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# From Surrogates to Stories: The Evolution of Federal Merger Policy

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*From Surrogates to Stories:*

# The Evolution of Federal Merger Policy

by Robert H. Lande and James Langenfeld

From its modern origins more than thirty years ago federal merger policy has centered around the use of standard surrogates for market power to make presumptions about the likely effects of mergers. Since that time it has been evolving towards an increasingly complex approach as economic considerations have expanded their influence on merger policy. This trend was solidified in the 1982 revision of the Department of Justice's Merger Guidelines, accelerated by the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines' increased emphasis on unilateral (as opposed to collusive) anticompetitive effects,<sup>1</sup> and has reached new heights in the last two years with new unilateral theories and the application of econometric analysis of market data and game-theory based simulation programs. In effect, merger policy has been moving away from reliance on surrogates and towards an approach that instead tells a story of anticompetitive harm—an approach that directly asks and answers the ultimate question: are prices to consumers likely to increase as a result of a merger? This new approach can lead to surprising conclusions.

## The Traditional Approach

*United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), one of the first modern merger cases,<sup>2</sup> held that the government must define the relevant mar-

ket and prove appropriate market share and market concentration data. If the government proved these surrogates for market power, the Supreme Court was willing to declare a presumption of illegality that would control unless defendant "clearly" could overcome it. *Id.* at 363. Once the government had defined the relevant market and showed an appropriate increase in concentration, the case was virtually over and the merger would be enjoined.<sup>3</sup>

As we have learned over the last thirty years, the traditional approach has many problems. For example, market definition can be an all or nothing game and can determine whether a merger will be challenged. Suppose, for example, that two manufacturers of luxury automobiles, such as Mercedes and BMW, want to merge. If the "relevant market" were considered to be "all new automobiles,"<sup>4</sup> the merger would probably be regarded as harmless since their market shares would be trivial. On the other hand, if there were such a thing as a "luxury car market," the merger might involve unduly high market shares and could thus be challenged and prevented. Unfortunately, the methods for and evidence of market determination seldom lead to unambiguous market definitions.

Accordingly, the conventional approach can lead to little predictability in "heterogeneous" or "differentiated" markets composed of products with substantially different features and prices, such as automobiles, or with significant brand distinction and (arguably) less obvious product differences, such as bath tissues. This problem can be serious because one can almost always find enough differences in products to make an argument that any market is heterogeneous. The traditional approach to this problem, at least prior to the 1992 Horizontal Merger Guidelines, was to decide how close the products of the merging

firms are in a product market space, and make this a qualitative "plus" or "minus" factor in the analysis.

Another problem with *Philadelphia National Bank's* presumptive approach is that every merger involves different competitive circumstances that can affect whether a merger is likely to reduce competition. Even if one can establish that a merger would result in a post-merger industry Herfindahl-Hirschman Index (HHI) over 1800 and an increase of more than 100, these calculations by themselves seldom accurately predict whether competition will be harmed by the merger. For example, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), held that current production of coal was a poor measure of future competition and that uncommitted coal reserves should be used instead.<sup>5</sup> Cases such as *United States v. Waste Management, Inc.*, 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd*, 743 F.2d 976 (2d Cir. 1984), recognized the importance of potential entry as a check on post-merger market power,<sup>6</sup> and *United States v. Country Lake Foods*, 1990-2 Trade Cas. (CCH) ¶ 69,113 (D. Minn. 1990), highlighted the impact of powerful buyers in counteracting increased seller concentration after a merger.

Perhaps for these reasons, *Philadelphia National Bank's* presumptive approach has eroded over time. For example, in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974), the Supreme Court rearticulated the formulation, but omitted "clearly" from the presumption. Moreover, even the word "presumption" may now be debatable. Recall the opinion in *United States v. Baker Hughes Inc.*, 731 F. Supp. 3 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990), in which Judge Thomas arguably abolished the presumption completely,<sup>7</sup> although the presumption does remain in the 1992 Horizontal Merger Guidelines.

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## Recent Government Approaches

Regardless of whether a presumption still exists under case law, the federal enforcers today do not merely define a relevant market, show the relevant market shares and HHI figures, and rest their case. Using a variety of economic models and techniques,<sup>8</sup> federal enforcers are attempting to develop additional information that would shed light on whether a merger is likely to be anti-competitive.<sup>9</sup>

In particular, there have been many recent attempts by the Federal Trade

Commission and the Department of Justice to shift the focus of investigations away from market definition, particularly in cases involving unilateral effects.<sup>10</sup> Their approach is to return to first principles. Since the enforcers ultimately care about the firm's ability to raise price after a merger, they look at a variety of factors and try directly to predict what will happen to future industry prices.

In the extreme, this means forgetting about market definition, market shares, and other surrogates of market power. As Jonathan Baker and Gregory Werden suggest in this issue of ANTITRUST, so long as the price of something is likely to rise, why should we waste time figuring out exactly what prices will go up? To use an example that Baker has used in the past, there might be an extreme case when we do not care exactly how the beer market is defined or what the precise market shares are—e.g., whether "lite" beer or imported beer should be included in the relevant market.<sup>11</sup> If Anheuser-Busch and Miller were to merge and the price of something (even if we have not defined precisely what it is) probably will increase, then the agencies should take this as direct evidence of reduced competition and attempt to stop the merger.

Other antitrust scholars and practitioners, such as Werden in this issue, argue that economic simulations based on estimates of own- and cross-price elasticities of demand should be used instead of analysis that centers around structural surrogates. In fact, the government in its internal deliberations frequently has used this type of analysis to predict directly profit-maximizing price increases.

At a minimum, this new method of analysis means an increased focus on the nature of competition between the merging firms and their close substitutes, paying particular attention to the likely effects of the merger on groups of customers.<sup>12</sup>

## Ideology or Improved Economic Tools

There is concern in the defense bar that economic story telling and the increased focus on unilateral effects analysis will lead to overly narrow market definitions, or no market definition at all. Some believe that the old *Brown Shoe* submarket concept has returned, albeit disguised by new economic language,<sup>13</sup> or there is

an attempt to avoid the statute's reference to a "line of commerce."

For example, in *United States v. Interstate Bakeries Corp.*, Civ. Action No.: 95C 4194 (N.D. Ill. filed July 20, 1995), the government alleged that the relevant product market was "white pan bread baked by wholesale and captive bakeries sold through retail food stores," and that the merger "would likely cause Interstate to raise its prices for white pan bread sold under its *brands* and the *brands* it is acquiring from Continental [such as Wonder or Webers]" (emphasis added). According to the Department of Justice, bread baked in stores' bakeries was not to be included in the same relevant market as branded bread, and store-brand white pan bread (such as Safeway), rolls, hearth baked, wheat, rye, diet, etc., breads would be unlikely to constrain a price increase in branded white pan breads after the merger.

By contrast, during the Reagan Administration, the FTC considered the same market in *Flowers Industries, Inc.*, 102 F.T.C. 1700 (1983), but alleged "[the] relevant product market for each acquisition . . . is the manufacture and sale of bread and bread-type rolls produced by wholesale bakeries, grocery chain bakeries, and in-store bakeries," where "bread shall mean white, wheat, rye, dark or variety baked bread products" and "bread-type rolls shall mean hamburger and hotdog rolls, brown and serve rolls, English muffins, hearth rolls, and similar products." *Id.* at 1701, 1705.

Thus, market definition and competitive analysis have shifted over the last decade. This would be desirable if the approach taken a decade ago resulted in markets that were too broad. After all, if the government could show that a merger would increase the price of "branded white bread" by 10 percent for a significant period of time, then the merger should be enjoined.

The government's new method of analysis is, however, not inherently pro-plaintiff. In many ways it was originated by (then) Posner and Landes in 1981.<sup>14</sup> Posner and Landes pointed out that if it were possible to calculate elasticity of supply and elasticity of demand, we could forgo market definition and market share because we would know everything we needed to know to assess a merger's com-

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petitive impact. However, because we cannot know this very often, we must instead use the traditional methods of calculating the surrogates of relevant market and market shares, and making presumptions.<sup>15</sup>

The government's new approach is saying, in effect, that enforcers agree with Landes's and Posner's overall methodology, but that economic theory, econometric techniques, data availability,<sup>16</sup> and developments in computer simulations have improved so much in the last fifteen years, we can now often answer Landes's and Posner's direct question. In this issue of *ANTITRUST*, Werden suggests that in those cases where we can answer the direct question and calculate likely price increases, we should do that, instead of using traditional structural analysis.

In addition to its provenance, another reason why this approach is not necessarily pro-plaintiff is that it sometimes can be used to weigh in favor of the legality of a merger under the right circumstances. In another recent merger of two bread bakeries, for example, one of the bakeries specialized in pan bread, while the other specialized in hearth bread. After an extensive analysis, the Department of Justice decided not to challenge the merger because, among other reasons, it was shown that the products of the two bakeries were not each other's closest competitor in retail sales.<sup>17</sup>

Accordingly, these recent developments may provide more bases for challenging mergers, but there does not appear to be an ideological bias involved in the government's new methodology.

### Disadvantages of the Trend

The new methodologies have a number of disadvantages, which may weigh against their use in spite of their lack of ideological bias and their widespread support. First, there are often problems with obtaining the necessary underlying data in a form that is of sufficient quality.<sup>18</sup>

Second, assuming that the data are available and reliable, discussions with the agencies often turn into a battle of the applicable economic assumptions, econometric analysis, and computer simulation models. For example, is the market better categorized as homogeneous or differentiated, is the firm's competition based on

quantity (Cournot game-theory models) or price (Bertrand game-theory models), or any game theory model at all?<sup>19</sup> What does one assume about the shape of the demand curves, the grouping of products in a demand system, and the structure of the demand estimation process?<sup>20</sup> What are the relevant time periods?<sup>21</sup> Which simulation model should we use?<sup>22</sup> Is product repositioning (a form of entry) easy?<sup>23</sup> Virtually all of these models always predict prices will rise as a result of a merger without any explicitly collusive behavior (absent significant efficiencies).<sup>24</sup> Accordingly, what level of predicted price increase is sufficient to merit challenging a merger? Different answers to these and other technical questions may lead to predictions of either a de minimis or a significant price increase from a merger, so the government's analysis risks being fragile.

Spelling out in detail the assumptions is very useful, as long as decision makers understand the assumptions and their importance. However, if one can change the analysis substantially by making fair but different assumptions, or if the analysis is based on relatively small differences in statistical estimates, the government's approach is unlikely to be very useful.

Third, the methodology may be less predictable than traditional market definition analysis. There is clearly uncertainty with both the 1992 Horizontal Merger Guidelines approach to market definition and these recent approaches.<sup>25</sup> However, faced with a client that wishes to merge with a competitor, a defense lawyer might be in a position of saying "it depends on the assumptions about the shape of the demand curve."

Moreover, it is not clear how often the government will be able to meet its burden of proof in court given the data and methodological issues. The new economic approaches being used by the antitrust agencies have not been really tested in litigation, and the courts could substantially affect the influence these new approaches have on merger policy and analysis.<sup>26</sup> Thus, the new unilateral effects analysis may lead to less business certainty, with all the negatives that flow from lower predictability.

A fourth drawback is that this new analysis can be time consuming and expensive, especially when the merging

parties attempt to challenge the government's analysis or attempt to use these approaches to dissuade the agencies from challenging a merger. It can often cost hundreds of thousands of dollars to do a complete analysis in a particular case, and the analysis moves even more from existing case law to the realm of economists.

### Practical Impact on Policy

One of the most important practical effects of the government's new approach is that it often can find unilateral anti-competitive effects at very low combined market shares. Jonathan Baker's article in this issue of *ANTITRUST* provides an example of how a merger can lead to a 12.5 percent price increase even though the firms' combined market share is only 20 percent.

Thus, it should come as no surprise that assumptions similar to those contained in the government's models can produce many scenarios involving combined market shares of even less than 20 percent that predict price increases of more than 10 percent. In fact, this type of analysis can predict price increases from 6 percent to over 50 percent after the merger of two firms that each have only 5 percent of a hypothetical market. Under reasonable assumptions, the new approach can predict significant price increases with what most would consider small market shares.

Do the Merger Guidelines permit a consideration of unilateral effects when the firms' combined market shares is this small? Many in the antitrust bar believe that the Merger Guidelines contain a general safe harbor for unilateral effects when the combined market shares total less than 35 percent, but it is clear from Baker's analysis that many of the current antitrust enforcers do not believe this. The Merger Guidelines state in Sections 2.211 and 2.22 that there will be no presumption of unilateral effects if the merged firm has less than a 35 percent market share, but this does not necessarily mean that a safe harbor exists if there is evidence that the merging firms are each other's closest competitor.

Is challenging mergers with combined market shares of less than 35 percent based on noncollusive theories consistent with past enforcement practice? As a practical matter, it represents a dramatic

change from the Reagan-Bush years. For example, from 1987 to 1992 the Federal Trade Commission challenged only four mergers (out of a total of 61 challenges) that involved an HHI increase of less than 400.<sup>27</sup> We would be surprised if any of the challenged transactions involved combined market shares as low as 20 percent.

Our experience suggests that during the Reagan years many enforcers believed that for a firm to have the power to unilaterally raise price and restrict output it would usually have to have more than 50 percent of a market, and even in those circumstances market power often was negated by ease of entry, repositioning, contestability, etc. Now the debate has shifted dramatically. The federal enforcers are not only concerned with market shares over 50 percent, but at least some appear concerned with combined market shares in the 20–35 percent range.

Economists differ over whether this mirrors the real world. Many economists continue to believe that substantial market power, when it exists at all, requires market shares well over 50 percent.<sup>28</sup> Others believe that market power can begin in the 30–40 percent range.<sup>29</sup> If one holds this latter view, the government's new policy could be justified by the incipency mandate of Section 7 of the Clayton Act—depending on how far the government and courts are willing to take these theories.

### Testing the New Approach in Court

Ever since *Philadelphia National Bank*, merger enforcement has been moving

away from a mechanical approach using surrogates and presumptions towards one that directly attempts to answer the ultimate question of whether price is likely to increase because of a merger. This trend has been accelerating recently, and it is not clear how far the agencies will take it or whether a court would ever go all the way and forgo the use of market definition, market share, and concentration.

In the Department of Justice's failed attempt to challenge the acquisition of the Parker Pen Company by the Gillette Company, its expert economic witness concluded that the merger was anticompetitive without including an analysis that defined a relevant market.<sup>30</sup> Would a court now adopt Baker's approach and conclude that the price of something is likely to rise by 12.5 percent, so never mind exactly what the relevant market is? Such an approach is contrary to long established case law, such as *Philadelphia National Bank*, which holds that it is first necessary to define the relevant market and calculate market shares. And, of course, the Merger Guidelines would have to be amended because they now assert that the government will start its analysis by defining the relevant market.

If the government is going to test the extreme version of its approach in court and assert that it did not have to define the relevant market or calculate concentration or market shares, then it should challenge a merger that is the equivalent of Coca-Cola buying Pepsi. This is probably the only way the government could convince a court to ignore the traditional surrogates and find potential harm to a relatively undefined "line of commerce."<sup>31</sup> If,

however, the government's analysis hinges on an economic model that shows a significant anticompetitive effect when there is a constant elasticity demand curve, but a straight line demand curve predicts only a de minimis price increase, it is unlikely that any court will hold that the government had met its burden of persuasion. Accordingly, we would expect that this approach would at least initially be tested in court in conjunction with a traditional structural analysis.

### Clarifying Policy

We believe that business needs an explicit safe harbor from unilateral effects analysis. Because a 35 percent post-merger market share does not appear to be a safe harbor threshold, and these theories have not yet been tested in court, the government should more clearly articulate its standards until these theories have been litigated. Further, because the new models almost always predict some price increase, it also would be desirable for the agencies to specify what they consider an allowable (or de minimis) predicted price increase. This is particularly important because the authors' experiences suggest that the agencies have been reluctant to accept any predicted price increase resulting from a merger.

Descriptions of the rationale for bringing specific cases, such as Baker's article in this issue, are extremely helpful. However, it is still difficult to generalize from this type of discussion and to provide a reasonably high level of certainty when counseling many prospective mergers, absent extensive and expensive analysis. ●

<sup>1</sup> See, e.g., Paul T. Denis, *Advances of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects*, 38 ANTITRUST BULL. 479 (1993).

<sup>2</sup> In some respects, such as requiring market definitions, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), can be considered the first modern merger case.

<sup>3</sup> The list of factors that could overturn the clear presumption was relatively short and, in the years immediately after the decision, rarely used.

<sup>4</sup> This was the market definition used by the FTC in evaluating the GM-Toyota joint venture in 1984. 103 F.T.C. 374 (1984).

<sup>5</sup> One can also argue that the court merely disagreed with the way market shares should be calculated, but the case does focus on future actions rather than on current sales.

<sup>6</sup> See Malcolm Coate & James Langenfeld, *Entry Under the Merger Guidelines 1982–1992*, 38 ANTITRUST BULL. 557 (1993) (discussing history of entry analysis in the courts).

<sup>7</sup> Judge Thomas held that despite *Philadelphia National Bank*, "The ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff . . ." *Baker Hughes*, 908 F.2d at 991 (citation omitted).

<sup>8</sup> The economic literature in this area has been developed and refined over many years and is too extensive to discuss here. The authors of important articles in the field include current and former Department of Justice and FTC economists, including Jonathan Baker, Luke Froeb, Thomas Overstreet, George Rozanski, Greg Werden, Carl Shapiro, and Robert Willig. For example, this magazine has recently published two articles on the subject of unilateral effects analysis, Thomas Overstreet et al., *Understanding Econometric Analysis of Price Effects of Mergers Involving Differentiated Products*, ANTITRUST, Summer 1996, at 30, and Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23.

<sup>9</sup> We only discuss the price effects of mergers. Others have suggested that merger enforcement should have additional concerns, but these are beyond the scope of this article. See Robert H. Lande, *Wealth Transfers as the*

*Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 137-40 (1982).

<sup>10</sup> It is unclear why the government has placed a renewed emphasis on unilateral effects. In part, it is probably due to economic theory's increased focus on the topic and the agencies' belief that collusion or other forms of coordination may either be unlikely to occur in differentiated markets or merely difficult to prove absent evidence that it has occurred in the past in a market under investigation. The difficulty of collusion or of demonstrating it has been highlighted by the Supreme Court in *Brooke Group, Ltd. v. Brown and Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

<sup>11</sup> Jonathan B. Baker, Product Differentiation through Space and Time: Some Antitrust Policy Issues, Presentation to the Antitrust and Trade Regulation Committee of the Ass'n of the Bar of the City of N.Y. 5-7 (Feb. 6, 1996).

<sup>12</sup> With respect to the focus on groups of customers, the recent government approaches follow the 1992 Horizontal Merger Guidelines' analysis of markets defined by the ability to price differently to different groups of customer. See §§ 1.12 & 1.22.

<sup>13</sup> There is little doubt that *Brown Shoe* was incorrectly decided, but the reasons for this are not necessarily related to its basic approach to market definition. See John L. Peterman, *The Brown Shoe Case*, 18 J.L. & ECON. 81 (1975). In some ways, *Brown Shoe's* approach to market definition foreshadows the more recent approaches of estimating elasticities of demand: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>14</sup> William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

<sup>15</sup> *Id.* at 938, 944.

<sup>16</sup> These data have come from sources such as Nielsen's and IRI's scanner-based price and quantity data on retail sales.

<sup>17</sup> Although two products do not need to be each other's closest competitors for the analysis to predict a price increase, as consumers place more products "in-between" those of the merging firms, this will tend to reduce the magnitude of the projected price increase. See Shapiro, *supra* note 8. The Department of Justice appears willing to allow a merger below some level of projected price increase (as yet undefined).

<sup>18</sup> For example, scanner data can provide a great deal of detailed price and quantity data by week. These data are now virtually always used in mergers involving products sold at supermarkets and drug stores, such as the bakery mergers discussed above and the recent merger between Kimberly Clark and Scott. *United States v. Kimberly-Clark Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,405 (N.D. Tex. 1996) (consent decree). Even with the availability of these data, however, there can be still be problems. For example, are coupons, returns, and rebates accurately factored in? When scanner data are not available, there are usually substantially more problems with obtaining accurate price and quantity data—although economists such as Baker, Werden, and Shapiro have suggested ways to infer some of the critical information. See, e.g., in this issue, Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, *infra* this issue, at 21; Werden, *Simulating Unilateral Competitive Effects from Differentiated Products Mergers*, *infra* this issue, at 27; Shapiro, *supra* note 8.

<sup>19</sup> The author of a recent article questioning the increased complexity of economic theories quotes the eminent Stanford game theorist David Kreps as saying, "Noncooperative game theory . . . has had a great run in economics over the past decade or two . . . we (economic theorists and economists more broadly) need to keep a better sense of proportion about where and when to use it." John Cassidy, *The Decline of Economics*, NEW YORKER, Dec. 2, 1996, at 37, 58.

<sup>20</sup> Any projection of price increases after a merger can be significantly affected by the assumption that there is a constant elasticity instead of a linear demand curve. A linear demand curve assumes that the quantity of demand will fall by the same amount for a given dollar price increase, regardless of the current level of sales. That is, the decrease in the number of units demanded divided by a one dollar increase in price equals a constant. Constant elasticity of demand assumes that there will be a constant percentage decrease in the quantity demanded for a given percentage

increase in price. In general, linear demand curves lead to predictions of smaller price increases than constant elasticity demand curves. Moreover, the grouping of products into like categories prior to the econometric analysis frequently affects estimates of how closely products compete. In fact, whether the econometric analysis directly estimates the elasticity of demand or does this indirectly through the impact of price on market shares can also greatly affect the results.

<sup>21</sup> Elasticity and firm behavior can also vary greatly over time, so it is crucial to choose the time period correctly.

<sup>22</sup> Alternative simulation models can give substantially different results. Compare Gregory J. Werden & Luke M. Froeb, *Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries*, in COMPETITION POLICY ENFORCEMENT: THE ECONOMICS OF THE ANTITRUST PROCESS (Malcolm Coate & Andrew Kleit eds., 1996), with Jerry Hausman et al., *Competitive Analysis with Differentiated Products*, 34 ANNALES D'ECONOMIE ET DE STATISTIQUE 159 (1994).

<sup>23</sup> For example, if we are worried about a merger of two country and western radio stations, how difficult would it be for a classical radio station to reposition itself and enter the country and western niche? Although the 1992 Horizontal Merger Guidelines would presumably treat this as "uncommitted" entry, and therefore it would be part of the agencies' burden of proof in market definition, "the agency staffs frequently try to place the burden of proof on the advocates of the merger to show that . . . other products should be included in the market share calculations." James Langenfeld, *The Merger Guidelines as Applied*, in Kleit & Coate, *supra* note 22, at 41, 46. The recent approaches make this analysis even more critical, and there is ongoing research on this issue. See Gregory Werden & Luke Froeb, *The Entry-Inducing Effects of Horizontal Mergers*, Paper Presented at the American Economic Association Meetings, New Orleans, La. (Jan. 1997).

<sup>24</sup> These models predict prices will increase as long as there is at least some substitutability between the products of the merging firms (a positive cross-elasticity of demand).

<sup>25</sup> Attorneys or businesspeople might have problems defining an antitrust market without extensive analysis, but might have a good idea about which companies are their closest competitors. Under these conditions, it is not clear whether the 1992 Horizontal Merger Guidelines or the new approach would create more uncertainty.

<sup>26</sup> One case that has grappled in detail with some of these issues is *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

<sup>27</sup> Alan A. Fisher & Robert H. Lande, Proposing a Structured Reformulation of the Comparatively Unpredictable 1992 Merger Guidelines, Paper Presented Before the ABA Antitrust Section Annual Meeting 7-8 (Aug. 10, 1992). Only one of these challenges involved an HHI increase of less than 300. It is unclear whether any of those four challenges involved unilateral effects analysis.

<sup>28</sup> See DENNIS CARLTON & JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION 803 (1994).

<sup>29</sup> See John E. Kwoka, Jr., *The Effect of Market Share Distribution on Industry Performance*, 61 REV. ECON. & STAT. 1, 101 (1979).

<sup>30</sup> *United States v. Gillette Co.*, 1993-1 Trade Cas. (CCH) ¶ 70,210 (D.C. Cir. 1993) (George A. Rozanski, Declaration in the proposed acquisition of the Parker Pen Company by the Gillette Company).

<sup>31</sup> By analogy, the attempted monopolization standard in the Ninth Circuit used to be similar to what some economists and government officials are considering in the merger area. *Lessig v. Tidewater Oil Co.*, 317 F.2d 459 (9th Cir.), *cert. denied*, 327 U.S. 993 (1964) (in certain cases market definition is "not an issue"). Many Sherman Act § 1 cases do not appear to require plaintiff to prove a relevant market and market share, or market concentration. As the Court noted in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993), however, "single firm activity is unlike concerted activity covered by § 1, which inherently is fraught with anticompetitive risk. For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.* at 892 (citation omitted). We believe that merger analysis based on unilateral anticompetitive effects is more analogous to monopolization analysis than to § 1 analysis.

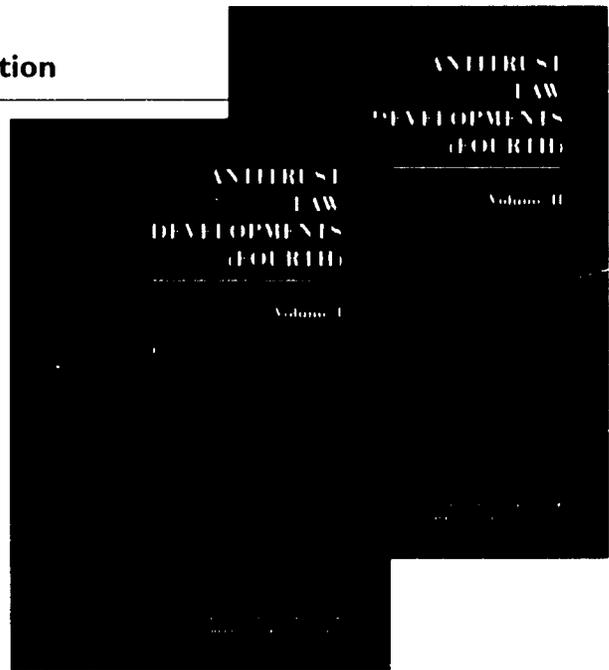
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