1, 23-24 (1989) (analyzing the Sherman Act's legislative history and concluding that "everyone agreed that competitors should be entitled to sue");[12] Yellow Pages, 951 F.2d at 1163. Indeed, because competitors may experience the effects of an antitrust violation so directly, they may often be particularly well positioned to serve as effective antitrust enforcers. See Hovenkamp, Antitrust's Protected Classes, supra, at 33 ("[A] system that permits the first person injured by the violation to sue is more efficient than a system that requires the legal system to suspend enforcement until the last person is injured.").[13]

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[12]As originally enacted in 1890, § 7 of the Sherman Act contained the "critical language" later incorporated into Clayton Act § 4. Associated General Contractors, 459 U.S. at 530.

[13]The district court also based its holding that the neurologists are not efficient enforcers on its assertion that the neurologists' damages "are speculative." Ertag, slip op. at 6. But lost profits are an appropriate measure of damages when competitors seek to challenge their foreclosure from a market. The difficulty of estimating the profits that would have been earned but for the illegal restraint is not a sufficient reason to find damages speculative. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946) (explaining that requiring exacting proof of damages "would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain"); see also J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S.

2. The fact that plaintiffs seek not only damages but also an injunction further undercuts the district court's conclusion that they lack standing because they are not "efficient enforcers." For "courts are less concerned about whether the plaintiff is an efficient enforcer of the antitrust laws when the remedy is equitable." Todorov, 921 F.2d at 1452. This is "because the dangers of mismanaging the antitrust laws are less pervasive in this setting." Id. As the Supreme Court explained in Cargill:

> [U]nder § 16, the only remedy available is equitable in nature, and, as we recognized in Hawaii v. Standard Oil Co.[, 405 U.S. 251 (1972)], "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." 405 U.S., at 261. Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

479 U.S. at 111 n.6. In light of these principles, and this Circuit's pre-Cargill precedent, see, e.g., Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 938 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977), it is generally sufficient to establish standing under section 16 that the plaintiff "shows a threatened loss or injury cognizable in equity proximately resulting from the alleged antitrust violation" that, if inflicted, would constitute antitrust injury. Sundance Land Corp. v. Community First Fed. Savs. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir. 1988) (modifying the same test applied by this Circuit prior to Cargill in light of that decision).[14] If the

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557, 565-67 (1981); Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123-24 (1969).

[14]The Court noted in Todorov that permitting the plaintiff

plaintiff has established antitrust injury, the congressional purpose to promote effective private antitrust enforcement can be served only by permitting the plaintiff to seek an injunction.

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to seek an injunction would be inappropriate because "he would be acting only in his interest." Id. at 1454; see also id. at 1455 (stating that "Dr. Todorov is simply looking to increase his profits, like any competitor" and that he lacked an "altruistic" motive). But this statement, and the court's conclusion that "Dr. Todorov is a particularly poor representative of the patients," id., simply flowed from its antitrust injury analysis. The court declined to permit Dr. Todorov to pursue a claim it viewed as inimical to the purposes of the antitrust laws, observing that "[i]f the radiologists or DCH are acting anticompetitively and are charging an inflated price, then their patients, their insurers, or the government, all of whom are interested in ensuring that consumers pay a competitive price, may bring an action to enjoin [such] practice." Id.

This dictum accordingly does not suggest that a competitor-plaintiff whose claims are consistent with the purposes of the antitrust laws should be barred from seeking an injunction under section 16 merely because other preferred plaintiffs might also assert a claim. Indeed, as the Ninth Circuit recognized, such reasoning "would prove far too much: since every competitor ideally prefers not greater competition, but that it reap the benefits of monopoly, no competitor would ever have standing." Yellow Pages, 951 F.2d at 1163.

CONCLUSION

The government takes no position as to whether the district court's decision should be affirmed on alternative grounds. The judgment, however, should not be affirmed on the basis articulated by the district court.

Respectfully submitted.

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November 14, 1995

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 1995, I caused a copy of the foregoing BRIEF FOR AMICI CURIAE UNITED STATES OF AMERICA AND FEDERAL TRADE COMMISSION IN SUPPORT OF APPELLANTS, to be served upon the following counsel in this matter by overnight courier:

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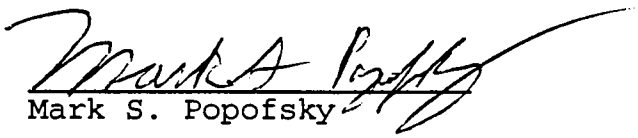

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