

# A CONCISE HISTORY OF CORPORATE MERGERS AND THE ANTITRUST LAWS IN THE UNITED STATES

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*American merger control law today is governed primarily by regulators and not courts, focusing on consumer welfare and efficiency. This was not always the case though, and the author traces the development of this area of law from its nascent beginnings with the Sherman Act to the era of private enforcement witnessed today. As the Indian economy continues to expand, mergers and acquisitions have become frequent bringing with them difficult questions of anti-competitive behaviour. A study of the American experience, it is argued, would provide valuable insight in enforcing the rather untested anti-merger provisions in the Competition Act of India.*

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## I. INTRODUCTION

As India embarks on earnest enforcement of Section 6, the anti-merger provision contained in its competition law, a look at the history of merger law in the United States may prove instructive and help avoid the pitfalls and missteps that plagued U.S. enforcement efforts. The U.S., of course, enacted the first competition law in 1890 with the passage of the Sherman Act and thus, as the forerunner, was

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in the position of having to make it up as it went along. In other words, the United States did not have other developed legal systems to look to when fashioning its own competition law policy.

I am not presuming to assert that late 19<sup>th</sup> century America mirrors 21<sup>st</sup> century India, but I do believe there may be some similarities. For example, through an Industrial Revolution following the Civil War which ended in 1865, the United States was transforming itself from a largely agrarian society to a more urban, industrial and business-based economy. One result was that for the first time, companies and individuals came to acquire, by hook or by crook, large accumulations of economic power and wealth.

In large part, those acquiring economic power formed so-called trusts, a series of interlocking companies which, while perhaps giving the appearance of competition, were in fact monopolies or near monopolies. The first of these originated in 1879 with the initial Standard Oil Trust, which would eventually give Standard Oil virtually a complete monopoly over the production, distribution and sale of oil products in the U.S. The trusts were in fact mere cartels in form and resulted in loose agreements among firms on price and output. Since the Sherman Act, passed by the United States Congress in 1890, was passed in large measure to battle the trusts, American competition law became known as *antitrust* law, and the name has stuck.<sup>1</sup>

Sometimes, in oligopolistic markets where few firms, while competing, collectively controlled a market, the competitors find it to their mutual advantage to merge. However, the initial attempt to apply the Sherman Act to consolidations was unavailing.<sup>2</sup> As a result of that decision and the perception that the Sherman Act was aimed primarily at cartels, an unprecedented wave of industrial consolidations took place from 1895 to 1904. Indeed, between 1897 and 1904, 4,227 firms merged into 257 consolidated enterprises. By 1904, it is estimated that 318 “trusts” controlled two-fifths of U.S. manufacturing assets.<sup>3</sup>

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1 For histories of the Sherman Act, see. e.g., RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992* (1996); HANS THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955); ALBERT H. WALKER, *HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICAN* (1910).

2 *United States v. E.C. Knight & Co.*, 156 U.S. 1 (1895) [Supreme Court of the United States United] (the defendant refined and manufactured 65% of U.S. sugar and had acquired four smaller, independent manufacturers, all in the Philadelphia area, which gave it over 90% of the market. The Supreme Court held that manufacturing was not “commerce” and thus the Sherman Act did not apply.)

3 See Jesse W. Markham, *Survey of the Evidence and Findings on Mergers*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 157 (1955); Ralph L. Nelson, *MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895-1956* (1959).

This period of rapid consolidation was finally brought to an end in 1904 with the government's successful prosecution in the *Northern Securities* case.<sup>4</sup> The case aroused great public interest, fueled by the "trust busting" rhetoric of Theodore "Teddy" Roosevelt, who was in the midst of a rousing election campaign for the 1904 presidency.<sup>5</sup> It is remembered as the first successful antitrust prosecution of a large industrial combination.

While the *Northern Securities* decision did much to dispel concerns that the Sherman Act could not reach large corporate consolidations, two subsequent consolidation cases were lost, casting doubt on its overall efficacy.<sup>6</sup> In 1911, however, the United States won three pivotal decisions against Standard Oil, American Tobacco, and Du Pont, all of which involved enormous industrial consolidations.<sup>7</sup>

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4 Northern Securities Co. v. United States, 193 U.S. 197 (1904) [Supreme Court of the United States] [Hereinafter, "*Northern Securities*"]. The Northern Securities Company was a holding company formed by competing railroads. The holding company was formed after a series of vicious business battles fought by the renowned American industrialists J.P. Morgan, James J. Hill, and E.H. Harriman. These three men controlled the Northern Pacific, Great Northern and Union Pacific Railways respectively. Rather than continue in competition with one another, Morgan, Hill and Harriman created a holding company to reduce competition and facilitate connecting long distance routes through St. Paul, Chicago, St. Louis, Kansas City, Omaha, Denver and other important cities from the Eastern United States to the rapidly disappearing frontier in the west. The Supreme Court struck down the consolidation in a 5-4 decision, over a strong dissent by Justice Oliver Wendell Holmes. See generally William Letwin, LAW AND ECONOMIC POLICY IN AMERICA 182-237 (1965) (describing *Northern Securities* as the "coming of age of the Sherman Act").

5 Although the "trust busting" label is normally applied to Theodore Roosevelt, it is his successor in the Presidency, William Howard Taft, who most deserves the label. During his four years in office (1908-12) Taft continued the case against Standard Oil that Roosevelt had begun in 1906 and brought monopolization suits against a plethora of leading American companies, including American Can, American Tobacco, Corn Products Refining, Du Pont, Eastman Kodak, International Harvester, United Shoe Machinery, U.S. Steel, and many leading railroads. See James C. German, *The Taft Administration and the Sherman Antitrust Act*, 54 MID-AMERICAN 172 (1972).

6 See *Cincinnati Packer Co. v. Bay*, 200 U.S. 179 (1906) [United States Supreme Court]; *United States v. Winslow*, 227 U.S. 202 (1913) [Supreme Court of the United States]. See also C. PAUL ROGERS III, STEPHEN CALKINS, MARK R. PATTERSON & WILLIAM R. ANDERSEN, *ANTITRUST LAW: POLICY AND PRACTICE* 502-08 (4<sup>TH</sup> ED., 2008); STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST* 320-24 (1993).

7 See *Standard Oil v. United States*, 221 U.S. 1 (1911) [United States Supreme Court]; *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) [United States Supreme Court]; *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) [United States Supreme Court]. See also *United States v. Union Pacific Railroad Co.*, 226 U.S. 61 (1912) [United States Supreme Court].

The *American Tobacco* case is emblematic. The American Tobacco Company, created in 1890, was a conglomeration of five “fiercely” competing companies which merged into one. After consolidation, the company controlled some 95% of the cigarette market, and 8% of the smoking tobacco market. Shortly after the merger, the company initiated severe price wars, and then purchased their bankrupted competitors. Perhaps the most egregious anticompetitive conduct occurred when the American Tobacco Company purchased 40 viable competitors and immediately shut them down after forcing the managers of the acquired companies to agree not to compete for ten to twenty years.

Although the Supreme Court found that both the American Tobacco Company and the Standard Oil Company’s activities violated Sections 1 and 2 of the Sherman Act, its adoption of the “rule of reason” standard caused widespread political concern that the Sherman Act had been compromised and would thereby permit companies to merge and become dominant in the market so long as they did not use anticompetitive tactics. Indeed, each of the three 1912 presidential candidates, William Howard Taft, Theodore Roosevelt and Woodrow Wilson, ran on platforms promising legislation to strengthen the antitrust laws.<sup>8</sup> After Wilson’s election, Congress in 1914 passed the Clayton Act (as well as the Federal Trade Commission Act), which included Section 7, an anti-merger provision that was intended to reach consolidations leading to monopoly.<sup>9</sup>

## II. THE CLAYTON ACT: 1914 TO 1950

The Justice Department and newly created Federal Trade Commission (FTC) were granted jurisdiction over the Clayton Act, thus, it was hoped, doubling the government’s enforcement authority. Early enforcement efforts were vigorous, particularly by the FTC, and, under Section 7, appeared to have halted the formation of holding companies, which had succeeded the trusts of the late 19<sup>th</sup> century.<sup>10</sup>

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8 See, e.g., DAVID DALE MARTIN, *MERGERS AND THE CLAYTON ACT* 20-43 (1959); ERNEST GELLHORN, WILLIAM E. KOVACIC, & STEPHEN CALKINS, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 33 (5<sup>th</sup> ed., 2004); A.D. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 178-80 (2d ed., 1970).

9 The original version of §7 read: “That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce....”.

10 See, e.g., David Dale Martin, *supra* note 8.

A significant flaw with the original version of Section 7, however, was that it applied only to acquisitions of stock of other companies, thus failing to reach asset acquisitions or other “statutory mergers” not technically involving purchases of stock.<sup>11</sup> Corporate America took full advantage of the Congressional oversight, and it can be argued that the omission facilitated the merger wave of the 1920s.

In addition, the earlier Congressional fears about the inability of the Sherman Act to curtail large industrial combinations under the rule of reason were realized in several Supreme Court decisions in the 1920’s.<sup>12</sup> In the *U.S. Steel* case the defendant was a holding company organized in 1901 to consolidate approximately 180 previously independent competitors. The combined firms controlled 80% to 90% of the country’s iron and steel production at the time of the consolidation, but had about 50% of the market when the government brought suit in 1911. The Supreme Court, in a 4 to 3 decision, ruled that the defendant had not violated the rule of reason. The Court found that the defendant had “resorted to none of the brutalities or tyrannies [of] other combinations,” reducing the government’s argument to one in which “the size of the corporation and the power it may have, not the exertion of that power, is an abhorrence to the law.”<sup>13</sup> The Court then held that size alone, without overt acts, was not an offense under the Sherman Act.<sup>14</sup> In contrast, Section 7 of the Clayton Act was intended to be preventative in nature and forbids mergers where there is a “substantial likelihood” of decreased competition without the requirement of overt acts other than that of combining or merging.

The Great Depression of the 1930s stilled merger activity; however, the post-war resurgence of the economy brought about an increase in merger activity and, concomitantly, a resurgence of the discontent about the limitations of Section 7. Fully sixteen bills to amend Section 7 were introduced in Congress between 1943 and 1949 and Congress held public hearings on proposed amendments in three separate sessions.<sup>15</sup>

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11 *Supra* note 7. See also *Thatcher Mfg. Co. v. FTC*, 272 U.S. 554 (1926) [Supreme Court of the United States].

12 See *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) [Supreme Court of the United States]; *United States v. International Harvester Co.*, 274 U.S. 693 (1927) [Supreme Court of the United States]; *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922) [Supreme Court of the United States]; *United States v. Reading Co.*, 253 U.S. 26 (1920) [Supreme Court of the United States]; *United States v. United States Steel Corp.*, 251 U.S. 417 (1920) [Supreme Court of the United States] [Hereinafter, “*U.S. Steel*”].

13 *U.S. Steel*, at 450.

14 *Id.* at 450-51.

15 See *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962) [Supreme Court of the United States] [Hereinafter, “*Brown Shoe*”] for a full legislative history.

Then, in the leading case of the decade, *United States v. Columbia Steel Co.*,<sup>16</sup> the Supreme Court by a 5-4 margin ruled that an asset acquisition by the nation's largest steel producer of the second largest steel fabricator in the western portion of the country in a concentrated market did not violate Sections 1 or 2 of the Sherman Act. There Columbia Steel, the wholly owned subsidiary of U.S. Steel, had purchased the assets of Consolidated Steel. U.S. Steel controlled 13% of the western market, while Consolidated Steel held 11% of the same market. The Court held that the relevant market was the national market for steel, and that even if the market were more narrowly defined, the companies would have been unable to maintain their current market shares given the current market conditions.<sup>17</sup> In so holding, the Court approved an increase in the level of concentration of an already highly concentrated industry, which effectively foreclosed significant actual and potential competition.<sup>18</sup>

The decision drew a strong dissent by Justice Douglas who famously penned "[w]e have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace – both industrial and social. It can be an industrial menace because it creates gross inequalities against existing and putative competitors. It can be a social menace – because of its control of prices..."<sup>19</sup>

Spurred by that dissent and wide discord about the *Columbia Steel* outcome as well as a 1948 Federal Trade Commission study on the undesirable effects of mergers,<sup>20</sup> Congress at long last acted to plug the loopholes that had so emasculated the original Section 7, passing the Celler-Kefauver Act in 1950.<sup>21</sup> That act expanded Section 7 to include asset as well as stock acquisitions and expanded coverage to include vertical and conglomerate as well as horizontal mergers.<sup>22</sup>

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16 *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) [Supreme Court of the United States] [Hereinafter, "*Columbia Steel Co.*"].

17 *Id.* at 528-30.

18 See, e.g., LAWRENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 591 (1976).

19 *Columbia Steel Co.*, 535-36. See also, C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEVELAND STATE LAW REVIEW 895, 924-26 (2008).

20 See Federal Trade Commission, *The Present Trend of Corporate Mergers and Acquisitions*, reprinted in HEARINGS ON H.R. 515, 300-317 (1950). See also Federal Trade Commission, THE MERGER MOVEMENT: A SUMMARY REPORT (1948).

21 Celler-Kefauver Act, ch. 1184, Pub.L. No. 81-899, 64 Stat. 1125 (1950) [Current version at 15 U.S.C. §§ 18, 21 (2006)].

22 The Supreme Court, however, did not confirm that §7 applied to vertical mergers until 1957. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) [Supreme Court of the United States].

### III. THE REVISED SECTION 7 AND THE WARREN COURT

With the revised Section 7, an aggressive Department of Justice, and a hawkish Supreme Court, the late 1950's and the 1960's brought about an unprecedented expansion of successful merger enforcement actions. Indeed, Justice Potter Stewart, a frequent dissenter in antitrust cases in those years, famously wrote in response to one particularly egregious merger decision, "[t]he sole consistency that I can find is in litigation under Section 7, the Government always wins."<sup>23</sup>

The 1962 *Brown Shoe* decision<sup>24</sup> was the first to reach the Supreme Court under the amended Section 7 and turned out to be particularly controversial. There the Supreme Court condemned the acquisition of the eighth-largest seller of shoes by the third-largest shoe seller. The Court examined the market shares of the participants, the level of concentration in the industry, the acquisition history of both companies, and then focused on a perceived trend toward concentration in the industry. With respect to the requisite market share, the Court noted that in 47 cities the combined market share of the merged firms would exceed 5% in men's, women's and children's shoes.<sup>25</sup> In striking down the acquisition, the Court applied Section 7's prophylactic "*incipiency*" standard which requires the government only to show that the merger "*may be substantially likely to lessen competition.*"<sup>26</sup>

*Brown Shoe* came to represent the epoch of the Populist period of antitrust law in the United States where the Justice Department and the Supreme Court seemed intent on protecting small business rather than the competitive process itself. The Court there noted that the efficiencies and potential lower consumer prices that could occur through vertical integration supported its finding of illegality because of the harm it could cause to small retailers.<sup>27</sup>

Seemingly speaking out of both sides of its mouth, the Court stated:

"[i]t is competition, not competitors which the Act protects. But we cannot fail to recognize Congress' desire to promote competition

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23 United States v. Von's Grocery, 384 U.S. 270, 301 (1966) [Supreme Court of the United States] (Stewart, J., dissenting).

24 *Brown Shoe*. Both firms manufactured and distributed shoes as well, giving rise to a vertical effects as well as horizontal merger analysis.

25 *Id.* at 343.

26 For a discussion of the incipency doctrine see Peter W. Rodino, Jr., *The Future of Antitrust: Ideology vs. Legislative Intent*, 35 ANTITRUST BULLETIN 575, 586-87 (1990).

27 *Brown Shoe*, 323-34. Five years later the Court reaffirmed this view in *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 579 (1967) [Supreme Court of the United States] ("possible economies cannot be used as a defence to illegality in section 7 merger cases.").

through the maintenance of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization.”<sup>28</sup>

Apparently, defence counsel in the *Brown Shoe* case felt compelled to argue, to counter the government’s assertion that integration efficiencies were anticompetitive, that the merger would produce no such economies or consumer benefit.<sup>29</sup> Further, the Court concluded that the merger must be enjoined, even though the combined firm would control only 7.2% of the nation’s retail shoe stores and only 2.3% of retail shoe outlets.<sup>30</sup>

Subsequently, in the *Philadelphia National Bank* decision, the Supreme Court seemed to provide a more definite standard for illegality.<sup>31</sup> There a proposed consolidation of the second and third largest commercial banks in the Philadelphia area would have resulted in a bank with about 36% of area banks’ net assets and would have increased the size of the largest two banks from about 44% to 59% of the area’s commercial banking business. In blocking the merger, the Court held that an acquisition which produces a firm with “an undue percentage” of the relevant market is presumptively illegal.<sup>32</sup>

Of course, strong facts make for easy decisions. In subsequent decisions, however, the Supreme Court made it clear that it was not constrained by the presumptive illegality standard of *Philadelphia National Bank*, as it continued to strike down horizontal mergers with questionable anticompetitive impacts.<sup>33</sup> Surely the

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28 *Brown Shoe*, 370 U.S. at 344.

29 See Harlan Blake & Kenneth Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUMBIA LAW REVIEW 422, 456-57 (1965). For additional criticisms of *Brown Shoe*, see, e.g., John L. Peterman, *The Brown Shoe Case*, 18 JOURNAL OF LAW & ECONOMICS 81 (1975); Thomas Kauper, *The “Warren Court” and the Antitrust Law: Of Economics, Populism, and Cynicism*, 67 MICHIGAN LAW REVIEW 325 (1968); Robert Bork & Ward Bowman, *The Crisis in Antitrust*, 65 COLUMBIA LAW REVIEW 363 (1965).

30 *Brown Shoe*, 294-95.

31 *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) [Supreme Court of the United States].

32 *Id.* at 363.

33 See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) [Supreme Court of the United States]; *United States v. Continental Can Co.*, 378 U.S. 441 (1964) [Supreme Court of the United States]; *United States v. Aluminium Co. of America*, 377 U.S. 271 (1964) [Supreme Court of the United States] (*Rome Cable*). See also *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) [Supreme Court of the United States] (bank merger struck down under Section 1 of the Sherman Act).



of the Warren Court's merger decisions was the 1966 *Von's Grocery* case.<sup>34</sup> In that case, the Court barred a merger between the third and sixth largest grocery chains in Los Angeles, even though the resulting market share of the merged company was only 7.5%. The merger created the second largest grocery chain in a market in which the largest firm had 8% of the market, and the four largest firms had a combined 28.8% market share.<sup>35</sup>

The majority was concerned about a perceived trend of mergers of grocery chains and about a reduction of single store groceries.<sup>36</sup> It believed that it was executing congressional intent to protect small businesses that might not survive in markets dominated by large chains.<sup>37</sup>

Justice Stewart wrote a blistering dissent, noting that the merger produced a firm with only 1.4% of the grocery stores (although with 7.5% of the grocery sales) and resulted in only a 1.1% market share increase of the two largest firms and a 3.3% market increase of the six largest grocery retailers.<sup>38</sup> He also noted the lack of connection between grocery chain acquisitions and the reduction of single stores, expressing doubt as to whether Congress intended Section 7 "*as a charter to roll back the supermarket revolution,*" calling the majority opinion as "*hardly more than a requiem for the so-called 'Mom and Pop' grocery stores.*"<sup>39</sup>

Although the 1960's were considered the halcyon period for the Populist merger enforcement that sought to protect the viability of small business, it turns out that the government often gained only Pyrrhic victories. While the government was winning on the law, it was frequently losing in the remedial stage of the cases, often gaining deficient or no relief.<sup>40</sup>

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34 *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) [Supreme Court of the United States] [Hereinafter, "*Von's Grocery*"].

35 *Id.* at 281 (White, J., concurring).

36 *Id.* at 272-74.

37 *Von's Grocery*, 275-77. See also LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 557 (2d ed., 2006).

38 *Von's Grocery*, 302. (Stewart, J., dissenting).

39 *Von's Grocery*, 288. Justice Stewart also argued that nothing the Court could do could resurrect Mom and Pop stores "*run over by the automobile or obliterated by the freeway.*" See also Joshua Wright, *Von's Grocery and the Concentration-Price Relationship in Grocery Retail*, 49 *UCLA LAW REVIEW* 743, 746-47 (2001) (arguing that *Von's Grocery* is "*no longer capable of any intelligible contribution to antitrust doctrine.*").

40 See Kenneth Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 *JOURNAL OF LAW & ECONOMICS* 43, 48 (1969) (survey showed of merger cases brought between 1950 and 1960 showed that federal enforcement agencies obtained no relief (21 cases) or deficient relief (8 cases) in 29 or 39 cases).

For example, in 1959 the Department of Justice brought a suit challenging the 1958 acquisition by Pabst, the nation's tenth largest brewer, of Blatz, which was number eighteen. The government did not finally prevail until a 1966 Supreme Court decision.<sup>41</sup> The Court remanded to the district court to find a buyer for what remained of Blatz. But Blatz no longer existed as a separate entity and finding a buyer for its brewing plant proved impossible. As a result, the district court dismissed the complaint, resulting in the Department of Justice winning the substantive law battle but losing the remedial war a full ten years after it had brought suit.<sup>42</sup>

The government's aggressive merger enforcement of the 1950's, 1960's and early 1970's was not limited to horizontal mergers. The enforcement agencies brought a number of suits successfully challenging so-called conglomerate acquisitions, which had the effect of expanding geographic or product markets and thus, theoretically at least, harming potential competition or entrenching a firm in a market.<sup>43</sup> They also used Section 7 to attack joint ventures,<sup>44</sup> mergers with vertical effects,<sup>45</sup> and mergers involving reciprocal purchasing arrangements.<sup>46</sup>

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41 United States v. Pabst Brewing Co., 384 U.S. 546 (1966) [Supreme Court of the United States].

42 United States v. Pabst Brewing Co., 296 F. Supp. 994 (E.D.Wis.1969) [District Court for the Eastern District of Wisconsin].

43 See, e.g., United States v. Marine Bancorporation, 418 U.S. 602 (1974) [Supreme Court of the United States] (potential competition); United States v. Connecticut National Bank, 418 U.S. 656 (1974) [Supreme Court of the United States] (potential competition); United States v. Falstaff Brewing Co., 410 U.S. 526 (1973) [Supreme Court of the United States] (potential competition theory); Ford Motor Co. v. United States, 405 U.S. 562 (1972) [Supreme Court of the United States] (potential competition & increased entry barriers); FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967) [Supreme Court of the United States] (entrenchment theory); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) [Supreme Court of the United States] (potential competition); Yamaha Motors Co. v. FTC, 657 F.2d 971 (8<sup>th</sup> Cir. 1981) [United States Court of Appeals, Eighth Circuit] (potential competition); Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255 (5<sup>th</sup> Cir. 1981) [United States Court of Appeals, Fifth Circuit] (potential competition); BOC International, Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977) [United States Court of Appeals, Second Circuit] (two theories of potential competition).

44 See United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) [Supreme Court of the United States]; Yamaha Motors Co. v. FTC, 657 F.2d 971 (8<sup>th</sup> Cir. 1981) [United States Court of Appeals, Eighth Circuit].

45 See Ford Motor Co. v. United States, 405 U.S. 562 (1972) [Supreme Court of the United States]; *Brown Shoe*.

46 See FTC v. Consolidated Foods Corp., 380 U.S. 592 (1985) [Supreme Court of the United States]; Allis-Chalmers Mfg. Co. v. White Consolidated Industries, Inc., 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970) [Supreme Court of the United States]; United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963).

#### IV. GENERAL DYNAMICS

On the substantive side, the tide began to significantly change with the Supreme Court's 1974 *General Dynamics* decision.<sup>47</sup> As the Supreme Court shifted from the Warren Court to the Burger Court, its make-up had changed significantly in the eight years since the controversial *Von's Grocery* decision. This time Justice Stewart found himself in the majority in a 5-4 decision to permit a merger between two coal companies over a strong government challenge.<sup>48</sup>

In *General Dynamics*, the Department of Justice had relied on market data to assert that the acquisition would materially enlarge the market share of the acquiring company in a market trending towards concentration. The Supreme Court disagreed, finding that the high market share of the merged firm was an inaccurate barometer of the likely competitive effects of the merger because the acquired company lacked the necessary uncommitted coal reserves to continue its current output level.<sup>49</sup>

In spite of its new approach, future attempts to apply the *General Dynamics* rationale to rebut market concentration data in other contexts proved largely unsuccessful.<sup>50</sup> The decision, like most of the Warren Court decisions of the previous two decades, failed to provide standards or guidelines for lower courts to follow.<sup>51</sup>

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47 *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) [Supreme Court of the United States].

48 See C. Paul Rogers III, *Perspectives on Corporate Mergers and the Antitrust Laws*, 12 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 301, 306-09 (1981) (describing how four new Justices had joined the Supreme Court).

49 415 U.S. 486, at 508.

50 See, e.g., *Olin Corp. v. FTC*, 986 F.2d 1295 (9<sup>th</sup> Cir. 1993) [United States Court of Appeals, Ninth Circuit]; *White Consolidated Industries, Inc. v. Whirlpool Corp.*, 781 F.2d 1124 (6<sup>th</sup> Cir. 1984) [United States Court of Appeals, Sixth Circuit]; *Kaiser Aluminium & Chemical Corp. v. FTC*, 652 F.2d 1324 (7<sup>th</sup> Cir. 1981) [United States Court of Appeals, Seventh Circuit]; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7<sup>th</sup> Cir. 1981) [United States Court of Appeals, Seventh Circuit]; *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108 (E.D. Pa. 1978) [Supreme Court of the United States]. Cf. *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) [United States Court of Appeal, Second Circuit]; *United States v. International Harvester Co.*, 564 F.2d 769 (7<sup>th</sup> Cir. 1977) [United States Court of Appeal, Seventh Circuit].

51 See, e.g., C. Paul Rogers III, *The Limited Case for an Efficiency Defense in Horizontal Mergers*, 58 TULANE LAW REVIEW 503, 514 (1983); James Ponsoldt, *The Expansion of Horizontal Merger Defenses After General Dynamics: A Suggested Reconsideration of Sherman Act Principles*, 12 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 361 (1981); Howard R. Lurie, *Mergers Under the Burger Court: An Anti-Antitrust Bias and Its Implications*, 23 VILLANOVA LAW REVIEW 213 (1978).

Nonetheless, the case is considered a watershed in U.S. merger jurisprudence because of the Supreme Court's willingness to look beyond market concentration measures to ascertain the likely competitive impact of consolidations.<sup>52</sup>

## **V. THE MERGER GUIDELINES AND PRE-MERGER NOTIFICATION**

The aggressive U.S. merger enforcement of the 1950's, 1960's and early 1970's thus identified two critical shortcomings: (1) the lack of analytical rigor and thus predictability in judicial opinions, and (2) the failure of adequate remedies where an acquisition was found to violate the law. A step toward addressing the first problem came with the issuance of the Department of Justice's Merger Guidelines in 1968.<sup>53</sup> These first guidelines, as well as successive versions, were not binding on the agency but were nonetheless designed to provide guidance to prospective merging entities on how the agency would analyze mergers, and about which acquisitions it would likely challenge.

Congress responded to the government's problems in obtaining adequate relief in 1976 by passing the Hart-Scott-Rodino Antitrust Improvements Act which in part mandates that parties contemplating a merger notify the government of their intent before the merger is consummated.<sup>54</sup> This premerger notification requirement allows the enforcement agencies to investigate the likely competitive impact of major acquisitions before they occur. Proposed mergers which are large enough to require notification cannot be lawfully consummated until the requisite waiting period has expired or the reviewing agency waives it.<sup>55</sup> Where the investigating agency determines that the proposed merger poses serious anticompetitive risks,

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52 See C. Paul Rogers III, Stephen Calkins, Mark R. Patterson & William R. Andersen, *supra* note 6, at 552; Lawrence A. Sullivan & Warren S. Grimes, *supra* note 37, at 632; Miles W. Kirkpatrick & Stephen Paul Mahinka, *The Supreme Court and the "New Economic Realism" of Section 7 of the Clayton Act*, 30 SOUTHWESTERN LAW JOURNAL 821 (1976).

53 U.S. Department of Justice, Merger Guidelines (1968), *reprinted in* 4 TRADE REGULATION REPORTER (CCH) ¶ 13,101.

54 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title II, § 201, 90 Stat. 1390 (1976). The Act added § 7A to the Clayton Act and is codified at 15 U.S.C.A. § 18a.

55 The Act provides for a 30-day waiting period once the required premerger filings are made. If, after an initial review, the investigative agency determines that the merger may be anticompetitive it can issue a "second request" which requires much more extensive information and documentation from the merging parties. Compliance with a second request may take weeks or even months and significantly protracts the merger review process.

it can seek injunctive relief to preserve the targeted company as an independent entity pending full judicial resolution of the case, thus avoiding the problem of untangling an already merged firm.

It is not a stretch to say that the introduction of Merger Guidelines, the *General Dynamics* decision, and the Hart-Scott-Rodino Act collectively ushered in the modern era of merger enforcement in the United States. The Merger Guidelines have evolved, with major revisions made in the 1982 edition in at least partial response to the criticism that the Justice Department was ignoring the 1968 Guidelines by failing to challenge mergers that those Guidelines would have made presumptively illegal.<sup>56</sup> The 1982 Guidelines introduced the Herfindahl-Hirschman Index (HHI) as a measure of the pre and post-market concentration of the relevant market, replacing the 1968 Guidelines' focus on the largest four firms in the market. Those Guidelines were revised in 1984 to clarify that reliance on the HHI calculations was not the sole basis of analysis of market concentration levels and stressing that qualitative analyses of markets and competitors were still important.<sup>57</sup>

In 1992 the Department of Justice and Federal Trade Commission for the first time issued joint Guidelines.<sup>58</sup> These were in fact a revision of the 1984 Guidelines and were an attempt to eliminate ambiguities and reflect advances in legal and economic thinking about the likely competitive impact of mergers. Notably, the 1992 Guidelines were for the first time limited to horizontal mergers, leaving conglomerate and vertical mergers to be governed under the 1984 Guidelines.

The next major Guidelines' revision occurred eighteen years later in 2010 to again reflect the agencies' present approaches and added sophistication in evaluating proposed mergers.<sup>59</sup> Among many changes, the 2010 Guidelines emphasize that identification of adverse competitive effects is the key and that relevant market definition may or may not be the starting point of that analysis.

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56 U.S. Department of Justice, Merger Guidelines (1982), *reprinted in* 4 TRADE REGULATION REPORTER (CCH) § 13,102. *See* William Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIFORNIA LAW REVIEW 618 (1983).

57 U.S. Department of Justice, Merger Guidelines (1984), *reprinted in* 4 TRADE REGULATION REPORTER (CCH) § 13,103.

58 U.S. Department of Justice and Federal Trade Commission, Merger Guidelines (1992), *available at* [www.usdoj.gov/atr/public/guidelines/hmg.htm](http://www.usdoj.gov/atr/public/guidelines/hmg.htm).

59 U.S. Department of Justice and Federal Trade Commission, Merger Guidelines (2010), *available at* [www.justice.gov/atr/public/guidelines/hmg-2010.html](http://www.justice.gov/atr/public/guidelines/hmg-2010.html) (Last Accessed on February 20, 2013).

They also emphasize that merger analysis is fact specific and may call for a variety of methodologies to ascertain likely competitive effects. The Guidelines provide extended discussion of how the agencies evaluate unilateral competitive and coordinated effects issues, and update the HHI concentration thresholds to reflect current agency practice. They also reflect the agencies' evolving view of efficiencies as a defence to an otherwise unlawful acquisition.<sup>60</sup>

The Guidelines are intended to enhance transparency, predictability and thus litigation avoidance. U.S. antitrust lawyers are better able to counsel prospective merger partners about the likelihood of a government challenge. The enforcement agencies, however, have come under criticism for their refusal to publish information about their enforcement decisions.<sup>61</sup> That is, neither agency routinely provides any explanation about decisions not to challenge a proposed merger, even if they considered genuine competitive issues. Similarly, the agencies typically do not disclose any information or analysis when a challenge results in the abandonment of the merger or where a negotiated settlement is reached.<sup>62</sup>

This lack of transparency and openness not only reduces predictability but can also mask under-or over-enforcement tendencies. Under-enforcement can be a particular problem both in cases in which no action is taken and in cases ending in consent decrees, in which typically only information about the remedy is disclosed. It also makes enforcement errors more difficult to detect, and can unfortunately help to mask political influence.<sup>63</sup>

The Guidelines' use of the HHI, perhaps unintentionally, reflects a significant shift from the agencies' earlier merger enforcement policy. For example, the HHI

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60 The courts and enforcement agencies began recognizing efficiencies in the 1980s, see e.g., C. Paul Rogers III, *The Limited Case for an Efficiency Defence in Horizontal Mergers*, 58 TULANE LAW REVIEW 503 (1983); Timothy Muris, *The Efficiency Defence Under Section 7 of the Clayton Act*, 30 CASE WESTERN RESERVE LAW REVIEW 381 (1980); Oliver Williamson, *Economies as an Antitrust Defence Revisited*, 125 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 699 (1977). However, not until the 1992 version did the Guidelines specifically mention efficiencies as a potential defence to a merger. The agencies revised the guidelines in 1997 for the sole purpose of amending and clarifying when they would consider efficiency gains in a merger and have continued to set forth their evolving thinking about when efficiencies are relevant in a merger analysis. DOJ/FTC Horizontal Merger Guidelines § 4 (2010). See also ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 56-60 (2007).

61 See, e.g., *id.*, at 63-66.

62 See, e.g., Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFFALO LAW REVIEW 937 (2003).

63 See, e.g., Lawrence A. Sullivan & Warren S. Grimes, *supra* note 37, at 605-06.

thresholds show that the government would today not bother to challenge at least three cases which it not only challenged but successfully litigated before the Supreme Court in the 1960's.<sup>64</sup>

A related issue is whether the Guidelines generally and the HHI specifically have influenced substantive antitrust law. While courts have been quick to claim their independence from the Guidelines,<sup>65</sup> they definitely have had a substantive impact. For example, courts have held used the HHI to establish a *prima facie* case,<sup>66</sup> a presumption of illegality,<sup>67</sup> and as a basis for a preliminary injunction.<sup>68</sup>

The pre-merger notification program authorized in the 1976 Hart-Scott-Rodino Act has been a rousing success both as measured by its objective of giving the federal enforcement agencies a meaningful opportunity to obtain pre-merger injunctions and by the fact that at least seventy other jurisdictions, including India, have adopted similar requirements.<sup>69</sup> Filings under the Act

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64 The three cases are *United States v. Von's Grocery*, 384 U.S. 270 (1966) [Supreme Court of the United States]; *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (Supreme Court of the United States); *United States v. Aluminium Co. of America*, 377 U.S. 271 (1964) [Supreme Court of the United States] (*Rome Cable*). See C. Paul Rogers III, Stephen Calkins, Mark R. Patterson & William R. Andersen, *supra* note 6, at 561-62.

65 See, e.g., *Olin Corp. v. FTC*, 986 F.2d 1295, 1300 (9<sup>th</sup> Cir. 1993) [United States Court of Appeals, Ninth Circuit] ("*Certainly the Guidelines are not binding on the courts . . .*"); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986) [United States Court of Appeals, District of Columbia Circuit] ("*Guidelines offer a useful illustration . . . but are by no means . . . binding on the court.*"); *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1484 (M.D. Ga. 1997) ("*The Merger Guidelines 5%-10% test is an inaccurate barometer of cross-elasticity of demand as to the facts of this case.*"), *aff'd*, 126 F.3d 1302, 1305 (11<sup>th</sup> Cir. 1997) [United States Court of Appeal, Eleventh Circuit] (government did not meet its burden of proof, making it unnecessary to address validity of 5%-10% test).

66 See, e.g., *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) [United States District Court, District of Columbia] (HHI market concentration and increase enough for a *prima facie* case, but "*not an overwhelming statistical case.*").

67 See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) [United States Court of Appeals, District of Columbia Circuit].

68 See, e.g., *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 51 (D.D.C. 2002) [United States District Court, District of Columbia].

69 See ANTITRUST MODERNIZATION COMMISSION, *supra* note 60, at 152. With the globalization of markets, mergers involving transnational companies face pre-merger notification requirements in multiple jurisdictions. For example, as early as 1989 the Gillette/Wilkinson merger was notified in 14 separate jurisdictions. See OECD, MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PRACTICES (1994). Of course, multiple notification requirements delay consummation of the merger, and increase both the costs and the uncertainty of approval. Jurisdictions may have differing competition

have averaged about 1,000 annually with a high of 4,749 in 2000, although recent increases in the filing thresholds have reduced the number of filings by about 50 percent.<sup>70</sup>

Pre-merger notification has, unexpectedly, shifted U.S. merger policy away from the courts and into the hands of the enforcement agencies. Prior to the act, the agencies frequently litigated merger cases, with a steady flow of cases reaching the Supreme Court. For example, during 1974 and 1975 the Supreme Court rendered decisions in four Section 7 cases<sup>71</sup> but in the almost 40 years since has not considered a single merger case on the merits.

Although the proponents of the legislation apparently assumed that pre-merger notification would expedite but not necessarily lessen the number of cases reaching the judicial system,<sup>72</sup> it has in fact significantly reduced the opportunities for judicial review.<sup>73</sup> Since the passage of the Act, many if not most merger cases are settled or abandoned through largely confidential negotiations without judicial opinions or records. In fiscal year 2006, for example, the government sought judicial

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objectives and come to opposite conclusions about the likely competitive impact of a proposed acquisition, as in the Boeing/McDonnell-Douglas merger of 1997, see Commission of the European Communities, *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Certain Conditions and Obligations*, 1997 O.J. (L 336-8/12/1997) 16, and the 2001 General Electric/Honeywell merger, see General Electric/Honeywell Case COMP/M.2220, Commission Decision of July 3, 2001. Major jurisdictions like the European Community and the United States are, however, increasingly engaging in cooperation agreements to provide each other earlier notice about competitive concerns with the goal of reducing conflicting outcomes. See generally C. Paul Rogers III, *Cross-Border Mergers and Antitrust: Jurisdiction, Enforcement and Cooperation Issues*, in Norbert Horn, ed., *CROSS-BORDER MERGERS AND ACQUISITIONS AND THE LAW* (2001).

70 See ANTITRUST MODERNIZATION COMMISSION, *supra* note 60, at 152.

71 See *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975) [Supreme Court of the United States]; *United States v. Connecticut National Bank*, 418 U.S. 656 (1974) [Supreme Court of the United States]; *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) [Supreme Court of the United States]; *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) [Supreme Court of the United States].

72 See H. Rep. No. 94-1343, at 14 (1976); S. Rep. No. 94-803, at 70 (1976).

73 Exceptions include *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) [United States Court of Appeals, District of Columbia Circuit]; *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8<sup>th</sup> Cir. 1999) [United States Court of Appeals, Eighth Circuit]; *FTC v. Freeman Hospital*, 69 F.3d 260 (8<sup>th</sup> Cir. 1995) [United States Court of Appeals, Eighth Circuit]; *United States v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) [United States District Court, N.D. California]; *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.C.D.C. 2000) [United States District Court, District of Columbia]; *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.C.D.C. 1997) [United States District Court, District of Columbia].



relief in 29 cases, or about 1.7% of proposed mergers for which there was a pre-merger filing.<sup>74</sup> Thus, in effect, the enforcement agencies are applying their merger enforcement policies in most cases without judicial review.

Litigation is also reduced because the potential merging parties are more strategically disadvantaged than previously when government challenges typically came after the consummation of the merger. As noted, judicial aversion to divestiture often meant that the government had no effective remedy even after winning on the merits.<sup>75</sup> In contrast, litigants today face the same substantial litigation costs knowing that the government, if successful, will obtain an injunction blocking the merger. Again, fewer litigated cases mean more agency and less judicial influence on merger policy. Further, fewer litigated cases reduce the number of cases available for review by appellate courts, including of course the Supreme Court.

Under the merger review process, if the enforcement agency believes that the proposed merger may have significant anticompetitive affects after a preliminary review, it can ask for additional information and documents. The so-called “second request” typically requires the production of millions of additional documents and can extend the time for the merger review by six months or longer.<sup>76</sup> It requires the expenditure of several additional million dollars for attorney’s fees. One estimate places the cost of complying with a second request at between \$5 million and \$10 million.<sup>77</sup> Although the enforcement agencies assert that they need the additional time and volume of information to accurately assess the merger’s likely competitive impact, many are skeptical.<sup>78</sup>

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74 But, of course, in the great majority of filings the government found no competitive concern and closed its investigation during the initial waiting period. See ANTITRUST MODERNIZATION COMMISSION, *supra* note 60, at 156.

75 In one extreme case, the Department of Justice in 1960 challenged a 1955 acquisition involving companies engaged in printing colour comic supplements. The trial court finally dismissed the complaint in 1970, but in 1970 the Supreme Court held that the acquisition violated Section 7 and ordered the trial court to fashion appropriate relief. That court ordered divestiture in 1973, but by then no interested buyer could be found. See *United States v. Greater Buffalo Press, Inc.*, 327 F. Supp. 305 (W.D.N.Y. 1970) [United States District Court, Western District of New York] (dismissing complaint), *rev’d*, 402 U.S. 549 (1971) [United States Supreme Court], *on remand to* 1973 WL 833 (W.D.N.Y.) [United States District Court, Western District of New York] (ordering divestiture).

76 THE ANTITRUST MODERNIZATION COMMISSION, *supra* note 60, at 152.

77 Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005). The agencies do periodically attempt to reform merger review to expedite the process, limit the scope of production, and in general reduce the burden of compliance with a second request. See Federal Trade Commission, Reforms to the Merger Review Process, *available at* [www.ftc.gov/os/2006/mergerreviewprocess.pdf](http://www.ftc.gov/os/2006/mergerreviewprocess.pdf).

78 THE ANTITRUST MODERNIZATION COMMISSION, *supra* note 60, at 152.

The relative secrecy of the merger review process also reduces the transparency hoped for from the pre-merger notification requirement and enhances the agencies' effective control over merger policy. The absence of merger review records or analysis further hinders scholarly and external review and assessment of the government's merger enforcement and may allow an agency to pursue a policy at odds with judicial or mainstream antitrust thinking. For example, a 1989 American Bar Association antitrust task force accused the Antitrust Division of the Department of Justice with not following its own merger guidelines in making enforcement decisions.<sup>79</sup>

## VI. PRIVATE ENFORCEMENT

An additional, perhaps unintentional, consequence of pre-merger notification is that it has reduced private enforcement of Section 7. Unlike the Indian Competition Act, private parties in the U.S. may sue for treble damages and injunctive relief, including divestiture,<sup>80</sup> under Sections 4 and 16 of the Clayton Act.<sup>81</sup> Although the number of all private antitrust suits was small prior to World War II, their numbers grew commensurately with the Populist expansion of antitrust law in the post-War era to a peak of 1,400 private complaints in 1978.<sup>82</sup>

Initially, at least, the passage of the Hart-Scott-Rodino Act appears to have had little effect on the number of private Section 7 enforcement actions. An American Bar Association task force reported that 144 private Section 7 actions were brought between 1977 and 1988, and that, from 1981 to 1986, there were as many private as government challenges to mergers.<sup>83</sup>

Beginning in the late 1970's, however, the Supreme Court seemingly raised the bar for private plaintiffs to establish antitrust standing and injury, issues not typically borne by the government. Thus, in the merger context, rivals of the merging parties do not have standing to sue, unless they allege a competitive injury

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79 REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW TASK FORCE ON THE ANTITRUST DIVISION OF THE U.S. DEPARTMENT OF JUSTICE 26-30 (1989).

80 See *California v. American Stores Co.*, 495 U.S. 271 (1990) [Supreme Court of the United States].

81 15 U.S.C.A. § 15; 15 U.S.C.A. § 26.

82 See Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in *PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* 4 (L. White ed., 1988).

83 See ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 16, *PRIVATE LITIGATION UNDER SECTION 7 OF THE CLAYTON ACT: LAW AND POLICY* 9, 11, 118-26 (1988).

to the market as a whole rather than just to them as a competitor.<sup>84</sup> The Court also made it more difficult for private plaintiffs to survive summary judgment<sup>85</sup> and, more recently, to survive a motion to dismiss on the pleadings.<sup>86</sup>

In addition to more demanding procedural hurdles, however, pre-merger notification provides additional disincentives for private enforcement. The cost of a private enforcement effort is substantial and the statistical risk of failure is great. Further, private litigants do not have pre-suit access to discovery, as does the government. That means they must file suit first to be able to gain information from the merging parties.

Post-merger lawsuits, like pre-Hart-Scott-Rodino government actions, face problems of securing an adequate remedy even if the plaintiff is successful on the merits. Courts are even more reluctant to grant divestiture today<sup>87</sup> and, further, a private litigant faces an uphill battle to prove money damages since it must establish causation between the unlawful merger and its loss of revenue or profits.<sup>88</sup>

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- 84 See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) [Supreme Court of the United States]; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) [Supreme Court of the United States]; *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228 (9<sup>th</sup> Cir. 1998) [United States Court of Appeals, Ninth Circuit]; *Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989) [United States Court of Appeals, Second Circuit]; *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981) [United States Court of Appeals, Second Circuit]; *Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc.*, 295 F. Supp. 2d 75 (D.D.C. 2003) [United States District Court, District of Columbia]. See also Joseph Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICHIGAN LAW REVIEW 1 (1995).
- 85 See, e.g. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) [Supreme Court of the United States]; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) [Supreme Court of the United States]; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8<sup>th</sup> Cir. 2000) (en banc) [United States Court of Appeals, Eighth Circuit]. Compare *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) [United States Supreme Court]. See also Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEORGETOWN LAW JOURNAL 1065 (1986); C. Paul Rogers III, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 667 (1979).
- 86 See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) [Supreme Court of the United States] (overruling previous “no set of facts” standard for pleading).
- 87 See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) [United States Court of Appeals, District of Columbia].
- 88 See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) [Supreme Court of the United States]; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) [Supreme Court of the United States]; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) [Supreme Court of the United States]; *Story Parchment Co.*

As a result, the plaintiffs' antitrust lawyers are less likely to take a private merger enforcement action on a typical contingent fee basis, leaving the private plaintiff to foot the cost of litigation entirely.<sup>89</sup>

In addition, it is easy to speculate that private plaintiffs may be less likely to persuade a court to enjoin, never mind award damages that would be automatically trebled, an acquisition that enforcement agencies chose not to challenge.

Mandatory pre-merger notification means that federal enforcement agencies will be closely reviewing proposed mergers which meet Hart-Scott-Rodino size thresholds. As a result, a private party opposing a merger is much more likely to devote resources urging that the enforcement agency oppose the merger and, if it does, supporting that effort. In fact, a private party may get two or more bites at the apple since it can weigh in against a proposed merger at each stage of the government's review and potential enforcement action.

Private merger enforcement could still, theoretically at least, be an effective enforcement mechanism, particularly for mergers that do not meet the pre-merger notification thresholds in smaller but still oligopolistic markets.<sup>90</sup> As the agencies have periodically adjusted the financial thresholds for mandatory pre-merger filing upward, the number of filings has declined, perhaps increasing the importance

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v. Paterson Parchment Co., 282 U.S. 555, 561-62 (1931) [Supreme Court of the United States]; Purex Corp. v. Proctor & Gamble Co., 664 F.2d 1105 (9<sup>th</sup> Cir. 1981) [United States Court of Appeal, Ninth Circuit] (target of unfriendly takeover unable to establish that market decline had any connection to threatened takeover).

89 See, e.g., Stephen F. Ross, *supra* note 6, at 387. Contingent fee agreements usually provide that the successful plaintiff's lawyer would receive a percentage, normally 33 to 40%, of a treble damage award plus costs expended. Thus, in a situation in which the plaintiff is bereft of resources, the contingent fee lawyer finances the litigation in the hopes of a large fee through settlement or a successful verdict on the merits, followed by a large damages award.

90 As noted, the Supreme Court has even held that divestiture is a remedy theoretically available to private litigants. See *California v. American Stores Co.*, 495 U.S. 271 (1990) [Supreme Court of the United States]. See also *Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8<sup>th</sup> Cir. 2010) [United States Court of Appeals, Eighth Circuit]; *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228 (9<sup>th</sup> Cir. 1998) [United States Court of Appeals, Ninth Circuit]; *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987) [United States District Court, E.D. Pennsylvania]. Since divestiture is equitable relief, private litigants may also face potential equitable defences such as laches and "unclean hands" which typically cannot be raised against the government. See, e.g., *Arthur L. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6<sup>th</sup> Cir. 1990) [United States Court of Appeals, Sixth Circuit].

of private enforcement in non-mandatory filing mergers.<sup>91</sup> Further, even since passage of the Hart-Scott-Rodino Act, private suits have occasionally halted very substantial (and presumably anticompetitive) mergers.<sup>92</sup> As recently as 1999, the Seventh Circuit Court of Appeals has affirmed that private enforcement is integral to the congressional mandate to protect competition and that the failure of the government to object to a merger does not establish its legality.<sup>93</sup> Thus, in spite of the obstacles and disincentives described above, private parties do sometimes bring Section 7 enforcement actions. The great majority, however, are unsuccessful.<sup>94</sup>

## VII. CONCLUSION

U.S. merger law has, not surprisingly given its 122 year history, changed dramatically both procedurally and substantively. In recent years, economic learning has advanced while U.S. antitrust policy has become more focused on consumer welfare and efficiencies as goals. The understanding of what signals likely competitive harm has evolved, and as a result cases that the government litigated all the way to the Supreme Court forty years ago would go unchallenged today.

Pre-merger notification and the Merger Guidelines have ushered in modern merger enforcement policy in the United States. Collectively they have had the effect of reducing the judiciary's role in merger enforcement while enhancing that of the enforcement agencies. As a result, enforcement policy is squarely in the hands of the government regulators. The Guidelines are in fact substantive and although not binding on the courts, are certainly influential. Further, since the government brings rather few cases to the judicial system, but disposes of most cases in the

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91 Of course, there is nothing to prevent the enforcement agencies from challenging a merger not meeting the mandatory filing thresholds or of private parties affected from urging the government to take action in those instances.

92 *See, e.g.,* Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981) [United States Court of Appeals, Second Circuit]; Marathon Oil Co. v. Mobil Oil Corp., 669 F.2d 378 (6<sup>th</sup> Cir. 1981) [United States Court of Appeals, Sixth Circuit].

93 *See* Allied Signal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 575 (7<sup>th</sup> Cir. 1999) [United States Court of Appeals, Seventh Circuit].

94 *See, e.g.,* Ginsburg v. InBev NV/SA, 623 F.3d 1129 (8<sup>th</sup> Cir. 2010) [United States Court of Appeals, Eighth Circuit]; Malaney v. UAL Corp., 2010 U.S. Dist. LEXIS 106049 (N.D. Cal. 2010) [United States District Court, Northern District of California]; Golden Gate Pharmacy Services v. Pfizer, Inc., 2010 U.S. Dist. LEXIS 47896 (N.D. Cal. 2010) [United States District Court, Northern District of California]; Vizio, Inc. v. Funai, Electric Co., 2010 U.S. Dist. LEXIS 30850 (C.D. Cal. 2010) [United States District Court, Central District of California].

merger review process, the agencies' influence over substantive merger law has effectively increased dramatically.

By the same token, the merger review process has had salutary procedural impacts, providing the government with meaningful access, oversight, and pre-merger injunctive relief. The Guidelines do in fact provide the business community with guidance about when the enforcement agencies are likely to challenge consolidations. This information is designed to and has increased predictability and certainty into the merger process. Thus, the U.S. merger system of review and challenge, while subject to ongoing criticism for a lack of transparency and while far from static, has improved demonstrably in the last 30 years.

India, in its nascent stage of merger review and enforcement, must of course develop its own merger enforcement processes, priorities, and goals specific to its growing economy in an increasingly borderless commercial world. It certainly can and perhaps should be informed by the development of merger policy in the United States and other "mature" competition jurisdictions, both for replication where appropriate and for mistake avoidance. With its long history, U.S. merger law provides plenty of fodder for both.