Non-Horizontal Merger Enforcement?
Of Course They Can

BY J. ROBERT ROBERTSON

Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration.

HAVING SPENT DECADES IMMERSED in antitrust merger law, whether from within the government or in private practice, it was no shock to me when the Department of Justice recently filed its complaint against AT&T. Nevertheless, the main question asked by reporters and others was, “Can they do this”? The assumption made by all was that, under the law, it was not possible to challenge anything but a traditional horizontal merger. To each person’s apparent surprise, my answer was, “Of course they can.” The legislative history and the law are clear that either the Federal Trade Commission or the Department of Justice can challenge any kind of merger or acquisition. Whether it is horizontal, vertical, or conglomerate makes no difference, and below I explore these concepts in detail.

The questioners’ surprise was not entirely misplaced: we have the detailed Horizontal Merger Guidelines but only some limited agency guidance on non-horizontal mergers, and there is no question that for decades, the agencies have taken few non-horizontal mergers to court. Importantly, however, Congress clearly intended that the antitrust agencies could challenge these kinds of mergers. In fact, in amending Clayton Act, Section 7 in 1949–1950, Congress was worried about non-horizontal combinations at least as much as horizontal ones.

Congress’s stated reason for revising Section 7 was not well received by the academics. In the ’70s and ’80s, Robert Bork and Richard Posner (and many of their followers) were some of the first professors to argue that the new Section 7 should be limited to horizontal merger enforcement—for the reason that there were either no good standards for non-horizontal mergers or that they simply should not be challenged as a matter of policy. Those early arguments have, over time, become a common understanding within the antitrust bar, even though they are contrary to the legislative history of the Clayton Act, Section 7.

There is also no reason to invent a new non-horizontal merger standard of proof for presumptions, burden-shifting, and the like, in non-horizontal mergers. There is ample, settled law and economics that can be used in non-horizontal cases. Indeed, in the AT&T/Time Warner case, the DOJ simply followed the basic burden-shifting framework found in both merger and non-merger antitrust cases: once the government puts forward evidence, either structural or direct, of likely anticompetitive effects, the burden shifts to the defendants to show that the government’s predictions are not accurate and that the merger is indeed not harmful to competition. Then, these countervailing effects are balanced, with the understanding that the government need only show the reasonable likelihood of net anticompetitive effects. This is a simple, established model for horizontal merger cases as well as for non-merger cases. There is no reason that this model cannot be used for non-horizontal merger cases as well, and indeed this is just what Congress intended.

Congressional Intent to Stop “Monster Consolidation,” and the Academic Backlash

After World War II, Congress was deeply concerned about large businesses destroying the fabric of the American economic system—i.e., small, independent businesses. The chief concern was that large companies would become so powerful that the government would need to become even more powerful to control them. The result would be a collapse of the economic framework of the capitalist system. For example, in support of the expansion of Section 7 in 1949, Rep. Sidney Yates argued:

Ever since Karl Marx, Communists have based their belief in the collapse of capitalism upon their prediction that concentration of wealth and power would be carried so far in capitalist countries as to deprive most people of protection from monopoly and to leave them without interest in the survival of private enterprise.

Yates’s comments were echoed by many others in Congress, and the fundamental principle that large, conglomerate and vertical mergers were extremely harmful to the well-being of the country was thoroughly spelled out in the legislative history. For example, Rep. Hale Boggs called the conglomerate acquisition “one of the most detrimental movements to a free enterprise economy.”

Senator Estes Kefauver emphasized: “The increased concentration of economic power is doomed free enterprise. The
present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development.” Kefauver was convinced that the Clayton Act needed to be amended to reign in these large, conglomerate or vertical mergers because, if the alleged trend towards fewer mergers continued, “[i]t either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.”

Many in Congress also expressed their concern that local ownership of small businesses was being threatened by large conglomerate corporations. “Under local ownership, there are strong social and civic ties that bind the community together. Under outside ownership, these ties are weakened and broken.” As Kefauver put it, “The control of American business is steadily being transferred, I am sorry to have to say, from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control.” Thus, many in Congress blamed large mergers and increased concentration for ruin- ing local competition and the decentralized fabric of the U.S. economy.

In its report, the House emphasized that the amendment of Section 7 was directed towards “the broad economic problem of high and increasing concentration with which this legislation is concerned.” And to be absolutely clear that the amended Section 7 applied to vertical and conglomerate mergers, the House Report explained that the former provision in the 1914 version of Section 7 that had required a lessening of competition “between the acquiring and the acquired firm has been eliminated.” Thus, as the House Report stated, “[T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly.”

Besides the fear of socialism or communism, the House saw other issues in conglomerate and vertical mergers. One example cited was downstream foreclosure, such as a vertical merger by a raw material producer of a fabrication plant, which could lessen competition in a fabrication market, “even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms.” And long before courts took on such issues in any detail, Congress appeared to understand that buyer power was as much of a problem for competition as downstream selling power because, if there were such power, “[s]uppliers are often compelled to accept what huge companies choose to pay.” As for any assumption that large mergers always are most often efficient and somehow good, Congress rejected that premise. For example, Rep. Emanuel Celler emphasized that “[b]igness does not mean efficiency, a better product, or lower prices.”

Support for Congress’ fear of large corporate acquisitions and mergers came from many sources, including economic data showing a trend that most of the corporate assets in the United States were becoming controlled by fewer and fewer large corporations, and by the Federal Trade Commission’s 1948 Report on the Merger Movement, detailing the history of this trend. The FTC Report concluded that “there are few greater dangers to small business than the continued growth of the conglomerate corporation.” The FTC Report sounded the alarm that “there is present in most conglomerate acquisitions a simple drive to obtain greater economic power. With the economic power which it secures through its operations in many diverse fields, the giant conglomerate corporation may attain an almost impregnable economic position.” Through its data and economic analysis, the FTC urged that “if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest. In either event, collectivism will have triumphed over free enterprise . . . .”

In the end, the Celler-Kefauver Act of 1950 revised Section 7 of the Clayton Act and deliberately included all kinds of mergers and acquisitions within its ambit. The Senate Report stated that the Act’s purpose “is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions” and “thereby aid in preserving small business as an important competitive factor in the American economy.” The House Report also made it clear that the scope of the revised Section 7 was broad and applied to “vertical and conglomerate as well as horizontal” mergers.

More than a decade later, then Professor Robert Bork criticized the revision of Section 7 as bad policy. Not only did he believe that very few horizontal mergers should be challenged, and certainly not through coordinated effects theory, which he rejected, but when he examined non-horizontal mergers, he rejected almost any theory that might challenge them. For example, absent below-cost pricing, “antitrust should never object to the verticality of any merger,” and “there is no threat to competition in any conglomerate merger.” In short, “[p]roperly drawn and applied horizontal rules are all that we need.”

Ignoring the data used by Congress, and the legislative history, Bork’s excuse for recommending that courts abstain from stopping conglomerate mergers was because, in his view, they were “no threat to competition” because “some conglomerate mergers surely do create efficiencies.” It should be noted, that despite Bork’s core argument that efficiencies should preclude any challenge to a non-horizontal merger, and to most horizontal mergers as well, the efficiencies defense had not been very successful in any litigated case.

In short, the history of the amendments to Section 7 leaves us with unambiguous Congressional intent and clear law that proscribes any merger or acquisition that creates the incipiency towards a likely, significant reduction of competition in any product and geographic market—whether that transaction is horizontal or non-horizontal.

It’s Clear That Section 7 Includes All Mergers

After the Celler-Kefauver Act became law, it took a number of years before any significant cases addressed its history. Under the pre-amended Section 7, the Supreme Court set the stage for non-horizontal mergers with du Pont, which was a
vertical case. As the Court pointed out, for decades, “The Government did not invoke § 7 against vertical acquisitions,” and yet the Court found that even the original Section 7 allowed a challenge to a vertical acquisition if it “tend[ed] to create a monopoly.”

The importance of this case for this discussion is that in du Pont, the Court specifically held that “although du Pont and General Motors are not competitors, a violation of the section has occurred,” and it ordered the divestiture of du Pont’s ownership of General Motors’ stock. The Court added that the antitrust agencies’ failure to challenge vertical acquisitions was irrelevant to Congress’s intent to include “vertical acquisitions . . . within the purview of the Act.”

The Court also recognized that in Congress’s recent amendment to Section 7, it had made “it clear that the bill applies to all types of mergers and acquisitions, vertical and conglom erate as well as horizontal.”

Following up on du Pont was the district court case of Bethlehem Steel. In the late 1950s, Bethlehem Steel attempted to merge with Youngstown Steel and claimed that they did not compete effectively for downstream customers. Thus, the merger should have been cleared. Yet, the DOJ refused clearance, and the case was then tried in the Southern District of New York. Judge Edward Weinfeld enjoined the transac tion on multiple theories, including horizontal, vertical, and conglom erate (potential competition) grounds.

The Court justified its injunction against the non-horizontal aspects of the merger based on the legislative history of the amended Section 7, which, under a “fair reading,” left “no doubt as to its major objectives,” including a concern about non-horizontal mergers.

Interestingly, Judge Weinfeld had no problem applying potential competition, vertical buyer power, and foreclosure theories (while rejecting any claims of efficiencies) to enjoin the merger. In this sense, the opinion in Bethlehem Steel was ahead of its time.

Four years later, in 1962, the U.S. Supreme Court finally got its chance to weigh in on the meaning of the amended Section 7 with Brown Shoe. Beginning with the district court’s opinion, which focused on Congress’s intent to “tight en[] the screws upon acquisitions,” the Supreme Court detailed the history of the Celler-Kefauver Act in great detail.

However, after nearly a dozen pages of dense history of the Act, Chief Justice Warren gave us one of the most mis-cited quotes in antitrust: “It is competition, not competitors, which the Act protects.” What follows that sentence, however, is the main point:

But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Upon that solid grounding in legislative history, as well as the plain language of Section 7, the Court found that the Act “was intended to apply to all mergers—horizontal, vertical or conglom erate.”

Although Brown Shoe is a long and sometimes confusing opinion, it remains the governing law today. Brown Shoe ended up being both a horizontal and a non-horizontal case. The horizontal aspects are well known, but the vertical aspects are less so. For the vertical side, in which the merging shoe companies would become vertically integrated into manufacturing, the Court used the legislative history to buttress its conclusion that Brown’s vertical integration gave it the power to expand its “avowed policy of forcing its own shoes upon its retail subsidiaries” and “may foreclose competition . . . without producing any countervailing competitive, economic, or social advantages.”

The theory of vertical harm was this: “tying a customer to a supplier . . . by foreclosing the competitors of either party from a segment of the market otherwise open to them . . . may act as a ‘clog on competition.’” As in Bethlehem Steel, the Court also recognized the harm from buyer power, which could “disrupt and injure” competition on the upstream supply side.

In short, Brown Shoe determined that Section 7 applied to any merger or acquisition agreement that resulted in a reasonable probability of substantially lessening competition or of tending to create a monopoly. That holding did not depend upon the form of the transaction, whether vertical, horizontal, conglom erate, or other.

Shortly after Brown Shoe, the FTC had the opportunity to address another attempt by merging parties to argue that Section 7 did not apply outside of the context of a horizontal merger. In Procter & Gamble (Clorox), the FTC responded sharply to the argument by holding: “Under Section 7, as amended, any acquisition whether it be vertical, conglom erate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce.”

In Clorox, Procter, a large retailer of goods for grocery stores, was attempting to buy Clorox, a large producer of bleach. The FTC focused on both a potential competition theory (whether Procter was a probable entrant into the bleach market) and whether the merger would expand Procter’s ability to obtain “favored treatment” for “shelf space” or “certain advantages in the display or marketing of its products which are not available to a single-product producer, such as the pre-merger Clorox.” After a remand for additional evidence (and a change of Commissioners), the FTC enjoined the transaction, but the Sixth Circuit reversed the FTC’s order in 1966.

In 1967, the Supreme Court reversed the decision of the Sixth Circuit and instructed it to affirm the FTC’s decision against Procter. Although one can explain the Supreme Court’s Clorox decision solely on the basis of a potential competition theory, the reasoning and holding of the Court has more relevance to any discussion of non-horizontal mergers. The Court declared emphatically that “[a]ll mergers are within the reach of [Section] 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglom erate, or other.” Agreeing with the FTC that a large con-
glomerate could change the competitive position of Clorox and thus harm competition, it explained: “The anticompetitive effects with which this product-extension merger is fraught can easily be seen.” Aside from potential competition, the Court pointed out the anticompetitive effects of the “substitution of the powerful acquiring firm for the smaller, but already dominant, firm” would raise “entry barriers” and “dissuade[s] the smaller firms from aggressively competing.”

The Court then added that “[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers may also result in economies but it struck the balance in favor of protecting competition.”

Justice Harlan agreed with the majority’s result but gave a more economically based argument in support of affirming the FTC. Citing the same legislative history as in Brown Shoe, he concluded that if a company obtains an “increased power over price” as a result of a merger, it “should be attackable under [Section 7],” and that the FTC could thus “properly find a conglomerate or product-extension merger illegal under [Section 7] because it substantially increases pricing power in the relevant market” and raises barriers to entry.

When one considers the actual legislative concerns expressed during the revision of Section 7, Harlan’s logic is sensible. Whereas there are other cases on both sides of these issues, du Pont, Bethlehem Steel, Brown Shoe, and Clorox give a broad view of the scope of Section 7. They all answer the fundamental question as to what kind of mergers or acquisitions fall within the ambit of Section 7: They all do. And all pose the same issue: whether the merged entity obtained market power as a result of the merger so that the likelihood is that competition will be harmed substantially.

Yes, Non-Horizontal Merger Challenges Happen Today

The history of non-horizontal merger challenges has continued at the agencies although most recent cases were settled or did not go forward in the face of a threatened complaint. For example, “Since 2000, the FTC and DOJ have challenged 22 vertical mergers—about one per year.”

A typical example is the Department of Justice’s challenge to United Technologies Corporation’s acquisition of Goodrich, in which the parties agreed to a divestiture remedy to reduce the vertical effects of the merged company’s position as the sole supplier of electronic control systems to its only competitor. The FTC’s structural remedy in Broadcom’s acquisition of Brocade follows the same pattern, and the resulting order was designed to prevent the vertical effects of Broadcom’s supply of fiber channel switches to Cisco, which competed directly with Brocade.

And when Comcast attempted to acquire Time Warner Cable, the Department of Justice stood by its conclusion that the merger would “make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers.” The parties abandoned the transaction. Thus, it is incorrect for anyone to say that the agencies have ignored non-horizontal mergers.

Standards of Proof Should Be the Same in All Merger Cases

The common thread found in all merger cases is a likelihood of substantial harm to competition in a relevant market. It should not matter how one classifies the case—as horizontal, vertical, conglomerate, product extension, potential competition, foreclosure, raising rivals’ costs, etc. Horizontal mergers have their economic models, and so do vertical ones. But there is no reason, in my view, to jettison the basic framework of burden shifting for non-horizontal mergers.

The basic burden-shifting structure in a merger case was not created by the courts only for Section 7. It had previously existed in non-merger Sherman Act cases for years, and continues to be used in such cases. For decades, the basic order of proof has been the same for all rule of reason cases, with the exception that in a merger case the proof need only show a “reasonable probability” of anticompetitive effects, so that a harmful merger can be stopped in its “incipiency.”

The classic burden-shifting framework is nearly identical in merger and non-merger cases. The burden-shifting framework in a non-merger case starts with the plaintiff’s defining a relevant market and offering proof that the challenged conduct is likely to be anticompetitive within that market.

Once the plaintiff makes out its prima facie case, either through direct evidence of likely anticompetitive effects or through market share statistics, the burden shifts to the defendant to show that the restraint at issue “actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.”

For merger cases, the defendant’s burden is deliberately similar: Once the plaintiff establishes its prima facie case, “the burden shifts to the defendants to rebut the presumption with evidence that ‘shows that the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant market.”

In the first stage of the burden-shifting framework, the plaintiff in any merger or Section 1 Sherman Act case can satisfy its prima facie case by showing that the merged entity has substantial market share in that market or the ability to foreclose more than 30–40 percent of the relevant market. If the market is already concentrated, and if the merger will increase the merged party’s market share by an appreciable amount as a result of the merger, it would follow that the prima facie case has been met. It should not matter whether the increase in market share arose from the acquired party directly or whether it arose from an increase in market power resulting from the merger.

Even without a strong structural case (based on market shares and changes of shares as a result of a merger), a plaintiff can still satisfy its initial burden by offering direct evidence of likely foreclosure or other harm to competition (likely tying, bundling, supracompetitive price increases, foreclosure of competition, and use of market power against buyers or sellers, etc.). For example, the European Commission has
focused its own Non-Horizontal Merger Guidelines on proof of such anticompetitive effects. Those Guidelines make sense, and are entirely consistent with the theories found in Brown Shoe and in most current non-horizontal concepts of competitive harm. Such direct evidence of likely effects is often the most compelling. In my experience, the best evidence of likely effects is not an economic model, but the parties’ and their customers’ documents that often detail potential price increases or other direct evidence of anticompetitive effects.

To rebut the plaintiff’s initial case in any merger or conduct case, a defendant can use classic arguments, such as a flawed market definition, low barriers to entry, likely entry, pro-competitive justifications, and efficiencies. In my experience, attacking the plaintiff’s market definitions has been the most effective form of defense. Other defenses can be as effective. However, defendants nearly always find it exceedingly difficult to prove reasonably verifiable, within market, merger-specific efficiencies as a defense. And, although the burden-shifting structure is the same in a merger case as it is in a Section 1 conduct case, in a merger case the defendants do not need to show that the transaction is actually procompetitive, as is necessary in a Section 1 case. But this is not really a difference. Few defendants have any chance of winning a merger case if they do not try to persuade the court that the merger has at least some pro-competitive effect. That is especially important when one considers that, in a merger case, the government’s burden to show likely, incipient harm is so low. This well-established burden-shifting framework can also be used in any non-horizontal merger case. For example, if a vertical merger allows an acquirer to purchase a large supplier, which would, for the first time, give the acquirer the ability to foreclose a competitor or raise a competitor’s cost so that the acquirer can raise prices, that would appear to satisfy a plaintiff’s prima facie case. If, for another example, a conglomerate merger allowed an acquirer to increase its market power against its suppliers upstream or control segments of retail downstream (such as control over shelf space), that would also appear to satisfy the kind of competitive harm Congress wanted Section 7 to stop.

A simple case could be based upon a defendant’s newfound ability (or predicted ability), as a result of a merger, to raise prices, enhance coordination between competitors, tie or bundle products together, or raise barriers to entry through exclusionary conduct. If, for example, the dominant water and electric companies combined and, in order for a customer to get a single bill, required customers to rent a water regulator box and sign a multi-year exclusive contract, would this fall within a prima facie case? If the power to do so harmed competition in either market, and the power to do so was created by the merger, the answer should be “yes.” This proof would be even more convincing if a new entrant would need to compete as a combined water and electric company to defeat the anticompetitive effects of the merger.

Another hypothetical example would be a vertical merger that gave the merged company a new ability to raise the costs of its competitors in a concentrated market, diverting customers to the merged company. The result may likely be higher market prices for the competitive products, or, due to the shift in market share to the merged entity, an increased likelihood of coordinated effects. These types of scenarios are just examples of prima facie cases that defendants could rebut.

Conclusion

The classification of a merger as either horizontal or non-horizontal should not determine whether the merger is likely to be anticompetitive, and it is clear that Congress intended the governing principle to be whether, through a merger or acquisition, the acquirer obtains additional market power to harm competition substantially. If it does, and there are no countervailing procompetitive justifications for the transaction, it should be enjoined. The unequivocal legislative history and binding Supreme Court precedent make clear that non-horizontal merger enforcement should be treated no differently.

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1 United States v. AT&T, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017), I take no position on the merits of this case or whether either side will prevail. This article is just about the theory. Success at trial, for either side, is always far more difficult than it appears, as this case shows. See discussion of AT&T infra.
2 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines 5.3 (2010), http://www.justice.gov/atr/public/guidelines/hmg/2010.html. I do not suggest that the agencies actually follow these guidelines in court or that they are, in fact, as formulaic in practice as they appear in print.
7 See, e.g., Section 7 of the Clayton Act: A Legislative History, 52 COLUM. L. REV. 766–81 (1952); the legislative history is also detailed in Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).
10 Id.; see also H.R. REP. No. 1191, 81st Cong., 1st Sess., at 13 (1949) (Larger corporations would lead to larger unions and “statism” necessary to regulate them.).
14 Id. at 11.
15 Id.
17 Id.
19 “The possibility of lower costs was brushed aside in the legislative deliberations. . . .” Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. REV. 226, 318 (1960).
20 95 CONG. REC. 11,486 (1949). Rep. Celler also stressed the difficulty “for small business to compete against the financial, purchasing, and advertising power of the mammoth corporations.” Id.
23 Id. at 59.
24 Id. at 68.
28 BORK, supra note 4, at 245–46.
29 Id. at 245.
30 Id. at 246, 248–49.
31 See, e.g., FTC v. Sysco Corp., 113 F. Supp. 3d 1, 82 (D.D.C. 2015) (“The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government’s prima facie case on the strength of the efficiencies.”).
32 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957). The case was brought in 1949, and thus was governed by the pre-amended Section 7.
33 Id.
34 Id. at 592.
35 Id. at 590.
36 Id. (citation omitted).
38 Id. at 583.
39 Id. at 583, 599, 613, 618 (addressing probable entrants; “Section 7 is intended to protect buyers as well as competing sellers”; the merger was a “threat to independent wire rope fabricators”; “A merger may have a different impact in different markets but if the proscribed effect is visited on a ‘threat to independent wire rope fabricators’; “A merger may have a different impact in different markets but if the proscribed effect is visited on a ‘threat to independent wire rope fabricators’”).
40 See British Oxygen Co., 86 F.T.C. 1241, 1975 WL 173325, at *95 (Dec. 8, 1975) (noting that indeed Bethlehem later became a direct competitor of Youngstown when it opened a plant in Chicago).
43 Brown Shoe, 370 U.S. at 344.
44 Id.
45 Id. at 317, 317 n.31; see also 314 n.21 (citation omitted) (noting that the Court had held in du Pont that even the earlier Act included non-horizontal acquisitions as well).
47 Brown Shoe, 370 U.S. at 334.
48 Id. at 324 (citation omitted).
49 Id. at 324 n.40.
51 The Procter & Gamble Co., 63 F.T.C. 1465, at *7 (1963) (quoting Scott Paper Co., 57 F.T.C. 1415, at *21 (1960)).
52 Id. at *67.
54 386 U.S. at 581.
55 Id. at 577.
56 Id. at 578.
57 Id. at 580 (citing Brown Shoe, 370 U.S. at 344).
58 Id. at 597, 604 (Harlan, J., concurring).
59 See generally 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 399–405 (8th ed. 2017). A more traditional approach can also be found in Ford Motor Company v. United States, 405 U.S. 562 (1972) (detailing the legislative history of the Celler-Kefauver Act and ordering divestiture in a vertical merger).
vertical mergers” can indeed be unlawful and then followed traditional analysis in examining the government’s unilateral and coordination theories and then rejected them based on a lack of evidence.86

In short, the court’s findings were factual, not legal. Although AT&T was an “epic battle” and an unusual case because it was a non-horizontal merger, Judge Leon’s opinion demonstrates that non-horizontal cases can be brought under the same law as horizontal mergers. He even said he was “skeptical . . . both as a matter of law and logic” of the argument that traditional law should not be applied in all merger cases.87 That, of course, was the point of this article, and like Judge Leon, I hope that others will not look merely at the outcome in AT&T and believe that it was “something more than a resolution of this specific case” rather than the result of a trial fought over the evidence.88

—J.R.R.

Postscript: AT&T—A New Beginning?

As this article was being sent to press, Judge Richard Leon delivered his 172-page AT&T decision.77 Judge Leon warns us that “the temptation by some to view this decision as being something more than a resolution of this specific case should be resisted by one and all!”88 He is correct. Instead of accepting the common thinking that non-horizontal merger law is dead, Judge Leon used the same general, burden-shifting approach that this article discusses.89 Thus, the outcome of AT&T was not the result of a mistaken or novel view of the law. It was, like most cases, driven by the evidence.

In AT&T, the government attempted to show that the merger would “enable Turner to charge AT&T’s rival distributors—and ultimately consumers—higher prices,” increase the risk of coordinated conduct between AT&T and Comcast, and prevent “AT&T’s rival distributors from using HBO as a promotional tool to attract and retain customers.”90 The court rejected all of these claims, not as a matter of law but due to a lack of proof.

Certain key issues guided Judge Leon towards this result. First, the court rejected the defendants’ argument that vertical mergers should be per se or presumptively lawful, as proposed by Robert Bork.81 Instead, the court assumed that “vertical mergers” can indeed be unlawful and then followed traditional merger law to determine whether the government had established its case through the evidence.82 It found that it had not.83 Second, the court accepted AT&T’s commitment to continue arbitrating its disputes, which reinforces the history of courts’ accepting real fixes to asserted competitive issues in a merger.84 It even accepted the defendants’ efficiency argument, based on the evidence, although it was “not necessary” for the “final judgment.”85 Finally, the court

77 AT&T, supra note 1, slip op. (June 12, 2018).
78 Id. at 171.
79 Id. at 53–54 and n.17, 56.
80 Id. at 60.
81 Id. at 59 n.20.
82 Id.
83 Id. at 59, 105 (accepting defendants’ expert’s analysis that prices would not increase).
84 Id. at 149 n.51.
85 Id. at 54 n.17.
86 Id. at 152–59 (describing the lack of evidence and an apparent concession by the government’s expert that coordination was not likely).
87 Id. at 54 and n.17.
88 Id. at 171.