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CLOSED BUT NOT FORGOTTEN: GOVERNMENT REVIEW OF CONSUMMATED MERGERS UNDER SECTION 7 OF THE CLAYTON ACT

Scott A. Sher*

I. INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") and the Department of Justice ("DOJ")[1] have the authority under section 7 of the Clayton Act ("section 7") to bring suit to challenge previously closed mergers and acquisitions, where they can demonstrate that a transaction may substantially lessen competition.[2] However, since the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "Act"),[3] such retrospective review has been rare. The HSR Act requires parties to most mergers to report their transactions to the antitrust agencies and to wait for approval before closing.[4] As a result, the Act has minimized the need for drawn-out, post-close challenges to transactions that often require lengthy, sometimes years-long, divestiture trials. The results of such trials often ineffectively restore the pre-merger competitive landscape, as it is usually impossible to "unscramble" a combined entity years after the close of a merger.[5] Likewise, in fast-moving dynamic markets, it is infeasible, if

* Scott Sher is a partner at Wilson Sonsini Goodrich & Rosati, PC. The author would like to thank Alisa Armstrong, David Balto, Chris Compton, Michael Cowie, and Lisa Davis for their helpful suggestions and revisions. The author would like to offer special thanks to Scott Russell for his insight and assistance during the writing and editing process.

1. Throughout the remainder of this article the DOJ and FTC will be referred to collectively as the "antitrust agencies."
2. Clayton Act § 7, 15 U.S.C. § 18 (2000).
3. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, Sept. 30, 1976, 90 Stat. 1383 (current version at 15 U.S.C. § 18a (2000)).
4. *See id.* § 18a(a).
5. H.R. REP. NO. 94-1373, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2643.

not undesirable, to recreate a status quo environment which time has already passed. As foreshadowed by Congress during the debate over its passage, the HSR Act has assisted "the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion."[6]

Nevertheless, the antitrust agencies still bring post-close challenges—and since 2001 have been more aggressive—where the alleged competitive concerns associated with a deal were not readily apparent before close. Beginning in 2001, the FTC has brought challenges to consummated mergers involving MSC.Software, Chicago Bridge, Airgas, and Aspen Technology, and has seriously investigated dozens more.[7]

These post-close challenges raise complex legal issues including the role of post-acquisition evidence in merger review

6. *Id.*

7. *See In re* Aspen Tech. Inc., No. 9310 (F.T.C. filed Aug. 6, 2003), http://www.ftc.gov/os/2003/08/aspencmp.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review); *In re* MSC.Software Corp., No. 9299 (F.T.C. Oct 29, 2002), http://www.ftc.gov/os/2002/11/mscdo.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review); *In re* Airgas, Inc., No. C-4029 (F.T.C. filed Dec. 12, 2001), http://www.ftc.gov/os/2001/10/airgascmp.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review); *In re* Chicago Bridge & Iron Co., No. 9300 (F.T.C. filed Oct. 25, 2001), http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

The Commission has recognized that such post-close investigations raise significant problems, even where the investigation does not result in an enforcement order. In its recent decision to close an investigation into the consummated merger of the only two manufacturers of possible therapies for a rare childhood disorder called Pompe Disease, the Chairman of the FTC, Timothy Muris, recognized the dangers associated with post-close review and enforcement, noting that FTC-ordered post-consummation relief could unwind transactions that have created real efficiencies in the market. *See* Press Release, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc., (Jan. 13, 2004), *at* http://www.ftc.gov/opa/2004/01/genzyme.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review). As this article discusses in further detail, fashioning remedies is also a critical problem in actions involving consummated mergers. *See* discussion *infra* Part IV. As FTC Commissioner Pamela Jones-Harbour observed, "[e]nthusiasm for justifiable enforcement must always be disciplined, however, by pragmatic considerations regarding the ability to achieve effective relief in a given case." Statement of Comm'r Pamela Jones-Harbour, Genzyme Corporation's Acquisition of Novazyme Pharmaceuticals Inc., File No. 021-0026 at 4 (2004), *at* http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

and the appropriate scope of relief available under section 7.[8] Since the passage of the HSR Act, the Supreme Court has not considered a challenge from the antitrust agencies to a closed merger, and lower court review of such challenges likewise has been limited.[9] As a result, the law on post-close review and challenge is dated, and in many instances, inappropriate to apply in the current HSR Act regulatory environment.

The effect of post-consummation review and challenge is substantial and potentially harmful to the parties, to the market, and ultimately to consumers as well. For example, in the recent *MSC.Software* litigation over the company's acquisition of two small rivals—which arguably gave the company a monopoly in a specialized software market—the parties litigated the case for more than a year.[10] Ultimately after spending millions of dollars in legal fees, MSC.Software was forced to divide its advanced Nastran business into multiple units, licensing its software and all improvements to one or two independent firms.[11] The costs were high and the relief was expansive. Both surely outweighed any benefits that the company could ever have contemplated when it originally considered acquiring two of its small rivals.

With these concerns in mind, this article explores the issues surrounding antitrust review of consummated mergers. Part II begins with an overview of the history of modern antitrust merger law, from the enactment of the Sherman Act in 1890 through the passage of the HSR Act in 1976.[12] Part III discusses the pertinent issues associated with post-close review and challenge, including the appropriate standard of review, the probative value of post-acquisition evidence, and the remedies available under section 7.[13] Finally, Part IV summarizes the significant problems associated with the post-consummation review and challenge of potentially anticom-

8. *See* discussion *infra* Part III.B, Part III.C.

9. *See, e.g.*, United States v. Syufy Enter., 903 F.2d 659 (9th Cir. 1990); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991).

10. *See In re* MSC.Software Corp., No. 9299 (F.T.C. filed Oct. 9, 2001), decision and order issued Oct. 29, 2002, *at* http://www.ftc.gov/os/2002/11/mscdo.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

11. *See id.* at 6-8.

12. *See* discussion *infra* pp. 44-56.

13. *See* discussion *infra* pp. 56-95.

petitive transactions.[14]

II. DEVELOPMENT OF MODERN ANTITRUST MERGER LAW

To fully comprehend the troubling nature of expansive post-close merger review, it is important to understand the development of modern merger antitrust law. The legislative history behind the enactment of each of the major antitrust statutes sheds light on the reasons why post-close review today should be limited, and also helps explain why outdated law concerning post-close review has little applicability in today's regulatory environment, where pre-notification of most transactions is required,[15] and where theories of competitive harm have changed significantly since the time that case law was decided.[16]

Modern antitrust merger law developed over the course of more than half a century. Congress began with the enactment of the Sherman Act in 1890,[17] later passing the Clayton Act in 1914,[18] amending it in 1950 (known as the Celler-Kefauver amendments),[19] and again in 1976 (the HSR Act).[20] Congress acted to strengthen the antitrust laws in response to a decision or series of decisions from the Supreme Court that effectively had rendered existing law powerless to remedy what many considered a troubling tide of increasing concentration in the American economy.[21] This article next explores in greater detail the enactment and rationale behind these antitrust statutes as well as the setbacks that the Supreme Court delivered to each.

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14. *See* discussion *infra* pp. 95-98.

15. *See* 15 U.S.C. § 18a.

16. *See, e.g.*, discussion *infra* note 71.

17. 15 U.S.C. §§ 1-7 (2000).

18. Clayton Act, 15 U.S.C. § 18 (2000) (originally enacted Oct. 15, 1914, ch. 323, 38 Stat. 730).

19. Celler-Kefauver Amendments, Pub. L. No. 81-899, Dec. 29, 1950, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (2000)).

20. Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, Sept. 30, 1976, § 201, 90 Stat. 1383, 1390-1394 (current version at 15 U.S.C. § 18a (2000)).

21. *See, e.g.*, 51 CONG. REC. 14200, 14222 (1914) (statement of Sen. Thompson); 51 CONG. REC. 9245, 9271 (1914) (statement of Sen. Carlin).

A. Early Failures Under the Sherman Act

In 1890, Congress passed the Sherman Act.[22] Section 1 provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."[23] Then, over the course of the next two decades, the Supreme Court curtailed the scope of section 1, destroying the very essence of the Act.[24] Following the passage of the Sherman Act, the government brought—and lost—a series of suits seeking to dissolve or restrict some of the larger conglomerations of the time.[25]

In 1895, in the first Sherman Act case to reach the Supreme Court, the government sought dissolution of the Sugar Trust[26] by suing the American Sugar Refining Company which commanded a sixty-five percent market share of the domestic sugar refining and sales market. The company had successively acquired four smaller sugar-refining companies, which added thirty percent of the remaining refining and sales shares in the country.[27] The government alleged a violation of section 1 of the Sherman Act, claiming that the combination constituted monopolization of the manufacture and sale of refined sugar in the United States, resulting in the control of sugar prices.[28] Further, these acquisitions allegedly constituted "contracts" with the intent to monopolize, equating to a conspiracy to restrain trade, which, in the opinion of the government, was clearly within the ambit of section 1.[29]

The Supreme Court agreed that the purchase of the four Philadelphia refineries' stock coupled with its own stock resulted in "the American Sugar Refining Company acquir[ing] nearly complete control of the manufacture of refined sugar within the United States."[30] Nevertheless, the Court con-

22. *See* 15 U.S.C. §§ 1-7 (2000).

23. *See* 15 U.S.C. § 1 (2000); *see also id.* § 2 (prohibiting unilateral conduct intended to monopolize a market).

24. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895), Standard Oil Co. v. United States, 222 U.S. 1, 88-89 (1911), and FTC v. Western Meat Co., 272 U.S. 554 (1926). *See also* 51 CONG. REC. 9538, 9552-3 (1914) (statement of Sen. Barkley) (discussing how the Supreme Court limited the scope of the Sherman Act).

25. *See supra* note 24.

26. *See E.C. Knight Co.*, 156 U.S. 1.

27. *Id.* at 2-5.

28. *Id.*

29. *Id.*

30. *Id.* at 9.

cluded that relief pursuant to the Sherman Act was beyond the scope of the statute.[31] According to the Court, the Sherman Act was concerned with contracts that restrained interstate or international trade[32] and interstate commerce remained unaffected by the exchange of voting securities.[33]

Following the *Sugar Trust* case, the Supreme Court further restricted the ability of the Sherman Act to effectively combat mergers that could lessen competition. This culminated with the *Standard Oil* decision, where the Supreme Court held that only *unreasonable* restraints of trade were illegal.[34] To establish illegality, the government had to demonstrate that a combination actually caused competitive harm.[35] The Court interpreted the Sherman Act as powerless to halt mergers or acquisitions that do not themselves constitute unreasonable restraints of trade.[36]

In other words, unless the merging parties intended an ill motive when entering into the merger, and only if the government could demonstrate that the merger harmed competition, would a merger be illegal under the Sherman Act. As a result, the government could only use the Sherman Act to challenge and remedy concentrations in markets that already had harmed competition.[37] The Act could not redress incipient concentrations that did not immediately manifest competitive harm at the time of the merger. Thus, before challenging a transaction, the government would have to wait until its effects had become apparent in the marketplace. Of course, by that time, it would be nearly impossible to unwind such a combination, as the independent corporate assets and structure of the merging parties would have disappeared.

B. Enactment of the Clayton Act and Early Failures Under that Statute

The early Sherman Act decisions prompted Congress to reexamine the antitrust laws and to consider a new legal re-

31. *Id.* at 17.
32. *See E.C. Knight Co.*, 156 U.S. at 17.
33. *Id.*
34. *Standard Oil Co.*, 222 U.S. at 88-89 (Harlan, J., concurring).
35. *Id.* at 81-82.
36. *Id.*
37. *Id.* at 88-93 (Harlan, J., concurring).

gime to lessen the increasing corporate concentration.[38] Senator Barkley, a primary proponent of the Clayton Bill, opined that "[n]otwithstanding that law [the Sherman Act] has been in force for 24 years, combinations, trusts, and monopolies have increased at a marvelous rate and have grown so enormous in size as almost to stagger with bewilderment and confusion the mind that undertakes to contemplate or unravel them."[39] The Supreme Court rendered the Sherman Act incapable of effectively addressing this trust problem,[40] and another of the Clayton Act's sponsors, Senator Thompson, expressed his conviction that this problem had corrupted the American way of life:

> Neither at birth, in life, nor at death are we free from trusts. We are welcomed into the world by the Milk Trust and rocked in a cradle built by the Furniture Trust. As we proceed through life we find practically everything we eat and everything we wear furnished by a trust and nearly every business in which we may wish to engage completely monopolized; and at last, as we approach death, we are brought face to face with the Coffin Trust, by which we are finally conveyed to our last resting place.[41]

In an attempt to address the trust problem, Congress passed the Clayton Act.[42] According to Senator Thompson, the antitrust legislation's chief purpose was to protect "the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring."[43]

As enacted in 1914, the Clayton Act prohibited a number of business practices, including anticompetitive acquisitions.[44] At the time of enactment, section 7 prohibited the acquisition of "stock or other share capital of another corporation . . . where the effect of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition."[45]

38. *Id.*
39. 51 CONG. REC. 9538, 9552 (1914) (statement of Sen. Barkley).
40. *See id.*
41. 51 CONG. REC. 14200, 14222 (1914) (statement of Sen. Thompson).
42. 51 CONG. REC. 9245, 9271 (1914) (statement of Sen. Carlin).
43. 51 CONG. REC. 14200, 14223 (1914) (statement of Sen. Thompson).
44. Clayton Act, ch. 323, 38 Stat. 730 (1914).
45. *See* 15 U.S.C. § 18 (2000).

Whereas the Sherman Act was designed to eliminate actual and unreasonable restraints of trade that already existed, the Clayton Act, according to Congress, "go[es] further than that. These acts are made unlawful wherever the effect may be to substantially lessen competition or may tend to create a monopoly in any line of commerce."[46] Thus, the Clayton Act's proponents reasoned that the government could block a transaction from closing even if it did not actually harm competition at the outset, so long as the government could demonstrate that if allowed to proceed, the transaction *sometime in the future* was likely to harm competition.[47]

Over the next two decades, the Supreme Court convincingly dashed the hopes of many Clayton Act proponents and eviscerated the intended purpose of section 7. In a series of decisions, the Court interpreted section 7 to allow businesses, through technical formalisms, to effectively and completely circumvent any governmental challenge to a business combination that represented even the most egregious concentration in a market.[48]

In two consolidated cases, *FTC v. Thatcher Manufacturing Co.*[49] and *Swift & Co. v. FTC*,[50] the Court held that section 7 applied only to mergers by stock acquisitions and did not address the acquisition of assets or property, even where the acquisition of assets and property could only be effectuated following the acquisition of voting securities.[51] In *Thatcher* and *Swift*, the defendant companies acquired the stock of their rivals and the FTC subsequently brought suit under section 7.[52] Before the FTC could secure an order of divestiture of the stock, Thatcher and Swift completed the acquisitions of the assets and property, making the voting securities of the acquired parties by themselves worthless.[53] The Court concluded that the FTC was powerless to order divesti-

46. 51 CONG. REC. 16316, 16318 (1914) (statement of Sen. Floyd).

47. *See id.*

48. *See, e.g.*, FTC v. Western Meat Co., 272 U.S. 554 (1926). *See infra* pp. 48-49.

49. FTC v. Thatcher Mfg. Co., 5 F.2d 615 (3d Cir. 1925).

50. Swift & Co. v. FTC, 8 F.2d 595 (7th Cir. 1925).

51. *Thatcher Mfg. Co.*, 5 F.2d 615 and *Swift & Co.*, 8 F.2d 595 were consolidated upon appeal to the Supreme Court and decided together with *Western Meat Co.*, 4. F.2d 223 (9th Cir. 1925). The citation for all three cases is 272 U.S. 554 (1926).

52. 272 U.S. at 560.

53. *Id.* at 559-60.

ture of anything besides the voting securities of another company.[54] According to the Court, the Clayton Act withheld from the government the ability to order a company to surrender the assets or property acquired from others.[55] The Court opined that "[t]he Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto."[56]

Later, in *Arrow-Hart & Hegeman Electric Co. v. FTC*,[57] the Court completely stripped the government's enforcement ability under section 7, concluding that the Act did not apply once a merger had already been effectuated.[58] In *Arrow-Hart*, the FTC challenged the acquisition of voting securities by a holding company.[59] Following the issuance of the complaint, the holding company merged the voting securities of the entities under its corporate umbrella and dissolved the voting securities of the independent companies.[60] The Court concluded that the act of extinguishing the independent entities' stock eliminated the ability of the FTC to challenge the transactions under the Clayton Act, as that statute was only concerned with aggregations of voting securities and not with aggregations of assets.[61] Therefore, the FTC could not seek relief once the acquired entity's voting securities had been dissolved, or if the transaction was technically structured as a sale of assets, rather than a sale of voting securities.

Not surprisingly, following these decisions, corporate transactions were organized in manners designed to exploit the limitations carved out by the judiciary.[62] Indeed, prior to the Act being amended in 1950, the government was unsuccessful challenging mergers under section 7.

54. *Id.* at 561.
55. *Id.*
56. *Id.*
57. Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934).
58. *Id.* at 595-96.
59. *Id.* at 591.
60. *Id.* at 590-91.
61. *Id.* at 595-96. After *Arrow-Hart*, mergers structured as sales of assets were not prohibited by section 7.
62. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

C. 1950 Amendments Closed Clayton Act Loopholes

Twice thwarted by the Supreme Court, Congress again sought to strengthen the federal government's antitrust enforcement capabilities by closing the loopholes opened by the Court and exploited by the business community. In 1950, Congress passed the Celler-Kefauver amendments to the Clayton Act.[63] As the Supreme Court indicated in *Brown Shoe Co. v. United States*: "[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[64] The House Report accompanying the amendments to the Clayton Act notes:

> That the current merger movement (during the years 1940-1947) has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time.[65]

According to Senator Carey Estes Kefauver: "[t]he Sherman Act test has been a measurement of accomplished monopoly. The purpose of the Clayton Act is to reach in their incipiency certain practices which if permitted to persist might eventually ripen into violations of the Sherman Act."[66] The Celler-Kefauver amendments to the Clayton Act passed in both Houses of Congress.[67] This initiated the third effort to provide the government with the ability to challenge the growing concentration in America's industries.

In *Brown Shoe Co. v. United States*, the Supreme Court summarized the legislative rationale behind the enactment of the Celler-Kefauver amendments to the Clayton Act:

- "[P]lug the loophole" in section 7 by including asset acquisitions under the umbrella of section 7

63. Celler-Kefauver Amendments, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (2000)).

64. *Brown Shoe Co.*, 370 U.S. at 315.

65. *Id.* at 316, n.27 (quoting H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3).

66. 96 CONG. REC. 16433, 16453 (1950) (statement of Sen. Kefauver).

67. Celler-Kefauver Amendments, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (2000)).

review;[68]

- Include vertical and conglomerate acquisitions within the purview of section 7, rather than just horizontal mergers;[69]
- Capture "incipient" mergers whose effects on competition were "probable" rather than "actual;"[70] and
- Express the Act's intention to deal with *probabilities* rather than with *certainties.* Thus, "[m]ergers with a probable anticompetitive effect were to be proscribed by this Act."[71]

The Clayton Act amendments and the subsequent Supreme Court interpretations of the scope of the FTC's enforcement power to review and challenge mergers equipped the government with the necessary tools to unwind transactions that potentially raised competitive concerns. After these changes, it appears that the pendulum wildly swung in the other direction: following 1950, the Supreme Court interpreted the amended section 7 in such a manner that antitrust authorities were granted the power to challenge even the most incipient of concentrations. For example, during the

68. *Brown Shoe Co.*, 370 U.S. at 316.

69. *Id.* at 317. Horizontal mergers refer to those mergers between parties with competing product lines. Vertical mergers refer to those mergers that result in the vertical integration of product lines or businesses. Conglomerate mergers refer to those mergers that result in the aggregation of complementary, rather than competitive, product lines.

70. *Id.* at 317-18.

71. *Id.* at 323, n.39. A significant source of tension in antitrust law has been the definition of the term "anticompetitive." Whereas in *Brown Shoe* the Supreme Court articulated that any increase in concentration could be considered anticompetitive, the antitrust agencies and the case law today embrace a much different meaning of the term. Post-1968, when the first set of antitrust guidelines was released, the prevailing antitrust thinking began to change. This "Chicago-School" thinking, which is accepted today by the mainstream, does not consider mere concentration anticompetitive (i.e., as necessarily leading to increased prices and other market power abuses). Instead, only where the government demonstrates that such transactions actually cause harm to consumer welfare, would antitrust concerns arise. *See* William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into the Antitrust Review of Horizontal Mergers,* 71 ANTITRUST L.J. 207 (2003).

This change in economic thinking is reflected in more recent merger policy, but is not apparent in older post-close challenges that were litigated mostly in the 1960s and early 1970s. As a result, much of the case law that exists concerning the nature of post-close challenges is irrelevant, outdated, and inconsistent with our understanding of the role of antitrust in merger analysis. *See, e.g.*, discussion *infra* Part III.B, Part III.C.

1960s, the government was successful in bringing actions for divestiture where firms aggregated through transaction only miniscule shares of sales in a particular market.[72] It appeared that Congress' intent to arrest incipient concentrations in the market had been realized.

D. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 Establishes Modern Merger Review

Even equipped with the amended and more expansive Clayton Act, the government nonetheless was at a disadvantage when seeking to challenge anticompetitive mergers or acquisitions because Congress had not required a pre-close notification that would forewarn the government of such looming anticompetitive mergers and acquisitions. Thus, "without advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare a case, the government often [had] no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7."[73] Without the opportunity to gather evidence to demonstrate to a court that a transaction in the early stages raised competitive concerns, the government's ability to successfully block such a transaction was highly circumscribed. In fact, as an important early study of pre-close challenges to mergers suggests, the government's success rate in such challenges was abysmal.[74]

In the absence of advance notice requirements, parties often clandestinely and speedily merged operations (the so-called midnight merger phenomenon), forcing the government to challenge the transaction following its closing with insufficient/inadequate evidence. As noted in the legislative history to the HSR Act: "[t]he government may well file suit, and ultimately win the subsequent litigation on the merits . . . [y]et by the time it wins the victory . . . it is often too late to enforce

72. *See, e.g.*, United States v. Vons' Grocery Co., 384 U.S. 270 (1966) (blocking merger that would have given combined company less than ten percent share of the Los Angeles grocery store market).

73. H.R. REP. NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2640.

74. *See* Malcolm R. Pfunder et al., *Compliance with Divestiture Orders under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 THE ANTITRUST BULLETIN 19 (1972).

effectively the Clayton Act."[75] This is because "[d]uring the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarkets are replaced, transferred, sold off or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged."[76] With this "scrambling" of the merging entities, it becomes nearly impossible to unwind the transaction and restore the "acquired firm to its former status as an independent competitor."[77]

Further, post-acquisition challenges resulted in protracted divestiture proceedings, which often lasted years or decades and cost the parties millions of dollars.[78] Then, once the proceedings had ended, appropriate remedies often could not be fashioned, because either the government could not identify a suitable buyer, the assets of the two parties had become too intertwined to separate through a divestiture order, or the acquiring firm had purposefully stalled the investiga-

75. H.R. REP. NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2640.

76. *Id.*

77. *Id.* at 9, 1976 U.S.C.C.A.N. at 2641.

78. Such was the case with El Paso Energy Company, which famously extended its merger litigation by a decade. As well-summarized by then Director of the Bureau of Competition, Federal Trade Commission, William Baer:

> It helps to begin with the reasons Congress enacted HSR in the first place. The poster child in the legislative debate was the tortured litigation history of *United States v. El Paso Natural Gas Co.* The case, brought under section 7 of the Clayton Act, involved the government's post-acquisition challenge of El Paso's purchase of a potential competitor, Pacific Northwest Pipeline Corp. ("PNW"). PNW already had a supply line running from New Mexico to the Pacific Northwest, and it wanted to sell excess supplies to customers in California, where El Paso was the sole supplier. El Paso promptly bought PNW, and the Department of Justice challenged the acquisition. After seven years of litigation, the Supreme Court ruled for the government and ordered divestiture "without delay." The unintended irony in that phase had become apparent to Congress when it enacted HSR. Divestiture in the *El Paso* case took an *additional ten years*, meaning that it took a total of 17 years before the government could cure an anticompetitive acquisition. The case went to the Supreme Court so many times some folks lost count. It was estimated that El Paso derived profits of $10 million for every year it retained the illegally acquired company. All of this took place in an effort to enforce Section 7 of the Clayton Act, a statute whose purpose was to stop anticompetitive acts in their incipiency.

William J. Baer, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act, Prepared Remarks Before The Conference Board (Oct. 29, 1996) (citations omitted), *at* http://www.ftc.gov/speeches/other/hsrspeec.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

tion and trial, while wasting the acquired party's assets and making the latter unattractive to any potential buyer.[79]

Focusing on the inherent limitations and deficiencies of the Clayton Act's reactionary orientations, Congress enacted the HSR Act to eliminate the deleterious effects of post-consummation challenges.[80] It was designed to provide the antitrust agencies with a mechanism whereby parties were required to pre-notify their intent to enter into mergers of a certain size and to give the agencies time to review such transactions before allowing the parties to consummate the deal.[81] According to the House of Representatives, substantial costs accompany post-close review "to the firms, the courts, and the marketplace. . . . To avoid the worst of these protracted exercises in futility is the major purpose of this bill. Merger litigation simply need not always continue for years and even decades–but if it takes place after consummation, it generally will . . . ."[82]

The HSR Act, however, does not capture all transactions that potentially raise competitive concerns: the HSR Act mandates pre-close review only of transactions that exceed a certain size[83] thus "smaller, illegal mergers may still be consummated, despite passage of this bill, and there may still be lengthy divestiture trials in future years"[84] Since the size of a transaction acts only as a rough proxy (at best) to identify transactions that may raise antitrust concerns, it is possible that transactions that do not required notification under the HSR Act will nevertheless require government-ordered redress pursuant to section 7.

Additionally, Congress amended the HSR Act to reduce the number of transactions subject to pre-closing review requirements.[85] In late 2000, the statute was amended to re-

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79. *See id.*

80. *See* 15 U.S.C. § 18a (2000).

81. H.R. REP NO. 94-1373, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2637.

82. *Id.* at 10, 1976 U.S.C.C.A.N. at 2642.

83. *See* 15 U.S.C. § 18a (2000) (also referred to as section 7a of the Clayton Act) (detailing the size of transaction test triggering the obligation to file a premerger notification with the antitrust agencies).

84. H.R. REP. NO. 94-1373, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 2637, 2643.

85. *See* Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762 (current version at 15 U.S.C. § 18a (2000)); *see also* 66 Fed. Reg. 8680 (F.T.C. Feb. 1, 2001) (interim rules published by the FTC interpreting congressional amendment to the HSR

quire the reporting of transactions valued at $50 million or more.[86] Prior to the 2000 amendments, transactions valued at $15 million or more were captured under the HSR Act.[87] As a result, today, fewer transactions require reporting under the Act. According to the FTC, some of these smaller transactions (valued at between $15 and $50 million) may violate section 7 because such deals may still substantially lessen competition within relatively narrow markets.[88] It follows that transactions which, prior to their close, might have required modification or challenge if reported under the pre-amended HSR Act, today may require antitrust agency intervention, pursuant to section 7 of the Clayton Act, following consummation because they are too small to be reported under the recalibrated thresholds.[89] Thus, in the wake of the higher reporting thresholds, post-consummation merger challenges are likely to increase in number and significance.

The enactment of the HSR Act has also had an ancillary effect: today, most merger challenges occur before close, and as a result, generally are settled pursuant to a consent decree, whereby the parties agree to some form of relief (structural or behavioral) and the government allows the merger to close.[90] Consequently, post-close challenges largely have become unnecessary, and whereas litigation followed by formal, published opinion was once the norm, today it is the rare exception. Thus, in the twenty-five years since the enactment of the HSR Act, little case law has developed that explores the contours of post-consummation review and challenge, and the scope of relief available under section 7. Much of the decades-

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Act in late 2000, revising 16 C.F.R. pts. 801, 802, and 803).

86. Pub. L. No. 106-553, Dec. 21, 2000, 114 Stat. 2762 (codified as amended at 15 U.S.C. § 18a(a) (2000)).

87. 15 U.S.C. § 18a(a) (1999).

88. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Challenges MSC.Software's Acquisitions of Its Two Nastran Competitors (Oct. 10, 2001), *at* http://www.ftc.gov/opa/2001/10/msc.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review). Former Director of the Bureau of Competition Joseph J. Simons states that challenging non-reportable deals "is particularly important now because the thresholds for reporting acquisitions have been raised." *See id.* However, the increased thresholds only recalibrate the scope of the statute to make it consistent with the thresholds as they existed in 1976. *See id.* The Act had never been indexed to inflation, and for the first twenty-five years, the thresholds never increased. *See id.*

89. *See* 15 U.S.C. § 18 (2000).

90. H.R. REP NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2642.

old law seems outmoded and inadequate at addressing many of the issues that arise when reviewing transactions in today's economy. This article next discusses the outdated case law applicable when reviewing contemporary transactions.[91]

III. CASE LAW CONCERNING THE REVIEW OF CONSUMMATED MERGERS

Case law regarding the substantive and procedural issues that arise during challenges to consummated mergers has remained relatively stagnant since the enactment of the HSR Act in 1976. However, with the FTC's stated intention to more actively review and challenge allegedly anticompetitive consummated transactions, undoubtedly many of these issues will become salient once again.[92] Historically, the case law explored most frequently several issues including: (a) the relevant time—the merger's consummation or the filing of the suit—to determine the transaction's effect on the market;[93] (b) the relevance of post-acquisition evidence to demonstrate whether the transaction violates section 7;[94] and (c) the breadth of relief that the Commission can order after concluding that a closed transaction violates section 7.[95]

At the Commission level, the last several challenges to consummated mergers have considered some of these key legal issues. For example, in *MSC.Software Corp.*,[96] the administrative litigation (which ultimately resulted in a negotiated consent without a final decision from the Administrative Law Judge), focused on the role of post-acquisition evidence and on the scope of the Commission's authority under section 7 to grant structural relief beyond a divestiture of the assets involved in an anticompetitive concentration.[97] Likewise, in

91. *See* discussion *infra* Part III.

92. *See supra* note 88.

93. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588-89 (1957).

94. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

95. *See, e.g.*, *In re* Diamond Alkali Co., 72 F.T.C. 700, 740 (1967).

96. *See In re* MSC.Software Corp., No. 9299 (F.T.C. October 29, 2002), *at* http://www.ftc.gov/os/2002/11/mscdo.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

97. *See* Respondent MSC.Software Corporation's Pre-Trial Brief and Proposed Conclusions of Law at 64-66 & 84-92, *In re* MSC.Software Corp., No. 9299 (F.T.C. July 1, 2002), *at* http://www.ftc.gov/os/adjpro/d9299/020701rmscptb.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

Chicago Bridge & Iron Co. N.V.[98] (on appeal as of November 1, 2004, to the full Commission), the parties disagree over whether the Administrative Law Judge sufficiently considered alternative remedial options when deciding to order Chicago Bridge to divest assets it acquired as a result of a merger, as well as whether section 7 gives the FTC the authority to order a divestiture of assets beyond those which are part of the competitive overlap that raised section 7 problems.[99]

A. Relevant Point in Time to Review Competitive Effects

In *United States v. E.I. du Pont de Nemours & Co.*[100] ("*du Pont*"), the Supreme Court held that the government can bring suit under section 7 any time it believes a transaction may cause a substantial lessening of competition.[101] The government can rely upon market conditions at the time of *suit*—rather than at the time of the *merger*—to demonstrate that a transaction represents an incipient competitive concern.[102] At the time, the decision was considered a significant expansion of the scope of section 7, providing new ammunition with which the antitrust agencies could challenge anticompetitive consolidations.[103]

Until *du Pont*, the government's ability to challenge transactions as anticompetitive was limited. As discussed above, the federal government, thwarted by Supreme Court decisions restricting the scope of the Sherman Act and the Clayton Act, largely was seen as powerless to halt the increasing concentration in America's industries.[104] *Du Pont* changed that landscape. An overview of the facts that led to the *du Pont* decision is crucial to understanding its scope.

98. *See In re* Chicago Bridge & Iron Co., No. 9300 (F.T.C. Oct. 25, 2001); *at* http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

99. *See* Respondents' Appeal Brief at 52-57 (Public Records Version), *In re* Chicago Bridge & Iron Comp., No. 9300 (F.T.C. Aug. 8, 2003), *at* http://www.ftc.gov/os/adjpro/d9300/030808respondentsappealbrief.pdf (last visited Oct. 24, 2004) (on file with the Santa Clara Law Review).

100. *E.I. du Pont de Nemours*, 353 U.S. 586.

101 *See id.*

102. *Id.* at 597-98.

103. *See id.* at 590-91.

104. *See* discussion *supra* Part II.A, Part II.B.

1. United States v. E.I. du Pont de Nemours & Co.[105]

In 1917, E. I. du Pont de Nemours & Co. ("du Pont") began a purchasing program of the stock of General Motors Corporation ("GM").[106] The purchasing was completed in 1919.[107] At the time of suit, du Pont owned approximately twenty-three percent of GM's outstanding voting securities and claimed that it purchased GM shares solely for the purpose of investment, rather than to take an active role in the management of that company.[108] Nevertheless, over the following years, up until the time when the Department of Justice brought an antitrust suit, du Pont and GM maintained a close relationship.[109] Du Pont regularly sought—and often won—contracts to supply GM with certain automotive products.[110] Du Pont maintained a position on the GM Board of Directors, and, in fact, members of the du Pont family or company held, at one time or another, the presidency and the chairman position at GM.[111] As an active and influential shareholder and director, du Pont acquired information concerning confidential GM business dealings, including sensitive information regarding GM's product plans and component needs, as well as the status of bids from other GM suppliers.[112]

Du Pont used its position to attempt to garner more GM business, leveraging its stock ownership to persuade GM to increase its reliance on du Pont as a supplier.[113] With the GM management's assistance, du Pont regularly succeeded in fostering its relationship with GM, notwithstanding opposition from divisions of GM arguing that du Pont should compete for GM business like the other suppliers.[114] Specifically, du Pont's sales to GM were substantial in two crucial supply areas: du Pont provided nearly seventy percent of GM's automotive finishes and forty percent of its automotive fabrics.[115]

105. *E.I. du Pont de Nemours*, 353 U.S. 586.
106. *Id.* at 598-99.
107. *Id.* at 602.
108. *Id.* at 588, 602.
109. *Id.* at 601-02.
110. *Id.* at 602.
111. *E.I. du Pont de Nemours*, 353 U.S. at 601-02.
112. *Id.* at 601.
113. *Id.* at 602.
114. *Id.* at 602-05.
115. *Id.* at 596.

In 1949, the DOJ challenged the du Pont/GM stock and business relationship under sections 1 and 2 of the Sherman Act, and section 7 the Clayton Act.[116] The district court granted summary judgment in favor of du Pont on all claims.[117] On the Sherman Act claims, the district court concluded that the parties' actions did not constitute illegal business relations designed to stifle competition.[118] On the Clayton Act claim, the court held that when du Pont *acquired* its GM stock, du Pont intended to hold the stock solely for purpose of investment.[119] The court also found it implausible that at that time the investment could not be construed as a relationship that would substantially reduce competition.[120]

The Supreme Court reversed the district court's holding with respect to the Clayton Act claim.[121] Writing for the majority, Justice Brennan concluded that the GM investment violated section 7 of the Clayton Act.[122] The Court did not reach the DOJ's claims under either section 1 or 2 of the Sherman Act.[123] The Court's reliance on section 7 was peculiar, as the DOJ's oral argument made no mention of the section 7 claim and its brief relied almost exclusively on the Sherman Act claims.[124]

The *du Pont* decision was a landmark for several reasons. This article discusses only one of them: the point in time when the transaction must exhibit its anticompetitive effect.[125] Justice Brennan concluded that the appropriate point in time to examine a section 7 claim is the time of *suit*, rather than the time of actual *acquisition*.[126] Justice Burton dis-

116. *Id.* at 588, 588 n.5.

117. United States v. E.I. Du Pont De Nemours & Co., 126 F. Supp. 235, 334-35 (D.C. Ill. 1954), *rev'd* 353 U.S. 586 (1957).

118. *Id.*

119. *See id.*; *see also E.I. du Pont de Nemours*, 353 U.S. at 597-98.

120. *See E.I. du Pont de Nemours*, 353 U.S. at 598.

121. *Id.* at 586.

122. *Id.* at 607-09.

123. *Id.* at 588 n.5.

124. *Id.* at 609-10 (Burton, J., dissenting).

125. *Id.* at 589. The decision also was important because it concluded that section 7 encompassed vertical relationships, not simply horizontal acquisitions. *Id.* at 590. Additionally, Justice Brennan decided, on a minimal factual record, that the relevant market included automotive finishes and fabrics, rejecting the parties' contention that the market included all finishes and fabrics. *Id.* at 593-95.

126. *E.I. du Pont de Nemours*, 353 U.S. at 597-98.

agreed.[127]

Justice Brennan framed the issues in his opening paragraph, positing that:

> The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, *at the time of suit*, of the creation of a monopoly of a line of commerce.[128]

Before *du Pont*, only one lower court, in *Transamerica Corp. v. Board of Governors*,[129] had expressly determined at what point in time the government could challenge an already closed merger, and when the merger had to present anticompetitive effects.[130] Agreeing with the *Transamerica* decision, the *du Pont* Court concluded that under section 7, a transaction that seemingly raised no competitive concerns at the time of its consummation can nonetheless be unwound pursuant to section 7 if, at some later point in time, the government concludes that there is a possibility that *at that later time* it raises competitive concerns.[131]

The Court reasoned that:

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation.[132]

To support his conclusion, Justice Brennan relied on highly ambiguous legislative history.[133] A passage from the Senate Report of the Clayton Act stated that the statute was intended to "arrest the creation of trusts, conspiracies, and

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127. *Id.* at 609-10 (Burton, J., dissenting).
128. *Id.* at 588-89 (emphasis added).
129. Transamerica Corp. v. Bd. of Governors, 206 F.2d 163 (3d Cir. 1953).
130. *See id.* at 166.
131. *E.I. du Pont de Nemours,* 353 U.S. at 597-98.
132. *Id.* at 589.
133. *Id.*

monopolies in their incipiency and before consummation."[134] Justice Brennan concluded that "'[i]ncipiency' in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect."[135] Thus, "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce . . . ."[136]

Armed with that conclusion, the Court explored the developing relationship between du Pont and GM, highlighting that over time du Pont gained significant traction in GM's business, ultimately securing a large portion of the latter's finish and fabric businesses.[137] At the time the government brought suit, the increased influence over GM's business was the "incipient" violation of section 7, regardless of the fact that at the time of the acquisition, the du Pont/GM relationship did not represent a concern under the Clayton Act.[138] The Court ordered the stock divested to remedy the competitive problem.[139]

Justice Burton wrote a vigorous dissent, claiming that the Court's interpretation of section 7 would "subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments."[140] Primarily concerned that such a conclusion would "violate[] elementary principles of fairness," Justice Burton predicted that:

> The result is that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock. In such an action, the Government need only prove that

134. S. REP. NO. 698, at 698, 63d Cong., 2d Sess. 1 (1914); *see also E.I. du Pont de Nemours*, 353 U.S. at 589.

135. *E.I. du Pont de Nemours*, 353 U.S. at 597.

136. *Id.* As discussed in Part II.B, *supra*, there was no contemplation in the Clayton Act debates that the regime that Justice Brennan articulated would be the rule. Given that in the forty years between the Clayton Act's enactment and *du Pont* no one had considered bringing such a suit, it seems unlikely that Congress considered Justice Brennan's reasoning to be the rule.

137. *See id.* at 586. One must wonder why, after concluding that the relationship was so "cozy," the Court did not choose to find that the transaction represented illegal collusion in violation of section 1 of the Sherman Act.

138. *See id.* at 589.

139. *See id.* at 607-08.

140. *Id.* at 622 (Burton, J., dissenting).

> probable rather than actual anticompetitive effects exist as of the time of suit. The Government may thus set aside a transaction which was entirely lawful when made, merely by showing that it would have been unlawful had it occurred at the time of suit, many years later. The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*.[141]

As did the majority, Justice Burton relied on the language of the statute and its legislative history to reach his conclusion. First, Justice Burton noted that section 7 forbids acquisitions where the effect of such "*acquisition* may be to substantially lessen competition."[142] Thus, according to the dissent, it is the acquisition and not the subsequent holding that must be judged under the Act.[143] Justice Burton acknowledged that the government could bring suit under section 7 at any time, but if it brought suit challenging a merger that had closed years before the challenge, the government must prove that *at the time of the acquisition* (rather than at the time of the suit), the transaction likely raised competitive problems.[144] Justice Burton reasoned that "[t]he offense described by [section] 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete . . . not at some later date to be arbitrarily chosen by the Government in bringing suit."[145]

According to the dissent, "[t]he Clayton Act was not intended to replace the Sherman Act in remedying actual restraints and monopolies. Its purpose was to supplement the Sherman Act by checking anticompetitive tendencies in their incipiency, before they reached the point at which the Sherman Act comes into play."[146] Under Justice Burton's interpretation, the government's burden to challenge consummated mergers would be substantially different than the burden set forth in the majority opinion. Rather than providing

141. *E.I. du Pont de Nemours*, 353 U.S. at 622-23 (Burton, J., dissenting).
142. *Id.* at 612 (Burton, J., dissenting) (citing section 7 of the Clayton Act) (emphasis added).
143. *Id.* at 622 (Burton, J. dissenting).
144. *Id.*
145. *Id.* at 620 (Burton, J. dissenting).
146. *Id.* at 621 (Burton, J. dissenting).

the government with the opportunity to review a transaction by relying on market conditions and the transaction's effect at the time of the suit, Justice Burton would have required the government to either (1) challenge a transaction under the Clayton Act, using the time of *acquisition* as the reference point in which to judge the probable effects of the transaction, or (2) challenge a transaction under the Sherman Act, if the challenge was brought following its close, and the agencies rely on evidence of market conditions at the time of the suit (rather than at the time of acquisition).[147] Thus, according to Justice Burton, the government in the latter circumstance would have to demonstrate that the merger or acquisition was an unreasonable restraint of trade, and that the deal caused actual anticompetitive effects.[148]

2. An Analysis of the du Pont *Rule*

The *du Pont* decision attracted rigorous debate in the year following the Court's opinion. Many feared that the decision would chill benign, efficiency-enhancing mergers.[149] In a 1958 article, Bruce Bromley noted that:

> The decision might seem to mean that if a purchaser buys the assets or all of the stock of a company representing an insubstantial factor in the market and the acquired assets or the company are subsequently expanded so as to represent a substantial market share, the acquisition, then, becomes subject to successful attack.[150]

Bromley found this to be an implausible rule.[151] To so conclude would ignore that "the substantial share largely reflects not the effect of the merger but rather internal growth which, all will agree, section 7 does not apply. The causal connection between the merger and the presumed ill effect is largely missing."[152] Bromley's conclusion and Burton's dissent

147. *E.I. du Pont de Nemours*, 353 U.S. at 612 (Burton, J. dissenting).

148. *Id.* at 622 (Burton, J. dissenting). This would make post-close challenges more difficult. The government has not successfully challenged a transaction under section 2 of the Sherman Act, nor has a private party. *See* discussion *supra* Part II.A.

149. *E.g.*, John C. Stedman, *The Merger Statute: Sleeping Giant or Sleeping Beauty*, 52 NW. U. L. REV. 567, 568 (1957).

150. Bruce Bromley, *Business View of the du Pont General Motors Decision*, 46 GEO. L.J. 646, 651 (1958).

151. *Id.*

152. *Id.*

were correct: the *du Pont* decision did not open the floodgates of challenge to transactions that had closed years or decades earlier.[153] The DOJ wisely recognized that to do so would cause chaos in the business community.[154] Thus, following the decision, the DOJ attempted "to calm the fears of business concerns understandably upset by the decision and fearful of an attempt to exploit the breakthrough [decision]."[155]

The *du Pont* regime raises significant issues. Where two companies combine completely and merge their operations, a post-close antitrust review that examines the transaction's potential effects at the time the agency brings suit, rather than at the time of acquisition, raises a concern about whether alleged competitive problems were caused by the acquisition or instead by extraneous changes in the structure of the market.[156] In today's economy, especially in high-tech industries, market definitions change rapidly, and market power often is transitory and unpredictable. Market forces unrelated to the transaction—including subsequent entry, exit, and change in consumer demand—may instead be the cause of market power for a company that also happened to acquire one of its competitors. Thus, a company without market power at the time of an acquisition may be able in the future to exert market power for reasons unrelated to a transaction.

In such instances, the law should not permit the government to rely upon market forces at the time of suit to challenge the transaction. If at the time of the deal the transaction does not raise incipient competitive concerns and market power only manifests itself in the future, during a subsequent challenge, it would be nearly impossible to assign causation of the alleged anticompetitive effect to the merger rather than to a changing competitive environment.[157] In such instances, the parties should not be punished retroactively for success simply because earlier they combined their operations in the absence of any monopolistic or predatory behavior. Just as the antitrust laws do not punish organic growth that results in

153. *See* Stedman, *supra* note 149, at 568.

154. *See id.*

155. *Id.*

156. *See* discussion *infra* Part III.B (discussing the role of post-acquisition evidence in consummated merger review).

157. *See* Bromley, *supra* note 150, at 651.

market power if such market power is not used anticompetitively,[158] section 7 should not punish merging parties that engage in transactions that do not raise concerns under section 7 at the time they were consummated. Instead, if the government intends to challenge such a transaction at a later date based on conditions at the time of suit and not at the time the transaction closed, it must demonstrate actual anticompetitive effects and bring a claim under section 2 of the Sherman Act.[159]

In addition, even if the causation issue can be resolved, the agencies and the courts must also determine whether such effects on the market were a probable consequence at the time of acquisition and not simply a reality at the time of suit. The following question may arise: if an industry powerhouse acquires a small intellectual property shop with an extensive, but not yet market-relevant patent portfolio, and in five years the combination of a patent in that portfolio with the portfolio of the acquiring company creates blocking issues inhibiting other competitors, is that transaction susceptible to a section 7 challenge under the time-of-suit theory, even if no such competitive concerns existed at the time of the transaction's consummation? As Phil Neal noted, section 7 deals with probabilities, not certainties:

> [E]ven if the causal connection between an acquisition and the impairment of competition can be taken as established, there is a further theoretical objection to use of post-acquisition evidence. This is simply that the occurrence of an event proves nothing about the probability that it would happen . . . . If competition declines following an acquisition, and the decline can be said to have been caused by the acquisition, this proves only that such a sequence of events was possible. It does not prove, or tend to prove, that the event was probable or likely.[160]

In the hypothetical posed above, if at the time of the transaction the likelihood that the acquired company's patent would ripen into blocking technology was a 100-to-1 possibility, should the odds playing out in favor of the acquiring party result in a section 7 challenge when the competitive problem

158. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

159. 15 U.S.C. § 2.

160. *See* Phil Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 224-25 (1952-53).

presents itself? Under the *du Pont* Court's time-of-suit rationale, such a challenge would seem appropriate. Justice Brennan would likely conclude that the relevant incipient competitive problem became obvious at the time of suit and was susceptible to challenge under section 7, even though possibly at the time of the acquisition such competitive problems were not considered probable or even likely. This result seems incorrect, inconsistent with the purpose of section 7, and antithetical to the public policy of ensuring consistency and predictability in business dealings. In such an instance, the agencies or the courts should use section 2 of the Sherman Act to remedy a competitive problem and should be required to demonstrate actual competitive harm, not merely the likelihood of such harm.[161]

Although *du Pont* is still good law, it is highly likely that Justice Burton's dissent may resonate with a majority of today's Supreme Court. Even the 1957 Court might have ruled differently if the facts of *du Pont* were not so unique: the government challenged du Pont's acquisition of only a portion of the voting securities of GM.[162] Thus, it was easy for the Court to analyze the effects of the holding of those voting securities at the time of suit, and it was easy to order divestiture, as there had been no commingling of the parties' assets.[163]

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161. 15 U.S.C. § 2.

162. *See E.I. du Pont de Nemours*, 353 U.S. at 588.

163. One fundamental question is whether Justice Brennan's *du Pont* decision renders the Sherman Act irrelevant when addressing the harm of mergers. The Clayton Act already provides the antitrust agencies and the courts with the benefit of *ex ante* review of potentially problematic transactions (i.e., with its focus on probabilities, not certainties). With the *du Pont* decision, however, Justice Brennan also allowed for *ex post* review of such transactions when convenient, without having to demonstrate actual competitive harm. At one time, the FTC raised this as a fundamental issue in post-close merger analysis: where post-acquisition conduct is a basis for the government's claim, is the Clayton Act the appropriate vehicle to challenge the combination? As the Commission once noted:

> To isolate, in a complex business and economic environment, the various causal strands that may contribute to particular effects is, however, a difficult and indeed often impossible task. For that reason, there is little point in utilizing section 7 where an actual restraint of trade has occurred subsequent to the acquisition. It is more appropriate in such a case to attack under Sherman or Federal Trade Commission Act principles a respondent's total course of conduct, including its acquisitions, rather than challenge simply the acquisitions themselves and attempt to use the other elements of the respondent's conduct as evidence of the competitive effects of

B. Role of Post-Acquisition Evidence

The Court's holding in *du Pont*—specifically that the appropriate point in time to analyze the potential effect of consummated transactions under section 7 is at the time of suit—raised a host of concerns about the probative value of post-acquisition evidence in a section 7 proceeding. As a result of the *du Pont* decision, courts were forced to grapple with the issue of what weight to ascribe to evidence of market effects that manifest during the period of time between the close of the transaction and the time a lawsuit was brought challenging that transaction.[164] In other words, courts were required to consider the extent to which such post-merger evidence is relevant and, therefore, admissible.

Case law in the wake of *du Pont* permits both parties to rely on post-acquisition evidence to the extent that it demonstrates either that a transaction raises incipient competitive problems or that the structure of a post-acquisition market inhibits the combined entity from exercising market power.[165] When, where, and how much weight such evidence should be afforded requires a case-by-case analysis: "applying the section 7 tests becomes an exceedingly complex process when the acquisition in question occurred long before the proceeding"[166] and a court determines whether the alleged anticompetitive market condition "is in whole or in part an 'effect' of the acquisition."[167]

Reliance on post-acquisition evidence raises significant issues of evidentiary standards for both the government and

the acquisitions.

In re Ekco Prod. Co., 65 F.T.C. 1163, 1211 (1964). The *Ekco Products* decision introduces an interesting issue: where the government seeks to rely on evidence of post-acquisition anticompetitive behavior as the basis of its claim, it can do so, but should it not instead utilize the Sherman Act as its vehicle to challenge a transaction? The argument goes that although section 7 can be used to bring post-consummation challenges, the government should rely on market conditions at the time of the merger to make its case under this predictive statute; to the extent that the government would rather rest its case upon demonstrating actual competitive harm, it should instead use the monopolization prohibition of section 2 of the Sherman Act.

164. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); *E.I. du Pont de Nemours*, 353 U.S. 586; *Consol. Foods Corp.*, 380 U.S. 592.

165. *See, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); *Consol. Foods Corp.*, 380 U.S. 592.

166. Neal, *supra* note 160, at 223.

167. *Id.* at 225.

the merging parties. To the extent that the government relies on post-acquisition evidence to make its case that a transaction is anticompetitive, it must be able to demonstrate that post-close anticompetitive behavior was enabled by the transaction and not by external market dynamics unrelated to the merger (i.e., that such evidence is *relevant* to the claim that the merger caused competitive harm).[168] On the other hand, merging parties cannot simply rely on the non-occurrence of competitive harm after an acquisition's close to establish conclusively that a merger is free from section 7 concerns.[169] The non-existence of such evidence could simply result from the company's conscious decision to forestall raising prices, reducing output, or affecting innovation while the government is reviewing the merger (i.e., such evidence may have little *probative* value).[170] Later when the attention of the government is turned away from the transaction, that entity could then engage in anticompetitive practices.[171] Next, this article traces the evolution of Supreme Court case law relevant to this issue, discusses the lower courts' application of that law, and concludes with an analysis of the role post-acquisition evidence should play in future challenges.

1. Evolution of Supreme Court Case Law

The role of post-acquisition evidence in merger challenges evolved over the course of several decades of Supreme Court opinions, starting with the decision in *du Pont*.[172] In *du Pont*, the Supreme Court relied heavily on post-acquisition evidence to support its holding that the relationship between du Pont and GM represented an incipient violation of the antitrust laws.[173] The Supreme Court concluded that post-acquisition evidence tended to prove that the stock relationship between du Pont and GM enabled competitive harm, specifically holding that du Pont used its stock position to gain favorable contracts with GM.[174] After *du Pont*, it appeared that the government would be able to rely upon post-acquisition events as

168. *See, e.g.*, *Gen. Dynamics Corp.*, 415 U.S. 486; *Consol. Foods Corp.*, 380 U.S. 592.

169. *See, e.g.*, Procter & Gamble Co., 386 U.S. at 577.

170. *Id.*

171. *Id.*

172. *See E.I. du Pont de Nemours*, 353 U.S. at 597-98.

173. *Id.*

174. *Id.* at 606.

nearly conclusive, probative evidence of whether a closed transaction raised competitive concerns. During the subsequent decade, the Court refined the *du Pont* rule by raising evidentiary barriers, thus limiting the cases in which the parties in merger litigation can rely on *ex post* evidence to support an incipiency challenge.[175]

Following *du Pont*, the Supreme Court decided *FTC v. Consolidated Foods Corp.* ("*Consolidated Foods*"),[176] which, although professing to follow the *du Pont* reasoning, confused the rule about the role of post-acquisition evidence in section 7 claims.[177] In *Consolidated Foods*, the Court reviewed a merger that had closed thirteen years prior to the FTC bringing suit to unwind it.[178] The court of appeals relied almost exclusively on post-acquisition evidence to conclude that the merger did not raise competitive problems.[179] Citing the lack of substantial changes in market structure and the absence of competitive harm after close (e.g., no price increases), the lower court held that evidence demonstrating the non occurrence of anticompetitive effects after the close of the transaction was sufficient to negate an alleged violation of section 7.[180]

The Supreme Court disagreed.[181] In a somewhat convoluted opinion, the Court first held that the court of appeals gave too much weight to the post-acquisition evidence in the case.[182] The court reasoned that "[p]robability of the proscribed evil is required . . . . If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time" until the regulators stopped looking.[183] After the regulators turned their collective attention from the review of the transaction, the Supreme Court assumed, that firm would be free to act anticompetitively.[184]

175. *See* discussion of United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974), *infra* pp. 72-74.

176. *Consol. Foods Corp.*, 380 U.S. 592.

177. *Id.*; *see also* United States v. Cont'l Can Co., 378 U.S. 441 (1964).

178. *Consol. Foods Corp.*, 380 U.S. at 593.

179. *Id.* at 598.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Consol. Foods Corp.*, 380 U.S. at 598. One must truly wonder whether the Supreme Court's concerns are as substantial as they suggest. If the concern

However, after chastising the court of appeals for relying too heavily on post-acquisition evidence to reach its decision, the Supreme Court itself re-examined the post-close evidence in the record and concluded that, in fact, "the post-acquisition evidence . . . tend[ed] to confirm, rather than cast doubt upon, the probable anticompetitive effect" of the merger.[185] The Court then went on to describe, in great detail, the post-merger competitive problems that followed the close of the transaction, concluding that such evidence demonstrated a violation of section 7.[186]

Adding further confusion to the role and weight of post-acquisition evidence, Justice Stewart's concurrence advocated for more express reliance on such evidence in section 7 cases.[187] Post-acquisition evidence, reasoned Justice Stewart, is "the best evidence available to determine whether the merger will distort market forces in [an] industry."[188] The holding in *Consolidated Foods* appeared to follow the *du Pont* rule in that the government can rely on post-acquisition evidence of anticompetitive effects in the market to establish a violation, while, on the other hand, suggested that the merging parties cannot cite the lack of competitive harm after the acquisition's close to rebut the government's case.[189]

Two years later, in *FTC v. Procter & Gamble Co.*,[190] the Supreme Court reversed the Court of Appeals for the Sixth Circuit's decision holding that the government failed to meet its section 7 burden when it challenged the merger between Procter & Gamble ("P&G") and Clorox.[191] In 1957, P&G acquired Clorox; the combination integrated two companies that did not compete but offered complementary products (P&G offered a range of household products; Clorox was the leading liquid bleach manufacturer).[192] The Court held that P&G's

is truly that once a merger closes and the agencies conclude their review under the Clayton Act that the combined entity acts anticompetitively, the government can certainly challenge the conduct under section 2 of the Sherman Act. *See* 15 U.S.C. § 2.

185. *Consol. Foods Corp.*, 380 U.S. at 598.

186. *See id.* at 598-601.

187. *See id.* at 605-06 (Stewart, J., concurring).

188. *Id.* at 606 (Stewart, J., concurring).

189. *See E.I. du Pont de Nemours*, 353 U.S. 586; *see also Consol. Foods Corp.*, 380 U.S. 592.

190. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

191. *Id.* at 570.

192. *See id.* at 570-73.

acquisition of Clorox "may substantially reduce the competitive structure of the [liquid bleach] industry by raising entry barriers" and by eliminating "potential competition" between P&G and Clorox.[193] In the eyes of the Court, the industry already was oligopolistic; P&G's acquisition of Clorox would inhibit smaller firms from competing because given P&G's market dominance it would be substantially easier for P&G than for smaller competitors to build the Clorox brand.[194] Also, P&G had access to a strong distribution network that would disadvantage smaller rivals.[195]

P&G argued that there was no evidence that the company had engaged in any anticompetitive practices in the nine years after the merger closed: prices had not increased, and P&G was unable to increase its market share for four years (despite its access to a greater advertising budget and stronger distribution channels).[196] The Court disagreed, discounting the fact that the government could not produce evidence demonstrating post-acquisition harm.[197]

Although Justice Harlan concurred, he viewed differently the utility and probative value of post-acquisition evidence in a section 7 case.[198] He concluded that "[t]he value of post-merger evidence seems more than offset by the difficulties encountered in obtaining it."[199] He believed that post-acquisition evidence had little relevance in a section 7 analysis irrespective of which party proffered it. Justice Harlan reasoned that:

> [D]ependence on post-merger evidence would allow controls to be evaded by the dissimulation of market power during the period of observation. For example, Procter had been aware of the [section] 7 challenge almost from the date of the merger, and it would be unrealistic, so reasoned the Commission, to assume that market power would be used adversely to competition during the pendency of the proceeding.[200]

Likewise, Harlan believed that courts should afford little

193. *Id.* at 578.
194. *Id.*
195. *See id.* at 574.
196. *Procter & Gamble Co.*, 386 U.S. at 576-77.
197. *Id.* at 576.
198. *Id.* at 593 (Harlan, J., concurring).
199. *Id.* (Harlan, J., concurring).
200. *Id.* at 591-92 (Harlan, J., concurring).

weight to post-merger evidence tending to demonstrate subsequent anticompetitive behavior, concluding that "post-merger evidence [is] generally irrelevant and proper only in the unusual case in which the structure of the market has changed radically since the merger . . . . Market structure changes, rather than evidence of market behavior, were held to be the key to a [section] 7 analysis."[201] Justice Harlan noted that "the need for businessmen to be able to make at least some predictions as to the legality of their actions when formulating future market plans" militated against the use of post-acquisition evidence in analyzing mergers.[202] Allowing the government to rely on changes in post-close behavior as a basis to challenge mergers potentially could chill the market, making it less likely that businesses would engage in merger activity with knowledge that the government would monitor their behavior following close.[203]

The Court adopted Justice Harlan's position in *United States v. General Dynamics Corp.*[204] In that case, the Court held that evidence of the combined entity's inability to exercise market power in the post-close market is probative to the extent that it explains objectively the structure of the market.[205] To reach its decision that the competitive environment in the coal industry had changed since the time of the acquisition of Material Service Corporation by United Electric, the Supreme Court concluded that the district court appropriately relied on post-acquisition evidence.[206] Subsequent to the acquisition's completion, the industry's market structure had changed swiftly, lessening the competitive significance of the combined entity's coal reserve.[207] In addition, the market influence of coal suppliers diminished in the time following the merger, with large utilities becoming the parties' major customers and forcing coal suppliers to enter into long-term contracts with terms highly favorable to the utilities (i.e., exhibiting characteristics of a power buyer market).[208]

The Court held that such post-acquisition evidence is in-

201. *Id.* (Harlan, J., concurring) (internal citation omitted).
202. *Procter & Gamble Co.*, 386 U.S. at 592-93 (Harlan, J., concurring).
203. *See id.*
204. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).
205. *Id.* at 506.
206. *Id.*
207. *Id.* at 498-501.
208. *Id.* at 500.

deed probative of the combined firm's power to influence the market, because such conditions were beyond the control of the parties:

> Such evidence could not reflect a positive decision on the part of the merger companies to deliberately but temporarily refrain from anticompetitive actions, nor could it reasonably be thought to reflect less active competition than that which might have occurred had there not been an acquisition in 1959. As the District Court convincingly found, the trend toward increased dependence on utilities as consumers of coal and toward the near-exclusive use of long-term contracts was the product of inevitable pressures on the coal industry in all parts of the country. And, unlike evidence showing only that no lessening of competition has yet occurred, the demonstration of weak coal resources necessarily and logically implied that United Electric was not merely disinclined but unable to compete effectively for future contracts.[209]

Thus, in *General Dynamics*, the Court clearly retreated from the rules set forth in *Consolidated Foods* and *du Pont,* holding that the government cannot argue that evidence of post-merger competitive harm was probative in a section 7 claim, while at the same time denying the parties the opportunity to rely upon such evidence to demonstrate that the merger was benign:

> [T]he 'time of suit rule' coupled with the limited weight given to post-merger evidence of no anticompetitive impact tends to give the Government a 'heads-I-win, tails-you-lose' advantage over a [section] 7 defendant: post-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded 'too much weight.'[210]

General Dynamics was the last Supreme Court case to consider fully the issue of the role of post-acquisition evidence in merger analysis. Congress passed the HSR Act less than two years later, substantially reducing the number of post-close challenges.[211] As a result, only a few lower court decisions have considered the appropriate role of post-acquisition

209. *Id.* at 506.
210. *Gen. Dynamics Corp.*, 415 U.S. at 505 n.13.
211. *See* 15 U.S.C. § 18a.

evidence since the enactment of the HSR Act.[212]

2. Lower Court Opinions

The primary decisions following *General Dynamics* have adhered to the reasoning of that case closely. In 1991, a district court in the Eighth Circuit decided the *United States v. Archer-Daniels-Midland Co.* ("*ADM*")[213] case, conforming to the general principles set forth in *General Dynamics.* In *ADM,* the court concluded that to the extent that the parties intend to rely on evidence about the post-close market, and the market exhibits "significant factors that are not, and cannot be, controlled by defendants," reliance on such evidence is legitimate.[214] In *ADM*, the court could properly rely on post-acquisition evidence because the events could not be "manipulated by ADM and other HFCS [High Fructose Corn Syrup] producers because of the pendency of this suit."[215]

The court exclusively relied upon evidence concerning the post-close market structure and ignored the behavioral evidence (i.e., evidence of price increases or output reductions) proffered by the parties.[216] It examined the nature of pricing in the relevant industry (HFCS pricing was kept secret),[217] the negotiation power of the buyers (the buyers, like Coca-Cola, were traditional "power buyers" with significant ability to control suppliers like ADM),[218] and the frequency and magnitude of transactions (infrequent and large).[219] Based upon that record, the court concluded that after the acquisition, the combined entity did not have the power to influence pricing.[220] The *ADM* decision followed closely the *General Dynamics* rule that only market structure and not the parties' behavior can be admitted as evidence.

United States v. Syufy Enterprises ("*Syufy*"), a 1990 decision by the Ninth Circuit Court of Appeals, also relied exclu-

212. *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991).

213. *Archer-Daniels-Midland Co.*, 781 F. Supp. 1400.

214. *Id.* at 1422.

215. *Id.*

216. *See id.* at 1422-23.

217. *Id* at 1416.

218. *Id.* at 1418-20.

219. *Archer-Daniels-Midland Co.*, 781 F. Supp. at 1422-23.

220. *Id.* at 1423.

sively upon post-acquisition evidence to deny a post-close challenge under section 7.[221] *Syufy* involved a series of acquisitions by a movie theater complex owner resulting in the acquisition of 100 percent of all first-run movie theaters in Las Vegas, Nevada.[222] In concluding that the series of transactions raised no concerns under section 7, the court set forth what it reasoned were conclusive facts based on the market structure rather than the behavior of Syufy. According to the court, immediately following Syufy's acquisition, a major movie distributor entered the market and captured more than fifty percent of the market within only a few years, demonstrating that Syufy did not have long-term market power because its market share declined so rapidly.[223]

As the court in *ADM,* the *Syufy* court relied on post-acquisition market structure—rather than on post-acquisition behavior—to conclude that a transaction did not raise competitive concerns.[224]

3. Observations Concerning the Appropriate Role of Post-Acquisition Evidence

The government, the merging parties, and the courts may be tempted to rely on post-acquisition evidence to make their respective cases under section 7. Thus, where competition has declined significantly, the government will point to this as conclusively establishing that a transaction was anticompetitive and harmful to the market.[225] On the other hand, merging parties will argue that, after the transaction, prices have not increased or innovation has remained robust in support that the merger did not affect competition.[226]

Post-acquisition evidence is often obvious (e.g., prices have gone up following a merger), but at the same time, it can

221. *Syufy Enters.*, 903 F.2d 659.

222. *Id.* at 662.

223. *Id.* at 665.

224. *See id.* at 664, 666-67. *Syufy* and *ADM* also reflect the changing nature of merger analysis. The courts, following *General Dynamics*, began to analyze transactions and their effects more thoroughly. Rather than concluding that increased concentration meant that a merger was anticompetitive, the courts instead looked beyond concentration statistics to consider whether a concentration contributed to a company's ability to exercise market power and whether the merger would harm consumer welfare. *See* discussion *supra* note 71.

225. *See Procter & Gamble Co.*, 386 U.S. at 576-77.

226. *See id.*

be problematic for several reasons. The mere occurrence or non-occurrence of an event does little to demonstrate causation.[227] Even if the issue of causation can be resolved, a more fundamental question remains: what are the consequences if the acquisition was the cause of anticompetitive behavior? Section 7 is a predictive statute and only acquisitions with probable adverse effects on competition should fall within the ambit of the statute.[228] Solely because an effect looking like anticompetitive behavior occurred does not mean that it was initially, *ex ante*, likely to happen or predictable at the time of the merger. Thus, the relevance of post-acquisition evidence is minimal, unless the government can demonstrate that post-close events were more than just a fortuitous result of a transaction that was unlikely to lessen competition.[229]

As Justice Harlan noted in his *Procter & Gamble, Co.* concurrence, section 7 demands a predictive, rather than a retrospective, analysis.[230] To maintain stability in markets, businesses must "be able to make at least some predictions as to the legality of their actions when formulating future market plans."[231] As a former chairman of the FTC stated:

> Conditional clearance of mergers pending postmerger developments is anathema to American antitrust because of both the market effects of this approach and the institutional arrangements in this country for review of mergers. As to market effects, there are many problems with reliance on postmerger evidence and forceful reasons why a transaction should not become illegal on the bases of postacquisition evidence. Some facts that could be developed after the merger are unreliable because they are within the control of the merging parties. For example, the fact that prices did not increase in the market after the merger may only reflect the fact that the combined company decided to forego price increases for a while—until the government stopped watching. Also, some things that might happen shortly after a merger—for example, the exit from the market of rival firms—would have been unpredictable at the time the transaction was entered into

227. *See* discussion *supra* Part III.A.2.

228. *See Brown Shoe Co.*, 386 U.S. at 317-18.

229. See *infra* note 232 for further discussion of the appropriateness of such post-close evidence.

230. *Procter & Gamble Co.*, 386 U.S. at 584, 599.

231. *Id.* at 592.

> and therefore unfair to charge against the interests of the merging parties. Finally, it would be counterproductive from the point of view of antitrust policy to discourage companies from taking procompetitive actions after the merger, out of fear that the companies would thereby convert what was legal to an illegal transaction.[232]

Case law concerning the admissibility and probative value of post-acquisition evidence was developed in an era when merger analysis was quite different. Since the mid-1970s, the antitrust agencies' analysis of whether mergers raise competitive problems has changed significantly. In cases decided during the 1950s and 1960s, the Supreme Court was willing to consider even a minimal delta in the Hircsh-Herfendahl Index ("HHI")[233] as a sign of an incipient competitive problem.[234] Just as the courts in the 1950s and 1960s simply relied on changes in market concentration to find a section 7 violation, so did those courts reflexively consider post-close evidence, including subsequent price or market share increases, as near conclusive evidence that a merger

232. Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L. J. 195, 223-24 (1992). Former Chairman Pitofsky's rationale echoes a Harvard Law Review comment published thirty years earlier:

> [W]hen the acquirer engages in post-acquisition predatory pricing of the product of the acquired company, it may seem easier and more appropriate to invalidate the merger at that point, but the proposition is not without difficulties. In the first place, problems are raised as to the relevance of post-acquisition evidence and the date as of which the legality of an acquisition is to be tested. If a merger would have been upheld at any time up to the occasion of predatory pricing, this is the equivalent of saying, from a legal standpoint, that expansion by acquisition was no more objectionable than expansion by building. If a company expanded by building and then indulged in predatory pricing, it would not be subject to a rule of automatic divestiture. There seems little more reason to apply such a rule when growth came by an otherwise unobjectionable acquisition. In either event, a section 2 Sherman Act proceeding against the firm for predatory pricing would permit divestiture when it was appropriate or necessary for the restoration of competitive conditions. There does not seem to be a good case for abandoning such flexibility in favor of an automatic rule.

Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1347 (1965).

233. HHI is the standard index used to measure the concentration in a market, and is calculated by summing the squares of the parties' market shares.

234. *See* 1 AMERICAN BAR ASS'N SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 333 (Debra J. Pearlstein, ed., 5th ed. 2002) (stating "[t]he early cases applying Section 7 interpreted the provision to prohibit even small increases in concentration in relatively unconcentrated markets").

presented a competitive problem.[235]

The law as it stands in 2004 suggests that the role of post-acquisition evidence ascribed by courts in the 1950s and 1960s is outdated. Since the early 1990s, merger review is largely guided by the Chicago School inspired *1992 Horizontal Merger Guidelines* ("*1992 Merger Guidelines*").[236] Under the *1992 Merger Guidelines*, courts and the antitrust agencies undertake a more rigorous analysis into a merger's effects on a market, rather than simply and reflexively looking at market concentration measured by HHI deltas when deciding whether a merger raises a section 7 problem.[237] In determining whether a transaction likely violates section 7, the antitrust agencies examine the entire structure of a market, focusing on whether its characteristics post-close would facilitate anticompetitive behavior.[238]

Likewise, when considering post-acquisition evidence in a challenge to a closed merger, the courts and antitrust agencies cannot solely rely on evidence that following a merger, prices have increased, that the pace of innovation has slowed, or that output has decreased, to attribute anticompetitive effects to a merger.[239] Instead, to the extent that a court considers post-acquisition evidence in its section 7 review of consummated mergers, the scope of admissible evidence must be extremely narrow and demonstrate that (1) any alleged anticompetitive effects are *caused* by a merger, rather than by subsequent and unrelated changes in the market, and (2) such effects are not merely short-term, transitory concerns. Below, this article highlights some of the pertinent categories of post-acquisition evidence and discusses how courts and antitrust agencies should use such evidence to support or rebut a claim that a merger caused a competitive problem.

Entry Evidence. Both the government and the merging

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235. *See, e.g., Consol. Foods Corp.*, 380 U.S. at 592.

236. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, 1992 HORIZONTAL MERGER GUIDELINES [hereinafter *1992 Merger Guidelines*], *at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html. (*revised* April 8, 1997) (revising section 4 to address "Efficiencies") (last visited Oct. 24, 2004).

237. *Id.* § 0.1-.2 (setting forth the "Purpose, Underlying Policy Assumptions and Overview" of the *1992 Merger Guidelines*).

238. *Id.*

239. *See, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486, 506 (1973).

parties should be able to rely upon post-acquisition evidence of market entry to support their claims. As in *Syufy,* the merged parties can use evidence of actual entry or demonstrate that post-close entry by new competitors is "easy," to support their claim that a closed merger could not harm competition.[240] Just as under the *1992 Merger Guidelines* examples of recent entry support the conclusion that a merger does not raise competitive problems, evidence of entry into a market following the close of a merger should provide near-conclusive evidence that a merger did not and could not adversely affect market conditions.[241] Where entry occurred, it follows that the merged entity could not sustain a long-term negative impact on the market. Of course, evidence of actual entry should not be required. Where the merged parties can demonstrate even in the absence of actual entry that hypothetical entry would be timely, likely, and sufficient, such evidence should also rebut a claim that a merger violates section 7.[242] On the other hand, the government cannot rely simply on the absence of entry as evidence that a merger raises a competitive problem. After all, the merger could have created efficiencies as well as a superior product.[243] Instead, the government must demonstrate that such entry is not easy because the market would not support entry even if the combined entity attempted to exercise market power.[244]

Price, Innovation, and Output Evidence. By itself, evidence of a post-close change in price should not be sufficient to show an anticompetitive effect, although under older case law, such evidence often was the focus of a court's analysis.[245] Instead of simply relying on evidence of such changes in price, innovation or output, a fact-finder must determine the reasons behind them. Even though proof of bad acts, including coordinated pricing, output reduction or decrease in the pace of innovation, can support a claim of market power, this evi-

240. *See Syufy Enters.*, 903 F.2d at 664-66.

241. *See 1992 Merger Guidelines*, *supra* note 236 at § 3. Evidence of actual entry would, of course, demonstrate that the merged entity could not sustain an increase in price, as additional firms would find it profitable to enter and charge less than the combined entity, driving prices back down to a pre-merger competitive level. *Id.*

242. *See id.*

243. *See id.* § 4.

244. *See id.*

245. *See, e.g.*, *Consol. Foods. Corp.*, 380 U.S. at 598.

dence alone is not probative without further indication that (1) the market cannot defeat such bad acts in the long-term, and (2) the merger facilitated such bad acts (i.e., the "causation" issue).[246] Bad acts alone do not demonstrate that a merger caused competitive imbalance.

Evidence About Efficiencies. Older case law was developed at a time when efficiencies had no role in section 7 merger analysis.[247] Today, the situation is different. Under the *Merger Guidelines*, the agencies and the courts must consider evidence of merger-specific efficiencies in determining whether a combination violates section 7.[248]

Thus, in a post-close challenge, the parties also must be able to introduce evidence that the merger resulted in cost savings, increased ability to develop products, better distribution, or ability to manufacture best-of-breed products using the combined technologies of both parties.[249] Although such evidence by itself cannot save an otherwise anticompetitive merger, it is probative in a post-close challenge under section 7.[250]

C. Appropriate Remedial Reach

The antitrust laws traditionally favor divestiture to remedy an illegal merger's competitive concerns.[251] Section 11(b) of the Clayton Act provides that the FTC, if it finds a violation of section 7, shall "issue . . . an order requiring [respondent] to cease and desist from such violations, and

246. *See generally Syufy Enter.*, 903 F.2d at 665.

247. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (holding that "the effect of [a merger] 'may be substantially to lessen competition'" in a market, it "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial").

248. *See 1992 Merger Guidelines*, *supra* note 236, § 4 (revised in 1997 to include section 4 addressing the role of efficiencies in merger review analysis); *see also, e.g.*, United States v. Rakford Mem'l Corp., 717 F. Supp. 1251 (N.D. Ill. 1990); United States v. Ivaco, Inc., 704 F. Supp. 1409 (W.D. Mich. 1989).

249. *See generally* Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729 (1999) (discussing the 1992 and 1997 revisions to the guidelines and the way the courts now consider efficiencies in competitive effects analysis).

250. *See 1992 Merger Guidelines*, *supra* note 236, § 4.

251. *See, e.g.*, *In re* Ekco Prod. Co., 65 F.T.C. 1163, 1217 (1964) (stating "while divestiture is normally the appropriate remedy in a Section 7 proceeding, on occasion it may possibly be impracticable or inadequate, or impose unjustifiable hardship – which underscores the importance of the Commission's having a range of alternatives in its arsenal of remedies").

divest itself of the stock, or other share capital, or assets . . . ."[252] The Supreme Court recognized that even though divestiture is "the most drastic" of available merger remedies, it nevertheless is "the most effective" to restore pre-merger levels of competition.[253] In *Ford Motor Co. v. United States*,[254] the Supreme Court held that section 7 "relief must be directed to that which is 'necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute' . . . or which will 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'"[255] Moreover, relief must not be punitive but must be designed to "redress the violations" and "to restore competition."[256] As explained by the Court in *United States v. American Tobacco Co.*,[257] "three dominant influences must guide" the analysis of the appropriate remedy following a determination that the antitrust laws were violated:

> 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition . . . .[258]

Fashioning a divestiture package after the close of a merger is difficult. Where two companies have combined their business operations and have begun the process of assimilating product lines, combining real estate, shedding duplicative manufacturing capabilities, or aggregating intellectual property, a post-close order of divestiture may be

252. 15 U.S.C. § 21(b) (2000).

253. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

254. Ford Motor Co. v. United States, 405 U.S. 562 (1972).

255. *Id.* at 573 n.8 (alteration in original) (citations omitted).

256. *Id.* at 573.

257. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

258. *Id.* at 185. Professor Areeda has stated:

> [F]ederal antitrust has not commonly used dissolution [as opposed to divestiture] as a remedy in simple merger cases, and it would certainly be an excessive penalty for an unlawful acquisition and nothing more. Rather, dissolution has generally been reserved for [section] 2 cases breaking large firms up into several component parts whose pieces do not reflect simple acquisitions that the firm had made in the recent past.

4A PHILLIP E. AREEDA *et al.*, ANTITRUST LAW ¶ 990c2, at 103 (1998) (citations omitted).

difficult, costly, punitive to the business involved in the merger, and, overall, detrimental to customers. Congress enacted the HSR Act to alleviate many of the problems associated with post-close divestitures.[259]

As a result, following the passage of the HSR Act, there has been little opportunity to develop case law concerning the appropriate scope of relief allowed in post-consummation challenges because the HSR Act largely eliminated the need to conduct post-close review. Next, this article discusses some of the more prominent Commission and court decisions on the topic of the appropriate scope of these older divestiture orders, and then analyzes why this older case law is ill equipped to accommodate post-consummation challenges in today's economy.[260]

a. Historical Case Law Regarding Remedial Scope of Section 7

1. In re Diamond Alkali Co.[261]

In *Diamond Alkali Co.*, the Commission forced an acquiring company to completely exit a market in an attempt to restore the pre-acquisition competitive state of that market.[262] The Commission concluded that Diamond Alkali should divest the cement processing plant it had acquired from Bessemer Limestone and Cement Co. ("Bessemer").[263] Prior to this acquisition, Diamond Alkali manufactured cement in two plants.[264] Following the Bessemer acquisition, Diamond Alkali discontinued cement production and dismantled the machinery at both of its internal plants because they had become obsolete and inefficient.[265] Thus, after the acquisition, Diamond Alkali confined its manufacturing operations to the Bessemer structures it had acquired.[266]

Immediately following the merger's close, the Commission issued a complaint challenging the transaction pursuant

259. H.R. REP NO. 94-1373, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2643.
260. *See* discussion *supra* Part II.C.2.
261. *In re* Diamond Alkali Co., 72 F.T.C. 700 (1967).
262. *See id.*
263. *Id.* at 740.
264. *Id.*
265. *Id.*
266. *Id.*

to section 7 and alleging that the cement processing industry had become too consolidated as a result of the Bessemer acquisition.[267] After finding a violation, the Commission was confronted with the issue of how to devise a remedy, which was difficult in light of the fact that Diamond Alkali had already dismantled its own internal competitive cement production facilities. The Commission framed the issue as follows:

> These facts present for consideration a novel question, namely, having found a violation of amended Section 7, to what extent can the Commission devise an effective remedy; and what should that remedy be, where the acquiring firm has divested itself of the preacquisition assets corresponding to the particular assets whose acquisition gave the merger its anticompetitive character. In short, what can the Commission do when there is no longer in being duplicate manufacturing facilities which upon an order of divestiture could form the basis for two viable firms and thus a restoration of competition.[268]

Diamond Alkali contended that "ordering divestiture would be penal and pointless since it would merely substitute one competitor for another and that therefore it should be permitted to retain the Bessemer assets."[269] According to Diamond Alkali, to order the divestiture of the Bessemer assets on these facts would ultimately harm consumers, as it would replace the Diamond Alkali/Bessemer combination of a healthy company (Diamond Alkali) and state-of-the-art cement processing facilities (Bessemer) with an independent Bessemer entity lacking the resources to effectively compete.[270] Diamond Alkali stated that it would exit the market

267. *Diamond Alkali Co.*, 72 F.T.C. at 704-05.

268. *Id.* at 741. *See also In re* Crown Zellerbach Corp., 54 F.T.C. 769 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961). In *Crown Zellerbach*, the Commission ordered the respondent to divest not only the assets it acquired as a result of the acquisition of St. Helens Pulp & Paper Co., but also:

> [S]o much of the plant machinery, buildings, improvements, and equipment of whatever description that has been installed or placed on the premises of the St. Helens plant by respondent as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition.

Id. at 808.

269. *Diamond Alkali Co.*, 72 F.T.C. at 741.

270. *See id.*

if the Commission ordered it to divest the Bessemer assets, as the company did not have the ability to restart its internally developed cement processing capabilities that it had shut down following the Bessemer acquisition.[271]

Remarkably, although it accepted Diamond Alkali's contention, the Commission concluded that Diamond Alkali had to divest the Bessemer plant despite the fact that doing so did not restore a pre-acquisition competitive balance in the market.[272] The Commission recognized that "ordering divestiture is a 'pig in a poke' because we know we have an effective competitor now on the scene, and we have no guarantee that anyone brought in as a substitute for Diamond Alkali would measure up to its level of effectiveness."[273] Nevertheless, the Commission concluded that Diamond Alkali would remain on the fringe of the market—a potential competitor to Bessemer—following the divestiture of the Bessemer assets.[274] In the eyes of the Commission, having Bessemer in the market and Diamond Alkali as a potential competitor was closer to the pre-acquisition competitive state of the market, rather than simply having Diamond Alkali control the Bessemer assets.[275]

Diamond Alkali demonstrates clearly the problematic nature of post-close challenges. The Commission recognized that its order was imperfect.[276] The Commission's opinion went to great lengths to highlight that it pleaded with Diamond Alkali to propose alternative relief that would restore the pre-acquisition competitive balance in the market; Diamond Alkali failed to do so.[277] Thus, according to the Commission, it was left with the choice to either (1) do nothing and allow the section 7 violation to continue, or (2) devise its own remedy to alleviate the competitive concern.[278] It chose the latter alternative, while recognizing the decision's shortcomings.[279]

271. *Id.*
272. *Id.* at 746-47.
273. *Id.* at 747.
274. *Id.* at 749.
275. *See Diamond Alkali Co.*, 72 F.T.C. at 749.
276. *Id.* at 743, 746-47.
277. *Id.* at 744-47.
278. *Id.* at 751.
279. *Id.*

2. In re Ekco Products Co.[280]

Ekco further demonstrates the problems with the post-close fashioning of relief. In *Ekco*, the Commission concluded that a series of acquisitions by Ekco Products Co. ("Ekco") violated section 7 in the market for commercial meat-handling equipment.[281] Over the course of several years, Ekco had acquired two sets of assets.[282] In 1954, Ekco acquired McClintock, which was the only company to manufacture commercial meat-handling equipment at the time.[283] Ekco had no presence in the market.[284] Following Ekco's McClintock acquisition, Blackman entered the market, and several years later, Ekco acquired Blackman's commercial meat-handling equipment assets as well.[285] The Commission concluded that both transactions violated section 7 on a conglomerate theory (the McClintock acquisition provided Ekco with a portfolio of assets in the commercial meat-handling market that made it more difficult for others to compete) and a horizontal theory (the Blackman assets directly competed with Ekco's assets acquired from McClintock).[286]

The Commission noted that divestiture would be difficult to order because (1) the McClintock assets had been commingled with existing Ekco assets, and (2) Ekco had dissolved completely the Blackman assets.[287] Thus, the Commission determined that it was impossible to restore the market to its pre-acquisition condition and, instead, fashioned an alternative remedy to restore competition in the market.[288] The Commission ordered that (1) Ekco could not acquire another company in the commercial meat-handling equipment market for five years, and, more importantly, (2) Ekco would be required to divest itself of the McClintock assets.[289] Much like the order in *Diamond Alkali*, the Commission's order in *Ekco* effectively took the acquiring company completely out of the

280. *In re* Ecko Prod. Co., 65 F.T.C. 1204 (Apr. 21, 1964).
281. *Id.* at 1221 (finding a violation of section 7 and ordering additional proceedings for purposes of devising appropriate relief).
282. *Id.* at 1204-06.
283. *Id.* at 1204-05.
284. *See id.*
285. *Id.* at 1205-06.
286. *Ecko Prod. Co.*, 65 F.T.C. at 1220-21.
287. *Id.* at 1221-23.
288. See *id.* at 1228-30, for Commission's opinion accompanying final order.
289. *Id.* 1228-30.

market.[290] The Commission reasoned that because the McClintock acquisition violated section 7 (on the conglomerate theory), it was appropriate to require Ekco to divest those assets.[291] The fact that Ekco had already dissolved the Blackman assets and would not be an active market participant following the divestiture largely was irrelevant according to the Commission, as the original McClintock acquisition, even standing alone, would have violated the Clayton Act.[292]

3. Reynolds Metals Co. v. FTC[293]

In *Reynolds*, the court of appeals rejected the Commission's decision to require divestiture of assets beyond those that the company had acquired.[294] The Commission successfully challenged the acquisition of Arrow Brands, Inc.—a small aluminum foil company that manufactured decorative foil flowers—by Reynolds Metals ("Reynolds"), the largest firm in the aluminum foil industry.[295] Prior to the merger, Arrow operated out of leased space.[296] Following the merger, Reynolds constructed a new plant for its Arrow subsidiary and purchased equipment for that facility.[297] Following these integration activities, the Commission brought suit challenging the merger as anticompetitive.[298] The Commission found that the transaction violated section 7 and, as part of the Order for Relief, required Reynolds to divest the Arrow assets and the newly constructed plant plus related assets.[299]

The court of appeals affirmed the Commission's conclusion that Reynolds's acquisition of Arrow was anticompetitive and illegal under section 7.[300] However, the court concluded that the portion of the order that required the divestiture of the new facility was overly harsh, punitive, and inconsistent

290. *Id.* at 1227-28.
291. *Id.* at 1228-30.
292. *Ecko Prod. Co.*, 65 F.T.C. at 1225-26.
293. Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).
294. *Id.* at 230-31.
295. *Id.*
296. *Id.* at 230.
297. *Id.*
298. *Id.*
299. *Reynolds Metals Co.*, 309 F.2d at 231.
300. *Id.* at 223.

with the purpose of section 7.[301] The court concluded that the remedy "should be decreed as to property obtained by such an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition"[302] and should exclude assets created after the acquisition was completed.[303]

b. Remedies Case Law Is Outdated

Case law concerning remedies to redress section 7 violations is not well-suited for many transactions in today's economy. The Commission must consider the need to devise a relief package that successfully restores competition to its premerger levels,[304] and as noted by the FTC in its 1999 divestiture study, "divestiture of an on-going business is more likely to result in a viable operation than is divestiture of assets selected to facilitate entry."[305]

Pre- and post-close relief orders, however, are substantially different. It is far easier to order the divestiture of an ongoing business prior to the combination of business operations.[306] On the other hand, "eggs" are often scrambled following close, making it difficult to determine the proper scope of assets to attribute to the acquired business: "[s]ome mergers

301. *Id.* at 230-31.

302. *Id.*

303. *Id.*

304. *See, e.g.*, *In re* Automatic Data Processing, Inc., No. 9282 (F.T.C. 1996), *at* http://www.ftc.gov/os/1996/11/d9282cmp.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review). In *ADP*, the Commission brought suit challenging the consummated, non-HSR reportable acquisition of the assets of AutoInfo, ADP's only competitor in the salvage yard information services business. In that order, the Commission gave ADP a choice of divestiture options. ADP was required to divest an on-going business, but was allowed to choose to divest the entire AutoInfo business or ADP's competitive business, or to license one of those two businesses, including updates and improvements. *Id.*

In *In re* Monier Lifetile L.L.C., the Commission required that the parties would have Monier divest three concrete roofing facilities to a foreign competitor to provide competitive capabilities in three geographic markets where the Commission determined competitive vigor had been adversely impacted following the combination of business operations of Monier and its closest competitor Boral Ltd. The parties were also required to provide that competitor with assistance for six months following divestiture. *In re* Monier Lifetile L.L.C., No. 9290, (F.T.C. Complaint filed on Sept. 22, 1998) *at* http://www.ftc.gov/os/1998/09/moniercmp.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

305. *See* FEDERAL TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 10 (1999) [hereinafter DIVESTITURE STUDY], *at* http://www.ftc.gov/os/1999/08/divestiture.pdf (last visited Oct. 25, 2004).

306. *Id.* at 2.

result in the destruction of productive resources . . . . Other mergers result in the firing of employees because their knowledge is duplicative . . . . Even worse than the loss of particular elements of a business is the destruction of the organic nature of an ongoing business acquired in the merger."[307]

Where a transaction has already closed, simple divestiture may be impractical or impossible.[308] Therefore, case law properly provides that the Commission may devise alternative structural relief to restore an industry's pre-transaction competitive balance.[309] The Commission must have leeway to devise relief that ensures the restoration of the pre-merger state of competition. Doubtless, there are cases that require the divestiture of acquired assets and improvements.[310] For example, to ensure operating success following the divestiture, the FTC's study suggests that in addition to the divestiture of an ongoing business, the buyer may also receive, at a minimum, information to facilitate the transfer of the divested business, including rights to related technology and intellectual property, technical assistance from the seller, and employees with special know-how necessary to run the business.[311] As Kenneth Elzinga noted in his study of post-close relief:

> [I]n a dynamic market the reestablishment of firm B as it existed at the time of acquisition, some five or ten years later, may not make technological sense; restoration to premerger status might dictate an outmoded firm with no chance of survival. Second, it is not illogical to assume that if the firm B had not been acquired, it would have added certain improvements itself; thus restoration of firm B in a meaningful premerger sense requires that it be an improved firm B that is reestablished.[312]

This article does not dispute the conclusion that divestiture may be appropriate to restore the pre-merger competitive balance in an industry, and that often, in post-close chal-

307. *Id.*

308. *Id.*

309. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 366 U.S 316, 334 (1961).

310. *See, e.g.*, *Diamond Alkali Co.*, 72 F.T.C. at 704-05.

311. *See* DIVESTITURE STUDY, *supra* note 305.

312. Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 59 (1969).

lenges, structural relief must include improvements that the acquiring party made to the acquired assets or must include ancillary relief to ensure that the divestiture package represents a viable business. There are problems, however, with wholesale application of these principles to post-close relief orders in today's economy.

First, the historically strong presumption favoring divestiture fails to take into account the efficiencies that many mergers provide to enhance consumer welfare. In the 1960s and 1970s, when the bulk of the merger remedies case law developed, the courts and the antitrust agencies largely ignored the role of efficiencies in merger analysis.[313] Today, the courts more regularly consider efficiencies.[314] The role of efficiencies likewise should be highlighted when fashioning relief in consummated merger challenges. If it is possible to remedy a merger's problems without structurally altering the market or damaging efficiencies or enhancements to consumer wealth, the antitrust agencies and courts should consider alternative, non-structural (i.e., behavioral) relief that restores the lost competition while simultaneously maintaining a merger's enhancement to consumer welfare.[315]

313. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (holding that "the effect of [a merger] 'may be substantially to lessen competition'" in a market, it "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial").

314. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 234, at 347 & nn.187-90 (citing to prominent district court, appellate, and Commission decisions paying considerable attention to efficiencies likely to be generated when assessing the overall merits of a merger); *see also 1992 Merger Guidelines, supra* note 236 at § 4; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, REVISION TO SECTION 4 OF HORIZONTAL MERGER GUIDELINES, [hereinafter *1997 Merger Guidelines*], *reprinted in* 72 Antitrust & Trade Red Rep. (BNA) 359 (Apr. 10, 1997).

315. In a very recent decision from the Federal Trade Commission to clear a consummated merger without requiring relief, one of the significant issues facing the Commission was how to fashion effective post-close relief. As Commissioner Pamela Jones-Harbour observed: "[e]nthusiasm for justifiable enforcement must always be disciplined, however, by pragmatic considerations regarding the ability to achieve effective relief in a given case." Statement of Comm'r Pamela Jones-Harbour, *supra* note 7, at 4.

In *Genzyme,* the Commission struggled with several questions: how can one divide research and development efforts that have been merged? How can an abandoned research and development path be resurrected? How can intellectual property rights be effectively shared? At best, the Commission concluded, that such relief would lead to less than desirable solutions. Thus, Chairman Muris observed that remedy would be problematic. Ultimately Chairman Muris concluded, "[n]either litigation nor remedial order would likely benefit Pompe patients. To the contrary, litigation could adversely affect Gen-

Second, devising remedies that are practical and adequate, yet at the same time not punitive or harmful to the public, represents a colossal task in post-close challenges. Although the guiding principles are clear—remedies must restore the market to its pre-acquisition state without punishing the acquiring party—the preceding case-by-case analysis reveals that adhering to such principles is difficult.[316] As noted in the *Divestiture Study*, where companies commingle assets (as usually happens following close), it is difficult to determine where the assets of one party end and the other's begin.[317] It is even more challenging to devise a remedy that both maintains the integrity of the company required to divest the assets and includes a competitively viable set of assets for a prospective buyer.[318] Particularly in high-tech markets, it is often impossible to separate out the assets of the merged parties following close. In these industries, integration occurs rapidly. Moreover, the nature of intellectual property rights and standards makes structural relief difficult to devise.

Third, while divestiture might be the historically "preferred" remedy, it can actually harm the public interest.[319] In addition to eliminating any efficiencies generated by a merger, divestiture can damage the scale generated by a merger: to order divestiture—while creating an additional competitor in the market—ignores the fact that the scale serves the needs of customers. Mergers in networked industries illustrate this point. Ordering divestiture in a networked industry can lessen the appeal of the network by lowering the number of users in the network. By definition, a network increases utility and consumer welfare for existing users with the addition of each new one that enters the net-

zyme's incentives to spend on R&D and could disrupt the Novazyme research program." Statement of Chairman Timothy J. Muris *In re* Genzyme Corporation / Novazyme Pharmaceuticals, Inc. at 20 (2004), *at* http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review). The use of discretion in this decision offers a promising glimpse into the future: the Commission recognized in *Genzyme* that such post-close relief orders raise significant possibilities that the remedy may be worse for consumer welfare than the merger itself.

316. *See* discussion *supra* Part III.C.1.

317. *See* DIVESTITURE STUDY, *supra* note 305, at 1-3 & n.4.

318. *See id.*

319. *Id.* at 3-4, 11.

work.[320] Thus, unless the agencies order a behavioral remedy, the splitting of a network potentially lessens consumer value in the product and forsakes economic welfare. Likewise, divestiture of assets or facilities of a high-tech manufacturer, for example, may impact that manufacturer's ability to leverage technology from the divested product line to other product lines, possibly inhibiting the company's ability to innovate in adjacent markets.

Fourth, high-tech companies and products evolve rapidly, making the agencies task of crafting an appropriate remedy almost impossible. Two (or even one) years after a transaction closes, the products and/or assets of the acquired firm may be obsolete with the acquiring party moving the best-of-breed technology of the acquired party's assets to its own product line. For example, it would be difficult to devise a divestiture package in a high-tech hardware industry years after the two companies have assimilated their legacy designs into a single next-generation product line, incorporating the unique expertise of each party in the newly merged firm. Assuming that the assets of the acquired party still existed, they likely would be old and obsolete. To make a competitively viable business unit quite possibly would cost a colossal amount of money and would require significant mindshare and resources. This would create a tremendous inefficiency in the market, and quite possibly in the end, the divested business would be transitioned to a third party that could not successfully maintain the product's position in the market. In high-tech markets, where acquisitions of competitors are usually prompted by the desire to purchase and build upon a more promising technology and one set of assets is most likely inferior or all but abandoned, it is even less likely that these assets will be made viable, much less improved, in the hands of a third party with no prior experience with the technology.

Thus, the antitrust agencies should consider more aggressively non-structural relief to restore competition. Non-structural remedies often are more appropriate to cure competitive problems because such relief does not disrupt a merger's efficiencies and benefits to the parties and to the

320. *See* Susan Creighton and Perry Narancic, *Mergers & Acquisitions: Antitrust Issues in High-Tech and Emerging Growth Markets*, *in* 1122 PLI Corporate Law and Practice Course Handbook Series 753, 766 (1999).

consumers.[321] For example, in networked industries, divestiture *may* enable more effective competition but can also impede the establishment of industry standards or force the industry to choose a second-best alternative.[322] Thus, when choosing between divestiture and non-structural relief, the agencies should consider: the size of the network, the likelihood of post-merger competition within the network and from competing networks, the extent to which the merger creates significant economies of scale, and whether the efficiencies associated with the increased size of the network will be passed along to consumers, or instead, will be absorbed by the merged firm.[323] In the end, where it is likely that the network will achieve significant economies that ultimately will benefit consumers and competition the agencies should consider non-structural relief to preserve the vitality of the network rather than breaking it up.

In the recent *MSC.Software* litigation, the post-close consent order mandated, among other things, divesture of at least one clone copy of MSC.Software's current advanced Nastran software, including the source code, to one or two acquirers who had to be approved by the FTC.[324] This litigation highlights some of the more significant concerns associated with post-close relief in today's high-tech markets. The proceedings in *MSC.Software* cost the acquiring company millions of dollars, took more than a year to resolve, and resulted in a diminution in the competitive significance of MSC.Software's Nastran business unit.[325] While such an order may restore the pre-acquisition competitive balance in the

321. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (Winter 2001).

322. *See* Robert Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, Prepared Remarks at the Antitrust, Technology and Intellectual Property Conference, Berkeley Center for Law and Technology (Mar. 2, 2001), *at* http://www.ftc.gov/speeches/Pitofsky/ipf301.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

323. *See id.*

324. *See* Press Release, FTC, MSC.Software Settles FTC Charges by Divesting Nastran Software, (Aug. 14, 2002), *at* http://www.ftc.gov/opa/2002/08/mscsoftware.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

325. *See* Respondent MSC.Software Corporation's Pre-trial Brief and Proposed Conclusions of Law at 88-89, *In re* MSC.Software Corp., No. 9299 (F.T.C. July 1, 2002), *at* http://www.ftc.gov/os/adjpro/d9299/020701rmscptb.pdf (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

advanced Nastran market, it may also result in significant harm. Without the scale that MSC.Software previously achieved through aggressive internal growth, innovation can slow to the detriment of the product's users.[326] Pre-acquisition, MSC.Software was the dominant player in the market[327] and presumably did not need to expend tremendous resources competing against its two inferior rivals. Following the divestiture order, MSC.Software was required, in essence, to compete against far stronger rivals, possibly requiring the company to divert development funds to other competitive activities (for example, marketing) that do not provide added value to strategic development activities.

In addition, the relief secured in *MSC.Software* essentially requires the company to create either one or two competitors with the same technological capabilities and product features in order to remedy the harm caused by the company's decision to acquire two small and competitively disadvantaged market participants with arguably inferior and uncompetitive technology.[328] Such relief seems overly punitive. One must wonder whether the lengthy and costly proceeding and the resulting order will impair MSC.Software's ability to compete effectively, causing a reduction, instead of promotion, of competition.[329]

Similarly, in *Chicago Bridge*,[330] as of the time that this article went to press, the parties are continuing to litigate before the Commission the issue of whether the government has the authority to order certain relief to remedy an alleged competitive harm from an acquisition that closed more than two years ago.[331] In that litigation, the FTC commenced a section 7 action against Chicago Bridge, contending that the acquisition of the Engineered Construction and Water Divisions of Pitt-De Moines ("PDM") lessened competition in the mar-

326. *Id.* at 89, 89 n.74.

327. *See* Press Release, *supra* note 324.

328. *Id.*

329. *Id.*

330. *In re* Chicago Bridge & Iron Co., No. 9300 (F.T.C. filed Oct. 25, 2001); *at* http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

331. *See* Respondents' Appeal Brief at 52, *In re* Chicago Bridge & Iron Comp., No. 9300 (F.T.C. Aug. 8, 2003), *at* http://www.ftc.gov/os/adjpro/d9300/030808 respondentsappealbrief.pdf (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

ket for storage tanks for certain products like liquid nitrogen and liquid oxygen.[332] The Administrative Law Judge concluded that the two-year-old transaction raised competitive problems in the markets for certain of the tanks acquired by Chicago Bridge.[333] In order to provide an attractive set of assets to a prospective buyer, the Administrative Law Judge ordered the divestiture not only of the assets involved in the challenged transaction that were in these problematic markets, but also of other assets that are used to manufacture tank products outside of those competitively problematic markets.[334] The parties disagree as to whether this order is appropriately within the remedial reach of sections 7 and 11 of the Clayton Act, or instead, whether it is an undue retribution disallowed by the antitrust laws.[335] Consistent with the *Divestiture Study*, the critical question for the Commission to consider is whether the divestiture of the assets beyond those acquired is *essential* to the viability of the divested business unit.[336]

As the court emphasized in *Reynolds*, an adjudicator must analyze carefully whether divestiture should be ordered simply because it is the "preferred remedy."[337] In its brief to the Commission, Chicago Bridge argues that the Administrative Law Judge failed to consider evidence on the issue of the appropriate relief and instead just presumed that divestiture was appropriate.[338] Especially where, as in *Chicago Bridge*, the Commission seeks relief beyond mere divestiture of the assets that raise competitive problems to grant the requested relief, the fact-finder must conclude that such an order of divestiture is necessary to restore competition to its pre-acquisition levels, *and*, equally importantly, that there is a nexus between the divestiture of the additional assets and the section 7 violation.[339]

332. *See In re* Chicago Bridge & Iron Comp., No 9300, slip op. at 1-2 (F.T.C. filed October 25, 2001) *at* http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

333. *Id.* at 2.

334. *Id.*

335. *See, e.g.*, Respondent's Appeal Brief, *supra* note 331, at 52.

336. *See id.*

337. Reynolds Metals Co. v. FTC, 309 F.2d 223, 231 (1962).

338. *See* Respondents' Appeal Brief, *supra* note 331, at 52.

339. *See, e.g.*, *Diamond Alkali*, 72 F.T.C. at 741.

As the *Divestiture Study* highlights, the generally preferred form of relief for restoring competition is to divest a business unit.[340] In *ADP*, for example, the Commission ordered the divestiture only of the acquired assets;[341] by contrast, in *Chicago Bridge*, the government further seeks to compel Chicago Bridge to divest additional assets to ensure the viability of the divested business and solicit prospective buyers.[342] Because the case is pending, it is not entirely clear from the existing record whether such relief is necessary, whether the merger generated any efficiencies in the market, or whether alternative, non-structural relief can achieve the objectives sought by the required divestiture.

When the antitrust agencies conclude that post-close challenge and relief are possible, they should avoid blind adherence to the framework of review set forth in older decisions. Because this older case law failed to adequately consider the role of efficiencies in merger analysis and minimized the role of forms of relief other than divestiture, it provides relatively little guidance for the present-day merger relief analysis.[343]

IV. CONCLUSION

The FTC's recent focus on reviewing and challenging closed transactions raises a host of significant issues that antitrust lawyers have only just begun to consider.[344] It is al-

340. *See* DIVESTITURE STUDY, *supra* note 305, at 1-3.

341. *See In re* Automatic Data Processing, Inc., No. 9282, slip op., § II (F.T.C. Oct. 20, 1997) (accepting the terms of a consent decree divestiture package), *at* http://www.ftc.gov/os/1997/10/autoinfo.htm (last visited Oct. 25, 2004).

342. *See* Answering and Cross-Appeal Brief of Complainant's Counsel at 17, 64-68, *In re* Chicago Bridge & Iron Co., No. 9300 (F.T.C. filed Sept. 13, 2003), *at* http://www.ftc.gov/os/adjpro/d9300/030916ccanswrandcrossappealbrief.pdf (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

343. *See* Kolasky & Dick, *supra* note 71; *see also* discussion *supra* Part III.B.2.

344. In addition to the *MSC.Software* and *Chicago Bridge* challenges, the FTC has also recently challenged mergers involving Aspen Technology and Airgas, summarized below.

Aspen Technology. On August 7, 2003, the FTC brought suit to unwind a merger, alleging that Aspen Technology, Inc.'s ("AspenTech") $106.1 million acquisition of Hyprotech, Ltd. ("Hyprotech") in 2002 was anticompetitive. The transaction was exempt from the reporting obligations of the HSR Act. According to Susan Creighton, director of the FTC's Bureau of Competition, "AspenTech's purchase of Hyprotech directly led to the combination of two of the three largest firms in the development and sale of certain process engineering simula-

ready clear, however, that the case law governing the framework for post-consummation review under section 7 is in many instances inappropriate for the analysis of merger activity in today's economy.

Undoubtedly, the FTC has the ability under section 7 to remedy any anticompetitive transaction, regardless of whether it has closed or is pending and whether it was below or above the HSR Act's reporting thresholds. At any time, the antitrust agencies can intervene and remedy competitive problems that are caused by mergers unduly concentrating a market. Nevertheless, aggressive use of the post-close challenge raises serious legal and practical issues, and may serve to chill business activity, slow innovation, and ultimately harm customers.

There are strong considerations that militate against aggressive post-close review. First, high-technology industries develop rapidly; as a result, markets and market definitions frequently change. What was a market yesterday is an afterthought today—for example, no one is concerned about whether Wang will dominate the Electronic Word Processor market or IBM the 7.5 (or for that matter 5.25) inch disk drive market—because markets disappear in the blink of an eye. Historically, regulatory review focused on a static view of relevant markets. Because high-tech markets change dy-

tion software." *See* Press Release, FTC, FTC Charges Aspen Technology's Acquisition of Hyprotech, Ltd. Was Anticompetitive (Aug. 7, 2003), *at* http://www.ftc.gov/opa/2003/08/aspen.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review). The parties settled the case in late July 2004. *See* Press Release, FTC, FTC Orders Aspen Technology, Inc. to Divest Assets from its 2002 Purchase of Hyprotech, Ltd. (July 15, 2004), *at* http://www.ftc.gov/opa/2004/07/aspen.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

Airgas. In *Airgas, Inc.*, the Commission challenged Airgas' acquisition of Puritan Bennett as a section 7 violation. Following its acquisition of Puritan Bennett, Airgas was the only producer of nitrous oxide in North America. The Commission and Airgas agreed to substantial relief. It requires Airgas to divest a nitrous oxide business, which consists of two nitrous oxide production plants, customer contracts, and all related assets necessary for distribution and storage to Air Liquide to create a new competitor in the market. The order also requires Airgas to supply Air Liquide with a specified amount of bulk liquid nitrous oxide from its Florida nitrous oxide production plant to ensure that Air Liquide has the same volume of nitrous oxide as Airgas did before its acquisition of Puritan Bennett. *See* Press Release, FTC, FTC Settlement Would Restore Competition in U.S. Market for Nitrous Oxide, (Oct. 26, 2001), *at* http://www.ftc.gov/opa/ 2001/10/airgas.htm (last visited Oct. 25, 2004) (on file with the Santa Clara Law Review).

namically, it is imperative that the agencies carefully consider whether mergers that lead to apparent concentration truly are anticompetitive or instead represent a temporary concentration. As the Court of Appeals for the D.C. Circuit observed in *United States v. Microsoft,*[345] "[r]apid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements."[346] Concentration does not result in anticompetitive market power where the existence of the market itself is only short-lived.

To the extent the government does challenge mergers that already have closed, the antitrust agencies should not simply rely on older case law and Commission decisions. The appropriate time for analyzing a consummated transaction to ascertain its competitive effects, the role of post-acquisition evidence in merger reviews, and presumptions favoring divestiture must be re-calibrated to meet the needs of today's marketplace. In the rare instances where post-consummation review is appropriate to make its case under section 7, the government must demonstrate that the merger itself is the competitive problem, not the changing nature of the market dynamic. Thus, the government must demonstrate through evidence of the market structure—not simply evidence of post-close behavior—that a transaction represents a true competitive concern. Where post-consummation review is sufficiently remote in time from the merger itself, notwithstanding case law to the contrary, one must be skeptical that any competitive concern results from that merger, rather than from some other dynamic in the marketplace. In such circumstances, it may be more appropriate to require the government to proceed under the Sherman Act and to demonstrate that the existing market concentration results in actual competitive harm, rather than allow the government to rely on probabilities of such harm in a section 7, Clayton Act analysis.

Finally, post-close review can paralyze markets. If the FTC prevails in its post-close challenges, companies like MSC.Software and Chicago Bridge not only stand to lose the

345. United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001).

346. *Id.* at 49.

valuable assets they acquired, but perhaps more importantly, those companies stand to lose years of independent product development that they would have engaged in but for the futile attempt to acquire a competitor. The lost opportunities for high-tech companies could be considerable: while they may find themselves in the position they were in prior to the consummation of a merger later challenged, all of their competitors or potential competitors presumably have moved on and continued to develop next-generation products during that time.

As the antitrust agencies continue to challenge consummated mergers, we will need to consider the appropriate framework for analyzing the effects of those transactions. The growing number of these challenges will lead to a resolution of the question whether decades-old law formed in a marketplace significantly different from today's will have continued viability, or whether we need a new framework for antitrust review.

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