THE PHILADELPHIA NATIONAL BANK PRESUMPTION: MERGER ANALYSIS IN AN UNPREDICTABLE WORLD

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The Philadelphia National Bank decision, drawing on elements of Brown Shoe, announced a presumption of illegality for mergers that significantly increased concentration in any market that was already at least moderately concentrated. This article makes the case that merger law should return to a strong reliance on that presumptive approach for merger analysis. The Court clarified the application of this presumption in its Continental Can decision and narrowly defined the scope of rebuttal in the General Dynamics, Marine Bancorporation, and Citizens & Southern decisions. This established a highly desirable policy for judging mergers because it removed the need for unnecessary and often erroneous speculation about specific future competitive effects. Unfortunately, the strength and clarity of the presumption has attenuated over the years. This article provides a doctrinal history that explains the basis for the presumption and its rebuttal. It then tracks its attenuation as reflected in the evolution of the merger guidelines. To support its thesis, the article reviews empirical evidence that shows that increased concentration is in fact generally associated with higher prices, reduced choice, and a loss in innovation while mergers themselves on average cause losses to the buyers (i.e., they are not overall efficiency enhancing). Hence, the danger in merger review is in false negatives and not in false positives. The data from post-merger effect studies strongly support this conclusion. A basic structural model would have condemned most of these anticompetitive mergers, but enforcement decisions, including remedies where there were challenges, failed to avoid significant harms. Such a model may result in increased false positives, but the explicit wording of Clayton 7 accepts some false positives in order to avoid false negatives and there is no reason to believe that false positives result in significant economic harms. Moreover, return to a robust use of the presumption will advance competition policy goals in static and dynamic terms as well as serving indirectly some of the fairness values that motivated antitrust law in the first place.