The Fall of Structural Evidence in FTC and DOJ Merger Review

Mike Cowie and Paul Denis discuss the FTC’s clearance of the Express Scripts/Medco merger. They contrast the FTC’s approach in this investigation against the DOJ’s approach in Oracle/PeopleSoft, and contend that the Express Scripts/Medco case represents a significant, visible sign that structural evidence no longer plays the role it once did in agency merger analysis.

The Impact of Twombly on Antitrust Actions Brought in the State Courts

Ned Cavanagh surveys the effects of the Supreme Court’s Twombly opinion on pleading standards and practice in state courts, and suggests how antitrust plaintiffs should consider pleading standards and other forum-specific factors when deciding whether to file an action in federal or state court.


Barbara Bruckmann uses the Sixth Circuit’s recent decision in Williams to show how little influence the Supreme Court’s 2006 Volvo opinion has had on getting the lower courts to interpret the Robinson-Patman Act as an antitrust law aimed at protecting competition rather than individual competitors.

Global Antitrust: Does It Have Limits?

Tad Lipsky shares his views on the global expansion of antitrust enforcement and argues that, while the global antitrust garden has blossomed abundantly, it is now badly overgrown and in desperate need of weeding and pruning.

Paper Trail

Editor John Woodbury discusses two papers that provide data on recent FTC merger investigations. The first, by the FTC, tracks the characteristics of mergers that were subject to an enforcement action versus those that were not, while the second, by Darren Tucker, describes the theories of harm and types of evidence the FTC considers when issuing a Second Request.
The Fall of Structural Evidence in FTC and DOJ Merger Review

Michael G. Cowie and Paul T. Denis

With the collapse of the AT&T/T-Mobile merger, the FTC’s investigation of the $34 billion merger of Express Scripts and Medco Health Solutions became the biggest story last year in antitrust merger enforcement. Opponents, largely competitors, lobbied and litigated against the deal based on large market shares and other structural evidence of market concentration in the pharmacy benefit management (PBM) business. Yet when the FTC cleared the deal, the Commission’s detailed closing statement made scant mention of market share, market concentration, or other traditional structural evidence.

The near omission of structural evidence from the Express Scripts/Medco closing statement was not an oversight. FTC staff remarks and our own experience representing Medco in the transaction show that the closing statement accurately reflects the course of the investigation. Very little time was spent on structural issues. The FTC’s decision on Express Scripts/Medco represents a significant, visible sign that structural evidence no longer plays the role it once did in agency merger analysis.

The agencies are now brushing past structural evidence in merger investigations. The FTC’s approach in Express Scripts/Medco contrasts with the DOJ’s approach to Oracle/PeopleSoft, a merger that was challenged following similar 3-to-2 complaints. The agencies’ closing statements on other recent scrutinized mergers confirm the declining significance of structural evidence. Competitive effects analysis—not inferences from market structure—is the primary rationale for the agencies’ decision to clear visible, heavily investigated transactions. Likewise, the DOJ and FTC merger guidelines over time have deemphasized market structure and increased the emphasis on competitive effects analysis, particularly the form of analysis that drove the FTC to close Express Scripts/Medco. Market structure evidence remains a screening tool during the initial Hart-Scott-Rodino Act waiting period and continues to be the focal point in agency merger litigation. But even in merger litigation, competitive effects analysis is growing in stature.


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FTC Clears Express Scripts/Medco over Opposition Focused on Structural Evidence

Express Scripts and Medco are large PBMs hired by employers to manage prescription drug plans for their employees. PBMs negotiate rates with retail pharmacies and establish retail pharmacy networks. PBMs often operate their own pharmacies (mail order pharmacies) in competition with retail pharmacies. PBMs also negotiate pricing with drug manufacturers to assure access to competitively priced drugs. As such, PBMs serve a purchasing function (relative to pharmacies and drug manufacturers) and also sell benefit services to employers and others. PBMs over the years have heard allegations of both monopsony and market power on the sell side. 4

Close Scrutiny. Express Scripts/Medco was closely scrutinized by the FTC, State Attorneys General, Congress, and a group of competitors opposed to the merger. The opponents to the transaction consisted largely of retail pharmacies that competed with the mail order pharmacy businesses of PBMs. Eventually, industry trade associations filed a preliminary injunction action in federal court to block the merger. 5 The merger received FTC clearance and closed before the federal court ruled against the preliminary injunction motion. 6

The main message of opponents was that the transaction was an unlawful 3-to-2 merger in an alleged market of full-service nationwide PBM services for large private employers, such as Fortune 500 companies. 7 In this purported market, the merger would create a firm with a share exceeding 80 percent, according to opponents. 8 They dismissed other competitors, outside the big three, as “niche,” “mid market,” or “second tier.” 9 As sellers of retail pharmacy services to PBMs, opponents also raised a monopsony concern that the merger would lead to a lowering of retail pharmacy reimbursement, allegedly threatening the viability of retail pharmacies. 10

The FTC Response. The FTC rejected opponents’ claims in its detailed closing statement, placing far greater weight on competitive effects analysis than on structural inferences advanced by opponents to the transaction. 11 In particular, the FTC cleared the merger in spite of its view that Express Scripts/Medco’s combined share exceeded 40 percent in a highly concentrated market consisting of full-line PBM services, 12 and that the merger “was over the HHI threshold of 2500 and therefore presumptively anticompetitive.” 13

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4 http://www.pbmwatch.com (materials with allegations against PBMs contained at “PBM Litigation Overview” and “Industry White Papers”).
5 Complaint, supra note 1.
7 Complaint, supra note 1, ¶ 81 (describing relevant market). The other member of the so-called big three is CVS Caremark. Id. ¶ 16.
9 Id.
10 FTC Closing Statement, supra note 2, at 1–2.
11 Id.; Howard Shelanski et al., Economics at the FTC: Drug and PBM Mergers and Drip Pricing, 41 REV. INDUS. ORG. 303 (2012) (stating that “the combined firm accounted for more than 40% of prescription dollars” and that the merger cleared “despite a significant increase in market concentration”).
In earlier days that alone may have killed a merger because a presumption of adverse competitive effects would be inferred from such structural evidence. But going beyond structural evidence, the FTC’s data-intensive analysis supported the conclusion “that the high market shares of the parties do not accurately reflect the current competitive environment and are not an accurate indicator of the likely effects of the merger on competition and consumers.”\(^{14}\) According to a leader of the FTC Bureau of Economics, Express Scripts/Medco “highlights areas of analysis that get greater billing in the revised Guidelines.”\(^{15}\)

Rather than inferring competitive effects from structural evidence, the FTC staff focused on bidding records and win-loss data.\(^{16}\) The staff found little competitive interaction between the merging firms with respect to large customers, certainly far less than might have been expected from the market share figures cited by opponents to the merger.\(^{17}\) As the staff looked at smaller customers, they found an ever-growing cadre of PBM competitors.

At its most basic level, the case represents a marked change in how the agencies conduct the process of inference compared with what they used to do following prior versions of the Guidelines and what most courts are still doing in applying the Supreme Court’s fifty-year-old Philadelphia National Bank precedent.\(^{18}\) Philadelphia National Bank supports an inference of anticompetitive effects from proof of high concentration. In contrast, the FTC staff in Express Scripts/Medco attempted to infer market definition from competitive effects evidence or by identifying some group of customers for whom the merging firms were regarded as uniquely close, if not the closest, rivals. Such a group was not to be found. Despite conducting over one hundred customer interviews, the FTC staff heard almost nothing in the way of customer complaints.\(^{19}\)

As part of its competitive effects analysis, the FTC placed weight on changing industry conditions and what that meant for competition tomorrow. For example, opponents said that health insurers historically had been fledgling, mid-market PBM competitors, unlikely to gain Fortune 500 customers. The FTC found that regulatory changes gave these competitors greater scale and ability to succeed across customer segments.\(^{20}\)

To reach the conclusion that post-merger there would be nine, not just two, significant competitors the FTC considered more than current position or size.\(^{21}\) Some competitors, albeit relatively small using conventional market share metrics, had already won significant contracts and

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14 FTC Closing Statement, supra note 2, at 1–2; Shelanski et al., supra note 12, at 303–07 (“This analysis also showed that market shares are not an accurate indicator of likely effects of the merger.”).
15 Interview with Alison Oldale, supra note 3, at 4.
16 ABA Antitrust Section, Audiotape, Express Scripts/Medco: The FTC Decision and Analysis (May 30, 2012), http://www.americanbar.org/groups/antitrust_law/resources/committee_program_audio/committee_program_audio_2012_05.html (remarks of FTC’s Jim Southworth); Shelanski et al., supra note 12, at 4–7 (describing the “bid-data analysis”).
17 Interview with Alison Oldale, supra note 3, at 4 (“We looked at what customers of one of the merging firms did if they became dissatisfied and switched to an alternative supplier, and found that they rarely went to the other merging firm. The parties were not particularly close competitors, and notwithstanding the large market shares, unilateral effects were not likely.”); Shelanski et al., supra note 12, at 6 (“The conditional loss analysis demonstrated that competition from non-merging rivals was substantial, relative to the pre-merger competition between ESI and Medco, and sufficient to prevent a substantial loss of competition from the acquisition.”).
19 ABA Antitrust Section Audiotape, supra note 16 (remarks of the FTC’s Jonathan Klarfeld).
20 FTC Closing Statement, supra note 2, at 3.
21 Id. at 2.
were positioned to grow in the future. The FTC characterized these competitors as “significant” instead of dismissing them as niche.22

Diversion analysis was also an important part of the FTC’s work and played an important role in forming the FTC’s closing decision.23 In its analysis, the FTC found that business shifted between the merging parties at a relatively low rate and that the companies lost significant business to competitors outside the so-called big three. Changing industry conditions were likely to intensify these dynamics, already reflected in the contract awards for large employers going forward. Thus, looking forward the Commission found no reason to believe that competition would be reduced as a result of the merger.

**Contrasts with the DOJ’s Approach in Oracle/PeopleSoft.** One way to see the changing role of structural evidence is to compare the FTC’s unconditional clearance of Express Scripts/Medco with the DOJ’s unsuccessful challenge of Oracle/PeopleSoft. The 3-to-2 concerns expressed in Express Scripts/Medco resembled the 3-to-2 concerns raised by the DOJ in Oracle/PeopleSoft.


<table>
<thead>
<tr>
<th></th>
<th><strong>Oracle: DOJ Allegations</strong>24</th>
<th><strong>Express Scripts: Opponent Allegations</strong>25</th>
<th><strong>Express Scripts: FTC Conclusions</strong>26</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Market share</strong></td>
<td>50%–70%</td>
<td>&gt;80%</td>
<td>&gt;40%</td>
</tr>
<tr>
<td><strong>Change in concentration</strong></td>
<td>3-to-2</td>
<td>3-to-2</td>
<td>10-to-9</td>
</tr>
<tr>
<td><strong>Product market</strong></td>
<td>High function software for large complex enterprises</td>
<td>Full-service, nationwide PBM services for large private employers</td>
<td>Full-service PBM services</td>
</tr>
<tr>
<td><strong>Customers at issue</strong></td>
<td>Fortune 500</td>
<td>Fortune 500</td>
<td>Private employers, government agencies, unions</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td>Lawsuit filed; PI denied; deal closed</td>
<td>Lawsuit filed; dismissed in part, portions remain pending</td>
<td>Unconditional clearance; deal closed</td>
</tr>
</tbody>
</table>

Both industries consisted of not only three large established players but other competitors characterized by opponents as “niche,” “mid market,” “regional,” or “limited scale.”27 Government agencies are large buyers in both industries, and selected vendors outside the big three. In Oracle/PeopleSoft, the DOJ went so far as to dismiss a competitor as “mid-market” even though

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22 Id.
23 ABA Antitrust Section Audiotape, supra note 16 (remarks of FTC’s Jim Southworth); Shelanski et al., supra note 12, at 5–6 (describing “conditional loss analysis” and stating that it is similar to the use of “diversion ratios”).
25 Complaint, supra note 1, ¶ 104–114.
26 FTC Closing Statement, supra note 2, at 2–3.
the DOJ, itself a very large customer, had recently selected this software vendor over the big three. 28 In Express Scripts/Medco the states were shown to be large buyers of PBM services and, like the DOJ in Oracle/PeopleSoft, often selected a supplier outside the big three, but this evidence was accorded more weight.

In describing the decision to challenge Oracle/PeopleSoft, the DOJ leadership emphasized the structural change from 3-to-2. 29 The FTC’s decision to clear Express Scripts/Medco over 3-to-2 objections can be interpreted as an important change in direction (although, of course, no two merger investigations yield the same facts or evidence).

**FTC and DOJ Closing Statements: Reasons for Clearing Difficult Transactions**

The change in direction to de-emphasize structural evidence is corroborated by an analysis of the antitrust agencies’ decisions on when to issue closing statements and how to explain the decision to close.

The agencies close most merger investigations without taking any enforcement action. In a small minority of those deals, the agencies make public statements explaining the decision not to challenge. These often arise in context of visible, heavily investigated mergers where the agencies have developed a substantial factual record.

The analysis below summarizes the rationale for the FTC and DOJ merger closing statements issued in the past ten years. Competitive effects analysis is the primary grounds for most of the closing decisions. Structural evidence is the primary grounds less than a quarter of the time and only once in the last five years. In the table below, the “primary ground” is based on an admittedly subjective reading of the closing statement to identify the factor—market structure, competitive effects, entry, efficiencies, or failing firm—that appears to have been most important in the agency’s decision.

**FTC and DOJ Merger Closing Statements, Primary Grounds for Clearance, 2002–12**

<table>
<thead>
<tr>
<th>Merger</th>
<th>Agency</th>
<th>Year</th>
<th>Primary Ground</th>
</tr>
</thead>
<tbody>
<tr>
<td>Universal/EMI</td>
<td>FTC</td>
<td>2012</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Express Scripts/Medco</td>
<td>FTC</td>
<td>2012</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Apple/Nortel and Google/Motorola</td>
<td>DOJ</td>
<td>2012</td>
<td>Competitive Effects</td>
</tr>
</tbody>
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29 Jaret Seiberg, DOJ to Block Oracle-PeopleSoft, THE DEAL, Feb. 27, 2004 (quoting Ass’t Att’y Gen. Pate as saying: “We took this action because it is the right thing to do to protect competition in an important market. Going [from] three to two companies in this market is a competitive problem that needed to be stopped.”); see also Rosch, supra note 28, at 8 (Commissioner Rosch worked as counsel to Oracle on the merger and stated: “When DOJ announced that it was challenging the merger, it had already painted the transaction as a case of three firms (SAP, Oracle, and PeopleSoft) going down to two firms—based on the views of select customers.”).

30 This consists of the agencies’ public statements on mergers receiving unconditional clearance. It does not include any merger for which there was an enforcement action or consent order.


32 FTC Closing Statement, supra note 2, at 2–7.

<table>
<thead>
<tr>
<th>Merger</th>
<th>Agency</th>
<th>Year</th>
<th>Primary Ground</th>
</tr>
</thead>
<tbody>
<tr>
<td>Southwest/AirTran</td>
<td>DOJ</td>
<td>2011</td>
<td>Efficiencies</td>
</tr>
<tr>
<td>Google/Admeld</td>
<td>DOJ</td>
<td>2011</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Perdue/Coleman Natural Foods</td>
<td>DOJ</td>
<td>2011</td>
<td>Market Structure</td>
</tr>
<tr>
<td>Google/Admob</td>
<td>FTC</td>
<td>2010</td>
<td>Entry</td>
</tr>
<tr>
<td>Cisco/Tandberg</td>
<td>DOJ</td>
<td>2010</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Delta/Northwest</td>
<td>DOJ</td>
<td>2008</td>
<td>Efficiencies</td>
</tr>
<tr>
<td>XM/Sirius</td>
<td>DOJ</td>
<td>2008</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Chicago Mercantile Exchange/CBOT</td>
<td>DOJ</td>
<td>2007</td>
<td>Market Structure</td>
</tr>
<tr>
<td>Smithfield/Premium Standard Farms</td>
<td>DOJ</td>
<td>2007</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Google/DoubleClick</td>
<td>FTC</td>
<td>2007</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>AT&amp;T/BellSouth</td>
<td>DOJ</td>
<td>2006</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>MediaNews/Contra Costa Times</td>
<td>DOJ</td>
<td>2006</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Whirlpool/Maytag</td>
<td>DOJ</td>
<td>2006</td>
<td>Competitive Effects</td>
</tr>
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## FTC and DOJ Merger Closing Statements continued

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<tr>
<th>Merger</th>
<th>Agency</th>
<th>Year</th>
<th>Primary Ground</th>
</tr>
</thead>
<tbody>
<tr>
<td>US Air/America West&lt;sup&gt;47&lt;/sup&gt;</td>
<td>DOJ</td>
<td>2005</td>
<td>Market Structure</td>
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<tr>
<td>Federated/May&lt;sup&gt;48&lt;/sup&gt;</td>
<td>FTC</td>
<td>2005</td>
<td>Market Structure</td>
</tr>
<tr>
<td>Sprint/Nextel&lt;sup&gt;49&lt;/sup&gt;</td>
<td>DOJ</td>
<td>2005</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Omnicare/NeighborCare&lt;sup&gt;50&lt;/sup&gt;</td>
<td>FTC</td>
<td>2005</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>RJ Reynolds/Brown &amp; Williamson&lt;sup&gt;51&lt;/sup&gt;</td>
<td>FTC</td>
<td>2004</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Anthem/WellPoint&lt;sup&gt;52&lt;/sup&gt;</td>
<td>DOJ</td>
<td>2004</td>
<td>Market Structure</td>
</tr>
<tr>
<td>UnitedHealth/Oxford&lt;sup&gt;53&lt;/sup&gt;</td>
<td>DOJ</td>
<td>2004</td>
<td>Market Structure</td>
</tr>
<tr>
<td>Caremark/Advance PCS&lt;sup&gt;54&lt;/sup&gt;</td>
<td>FTC</td>
<td>2004</td>
<td>Market Structure</td>
</tr>
<tr>
<td>Genzyme/Novazyme&lt;sup&gt;55&lt;/sup&gt;</td>
<td>FTC</td>
<td>2004</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Arch Wireless/Metrocall&lt;sup&gt;56&lt;/sup&gt;</td>
<td>DOJ</td>
<td>2004</td>
<td>Competitive Effects</td>
</tr>
<tr>
<td>Sunoco/Coastal Eagle Point&lt;sup&gt;57&lt;/sup&gt;</td>
<td>FTC</td>
<td>2003</td>
<td>Entry</td>
</tr>
<tr>
<td>HP/Compaq&lt;sup&gt;58&lt;/sup&gt;</td>
<td>FTC</td>
<td>2002</td>
<td>Efficiencies</td>
</tr>
<tr>
<td>Carnival/Princess&lt;sup&gt;59&lt;/sup&gt;</td>
<td>FTC</td>
<td>2002</td>
<td>Competitive Effects</td>
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<sup>50</sup> Statement of the Commission, Omnicare, Inc./NeighborCare, Inc. at 1–2 (June 16, 2005), available at http://www.ftc.gov/os/caselist/0410146/050616stmtcom0410146.pdf.


It is difficult to draw definitive conclusions from this analysis, as the incidence of agency closing statements depends on the volume of merger activity in the economy, the volume of strategic mergers, the approach of agency leadership to the use of public closing statements, and other variables. Nonetheless, according to this analysis, market structure appeared with some frequency in closing statements eight to ten years ago but almost disappeared from recent closing statements.

Merger Guidelines: The Rise of Competitive Effects Analysis

Over time, the merger guidelines have also deemphasized the importance of historical market shares and increased the emphasis on competitive effects analysis. One possible way to show this evolution is to look at the percentage of total words in the guidelines devoted to market structure issues relative to the percentage of words devoted to competitive effects. The assumption underlying this “test” is that the agencies will spill more ink on issues that are important to them.

This analysis shows a marked, measurable shift away from market structure analysis.

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<tr>
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<tbody>
<tr>
<td>DOJ Merger Guidelines, 1968</td>
<td>53%</td>
<td>8%</td>
<td>6.6</td>
</tr>
<tr>
<td>DOJ Merger Guidelines, 1982</td>
<td>58%</td>
<td>24%</td>
<td>2.4</td>
</tr>
<tr>
<td>DOJ Merger Guidelines, 1984</td>
<td>65%</td>
<td>18%</td>
<td>3.6</td>
</tr>
<tr>
<td>DOJ &amp; FTC Horizontal Merger Guidelines, 1992</td>
<td>45%</td>
<td>25%</td>
<td>1.8</td>
</tr>
<tr>
<td>DOJ &amp; FTC Horizontal Merger Guidelines, 1992 (rev. 1997)</td>
<td>42%</td>
<td>24%</td>
<td>1.8</td>
</tr>
<tr>
<td>DOJ &amp; FTC Horizontal Merger Guidelines, 2010</td>
<td>39%</td>
<td>42%</td>
<td>0.9</td>
</tr>
<tr>
<td>DOJ &amp; FTC Commentary, 2006</td>
<td>20%</td>
<td>36%</td>
<td>0.6</td>
</tr>
</tbody>
</table>

60 Assigning words in the guidelines to market structure or competitive effects is relatively straightforward, as the guidelines separate these in the analysis.


As shown above, the very first U.S. merger guidelines, the 1968 DOJ Merger Guidelines, devoted nearly seven times as much attention to market structure as to competitive effects. Antitrust thinking at the time was still dominated by the structure-conduct-performance paradigm, and the legal or economic literature paid little attention to the mechanism by which mergers might have an adverse effect on competition.68

As legal and economic thinking progressed, the focus shifted dramatically. With the 1982 DOJ Merger Guidelines, the ratio of words devoted to market structure relative to competitive effects fell to 2.4 as the DOJ devoted relatively more attention to competitive effects and relatively less attention to market structure. This change reflected the growing understanding in legal and economic circles of George Stigler’s pathbreaking article, *The Theory of Oligopoly* (which predated the 1968 Guidelines), as popularized and extended by Harold Demsetz, Richard Posner, and others.69

Two years later in 1984, the ratio of words devoted to market structure relative to competitive effects rose slightly as the DOJ made greater efforts to explain the hypothetical monopolist paradigm used for market definition.70 But the 1984 revisions clarified that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger,”71

By 1992, with the issuance of the first joint DOJ and FTC Horizontal Merger Guidelines, the ratio of words devoted to market structure relative to competitive effects evidence fell again as the agencies articulated a dedicated “Competitive Effects” framework.72 The agencies no longer cited concentration as the factor that made them “likely to challenge” a transaction. Instead, analysis of market structure became just one of five steps, each necessary and, together, sufficient to determine the likely effect of a merger. The agencies added safe harbors and a series of concentration thresholds. But even at the highest range of concentration the agencies recognized that the merging parties could overcome the presumption in the remaining steps of the analysis.73

With the 2006 Commentary on the Horizontal Merger Guidelines, a comprehensive report on completed merger investigations, the agencies went out of their way to de-emphasize structural factors and highlight the importance of empirical tests used to measure proximity or closeness of head-to-head competition.74 For example, the Commentary reports that competitive effects analysis played a critical role in the agencies’ enforcement actions to challenge Nestle/Dreyer’s (ice cream) and Interstate Bakeries/Continental Baking (bread), and in their decisions to clear R.J. Reynolds/Brown & Williamson (cigarettes) and Fortune Brands/Allied Domecq (bourbon).75

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71 Id. sec. 3.11.


73 Id. sec. 1.51.


The release of the joint 2010 Horizontal Merger Guidelines continued the trend of the earlier guidelines, and the relative emphasis on competitive effects suggested by the Commentary. The agencies added new sections, all focused on competitive effects, and the ratio of words devoted to market structure relative to competitive effects evidence fell from 1.8 in the 1992 Guidelines to 0.9. Taking the central role of competitive effects analysis as a given, the 2010 Guidelines focused on the methods or techniques for conducting competitive effects analysis. Public statements of FTC and DOJ leadership reinforce this shift.

The recent FTC closing statement in Express Scripts/Medco continues on this path. Only three of the forty-nine paragraphs even mention market definition, market structure, or concentration. 

**Agency Merger Litigation: Market Structure Evidence Still Has a Starring Role**

In contrast, a different picture emerges when looking at how the agencies litigate merger challenges. A review of agency preliminary injunction briefs filed in U.S. district courts shows relatively heavy reliance on structural evidence. Of course, the agencies must tailor their case presentation for the judicial audience. Courts may expect the government to present a structural case and may be more familiar with the narrative that market delineation supports. Market delineation may help organize and focus the case for advocacy purposes.

In litigation, the agencies wield *Brown Shoe* to define markets based on qualitative evidence. Then they use *Philadelphia National Bank* to establish a presumption of anticompetitive effects from the market structure evidence which, under *Brown Shoe*, may be purely qualitative (such as evidence of industry perception). This puts data-intensive competitive effects analysis, of the type we see in the 2010 Guidelines and in agency merger investigations like Express Scripts/Medco, on the sidelines.

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77 Id. at 4 (“They abandon the analytical framework of prior guidelines in favor of describing principal analytical techniques and types of evidence used to assess a merger and make plain that the agencies’ analysis need not start with nor even necessarily use market definition.”).

78 See, e.g., *interview with Julie Brill, Comm’r, Fed. Trade Comm’n, ANTITRUST SOURCE*, Feb. 2012, at 5 (“What the 2010 Guidelines did was to take a step away from the use of market definition, market structure, and market shares as gating issues. The 2010 Guidelines consider competitive effects first, and I think we got that right.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb12_brill_intrvw_2_27f.authcheckdam.pdf; J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector, Remarks Before the ABA Antitrust Section Fall Forum 3 (Nov. 18, 2010) (“[M]arket definition is not a ‘gating’ or threshold issue in the sense that the agencies have to prove a relevant market before it can look at a merger’s competitive effects.”), available at http://www.ftc.gov/speeches/rosch/101118fallforum.pdf.

79 FTC Closing Statement, supra note 2.

80 Thomas O. Barnett, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives 4 (June 26, 2008), available at http://www.justice.gov/atr/public/speeches/234537.htm (“[S]ome have suggested that one solution to the challenge . . . is to abandon market definition and proceed directly to a competitive effects analysis. I want to sound a note of caution about such an approach. As an initial matter, most judges are likely to expect the agencies to present and support a relevant market definition, and a failure to meet that expectation could cause the agency to lose credibility with the court. Further, the market definition exercise places a practical discipline on the analysis.”); Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. No. 3 (forthcoming 2013) (draft of Feb. 14, 2002, at 2, 14), available at http://ssrn.com/abstract=2004655 (“Because a relevant market denotes the competitive process at issue, alleging a relevant market brings clarity and power to the narrative. . . . Decades of experience suggests that market delineation often adds clarity and power to the narrative.”).

81 Id.


In its recent challenge to H&R Block/TaxACT, the DOJ dwelled on company documents to show closeness of competition. Yet the DOJ cited Brown Shoe five times, highlighted Brown Shoe's qualitative factors for defining markets, and presented evidence supporting each factor. The DOJ quoted Brown Shoe for the notion that the court could assess competitive effects by examining the “structure, history, and probable future of the market in question.” Relying on Philadelphia National Bank, the DOJ then asked the court to find that “the challenged acquisition is presumptively unlawful because it will substantially increase concentration.”

The recent FTC brief in OSF/Rockford Health takes a similar approach in challenging a hospital merger as an illegal 3-to-2 merger. What stands out is the absence from the brief of any showing that customers (the health plans) obtained price concessions because of rivalry between the merging hospitals or that customers switched or threatened to switch in order to keep pricing competitive. The FTC brief is heavy on concentration and light on competitive effects analysis. Citing Philadelphia National Bank, the FTC concludes that “the extraordinary increase in market concentration triggers a strong presumption . . . that the Acquisition is anticompetitive and unlawful.” Moreover, “The strong structural case here—and the resulting presumption of illegality—creates an insurmountable burden for Defendants . . . and the Court may order relief on this basis alone.”

These recent preliminary injunction briefs mirror ones from ten to fifteen years ago. We do not see the shift in focus like we do with the guidelines and in agency practice. For example, the FTC brief in the 1990s drug wholesalers case cited Brown Shoe five times and dwelled on qualitative evidence bearing on market definition. Likewise, in the chewing tobacco merger, the FTC’s brief cited Brown Shoe seven times and invoked Philadelphia National Bank in emphasizing that the merger “is so inherently likely to lessen competition.”

Over time, the courts can be expected to absorb developments in agency guidelines and investigative practice and lead the parties to take a different approach in litigating merger challenges. There are already some initial signs of change in how the agencies litigate merger cases. The FTC’s complaint last year in Graco/ITW led with direct effects evidence. As the Deputy Director of the FTC’s Bureau of Economics explained, the Graco/ITW complaint “avoid[ed] a detailed identification of the narrowest markets—as the revised Guidelines emphasized we might

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84 Wayland, supra note 3, at 12–23 (discussing use of company documents to show head-to-head competition and anticompetitive effects in litigating H&R Block/TaxAct).
89 Id. at 2.
90 Id. at 8.
sometimes do.” The FTC reversed the standard approach: “Instead of using market definition and shares as the starting point for our analysis we focused more directly on effects . . . . You can see this emphasis in the way the complaint is written, with the analysis of effects first and of market definition second.” The competitive effects story that is the focus of the FTC’s complaint is based on data looking “directly at the switching behavior of customers between the two merging parties.”

The FTC’s approach in Graco/ITW suggests that the agencies’ investigative practice is starting to be exported to litigation. While the decision in Express Scripts/Medco is a clear sign that the 2010 Guidelines approach is embedded in agency investigational practice, we can expect slower, more incremental change before the courts.

94 Interview with Alison Oldale, supra note 3, at 5.
95 Id.
96 Id.
The Impact of *Twombly* on Antitrust Actions Brought in the State Courts

Edward D. Cavanagh

The Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*¹ set off shockwaves that reverberated throughout the federal civil justice system. In a calculated effort to raise the bar for pleadings in federal court, the Court (1) redefined notice pleading; (2) consigned to the scrap heap the fifty-year old “no set of facts” test embodied in *Conley v. Gibson*² in favor of a “plausibility” standard; and (3) assigned trial judges the task of actively scrutinizing complaints to make sure that deficient claims do not proceed to expensive discovery and perhaps an equally expensive, and ultimately unsuccessful, trial.³

As federal courts have labored to implement the new pleading standards, state courts have taken notice of *Twombly* and its progeny as well in addressing state law pleading issues. This article (1) examines the treatment of *Twombly* by the state courts, particularly in antitrust cases; (2) analyzes whether that treatment inures to the benefit or detriment of state court litigants; and (3) considers pleading along with other factors in analyzing the practical question of which forum—state or federal—might be the most advantageous venue for a given civil action.

Impact of *Twombly*

*Twombly* did two things: (1) it raised the bar for pleadings in federal court; and (2) it tasked district courts with the responsibility of acting as gatekeepers at the motion to dismiss stage to screen out insubstantial claims that would otherwise proceed to time-consuming and expensive discovery.

Higher Pleading Standard—The Plausibility Test

As noted, the *Twombly* court “retired” the “no set of facts” standard set forth in *Conley v. Gibson* and adopted a plausibility standard in its place. Interestingly, *Twombly* was not a wholesale rejection of *Conley v. Gibson*. The Court reaffirmed *Conley*’s requirement that a complaint provide notice plus grounds for relief and further held that those grounds must be plausible.⁴ But precisely what the Court meant by plausible is not clear. For one thing, the Court articulated the plausibility standard in several ways. Furthermore, contributing to the problem is the Court’s articulation of plausible in terms of what it is *not*. A complaint that contains conclusory allegations or a formulaic recitation of statutory standards, as opposed to factual allegations, is not plausible. The Court also explained that allegations that make the conduct in question merely possible do not meet the

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⁴ Id. at 555.
plausibility standard. On the other hand, plausibility does not demand that the plaintiff at the
pleading stage show that the conduct in issue is probable. Plausible is thus somewhere between
possible and probable, but where the dividing lines lie is not clear.\(^5\)

Elsewhere in the opinion, the Court described its plausibility test in a more affirmative manner.
For example, a complaint is plausible where it provides “enough factual matter (taken as true) to
suggest that an agreement was made,” that is, “enough fact to raise a reasonable expectation that
discovery will reveal evidence of illegal agreement.”\(^6\) Neither of the foregoing statements, how-
ever, is particularly helpful in identifying when the quantum of facts pleaded is sufficient. Finally,
the task fell to Justice Stevens, in dissent, to make a token effort to square the Court’s plausibili-
ty standard with the examples of bare-bones pleading contained in the Appendix of Official Forms
of the Federal Rules of Civil Procedure,\(^7\) which the Advisory Committee deems sufficient to sur-
vive a motion to dismiss.\(^8\) In short, *Twombly* left a lot of questions unanswered.

**District Courts as Gatekeepers**

The result in *Twombly* was inextricably linked to the high costs of litigation, particularly the high
costs of pretrial discovery in antitrust cases. The Court admonished district judges faced with
motions to dismiss not “to forget that proceeding to antitrust discovery can be expensive.”\(^9\) As
Judge Richard Posner has observed, *Twombly* “is designed to spare the defendants the expense
of responding to bulky, burdensome discovery unless the complaint provides enough information
to enable an inference that the suit has sufficient merit to warrant putting the defendant to the bur-
den of responding to at least a limited discovery demand.”\(^10\) Nor was the Court in *Twombly*
concerned solely about monetary costs. The Court emphasized that deficiencies in antitrust claims
must be exposed at the threshold of the action because otherwise “[a largely groundless claim]
[would] be [permitted] to ‘take up the time of a number of other people, with the right to do so rep-
resenting an in terrorem increment of the settlement value.’”\(^11\)

*Twombly* thus assigns to district judges the role of gatekeepers whose job is to parse com-
plaints at the motion to dismiss stage and to weed out infirm and potentially costly claims. The
lower courts have embraced this gatekeeper role and have been sensitive to potentially high dis-
copy costs in evaluating pleadings. For example, the Seventh Circuit has ruled that where
anticipated discovery costs are unusually steep, the district court may require added factual detail
in assessing plausibility.\(^12\) Similarly, courts have been cognizant of discovery costs in analyzing
threshold antitrust issues, including standing and antitrust injury. At the same time, no court has
dismissed an antitrust claim solely because the costs of discovery might be very high as even
meritorious antitrust claims are expensive to litigate.

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\(^5\) Id. at 556.

\(^6\) Id.

\(^7\) Id. at 575–76 (Stevens, J., dissenting).

\(^8\) FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contem-
plate.”), & advisory committee’s note.

\(^9\) *Twombly*, 550 U.S. at 558.

\(^10\) *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010).


\(^12\) Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797, 803–04 (7th Cir. 2008).
Iqbal
Two years after its decision in *Twombly*, the Court revisited the pleading requirements in *Ashcroft v. Iqbal*.

Reiterating its earlier holding, the Court made clear that *Twombly* applied to all civil complaints and was not limited to complex antitrust cases. The Court also underscored “[t]wo working principles [that] underlie [the] decision in *Twombly*: (1) on a motion to dismiss only well-pleaded facts must be accepted by the court as true, and conclusory allegations can be disregarded; (2) a complaint must state “a plausible claim for relief” to survive a motion to dismiss. The process of determining plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Again, however, the Court did little to flesh out the meaning of “plausible.”

Twombly in the Lower Courts
The task of clarifying *Twombly* has been left to the lower courts to develop on a case-by-case basis. The response from the lower courts has been pragmatic and measured. Although *Twombly* has faced harsh criticism from the academic community, the predicted parade of horribles has not materialized. The federal courts have by and large heeded Judge Posner’s admonition that *Twombly* “must not be overread.” At the same time, courts have carefully parsed antitrust conspiracy claims. For example, the Second Circuit in *Starr v. Sony BMG Music Entertainment* upheld an antitrust conspiracy claim premised on parallel business behavior by purchasers of digital music alleging that the defendants, major record labels, had agreed to fix prices and terms under which their music would be sold on the Internet. In denying the motion to dismiss, the Court held that the complaint “succeeds where *Twombly*s failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants.”

(1) The defendants, through the creation of two joint ventures, controlled about 80 percent of the Internet music business and used the joint ventures, as well as trade association meetings, to exchange price information.

(2) The prices charged by the defendants for Internet music were unreasonably high and did not reflect the enormous savings over distribution of music via CDs, nor were terms of sale consumer friendly.

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14 Id. at 678–79.
15 Id. at 679.
17 Limestone Development Corp., 520 F.3d at 803.
18 592 F.3d 314 (2d Cir. 2010).
19 Id. at 317.
20 Id. at 323.
Third parties, whom the defendants used to distribute Internet music, had to sell to consumers on the same terms as the defendants.

(4) The defendants used Most Favored Nation clauses in dealing with their joint ventures and tried to hide this fact, lest they attract antitrust scrutiny.

(5) The defendants agreed to sell music at a wholesale price of 70 cents per song at a time when rival independent sellers charged 25 cents per song.

(6) The defendants jointly agreed not to deal with eMusic, the second largest Internet music retailer.

(7) The defendants were subject to at least three governmental antitrust investigations.

(8) The defendants jointly agreed to raise their price of Internet music from 65 cents to 70 cents per song.  

Moreover, the appellate courts have not hesitated to rein in trial courts when they have taken Twombly too far. Anderson News L.L.C. v. American Media, Inc. 22 is a case in point. Anderson was a wholesaler of single-copy magazines, i.e., magazines sold at newsstand rather than by subscription, who sued magazine publishers, distributors (publisher’s representatives), and a rival wholesaler, alleging a complex lattice-work conspiracy with both horizontal and vertical elements to drive Anderson from the field after Anderson announced the imposition of a $.07/copy surcharge for each magazine that it handled. The trial court granted the defendants’ motion to dismiss:

The Complaint alleges that Defendants engaged in a broad industry-wide conspiracy. The ultimate goal of this alleged conspiracy was to eliminate both Anderson and non-party Source, two of the four largest magazine wholesalers. ... This goal is not plausible. Publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers. Destroying Anderson and Source would reduce the publisher’s wholesale outlets from four to two and would give Hudson and News Group, the two remaining major wholesalers, 90% of the market share ... This is too much market power to yield to wholesalers. Indeed, the Complaint alleges that Anderson’s demise has substantially reduced the output of magazines as well as the ability of retailers to obtain magazines. ... It is implausible that magazine publishers would conspire to deny retailers access to their own products. Collusion to destroy Anderson and non-party Source—the ultimate goal of the alleged conspiracy—is facially implausible. 23

The trial court also denied Anderson’s motion to amend, even though the amended complaint (1) provided detailed factual allegations setting forth the conception, operation, and efficacy of the defendants’ illegal plot; (2) alleged an actual agreement among the defendants to terminate Anderson; (3) identified the time, date and place of conspiratorial meetings and the participants therein; and (4) set forth statements allegedly made by the defendants that may be plausibly construed as indicating agreement among the defendants to drive Anderson from the field. The Second Circuit reversed and upheld the amended complaint. The appellate court stressed that the amended complaint had alleged an actual agreement, had named names, and had provided details of conspiratorial meetings. As a result, the allegations were not merely conclusory and accordingly, the amended complaint was more than adequate to meet Twombly’s plausibility standard. 24

21 Id. at 319, 323–24; see Edward D. Cavanagh, Making Sense of Twombly, 63 S.C. L. Rev. 97, 125–26 (2011).
22 680 F.3d 162 (2d Cir. 2012).
23 Id. at 172–73 (quoting the court below).
24 Id. at 186–89.
Equally important, the Second Circuit took the trial court to task for committing analytical errors in the application of *Twombly*. The Court of Appeals held that the trial court had misconstrued plausibility by framing the issue as whether or not there is a plausible alternative for the defendants’ conduct, when the proper question under *Twombly* is whether the complaint alleges sufficient facts to make the plaintiff’s claim plausible. It also took the trial court to task for making factual findings on a motion to dismiss. Specifically, the appellate court criticized the trial judge’s ruling that defendants’ “acted separately” was the “most plausible” scenario. In short, dismissal orders are not a given under *Twombly*. Courts will carefully scrutinize pleadings in assessing the plausibility of antitrust claims and uphold only those complaints that are well-pleaded.

**State Court Responses to Twombly**

*Twombly* has been widely cited by the federal courts, and the pleading controversy at the federal level has spilled over into the state courts. This is not surprising, given that twenty-six states and the District of Columbia had embraced the permissive “no set of facts” standard set forth in *Conley v. Gibson*; which *Twombly* unceremoniously “retired.” What is surprising is the variation in responses from the state courts, even among those states that had previously adhered to federal precedent.

On the one hand, some states have embraced *Twombly*’s plausibility standard. Thus, the Massachusetts Supreme Court in *Iannacchino v. Ford Motor Co.*, following the lead of *Twombly*, rescinded the *Conley* standard and “[took] the opportunity to refine the standard governing motions to dismiss” under Massachusetts law. That case was a class action for violations of the Massachusetts Consumer Protection Act and breach of warranty wherein the plaintiffs claimed that Ford and other auto parts manufacturers installed and sold door handle systems that did not comply with safety standards and thus were defective. The court found that a bare allegation that a product was “defective” was conclusory and “[did] not suffice to state a viable claim.”

In addition, the court found that the complaint was legally deficient because it failed either to allege that the plaintiffs suffered personal injury or property damage or to “identify a legally required standard that the vehicles were at least implicitly represented as meeting, but allegedly did not.” Whether *Iannacchino* will be an effective vehicle for reining in private actions under the expansive Massachusetts Consumer Protection Act remains to be seen. However, subsequent cases have made clear that neither *Twombly* nor *Iannacchino* abandons notice pleading and that Massachusetts remains a notice pleading jurisdiction.

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25 Id. at 189–90.
26 Id. at 181, 189–90.
30 Id. at 882.
31 Id.
32 Id. at 888.
33 Id.
The District of Columbia has also adopted *Twombly* in *Chamberlain v. American Honda Finance Corp.* but went one step beyond the Massachusetts courts. Chamberlain ruled that even before *Twombly*, an antitrust complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.” Still other state courts have embraced *Twombly* with little fanfare. On the other hand, for those states that have not adopted notice pleading and instead require fact pleading, the impact of *Twombly* has been quite different. Here, it is not a matter of the federal courts giving direction to the state courts, but rather, of having the *Twombly* Court bring federal pleading standards more in line with those of many states. The thrust of *Twombly*, in fact-pleading jurisdictions, is that it reaffirms rather than redirects the pleading standards. Thus, the Supreme Court of Connecticut observed that *Twombly*’s requirement that a complaint set forth sufficient factual allegations to raise a right to relief above the speculative level had “particular pertinence” in Connecticut, a fact-pleading jurisdiction. Although it is true that the *Twombly* Court purported to reaffirm the concept of notice pleading and certainly did not urge a return to fact pleading, the end result of *Twombly* is that federal pleading standards do move closer to those of fact-pleading jurisdictions.

But *Twombly* has had an even more subtle impact on pleading practices in other states, especially in New York. Pleading in New York courts is governed by Civil Practice Law & Rules 3013, which provides that:

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

The New York standard is thus a hybrid of notice pleading and fact pleading that requires a pleader not only to put the defendant on notice of the claim, but also to set forth the elements of its cause of action. Accordingly, in cases involving claims under the Donnelly Act, New York’s analogue to the Sherman Act, courts have traditionally required a plaintiff to: (1) allege facts establishing conspiracy; (2) allege facts identifying the relevant product and geographic markets; (3) describe the nature and effect of the conspiracy; and (4) describe the manner in which the economic impact of the conspiracy restrains trade.

This approach was recently reaffirmed by the New York Court of Appeals in *Global Reinsurance Corporation-US Branch v. Equitas Ltd.* Without citation to *Twombly*, the Court of Appeals dis-

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36 Id. at 1023 (quoting *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir.1981)).
38 See *Bridgeport Harbour Place I, LLC v. Ganim*, 32 A.3d 296, 302 n.7 (Conn. 2011).
39 N.Y. GEN. BUS. LAW § 340 (CONSOL. 2012).
40 N.Y. GEN. BUS. LAW § 340 (CONSOL. 2012).
missed a Donnelly Act claim brought by the New York branch of Global Reinsurance Corporation. Global’s claim arose in the field of retrocessionary reinsurance, that is, reinsurance for reinsurers. Lloyd’s of London provided insurance policies throughout its independent syndicates for retrocessional coverage of “non-life risks,” including environmental, asbestos, and catastrophic risks. The underwriters of these policies had misjudged their risks and were confronted with large claims in the early 1990s. In 1996, the syndicates created defendant Equitas to reinsure their otherwise uninsurable retrocessionary obligations.43

Global had purchased reinsurance coverage from Lloyd’s syndicates, but its policies were later ceded to Equitas. Global claimed that the agreement among syndicates to leave claims management largely to Equitas suppressed competition in claims management services. In dismissing the antitrust complaint, the Court of Appeals held that the plaintiff (1) failed properly to allege market power in the defendants; (2) failed to allege antitrust injury; (3) failed to allege competitive harm beyond the London reinsurance marketplace; and (4) failed to allege the nexus between the conspiracy and injury suffered and the State of New York.44

Although the New York Court of Appeals did not cite Twombly, the decision is unquestionably Twombly-esque in two important respects. First, the court asserts that to survive a motion to dismiss, an antitrust claim must be “plausible.”45 Second, the court undertook the kind of detailed vetting of the complaint that Twombly demands. While New York’s highest court has not specifically addressed the question of how Twombly bears on state court pleading requirements, Equitas would appear to put New York in the Twombly camp.

However, other states, even states with procedural codes that are modeled after the Federal Rules of Civil Procedure, have rejected Twombly outright. In McCurry v. Chevy Chase Bank, FSB,46 the Washington Supreme Court observed that the Twombly standard was predicated on policy determinations specific to federal courts—the inability to control discovery costs or to prevent discovery abuses and the inability to weed out claims that are largely groundless. The court concluded these concerns did not pertain in Washington state courts sufficient “to warrant such a drastic change” in pleading standards.47 In addition, the Washington court criticized Twombly for directing trial courts to assess the likelihood of success on the merits at the motion to dismiss stage and to dismiss those claims if the judge “does not believe it is plausible the claim will ultimately succeed.”48

Similarly, the Tennessee Supreme Court in Webb v. Nashville Area Habitat for Humanity49 held that the policy concerns that led to the Twombly ruling did not justify changes in pleading rules in the Tennessee courts, and shared the critical view that Twombly licensed fact-finding at the motion to dismiss stage.50 The court further criticized Twombly for having led to loss of “clarity, stability and predictability” in federal pleadings.51 The court was also skeptical about the analytic use-

43 Id. at 73.
44 Id. at 77–79.
45 Id. at 77 n.8 (“there is no plausible explanation for the persisting submarket allegation”).
46 233 P.3d 861, 863 (Wash. 2010).
47 Id.
48 Id.
49 346 S.W.3d 422 (Tenn. 2011).
50 Id. at 430–32.
51 Id. at 431.
fulness of the fact/conclusion dichotomy proffered by *Twombly* and its progeny, especially given that the line between fact and conclusion is “blurry” at best.\(^{52}\) Finally, the court expressed concern that evaluating of complaints before discovery may result in a disproportionate dismissal of certain classes of claims, including antitrust claims.\(^{53}\)

Other states have been more succinct, but no less direct, in eschewing *Twombly*. The Vermont Supreme Court was simply “unpersuaded” by *Twombly*.\(^{54}\) The courts in Arizona\(^{55}\) and Iowa\(^{56}\) ruled that any changes in pleading standards should come through the rulemaking process.

Clearly, the response to *Twombly* in the state courts has varied from state to state. It would be unrealistic to expect that *Twombly* would create uniformity in pleading practices in federal and state courts. First, there is no compelling need for such uniformity. Pleading standards have evolved from local custom and practices, which have varied from state to state. Uniformity in pleading for the sake of uniformity is not a worthy goal. As long as the pleading standards are fair to the litigants and evenhandedly applied, variation from state to state is not only tolerable but also desirable.

Second, *Twombly* was not a call for reform in pleading throughout the civil justice system but rather was limited to pleadings in federal court under Rule 8(a)(2) of the Federal Rules of Civil Procedure. Moreover, as noted above, the analysis of pleading in *Twombly* was closely tied to the substantive nature of the case. A fundamental concern of the Court in *Twombly* was the high cost of discovery in private treble-damage actions of dubious merit. Ultimately, the Court decided that raising the bar for antitrust pleadings would lessen the number of questionable private antitrust actions that would proceed to costly discovery.

However, concerns about the high costs of discovery tend to be less in state courts than in federal courts. This is true in part because of the nature of the cases that populate state court dockets—personal injury, commercial litigation, real estate disputes—which tend to be routine and less complex than the more sophisticated cases that tend to land in the federal courts. Also, not all states have discovery procedures that match the breadth of discovery in federal courts, and so by definition discovery is of less concern in those states.

Moreover, some states have procedural alternatives to a motion to dismiss to attack vague or infirm pleadings. In New York, for example, a defendant can serve a demand for a bill of particulars and thereby force the plaintiff to amplify its complaint with factual details of its claim.\(^{57}\) Unlike interrogatories or document demands, which are often the subject of contentious disputes, the plaintiff’s obligations in responding to a demand for a bill of particulars are well understood and tend not to ignite controversy in a given New York case, as interrogatories sometimes do in federal courts. The bill of particulars thus provides perhaps a more efficient vehicle than the standard motion to dismiss for challenging vague complaints.

Lastly, courts may find that in the wake of *Twombly*, litigants are more careful in drafting pleadings and are adding more factual detail so as to obviate the need for the kind of detailed analysis of the pleadings suggested by *Twombly*. Accordingly, the need for a formal re-assessment of pleading standards is less intense.

\(^{52}\) *Id.* at 432–33.

\(^{53}\) *Id.* at 434.

\(^{54}\) Colby v. Umbrella, Inc., 955 A.2d 1082, 1086 n.1 (Vt. 2008).


\(^{56}\) Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012).

\(^{57}\) N.Y. C.P.L.R. 3041 (Consol. 2012).
Factors to Consider in Forum Selection

Pleading rules are not the only considerations that plaintiffs must take into account in deciding between federal and state forums to prosecute an antitrust action; there are other significant concerns. First, plaintiffs must be familiar with the relevant substantive state law and make sure that at the very least, that law is no less favorable than federal law. Second, and closely related to the first concern, is whether there is any difference in procedural law (apart from the pleading rules). For example, in New York under Civil Practice Law & Rules 901, class actions are barred in actions seeking penalties. Thus, Donnelly Act cases, which provide for mandatory treble damages, cannot be brought as class actions in New York state courts. A third concern is docket congestion. Plaintiffs must determine which avenue provides a shorter time to trial.

Fourth, plaintiffs must weigh the competence, experience, and degree of sophistication of judges in state courts under consideration compared with federal judges. Fifth, in the wake of *Dukes*, federal class certification standards have tightened considerably and may be further tightened in the near future. Indeed, class certification standards in federal court may pose even greater hurdles to plaintiffs than *Twombly*’s enhanced pleading standards, thereby making state courts more inviting.

In addition, plaintiffs must take into account the fact that defendants have procedural weapons available to them to counteract their initial choice of forum. Most prominent among these weapons are the Class Action Fairness Act of 2005 (CAFA) and removal. Removal permits defendants to elect a federal forum where the action is brought in state court and federal subject matter jurisdiction exists. CAFA permits defendants to remove a class action filed in state court where the amount in controversy exceeds $5 million and there is minimal diversity between defendants and any plaintiff. Simply put, commencing an action in state court does not guarantee that the matter will not eventually wind up in federal court.

Conclusion

Although some state courts have expressed skepticism about the *Twombly* holding, other courts have embraced *Twombly* wholeheartedly. It is clear that *Twombly* has cast a long shadow over state court pleading practice, and state court defendants will continue to file motions to dismiss relying on that case. Less clear is the role that perceived lenient state court pleading rules should play in forum selection. When a plaintiff looks at the larger antitrust litigation picture, a state court, even with relaxed pleading standards, may not be the forum of choice.

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58 New York Civil Practice Law & Rules 901(b) provides that:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

N.Y. C.P.L.R. 901(b) (Consol. 2012).


60 See Comcast Corp. v. Behrend, 133 S. Ct. 24 (2012) (granting certiorari on the issue of whether damages can be awarded on a class-wide basis).


Volvo Seven Years Later:

Barbara O. Bruckmann

The U.S. Supreme Court has had immense influence on the development of antitrust law in the lower courts, as seen most recently in their response to the Court's decisions in Bell Atlantic Corp. v. Twombly,1 Verizon Communications, Inc. v. Trinko,2 and Leegin Creative Leather Products, Inc. v. PSKS, Inc.3 That cannot be said of its decision in Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.4—its most recent opinion construing the Robinson-Patman Act,5 the principal federal antitrust statute addressing pricing discrimination. In the seven years since its issuance, Volvo has had only a marginal impact on the development of RP law. This remarkable phenomenon was illustrated again by the Sixth Circuit's 2012 decision in Williams v. Duke Energy International, Inc.6

In Volvo, while the Supreme Court recognized that the Robinson-Patman Act was born of Congress' desire to protect small “mom and pop” stores from the entry of chain stores and their exercise of purchasing clout, it also sought to reconcile the Act with mainstream antitrust concerns. The Robinson-Patman Act is denominated a federal antitrust law, but calling it one has usually been where the similarity has ended. It has long been construed to protect a single competitor where the only evidence of “competitive harm” is lost sales to a favored buyer without regard to any injury to competition, and where lower prices to consumers can trigger liability.

The Volvo Court did not uproot the foundation of the Act. But it arguably recast the burden on the plaintiff alleging price discrimination to show systemic discrimination against small rival(s) in favor of a buyer with market power in a properly defined relevant market so that enforcement of the Act would move closer to—and thus “signal[] no large departure from”—the general antitrust focus on harm to competition.7 To that end, it stated it “would resist interpretation [of the Act] geared more to the protection of existing competitors than to the stimulation of competition.”8 Bold language—yet seven years have elapsed since Volvo, and the development of RP law consistent

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7 546 U.S. at 180–81.
8 Id. at 181.
with that decision remains spotty. In a number of courts, the decision has been wholly ignored or consigned to its facts. The Sixth Circuit had in the past joined the few federal circuits that have applied the reasoning of *Volvo*. Its recent opinion in *Williams*, however, not only ignores *Volvo*, but also applies the Act broadly without much analysis of the import of its holdings. Given *Volvo*’s relatively weak footprint, *Williams* may further stall development of RP law along the lines advanced by the *Volvo* Court.

**The *Volvo* Court Urges Narrow Application of the Robinson-Patman Act**

The Supreme Court’s 2006 decision in *Volvo* involved alleged price discrimination in the sale of specially ordered heavy-duty trucks. The plaintiff, a franchised Volvo dealer, complained that Volvo Trucks North America, Inc. offered other Volvo dealers more favorable price concessions than those offered to the plaintiff in its bids to supply trucks to retail customers. The Supreme Court granted certiorari to resolve the following question: “May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer?”

In framing its analysis, the Court began with the original intent of the Act in 1936 “to target the perceived harm to competition occasioned by powerful buyers . . . specifically, Congress responded to the advent of large chainstores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.” Reiterating the holding of its earlier primary-line Robinson-Patman decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, it stated:

> Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-Patman does not “ban all price differences charged to different purchasers of commodities of like grade and quality;” rather, the Act proscribes “price discrimination only to the extent that it threatens to injure competition.”

Then, turning to tenets of RP construction, the Court described the historic “hallmark of the requisite competitive injury” as the “diversion of sales or profits from a disfavored purchaser to a favored purchaser”—a harm traditionally measured solely as between two buyers in an *intra-brand* market and unique to RP law. It also acknowledged that “a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time”—the so-called *Morton Salt* inference. Nevertheless the Court emphasized that “[a]bsent actual competition with a favored Volvo dealer . . . Reeder cannot establish the competitive injury required under the Act.”

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9 *Id.* at 175. The Robinson-Patman claim in *Volvo* arose under Section 2(a) of the Act, 15 U.S.C. § 13(a), the central provision prohibiting unlawful price discrimination.

10 *Id.*

11 509 U.S. 209 (1993). Under Section 2(a) of the Act, price discrimination may injure competition at different levels of distribution. Primary-line injury occurs between the discriminating seller and its competitor. Secondary-line injury occurs between customers of the discriminating seller, and tertiary-line injury occurs between (or with) their respective customers. *Brooke Group* was a primary-line case; *Volvo* and *Williams* were secondary-line cases.

12 546 U.S. at 176 (citations omitted).

13 *Id.* at 177.

14 *Id.*


16 546 U.S. at 177.
The Court then focused on the quality of Reeder’s evidence of discrimination, which fell into three categories: (i) concessions to Reeder on several successful bids against non-Volvo dealers, as against larger concessions to other successful Volvo dealers on different bids; (ii) concessions to Reeder on several unsuccessful bids against non-Volvo dealers, as against larger concessions to other Volvo dealers who successfully bid on different bids; and (iii) two occasions on which Reeder bid against another allegedly favored Volvo dealer. Rejecting the sufficiency of that evidence, the Court held that “selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act.” In the Court’s view, Reeder failed to show that (1) as to the evidence in categories (i) and (ii), it “compete[d] with beneficiaries of the alleged discrimination for the same customer,” (2) the favored dealers were “consistently favored vis-à-vis Reeder,” or to offer any “systematic study” of the claimed discrimination, or (3) the favored truck dealers were power buyers with the clout originally targeted by the Act. On those facts, the Court held the Morton Salt inference would not apply:

We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chainstore paradigm. Here, there is no discrete “favored” dealer comparable to a chainstore or a large independent department store—at least, Reeder’s evidence is insufficient to support an inference of such a dealer or set of dealers.

The Court also specifically addressed Reeder’s evidence that on two occasions it competed directly with another Volvo dealer. The Court had no trouble concluding that on the facts Reeder had not proved that it was disfavored, or the alleged loss (amounting to one sale) was “not of such magnitude as to affect substantially competition between Reeder and the ‘favored’ Volvo dealer.”

The Court then squared its rejection of Reeder’s claim against a broader backdrop of antitrust law:

Interbrand competition, our opinions affirm, is the “primary concern of antitrust law.” The Robinson-Patman Act signals no large departure from that main concern. Even if the Act’s text could be construed in a manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition.

Considering the specific facts before it, the Court stated:

[T]here is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier’s selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman’s governance to such cases, we continue to construe the Act “consistently with broader policies of the antitrust laws.”

In so holding, the Court observed that “the market impact of a vertical practice . . . may be a ‘simultaneous reduction of intrabrand competition and stimulation of interbrand competition.’”

17 Id. at 178.
18 Id.
19 Id. (citation omitted).
20 Id. at 180.
21 Id. at 180–81 (citation omitted; footnote omitted).
22 Id. at 181 (citations omitted; emphasis added).
23 Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–52 (1977)).
Volvo Fails to Take Hold in the Lower Courts

After Volvo, in secondary-line price discrimination cases, one would reasonably expect the lower courts to require a plaintiff to allege facts showing that:

1. the plaintiff competed against the favored buyer(s) in a properly defined relevant market, if not for the same customer in a customer-driven bid market;
2. if the plaintiff sought to invoke an inference of competitive injury (in lieu of proving the possibility of harm to competition), the buyer had market power (or at least exhibited the clout of a power buyer) and the alleged discrimination was persistent and systematic; and
3. the discounting did not stimulate price competition against other brands, but instead favored buyers with market power at the expense of smaller rivals such that harm to competition was possible.

The Volvo Court provided sufficient detail in the course of its opinion for the lower courts to apply points 1 and 2 in subsequent cases. The quality of harm to competition is less developed in the Court’s discussion, but the consideration is present and provides a platform for further development in the lower courts. Those expectations for the most part have not materialized.

Specifically, in cases outside the bid context, the lower courts have been slow to adopt the reasoning of Volvo, and in some cases have ignored the decision entirely.24 For example, Volvo’s limitation of the Morton Salt inference to situations akin to the “chainstore paradigm” where the favored buyer may be alleged to have market power is new and not limited to the bid context. The interjection of a requirement of market power in the concluding paragraph of the Court’s opinion on the proper “governance” of the Act is the linchpin linking alleged discrimination to the possibility of harm to competition—the aim, so said the Court, of the Robinson-Patman Act and antitrust law generally. But that important development has been largely ignored by lower courts, which have allowed the inference based on a pre-Volvo showing of substantial discrimination between two competing customers over time. In effect, the inference continues to be invoked without regard to the market power (or clout) of the favored purchaser(s)—a factor that, perhaps, could redirect enforcement of the Act toward areas of possible competitive concern.

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Likewise, courts have applied, as an isolated holding, the discussion in Volvo that discrimination “substantially” affect competition between a favored and disfavored customer without regard to the broader implications of the decision.\(^\text{25}\)

Volvo’s renewed emphasis on the risk of anticompetitive applications of the RP Act runs headlong into prior judicial constructions holding that the Act indeed protects individual competitors—decisions not specifically overruled in Volvo. As observed by one circuit court judge:

> We are asked [in Volvo] to apply the RPA, a statute that “is fundamentally inconsistent with the antitrust laws,” . . . in a fashion that is “consistent with the broader policies of the antitrust laws.” This conundrum is bound to create confusion for judges called upon to apply the RPA in a host of settings.\(^\text{26}\)

Nonetheless, a minority of courts have grappled with Volvo and sought to apply its reasoning outside the bid context.\(^\text{27}\) For example, in Drug Mart Pharmacy Corp. v. American Home Products Corp.,\(^\text{28}\) a large group of independent retail pharmacies sued five pharmaceutical manufacturers, alleging price discrimination in the sale of brand name drugs. In addressing defendants’ summary judgment motion, the New York district court relied heavily on Volvo. It observed the Court’s caution to construe the Act narrowly, the Court’s description of the Act’s original intent to target “perceived harm to competition occasioned by powerful buyers,” and its statement that the Act prohibits “price discrimination only to the extent that it threatens to injure competition.”\(^\text{29}\) It further noted as to the last point: “The Supreme Court emphasized this point in Volvo, where it warned against ‘interpretation[s of the Act] geared more to the protection of existing competitors than to the stimulation of competition.’”\(^\text{30}\) The district court also “question[ed] . . . the continued viability” after Volvo of those circuit court decisions suggesting that injury to a single competitor is sufficient

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For decisions applying Volvo in the bid context, see Feesers, Inc. v. Michael Foods, Inc., 591 F.3d at 203–05 (rejecting RP claim for failure to prove competition between favored and disfavored bidders; outcome held consistent with Volvo); Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 227 (3d Cir. 2008) (acknowledging that Volvo Court “reinforced the need to interpret the RPA narrowly” and thus finding losing bidder not purchaser under Act when by nature of bid process it never purchased from seller); Data Capture Solutions, Repair & Remarketing, Inc. v. Symbol Techs., Inc., 520 F. Supp. 2d 343, 349 (D. Conn. 2007) (following Volvo; bidder not purchaser).


\(^{29}\) Id. at *9.

\(^{30}\) Id.
to establish competitive injury even in the face of evidence that competition remains healthy—cases relied on by the plaintiffs.\footnote{Id. at *9 n.18.}

The parties in Drug Mart Pharmacy had focused their discovery on matching the plaintiffs’ lost sales to allegedly favored buyers, and had not directly addressed whether the alleged discrimination had any impact on consumers in the market for brand name drugs. The court therefore concluded: “Because the parties have not addressed the impact on competition generally, and because it is difficult to conceive of an adverse impact on competition absent a significant diversion of sales, I do not separately consider whether defendants’ pricing practices have adversely affected competition in the market for [brand name prescription drugs] from a consumer’s point of view.”\footnote{Id. at *9.} The court proceeded to examine the evidence of lost sales and concluded it was de minimis and thus insufficient to avoid summary judgment on the claim.

The Sixth Circuit had addressed Volvo outside the bid context in Smith Wholesale Co. v. RJ Reynolds Tobacco Co.,\footnote{477 F.3d 854 (6th Cir. 2007). Cf. New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046, 1051 (6th Cir. 2011) (strictly applying Twombly in dismissing flawed RP claim even though needed facts were in hands of defendants).} where it relied on Volvo as a basis for refusing to “micromanage” the defendant’s challenged distribution system absent a showing that the alleged discrimination threatened to harm competition.\footnote{477 F.3d at 879–80.} That approach renders even more surprising its subsequent decision in Williams.

**The Awkward RP Claims in Williams**

In Williams v. Duke Energy International, Inc.,\footnote{681 F.3d 788 (6th Cir. 2012), cert. denied, 81 U.S.L.W. 3388 (Jan. 14, 2013) (No. 12-477). The Williams plaintiffs sued Duke Energy and several related entities which, for purposes of the RP claims, are simply referred to collectively as “Duke.”} residential and business customers of Duke sued Duke and General Motors, alleging Duke paid substantial rebates to certain large customers, including General Motors, in exchange for those customers withdrawing objections to Duke’s rate stabilization plan then pending before the Public Utilities Commission of Ohio. In a putative class action, the plaintiffs alleged various claims against the defendants, including violations of the Robinson-Patman Act, the Racketeer Influenced and Corrupt Organizations Act, and state law.\footnote{681 F.3d at 798 (6th Cir. 2012), cert. denied, 81 U.S.L.W. 3388 (Jan. 14, 2013) (No. 12-477). The Williams plaintiffs sued Duke Energy and several related entities which, for purposes of the RP claims, are simply referred to collectively as “Duke.”}

The district court dismissed the federal claims because it concluded that the filed-rate doctrine deprived it of subject-matter jurisdiction.\footnote{681 F.3d 788, 792 (S.D. Ohio May 30, 2008). The Robinson-Patman Act only covers discriminations concerning “commodities,” and it has long been a matter of dispute whether electricity is better characterized as an intangible or service or as a commodity. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 510 (7th ed. 2012). Here, the Sixth Circuit aligns itself with the view that electricity is a commodity within the scope of the Act. This article expresses no opinion on the correctness of that characterization.} The Sixth Circuit reversed the lower court on that point and considered the plaintiffs’ RP claims.\footnote{See supra note 33 and accompanying text.}

The Sixth Circuit’s analysis of the RP claims is not clear in all respects. On the facts presented, however, it ignores the Sixth Circuit’s prior decisions in Smith Wholesale and Albany Tractor,\footnote{See supra note 33 and accompanying text.}
other precedents limiting the scope of the Act, and the analysis in Volvo, all of which would have required dismissal. The weaknesses in the court’s analysis include imprecision in its discussion of the nature of competition between favored and disfavored customers, confusion as to the role of resale in assessing an RP claim, acceptance at face value of consumers of electricity that pay more as proper RP plaintiffs, and mistaken reliance on an earlier Sixth Circuit decision permitting plaintiffs asserting RP claims to infer actual damage from the fact of discrimination.

First, even before Volvo, there was consensus among the courts that Robinson-Patman Act plaintiffs must allege facts showing that they compete with allegedly favored purchasers, a view adhered to previously by the Sixth Circuit. In Williams, however, the Sixth Circuit required very few facts in finding that the plaintiffs’ allegations of competition with allegedly favored customers were sufficient. Specifically, the complaint was brought on behalf of two putative subclasses: the first included firms that competed with favored customers and did not receive the challenged rebates; and a second that included those that simply did not receive the rebates and implicitly did not compete. Of the four named plaintiffs, only two fell into the first subclass. To find the necessary competitive nexus, the Sixth Circuit pointed to allegations that members of the first subclass competed with allegedly favored customers—a plaintiff group merely described as “providers of goods and services,” a far cry from relevant market definition and facts pointing to head-to-head competition with customers alleged to have received rebates. The complaint suggested that the RP claims in particular may have been limited to the first subclass, but the court described the claims as those of “Plaintiffs” and ignored the presence of the second subclass (for which there was no allegation of competition) and two of the named plaintiffs who were not alleged to compete with any favored customer. And, it did not fault the plaintiffs’ failure to identify the allegedly favored customers with which some of them competed for purposes of their RP claims. Without predicate facts identifying the favored and disfavored customers and the extent of competition between them, a court has no basis to decide whether the claims begin to fall within the “governance” of the Robinson-Patman Act, as Volvo commanded.

The uncertain nature of the competition between the plaintiffs and allegedly favored customers became more complex in light of the defendants’ argument that the Robinson-Patman Act should not apply because, unlike the typical RP claim, the favored and disfavored buyers did not com-

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40 See, e.g., Shell Co. (Puerto Rico) Ltd. v. Los Frailes Serv. Station, Inc., 605 F.3d 10, 25–26 (1st Cir. 2010) (§ 2(a) claim failed for lack of proof that proximate service stations were in actual competition with plaintiff); Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, 203–05 (3d Cir. 2010) (claim failed when plaintiff did not prove that it and favored buyer were competing purchasers); Infusion Res., Inc. v. Minimed, Inc., 351 F.3d 688, 692–93 (5th Cir. 2003) (failure to prove “actual competition with favored purchaser” at time of discrimination); Godfrey v. Pulitzer Pub’g Co., 276 F.3d 405, 410–12 (8th Cir. 2002) (plaintiff must show a competitive relationship between favored and disfavored customers); Best Brands Beverages, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987) (“[P]laintiff must first prove that . . . it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential.”); Lupia v. Stella D’Oro Biscuit Co., 586 F.2d 1163, 1170 (7th Cir. 1978) (Plaintiff failed to allege competition between disfavored and favored wholesalers); High Tek USA, Inc. v. Heat & Control, Inc., No. 12-cv-00805, 2012 WL 2979051, at *4 (N.D. Cal. July 18, 2012) (dismissing RP claim where favored customers not in competition with plaintiff); Barnett Chrysler Plymouth Co. v. Kia Motors Am., Inc., No. 08-828, 2008 WL 4755836, at *4 (D. Minn. Oct. 27, 2008) (dismissing RP claim where plaintiff failed to allege facts showing it and neighboring dealership competed).


43 Id. ¶ 51.

44 681 F.3d at 801. Unlike Albany Tractor, the Sixth Circuit panel in Williams accepted the plaintiffs’ argument that the identity of favored customers was “in the hands of the Defendants” (and could be the subject of subsequent discovery), notwithstanding the plaintiffs’ allegations that they competed with and lost profits to those customers.
pete in the resale of the seller’s product, which was electricity. The Sixth Circuit correctly rejected the contention that the Robinson-Patman Act could not apply to situations in which the product was not resold as is, but in so doing ignored Volvo’s statement that the Act “centrally” addressed discrimination between resellers. Nonetheless, having put resale to one side, the Sixth Circuit asserted that the facts before it were “precisely the same” as those in FTC v. Morton Salt Co., in which “certain merchants were injured when they had to pay . . . substantially more for their goods than their competitors had to pay.” The Sixth Circuit missed the point: the inference of injury arose in Morton Salt precisely because of the fiercely competitive nature of the market for the resale of salt.

Next, having rejected the requirement of resale, the Sixth Circuit failed to recognize the trend among courts to reject RP claims based on discrimination to individuals like plaintiff Williams, a residential customer, and to apply a different approach to claims based on discrimination between commercial consumers of an input (like electricity). Courts typically do not extend Robinson-Patman Act protection to individual consumers for the simple reason that they do not compete in any market. The situation is different for commercial consumers; the question, instead, is whether the input sold at a discriminatory price but consumed or incorporated into a second product has had a material impact on the total cost of the second product such that the discrimination could harm downstream competition with firms that buy the input at a higher price and compete in the sale of the second product. Pointedly, when the seller’s product is incorporated into or consumed in producing a second product, “the cost of which [is] determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few,” an inference of injury should not be available. The appeals court apparently would have none of that, rejecting without discussion the defendants’ argument that the plaintiffs failed to allege the effect of the cost of electricity on their sales or profits.

Finally, the defendants argued that the plaintiffs failed to adequately allege “competitive disadvantage and damage to their business or property.” Actual injury in the form of damage to business or property caused by the discrimination—or antitrust injury—is necessary to sue for damages only available under Section 4 of the Clayton Act (the Robinson-Patman Act does not include remedial provisions). In response, the Sixth Circuit seemingly collapsed the requirements of competitive injury (an element of the prima facie claim) and antitrust injury (required under

45 See infra notes 50 & 51 and accompanying text.
46 681 F.3d at 801 (citing FTC v. Morton Salt Co., 334 U.S. 37, 46–47 (1948)).
47 334 U.S. at 50–51 (“keen” competition).
48 See FAC, ¶ 6, Williams, No. 1:08-cv-0046, 2008 WL 2515640.
51 Minneapolis-Honeywell Regulator Co., 191 F.2d at 792.
52 681 F.3d at 801.
53 Id.
Section 4 of the Clayton Act). In so doing, it relied on Schwartz v. Sun Co., an earlier Sixth Circuit decision that made the same apparent error. In Schwartz, the Sixth Circuit suggested that antitrust injury could be inferred from the fact of discrimination, relying on precedent discussing the Morton Salt inference. As discussed above, the Morton Salt inference is a means of establishing a prima facie showing of competitive injury, and does not apply to proof of antitrust injury under Section 4. That outcome—to the extent the Sixth Circuit would permit an inference of damage to business or property under Section 4 of the Clayton Act—is flawed, and does not reflect the weight of authority.

Conclusion

In the end, the Sixth Circuit in Williams accepted the plaintiffs’ RP claims and remanded to the district court a putative class action undisturbed as alleged. The case will play out for some time. In the meantime, the Sixth Circuit’s failure to consider existing precedent and the cautions in Volvo leaves it to counselors to sort out the road ahead for their clients. This is all the more troubling given the divided views among the lower courts in the wake of Volvo.

The Robinson-Patman Act is very technical and has been subject to decades of judicial construction. Volvo was ostensibly an effort by the Court to rein in the Act’s “governance” by injecting a requirement of market power, stopping too-easy use of the Morton Salt inference, and urging courts to interpret the Robinson-Patman Act in a manner that focuses on possible market harm. By failing to heed the call, the Williams decision signals ongoing uncertainty as to the legacy of Volvo and continuing risk that the Robinson-Patman Act remains a tool to attack price discrimination without any limiting antitrust principle.

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55 276 F.3d 900 (6th Cir. 2002). The passage from Schwartz quoted by the Williams court was part of a larger point, which concluded with the observation that while the standard of proof for damages is “less than stringent . . . there must be some direct evidence of injury.” Id. at 904 (citation omitted). Notwithstanding that recognition, the Schwartz court was apparently persuaded that an inference of antitrust injury was nonetheless acceptable.

56 Id. at 904–05 (citing Kroger Co. v. FTC, 438 F.2d 1372, 1378 (6th Cir. 1971)). The quoted passage from Kroger addressed whether the Commission had produced sufficient evidence to support an inference of injury to competition for purposes of establishing the element of the claim. Antitrust injury was not at issue. See 438 F.2d at 1378–80. In Schwartz, on the other hand, the court was addressing whether the plaintiff had shown antitrust injury. See 276 F.3d at 904; see also id. at 905–06 (Suhrheinrich, C.J., dissenting) (finding a lack of evidence that lost sales at the plaintiffs’ service stations were caused by an alleged price difference).

57 See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (§ 4 of Clayton Act requires showing of “actual injury attributable to something antitrust laws were designed to prevent”); Dynergy Mkts. & Trade v. Multilt Corp., 648 F.3d 506, 522 (7th Cir. 2011) (to claim damages, plaintiff must provide actual injury caused by discrimination); Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 163 (2d Cir. 2004) (plaintiff “must establish that it has suffered actual economic injury as a result of the defendant’s conduct,” evidence of lost sales or profits to favored customer sufficient); Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc. 63 F.3d 1267, 1273–76 (3d Cir. 1995); Dayton Superior Corp. v. Marjam Supply Co., No. 07 cv 5215, 2011 WL 710450, at *7–8 (E.D.N.Y. Feb. 22, 2011) (plaintiff could match its losses to gains by favored competitors); see also Camarda v. Snapple Distrib., Inc., 346 F. App’x 690, 692 (2d Cir. 2009) (plaintiff failed to show actual injury to business not caused by factors unrelated to discrimination).
Global Antitrust: Does It Have Limits?

Abbott B. Lipsky, Jr.

Before 1985 there was only one mandatory suspensive premerger notification scheme of general applicability in the world—Hart-Scott-Rodino review in the United States; now there are scores. Similarly, antitrust challenges to monopolization were almost exclusively American until at least the early 1970s (about the time the European Commission first squared off against IBM Corp.), but “abuse of dominance” claims are now increasingly common not only in Europe but also in Australia, Canada, Japan, Mexico, South Africa, South Korea, and elsewhere, and they are a realistic threat to companies operating in almost any economically significant jurisdiction. Finally, aggressive prosecution of price fixing and analogous covert cartel behavior—long a hallmark of U.S. antitrust enforcement—now appears in waves of coordinated “dawn raids” upon suspected wrongdoers in Brazil, Canada, the European Union and its Member States, Japan, South Korea, Switzerland, and a steadily increasing number of other jurisdictions in addition to the United States.

This spectacular global expansion of antitrust enforcement has never received much commentary outside the confines of the antitrust community—the antitrust bar, enforcement agency officials, the economists who assist in advocacy on behalf of parties engaged in antitrust disputes, as well as academics interested in antitrust issues and policies. Major antitrust matters do attain some higher visibility in the financial press and, more rarely, even in the mass media. Examples include EU and U.S. investigations of Google, the EU’s initial objections to the acquisition of McDonnell Douglas by Boeing (later resolved), and the clear conflict between the U.S. and EU over General Electric’s proposed acquisition of Honeywell International (which the parties ultimately abandoned). The main U.S. case against Microsoft was followed closely in the popular media, although years of drama ended with only a mild behavioral consent decree. A recent EU investigation of alleged abuse of dominance by Russian energy utility Gazprom led to front-page global coverage of powerful figures on both sides of the underlying dispute (over natural-gas prices)—Russian President Putin and EU Vice President and Competition Commissioner Joaquin Almunia.

On the whole, however, antitrust’s transition from an American sport to a global one has occurred well beneath the threshold of public attention and without media-worthy controversy.

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1 Changes in control of firms licensed to participate in the regulated financial, insurance, telecommunications, transportation, and energy sectors, among others, required prior approval of a state or federal agency in the United States prior to the enactment of Hart-Scott-Rodino (HSR). Similar requirements were probably found in many regulated industries outside the United States. But HSR seems to be the first to impose such a competition-based review upon transactions involving firms in the broad run of “unregulated” industries.


3 See, for example, the partial listing contained in the Merger Notification and Procedures Templates on the website of the International Competition Network, http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx.
I have noted on several previous occasions that the sudden and near-total global proliferation of antitrust and the continuing “arms race” for criminal remedies, leniency programs, and collective private damage actions is perhaps the most radical and far-reaching upsurge of international business regulation in modern history. The fact that it has passed virtually unremarked upon in the broader public policy dialogue makes it all the more extraordinary. Global citizens need not adjust the volume on their ear buds—these explosions are silent so far as the mainstream media of the world are concerned.

The antitrust garden has flowered lavishly, and whatever its benefits, it also has thorns and tangled underbrush: multiple overlapping notification requirements, vague and often contradictory standards of behavior (concerning linked discounts, predatory pricing, price “squeezes,” joint ventures and their collateral restraints, vertical agreements on territory or price, and “joint dominance”), intrusive and fabulously expensive investigations and proceedings (administrative and/or judicial), often leading to a multijurisdictional farrago involving duplicative, slow, and poorly coordinated proceedings. The result can include crushing remedies that sometimes seem to have only a tenuous relationship to culpability. Such disadvantages place heavy burdens on the business community, legal institutions, and the global economy more generally. The fear is that burdens that are now merely heavy could become more visibly debilitating to firms, industries, and broader economic systems—a situation that is especially problematic in a very fragile global economy that remains under increasing threats from multitrillion-dollar fiscal imbalances that would have seemed nightmarish and intolerable just a few years ago.

Global antitrust law and policy generates monstrous quantities of laws, regulations, cases, policy statements, position papers, books, journals, newsletters, conferences, and other output. Seemingly infinite additional quantities of antitrust-relevant information hover invisibly out in the Cloud, just a few clicks from view. Almost thirty years ago Frank Easterbrook published an article, The Limits of Antitrust. That article—written when antitrust outside the United States was at best a faint and infrequent distraction in the consciousness of the (then-overwhelmingly American) antitrust bar—provided a kind of U.S. implementation plan for a strong version of the prescriptions of the so-called Chicago School of antitrust. Limits appeared just as U.S. antitrust law was being bolted onto new intellectual foundations by early Reagan appointees at the Antitrust Division (like William F. Baxter) and Federal Trade Commission (James C. Miller III) and by a small but influential group of judicial appointees representing the vanguard of the Law and Economics movement: Robert Bork, Easterbrook himself, Richard Posner, Antonin Scalia, and others. This foundation has remained stable despite persistent attempts to chip away by post-Chicagoans, Behaviorists, and (European) Ordoliberal.

The wild (if not irrational) exuberance of global antitrust practice invites the question of what limits it might eventually observe. Even the most skillful and determined students and practitioners of antitrust must struggle to master all the ins and outs of even a single antitrust system: policy objectives, substantive standards (and the economic theory and empirical techniques relevant

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5 As this is written, the global economy is laboring under threats of unprecedented magnitude: ballooning sovereign debt in the United States, Europe, Japan, and elsewhere, and a broad and persistent economic sluggishness that seems immune even from recent and continuing massive government and central bank stimulus.

to developing and applying them), exemptions, institutional design, rules of procedure, evidence, remedy, appeal and review, and so on. But place on top of this the complexity of understanding multiple such systems as well as their emergent interactions—cross-border discovery, simultaneous litigation in multiple jurisdictions, multiple overlapping leniency programs, multiple cumulative remedies, and the difficulties of managing simultaneous actions for collective redress in multiple jurisdictions—and it is apparent that things are becoming difficult to control. This mega-system has become so massive, ubiquitous, and complex that it seems to defy rational pressure to conform to manageable objectives and standards. Despite the constant efforts of a variety of organizations aimed at reducing unnecessary disconnections and burdens—the International Competition Network, most notably—this antitrust garden is now badly overgrown and in desperate need of weeding and pruning.

The application of law-and-economics prescriptions to U.S. antitrust in the 1970s and 1980s was a reaction (in some broad sense) to a particular national antitrust regime that had been allowed to grow without the type of limits that Easterbrook’s article later suggested. Another eminent antitrust scholar offered a discussion of limits on antitrust, albeit in the context of a single U.S. monopolization issue—Phillip Areeda, in his article, *Essential Facilities: An Epithet in Need of Limiting Principles.* That article made some important observations about the essential facilities doctrine, the main theme being that while the doctrine sounds very compelling when set forth in simplest terms, it can get carried away in implementation (hence the “need for limiting principles”). It might be very costly to force an integrated monopolist to modify its monopoly facility so that it can offer services on a newly created market, and to manage the creation of that market by judicial decree, as the doctrine might sometimes seem to require. For example, in the Bell System divestiture, the parties and the decree court were forced to choose the specific point at which the connections within the existing telecommunications network would be cut in order to create the new “points of presence” where competing long-distance carriers might attach their wires at the newly defined boundaries of the local networks. The litigants and the court had to choose criteria and draw the “Local Access and Transport Area” boundaries. Someone—ultimately it was the Federal Communications Commission—had to review the “access tariffs” required to be filed by the Regional Bell Operating Companies, which specified the terms and conditions on which the new interLATA carriers would obtain access to local intralATA communications facilities and services from the RBOC’s, and to choose the criteria and the process by which the legality of these tariffs would be determined. The same parties had to envision how changes in demand, cost, and technology—some of them both swift and profound (e.g., the transition from circuit switching to packet switching and the huge expansion of mobile and data services relative to landline voice communication)—would be accommodated as the system established by the consent decree in the case (known as the Modification of Final Judgment) evolved.

The AT&T divestiture worked out tolerably well, and in the long run it is probably best judged a success, although it is hardly a matter of unanimous agreement within the antitrust/telecom community. But the Bell System example is the exception that proves the rule—essential facilities cases that fail to account for practical costs and complexities can lead to unworkable remedies. The seminal essential facilities case, *United States v. Terminal Railroad Association,* was actually the first Supreme Court phase of a decades-long series of skirmishes between the federal gov-

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8 224 U.S. 383 (1912).
ernment and railroads organized by Jay Gould to dominate transportation through St. Louis. In three trips to the Supreme Court, the government established Sherman Act liability but failed to obtain any competitively consequential relief.9

But, like “essential facilities,” are there not many other antitrust phrases that pose equal danger because of their emotional resonance but potential for overextension? Consider “restraint of trade,” “restrictive agreement,” “market distortion,” “abuse of dominance,” even “unfair methods of competition.” Each one of these concepts—regarded as fundamental in some major antitrust-law enforcement system—sounds as if it defines something that deserves to be hunted down and brought to heel. Who could be in favor of “exclusionary conduct”? Why should we tolerate a “market distortion”? Wouldn’t you join the march or at least sign the petition against “unfair” methods of competition?

In fact, isn’t antitrust an epithet-rich environment? Each one of these phrases has been stretched beyond breaking point in various significant episodes of antitrust enforcement. Consider, for example, the morass created by the original implementation of Article 85 of the Treaty of Rome (now numbered 101 in the current governing Treaty)—the main European Economic Community/European Union provision governing anticompetitive agreements. The original sweep of Article 85 rendered nearly all commercial contracts—franchise agreements, intellectual property licenses, supply agreements, etc.—potentially illegal and void. Penalties could be avoided only by “notifying” the agreement and obtaining either a declaration of non-applicability of the prohibition or a determination (“exemption”) that potential consumer benefit outweighed any restrictive effect. The result was that tens of thousands of notifications were filed—an unmanageable inundation that resulted in near-total gridlock: only a tiny fraction were ever acted upon. It took the institutions of the EEC and its successor the European Union more than a quarter-century to begin the recovery from these early mistakes. (The antidote included adoption of “block exemptions,” eventual incorporation of economic reasoning in the substantive standards, and other substantial changes in the EU legislation and implementing regulations.)

Of course the United States was no slouch in carrying the concept of “restraint of trade” out beyond the breakwater of economic sense: at one point all vertical restraints were per se illegal under Sherman Act Section 1, as were the vast majority of patent licensing restrictions, as well as restraints ancillary to the formation of output-enhancing joint ventures. Traces of these errors linger in our law as well: consider for example the state systems, largely modeled on federal antitrust, that cling to the notion of per se illegality for minimum vertical price setting even after this approach was explicitly overruled at federal level. Another example is the occasional misapplication of United States v. Topco Associates10—still sometimes referred to in its original sense as prohibiting all horizontal restraints. But do recent citations of Topco also mean to endorse the footnote that sarcastically rejects application of the rule of reason as an invitation for courts to wander into the “wilde of economic theory”? That’s hard to square with the resurgence of the rule of reason in virtually every other facet of U.S. antitrust law11 other than those designed to deal with the “classic cartel.”

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10 405 U.S. 596, 609 n.10 (1972).
11 Minimum and maximum vertical price restraints, exclusive territories, and a variety of patent licensing restrictions are all examples of practices that once were per se illegal but are now evaluated under the rule of reason.
By incorporating elements that are both vague and sinister, the key antitrust phrases almost guarantee extended debate and uncertainty about which forms of competitive conduct should be regarded as beyond legal bounds. The deeper one’s suspicions are about the players, the more penalties one will call. Hence, there are always temptations to push the borders of legality outward. Competition itself is not a sharply defined quantity—even in concept—like wavelength or acceleration. Any system of law that seeks to promote “competition” must anchor itself to articulated understandings of the concept, lest it drift off into incoherence, which invites arbitrary and uncontrollable enforcement. This would be of little interest in a penny-ante game. But global antitrust yields increasingly potent weapons—the expense, invasiveness, and disruption of massive litigation, remedies that often include incarceration of individuals and criminal fines or civil damages ranging into billions of dollars, restrictive injunctive relief and, for firms like Standard Oil, United Shoe Machinery, and the former Bell System, dissolution. Who would push the button on such a weapon without a clear understanding of the targeting principles and the potential long-run fallout? Given the sheer firepower, an irresponsible deployment of antitrust can create—and in some instances has created—enormous damage. So today’s global antitrust begs to be confined within responsible “limits.”

Are our current institutions designed to find and adopt such limits? In a well-considered and intriguing assessment of the relative competence of various approaches to institutional design for antitrust enforcement and competition advocacy, Frédéric Jenny, a former French competition agency member and career-long student of many different antitrust enforcement regimes throughout the world, quotes this assessment by Professor George Yarrow of the Regulatory Policy Institute:

My strong view is that the big regulatory issues are best addressed via organizational cultures that are deliberative/adjudicative in nature. In relation to economic issues . . . courts generally make better assessments than administrative agencies, because (a) they are usually much more interested in discovering what is the case/truth, and (b) they make use of a sort of competitive process (there will be alternative cases/narratives put before the court). In contrast, the attentions of executive/administrative agencies are easily distracted by bureaucratic and short-term media/political issues, and one of their central objectives (in practice possibly their central objective) is usually to convey a good impression of themselves, irrespective of that which is the case. (One of the lessons I have learnt from a lifetime of study in these areas is that it is difficult to overestimate the potential dysfunctionality of large bureaucracies which, for one reason or another, are in contact with the political system.)

Although the passage certainly seems intended as an endorsement of judicial/adjudicative bodies as distinct from executive-branch and administrative agencies, that is not necessarily the point I would emphasize, considering all the best learning and advice I have been exposed to in a long career in antitrust. Viewed over the long term, it is apparent that in the United States, at least, courts were willing participants and perhaps in some cases the driving force behind some of antitrust’s most doubtful experiments, including for example the ill-fated government monopolization case against IBM filed in 1969 and dismissed by consent in 1982. On the other hand, the Supreme Court, in both the Standard Oil case and in many decisions during and following the Reagan Reformation, sought to give (or restore) meaningful content to the rule of reason and thereby avoid doctrinal approaches that would create unwarranted legal risk for ordinary and

apparently harmless categories of business conduct (e.g., buying groups, vertical restrictions, patent license restrictions, restraints ancillary to legitimate joint ventures—even if horizontal). Even our present antitrust-savvy Supreme Court has come under criticism, however, for an alleged recent tendency (Verizon v. Trinko, Credit Suisse v. Billing)\(^\text{13}\) to toss complaints about competitive conduct over to regulatory agencies, snatching such disputes away from antitrust litigation.

So both the theory and practice of antitrust bring us back to the idea of limiting principles. There is a need to choose some basic approach to ensure that antitrust is appropriately tailored to contemporary economic understandings and competitive conditions, as well as the current state of the art of design for competent enforcement institutions. Agencies are not necessarily better than courts—either can go (and have gone) off the rails. Decisions are not necessarily right just because they employ economic analysis (although decisions that do not employ economic analysis are only right by coincidence). Any form of conduct—if described with a sufficiently disparaging phrase (“restraint of trade”—can be cast into legal jeopardy in a manner that ultimately damages (rather than preserves) competitive markets and their capacity to provide benign guidance for our economic system. To design the best institutions and adopt the most effective rules requires a constant search for “limits” and suitably critical treatment for all of antitrust’s epithets.

It has often proven possible to identify limiting principles and methods that are useful within each individual antitrust enforcement system. These include constant application of empirically based microeconomic analysis to assure continuous refinement of substantive rules, adoption of procedural steps that improve the likelihood of sound and objective decisions (e.g., by requiring inter alia that those accused of antitrust wrongdoing be allowed to confront such charges before any prejudgment occurs), and ongoing quality assessment of enforcement system performance.

In the international sphere, however, more aggressive and sophisticated strategies may be necessary. “Soft convergence” has taken us only so far: at some point a more intensive discipline may be required to tame the antitrust overgrowth. Perhaps some new form of international case management could be attempted, or perhaps new experiments in multijurisdictional rulemaking could suggest more effective ways of reducing the expense, burden, and delay inherent in the current environment. Ideally, such new disciplines will emerge from within the antitrust community itself as a result of a common recognition of the need for such mechanisms. Recent economic history affirms that crises can provide a missing element of urgency that leads to action, but solutions imposed in the heat and noise of crisis can be far less effective than those designed deliberately under conditions of stability, without the atmosphere of crisis where pious recrimination, a search for villains, and demands for quick action often preempt careful reflection and consensus-building toward fundamentally sound solutions.

At its current rate of expansion, global antitrust will soon reach some kind of ultimate limits; the antitrust community itself probably still has the ability to bring those limits into view. With the global economy still so close to the precipice, it is in everyone’s interest to design those limits with care and impose them through consensus.

Paper Trail: Working Papers and Recent Scholarship

Editor’s Note: In this edition, we look at two complementary papers: the FTC’s recently released report compiling data from its horizontal merger investigations, and a paper by Darren Tucker characterizing the kinds of theory and evidence the FTC considers when issuing a Second Request as a result of its initial phase investigation.

Send comments and suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers


Recently, the FTC released a report compiling data from its horizontal merger investigations, Horizontal Merger Investigation Data, Fiscal Years 1996–2011 (FTC Report). The report tracks the characteristics of mergers that led to some enforcement action (e.g., a challenge to the proposed merger or a consent decree) and those for which the investigations were closed without any enforcement action, all conditional on the merging parties having been issued a Second Request. This report is an ongoing effort by the FTC to increase transparency in its decision-making process. By coincidence, Antitrust Source Editorial Board Chair Darren Tucker also has a paper along similar lines, but addressing the characteristics (and more) of matters that lead to a Second Request.

Thus, while these two papers are generally complementary, the focus of each is quite different. The Tucker paper characterizes the kinds of theory and evidence the FTC actually considers when issuing a Second Request as a result of its initial phase investigations and, most interestingly, whether the agency’s focus on relevant issues shifted as a result of the adoption of the 2010 Horizontal Merger Guidelines. For that comparison, the Tucker paper draws on initial phase investigations between 2008 and 2012.

The FTC Report simply compiles the data without any particular characterization or conclusion for the entire 1996–2011 period. Given their aggregate nature, the data do not allow one to assess whether enforcement considerations changed as a result of the 2010 Guidelines. The FTC Report certainly provides a historical guide as to the factors the FTC has considered when undertaking an enforcement action. However, it’s less obvious whether this guide is a useful basis on which practitioners might rely for merger filings today since it encompasses multiple enforcement regimes.

* Page cites within are to SSRN version.
Both the FTC Report and the Tucker paper rely on internal FTC staff memoranda to characterize various mergers. While there are differences in how each defines certain characteristics, the definitions of those characteristics appear at least broadly consistent across the two papers. And both papers note at the outset that they are focusing on horizontal mergers, not vertical, although vertical issues can be part of the competitive effects story for a horizontal merger.

The Tucker paper provides data at both the transaction level and the market level, while the FTC Report focuses almost exclusively on the number of markets involved across all transactions.1 Both papers allow the practitioner to evaluate for any given transaction the kinds of market-specific factors that the FTC staff may consider in deciding whether to take an enforcement action. That market focus may be sensible since any enforcement action may arise because of concerns in some subset of markets involved in any particular transaction.2

First, I will first summarize some of the salient aspects of the Tucker paper, which by its nature will be of more interest than the FTC Report for those who might wonder about the effects of the Guidelines’ revisions on enforcement practices. To “spike” the FTC Report with more excitement, I will summarize some aspects of the FTC Report by identifying the extent to which mergers generating enforcement actions are associated with certain characteristics. To be clear, my discussion of the FTC Report is based on my own calculations, using the FTC Report as the data source, and the discussion here is not contained in the report. The interested reader can make additional cuts of these data as well. But unlike the Tucker paper that addresses the underlying theories of competitive harm, the focus of the FTC Report and also that of my recast of the data is solely on more structural characteristics and other evidence (e.g., “hot documents”) associated with enforcement actions following a Second Request.

The Tucker Paper

As noted above, the Tucker paper considers the kinds of factors that are associated with a decision to issue a Second Request across 77 transactions.3 Tucker is quick to point out that “the results may not reflect FTC merger practice generally and cannot be used to infer a causal relationship between the presence of certain forms of evidence and the likelihood of a Second Request.” (p. 605) In part, this is because the paper focuses on investigations that led to a Second Request and does not include any data on those investigations that concluded without a Second Request.4

Looking at the sample as a whole, Tucker first considers the theories of harm raised by the staff. Unilateral effects concerns played a role in over 90 percent of the investigations, while coordinated effects generated concerns in over half of all investigations. Non-price concerns (e.g., a loss in product variety) were raised in nearly half of the investigations reviewed by Tucker. The staff

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1 The Tucker paper focuses on a total of 77 investigations, split about evenly between periods before and after the adoption of the 2010 Guidelines, and 130 markets. These were markets identified as ones of concern in the staff memoranda. The FTC Report is based on 464 Second Requests involving 1,372 markets. It appears that the FTC Report identified the markets in the same way as the Tucker paper.

2 There are other differences that render comparisons more difficult. For example, the HHI ranges and the HHI delta ranges used in some of the data compilations differ between the two papers. I also note that both papers provide data for selected industries, such as pharmaceuticals. I will not be discussing those industry-specific analyses here.

3 Some characteristics data are not available for all transactions, so the number of transactions (and markets) can vary across the various tabulations. This is true of the FTC Report as well.

4 As Tucker notes, detailed staff memos “are not prepared when staff concludes that no further investigation is necessary . . . .” (p. 605) Having said that, some of the Tucker discussion might lead the reader to inadvertently interpret the results in a causal way. For example, Tucker’s Section II is titled “Study Findings—Factors Leading to Second Requests.” (p. 607)
raised concerns regarding potential competition, exclusionary conduct, price discrimination, and monopsony far less frequently.\(^5\) Given the time period involved, I find the significance of unilateral effects concerns not surprising. But some may think the reliance on coordinated effects is much less frequent than might have been expected.

In his Table 3, Tucker then considers the type of evidence the staff relies on when issuing a Second Request. Notwithstanding the significance of unilateral effects concerns, market structure was cited as a concern in each investigation. The other important concern associated with the issuance of a Second Request was existence of significant entry barriers, cited in 86 percent of the investigations. Customer complaints played a role in nearly half of the investigations. “Hot documents” played a more limited role in this phase of the merger review, perhaps because of the relatively limited document production that occurs during the initial phase investigation.

The Tucker paper also considers the extent to which the change in the number of significant competitors is associated with a Second Request. Across all 130 markets (identified by the staff memoranda and for which there was sufficient data) used by Tucker, 24 markets (or 15% of all markets of staff concern) were associated with a two-to-one merger; 44 markets (27%) were associated with a three-to-two merger; and 58 (35%) were associated with a four-to-three merger. (Tucker Table 4)

Finally (for purposes of this discussion), the Tucker paper identifies the association between the HHI levels and changes with the issuance of a Second Request. (Tucker Table 5) The paper notes, “not surprisingly,” that 94 percent of the markets exceeded the 1500 HHI/100 HHI delta (moderately concentrated markets in the 2010 Guidelines) and 88 percent exceeded the 2500 HHI/200 HHI delta (highly concentrated markets in the 2010 Guidelines and in the range where the merger is presumed to have adverse competitive effects).

The Tucker paper then turns to a comparison of practices before and after the adoption of the 2010 Guidelines, focusing on the significance in particular of the “new” competitive harm theories identified in the 2010 Guidelines: exclusionary conduct, monopsony, price discrimination, and non-price effects. “Spoiler alert”: in terms of theories of competitive harm, there is little difference between the before and after periods. Exclusionary conduct, monopsony, and price discrimination were identified as concerns with about the same frequency in the before and after period. The only noticeable difference was in the frequency of non-price concerns, which were present in 41 percent of the pre-2010 Guidelines transactions but in 53 percent of the post-2010 Guidelines transactions.\(^6\) (Tucker Table 8)

The Tucker paper also wades into the controversy on the relevance of defining a relevant market. As the data indicate, the staff almost always defined relevant markets in the pre- and post-period: 100 percent of the investigations leading to a Second Request defined relevant markets in the pre-period and 97 percent in the post-period.\(^7\) (Tucker Table 9)

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\(^5\) Among these four concerns, potential competition was listed the most often, in 25 percent of the investigations, and monopsony was listed the least often, in 7 percent of the investigations.

\(^6\) It appears that the Tucker paper does not separately assess the pre- and post-periods reliance on unilateral effects because those concerns had been identified in the 1997 Guidelines as well as the 2010 Guidelines. (Tucker Table 2) I note in passing that coordinated effects were raised as a concern in 56 percent of the transactions. Granted that coordinated effects were not “new” to the 2010 Guidelines, it nonetheless would have been interesting to determine whether reliance on coordinated effects differed between the pre- and post-period.

\(^7\) There was one matter out of 39 in the post-period that did not define a relevant market.
Based on the findings of overall similarities of the before and after period in the dimensions discussed above and in other dimensions studied, the Tucker paper concludes that:

The survey results are also generally consistent with the Agencies’ position that the 2010 Merger Guidelines reflected existing practice. . . . Unilateral effects, coordinated effects, and potential competition remain the workhorses of horizontal merger analysis, and FTC staff continues to define markets in all cases where staff makes a Second Request recommendation. (p. 624)

The FTC Report
The FTC Report considers the characteristics of transactions that generated an enforcement action, given that the FTC had issued a Second Request. While not explicitly defined, presumably an enforcement action is one that results in either a consent decree or a court challenge to the transaction. The Report notes that if the transaction was abandoned before the completion of the review of the deal, that abandonment is also considered an enforcement action.

The internal staff memoranda in these matters are far more detailed factually and analytically than those in matters during the initial phase investigation. As compared to the initial phase investigation memoranda examined in the Tucker paper, the FTC Report relies on staff memoranda that are likely to be far more detailed and analytic (typically) than those reviewed in the Tucker paper.

As I noted at the outset, the FTC Report compiles the data without any commentary or interpretation. Here I offer a précis of what kinds of information a practitioner can generate using these data. Table 3.1a below corresponds to Table 3.1 in the FTC Report, identifying the number of markets for which an enforcement action was the outcome and for which no enforcement action was taken by the FTC.8 This table, for example, indicates that an enforcement action occurred with respect to 1055 identified markets and the FTC took no action with respect to 304 identified markets.

Table 3.1b simply translates the entries in Table 3.1 (and 3.1a) into percentages of the total markets identified that led to an enforcement action. Overall, nearly 80 percent of those markets were subject to an FTC enforcement action. One could interpret this as suggesting that if the FTC issues a Second Request for a transaction, that transaction is highly likely to be subject to some enforcement action. However, one should be cautious about such an interpretation since typically we know more about a transaction than simply that it generated a Second Request. So, for example, even though overall 80 percent of these markets were subject to an enforcement action, only about 45 percent of all markets with an HHI delta in the 100–199 range resulted in an enforcement action (across all post-merger HHIs). Thus, there is still considerable variation in the incidence of enforcement actions when considering more specific characteristics of the transaction.

This kind of analysis provides the practitioner with some insight as to the “likelihood” that a particular transaction will result in an enforcement action of some type. Thus, if the post-merger HHI is between 2000 and 2999 and the delta HHI is between 200 and 499, the FTC is likely to take some enforcement action (59.6%). But caution is warranted since the reason for an enforcement action may in fact not be solely or even largely a structural issue. There may be other reasons (perhaps more important reasons) that led to the enforcement action. After all, Table 3.1b only looks at two factors—the post-merger HHI and the delta HHI. It is perhaps best to think of these percentages as empirical regularities rather than likelihoods of an enforcement action.

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8 For ease of exposition, I have included less detail than is available in the FTC Report.
Table 4.1 below identifies the number of markets in which an enforcement action was associated with a merger-induced reduction in the number of significant competitors (taken directly from Table 4.1 in the FTC Report) and the extent to which an enforcement action was associated with that reduction (my calculations, based on the FTC data). For example, when a market experienced a merger-induced reduction in the number of significant competitors from 2 to 1, the FTC engaged in an enforcement action 98 percent of the time. By contrast, a reduction in the number of significant competitors from 8 to 7 was associated with an enforcement action for 24 percent of the identified markets in that category.

Tables 5.1a and 5.2a (which correspond to Table 5.1 and Table 5.2 in the FTC Report) show the incidence of enforcement actions associated with hot documents and with the absence of hot documents by post-merger HHI levels and by HHI deltas. However, here the sample size is considerably smaller, looking only at those transactions that involved three or fewer markets—a total of 258 markets.

Tables 5.1a and 5.1b assess the incidence of enforcement actions when staff identified hot documents. The first point to note is that hot documents were only identified for a relatively small sample of 28 markets. The extent to which hot documents are associated with an enforcement action is nearly 90 percent overall. While I also have included the enforcement incidence for various combinations of post-merger HHI and HHI deltas, the small sample sizes suggest caution in making any further inferences.

Tables 5.2a and 5.2b parallel the previous two tables, but look at whether the absence of hot documents affected the enforcement incidence. Overall, that would seem to be the case. Across all post-merger HHI levels and HHI deltas, the likelihood of an enforcement action for any particular market was only 65 percent. While there is a larger overall sample size here (230 markets), within a specific HHI level and HHI delta range there may be only a handful of observations, requiring caution when making inferences.

More importantly, a comparison of the two Tables 5.1b and 5.2b suggest that the incidence of an enforcement action is considerably higher when there are hot documents.

Tables 7.1a and 7.1b review the extent to which an enforcement action was associated with “strong” customer complaints for 114 markets reviewed. As with table 5.1a, the FTC Report considered only those transactions that involved three or fewer markets. Overall, the incidence of enforcement actions associated with strong customer complaints is nearly 100 percent, which I find surprising.

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9 The FTC Report notes that there was no information on significant competitors for 229 markets, 86% of which were in the oil industry.

10 One can’t help but wonder why there was no enforcement action for the other 2% of the markets in this category.

11 Looking back at Table 3.1b, in looking across any particular row or column, the incidence of an enforcement action increases as the post-merger HHI increases and as the delta HHI increases. This is what one might expect. In Table 4.1, the incidence of an enforcement action decreases with the increase in the number of significant competitors (again, what one might expect) until a seemingly odd jump in the enforcement incidence at the “8 to 7” and the “10 to 9” categories. The latter may be explained by small numbers, but that explanation does not fit the “8 to 7” category. Perhaps this is where a more discrete time series would have been helpful, to assess whether enforcement incidence in that category might have been associated with changes in the antitrust regime.

12 There is no explanation for this data truncation. Perhaps the hot documents were not specific to a particular market and so the relevance of such a generalized document for the FTC Report is likely to decrease as the number of markets in a transaction increases.

13 In terms of identifying relevant customer complaints, the FTC Report notes that “[c]ustomer reaction has been recorded as a ‘strong customer complaint’ where customers expressed a credible concern that a significant anticompetitive effect would result if the transaction were allowed to proceed.” (p. 4)

14 Retail markets are also excluded because customers are mostly individual consumers in these markets. (p. 5)
As before, I remain leery of small sample size issues in making further inferences depending on the HHI/HHI delta combinations. However, it can be seen that when the HHI delta exceeds 500, there are 110 identified markets associated with strong customer complaints. Almost 100 percent resulted in an enforcement action. By contrast, throughout the entire sample, when the HHI delta exceeds 500, the overall enforcement incidence is “only” 86 percent (Table 3.1b). This suggests that the role of strong customer complaints has a non-trivial impact on the enforcement incidence, to the extent one is willing to identify causal links between these various characteristics and the enforcement incidence.

Tables 7.2a and 7.2b review the incidence of enforcement actions for 122 markets for which there are no strong customer complaints. Overall, markets for which there are no customer complaints are associated with an enforcement action in about 43 percent of the 122 markets. Without inferring too much from these data, it’s still striking how different the overall enforcement incidence is with strong customer complaints versus with no such complaints.

For markets where the HHI delta is in excess of 500, the enforcement incidence in the absence of strong customer complaints is about 47 percent. For those markets where the HHI delta is between 200 and 499, the enforcement incidence is about 41 percent.

Closing Comments
Both papers serve the goals of promoting more transparency in merger enforcement quite well, although the FTC Report makes it more difficult to undertake the kinds of comparisons reported in the Tucker paper. However, as the Tucker paper notes, any inferences drawn from data on matters resulting in a Second Request must be qualified in the absence of comparable data on those mergers for which no Second Request was issued. The FTC Report is somewhat better in that regard because it can compare markets resulting in an enforcement action versus those where no enforcement action was taken. Both suffer from the flaw of looking at only simple cross-tabulations. That is, these tables offer a window into Second Request/enforcement incidence when looking at most at three variables (e.g., HHI, HHI delta, and strong customer complaints, as in Tables 7.1a and 7.1b). A more rigorous statistical analysis (e.g., a regression analysis) could account simultaneously for these three factors as well as the number of significant competitors, the availability of “hot documents,” and others.

In closing, I note that my discussion here does not do justice to the richness of the data in the FTC Report and of the analysis in the Tucker paper. For example, the FTC Report also provides enforcement data by the height of entry barriers and by some large industry segments (e.g., pharmaceuticals and hospitals). The interested reader can transform the raw numbers provided by the FTC into percentages as in the discussion surrounding my various “b” tables. In addition to providing data for large industry segments roughly comparable to those used in the FTC Report, the Tucker paper also considers (among other dimensions) the significance of efficiency claims in matters leading to a Second Request, the kind of evidence/methodologies associated with such matters, and the role of power buyers. All in all, the Tucker paper and the FTC Report are worth more than a quick look.

—JOHN R. WOODBURY

15 While not discussed here, it is interesting and comforting perhaps to note that for markets where entry was considered “easy,” there were no enforcement actions. See FTC Report Table 9.1.
### Table 3.1a
Post Merger HHI and Change in HHI (Delta)
All Markets (Enforced/Closed)

<table>
<thead>
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<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
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<tr>
<td>0–1,999</td>
<td>0/18</td>
<td>22/35</td>
<td>53/41</td>
<td>15/13</td>
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<td>104/38</td>
<td></td>
<td>167/88</td>
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<tr>
<td>3,000–6,999</td>
<td>2/3</td>
<td>11/4</td>
<td>36/12</td>
<td>463/87</td>
<td></td>
<td>512/106</td>
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<tr>
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<td>0/0</td>
<td>0/0</td>
<td>2/0</td>
<td>284/3</td>
<td></td>
<td>286/3</td>
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<tr>
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<td>147/91</td>
<td>866/141</td>
<td></td>
<td>1055/304</td>
</tr>
</tbody>
</table>

### Table 3.1b
Post Merger HHI and Change in HHI (Delta)
All Markets (% associated with an enforcement action)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td>0.0%</td>
<td>38.6%</td>
<td>56.4%</td>
<td>53.6%</td>
<td></td>
<td>45.7%</td>
</tr>
<tr>
<td>2,000–2,999</td>
<td>33.3%</td>
<td>38.5%</td>
<td>59.6%</td>
<td>73.2%</td>
<td></td>
<td>65.5%</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>40.0%</td>
<td>73.3%</td>
<td>75.0%</td>
<td>84.2%</td>
<td></td>
<td>82.8%</td>
</tr>
<tr>
<td>7,000+</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>99.0%</td>
<td></td>
<td>99.0%</td>
</tr>
<tr>
<td>Total</td>
<td>13.8%</td>
<td>44.7%</td>
<td>61.8%</td>
<td>86.0%</td>
<td></td>
<td>77.6%</td>
</tr>
</tbody>
</table>

**Notes:**

[1] Source: FTC Horizontal Merger Investigation Data, January 2013, Table 3.1.


[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action). In some instances, there were no markets implicated and those have been identified as N/A.
Table 4.1
Number of Significant Competitors
All Markets

<table>
<thead>
<tr>
<th>Significant Competitors</th>
<th>Total Markets</th>
<th>Enforced (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 1</td>
<td>303</td>
<td>98.0%</td>
</tr>
<tr>
<td>3 to 2</td>
<td>371</td>
<td>89.2%</td>
</tr>
<tr>
<td>4 to 3</td>
<td>225</td>
<td>77.3%</td>
</tr>
<tr>
<td>5 to 4</td>
<td>103</td>
<td>64.1%</td>
</tr>
<tr>
<td>6 to 5</td>
<td>54</td>
<td>35.2%</td>
</tr>
<tr>
<td>7 to 6</td>
<td>25</td>
<td>12.0%</td>
</tr>
<tr>
<td>8 to 7</td>
<td>25</td>
<td>24.0%</td>
</tr>
<tr>
<td>9 to 8</td>
<td>11</td>
<td>0.0%</td>
</tr>
<tr>
<td>10 to 9</td>
<td>6</td>
<td>33.3%</td>
</tr>
<tr>
<td>10+</td>
<td>20</td>
<td>0.0%</td>
</tr>
<tr>
<td>Total</td>
<td>1143</td>
<td>78.6%</td>
</tr>
</tbody>
</table>

Notes:
[1] Source: FTC Horizontal Merger Investigation Data, January 2013, Table 4.1.
[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action).
Table 5.1a
Post Merger HHI and Change in HHI (Delta)
All Markets Hot Documents Identified (Enforced/Closed)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td>0/0</td>
<td>0/0</td>
<td>0/0</td>
<td>0/1</td>
<td>0/1</td>
</tr>
<tr>
<td>2000–2,999</td>
<td>0/0</td>
<td>0/0</td>
<td>2/0</td>
<td>1/0</td>
<td>3/0</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>0/0</td>
<td>0/0</td>
<td>1/0</td>
<td>12/2</td>
<td>13/2</td>
</tr>
<tr>
<td>7,000+</td>
<td>0/0</td>
<td>0/0</td>
<td>0/0</td>
<td>9/0</td>
<td>9/0</td>
</tr>
<tr>
<td>Total</td>
<td>0/0</td>
<td>0/0</td>
<td>3/0</td>
<td>22/3</td>
<td>25/3</td>
</tr>
</tbody>
</table>

Table 5.1b
Post Merger HHI and Change in HHI (Delta)
All Markets Hot Documents Identified (% associated with an enforcement action)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>0.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>2000–2,999</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>85.7%</td>
<td>86.7%</td>
</tr>
<tr>
<td>7,000+</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Total</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>88.0%</td>
<td>89.3%</td>
</tr>
</tbody>
</table>

Notes:
[1] Source: FTC Horizontal Merger Investigation Data, January 2013, Table 5.1.
[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action). In some instances, there were no markets implicated and those have been identified as N/A.
Table 5.2a
Post Merger HHI and Change in HHI (Delta)
All Markets No Hot Documents Identified (Enforced/Closed)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td></td>
<td>0/0</td>
<td>0/5</td>
<td>1/3</td>
<td>0/3</td>
<td>1/11</td>
</tr>
<tr>
<td>2000–2,999</td>
<td></td>
<td>0/1</td>
<td>0/1</td>
<td>4/10</td>
<td>11/15</td>
<td>15/27</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td></td>
<td>1/0</td>
<td>2/3</td>
<td>6/4</td>
<td>75/34</td>
<td>84/41</td>
</tr>
<tr>
<td>7,000+</td>
<td></td>
<td>0/0</td>
<td>0/0</td>
<td>2/0</td>
<td>48/1</td>
<td>50/1</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>1/1</td>
<td>2/9</td>
<td>13/17</td>
<td>134/53</td>
<td>150/80</td>
</tr>
</tbody>
</table>

Table 5.2b
Post Merger HHI and Change in HHI (Delta)
All Markets No Hot Documents Identified (% associated with an enforcement action)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td></td>
<td>N/A</td>
<td>0.0%</td>
<td>25.0%</td>
<td>0.0%</td>
<td>8.3%</td>
</tr>
<tr>
<td>2000–2,999</td>
<td></td>
<td>0.0%</td>
<td>0.0%</td>
<td>28.6%</td>
<td>42.3%</td>
<td>35.7%</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td></td>
<td>100.0%</td>
<td>40.0%</td>
<td>60.0%</td>
<td>68.8%</td>
<td>67.2%</td>
</tr>
<tr>
<td>7,000+</td>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>98.0%</td>
<td>98.0%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>50.0%</td>
<td>18.2%</td>
<td>43.3%</td>
<td>71.7%</td>
<td>65.2%</td>
</tr>
</tbody>
</table>

Notes:
[1] Source: FTC Horizontal Merger Investigation Data, January 2013, Table 5.2.
[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action). In some instances, there were no markets implicated and those have been identified as N/A.
Table 7.1a
Post Merger HHI and Change in HHI (Delta)
All Markets Strong Customer Complaints (Enforced/Closed)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0–99</td>
<td>100–199</td>
</tr>
<tr>
<td>0–1,999</td>
<td>0/0</td>
<td>0/0</td>
</tr>
<tr>
<td>2000–2,999</td>
<td>0/0</td>
<td>0/0</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>0/0</td>
<td>0/0</td>
</tr>
<tr>
<td>7,000+</td>
<td>0/0</td>
<td>0/0</td>
</tr>
<tr>
<td>Total</td>
<td>0/0</td>
<td>0/0</td>
</tr>
</tbody>
</table>

Table 7.1b
Post Merger HHI and Change in HHI (Delta)
All Markets Strong Customer Complaints (% associated with an enforcement action)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>Change in HHI (Delta)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0–99</td>
<td>100–199</td>
</tr>
<tr>
<td>0–1,999</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>2000–2,999</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>7,000+</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Total</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Notes:
[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action). In some instances, there were no markets implicated and those have been identified as N/A.
### Table 7.2a
Post Merger HHI and Change in HHI (Delta)
All Markets No Strong Customer Complaints (Enforced/Closed)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td>0/0</td>
<td>0/5</td>
<td>1/3</td>
<td>0/4</td>
<td>1/12</td>
</tr>
<tr>
<td>2,000–2,999</td>
<td>0/0</td>
<td>0/1</td>
<td>4/10</td>
<td>5/12</td>
<td>9/23</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>1/0</td>
<td>2/3</td>
<td>5/4</td>
<td>24/26</td>
<td>32/33</td>
</tr>
<tr>
<td>7,000+</td>
<td>0/0</td>
<td>0/0</td>
<td>2/0</td>
<td>9/1</td>
<td>11/1</td>
</tr>
<tr>
<td>Total</td>
<td>1/0</td>
<td>2/9</td>
<td>12/17</td>
<td>38/43</td>
<td>53/69</td>
</tr>
</tbody>
</table>

### Table 7.2b
Post Merger HHI and Change in HHI (Delta)
All Markets No Strong Customer Complaints (% associated with an enforcement action)

<table>
<thead>
<tr>
<th>Post Merger HHI</th>
<th>0–99</th>
<th>100–199</th>
<th>200–499</th>
<th>500+</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–1,999</td>
<td>N/A</td>
<td>0.0%</td>
<td>25.0%</td>
<td>0.0%</td>
<td>7.7%</td>
</tr>
<tr>
<td>2,000–2,999</td>
<td>N/A</td>
<td>0.0%</td>
<td>28.6%</td>
<td>29.4%</td>
<td>28.1%</td>
</tr>
<tr>
<td>3,000–6,999</td>
<td>100.0%</td>
<td>40.0%</td>
<td>55.6%</td>
<td>48.0%</td>
<td>49.2%</td>
</tr>
<tr>
<td>7,000+</td>
<td>N/A</td>
<td>N/A</td>
<td>100.0%</td>
<td>90.0%</td>
<td>91.7%</td>
</tr>
<tr>
<td>Total</td>
<td>100.0%</td>
<td>18.2%</td>
<td>41.4%</td>
<td>46.9%</td>
<td>43.4%</td>
</tr>
</tbody>
</table>

**Notes:**

[1] Source: FTC Horizontal Merger Investigation Data, January 2013, Table 7.2.


[3] Percentages are calculated as the number of markets triggering an enforcement action over total markets (whether or not there was an enforcement action). In some instances, there were no markets implicated and those have been identified as N/A.