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Paul Stancil
BYU Law, stancilp@law.byu.edu

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ATOMISM AND THE PRIVATE MERGER CHALLENGE

Paul J. Stancil

INTRODUCTION

Much of the apparent schizophrenia in American economic history since the Industrial Revolution is the result of a uniquely American tension: Americans prize and encourage individual success, but they fear its entourage. That tension originates in two equally fundamental but sometimes competing concepts of economic liberty: freedom to succeed and freedom from concentrated power. That is, America idolizes "competition," but it mistrusts the size and economic power that successful competitors seek and sometimes acquire.¹

The struggle between these two norms has played out repeatedly in the birth and spasmodic evolution of American antitrust law. Most antitrust law has evolved to an efficient equilibrium in two ways. First, competition policy itself has improved substantially. Modern substantive antitrust theory focuses upon "freedom to," emphasizing consumer welfare and efficiency over once-dominant "freedom from" impulses that produced a competition policy primarily focused upon the dispersion of economic power as an end unto itself.² Second, in most contexts, the law governing private antitrust enforcement has evolved to increase the overlap between self-interest and the public interest, and to limit opportunistic behavior on the part of private plaintiffs.³

Indeed, private enforcement is an integral component of the federal antitrust system, and every federal antitrust law gives private parties the right to pursue private claims. The federal antitrust law governing mergers and acquisitions is no exception—private parties have the explicit statutory right to seek treble damages and injunctive relief in connection with transactions that "may [tend to] substantially . . . lessen competition."⁴ This is, on balance, a good thing. Federal enforcement resources are

¹ See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100, at 3-7, ¶ 111, at 97-114 (2d ed. 2000) (discussing desire for competition and fear of monopolies as purposes for antitrust legislation).
² Id. ¶ 100b, at 5-6.
³ See id. ¶ 103d, at 60-61 (discussing "charter of freedom" that the Sherman Act was to impose).
limited, and private parties are often better able to detect and deter anticompetitive conduct than distant federal enforcers.

But as important as private merger enforcement is, it also carries with it substantial risks of opportunistic behavior. Private parties act in their own perceived self-interest, and the implicit assumption behind private enforcement is that self-interest and the public interest overlap sufficiently to justify the existence of a private right of action. Where private enforcement rights exist, it is absolutely critical that (1) the law minimize the costs associated with inefficient opportunistic behavior on the part of private plaintiffs, and (2) the private enforcement mechanism reflects the current balance of policy considerations governing public enforcement.

Circumstances now demand a close evaluation of these goals in the area of private antitrust merger enforcement. Although private antitrust merger litigation has a relatively modest history, a number of recent developments suggest that private enforcement will increase substantially in the near future. But if most areas of private antitrust enforcement have reached an acceptable equilibrium, the law governing postcompletion private merger challenges has not. That law instead continues to encourage excessive opportunistic behavior. Moreover, while the law was arguably consistent with the competition norms of previous generations, it is now fundamentally inconsistent with current antitrust principles. The coming increase in private claims demands that the law of private postmerger challenges be modernized.

Part I of this Article discusses the tensions inherent in the American competition norm and briefly sketches the modest history of private merger challenges. Part II explains how recent developments in antitrust law are providing new incentives for private plaintiffs to challenge mergers. Part III identifies two anachronistic doctrines governing postcompletion private merger claims that are fundamentally inconsistent with current antitrust thinking: (1) a procedural and remedies structure that allows private plaintiffs to impose massively disproportionate costs upon defendants, and (2) antiquated and ill-fitting rules that unreasonably extend the time during which private plaintiffs can sue.

Part IV of the Article concludes that these problems can be mitigated only by legislative adoption of (1) fee- or cost-shifting rules lessening private plaintiffs' ability and incentive to impose disproportionate costs upon defendants; (2) a "single damages" rule for most private merger claims; (3) fixed, merger-specific statutes of limitation and laches periods for private claims; (4) fixed, merger-specific rules rejecting tort-style "accrual" standards; and (5) firm rules limiting the admissibility of postacquisition evidence in postcompletion merger litigation.

6. See id. (allowing recovery of attorney's fees); see also AREEDA & HOVENKAMP, supra note 1, ¶ 101, at 11 (discussing the historical policy considerations of antitrust enforcement).
I. **THE COMPETITION NORM, ANTITRUST LAW, AND THE HISTORY OF PRIVATE MERGER LITIGATION**

A. **Development of the Casus Belli**

The tension between "freedom to succeed" and "freedom from success" has deep roots in American economic history, although it was rarely obvious through the first half of the nineteenth century. But as the Industrial Revolution took hold in the United States, "freedom to" ultimately found itself on a collision course with "freedom from." The creation of national markets and the aggregation of economic power in large industrial and agricultural producers ultimately led to repeated struggles for primacy between these now-competing organizing principles. Throughout the early- and mid-1800s, "freedom to" carried the day, as entrepreneurs built commercial empires and the nation expanded westward.

But by the late nineteenth century, the two principles were in open conflict, and "freedom from" apparently had the upper hand. Fueled in part by a particularly potent combination of significant industrial and agricultural concentration, utopian socialist thought, and economic desperation, the inherent American suspicion of concentrated power coalesced under the banner of "populism." This aggressive manifestation of the "freedom from" impulse worked to weaken the institutional economic powers of the age. Because the industrial organization goals of this movement focused upon the dispersion of productive capacity into ever-smaller units, the movement's competition philosophy is best described as "atomistic."

Although the equilibrium point has shifted back and forth along the continuum over time, the tug-of-war between America's lionization of success and its atomist suspicions of size and power has remained a constant in American economic life over the past century. Nowhere has this tension been more apparent than in the development and interpretation of American antitrust law.

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7. See generally MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861-1901, at 3-31 (1934) (suggesting that the American Industrial Revolution accelerated dramatically after 1865 from elements in place well before the Civil War).
8. Id.
9. See, e.g., EDWARD BELLAMY, LOOKING BACKWARD: 2000-1887, at 11 (Alex MacDonald, ed., Broadway Literary Texts 2001) (1888) (telling utopian story of a young man from 1887 who awakens in year 2000 to find that his world of harsh economic competition has become a society based upon cooperation); see also AREEDA & HOVENKAMP, supra note 1, ¶ 100b, at 4-6 (discussing populist theory of protecting consumer welfare through antitrust legislation); JOSEPHSON, supra note 7, at 375-403 (depicting domination of certain classes in aggressive economic age).
10. JOSEPHSON, supra note 7, at 375-403.
11. AREEDA & HOVENKAMP, supra note 1, ¶ 100b, at 4-6.
12. Among serious commentators, there is essentially unanimous agreement that certain aggregations of economic power have negative societal effects; there is similar consensus that a purely atomistic economy would be dreadfully inefficient. Thus, the conflict will continue to take place within a limited middle range along a continuum bounded by "full economic 'freedom to'" on one side and "pure atomism" on the other. See AREEDA & HOVENKAMP, supra note 1, ¶ 100b, at 4-6 (explaining conflict between populist theory of consumer welfare and economic theory of market well-being).
B. The Sherman Act and the Clayton Act

1. The Sherman Act

The antitrust laws owe their very existence to the nascent atomist sentiment of the late-1880s and early-1890s. In 1890, Congress passed the Sherman Act, which today remains the primary American antitrust statute. In strikingly ambiguous language, section 1 of the Act declared that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade... is hereby declared to be illegal." In similarly amorphous terms, section 2 of the Act prohibited "monopolization": "Every person who shall monopolize, or attempt to monopolize... trade or commerce... shall be deemed guilty of a misdemeanor..." Section 7 of the Sherman Act also provided a treble-damages remedy for "[a]ny person who shall be injured in his business or property" due to a violation of the antitrust laws.

Although commentators disagree as to the predominant congressional purpose of the Sherman Act, there is little question that the atomist movement had a huge hand in its enactment.


14. Sherman Act, ch. 647, §§ 1-7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-6a (2000)). Numerous sources characterize Congress's passage of the Sherman Act as merely codifying the common law concerning restraints of trade. See, e.g., BORK, supra note 13, at 20 ("Sherman and many of his colleagues repeatedly assured the Senate, without objection by anyone, that they proposed merely to enact the common law."). Notwithstanding these characterizations, the Sherman Act significantly altered the legal landscape.


16. Id. § 2.


18. Compare BORK, supra note 13, at 21-22 (arguing that the legislation was concerned with protecting efficiency and consumer welfare), with RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 199-200 (1965) (arguing that the goals of the Act were not only economic, but also political: to limit private accumulations of power, protect democracy (social and moral), and to protect "competitiveness" as a fundamental trait of the national character), and Lande, supra note 13, at 105-06 (arguing that Congress was primarily concerned with distributive goals—redistributing economic surplus from producers to consumers).

19. See JOSEPHSON, supra note 7, at 359 (quoting an unnamed Senator stating, in connection with the passage of the Sherman Act, that "something must be flung out to appease the restive masses"). The scholarly debate concerning the original goals of the antitrust laws and their optimal modern focus continues today, although the focal point of that debate has shifted dramatically. See also Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Remarks at the American Bar Association Antitrust Section Fall Forum: Looking Forward: Merger and Other Policy Initiatives at the FTC 1-2 (Nov. 18, 2004) (transcript available at http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf) (quoting Janet McDavid, What a Kerry Victory...
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The passage of the Sherman Act represented a major victory for atomism, but it was not a decisive stroke. The "freedom to" narrative retained substantial power even after the Act was enrolled, and proponents of individual economic liberty clashed with opponents of size and success repeatedly but inconclusively for the next seventy-five years.\(^\text{20}\) As a result, from 1890 until the mid-1970s, American competition policy lived in a relatively constant state of low-level cognitive dissonance, pulled in opposite directions by relatively equally matched norms.\(^\text{21}\) Although trends shifted over time, neither side could ever claim complete victory.

2. The Clayton Act

In 1914, atomism won another major legislative victory with the passage of the Clayton Act.\(^\text{22}\) Among other things, the Clayton Act added two weapons to public and private antitrust enforcers' arsenals. First, section 16 of the Act authorized private antitrust plaintiffs to seek injunctive relief for antitrust violations, in addition to the treble damages already authorized under the Sherman Act.\(^\text{23}\) Also, for the first time, Section 7 of the Clayton Act formally prohibited corporations from purchasing the stock of a competitor if that purchase would "tend to substantially lessen competition" or tend to create a monopoly in any market:


20. See William E. Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 ANTITRUST L.J. 377, 379 (2003) (persuasively arguing that the prevailing "pendulum" narrative of antitrust enforcement—too much in the 1960s and 1970s, too little in the 1980s, and "just right" in the 1990s and beyond—is overly simplistic and that it ignores the incremental evolution that took place during those periods). Kovacic's evolutionary argument is consistent with the thesis of this Article, and none of the characterizations contained herein are intended to suggest that antitrust law historically has existed on a static, zero-sum continuum from "good" to "bad."

21. Professor Lande appropriately criticizes Bork's "efficiency" interpretation of congressional intent as ahistorical. See Lande, supra note 13, at 94-106 (discussing the legislative history which prioritizes the protection of consumer welfare against unfair competition). He also correctly identifies the populist underpinnings of the antitrust laws. Id. at 87-89. But it is helpful to divorce Bork's evangelical excesses from his antitrust theology. Bork's normative approach to the antitrust law is largely correct, despite the statutory interpretation concerns his reimagining of history attempts to deflect. See AREEDA & HOVENKAMP, supra note 1, § 103d, at 57-61 (protesting the emphasis placed on the policy significance of legislative history).


23. 15 U.S.C. § 26 (allowing injunctive relief "against threatened loss or damage by a violation of the antitrust laws").
No corporation engaged in commerce shall acquire, directly or indirectly, the
whole or any part of the stock or other share capital of another corporation
engaged also in commerce, where the effect of such acquisition may be to
substantially lessen competition between the corporation whose stock is so
acquired and the corporation making the acquisition, or to restrain such
commerce in any section or community, or tend to create a monopoly of any
line of commerce.24

Because the Clayton Act expressly defined section 7 as an "antitrust law,"25 the
Act necessarily authorized private plaintiffs to seek both damages and injunctive relief
in connection with prohibited transactions.26 Although anticompetitive mergers and
acquisitions had been illegal under the Sherman Act as well (prohibiting "monopolization" and "combinations" in restraint of trade),27 section 7 made this
prohibition explicit, and it substantially relaxed the liability standards under which a
transaction violated the law.28

3. The Celler-Kefauver Act of 1950

As originally drafted, section 7 of the Clayton Act was not particularly effective,29
prohibiting only anticompetitive stock acquisitions.30 Many purportedly
anticompetitive transactions were able to circumvent these narrow prohibitions by
avoiding stock transactions.31

In 1950, Congress atomized again, enacting revisions to section 7 that one leading
commentator has described as deriving from an especially "outspoken concern for
small-business welfare."32 With the Celler-Kefauver Act, Congress broadened the
scope of section 7 to prohibit a far wider cross-section of potentially anticompetitive
transactions, explicitly condemning asset acquisitions as well.33 The Celler-Kefauver
amendments effectively closed loopholes in the original version of section 7 and
provided antitrust enforcers—public and private alike—with a substantially stronger
tool with which to accomplish atomistic ends. In the three decades following the
Celler-Kefauver amendments, the atomist worldview was ascendant in the antitrust law

24. Id. § 18.
25. Id. § 12.
26. Id. §§ 15, 26.
27. See N. Sec. Co. v. United States, 193 U.S. 197, 325 (1904) (condemning anticompetitive stock
mergers pursuant to section 1 of the Sherman Act).
28. See Frederic M. Scherer & David Ross, Industrial Market Structure and Economic
Performance 174 (1990) (detailing the intricate network of cartels used to side-step monopoly
omenclature).
29. See id. at 175 (describing "gaping loopholes" left by original act).
30. See supra note 24 and accompanying text for the original construction of section 7.
31. See Brown Shoe Co. v. United States, 370 U.S. 294, 314 n.25 (1962) (summarizing FTC annual
reports beginning in 1928 identifying and decrying loophole).
(1982).
generally, and it was especially dominant as to merger challenges.\textsuperscript{3}4 As a result, the horizontal merger fell into scandalous disrepute.\textsuperscript{3}5

\section*{C. The Problem of “Honorable Success”}

Courts interpret the Sherman Act in the context of conduct, not status.\textsuperscript{3}\textsuperscript{6} The Act defines classes of commercial behavior the law will not tolerate in the pursuit of profit,\textsuperscript{3}7 but it does not attempt to address the more difficult question arising from honorable success: How much success is too much?

Businesses do not cut costs, improve quality, or innovate out of altruism. They do so in the hope that the next innovation, the next price cut, or the next efficiency improvement will put them over the top. The best competitors want nothing more than to destroy their rivals, and society encourages them to do so, because competition benefits consumers. They pay lower prices for greater quantities of better goods. Profits provide the incentive to compete; the opportunity to seek ever-higher profits is integral to a market economy.

Even so, when a successful competitor has cleared the field of its opponents, however honorably, the law and economists alike are understandably worried. Now a monopolist, the successful competitor can raise its price or decrease the quality of its products.\textsuperscript{3}8 Monopoly inefficiently benefits the monopolist at the expense of consumers, so long as the monopolist effectively controls the market.\textsuperscript{3}9 There exists, therefore, a perpetual temptation to curb the excesses invariably associated with monopoly, to allow success to bloom as briefly as possible before harvesting its fruit and distributing it for the common good. American suspicion of size and power magnifies this temptation.

But there is no easy answer to the monopoly profit question, assuming that the monopolist has obtained its market power “fairly.” The monopolist’s higher profits, while detrimental to consumers in the short term, are also a beacon drawing new contestants into the fray. Without the prospect of spectacular success, and without the opportunity to get some of what the monopolist has, the fires of competition sputter and may ultimately die.\textsuperscript{4}0

\begin{enumerate}
\item See id. (prohibiting mergers with language that bolstered the atomistic goals).
\item See also Scherer & Ross, supra note 28, at 175-76 (discussing hard-line approach of dramatic increase in government enforcement activity and appellate success in challenging mergers). See infra note 49 for an explanation of horizontal mergers.
\item To a lesser extent, the same is true of any successful dominant firm, whether it is technically a monopolist or not. Although a “competitive fringe” may constrain the dominant firm’s pricing to some extent, the dominant firm will still enjoy some pricing power, and will typically set its output lower than it would in a competitive market. Dennis W. Carlton & Jeffrey Perloff, Modern Industrial Organization (1990), reprinted in E-COMMERCE ANTITRUST AND TRADE PRACTICES: PRACTICAL STRATEGIES FOR DOING BUSINESS ON THE WEB 131 (Harry S. Davis & Rebecca P. Dick eds., 2000).
\item See, e.g., William A. Mceachern, Microeconomics: A Contemporary Introduction ch. 9 (6th ed. 2002).
\item See William Baumol, John Panzar & Robert Willig, Contestable Markets and the
Over time, the Sherman Act has reached an uneasy but efficient truce with the problem of honorable success.\footnote{See infra Part I.C.2 for a discussion of current academic analysis and the actual use of the Sherman Act.} Similarly, section 7 of the Clayton Act has also implemented a cease-fire with the market power problem, at least in the context of government merger enforcement actions. But the process was difficult. The story of the long and contentious parley between "freedom from" and "freedom to" is central to understanding the problems and solutions identified in this Article.

1. The Atomism Paradigm

Throughout the middle of the twentieth century, antitrust law directed its efforts toward promoting and maintaining what enforcers and academics of the time considered ideal market structure.\footnote{See supra note 19, at 1701 (explaining how monopolistic competition fosters desire to enter into competition).} Rather than focusing upon the welfare of consumers (i.e., focusing upon price, total output, quality, choice, etc.), enforcement efforts and decisional law instead focused upon the number and size of competitors in a given market.\footnote{See supra Part I.C.2 for a discussion of current academic analysis and the actual use of the Sherman Act.} According to the theory of the day, the structure of a market drove the conduct of its participants, which in turn dictated the performance of that market.

Led by Joe Bain, Edward Mason, and other Harvard economists, the "structure-conduct-performance" ("S-C-P") school articulated "atomistic" markets—markets consisting of a large number of small producers—as the ideal.\footnote{See supra note 19, at 1701 (explaining how monopolistic competition fosters desire to enter into competition).} These economists and the antitrust enforcers they influenced were inherently pessimistic about markets and, more importantly, about any moderately concentrated market's ability to produce competitive results without help. Accordingly, they spoke in terms of fostering THE THEORY OF INDUSTRY STRUCTURE 209 (1982) (detailing a theory that if a monopoly holds entire power over a market new market entrants will not come forward because they will not be able to succeed); Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 2 (1984) (theorizing that monopolies delay competition and that antitrust law exists to speed up this inevitability); Easterbrook, Workable Antitrust Policy, supra note 19, at 1701 (explaining how monopolistic competition fosters desire to enter into competition).

Professor Turner later headed the Antitrust Division at the Department of Justice as an Assistant Attorney General appointed by President Johnson. See also U.S. DEP’T OF JUSTICE, MERGER GUIDELINES § 3.0 (1968), http://www.usdoj.gov/atr/merger/11247.pdf [hereinafter 1968 MERGER GUIDELINES] (creating two-pronged conduct and geographic approach to market definition, with emphasis on effective competition amongst all sellers). Kolasky and Dick correctly note that the 1968 Guidelines included a rudimentary "efficiencies" defense, and that they are therefore an improvement over the purely atomistic approach of the Warren Court, but the 1968 Guidelines are still atomistic at heart. Kolasky & Dick, supra note 19, at 212-214.

41. See supra Part I.C.2 for a discussion of current academic analysis and the actual use of the Sherman Act.
42. See Hovenkamp, Antitrust Policy After Chicago, supra note 36, at 214-222 (summarizing historical trends in antitrust enforcement). Hovenkamp's prediction that the Chicago School would also fall by the wayside has proved less than prescient, but his summary of the historical schools of antitrust thought is nonetheless instructive. Id.; see also Kovacic, supra note 20, at 430-42 (discussing mergers and the possibility of increased efficiency and preserving a decentralized economic structure).
43. See Hovenkamp, Antitrust Policy After Chicago, supra note 36, at 214-69, for a discussion of the past ideals of the Chicago School and the current ideology of its critics.
44. See, e.g., JOSEPH BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 53-113 (1956) (discussing the issue of large firms as a barrier to entry for small firms); EDWARD S. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 354 (1959) (defining optimal economic model as one without a dominant market leader).
45. See CARL KAYSER & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44 (1959) (discussing four alternative goals for antitrust policy and advocating one that limits market power).
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“workable competition” by using government intervention to demolish, or at least prevent, the development of subjectively undesirable market structures.46

Atomism was more than the ideal, though. It was also the explicit normative goal of antitrust enforcement, and in particular, of section 7 enforcement.47 Although the atomism norm was difficult to implement against traditional single-firm success,48 mergers and acquisitions were another story. For many years, it was virtually impossible to obtain government approval for any horizontal merger49 in which the merged parties would enjoy more than five to ten percent market share in any given market.50 Though government challenges faced practical difficulties, “big is bad” was an apt description of the prevailing merger enforcement philosophy for much of the twentieth century.51

Additionally, because antitrust law was primarily concerned with market structure, enforcers and courts alike were inherently suspicious of size, however obtained. Despite the ostensible legality of market share gained by virtue of “superior skill, foresight, and industry,”52 enforcers and courts both looked for ways in which large market participants could be chopped down to size. Section 7 offered a back door through which enforcers could essentially challenge size alone, and they often took advantage of that opportunity.53

2. The “Chicago School” Revolution, Post-Chicago Learning, and the Current Antitrust Equilibrium

Atomism has lost currency with most government antitrust enforcers and with most courts as well.54 Although market structure continues to matter, atomism is no longer the implicit goal of competition law. Nor does atomism feature prominently

46. Hovenkamp, Antitrust Policy After Chicago, supra note 36, at 214; see Easterbrook, Workable Antitrust Policy, supra note 19, at 1700 (renaming the “workable competition” ideology to be the “workable antitrust policy school”).

47. 21 CONG. REC. 3150-51 (statement by Sen. George) (discussing goals of section 7 of the Sherman Act of 1890).

48. But see United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) (certified to the Second Circuit by the Supreme Court).

49. Loosely speaking, a “horizontal” merger involves combining the business assets of actual or potential direct competitors.

50. See, e.g., 1968 MERGER GUIDELINES, supra note 45, § 6 (describing when the DOJ would challenge mergers).


52. See Alcoa, 148 F.2d at 430 (discussing the legislative history of the Sherman Antitrust Act and rejecting intent for evidence of monopolistic conspiracy). Alcoa is one of several important antitrust cases from which modern courts continue to draw language, even while rejecting their holdings and results.


54. Dibadj, supra note 19, at 772.
within the substantive law governing premerger section 7 challenges. Instead, modern enforcers tend to analyze markets from the other direction, seeking outcomes that maximize consumer welfare. This in turn elevates efficiency goals over market structure goals in many cases, and has created an antitrust environment in which size is often tolerated because it produces greater overall utility for consumers.

This change began to take root in the 1970s, and arose out of the work of Aaron Director and his protégés at the University of Chicago. Although it is difficult to define the precise boundaries of “Chicago School” thinking, its primary trait was a deep skepticism of the static and inherently collusive world posited by the S-C-P crowd. Instead, Chicago School adherents emphasized the inherent dynamism of most markets and counseled caution rather than intervention as the default response to allegedly anticompetitive practices. At its most extreme, the Chicago School was deeply skeptical that the antitrust laws had any value at all. Some suggested that inevitable “chiseling” and “cheating” would serve to prevent sustained price fixing and other collusion. Others doubted that it was necessary to prohibit monopolization or concentrating mergers, because most markets are “contestable”—that is, subject to entry or the threat of entry—which would keep prices at competitive levels.

If Director and his protégés provided the theological underpinnings for the new antitrust, Professor Robert Bork was the new religion’s most effective evangelist. In his deeply influential 1978 book, The Antitrust Paradox, Bork attacked the atomism paradigm in prose accessible to the general public. Bork argued that a “consumer welfare” standard is the only viable metric on which to judge the competitive merits of a particular practice or transaction, and that antitrust law should abandon its fascination with “perfect competition” in favor of ensuring efficient production.

55. For linguistic convenience, “premerger” in this context refers also to challenges brought soon after completion.
56. See, e.g., Kolasky & Dick, supra note 19, at 207 (noting the DOJ’s focus on efficiency as the ultimate goal, and competition as merely a means).
57. See, e.g., BORK, supra note 13, at 145 (discussing Aaron Director’s hypothesis on the “logic of price theory, that would-be monopolists would always prefer mergers to predation”); WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 57, 58-59 (1973) (explaining Aaron Director’s theory of monopolistic competition); RICHARD A. POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 174 (1976) (crediting Aaron Director with developing new theory of tying); John McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J.L. & ECON. 137, 138 n.2 (1958) (explaining that he wrote his work as a reaction to Aaron Director’s theory); Lester G. Telser, Abusive Trade Practices: An Economic Analysis, 30 LAW & CONTEMP. PROBS. 488, 489 (1965) (thanking Aaron Director for his inspirational theory of “applying economic analysis to antitrust problems”).
58. See, e.g., Easterbrook, Workable Antitrust Policy, supra note 19, 1707-09 (noting the Chicago School’s pejorative description that the atomistic model’s simplification is in fact oversimplification).
59. See id. at 1701, 1706-09 (responding to pejorative descriptions of Chicago School thinking as “static”).
60. See, e.g., Easterbrook, Workable Antitrust Policy, supra note 19, at 1701 (indicating that “[t]he desire to make a buck leads people to undermine monopolistic practices”).
61. See also BAUMOL, PANZAR, & WILLIG, supra note 40, at 351-56 (discussing monopolies and ability of competitors to enter a market). Baumol is not technically a Chicago School economist, but the theory of contestable markets is often associated with Chicago School thinking.
62. BORK, supra note 13, at 48-49.
63. Id. at 107-15.
Chicago School prophets whose work he promoted radically reshaped antitrust law. The consumer welfare standard they promoted is now ingrained in the fabric of modern antitrust law.64

Some commentators now suggest that antitrust has entered a “post-Chicago” period.65 Although the current equilibrium does stop short of adopting the Chicago School catechism chapter and verse, a “post-Chicago” nomenclature understates the depth and breadth of the Chicago School’s influence upon current antitrust thinking. Time and empirical experience have somewhat undermined some extreme positions associated with the Chicago School.66 For example, over the past decade, government enforcers have uncovered a number of effective, long-running price fixing conspiracies.67 Similarly, recent merger research suggests that not all transactions are efficient,68 and the theory of contestable markets has not gone unchallenged either.69 Nonetheless, the Chicago School’s “defeats” have related primarily to its predictive components, not its normative framework. The “consumer welfare” standard now frames the debate in virtually every dispute.70

64. Hovenkamp, Antitrust Policy After Chicago, supra note 36, at 283-84.

65. See, e.g., Joseph F. Brodley & Ching-to Albert Ma, Contracting Penalties, Monopolizing Strategies, and Antitrust Policy, 45 STAN. L. REV. 1161, 1180 (1993) (summarizing development of the “law and economics” approach to penalties); Frederic M. Scherer, Some Principles for Post-Chicago Antitrust Analysis, 52 CASE W. RES. L. REV. 5, 7 (2001) [hereinafter Scherer, Post-Chicago Analysis] (proposing the Chicago School’s weakness of “far too few careful empirical studies” as the jumping-off point for post-Chicago analysis).

66. Critics of the modern “efficiency” paradigm are quick (and correct) to point out that time and experience have softened the hard-line positions of the 1970s antitrust insurgency. Cartels and other anticompetitive behaviors have proved somewhat more persistent than skeptical economic theory might have predicted. See, e.g., Frederic M. Scherer, International Trade and Competition Policy, in COMPETITION AND TRADE POLICIES: COHERENCE OR CONFLICT? 20-23 (Einar Hope & Per Maeleng eds., 1998) [hereinafter Scherer, International Trade] (discussing the jurisdictional problems and cooperation required in addressing, among other things, the creation of cartels). Similarly, some recent research is skeptical that efficiencies always result from mergers. See Scherer, Post-Chicago Analysis, supra note 65, at 10-23 (showing examples and evidentiary studies to illustrate that the Chicago School has always been compromised in ideology). Nonetheless, the shift in focus from the 1960s to present has been so complete that this “softening” is relevant only on the margins. The efficiency norm continues to define the terms of the debate: the “softening” is not a “shift.” See Kolasky & Dick, supra note 19, at 207 (“There is a widening consensus among jurisdictions with competition laws that ‘the basic objective of competition policy is to protect competition as the most important means of ensuring the efficient allocation of resources—and thus efficient market outcomes—in free market economies.’” (quoting Org. for Econ. Co-operation and Dev., Competition Policy and Efficiency Claims in Horizontal Agreements, OECD/GD(96)65, at 5, 1996)). See also Majoras, supra note 19, at 1-2 (quoting Janet McDavid, What a Kerry Victory Means for Antitrust Law, GLOBAL COMPETITION REV. (2004), available at http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=2007) (discussing antitrust policy as a bipartisan effort).

67. See Scherer, International Trade, supra note 66, at 20-23, for a discussion of the conduct of international businesses and the committee’s attempts at determining and addressing the issues raised by such conduct.

68. See Scherer, Post-Chicago Analysis, supra note 65, at 10-23, for an acknowledgment of the need for further case studies on economic efficiency.

69. See Dibadj, supra note 19, at 762-63, for an explanation of the Post-Chicago School as a reaction to the Chicago School’s lack of reality. See also Thomas B. Leary, The Essential Stability of Merger Policy in the United States, 70 ANTITRUST L.J. 105, 121 (2002) (noting that theory is often subordinated to reality).

70. This is not to say that the current equilibrium is to everyone’s liking. See, e.g., Joseph F. Brodley, Patrick Bolton & Michael H. Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L.J.
Moreover, the current equilibrium enjoys broad-based support from both major political parties. As Janet McDavid wrote on the eve of the 2004 presidential election, [T]oday's antitrust policy "was built on a broad consensus from prior Republican and Democratic administrations that has bipartisan support, shared to a large degree by both academics and the business community, which recognize the importance of well-grounded antitrust enforcement in keeping markets open, and see antitrust as an alternative to regulation."  

a. The Modern Sherman Act

As it stands now, neither sections 1 or 2 of the Sherman Act condemn success—even market-dominating success—unless the successful business crosses one of two lines in the sand. First, it cannot unreasonably restrain trade in concert with other market participants. Compared to the atomistic past, "unreasonable restraints" are now relatively narrowly defined. Second, it cannot unfairly exclude its competitors. If a monopolist achieves and maintains its position through the exercise of "superior skill, foresight, and industry," the Sherman Act will not deny the firm its monopoly profits so long as it maintains its position "fairly."

"Hard-core" cartel activity—overt horizontal price fixing, bid rigging, market allocation—remains per se illegal. But section 1 of the Sherman Act no longer peremptorily condemns a number of practices that once received per se treatment. Instead, the vast majority of restraints are now evaluated under the "rule of reason"—a fact-specific balancing inquiry weighing the procompetitive benefits of a restraint against its anticompetitive effects.

2239, 2240 (2000) (discussing predatory pricing as unfavorable but economically desirable); Dibadj, supra note 19, at 752-75 (explaining the Chicago School's spin on consumer welfare as "allocative efficiency"); Eleanor M. Fox, What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 ANTITRUST L.J. 371, 372 (2002) (arguing that the U.S. government prefers to stay out of antitrust issues unless a consumer or total wealth is affected).


72. The "concerted behavior" rules apply to all market participants, not just market dominating firms. But outside the "per se" categories, the "unreasonably" requirement mandates significant market effects.

73. Compare State Oil Co. v. Khan, 522 U.S. 3 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968) (holding that vertical maximum price fixing is a per se violation of that statute), Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (returning to rule of reason to govern antitrust interpretation), and Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985) (holding that the applicable test was the rule of reason test and not a per se rule), with United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (utilizing the rule of reason to conclude that there was an unreasonable restraint of trade), and Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959) (noting that certain actions interfere with the trading power of other manufacturers).

74. Alcoa, 148 F.2d at 430.

75. KAYSEN & TURNER, supra note 45, at 94-99 (discussing per se rules and alternative theories).

76. See, e.g., AMER. BAR ASSOC., SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 58 (5th ed. 2002) (hereinafter "ALD 5TH").

77. See id. (noting that practices such as tying arrangements and group boycotts are per se illegal). See supra note 72 for an explanation of "per se categories."

78. KAYSEN & TURNER, supra note 45, at 98-99 (discussing per se rules and alternative theories).
In the context of unilateral behavior, the Sherman Act forbids only “monopolization” and “attempted monopolization” of markets. To sustain a "monopolization" claim, a plaintiff must currently prove both that the alleged monopolist possesses "monopoly power" in a given market, and that it engaged in "exclusionary conduct" that had the effect of sustaining or increasing its monopoly power. In order to prove attempted monopolization, a plaintiff must show that the defendant (1) specifically intended to monopolize a given market, (2) engaged in exclusionary behavior, and (3) enjoyed a dangerous probability of success.

b. Modern Merger Review

Although the text of section 7 of the Clayton Act is largely unchanged since its revision in 1950, its substantive meaning has shifted dramatically since the Chicago School began to gain judicial followers in the 1970s. The statute now countenances (even encourages) transactions that would have been seen as unthinkably anticompetitive under the same provision only a generation ago. In 1968, the Department of Justice issued a set of Merger Guidelines deeply steeped in the atomist tradition, with presumptive illegality tied to very small market shares and market share

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increases for horizontal mergers. By the time the DOJ issued the 1982 Guidelines, atomism was out and consumer welfare was in.

Riding the crest of the Chicago School wave, the substantive standards under which mergers are reviewed for their competitive impact have swiveled almost a full 180 degrees since the early 1970s. As a practical matter, the transformation in the substantive merger review law from the 1960s to the 1980s is best understood as a complete reversal in the presumptions associated with merger transactions. Oversimplifying only slightly, horizontal mergers were presumptively illegal in the old world and they are presumptively legal in the new.

This reversal of presumptions required a rethinking of the incentive structures associated with antitrust merger enforcement. When the default rule shifts from "presumptively bad" to "presumptively good," it makes sense to ensure that the law governing merger challenges does not work at cross-purposes with the new goals. The rules governing government enforcement in the context of premerger review are now generally consistent with a standard of presumptive legality. The rules governing private postmerger challenges are not.

D. History of Private Merger Challenges 1914-2000—A Perpetual Perfect Calm

The first reported private claim under section 7 of the Clayton Act was decided in 1917. This was just three years after Congress passed the Clayton Act in response to concerns that the Sherman Act's retrospective focus and difficult liability standard did not offer sufficient protection from anticompetitive transactions. But despite the fact that private challenges have always been a part of the section 7 enforcement framework, private antimerger suits have always been far less common than antitrust "conduct" suits challenging alleged conspiracies, monopolization, or price discrimination.

84. See 1968 MERGER GUIDELINES, supra note 45, ¶ 5-6 (contrasting when the DOJ will challenge mergers that are highly concentrated and when it will challenge mergers that are less highly concentrated).

85. The Supreme Court's 1974 opinion in United States v. General Dynamics Corp. represented the beginning of the end, in some ways, for an atomism-driven merger policy. See Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (holding the government's showing of significant concentration not enough to prove substantial lessening of competition).


87. A "presumptions" focus also helps illustrate the reality of continued enforcement against truly anticompetitive mergers. Conventional wisdom notwithstanding, recent government enforcement has not been "anything goes," but the law has returned the burden of proof to merger opponents. Id.

88. See Niles-Bement-Pond Co. v. Iron Molders' Union, Local No. 68, 246 F. 851, 864 (S.D. Ohio 1917) (finding the case did not fall within section 7 of the Clayton Act), rev'd on jurisdictional grounds, 258 F. 408 (6th Cir. 1918), aff'd, 254 U.S. 77 (1920).

89. See SCHERER & ROSS, supra note 28, at 174-75 (discussing the pre-Clayton Act interpretation of the Sherman Act and that the purpose of the Clayton was to prevent trusts from forming prior to their creation).

90. There were a total of 144 private merger challenges filed in the twelve years between 1977 and 1988. ABA MONOGRAPH No. 16, supra note 83, at 9-12. From 1981 to 1986, the number of private merger
There are several obvious explanations for the apparent unpopularity of private merger challenges. First and foremost, there are almost certainly fewer competitively sensitive mergers and acquisitions than there are alleged "conduct" offenses.\(^9\) Relatively fewer questionable mergers necessarily mean relatively fewer potential merger challenges. Accordingly, we should not be concerned with whether there are too few (or too many) merger challenges relative to other types of private antitrust suits. Rather, the relevant questions are: (1) whether structural factors have dampened enthusiasm for private section 7 litigation in the past, and (2) whether those factors are likely to suppress private merger claims in the future.

Three separate sets of factors have suppressed the level of private enforcement activity in the three distinct historical periods of section 7 enforcement from 1914 to 2000. From 1914 to 1950, private and public enforcement alike were hampered by a statute riddled with loopholes.\(^9\) From 1950 to 1978, a deeply atomistic competition policy overdeterred private claims by overdetering overall merger activity.\(^9\) Finally, from 1978 to 2000, increases in horizontal merger activity and relaxation of the substantive liability standards governing section 7 claims were offset by a number of developments that severely circumscribed private parties' legal and practical ability to pursue claims.\(^9\)

1. 1914-1950—A Wrong Without a Remedy

In its original form, section 7 did little to stem the tide of allegedly anticompetitive mergers. Congress drafted the original text in response to a series of horizontal stock acquisitions that merging parties had used to circumvent the Sherman Act during the 1895-1904 merger wave and thereafter.\(^9\) One Progressive member of Congress described the problem in this way: "Trusts have been ordered dissolved in the past, and the only change effected was one in the methods of bookkeeping. It is time for straightforward action and an honest effort to protect the people from the powers

challenges approximated the number of government merger challenges. See id. (reporting the oligarchical methods used to avoid antitrust liability). By contrast, the Georgetown Private Antitrust Litigation Project sampled five district courts from 1973 to 1983. In each year of the survey period, there were at least 100 private antitrust suits filed in each of the five sampled districts (Southern District of New York, Northern District of Illinois, Northern District of California, Eastern District of Missouri, Northern District of Georgia), and a total of 1938 cases over the eleven survey years. Thomas E. Kauper & Edward A. Snyder, An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared, 74 GEO. L.J. 1163, 1175, 1177 tbl.2 (1986); see also Steven C. Salop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 GEO. L.J. 1001, 1006 tbl.4 (1986) (analyzing same data, concluding that private merger claims were included in 5.8% of all sampled antitrust claims, and constituted the primary allegation of wrongdoing in 2.6%).


92. See infra Part I.D.1 for a discussion of enforcement of section 7 from 1914-1950.


95. See Brown Shoe, 370 U.S. 294, 314 n.21 (1962) (discussing reasons the original Act was interpreted to be limited to horizontal mergers by enforcing agency and courts).
that prey upon them." It Like many statutes drafted in response to a specific perceived problem, the law insufficiently addressed the myriad ways in which that problem could manifest. The original language prohibited only potentially anticompetitive stock acquisitions.

Businesses quickly found ways to circumvent the new law. Asset sales, lease agreements, and transactions involving partnerships and other non-corporation entities did not fall under the express terms of the Act, and the stock sale became less common, especially in connection with acquisitions with true anticompetitive potential.

During this period, government and private enforcers alike also first came to terms with section 7's practical limitations. The government and private parties had the right to seek precompletion injunctive relief in connection with a transaction that threatened competitive harm. But they were often unable to slow or stop even preannounced mergers before completion unless they won a race to the courthouse they often did not know they had entered.

2. 1950-1978

In 1950, the Celler-Kefauver Act solved one of section 7's perceived problems, expanding coverage to prohibit essentially any potentially anticompetitive corporate merger or acquisition. This might have opened the floodgates for private enforcement of section 7, but it did not. The relative absence of significant private merger challenges during this period is best explained as a side effect of the atomism norm's dominance in American antitrust law during those years.

Also in the 1950s, Joe Bain and others introduced the structure-conduct-performance literature to antitrust enforcers. S-C-P theory dovetailed almost seamlessly with the "freedom from" impulse, decrying the existence of concentrated markets, and offering rigorous economic justification for Americans' reflexive suspicion of size and economic power. As a result, antitrust became increasingly hostile to mergers of all types. It was particularly suspicious of horizontal mergers.

97. See supra Part I.B.3 for a discussion of section 7 as originally enacted. Supporters of the 1950 amendments contended that the 1914 Act's language was "the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition." Brown Shoe, 370 U.S. at 313. The Supreme Court disagreed, noting that asset acquisitions had been considered and dismissed as unimportant to a bill primarily directed at preventing the development of holding companies that secretly acquired competitors by purchasing their stock. Id. at 313-14.
98. See id. at 314 (describing what the original Clayton Act did and did not permit).
99. Id. at 314.
100. See id. (describing proposed amendments that would have required prior notification of companies' plans so that plaintiffs could pursue injunctive relief in advance).
101. See supra notes 33-35 and accompanying text describing the broadening of section 7 to target additional anticompetitive actions.
102. See supra notes 44-46 and accompanying text, recounting the belief of the S-C-P school that atomistic markets are ideal markets.
103. See, e.g., Robert Pitofsky, Kirkpatrick Lecture: Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies, 91 Geo. L.J. 169, 170 n.2 (2002) (referencing case that blocked horizontal merger of two Los Angeles supermarket chains with combined market share of 8-9%).
Because S-C-P taught that even moderate concentration was to be avoided, government antitrust enforcers routinely challenged horizontal mergers involving modest market shares.\textsuperscript{104}

The liability standards in place from the 1950s through the 1970s tended to generate significant Type I errors, declaring presumptively illegal many mergers that were in fact competitively neutral or even procompetitive under modern standards.\textsuperscript{105} These “false positives” overdeterred horizontal merger activity, at least from the perspective of a consumer welfare standard.\textsuperscript{106} And that, in turn, deterred suits dependent upon that activity for their genesis.\textsuperscript{107}

\textit{a. The Liability/Relief Disconnect}

Most of the “easy” cases during this period were government enforcement actions. These government challenges did not usually involve damages claims, and did not technically preclude private plaintiffs from making parallel claims.\textsuperscript{108} But the government tends to challenge transactions before or near the time of completion.\textsuperscript{109} A private plaintiff would have virtually no incentive to seek a duplicative injunction, and little incentive to sue for the limited damages that could have accrued from the time of the merger to the time of an early government suit. There was relatively little low-hanging fruit for private plaintiffs to pick.

\textsuperscript{104} \textit{Id.} at 170.

\textsuperscript{105} \textit{See, e.g.,} \textit{SCHERER \\ & ROSS, supra} note 28, at 176 (describing increased enforcement activity in 1950s and 1960s and noting that the Celler-Kefauver Act was “consciously structuralist”).

\textsuperscript{106} The merger wave from 1955 to 1973 involved primarily conglomerate mergers that did not raise substantial competitive concerns. \textit{Id.} at 158. There is some evidence that merging parties substituted away from horizontal transactions in part because of the antitrust risks associated with those transactions. \textit{Id.} (“The strict enforcement of U.S. antitrust laws deflected merger activity into non-horizontal categories and restrained increases in seller (that is, horizontal) concentration below what they would have been under unfettered conditions.”) The fourth merger wave in the 1970s and 1980s demonstrated that the third merger wave’s focus on conglomerate transactions did not improve consumer welfare. A substantial percentage of the mergers in the 1980s “deconglomerated” the inefficient conglomerates formed in the 1960s and early 1970s. \textit{See generally id.} (discussing the reasons the 1980s ended the conglomerate wave of the 1960s and 1970s).

\textsuperscript{107} A record number of mergers in 1969, for example, should not be misinterpreted as counterrargument to this point. Over seventy percent of the mergers during the third merger wave were primarily conglomerate in character. \textit{See GILSON \\ & BLACK, supra} note 91, at 17 (arguing that the third merger wave was largely one of conglomerate and diversification, characterized by rapid acquisition of lines of business outside acquirers’ “traditional areas of interest.”).

\textsuperscript{108} The federal government is authorized to seek only equitable relief in most antitrust cases. \textit{See} Sherman Act, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4 (2000)) (authorizing “proceedings in equity”). Damages claims by the United States are authorized only when the United States itself is “injured in its business or property,” in which case it may seek treble damages. Clayton Act, ch. 323, § 4A, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 15a (2000)). Accordingly, even when the federal government challenges a transaction well after its completion (and ostensibly after damages have accrued), damages claims in most cases will remain available to private plaintiffs under section 26 of the Clayton Act. \textit{Id.} § 26.

\textsuperscript{109} \textit{But see} United States v. E.I. DuPont De Nemours & Co. (DuPont I), 353 U.S. 586, 598 (1957) (noting that, whenever threat of prohibited effects becomes apparent, no decisions in suits brought near time of completion foreclose later suits by the government). \textit{See infra} Part III for a discussion of problems with laws governing private merger challenges.
As important, until the 1980s, there was only limited correlation between liability standards and damages in merger cases. Plaintiff-friendly, atomism-seeking precedent may have supported liability for a merger combining two companies with a combined market share of less than ten percent in a market considered competitive by today’s standards, but a private plaintiff understandably would have been hard-pressed to prove damages resulting from that combination. Installing liability roadblocks at (or beyond) the extreme outer boundaries of potentially anticompetitive behavior may have deterred merging parties from crossing the threshold into truly objectionable conduct, but it also deterred private parties from patrolling those borders. Under the circumstances, even automatic trebling of damages may not have offered sufficient incentives for private plaintiffs to challenge many mergers that would have been illegal under then-prevailing standards.

b. The Availability of Injunctive Relief

Private section 7 plaintiffs have always been able to seek injunctive relief. But the availability of injunctive relief alone typically would create sufficient incentive to sue for only three special classes of plaintiff: state government enforcers, hostile takeover targets themselves, and competitors within the merging companies’ industry. The Supreme Court rendered two of these classes more or less irrelevant in 1978. State enforcers continue to seek or at least threaten injunction actions in connection with questionable mergers, but competitors and takeover targets have found it more difficult to challenge mergers after the Supreme Court limited standing to those who are threatened with an injury “of the type the antitrust laws were designed to prevent.”

As a general rule, suits for injunctive relief are considerably less attractive to most private plaintiffs than treble damages suits. And injunctions alone do not compensate contingency-fee lawyers. Moreover, injunctive relief in merger cases is most effective as a preventive measure, but as a general rule, most private suits will be filed after the mergers they challenge have been completed. Viewed after the fact, it

110. See supra notes 47-51 and accompanying for a discussion of the atomism paradigm.

111. See Gottesman v. Gen. Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969) (determining that “plaintiffs cannot rest on a showing of a violation of § 7,” but must prove actual harm).

112. See infra Parts I.D.3.b-c discussing the antitrust injury doctrine.


114. At least one commentator believes that these plaintiffs deserve enhanced stature in the eyes of the law. See Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 Mich. L. Rev. 1, 25-26 (1995) [hereinafter Brodley, Antitrust Standing] (arguing that the private enforcement system should be modified to permit more effective private enforcement of anticompetitive mergers). However, as of this writing, competitors and merger targets find it difficult to sustain lawsuits in light of the Supreme Court’s “antitrust injury” doctrine. See infra Parts I.D.3.b-c for a discussion of limitations on standing imposed by Brunswick Corp. v. Pueblo Bowl-O-Mat and Illinois Brick Co. v. Illinois.

115. Private plaintiffs may file a section 7 action for injunctive relief before a transaction is completed. See Clayton Act, ch. 323 § 16, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 26 (2000)) (authorizing suit for “threatened loss or damage”) (emphasis added); 15 U.S.C. § 18 (transaction violates statute if its effect “may be substantially to lessen competition.”) (emphasis added); see also California v. Am. Stores Co., 495
is no certain thing that a suit seeking only injunctive relief against a previously consummated merger would ultimately address a potential plaintiff's actual or threatened injuries. This was especially true before 1990, when the availability of a divestiture remedy for private plaintiffs was an open question.\textsuperscript{116} It could have been difficult indeed for a private plaintiff to justify an antimerger injunction suit in the absence of significant provable damages.

c. Government as Torchbearer

The fact that there was little private enforcement of section 7 from 1950 to 1978 does not mean that the law or its enforcers took a laissez-faire attitude toward mergers or antitrust enforcement. To the contrary, prevailing antitrust thought from the 1950s through the 1970s was actively hostile to horizontal mergers, and the government enforcement culture was driven by the atomism norm.\textsuperscript{117} The influence of atomistic thinking was nowhere more apparent than in the Supreme Court's landmark 1962 \textit{Brown Shoe Co. v. United States}\textsuperscript{118} decision. In \textit{Brown Shoe}, the Court upheld a government challenge to Brown Shoe's acquisition of Kinney Shoe—a transaction that resulted in a combined market share of approximately 5.2% of national shoe production.\textsuperscript{119}

The \textit{Brown Shoe} decision sent a clear message to potential acquirers that horizontal acquisitions were inherently suspect, and the law would not countenance any significant increase in market concentration, even if it improved efficiency:

[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.\textsuperscript{120}

The \textit{Brown Shoe} decision was just one in a series of government cases that reinforced the atomism norm during this period.\textsuperscript{121} Government promotion of atomistic markets was so "effective" that little private enforcement was even possible.\textsuperscript{122}

\footnotesize

\textsuperscript{116} \textit{See Am. Stores Co.}, 495 U.S. at 283 (interpreting 15 U.S.C. § 16 as permitting relief in the form of divestiture).

\textsuperscript{117} \textit{See supra} Part I.C.1 for a discussion of the atomism paradigm.

\textsuperscript{118} \textit{370 U.S. 294 (1962).}

\textsuperscript{119} \textit{Brown Shoe}, 370 U.S. at 303 (reporting perspective market shares of Kinney and Brown at time of proposed merger). The \textit{Brown Shoe} opinion has been roundly criticized by a host of Chicago School-influenced commentators in connection with its theory of vertical harm, its approach to market definition, and other issues. \textit{See, e.g.}, Bork, \textit{supra} note 13, at 198-216 (characterizing \textit{Brown Shoe} as "the crash of merger policy"). This Article is concerned with \textit{Brown Shoe} only insofar as it was emblematic of an atomism-driven enforcement norm at the time.

\textsuperscript{120} \textit{Brown Shoe}, 370 U.S. at 344.

\textsuperscript{121} \textit{See, e.g.}, \textit{Pabst Brewing Co.}, 384 U.S. at 552 (finding that the intent of section 7 is to "[arrest]
Starting in 1978, a new series of events effectively guaranteed that private merger challenges would remain at the margins of antitrust enforcement, even as the overall pace of horizontal merger activity increased exponentially. Courts still resolved the occasional private claim, but by 2000, successful private challenges were increasingly rare. Four separate events share responsibility for that state of affairs: (1) passage of the Hart-Scott-Rodino Act in 1976 (effective September 5, 1978), (2) the Supreme Court's 1977 adoption of the so-called Illinois Brick bar against indirect purchaser suits, (3) the Supreme Court's introduction and amplification of the "antitrust injury" doctrine in 1977 and 1985, and (4) the rise of the Chicago School and the introduction of the Justice Department's 1982 Merger Guidelines and their progeny. Together, these developments dramatically curtailed private parties' incentives and ability to challenge potentially anticompetitive mergers, even as merger activity was taking off under Chicago School rules.

a. Hart-Scott-Rodino

By 1976, federal antitrust enforcement agencies were thoroughly frustrated by their inability to enforce section 7 effectively. This frustration stemmed in large part from federal enforcers' limited success in challenging potentially anticompetitive transactions before completion, and in the related difficulties enforcers faced in obtaining effective relief once the subject businesses had been integrated. In response, Congress passed the Antitrust Improvements Act of 1976, also known as the Hart-Scott-Rodino Act or simply "HSR." The Federal Trade Commission's rules
implementing HSR went into effect on September 5, 1978. The statute erects government roadblocks in the path of pending mergers and illegalizes "merger by ambush" techniques. Under HSR, all transactions meeting certain size/value thresholds must be reported to the federal government before completion. Proponents of reportable transactions must supply the government basic information regarding the transaction and its likely competitive effects. Moreover, HSR imposes a waiting period during which the parties cannot complete the transaction. During that waiting period, the government may investigate the potential competitive impact of the merger. Reportable mergers cannot move forward unless and until the agencies explicitly or implicitly authorize consummation. Parties failing to make premerger filings in connection with a reportable merger are subject to substantial penalties. Harsh sanctions also await parties who begin integrating their businesses before receiving final government approval.

In the event that the government concludes that a proposed merger warrants further investigation, it may issue subpoenas (known colloquially as "Second Requests") to the parties. Second Requests further delay consummation until the parties have completed their responses. Throughout the HSR process, the government and merger parties often negotiate regarding the actual competitive significance of the transaction and potential remedies (e.g., divestiture of overlapping assets, etc.) that might address agency concerns. If the parties fail to reach agreement, the government can file suit to block the merger.

But courts have tried relatively few merger cases since HSR went into effect. The vast majority of merger issues are resolved without litigation, and when the government expresses its intention to block a merger, the parties often abandon the deal. As a result, most of the "case law" governing the analysis of mergers today comes not in the form of reported decisions, but instead exists as accumulated internal


128. Baer, supra note 124.


131. Id. § 18a(g).

132. Id.


135. Some of this decline is likely attributable to changes in substantive liability standards. See supra Part I.C.2. for a description of the shift in emphasis from atomistic theory to consumer welfare protection led by Chicago School.

agency wisdom and HSR counsel lore.\textsuperscript{137} Government theories and party responses are rarely tested before a judge.\textsuperscript{138} The Supreme Court has not issued a substantive merger decision in over thirty years.\textsuperscript{139}

Although it is hard to draw firm conclusions from a limited dataset, it seems clear that HSR significantly reduced the number of meritorious private antimerger suits, at least relative to the overall annual number of horizontal mergers and acquisitions.\textsuperscript{140} By establishing a formal mechanism for premerger review, HSR limited the number of transactions likely to be subject to private challenge.\textsuperscript{141} HSR also affected courts' willingness to intervene in connection with mergers that (1) had not been subject to filing requirements, (2) were left uninvestigated after premerger reporting, or (3) were investigated but allowed to proceed by government enforcers. The absence of government action on a particular merger, while of no formal legal significance, had some impact on a potential plaintiff's pre-suit analysis.

HSR decreased incentives for private plaintiffs to file suit from the date it went into effect in 1978 because it subjected mergers above a certain size threshold to premerger government review.\textsuperscript{142} And because of a significant flaw in the drafting of HSR, private suits became less attractive every year thereafter. For most transactions, the original provisions of HSR established a $15 million filing threshold—if a

\textsuperscript{137} E.g., Ashutosh Bhagwat, Modes of Regulatory Enforcement and the Problem of Administrative Discretion, 50 HASTINGS L.J. 1275, 1307 (1999) (stating that "the antitrust agencies' 'enforcement policies' are in effect the law of antitrust mergers today"); Grimes, supra note 136, at 945-47 (explaining that agency discretion in enforcement provides guidance within the agency and to a few "privileged outsiders" but not to the public); Gary L. Reback & Christopher O.B. Wright, Government Antitrust Review of High Technology Mergers, COMPUTER LAW., June 1992, at 1, 3 ("Merger review under the antitrust law is primarily conducted by administrative agencies; staff attorneys and economists inside the Federal Government evaluate the competitive effects of mergers more often than do federal judges").

\textsuperscript{138} Economists play a unique and central role in defining the functional law of merger challenges. The dozens of reported cases analyzing section 7 of the Clayton Act are essentially meaningless to the practitioners of the dismal science charged with analyzing the competitive effects of a merger. In the vast majority of contested cases, it comes down to whether government economists are more persuasive than their counterparts retained by the merger proponents. As a result, the antitrust community tends to have a more academic focus than most other legal disciplines, and the level of interaction between government lawyers and economists and their private counterparts is remarkable.

\textsuperscript{139} See supra note 85 for a discussion of General Dynamics marking the end of the Supreme Court's substantive merger decisions. The Supreme Court has issued three opinions in private section 7 cases since 1978. See infra Parts I.D.3.b-c for an examination of Pueblo Bowl-O-Mat, Illinois Brick, and Cargill, Inc. v. Monfort of Colorado, Inc. Each of these opinions is important in understanding the past and future role of private challenges. But none addressed the substantive liability standards applicable under section 7.

\textsuperscript{140} It is extremely difficult to extract the effects of any one individual development upon the frequency of private merger challenges. A number of these developments occurred virtually simultaneously. In addition, there are numerous other factors in play, including the overall pace of merger activity, the relative level of government enforcement, etc.

\textsuperscript{141} Government inaction after a premerger filing does not preclude private suits as a matter of law. ABA MONOGRAPH No. 16, supra note 83, at 54-55. But if the government chooses not to challenge a particular transaction after HSR review, private parties are likely to think twice before filing their own lawsuit.

\textsuperscript{142} Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (1976) (codified as amended at 15 U.S.C. § 18a(a)(1)-(2) (2000)). The absolute number of reported private merger claims is not terribly helpful in evaluating the effects of any particular legal factor, primarily because any law-driven trends are likely to be overwhelmed by the trends in the overall level of merger activity.
transaction's total value was less than $15 million, the parties were not required to make a premerger filing and could consummate their merger without prior government approval.143 This did not mean that mergers without filing requirements were presumptively legal. Rather, the $15 million thresholds acted as a filter, such that the government's limited resources could be focused upon transactions with greater potential competitive impact.

But HSR's original transaction value thresholds did not increase to keep pace with inflation. From 1976 through 2000, the $15 million threshold stayed the same in nominal dollars. In real terms, the filing threshold fell dramatically. In 1985, a $15 million transaction would have been equivalent in real terms to an $8.5 million transaction in 1976 dollars.144 A $15 million transaction in the year 2000 would have been a $5.9 million transaction in 1976 dollars.145 As a result, there were proportionally more premerger filings every year due to inflation. By 2000, this included thousands of annual filings for transactions far smaller in real terms than HSR captured in 1978.

By the close of the century, premerger filings were overwhelming the federal government, and a large and ever-increasing percentage of potentially anticompetitive transactions was subject to at least token government review.146 As a result, federal enforcers identified and addressed the vast majority of potentially anticompetitive mergers, albeit at substantial cost to their other enforcement efforts. If there was little low-hanging fruit available to plaintiffs before 1976, the tree had been picked clean by 2000.

143. The actual thresholds for premerger filings were (and remain) fairly complex, and there were (and are) a number of different ways in which a transaction could trigger a premerger filing requirement. See, for example, 15 U.S.C. § 18a for the current set of threshold tests (actual monetary thresholds are available at Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 70 Fed. Reg. 5020-01 (Jan. 31, 2005)). For purposes of this Article, however, the most common "size-of-transaction" threshold is sufficient to illustrate the issues. The other thresholds are subject to the same analysis, although the dollar values for those thresholds are different.


b. The Antitrust Injury Doctrine

In 1977, the Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.\textsuperscript{147} rejected a private merger challenge brought by a bowling alley owner upset that a large company had purchased a failing rival. The Court rejected the plaintiff's section 7 claim, reasoning that the plaintiff's injury would have been the result of increased competition in the local bowling alley market.\textsuperscript{148} According to the Court, that was not the kind of injury Congress had in mind when it created a private right of action under the Clayton Act.\textsuperscript{149} The Court held that in order to have standing to sue, private antitrust plaintiffs must demonstrate that they suffered an "injury of the type the antitrust laws were intended to prevent."\textsuperscript{150} This is typically interpreted as a requirement that the plaintiff's injury result from increased prices or decreased output.\textsuperscript{151}

In 1986, the United States Supreme Court extended this "antitrust injury" requirement to private merger plaintiffs seeking solely injunctive relief.\textsuperscript{152} In Cargill, Inc. v. Monfort of Colorado, Inc.,\textsuperscript{153} a meat-packing company sought to block the merger of two larger competitors.\textsuperscript{154} Applying Brunswick explicitly, the Supreme Court held that any increase in price attributable to the merger would in fact benefit the plaintiff, and that the plaintiff therefore lacked standing to file an injunction suit regarding that threatened injury.\textsuperscript{155}

The Cargill plaintiff also alleged that it would be a victim of exclusionary conduct on the part of the merged firm designed to drive it out of business.\textsuperscript{156} The Court recognized that exclusionary behavior would constitute "antitrust injury" to a competitor, but held that the plaintiff had failed to provide sufficient evidence in support of its claim.\textsuperscript{157}

Brunswick and Cargill had an obvious and immediate effect on private merger challenges, severely limiting the types of potential plaintiffs that could maintain a suit under section 7.\textsuperscript{158} Although persuasive arguments can be made that the antitrust injury doctrine furthers legitimate antitrust goals and creates appropriate disincentives to opportunistic behavior, there is little doubt that it further discourages certain highly

\begin{itemize}
  \item \textsuperscript{147} 429 U.S. 477 (1977).
  \item \textsuperscript{148} Brunswick Corp., 429 U.S. at 490.
  \item \textsuperscript{149} Id. at 487-88.
  \item \textsuperscript{150} Id. at 489.
  \item \textsuperscript{151} See, e.g., Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986) (stating that "antitrust injury" means injury from higher prices or lower output).
  \item \textsuperscript{152} Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113 (1986).
  \item \textsuperscript{153} 479 U.S. 104 (1986).
  \item \textsuperscript{154} Cargill, Inc., 479 U.S. at 106-07.
  \item \textsuperscript{155} Id. at 116-17.
  \item \textsuperscript{156} Id. at 117.
  \item \textsuperscript{157} Id. at 118-19.
  \item \textsuperscript{158} See generally ABA MONOGRAPH No. 16, supra note 83 (describing effects of "antitrust injury" decisions on frequency of private challenges).
\end{itemize}
motivated but potentially opportunistic private plaintiffs from even making the attempt.159

In the history of private challenges before 1986, the most common plaintiffs were the competitors of the merging parties.160 While competitors are one of the groups most likely to be upset by a competitor’s merger, the Supreme Court recognized in Brunswick and Cargill that they are not particularly good plaintiffs.161 Competitors do not and should not have standing to complain about increased prices resulting from the merger, which would benefit them as market participants. Instead they face a far higher hurdle—in many circuits, they must prove that the merged firm is likely to engage in successful exclusionary conduct that will hurt the plaintiffs themselves.162 Some courts have established liberal standards for standing based on future exclusionary behavior by the more-powerful merged entity.163 Regardless, the antitrust injury doctrine has further limited private merger challenges.164

The antitrust injury doctrine also limits the ability of hostile merger takeover targets to challenge unattractive transactions on antitrust grounds.165 A purchased

159. For a different perspective on the antitrust injury doctrine in the context of private merger suits, see Brodley, Antitrust Standing, supra note 114, at 16, which suggests that “the antitrust policy doctrine addresses the problem of the wrongly motivated private litigant by scrutinizing the plaintiff’s injury to determine whether the self-interest the plaintiff seeks to vindicate is consistent with antitrust goals.”

160. See ABA MONOGRAPH No. 16, supra note 83, at 118-26 (describing prevalence of competitor challenges in pre-Brunswick world). According to the ABA’s survey, of the 144 private merger challenges filed from 1977-1988, fifty were filed by third-party competitors, thirty-nine by hostile takeover targets, twenty-two by customers (including terminated distributors), eleven by disappointed bidders, five by employees or suppliers, and seventeen by other types of plaintiffs. Id.

161. See Brodley, Antitrust Standing, supra note 114, at 46-78 (arguing that courts should use equity mechanisms to ensure competitor-plaintiffs have proper incentives).


163. See, e.g., R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 107-11 (2d Cir. 1989), cert. denied, 493 U.S. 815 (1989) (holding that a competitor has standing to challenge a merger if the resulting postmerger market share is sufficient to increase the probability of postmerger predatory behavior); Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180, 1183 (8th Cir. 1998) (holding that the District Court’s determination that “this is one of those rare cases [in which] a competitor plaintiff has successfully proved a threat of antitrust injury” was not clearly erroneous). This interpretation of the Cargill standard is far from universal. See ALD 5TH, supra note 76, at 846 n.61 (listing cases where competitor was denied standing). Nonetheless, a large number of potential merger parties are amenable to federal suit somewhere within the Second and Eighth Circuits’ jurisdiction, and so competitor suits continue to be a realistic possibility in connection with many mergers.

164. Some argue that the decline in private merger challenges in the 1980s and 1990s was ipso facto undesirable. See, e.g., Brodley, Antitrust Standing, supra note 114, at 4-10 (stating that apparently unlawful mergers went forward unchallenged as a result of the restrictive standing requirements). But because private parties and their attorneys have incentives for opportunistic, profit-maximizing behavior not shared by most government enforcers, it is illogical to assume that more private enforcement is necessarily better. Brodley’s “incentive compatibility” arguments to the contrary are unpersuasive. Id. at 80-103 (arguing that the plaintiff’s private interest in forestalling a merger and the public interest in maintaining competition must be compatible to have effective enforcement). Nonetheless, this Article expresses no opinion as to whether there was too much or too little private enforcement activity during the 1980s and 1990s. The primary purpose in highlighting the “dead period” is to contrast the conditions responsible for the decline to the conditions prevailing today and in the future.

165. Lower courts appear to be evenly split as to whether a hostile takeover target can invoke section 7
company is not usually injured by the anticompetitive effects of an acquisition.\textsuperscript{166} Instead, any injury it suffers from a merger or acquisition would typically be unrelated to the potential anticompetitive consequences of the acquisition, which will typically redound to the target company's benefit in the form of higher profits.

c. Illinois Brick

Having already struck a significant blow in Brunswick, the Supreme Court again weakened the private merger enforcement regime just a few months later by further limiting the universe of potential antitrust plaintiffs. In Illinois Brick Co. v. Illinois,\textsuperscript{167} the Court barred "indirect" purchasers—buyers who purchased products subject to antitrust violations two or more levels below the defendants in the chain of distribution—from filing suit to recover antitrust damages.\textsuperscript{168}

In an extended exercise in speculative pragmatism, the Court acknowledged that indirect purchasers could bear some or all of the costs of an antitrust violation because upstream distributors could often pass through overcharges.\textsuperscript{169} But the Court rejected indirect purchaser claims, concluding that allowing such suits could lead to double recoveries and extraordinary difficulties in apportioning damages among different victims.\textsuperscript{170} Instead, the Supreme Court held that in most cases, only direct purchasers—those who bought the product directly from the antitrust defendant—could sustain private claims.\textsuperscript{171} The Supreme Court has not explicitly applied Illinois Brick

after Cargill. See ALD 5th, supra note 76, at 869 n.162 and the cases cited therein. For example, in Anago, Inc. v. Technol. Med. Prods., 976 F.2d 248, 251 (5th Cir. 1992), cert. dismissed, 510 U.S. 985 (1993), the Fifth Circuit rejected a target’s section 7 challenge on antitrust injury grounds, holding that "[p]roof that a plaintiff will be adversely affected by the merger itself will not suffice in this Court, unless the injuries are related to the anticompetitive effects of the merger." By comparison, the Second Circuit has held that the target company’s loss of independence "is causally related to the injury occurring in the market place" and has granted standing on that ground. See Consol. Gold Fields PLC v. Minoroce, S.A., 871 F.2d 252, 257-58 (2d Cir. 1989), cert dismissed, 492 U.S. 939 (1989). For the contrary view that targets should have standing, see Brodley, Antitrust Standing, supra note 114, at 78-104 listing the rationales for granting target standing.

166. That is, unless we dramatically expand our definition of "injury to competition" to encompass the sorts of things Professor Brodley unpersuasively suggests we should consider. See Brodley, Antitrust Standing, supra note 114, at 78-106 (suggesting that effects of an unlawful merger injure the target firm and benefit its shareholders only by illegal means); see also Consol. Gold Fields, 871 F.2d at 257-58 (reaffirming target standing to challenge takeovers). In extolling the virtues of the takeover target as the best possible litigant, Brodley demonstrates a subtle preference for atomism by dismissing the takeover target's unique incentives to behave opportunistically for reasons utterly unrelated to the competitive effects of a merger. Brodley, Antitrust Standing, supra note 114, at 79, 95-103. The primary problem among several inherent in Brodley's analysis is that it assumes the fact of a violation, when the opportunism critique is based upon the costs associated with improper use of section 7. Brodley's approach is inherently atomistic because it implicitly prefers a world in which merger activity is to be discouraged.

169. Id. at 730-33.
170. Id. at 730, 737.
to merger challenges, but lower courts have held that *Illinois Brick* applies in the merger context as well.\textsuperscript{172}

*Illinois Brick* has had a substantial chilling effect on all types of private antitrust litigation. In the thousands of industries typified by multiple layers of distribution, *Illinois Brick* completely denies relief to the ultimate consumers of a product (and to every other indirect purchaser in the chain).\textsuperscript{173} *Illinois Brick* instead leaves the "private attorney general" role in the hands of direct purchasers who have existing commercial relationships with the wrongdoers, and who may have been able to pass through part or all of any illegal overcharge they endured to their customers.

*Illinois Brick* likely deters private merger challenges more than it deters antitrust conduct suits. It may well be wishful thinking to expect a direct purchaser to challenge one of its suppliers' business decisions to purchase a competing supplier. And it is not clear that a direct purchaser's incentive to sue necessarily increases as the anticompetitive character of the transaction increases. In fact, the opposite may be true. The more concentrated the industry, the fewer alternative suppliers to whom a direct purchaser can turn if it has burned its bridges by way of a section 7 suit. Moreover, in more concentrated upstream industries, there is a greater likelihood that the direct purchaser will be able to pass through all or most of any merger-related price increases to its own customers, and will thus be less interested in a section 7 lawsuit.\textsuperscript{174}

But even if *Illinois Brick* had no special effect upon private merger challenges, the general rule it announced eliminated a large, potentially motivated category of possible plaintiffs from the universe of parties with standing to challenge allegedly illegal transactions. In fact, in many multi-level industries, *Illinois Brick* denies recovery to the classes of customer most likely to suffer actual damages from increased prices.

Taken together, *Illinois Brick* and the antitrust injury doctrine were a particularly brutal combination, dramatically limiting the ability of the two most motivated (if potentially opportunistic) groups of potential plaintiffs to seek relief. *Illinois Brick* prevents most indirect purchasers from challenging anticompetitive mergers, and the antitrust injury doctrine erected substantial hurdles for competitors and target companies. By the end of 1977, the only private parties\textsuperscript{175} that could reliably challenge a merger without being thrown out of court were the direct purchasers of the merged companies' goods. Although direct purchaser merger suits are not unheard of,\textsuperscript{176} direct purchasers in most multi-level industries have substantially less incentive to act as

\textsuperscript{172.} Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1233-34 (9th Cir. 1998).

\textsuperscript{173.} *Illinois Brick*, 431 U.S. at 729 (refusing to extend standing to "any party in the chain").

\textsuperscript{174.} This is dependent upon a number of variables, including elasticities of demand.

\textsuperscript{175.} Excluding state antitrust enforcers.

\textsuperscript{176.} See, e.g., Diskin v. Daily Racing Form, Inc., No. 92 Civ. 6374, 1994 U.S. Dist. LEXIS 9129, at *15 (S.D.N.Y. July 7, 1994) (holding individual newspaper buyer had standing as direct purchaser because intermediate distributors were not independent entrepreneurs).
"private attorneys general" than either indirect purchasers or competitors of the merging parties.\textsuperscript{177}

d. The 1982 Merger Guidelines

In 1982, the Department of Justice struck yet another blow against private merger enforcement with the introduction of its 1982 Merger Guidelines.\textsuperscript{178} The 1982 Merger Guidelines and their progeny dramatically improved antitrust merger analysis, but they certainly were not good for private plaintiffs.

Up until the early 1980s, government enforcers and private parties alike relied upon a combination of case law—almost all of it favorable to antimerger plaintiffs—and the similarly plaintiff-friendly 1968 Merger Guidelines to analyze transactions.\textsuperscript{179} But by the late 1970s, both the 1968 Guidelines and the S-C-P-influenced judicial precedent they paralleled and promoted were under attack. Chicago School critics claimed that existing low market share thresholds for illegality were both arbitrary and incorrect, and that these thresholds unfairly condemned large numbers of competitively neutral or even procompetitive business combinations.\textsuperscript{180}

The Department of Justice issued its 1982 Merger Guidelines against this backdrop.\textsuperscript{181} Like their 1968 predecessor, the 1982 Guidelines "describe[d] the general principles and specific standards normally used by the Department [of Justice] in analyzing mergers."\textsuperscript{182} But unlike the 1968 Guidelines, the 1982 Guidelines did not rely exclusively upon market structure, expressed in terms of nominal market share thresholds, as the primary relevant metric for competitive analysis. Instead, they

\textsuperscript{177} For a contrary perspective, see Posner & Landes, supra note 171, at 609-15, arguing that direct purchasers should be more motivated to sue. Posner & Landes' argument is based in part upon a neoclassical assessment of detection costs at various levels of distribution. \textit{Id.} at 609-11. Their analysis is less persuasive in the context of mergers, which are or become public knowledge at or near the time of completion. The "detection costs" associated with anticompetitive mergers are lower than those relating to secret conduct offenses; and the causal relationship between a price increase and a potentially illegal merger much more readily apparent. \textit{Id.} at 610-15.


\textsuperscript{179} \textit{See} Edward Cavanaugh, \textit{Antitrust Remedies Revisited}, 84 OR. L. REV. 147, 182 (noting that the rules adopted in the 1968 Guidelines struck down a merger where the share of the relevant market was less than eight percent).

\textsuperscript{180} \textit{See}, e.g., \textit{Brown Shoe}, 370 U.S. at 343-44 (disallowing a potentially efficient merger solely on the grounds of market share threshold). The 1968 Merger Guidelines indicated that government challenge was likely, even in "less highly concentrated" markets, when the acquiring firm accounted for 5% of the market, and the acquired firm accounted for five percent or more. 1968 MERGER GUIDELINES, supra note 45, \textit{§} 6. As the acquiring firm's market share rose to twenty-five percent, the 1968 Guidelines recommended challenging acquisition of any firm with one percent or more of the market. If the market was "highly concentrated" (shares of the four largest firms accounting for approximately seventy-five percent or more of the market), the challenge thresholds were even lower. \textit{See id.} \textit{§§} 5-6 (if acquiring firm has fifteen percent or more of the market, the Guidelines recommend challenging acquisition of any firm with one percent or more of the market).

\textsuperscript{181} 1982 Merger Guidelines, \textit{supra} note 178.

\textsuperscript{182} \textit{Id.} \textit{§} 1.
introduced a more rigorous economics-based framework for analyzing the competitive effects of mergers that remains essentially unchanged today. 183

The 1982 Guidelines imposed structure on the merger review process. Enforcers analyzing a transaction were first required to define relevant product and geographic markets potentially affected by the merger. 184 The new Guidelines then directed enforcers to calculate a "Herfindahl-Hirschman Index" or "HHI," for the premerger market and for the hypothetical postmerger market. 185 The HHI is a measure of market concentration obtained by summing the squares of each market participant's market shares. 186 Under the 1982 Merger Guidelines analysis, the agencies were to compare the premerger HHI with the proposed transaction's hypothetical postmerger HHI. 187 Large absolute postmerger HHIs and large merger-induced increases in HHI triggered additional government scrutiny. 188

Assuming a merger met or exceeded the Merger Guidelines' thresholds for additional scrutiny, enforcers were then to consider whether entry or other factors would mitigate the competitive harm likely to result from the transaction. 189 Finally, the investigators were to consider whether one of several affirmative defenses applied. 190 The Merger Guidelines effectively supplanted existing judicial precedent as the decisional law of mergers, very quickly within the agencies and more slowly in the increasingly rare judicial decisions addressing questions of substantive liability under section 7.

As the Guidelines approach slowly filtered into the courts, it shifted the substantive liability standards significantly in defendants' favor. While few would now dispute that liability standards under the Guidelines are superior to the pre-Guidelines precedent, the change did not help private plaintiffs. The adoption of the 1982 Merger

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184. The 1968 Guidelines also discuss relevant market definition, but in much less concrete terms. Compare 1982 Merger Guidelines, supra note 178, § II(A), (C), with 1968 MERGER GUIDELINES, supra note 45, § 3.


186. Id.

187. See id. § III(A)(1) (directing agencies to consider both postmerger concentration and increase in concentration caused by the merger, as measured by HHI).

188. See id. § III(A)(1)(c) (stating that because large postmerger HHIs are indicative of highly concentrated markets with significant competitive concerns, the Department will favor any close question in favor of challenging a merger).

189. See id. § III(A)(2)(c)(1)-(3) (stating that, beyond market concentration, the DOJ should consider ease of entry, likelihood and profitability of collusion, nature of product, terms of sale, buyer market characteristics, and conduct of firms in market).

190. See 1982 Merger Guidelines, supra note 178, § V(A)-(B) (discussing the availability of affirmative defenses to seemingly anti-competitive mergers such as achieving efficiencies and the taking over of a "failing" firm).
Guidelines also played an important role in setting the stage for the coming private merger challenge crisis. Confronted with all these disincentives, it is worth asking the question: Is there any reason to believe private merger challenges will make a comeback? The answer to that question is a resounding and somewhat surprising yes.

II. THE COMING WAVE OF PRIVATE ANTITRUST MERGER CHALLENGES

Over the past fifteen years, at least five separate developments have helped point the compass back in the direction of private merger challenges. First, the Supreme Court conclusively established the availability of divestiture remedies to private litigants. Second, Congress recalibrated the Hart-Scott-Rodino Act ("HSR") premerger filing thresholds, increasing them substantially above their 1978 levels in real terms. Third, the government has suffered a string of recent court defeats. Fourth, state antitrust enforcement has increased substantially. Fifth, Illinois Brick Co. v. Illinois now appears vulnerable. Each of these developments will work to increase private antitrust merger litigation in the future.

A. Divestiture as a Remedy in Private Merger Suits

Until 1990, federal courts had different opinions as to whether private plaintiffs could seek divestiture (the complete unwinding of a merger) in section 7 suits. Although section 16 of the Clayton Act directly authorizes private plaintiffs to seek equitable remedies, courts disagreed as to whether the "death penalty" of divestiture was properly characterized as injunctive relief.

191. The long-term net effects of the Merger Guidelines upon private merger challenge activity levels are difficult to assess. Immediately after their introduction, they almost certainly deterred private suits. And working hand-in-hand with HSR, it seems likely that they had a net deterrent effect through the 1990s as well. But the Guidelines themselves were at least partially responsible for a massive increase in merger activity and for a related decrease in government enforcement, and thus may ultimately yield a higher absolute level of private enforcement.

192. See California v. Am. Stores Co., 495 U.S. 271, 295-96 (1990) (stating that divestiture is available to private litigants who have shown "threatened loss or damage").


194. See infra notes 246-57 and accompanying text, suggesting how recent court defeats will curb the government's appetite for fully litigating merger challenges, leading to an increase in private merger challenges.

195. See infra notes 258-62 and accompanying text, for a discussion that more states have aggressively enforced antitrust regulations, independent of the federal government, and in some cases filing suit where the federal government chose not to challenge the transactions at all.


197. Compare Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 920 (9th Cir. 1975) (holding that remedy of divestiture not available as in private actions), with Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 429 (1st Cir. 1985) (declining to adopt a per se exclusion of divestiture from the equitable relief available for private actions).

198. See Int'l Tel. & Tel. Corp., 518 F.2d at 920 (finding that, in private actions, divestiture is not
The Supreme Court resolved that question in favor of private divestiture actions in 1990. In *California v. American Stores Co.*, the Court allowed the State of California to seek divestiture in connection with a merger between the American Stores supermarket chain and its competitor Lucky Stores, Inc. Private plaintiffs are now unambiguously authorized to seek divestiture as a remedy.

Because the vast majority of private merger challenges take place after the transaction has been completed, the *American Stores* holding tilted the balance of power dramatically in private plaintiffs’ favor. The prospect of unwinding an already completed merger may be more damaging to merger defendants than a treble damages award, and it would almost certainly pose a greater threat than any injunctive relief short of divestiture. Moreover, because proof of damages is often difficult in merger cases brought at or near the time of completion, the availability of a “death penalty” sanction provides substantial additional incentives for private plaintiffs to file section 7 claims. It also encourages defendants to resolve those claims in advance of trial.

### B. Recalibration of the HSR Thresholds

Even while *American Stores* made private suits more attractive after 1990, falling HSR premerger filing thresholds exercised an opposite influence through the end of the twentieth century. Private suits remained relatively uncommon because, by the late 1990s, a huge percentage of transactions were subject to some form of premerger government review.

In 2000 Congress finally ended HSR’s unintended incremental journey toward universal premerger filing requirements. Effective February 1, 2001, Congress raised the premerger filing thresholds substantially, increasing the most important threshold from $15 million to $50 million. Depending on the measure of inflation, $50 million in the year 2000 was approximately equivalent to between $16.5 million and $22.05 million.\(^{203}\)

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200. In the context of the antitrust laws, all challenges not brought by the federal government qualify as “private.” *Am. Stores Co.*, *495 U.S.* at 296. This includes challenges brought by non-federal governmental subdivisions, including individual states. *Id.*

201. The incentive to file a claim should not be confused with the incentive to pursue a claim to judgment. Even if divestiture is unlikely, its availability to private plaintiffs and the relatively liberal standard of proof associated with injunctive relief in antitrust cases put substantial pressure on merger defendants to resolve private merger suits in advance of trial.

202. In 2000, the last full year under the original thresholds, there were 4749 transactions reported to the agencies. *FTC/DOJ ANN. REP. TO CONG.* app. A (2003) (line of transactions labeled: “Adjusted Transactions in Which a Second Request Could Have Been Issued”) (reflecting the number of transactions reported less the transactions for which the government was not authorized to request additional information). In 1988, there were 2391. *FTC/DOJ ANN. REP. TO CONG.* app. A (1997) (listing number of transactions reported less the transactions for which the government was not authorized to request additional information).

million in 1976 dollars.\textsuperscript{204} Accordingly, the net effect of the legislation was to raise real premerger filing thresholds to a level somewhere between ten percent and fifty percent above the level Congress first established in 1976.

As important, the 2000 legislation is designed to maintain future premerger filing thresholds at the same level in real terms. Now, for each fiscal year beginning after September 30, 2004, the threshold is adjusted for inflation (or deflation) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003.\textsuperscript{205} The first such adjustment recently went into effect. Effective March 2, 2005, the primary premerger filing threshold is $53,100,000.\textsuperscript{206}

The increase in premerger filing thresholds first went into effect in 2001. As expected, the new thresholds dramatically decreased the number of premerger filings.\textsuperscript{207} But the threshold change has also produced some surprising results. Both the dramatic decrease in filings and the surprising data regarding post-increase agency review suggest that more private challenges are on the way.

The increased thresholds no longer require premerger filings for most transactions valued between $15,000,000 and $53,100,000. But the absence of premerger filing requirements should not be confused with per se legality. The absence of filing requirements simply means that transactions valued below the thresholds can be completed without a waiting period during which the federal government can

\textsuperscript{204} National Aeronautics and Space Administration, Cost Estimating Web site: Inflation Calculators, http://wwwl.jsc.nasa.gov/bu2/inflate.html (last visited Apr. 7, 2006). Using the Consumer Price Index, $50 million in 2000 was roughly equivalent to $16.5 million in 1976. Id. Under the Producer Price Index, it was equivalent to $22.05 million in 1976 dollars. Id. Using the GDP method, see supra notes 144-45, the new threshold was roughly equivalent to $19.7 million in 1976 dollars. Id. Because Congress mandated that the GDP method be used to calculate new annual threshold increases, it is fair to hypothesize that Congress intended to increase real filing thresholds about thirty-one percent over the initial 1976 level. Clayton Act, ch. 323 § 8, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 19(a)(5) (2000)).

\textsuperscript{205} 15 U.S.C. § 19(a)(5). The inflation threshold adjustment is calculated using the same methodology used since 1999 in connection with section 8 of the Clayton Act's thresholds regarding interlocking directorates. The adjustment is performed as follows:

Thresholds in this subsection shall be increased (or decreased) as of October 1, of each year by an amount equal to the percentage increase (or decrease) in the gross national product, as determined by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 20, 2003.

Id.


\textsuperscript{207} In FY 2000, the last full year under the old $15 million filing thresholds, the agencies received filings on 4926 transactions. See FTC/DOJ ANN. REP. TO CONG. app. A (2003) (listing number of transactions in the first line of the table as: "Transactions Reported"). In FY 2001, during which the revised thresholds went into effect, the agencies reviewed 2376 transactions. Id. In FY 2002, the first full year under the new thresholds, the agencies reviewed 1187 transactions. Id. In FY 2003, the agencies reviewed 968 transactions. Draft Data Obtained from Premerger Notification Office (June 30, 2005) [hereinafter "Draft PNO Data"] (on file with author). In FY 2004, the agencies reviewed 1377 mergers, and, in the first half of FY 2005 (through June 30, 2005), the agencies had reviewed 1172. Id. Although some of the initial decrease in filings was likely attributable to an overall decrease in the pace of merger activity in late 2001 and 2002, the vast majority of the decrease in filings was almost certainly a function of the increase in filing thresholds. Figures for 2004 and the first half of 2005 suggest that merger activity is again on the upswing.
investigate the transaction before completion. The thresholds say nothing about whether a particular merger violates the Clayton Act because it may tend substantially to lessen competition in a particular relevant market.\textsuperscript{208}

1. Relevant Markets in Merger Cases

Relevant market definition is central to most areas of antitrust law and is a particularly important component of every merger analysis. The central question in most antitrust cases is deceptively simple: Does the challenged conduct or transaction unreasonably reduce competition?\textsuperscript{209} But before answering that question, antitrust courts first require plaintiffs to define and prove a "relevant market"; that is, an "area of effective competition."\textsuperscript{210} The purpose of the relevant market determination is to draw a boundary "between those products and services that compete with each other to some substantial degree and those that do not."\textsuperscript{211} With the increase in HSR thresholds, there are countless additional cognizable relevant markets nationwide in which potentially problematic transactions can take place without premerger government review.

Relevant markets in antitrust cases consist of two components: (1) a relevant product market, and (2) a relevant geographic market.\textsuperscript{212} The relevant product market is defined as the set of products or services that legitimately compete with one another.\textsuperscript{213} The relevant geographic market is the geographic area in which that competition takes place.\textsuperscript{214}

Relevant market definition is inherently fact-specific. It is also broadly subject to the laws of common sense. For example, although it is possible to assert a relevant product market consisting of "retail purchases of all new and used automobiles," it is difficult to envision a brand new Mercedes SLK truly competing with a 1987 Yugo for retail car shoppers' dollars in the real world. Whether a 1998 Lexus or a new Toyota
Camry competes with the new Mercedes is a closer question—the kind of question typically the subject of intense debate and expert analysis in antitrust cases.²¹⁵ Relevant market definition is important to most antitrust cases, but it is absolutely central to antitrust merger investigations. A merger is illegal only if it "may tend substantially to lessen competition" in some relevant market.²¹⁶ Accordingly, the Merger Guidelines devote substantial space to establishing a framework for relevant market definition.²¹⁷

a. Product Market Definition Under the Guidelines

Under the Guidelines approach, the basic relevant product market inquiry is essentially a thought experiment. Starting with the smallest potential relevant product market, the investigator must determine whether a hypothetical monopolist controlling one hundred percent of the production of that particular product would be able to raise price profitably by a small but significant amount.²¹⁸ In the jargon of antitrust, this is known as a "SSNIP" test, because it asks whether the hypothetical monopolist would find it profitable to engage in a "small but significant and nontransitory increase in price."²¹⁹ If the investigator concludes that a SSNIP for the first hypothetical product market would be unprofitable because customers would substitute away to other products, then those products are added into the relevant product market and the thought experiment repeated until the hypothetical monopolist's SSNIP would be profitable. Many courts have adopted the Merger Guidelines' SSNIP test for relevant product market definition in both merger and non-merger antitrust cases.²²⁰

²¹⁵. The 1992 Horizontal Merger Guidelines now provide the de facto standard for relevant market determinations in all types of antitrust cases. 1992 HORIZONTAL MERGER GUIDELINES, supra note 83, § 1.0. In the context of product market definition: "The Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a 'small but significant and nontransitory' increase in price." Id. § 1.11.


²¹⁷. See 1992 HORIZONTAL MERGER GUIDELINES, supra note 83, §§ 1.0-1.5 (setting out framework for "relevant market" by comprehensively defining product market, geographic market, identifying firms participating in relevant market, market share calculation, and market concentration calculation).

²¹⁸. There is no "magic percentage" price increase that qualifies as "small but significant" for purposes of the SSNIP test. The most recent version of the Guidelines note that "what constitutes a 'small but significant and nontransitory' increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent." 1992 HORIZONTAL MERGER GUIDELINES, supra note 83, § 1.11. In much of the merger literature, price increases of five percent and ten percent are commonly suggested as appropriate SSNIPs. See, e.g., Timothy J. Brennan, "Vertical Market Power" as Oxymoron: Horizontal Approaches to Vertical Antitrust, 12 GEO. MASON L. REV. 895, 915 n.52 (2004) (stating that SSNIPs are "often taken to be" 5% to 10% over a year).

²¹⁹. 1992 HORIZONTAL MERGER GUIDELINES, supra note 83, § 1.11 (emphasis added).

²²⁰. Although the SSNIP analysis is essentially a thought experiment, the inquiry is typically quite rigorous. Economists and econometricians (quantitative economists focusing upon statistical analysis of data) on both sides of an investigation or dispute develop sophisticated models for the sole purpose of helping to
b. Geographic Market Definition Under the Guidelines

Relevant geographic markets are defined the same way, except that the operative question is "where" rather than "what." Many products are sold in national or even worldwide markets; in fact, many government merger challenges focus on transactions in which the United States or the world is the relevant geographic market. But not all challenged restraints fit the nationwide mold.221 Even in today's global society, many products compete in local or regional markets.

For example, a heart attack patient in Milwaukee may seek emergency medical care in a nearby suburb, but is unlikely to seek such care just eighty miles away in Chicago. And even in the age of electronic commerce, there remain countless other goods and services for which the area of effective competition is relatively limited.222

The Merger Guidelines apply the SSNIP test to geographic determinations as well. To define a relevant geographic market, the Guidelines require investigators to draw the smallest possible geographic market that would profitably sustain a hypothetical monopolist's SSNIP without losing too many customers to suppliers outside the proposed market.223 If a SSNIP would not be profitable because customers would defect to other areas, those areas must be included in the putative relevant geographic market, the test repeated, and the geographic market expanded until a profitable SSNIP would be possible.224

The only operative question in most antitrust conduct cases is whether the challenged conduct or transaction unreasonably restrains (or threatens to restrain) trade within the properly defined relevant market. In the context of merger claims, the threshold is somewhat lower—the court must ultimately determine whether a challenged transaction may tend "substantially to lessen competition" within the relevant market.225 Once an investigator has defined the relevant market, the absolute

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221. Even certain apparently national mergers (e.g., a merger of national-scope oil companies) ultimately may be analyzed for their effects upon local markets. In the oil example, the government often focuses on localities where the merging parties enjoy particularly strong market presence. See, e.g., Press Release, Fed. Trade Comm'n., Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets (Nov. 30, 1999) (detailing gas station divestitures in Exxon/Mobil merger).

222. There exist many goods and services for which purchasers are unwilling or unable to travel long distances to purchase, and for which out-of-area supply is not a viable option. The 1992 Horizontal Merger Guidelines describe the inquiry as follows:

[T]he Agency will delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere.


223. Id.

224. Id.

impact of a merger is irrelevant. Even if a merger or acquisition threatens to limit competition only within a financially small and geographically circumscribed local market, it still violates the statute.226

2. Why the Increased Filing Thresholds Encourage Private Claims

Many transactions valued below even the old $15 million reporting threshold conceivably could have violated section 7.227 Thus, there existed even before 2001 a theoretical category of potentially objectionable mergers that would not have been subject to premerger filings, and would have been unlikely to draw government attention before completion. But by 2001, the $15 million threshold for premerger review was very low in real terms, and the economic incentives for private suit in a sub-$15 million relevant market likely would not have been sufficient to draw much interest from potential plaintiffs.228

The increased thresholds change that equation. There are now countless cognizable relevant markets in which a potentially objectionable transaction would not be subject to federal premerger filings, but where the damages and interests at stake are likely to generate sufficient incentives to file private suits. With annual inflation adjustments keeping the filing thresholds constant in real terms, the number of cognizable relevant markets below the thresholds should also remain relatively constant over time.

present a weak prima facie case, the court ultimately found that defendant provided ample evidence to determine the central question of whether the transaction will substantially lessen competition); United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (D.C. Cir. 1990) (focusing on evidence of market concentration and anticompetitive activities in determining whether a transaction substantially lessens competition). Even in postcompletion challenges, the court should analyze whether the transaction was likely to reduce competition at the time of completion. See generally AREEDA & HOVENKAMP, supra note 1, ¶ 1205 (arguing that continually reexamining mergers based on postcompletion competitiveness is unfair because, among other factors, it encourages parties to delay litigation in hopes that subsequent developments make the merger seem better or worse, and it inhibits a legally merged firm from establishing post-merger organization and effectively conducting business decisions out of “fear of subjecting its once lawful creation to challenge”). Although market performance data can be relevant to this inquiry, it remains at root a prospective question.


227. Consider a $500 thousand merger of the Floyd’s Barber Shop in Mayberry, North Carolina with his one and only crosstown rival. If the next closest barber shop is 20 miles away down a treacherous mountain highway, that merger could tend substantially to lessen competition for barber services in the Mayberry, North Carolina market.

228. The threat of entry is another possible explanation for the reluctance to bring private merger challenges in potential cases falling below the old thresholds. Absent significant regulatory barriers, truly anticompetitive transactions falling below the old filing thresholds are more likely to be subject to entry that would be “timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.” 1992 HORIZONTAL MERGER GUIDELINES, supra note 83, § 3.0. An otherwise anticompetitive transaction in a market subject to easy entry is unlikely to be found anticompetitive in a postmerger challenge absent significant evidence of actual anticompetitive behavior. Even if potential plaintiffs were not deterred by the application of entry analysis per se, it is likely that actual or potential entry substantially mitigated the anticompetitive effects of otherwise objectionable small mergers.
Potential private plaintiffs now have incentives to file claims that they did not have before 2001. Fifty-three million dollars is more than three times greater than $15 million. While it may be no more likely now than it was in 2000 that private plaintiffs will challenge transactions involving $15 million or less, a $30 million acquisition or a $50 million transaction offers much more in potential damages than a $14 million acquisition. Also, the increased thresholds will mean that many more publicly announced and potentially anticompetitive transactions will not be subject to mandatory premerger review.

Recent government merger review statistics support the theory that higher premerger filing thresholds will lead to more private claims. In their most recent HSR report to Congress, the DOJ and the FTC included their traditional compendium of annual merger review statistics. As noted above, the absolute number of transactions reviewed from year to year decreased substantially after 2000, the last full year under the old $15 million thresholds. By fiscal year 2002, the first full year under the thresholds, reported transactions had fallen to 1187, nearly eighty percent below their high of 4926 in 2000.

But far more interesting are the data relating to the number of “Second Requests” issued by the government from year to year. In the seven years leading up to the threshold changes, the antitrust agencies issued Second Requests in connection with between 2.0% and 3.8% of reported transactions on an annual basis—between 73 and 125 Second Requests each year. In the three years during and after the phase-in of the revised thresholds, the agencies issued Second Requests in connection with 3.1%, 4.2%, and 3.6% of reported transactions for fiscal years 2001, 2002, and 2003, respectively.

Comparing the last three years under the old thresholds to the first three years under the new thresholds, there is some increase in the percentage of reported mergers subject to intense scrutiny by the agencies. The agencies issued Second Requests for 2.7% of reported transactions in 1998, 2.6% in 1999, and 2.0% in 2000. After the threshold changes, the number of Second Requests expressed as a percentage of all reported transactions rose somewhat, to levels more in keeping with the percentages from 1994-1997. But even though the percentage of transactions subject to a Second Request doubled from 2.1% in 2000 to 4.2% in 2002, the number of overall filings fell by almost 80% in that same time period.

230. See id. (showing “Transactions Reported” dropping from 4296 in 2000 down to 1454 in 2004).
231. Id.
232. Id.; Draft PNO Data, supra note 207.
234. Id.
235. Id.
236. See id. (showing post-threshold percentages between 2.1%-4.3% and 1994-1997 percentages between 3.5%-3.8%).
237. See id. (showing transactions subject to Second Request dropping from 4749 in 2000 down to 1142 in 2002, roughly a seventy percent decline). Draft data from the government tells essentially the same story for 2003, 2004, and the first half of 2005. Draft PNO Data, supra note 207. In 2003, there were 968 merger filings, and 35 second requests (3.6%). In 2004, there were 1377 and 35 (2.5%). Id. In the first half of
Because the issuance of a Second Request is a reasonable proxy for the conclusion that a merger may raise significant competitive risks,\textsuperscript{238} this data suggests that additional private enforcement may be both necessary and inevitable. The threshold increases dictate that the federal agencies now leave uninvestigated many transactions they previously would have considered worthy of substantial attention. These statistics strongly suggest that at least some of the transactions subjected to intense scrutiny of a Second Request before the threshold increase were transactions that would no longer be subject to premerger filing requirements under the revised thresholds.

This is also intuitively obvious from the absolute numerical data, which demonstrate that the threshold increase was largely practical in nature and did not represent any conclusion on the part of Congress or the agencies that smaller mergers were inherently legal under section 7. If only the larger mergers were truly competitively significant, we would expect the absolute number of Second Requests issued to have remained relatively constant even as the thresholds rose. Instead, the number of Second Requests fell precipitously, from ninety-eight in 2000 to forty-nine in 2002.\textsuperscript{239} Even though there was a substantial decrease in overall merger activity between 2000 and 2002, it was not an eighty percent decrease.\textsuperscript{240} Some of the decrease in Second Requests must have been the result of competitively significant transactions slipping through the cracks in the absence of a premerger filing requirement.\textsuperscript{241}

Perhaps government enforcement will pick up some of the transactions its revised premerger thresholds have left on the table. Both the DOJ and the FTC have indicated recently a renewed commitment to pursuing postmerger challenges, when appropriate.\textsuperscript{242} But federal postmerger enforcement activity is likely to remain the

\textsuperscript{238} See also House Subcommittee's Analysis of Federal Enforcement: Federal Merger Enforcement (1979-1987), 54 Antitrust & Trade Reg. Rep. (BNA) No. 1357, at 476, 476-78 (March 17, 1988) (showing that from 1979-1987, 665 transactions triggered a Second Request, and 132 of those, or twenty percent, resulted in Enforcement Actions, with an additional 41 transactions, or six percent, voluntarily abandoned after FTC Second Requests).

\textsuperscript{239} FTC/DOJ ANN. REP. TO CONG. app. A (2003).

\textsuperscript{240} Although it is not an "apples-to-apples" comparison, FactSet MergerStat reported 9566 overall transactions in 2000, 8290 in 2001 (-13% year-on-year), 7303 in 2002 (-12%), 7983 in 2003 (+9%), and 9783 in 2004 (+23%). Comparing 2002 with 2000, MergerStat reports only a 24% decrease in overall merger activity (7303/9566). FACTSET MERGERSTAT, LLC, MERGERSTAT REVIEW 2005 196-97 (2005).

\textsuperscript{241} Data from earlier FTC/DOJ Annual Reports bear this out. For example, in FY 2000, the last full year under the $15 million filing thresholds, the agencies issued a total of ninety-eight Second Requests. Twenty-two of those were issued in connection with transactions valued at less than $50 million. FTC/DOJ ANN. REP. TO CONG. ex. A (2000). Of those twenty-two, nine were issued in connection with transactions valued at less than $25 million. Id. In FY 1999, 17 of 113 Second Requests were for transactions valued at less than $50 million; in FY 1998 and FY 1997, the proportions were 27/125, and 27/122, respectively. FTC/DOJ ANN. REP. TO CONG. ex. A (1999).

exception rather than the rule. The data suggest that before the threshold increases the government issued Second Requests and even obtained relief in connection with numerous now-unreportable transactions.\textsuperscript{243} It is reasonable to expect that this new low-hanging fruit will occasion an increase in private enforcement activity in the future.

The increase in filing thresholds also means that more private merger challenges will take place well after mergers are completed. In many cases, potential plaintiffs will not learn of the transaction until near or after closing. Moreover, private cases will be more attractive to many private parties if they carry with them some prospect of a significant damages recovery. For all their policy advantages, premerger suits do not offer private plaintiffs any opportunity for significant damages awards. But postmerger challenges do. Several years of even a five percent merger-induced price increase in a $30 to $15 million market would translate to a substantial damages award.\textsuperscript{244}

Finally, it is important to note the deterrent effects of the old thresholds. Reportability of a potential transaction under HSR must always be considered in deciding whether to pursue a borderline or genuinely anticompetitive merger. Because non-reportable transactions have a substantially lower likelihood of being challenged, and because it remains easier to beg forgiveness than ask permission,\textsuperscript{245} the increase in HSR thresholds has undoubtedly provided some additional incentive for parties to engage in larger competitively questionable transactions.

3. Recent Government Defeats

There is at least one reason to believe the government might not pick up the slack associated with the narrower net it cast in the increased threshold world. Over the past decade, federal enforcers have lost more fully litigated merger challenges than they have won.\textsuperscript{246}

\textsuperscript{243} See generally John Harkrider, Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions, 2005 COLUM. BUS. L. REV. 317, 320-22 (2005) (stating that the Government obtains relief in over half of all “significant” merger investigations, and the FTC sets a target that between sixty and eighty percent of all Second Requests should result in enforcement action).

\textsuperscript{244} It is difficult to generate a “standard” or “average” ratio between the value of a transaction and the annual sales affected by that transaction. This is in large part because different types of businesses have very different equity-to-sales profiles. Still, it is not hard to imagine a $50 million merger involving approximately that much in annual market sales. If a merger increases prices by five percent in a $50 million annual market for three years before suit, the total damages suffered by all victims would be approximately $7.5 million. Although treble damages are inappropriate in the context of most merger cases (see below), trebling remains the law of the land as of this writing, so this aggregate claim would be worth $22.5 million under the current law. If a significant percentage of those plaintiffs’ claims could be aggregated, this suit could easily be worthwhile to those plaintiffs and their attorneys.

\textsuperscript{245} See Molly S. Boast, Acting Dir., Fed. Trade Comm’n, Bureau of Competition, Report from the Bureau of Competition Before the American Bar Association Antitrust Section, Spring Meeting 2001 (March 29, 2001) (transcript available at http://www.ftc.gov/speeches/other/boastmollys.htm) (noting both difficulties in “investigating and challenging nonreportable transactions” and the FTC’s limited resources).

\textsuperscript{246} The extent of the agencies’ “losses” should not be overstated. The agencies continue to enjoy substantial success in obtaining both structural relief and abandonment without formal litigation. Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, 2005 ABA Annual Meeting: Reflections on My First Year 7-8
According to Westlaw, since March 1995, the Federal Trade Commission and the Antitrust Division of the Department of Justice together have won eight litigated merger challenges. In that same time, they have lost nine. The Department of Justice has been particularly unsuccessful in court of late, losing three of four challenges since 2000, and obtaining only one injunction. In 2004, the FTC and the DOJ each lost major merger challenges at the district court level and chose not to appeal. In both cases, the district court held that the agency had failed to prove a

247. See FTC v. H.J. Heinz Co., 246 F.3d 708, 727 (D.C. Cir. 2001) (finding merger of second and third largest baby food manufacturers would be anticompetitive); FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 53 (D.D.C. 2002) (holding that effects of glassware company’s merger with competitor could have substantially lessened competition); FTC v. Swedish Match, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) (granting injunction to stop acquisition of competitor’s tobacco business upon finding a probability that it would substantially lessen competition); United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000) (prohibiting a joint venture between turbine pump manufacturers due to a reasonable probability that it would substantially impair competition); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 66-67 (D.D.C. 1998) (enjoining merger of wholesale prescription drug manufacturers and finding a probability of substantially lessening competition); Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180, 1184 (8th Cir. 1998) (disallowing an acquisition that would substantially lessen competition in local newspaper business in northwest Arkansas); FTC v. Staples, Inc., 970 F. Supp. 1066, 1093 (D.D.C. 1997) (finding probability that merger between office products superstores will substantially lessen competition). For the purposes of this Article, “winning” or “losing” a merger consists of winning or losing in a preliminary injunction proceeding. As discussed below, some cases are litigated through to the Court of Appeals, while others reach final disposition at the district court level.


cognizable relevant market in which the proposed merger was likely to lessen competition.251

Both the DOJ and the FTC do the great majority of their merger work extrajudicially through informal, intra-agency adversarial proceedings. Fully litigated government merger cases remain rare. When a federal agency sues to stop a merger, or even indicates its intention to sue, most parties abandon their transaction without further proceedings.252 Unlike most merger proponents and opponents, the government is a constant player in the merger game. It is in the government’s long-term best interest to maximize its premerger leverage, and losing cases doesn’t help. The government will continue to bring the major merger challenges it considers important, regardless of whether its theory of liability is airtight. But the government’s recent losing trend may well limit its interest in pursuing marginal cases. Those cases will increasingly fall to private plaintiffs.

Private parties do not face the government’s incentive structure. Most private parties lack the ability to interpose themselves between two merging parties without first filing suit. Therefore, regardless of the timing of the claim, private merger challenges inevitably take the form of a lawsuit. Unlike the federal agencies, private parties will find it extremely difficult to extract concessions or obtain relief without filing suit. Furthermore, the most probable private plaintiffs are not likely to be repeat players in merger challenge law at all—much less to have consistent and predictable policy preferences regarding outcomes. The private merger plaintiff’s decision calculus is the same as a private plaintiff’s calculus in virtually every other type of litigation: Is this lawsuit, standing alone, worth it?

Accordingly, the government agencies’ recent court failures are likely to promote the filing of private merger challenges in at least two ways. First, because the agencies are primarily interested in maximizing their success in the premerger context, the government may file fewer suits, retreating into doctrinally safe areas for those suits it does file. This will in turn leave more marginal suits available to private plaintiffs.

The government’s unimpressive on-field performance may also make government agencies reluctant to challenge completed mergers, at least on the margins. Once a merger has been completed, the government’s substantial HSR powers disappear.253 In the context of completed transactions, government enforcers are hardly more powerful than private litigants. Like private plaintiffs, the government can negotiate with the potential defendants before litigating, but they have virtually no power to force the issue without filing suit. Because lawsuits have recently broken badly for the government, and because a lawsuit breaking badly has precedential effects on the many

252. See FTC/DOJ ANN. REP. TO CONG. 8, 11 (2004) (explaining that in FY2004, FTC/DOJ challenged twenty-four transactions and in all but two cases, which were litigated in district court, the parties either abandoned the merger or voluntarily restructured it to alleviate competitive concerns).
253. See id. at 3 (stating that the primary purpose of the Hart-Scott-Rodino Act, made very clear by legislative history, is to give antitrust enforcement agencies tools, such as reporting requirements and waiting periods to allow for the investigation, review, and challenge of mergers before they have been consummated).
other mergers the agencies review, the government may think twice before pursuing completed transactions, notwithstanding their recent rhetoric.254

This is not idle speculation. In their two most recent premerger defeats, the agencies chose not to pursue appeals.255 However they may try to spin it in public, government decisions not to appeal must be based in some part upon the realization that a negative court of appeals opinion has much more impact than a negative district court opinion. Many section 7 determinations are heavily fact-intensive. Given the deference that appeals courts must pay to lower courts' factual determinations,256 and given the very real chance that the government might lose again in a court with substantially more precedential influence, discretion is often the better part of valor. This is especially true because the majority of the agencies' merger control work is done outside the courts.257

Therefore, there is ample reason to believe that government losses in merger cases will ultimately produce more rather than fewer private suits.

4. Increase in State Enforcement Activity

In the last ten years, state enforcement of the federal antitrust laws, and in particular of section 7 of the Clayton Act, has increased substantially. Acting through the National Association of Attorneys General, the states have adopted their own Merger Guidelines258 and have established effective protocols for cooperation on merger investigations.259 Several states have demonstrated substantial independence from the federal government in the area of merger review, seeking additional relief in government challenges and occasionally filing suit even when the federal government has decided not to challenge a particular transaction at all.260

State independence is likely to increase even further over the next several years, and, with it, state enforcement of section 7. Although some of the "opportunistic


255. See supra note 250 and accompanying text for a discussion of Oracle Corp. and Arch Coal, Inc., two cases which the agencies lost challenges but chose not to appeal.

256. See H.J. Heinz Co., 246 F.3d at 713 (stating that the appeals court will set aside the court's factual findings only if they are "clearly erroneous").

257. The FTC and DOJ must continue to demonstrate their willingness to pursue court challenges, or merging parties will increasingly run roughshod over government enforcers. Nothing in this Article is meant to suggest that the agencies' recent losses will eliminate their desire to file suit—any effect will be felt on the margins.


260. See, e.g., Am. Stores, 495 U.S. at 295-96 (granting California's complaint, which sought injunctive relief).
behavior" concerns discussed below\textsuperscript{261} are not as applicable to the states as they are to other private parties, the recent pattern of state enforcement suggests that the states are not wholly altruistic in their analysis of allegedly anticompetitive transactions. Instead, at least some state enforcement activity seems to be driven by internal and external politics, and the seriousness with which states pursue claims may correlate strongly with their perception of the political value of the investigation.\textsuperscript{262}

5. The Last Piece of the Puzzle? Cracks in Illinois Brick's Mortar

Most recent private merger challenges have been filed by state governments or by a target or direct competitor of the merging parties. By contrast, antimerger lawsuits filed by consumers have been comparatively rare.\textsuperscript{263} There are a number of reasons for this disparity. It is at least partially explained by consumers' relatively diffuse incentives to file suit, especially as compared to the incentives (whether noble, opportunistic, or both) faced by a competitor, target, or a state antitrust enforcer. In the typical merger case, no one consumer's actual or potential damages are likely to be large enough to justify a lawsuit. Although mechanisms do exist for aggregating claims (class actions, mass actions, etc.),\textsuperscript{264} it is more difficult to facilitate collective action than it is for a single, highly motivated entity to file a claim.

More important by far, though, are the limitations the Supreme Court imposed in \textit{Illinois Brick Co. v. United States}. Subject to the limitations of the antitrust injury

\textsuperscript{261} See \textit{infra} Part III for discussion of how the current private merger challenge framework provides incentives for plaintiffs that encourage opportunistic behavior.

\textsuperscript{262} See, e.g., \textit{Oracle Corp.}, 331 F. Supp. 2d at 1175-76 (detailing Oracle/PeopleSoft merger challenge in which State pursued more intense investigations when State itself was affected by merger after recently purchasing PeopleSoft software).

\textsuperscript{263} See ABA MONOGRAPH No. 16, \textit{supra} note 83, at 118-26 (survey stating that of the 144 private merger challenges filed from 1977-1988, 50 were filed by third-party competitors, 39 by hostile takeover targets, 22 by customers (including terminated distributors), 11 by disappointed bidders, 5 by employees or suppliers, and 17 by other types of plaintiffs). \textit{But see} Midwestern Mach., Inc. v. Nw. Airlines, Inc., 167 F.3d 439, 430-31 (8th Cir. 1999) (\textit{Midwestern Mach. I}) (postcompletion class action suit brought by frequent flyers on Northwest Airlines, challenging merger with Republic Airlines), \textit{rev'd}, 392 F.3d 265 (8th Cir. 2004) (\textit{Midwestern Mach. II}) (dismissing frequent flyers' class action after statute of limitations had run); \textit{In re EVIC Class Action Litigation} v. United Parcel Serv., Inc., No. M-21-84 (RMB), 2002 WL 1766554, at *1-2 (S.D.N.Y. July 21, 2002) (denying motion to dismiss in class action section 7 claim filed by UPS customers); Panache Broad. of Pa., Inc. v. Richardson Elec., Inc., No. 90 C 6400, 1999 WL 342392, at *4 (N.D. Ill. May 14, 1999) (certifying class of purchasers for liability determination on Sherman Act and section 7 claims); KK Motors, Inc. v. Brunswick Corp., No. CIV. 98-2307, 1999 WL 246808, at *1 (D. Minn. Feb 23, 1999) (staying class certification in boat manufacturer class action section 7 case against supplier of marine engines pending Eight Circuit's resolution of related case).

\textsuperscript{264} See \textit{supra} note 263 for a list of recent consumer class actions brought under section 7. See Brodley, \textit{Antitrust Standing}, \textit{supra} note 114, at 36-38 (arguing that customers are ineffective plaintiffs in merger injunction cases because a lack of monetary damages serves as a low incentive to invest heavily in the litigation and customers lack detailed knowledge of relevant markets relative to business competitors). Brodley's characterization of customers as ineffective plaintiffs seems to depend implicitly upon Brodley's belief that obtaining a premerger injunction is the only viable metric by which to judge the efficacy of different plaintiff classes. \textit{See id.} at 22, 36-38 (stating that injunctions are the "standard remedy in merger enforcement" cases because postmerger damages suits provide little deterrence, and arguing that plaintiffs lack the resources, financial incentives, and detailed knowledge to effectively prosecute an injunctive merger challenge). In addition, his trends from the first half of the 1990s seem to be inconsistent with the trends from 1995 forward.
doctrine, it has long been the general rule that private plaintiffs can pursue antitrust damages actions when they have suffered injury "by reason of anything forbidden in the antitrust laws."265 And private plaintiffs can seek injunctive relief "against threatened loss or damage by violation of the antitrust laws."266 Read literally, these provisions would seem to authorize suit by an ultimate consumer any time a transaction produces or threatens to produce antitrust injury. In fact, given the "antitrust injury" hurdles competitors must clear before bringing suit in many jurisdictions (i.e., demonstrating a likelihood of exclusionary behavior by the merged business), the consumer suit would appear to be the preferred vehicle for non-government private enforcement of section 7. But Illinois Brick bars many of those claims.

The Supreme Court issued Illinois Brick as a complement to its earlier Hanover Shoe, Inc. v. United Shoe Machinery Corp.267 decision, in which it had held that alleged antitrust violators could not defeat direct purchaser suits by arguing that the direct purchasers passed along the full amounts of any overcharges to subsequent purchasers.268 From the Supreme Court’s perspective, Illinois Brick’s converse holding—that if the “pass-on” theory could not be used defensively by violators, neither should it be used offensively by indirect purchasers—followed naturally and necessarily from Hanover Shoe.269 The Supreme Court reasoned that allowing indirect purchaser suits could create significant opportunity for double recovery, and that it could make antitrust damages actions unnecessarily complex.270

Although Illinois Brick is not without its supporters,271 it has also been subject to substantial criticism in the nearly thirty years since it was announced.272 More importantly, many states with antitrust laws otherwise modeled after the federal antitrust statutes have not followed Illinois Brick.273 In fact, a number of state legislatures have passed “Illinois Brick repealers,” statutes expressly authorizing indirect purchaser damages suits.274 Other states have rejected Illinois Brick judicially.275 In many jurisdictions, the indirect purchaser suit has become a fixture of

268. Hanover Shoe, 392 U.S. at 494.
270. Id. at 730-33. The Supreme Court also notes that indirect purchasers do not necessarily make good plaintiffs because their incentives to sue are relatively diffuse compared to the incentives of direct purchasers. Id. at 737-38. Regardless of whether this is factually correct, it is also something of a self-fulfilling prophecy.
271. See, e.g., Posner & Landes, supra note 171, at 604 (stating that allowing “indirect purchasers to sue would probably retard rather than advance antitrust enforcement”).
272. Id. (noting numerous legislative attempts to overrule the decision).
274. See ALD 5th, supra note 76, at 811-12 and accompanying footnotes citing to nineteen state statutes and the District of Columbia’s statute authorizing an indirect purchaser the opportunity to recover damages for state antitrust violations.
275. See, e.g., Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99, 102 (Ariz. 2003) (refusing to read the federal guidance clause as a manifestation of “legislative intent to rigidly follow federal precedent on every issue of antitrust law”); Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002) (noting the state’s
state antitrust law, and most of the parade of horribles the Supreme Court envisioned in *Illinois Brick* has failed to materialize.\footnote{276}

Unfortunately, this patchwork application of *Illinois Brick* is far from costless. Although the indirect purchaser suits seem to work relatively well within individual states, commentators on both sides of the debate concur that the current "checkerboard of state laws" produces "costly and inefficient" litigation.\footnote{277} They also generally agree that the question of whether indirect purchasers should be allowed to pursue antitrust damages claims should have a single answer across all U.S. jurisdictions.\footnote{278}

In 2002, Congress created the Antitrust Modernization Commission, a bipartisan group tasked with analyzing the antitrust laws and making recommendations to Congress regarding potential improvements.\footnote{279} In a December 21, 2004 memorandum, the Commission's "Civil Procedure and Remedies Working Group" recommended that the full Commission study five major civil procedure and remedies issues.\footnote{280} Possible statutory repeal of *Illinois Brick* topped the list.\footnote{281} According to the Working Group, the problems inherent in the "checkerboard" of state and federal indirect purchaser law demonstrate the need for uniformity.\footnote{282} Given the general state of play regarding indirect purchaser actions, it seems most likely that the Commission ultimately will recommend that *Illinois Brick* be repealed or modified to allow indirect purchasers some recovery rights.\footnote{283} The other primary alternative—federal preemption of inconsistent state indirect purchaser statutes—does not appear to be in the cards for now.\footnote{284}

harmonization statute mandates that the provision "shall not be made in such a way as to constitute a delegation of state authority to the federal government"); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 686 (N.C. Ct. App. 1996) (noting that the court is not required to construe the state's statute in harmony with the limitations set forth in *Illinois Brick*).

\footnote{276. See Michael S. Jacobs, *Lessons from the Pharmaceutical Antitrust Litigation: Indirect Purchasers, Antitrust Standing, and Antitrust Federalism*, 42 ST. LOUIS U. L.J. 59, 86 (1998) (noting that federal courts have ignored the claims of indirect purchasers, but that state courts have become "increasingly hospitable" to their claims); Posner, *Federalism and Enforcement*, supra note 171, at 14 (noting an average of less than two antitrust parens patriae suits per state have been brought over a twenty-seven year period).}


\footnote{278. See Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940 (2001) (insisting that uniformity requires states to be stripped of their authority to bring antitrust suits).}


\footnote{280. Civil Procedure and Remedies Working Group Memo, *supra* note 277, at 2.}

\footnote{281. *Id.*

\footnote{282. *Id.* at 3.}

\footnote{283. Admittedly, the other possible alternative is that the Commission recommends full federal preemption of all state indirect purchaser laws, applying *Illinois Brick* across the board. While this solution does not appear to be necessary or desirable, the Commission's recommendation decision is likely to be binary—repeal *Illinois Brick* across the board or preempt all state indirect purchaser actions statutorily. *Id.* at 4.}

\footnote{284. Official comments submitted to the Commission were almost uniformly critical of the *Illinois Brick* rule, albeit to varying degrees and with varying degrees of objectivity. These comments can be accessed at www.amc.gov/public_studies-fr28902/remedies.htm.}
It is impossible to handicap whether or when Congress will repeal *Illinois Brick*. Congress has a long history of ignoring expert advice regarding reformation of the antitrust laws, and the Modernization Commission’s final report to Congress is not due until April 2007. That said, the vitality and success of state indirect purchaser claims, the general tenor of the current academic debate, and the bipartisan recognition that the current patchwork system is broken together suggest that repeal ultimately is the most likely outcome.

If *Illinois Brick* is ultimately repealed, the final significant hurdle to private merger challenges will be gone. End-user consumer class actions will be authorized as to products sold through multiple levels of distribution. Class action plaintiffs’ lawyers will be able to file consumer suits challenging a whole host of potential and completed transactions on behalf of plaintiffs to whom such suits are currently unavailable, or at least unattractive. Moreover, indirect purchasers do not face the same disincentives to sue that many direct purchasers do. End-users cannot pass through overcharges. They do not have longstanding commercial relationships with potential defendants and they do not face retaliation from suppliers in the event of an unsuccessful (or even a successful) suit.

Given the commercial realities facing the prototypical direct purchaser, it is small wonder that they are often reluctant to enter the fray, even in conduct cases. How much more reluctant would they be to challenge an anticompetitive merger involving one or more of their suppliers? Extending recovery rights down the distribution chain would allow the law to bypass reluctant direct purchasers and would almost certainly produce a dramatic increase in private enforcement activity. By authorizing suit at the level most likely to feel the anticompetitive effects of an illegal transaction, repeal of *Illinois Brick* would create significant incentives for private claims.

If Congress fails to repeal *Illinois Brick*, the coming wave of private merger challenges may be delayed somewhat, but it will not be derailed. Over half of all states have rejected *Illinois Brick* in connection with their state antitrust laws, many of which explicitly contain or have been interpreted to include a “Baby section 7” analogous to section 7 of the Clayton Act. If indirect purchasers continue to be denied a federal remedy for the injuries they suffer in connection with allegedly anticompetitive mergers, it is likely that they will increasingly take to the state courts in search of compensation.

Moreover, large classes of direct purchasers (typically end-users of products or services) whose ability to sue is not affected by *Illinois Brick* will still exist. These

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285. See U.S. DEP’T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 260-61 (1977) (recommending that Congress dramatically revise the Robinson-Patman Act, but this recommendation has been largely ignored).


287. Because *Illinois Brick* is founded upon concerns regarding the amount and apportionment of damages, courts have refused to apply its limitations to suits seeking only injunctive relief. See In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 400 (3d Cir. 2000) (stating the requirements for standing when seeking injunctive relief are simply: “(1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury”). But even with the availability of attorney’s fees, the injunctive relief suit may not be as attractive to indirect purchasers as a damages claim.

288. See ALD 5TH, supra note 76, at 811-12 & nn.61-3 for citations to each state’s statute.
customers can and do file private merger challenges and are likely to increase their litigation activity in the future. 289

In recent years, private antitrust enforcement under state law has increased substantially, much of that in the form of indirect purchaser suits supplemental to federal criminal or civil direct purchaser actions. This trend is likely to continue in the context of private merger challenges, especially in connection with transactions that are not subject to federal premerger review.

III. FLAWS IN THE LAW GOVERNING PRIVATE MERGER CHALLENGES

The stage is set for a private merger challenge revival. 290 Standing alone, the coming wave of private merger challenges is neither good nor bad. Private enforcement is vital to the functioning of the antitrust system, 291 for both mergers and conduct offenses. Moreover, to the extent increased premerger filing thresholds allow competitively significant mergers in smaller relevant markets to slip through the cracks, the judicial system needs additional private claims to fill the gaps.

But there are threats associated with increased private enforcement as well. Private rights of action are inherently risky in ways that government enforcement actions are not. In redesigning the optimal postmerger enforcement regime, it is absolutely critical that policymakers eliminate any aspect of the existing regime that is likely: (1) to encourage excessive inefficient opportunistic behavior on the part of private plaintiffs, or (2) to produce excess consumer welfare costs in the form of a return to atomism.

Two characteristics of the "current" legal regime are worthy of particular attention, primarily because they are not truly "current." Instead, these characteristics are anachronisms from the atomism era. As such, they create two separate opportunities for mischief. First, they tilt the playing field substantially in favor of private plaintiffs—something that arguably would have been consistent with the strong 1950s/60s norm against horizontal market concentration, but is inconsistent with current antitrust thinking. Second, they open the door to renewed hostilities between

289. See supra note 263 for a list of recent class action purchaser challenges.

290. It is difficult to determine whether there has been any significant increase in private merger challenges in the last several years, but the factors suggesting an increase is imminent do not necessarily suggest that it should already have happened. For example, although the premerger filing thresholds increased in 2001, there was a significant decrease in overall merger activity from late 2000 through 2003. See FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003, at 4-13, available at http://www.usdoj.gov/atr/public/201898.pdf (charting merger challenges for the relevant years). Because appropriate, private plaintiffs are likely to need a damages incentive before filing suit, it is too early to expect substantial private enforcement activity in connection with the recent increase in merger activity. Similarly, Illinois Brick repeal or modification is unlikely for at least two more years. In the parlance of the DOJ Antitrust Division’s merger review process, this Article proposes a “fix it first” remedy. See R. Hewitt Page, Acting Assistant Attorney Gen. Antitrust Div., U.S. Dept. of Justice, Speech before the Bar of the City of New York at the Milton Handler Annual Antitrust Review 11-13 (Dec. 10, 2002) (transcript available at http://www.usdoj.gov/atr/public/speeches/200868.pdf) (noting a fix-it first remedy allows parties to restructure an otherwise problematic transaction).

291. See AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 575 (7th Cir. 1999) (noting that Congress included this private right as a means of protecting competition); ABA MONOGRAPH No. 16, supra note 83, at 12-21.
the competing principles of economic liberty. Because the current equilibrium is close to optimal, the law should close these loopholes as quickly as possible.

There are two central problems with the current private merger challenge framework that encourage excessive opportunistic behavior and restart the shooting war between the competing components of the competition norm.

First, as currently structured, merger challenges allow private plaintiffs to impose disproportionate costs upon defendants. While this disproportionality arguably would support an atomistic competition policy aimed toward severely limiting merger activity, it is completely at odds with a regime in which mergers and acquisitions are presumptively legal. Given the unique structure of the private merger challenges, the costs private plaintiffs can impose upon merger defendants, and the current thinking regarding the value of merger activity, the law must mitigate plaintiffs' ability to impose excess costs.

Second, current law often authorizes private merger challenges long after the subject transaction has been completed. Although antitrust damages suits are technically subject to a four-year limitations period, still-valid (and still-cited) Supreme Court precedent allows plaintiffs to circumvent this restriction. Under one formulation of the standard, no violation of the Clayton Act occurs until the transaction "threatens to ripen into a prohibited effect," regardless of when the transaction was completed. In the case announcing the rule, the government challenged stock acquisitions over thirty years after the fact. Additionally, the Supreme Court has reached the same effective result from a different direction by applying a tort-style "accrual" standard to merger challenges. Under that standard, a private merger claim does not "accrue" (and the limitations period does not begin to run) until the private plaintiff claims to have suffered injury, regardless of when the transaction was completed. These rules may be well-suited to a regime in which atomistic competition is the explicit goal. But neither of these doctrines makes sense in today's promerger, efficiency-focused environment.

A. Imposition of Costs

Antitrust is expensive. Even meritless antitrust suits are staggeringly costly to defend. With complex, high volume discovery and bet-the-company importance the rule rather than the exception, seven-figure attorneys' fees are common in many antitrust cases, even in the context of a successful defense. With the prospect of

292. See infra Part III.A.1 for a discussion of defendants' inability to impose similar costs on plaintiffs.
293. See infra Part III.B for a discussion of the timing of merger challenges.
296. Id. at 590.
treble damages and "death penalty" equitable sanctions added in, the risks associated with antitrust litigation can be overwhelming.

1. Structural Impediments to an Equitable Cost Structure

Moreover, unlike many other types of antitrust litigation, most meritless merger challenges are not easily disposed of on motions to dismiss or at the summary judgment stage. Assuming a plaintiff has standing to bring a section 7 claim, virtually any merger challenge involving a significant transaction and a facially reasonable relevant market is destined to survive summary judgment. Whether a particular transaction "may tend substantially to lessen competition" is an inherently fact-specific inquiry. Accordingly, even if so inclined, courts may find it difficult to ply their traditional gatekeeper trade in the context of merger challenges and are often obligated to allow a full hearing on the merits.

But the substantial expenses associated with the defense of merger challenges are just part of the story. So too are the difficulties associated with disposing of merger litigation in its preliminary stages. Equally if not more important is the massive inherent disparity in costs between private plaintiffs and defendants in the typical merger case. In virtually every merger case, plaintiffs can and do impose significant costs upon defendants in the form of massive discovery requests, etc. Because merger defendants have little or no corresponding ability to impose substantial costs on private merger plaintiffs, the opportunistic incentives are skewed dramatically.

In many traditional commercial cases or tort lawsuits, and in some antitrust lawsuits, there is relative parity between plaintiffs and defendants with respect to the costs of litigation. Discovery flows both ways, and bidirectional debates as to liability, damages, counterclaims, and other matters permit defendants to impose costs upon plaintiffs in close proportion to the costs plaintiffs can impose upon defendants. In those cases, plaintiffs' ability and incentive to act opportunistically within the litigation is substantially limited by the defendant's ability to "do unto plaintiffs" as plaintiffs have done unto them.

By contrast, the typical merger case does not offer the defendant much opportunity to "push back" against plaintiffs. Whether the plaintiffs are competitors, targets, or consumers, the only relevant inquiry in a merger case is whether the

300. See supra Part II.B.1 for a discussion of the difficulty in determining exactly what constitutes "less competition."
301. This is really just the entropy principle writ legal. The filing of a lawsuit is analogous to the introduction of disorder into a system. It is far harder to clean up a mess than to make it in the first place.
303. Plaintiffs' participation in merger challenges is not costless. Expert testimony, analysis of discovery materials, etc. are not free. But these costs are usually but a fraction of the costs borne by defendants in a merger case.)
challenged transaction reduces competition—an issue largely divorced from the plaintiff's participation in the market at any level. Defendants can ultimately obtain limited discovery from plaintiffs (typically related to expert testimony and damages issues), but the costs associated with responding to defendants' requests are fairly limited, especially measured against defendants' costs in responding to the wide-ranging discovery in which merger plaintiffs invariably engage.\textsuperscript{304}

In fact, under the unique rules governing section 7, one popular defensive response to disproportionality—overwhelming plaintiffs with discovery materials—is unlikely to be particularly effective. Plaintiffs can and do impose massive discovery burdens on merger defendants, but plaintiffs' substantive claims are rarely dependent upon the "needle in a haystack" defendants have hidden among gigabytes of data. Instead, the discovery materials produced by defendants are often ancillary to the plaintiffs' economic analysis centerpiece.

The "final costs" to plaintiffs and defendants differ substantially on an expected value basis.\textsuperscript{305} In most merger challenges, there is little or no basis for a counterclaim and no way to increase plaintiffs' risks beyond the cost of the challenge itself. Moreover, the American Rule works only in one direction in antitrust cases—an award of attorneys' fees is mandatory if the plaintiff prevails, but defendants cannot recover their attorneys' fees if the plaintiffs are unsuccessful.\textsuperscript{306} Accordingly, plaintiffs' risks in nonfrivolous merger cases are typically limited to their costs of litigation, even if they lose.

A defendant stands to lose substantially more in the typical merger challenge. In addition to its own disproportionately high legal fees, a defendant may ultimately be

\textsuperscript{304} Even a premerger government investigation typically involves massive discovery obligations. See Fed. Trade Comm'n, Request for Additional Material and Documentary Material, at 5-11 (Model Request Form), available at http://www.ftc.gov/os/2004/04/040428modelrequest.pdf (last visited Apr. 9, 2006) (requiring target companies to divulge an enormous amount of information in an FTC investigation). A private postmerger suit is typically far more onerous.

\textsuperscript{305} In game theory economics, the term "expected value" has a precise meaning. Formally, it is the sum of the products of the different potential outcomes or payoffs and their respective anticipated marginal probabilities. DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 247-51 (1994). An economically rational actor should be indifferent between a guaranteed payment of its expected value and proceeding forward to the completion of the game. Id. (noting that most litigants prefer known costs to potentially greater unknown costs). For example, if a particular dispute has a 10% chance of resulting in a $1 million plaintiffs' verdict, a 70% chance of resulting in a $500 thousand plaintiffs' verdict, and a 20% chance of resulting in a defense verdict, the defendant's expected payout is ($1,000,000 x 0.10) + ($500,000 x 0.70) + ($0 x 0.20) = $450,000. Absent externalities or multiple iteration incentives, the defendant should be willing to pay up to its expected value of $4.5 thousand to resolve the case. That number could rise substantially if the costs of defense are factored in, although those costs are relevant only on a prospective basis—once incurred, they are economically irrelevant sunk costs. It is possible to craft a formal game theoretical model of the private merger challenge based upon a symmetric information variant of the "P'ng Settlement game." See Ivan Park-Liang P'ng, Strategic Behavior in Suit, Settlement & Trial, 14 BELL J. OF ECON. 539, 539-50 (1983) (outlining the basic variables influencing plaintiffs and defendants to either proceed with the suit or settle the matter); see also ERIC RASMUSEN, GAMES & INFORMATION: AN INTRODUCTION TO GAME THEORY 59-62 (3d ed. 2001) (applying the P'ng settlement game to show why it should be true that a defendant will settle for an amount up to the expected legal costs).

\textsuperscript{306} See, e.g., U.S. Football League, 887 F.2d at 409 (awarding over $5 million in legal fees to the plaintiffs).
responsible for plaintiffs’ legal fees and treble damages.307 Such a defendant may also ultimately face equitable sanctions up to and including divestiture of the acquired assets.308 If a judge or jury ultimately concludes that a merger violated section 7, the consequences to the defendant can be disastrous. It is incumbent upon defendants to calculate their exposure early and often in merger cases, and defendants may often prefer to bargain their way out of private merger suits by paying up to their perceived expected costs for a dismissal.309

2. Treble Damages Make No Sense in Merger Cases

Courts have reflexively interpreted section 7 of the Clayton Act to authorize treble damages awards for successful plaintiffs.310 This is the correct decision as a matter of statutory interpretation—section 4 of the Clayton Act explicitly authorizes treble damages for injuries suffered “by reason of anything forbidden in the antitrust laws.”311 But as a matter of sound policy, there is no modern justification for treble damage awards in the vast majority of private merger cases. Treble damages may still make sense in the context of cartel behavior, monopolization, and other conduct offenses.312 Those behaviors are still presumptively (and in some cases, per se) illegal, and the deterrence value of a treble damages remedy is substantial.

By contrast, the law now presumes that mergers and acquisitions are legal, even beneficial.313 Treble damages awards may have been acceptable as deterring conduct...
inconsistent with an atomism norm, but they make no sense now. Encouraging procompetitive transactions is more difficult in a world where parties crossing an ill-defined and distant line are subject to a multiple damages award. Moreover, none of the justifications traditionally offered in defense of antitrust treble damages—deterrence, punishment, compensation for undetected conduct—apply to merger transactions that are typically public and procompetitive.

Under current rules, the potential private merger plaintiff faces an unfairly attractive calculus, regardless of the merits of its potential claim. Even for most nonreportable transactions, the payoffs can be substantial—attorneys' fees plus treble damages that could easily run to millions of dollars in a typical case. When the downside to filing is low, even a low-probability case begins to look attractive. Moreover, the availability of equitable relief up to and including the "favored" remedy of divestiture gives plaintiffs additional bargaining power. For that reason, the hostage value of a private suit may be significant, even if the plaintiff has questionable interest in pursuing its claims through trial.

B. The Timing of Merger Challenges

The Clayton Act purports to impose a four-year limitations period on damages actions brought under the antitrust laws. For suits seeking injunctive relief, the four-year statutory damages limitation period likely defines the outer boundaries for an equitable laches period in connection with private section 7 suits. Notwithstanding these limitations, the decisional law governing the timing of private merger challenges has preserved and perpetuated two lines of cases.

### Footnotes

314. Interestingly, commentators who have considered the elimination of treble damages have not done so in connection with private merger challenges. See, e.g., Cavanagh, Contribution, supra note 312, at 1328-36 (noting that commentators who advocate the abolition of mandatory trebling argue they should be maintained in certain cases). The justifications offered for retaining the treble damages remedy as to other classes of conduct simply do not apply to merger challenges.

315. Multiple damages might be justifiable in merger cases on a showing of heightened culpability; for example, intent to accomplish anticompetitive ends. Cavanagh, Contribution, supra note 312, at 1332. This would essentially lead to an antitrust analogue of the law governing "willful" patent infringement, with the attendant waiver of privilege issues. For a discussion concerning the negative effects of the waiver provision on the attorney-client relationship in patent law, see John Dragseth, Note, Coerced Waiver of the Attorney-Client Privilege for Opinions of Counsel in Patent Litigation, 80 MINN. L. REV. 167, 167-70, 184-90 (1995).

316. The incentives and equilibria suggested by the cost disparities can be presented in the form of a standard game theoretical model. Although reasonable minds may disagree as to the appropriate payoffs and probabilities associated with the model, it is obvious that the cost disparities skew the incentives against merger defendants, regardless of the merits of a plaintiff's merger claim. Treble damages skew the incentives even further.

317. See, e.g., U.S. Football League, 887 F.2d at 409 (awarding over $5 million in damages and legal fees to the plaintiffs).


319. See Int'l Tel. & Tel. Co., 518 F.2d at 929 (adopting four-year laches period in connection with section 7 divestiture suit); Areeda & Hovenkamp, supra note 1, ¶ 1205b (recommending four-year or shorter laches period for section 7 cases because of hardships imposed by postmerger equitable relief). But see Scherer, Post-Chicago Analysis, supra note 65, at 22-23 (suggesting a "probationary period" for potentially anticompetitive mergers).
dramatically extending the time during which private parties can file suit. These doctrines date from, and were appropriate to, an atomistic competition policy based upon S-C-P market theory because they offer an opportunity to revisit and revise “imperfect” market structures on the pretext that the identified “imperfections” in a given market arose out of a long-completed merger or acquisition.

But neither doctrine makes any sense in the context of modern section 7 enforcement. Antitrust law now encourages rather than condemns most mergers, and market dynamism renders suspect any purported causal relationship between a long-completed merger and current market performance. Market dynamism also mitigates the concerns courts articulated in adopting liberal time-of-suit rules, making it exceedingly unlikely that merging parties would be able to lie in wait by delaying anticompetitive conduct until after a limitations period has passed. Finally, unlike certain other types of antitrust violations, most allegedly anticompetitive mergers are public knowledge before or near the time of completion, and there are effective tools for analyzing the actual and likely competitive effects of a transaction either before or immediately after it has been completed. In light of these factors, the rules allowing suit beyond a reasonable limitations period must be eliminated.

These doctrines survive largely by historical accident. The HSR-driven decrease in the pace of postmerger litigation and the reflexive adoption of ill-fitting standards from other areas of antitrust law combined to preserve these anachronisms when virtually every other area of the antitrust law has evolved beyond the norms these rules implicitly support. But these rules also persist at least in part because atomism itself is not completely dead, and because the rules appear to mitigate the risks associated with the accumulation of economic power.

Taken together, these cases allow private plaintiffs to extend their window for opportunistic behavior indefinitely into the future. Moreover, they invite a return to atomism, encouraging private parties and courts alike to substitute their intuitions regarding appropriate market structure for the judgment of the market itself. Public policy supports neither outcome. The hidden costs of the antiquated time-of-suit rules governing private merger challenges threaten to overdeter socially beneficial merger and business activity by exposing merging parties to perpetual risk of suit and, paradoxically, by increasing their risk of future liability in direct proportion to their success in the market.

320. This is not, by and large, a problem with the substantive law governing suits brought before or near the time of a merger’s completion. In recent years, courts have begun to apply modern, Guidelines-based analysis in evaluating such challenges. See, e.g., FTC v. H.J. Heinz Co., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) (noting the Guidelines are not binding on courts, but that they are a “useful illustration”); FTC v. Tenet Healthcare Corp., 186 F.3d 1045, 1053 (8th Cir. 1999) (employing the Guidelines while evaluating a “critical loss” argument made by the defendant); AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 574 n.3 (7th Cir. 1999) (citing the Guidelines); FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (relying on the Guidelines in determining whether a market is “concentrated” or “unconcentrated”); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004) (citing the Guidelines extensively in evaluating the plaintiff’s claims); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (noting the Guidelines set forth an “analytical framework” for courts to employ in antitrust cases).
1. *DuPont* and Its Pre-HSR Progeny

In 1917, DuPont was looking for investment opportunities.\(^\text{321}\) It ultimately decided to invest heavily in General Motors stock, purchasing a twenty-three percent ownership stake in the automaker between 1917 and 1919. Over time, most of General Motors' divisions shifted their purchase of automotive fabrics and finishes to DuPont products. In 1949, some thirty years after DuPont's final stock purchase, the Department of Justice filed a lawsuit seeking and ultimately obtaining DuPont's full divestiture of its ownership in General Motors.\(^\text{322}\) At the time of suit, General Motors commanded approximately fifty percent of the U.S. automotive market, and DuPont provided over sixty percent of GM's fabrics and finishes.\(^\text{323}\) Hearing the case as a direct appeal from the Northern District of Illinois, the Supreme Court reversed the trial court's decision that the Department of Justice's suit was time-barred.\(^\text{324}\)

The Court's substantive determination turned on its analysis of the close relationships between General Motors' and DuPont's fabrics and finishes businesses. Writing for an unusual four-justice majority, Justice William Brennan stated:

The fact that sticks out in this voluminous record is that the bulk of DuPont's production [of automotive fabrics and finishes] has always supplied the largest part of the requirements of the one customer in the automobile industry connected by a stock interest. The inference is overwhelming that DuPont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.\(^\text{325}\)

On the basis of that inference, the Supreme Court held that DuPont's 1917-19 stock purchases violated section 7 and remanded the case to the district court for further hearing on appropriate equitable relief.\(^\text{326}\)

Modern readers may find DuPont somewhat jarring. When DuPont acquired General Motors stock, anticompetitive effects were completely unforeseeable. With only eleven percent of the U.S. automobile market in 1919, General Motors was not yet a dominant producer of automobiles, and the automotive fabrics and finishes markets

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\(^\text{321. See DuPont I, 353 U.S. at 599-600} (\text{noting that between 1917 and 1919 DuPont purchased a twenty-three percent interest in General Motors}).\)

\(^\text{322. Although the time-of-suit holding at issue in this Article is found at DuPont I, 353 U.S. at 590, the Supreme Court ultimately ordered DuPont to divest itself of GM stock in DuPont II. 366 U.S. at 334.}\)

\(^\text{323. DuPont I, 353 U.S. at 596.}\)

\(^\text{324. Id. at 607.}\)

\(^\text{325. Id. at 605. William Brennan was sworn in as an Associate Justice on October 16, 1956. DuPont was argued less than one month later, on November 14-15, 1956. DuPont I, 353 U.S. at 586. The DuPont opinion was issued on June 3, 1957 and appears to be Justice Brennan's first opinion. Justices Clark, Harlan, and Whittaker did not take part in the decision, and Justices Burton and Frankfurter dissented, leaving Justice Brennan to write for a rare four-member majority. Id. at 608.}\)

\(^\text{326. Justice Burton's dissent was joined by Justice Frankfurter. DuPont I, 353 U.S. at 609-10 (Burton, J., dissenting). Burton essentially describes the Government's Clayton Act claim as an afterthought. Id. (noting that this was the first case in which the government sought to apply the Clayton Act to a vertical integration). He then criticizes the majority for: (1) applying section 7 to a vertical acquisition; (2) holding that the time chosen by the Government in bringing the action is controlling rather than the time of the stock acquisition itself; and (3) disregarding the facts found by the district court and finding that the facts of the case justified a finding of illegality. Id. at 611, 612-54.}\)
were themselves in their infancy. In fact, the primary product at issue in this 1949 case about 1917-19 stock acquisitions was not even invented until 1924.\footnote{Duco, a nitrocellulose-based lacquer finish that became the industry standard for automobiles for several generations. DuPont Refinish Homepage, http://www.dupontrefinish.com (last visited Feb. 4, 2006) (providing technical data about DuPont automotive paints).} Notwithstanding the fact that no substantial lessening of competition was even possible at the time of the transactions, the Supreme Court found liability thirty-eight years later, based upon several decades of subsequent events.

The opinion’s opening paragraphs capture the essence of the S-C-P paradigm and telegraph the result. According to the Court, the question is:

\[\text{W}hether du Pont’s commanding position as General Motors’ supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce.\footnote{DuPont I, 353 U.S. at 596.}

With that formulation, \textit{DuPont} comes very close to holding outright that a “commanding position” in a market violates section 7 of the Clayton Act if there is \textit{any} merger or acquisition in a defendant’s past that could be even fractionally responsible for the defendant’s success. Moreover, it seems to shift the plaintiff’s burden of proof squarely onto defendants.\footnote{See also United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966) (noting that section 7 only requires the plaintiff to prove a merger may substantially lessen competition anywhere in the country); Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962) (finding the plaintiff easily met the burden of proof).} After all, the opinion asks not whether the transaction “tends substantially to lessen competition,” but whether the defendant obtained its position “on competitive merit alone.”\footnote{DuPont I, 353 U.S. at 588-89.} As important, the modern reader likely would see inequity in a forced divestiture where neither the purchaser nor the purchased had substantial shares in the very markets at issue at the time of the transaction.\footnote{Although the term “General Motors market” itself seems foreign to any modern reader familiar with standard relevant market analysis, it may be wise to give the Supreme Court the benefit of the doubt on that issue. According to the opinion, at the time of suit, GM manufactured approximately fifty percent of the automobiles in the United States, and the opinion takes care to distinguish other types of finishes and fabrics from automotive finishes and fabrics. \textit{DuPont I}, 353 U.S. at 596.}

The largely extrajudicial evolution of merger law has rendered \textit{DuPont}’s atomistic normative framework moot. A 1950s judge would hardly recognize today’s Guidelines-driven world, in which mergers involving two of the five or six most significant competitors in a market are routinely approved.\footnote{See, e.g., Kolasky & Dick, supra note 19, at 208 (noting that courts are increasingly likely to balance the anticompetitive effects of a restraint against competition-enhancing effects).} A modern-day \textit{DuPont} challenge would almost certainly be decided very differently.

The days of the eight percent market share liability trigger\footnote{See, e.g., 1968 MERGER GUIDELINES, supra note 45, \S 5 (in markets with 4-firm concentrations of 75% or higher, “the Department will ordinarily challenge mergers between firms accounting for,} are long gone. But \textit{DuPont} is not dead yet. For a number of reasons, the Court’s “time-of-suit” holdings——
allowing the government to challenge transactions thirty years or more after completion, and apparently allowing courts to analyze competitive effects of merger as of the time of suit, rather than the time of completion—are still alive and have in fact been extended to private challenges. In light of the ever-increasing incentives toward private postmerger suits, it is worth examining DuPont's timing holdings in detail.

a. The Time-of-Suit Holding

According to DuPont, the test of a violation of section 7 is whether, "at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraint." A merger or acquisition is "within reach of [section 7] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce." Justice Brennan reasoned that section 7 of the Clayton Act was designed to arrest anticompetitive transactions in their "incipiency." This is hardly a controversial conclusion. But to the DuPont Court, "incipiency" meant at "any time when the acquisition threatens to ripen into a prohibited effect." The DuPont court noted that previous merger challenges previously had been brought "at or near the time of acquisition," but dismissed the relevance of timing in those cases, stating: "None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action at any time when a threat of the prohibited effects is evident."

Accordingly, the Supreme Court allowed the government's challenge of DuPont's thirty-year-old GM stock purchases to go forward and affirmed a finding of illegality based upon market facts obtaining at or near the time of suit, rather than at the time the acquisition was completed. The DuPont time-of-suit holding would be controversial today even if it remained limited to government challenges of stock-only acquisitions. DuPont seems to hold unequivocally that the time of completion of a challenged transaction is largely irrelevant to the question of when a suit can be filed. Instead, DuPont apparently

334. See infra note 368, for cases in which courts have employed this time-of-suit analysis.
335. DuPont I, 353 U.S. at 607 (emphasis added).
336. Id. at 593 (emphasis added).
337. Id. at 589.

338. See ALD 5TH, supra note 76, at 316 n.4 (noting that early case law contains statements that the purpose of section 7 was to reach incipient anticompetitive actions).
340. Id. at 598.

341. Id. at 620 (Burton, J. dissenting). Justice Burton's view has more or less carried the day with modern commentators and federal enforcement agencies, but his analysis has not gained the same purchase with his judicial descendants. See Scott A. Sher, Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act, 45 SANTA CLARA L. REV. 41, 66 (2004) (suggesting Justice Burton's dissent "may resonate with a majority" of the Supreme Court Justices sitting in 2004).

342. See generally Sher, supra note 341, at 58-69 (analyzing the impact of the DuPont decision).
stands for the proposition that violations of section 7 themselves take place whenever conditions converge to make a previously completed transaction look like a bad idea in retrospect, regardless of how long ago the transaction was completed or what has happened to the market in the interim. Because a "violation" under DuPont can take place years or decades after the merger was completed, the opinion implicitly requires courts to analyze the competitive conditions prevailing at the time of suit in connection with their determinations of whether the transaction tended to substantially lessen competition.

Justice Burton's dissent points out that section 7 itself contradicts the four-justice majority's time-of-suit holding because the statute prohibits a transaction only if the effect of the acquisition itself (and not the effect of holding that which was acquired) was to substantially lessen competition. As he stated, "The statutory language is unequivocal. It makes the test the probable effect of the acquisition at the time of the actual acquisition, and not at some later date to be arbitrarily chosen by the Government in bringing suit."

2. The Expansion of the DuPont Doctrine

In their well-known antitrust law treatise, Areeda and Hovenkamp suggest that the incipiency holding in DuPont appropriately applies only to government challenges and then only to stock transactions falling short of full business integrations. Though this would be a useful way to limit the negative impact of a holding that allows plaintiffs to reach back thirty years or more to undo business combinations that were not foreseeably anticompetitive at the time of consummation, Areeda's interpretation appears to reflect at least some wishful thinking. Courts have expanded rather than circumscribed DuPont's reach.

a. Consolidated Foods

In 1965, the Supreme Court itself expanded DuPont beyond the stock purchase context, applying DuPont in a traditional "business integration" merger case. In FTC v.

343. See supra Part III.B.1 for a discussion of the important aspects of the reasoning in DuPont.


345. See DuPont I, 353 U.S. at 620 (Burton, J., dissenting) (noting the statute prohibits acquiring, not holding, the stock).

346. Id.

347. Areeda & Hovenkamp, supra note 1, ¶ 1205c3.

348. The DuPont opinion itself would seem to cut against Areeda's interpretation, because it imposes liability for the purchase of "all or any part of the stock of another company." DuPont I, 353 U.S. at 592 (emphasis added). But see Areeda & Hovenkamp, supra note 1, ¶ 1200-1205f, 251-320 (arguing the "holding" of assets acquired through an unlawful merger does not affect the statute of limitations under section 7 of the Clayton Act).

349. See infra Part III.B.2.a for a detailed analysis of this expansion.
Consolidated Foods Corp., the Court stated that, under DuPont, "post-acquisition conduct may amount to a violation of section 7 even though there is no evidence to establish probability in limine," and held that Consolidated Foods' purchase of a rival producer of dehydrated onion and garlic over ten years before suit violated section 7 of the Clayton Act.

Consolidated Foods is a remarkable example of the then-dominant S-C-P preference for atomistic markets. It explicitly holds (as DuPont had implied) that postacquisition conduct can constitute a violation of section 7 even when there is no evidence at or before completion that a particular merger will lessen competition. And it does not matter whether the transaction could have foreseeably affected competition at the time of its completion. In the Consolidated Foods/DuPont world, therefore, there is no rest for the weary if they have a merger in their history. A past merger may be enough to condemn future success, regardless of whether that merger had any foreseeable competitive effects at all at the time of consummation.

b. General Dynamics

The Supreme Court reiterated the Consolidated Foods holding in United States v. General Dynamics Corp., in which it found that "[t]he mere nonoccurrence of anticompetitive effects from a merger would, of course, merely postpone rather than preclude a divestiture suit." The Court justified its conclusion as follows: "If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a section 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." The Court stated that "a merger may be attacked ab initio long after its culmination if effect on competition not apparent immediately after the merger subsequently appears."

General Dynamics offers the only possible justification for the survival of the DuPont rule and functionally similar "accrual" standards—that the rules arguably prevent defendants from lying in wait until the limitations period has passed to exercise the market power they obtained through an illegal merger. But this justification is

351. Consol. Foods, 380 U.S. at 598, 601. Scott Sher correctly analyzes Consolidated Foods as "confus[ing] the rule about the role of post-acquisition evidence in section 7 claims" with the DuPont time-of-suit holding. Sher, supra note 341, at 69. However, DuPont is also operative on its own terms in Consolidated Foods—the challenge took place over ten years after merger completion. Consolidated Foods highlights the practical difficulties associated with disentangling the rules regarding postacquisition evidence with the rules regarding time of suit in the context of challenges brought long after completion.
352. See Consol. Foods, 380 U.S. at 598 (holding the Court of Appeals did not err in examining postacquisition evidence in the case).
354. Gen. Dynamics, 415 U.S. at 504-05 & n.13. General Dynamics was also a traditional business integration merger case, not a partial stock ownership case like DuPont. Id. at 488-89.
355. Id. at 504-05. The Court's fears were largely unfounded.
356. Id. at 505 n.13.
357. See supra note 356 and accompanying text for the Court's justification of the DuPont rule.
inconsistent with economic reality, and, therefore, it offers no real support for the continued existence of the DuPont standard.\footnote{358}{See infra Part III.B.4.d for an explanation of how market dynamism weakens any justification for the DuPont rule.}

c. **ITT Continental Baking**

The Supreme Court’s most recent explanation of the DuPont doctrine, albeit in dicta, came in 1975. In *United States v. ITT Continental Baking Co.*,\footnote{359}{420 U.S. 223 (1975).} the Court stated:

Thus, there can be a violation at some time later even if there was clearly no violation—no realistic threat of restraint of commerce or creation of monopoly—at the time of the initial acts of acquisition. Clearly, this result can obtain only because “acquisition” under section 7 is not a discrete transaction but a status which continues until the transaction is undone.\footnote{360}{420 U.S. at 242.}

Although this statement is dicta within the context of Continental Baking, it remains the Supreme Court’s clearest and most alarming articulation of a DuPont doctrine that remains virtually undisturbed to this day.\footnote{361}{Continental Baking involved a government suit to enforce a previously entered consent decree prohibiting certain bakery mergers. The Supreme Court allowed the government to recover daily fines, reasoning by analogy to the DuPont rule that each new day brought a separate actionable violation of the consent decree. *Id.* at 226.}

Since Continental Baking, lower courts have reaffirmed DuPont in the government challenge context.\footnote{362}{See, e.g., United States v. Coca-Cola Bottling Co., 575 F.2d 222, 230-31 (9th Cir. 1978) (citing DuPont to define the scope of relief available under section fifteen of the Clayton Act in a government challenge to an acquisition).}

d. **Expansion to Private Claims**

If the government challenge cases discussed above had fixed the outer boundaries of DuPont there would be less reason to worry.\footnote{363}{As recently as January 2005, the FTC cited DuPont for the proposition that the government retains the authority to challenge mergers long after they have been consummated. See Complaint Counsel’s Revised Pretrial Brief, Nw. Healthcare Corp., F.T.C. No. 011 0234 (Jan. 27, 2005), available at http://www.ftc.gov/os/adjpro/d9315/050127ccrevisedpretrialbrief.pdf. On February 10, 2004, the FTC filed an administrative complaint seeking divestiture and other equitable remedies in connection with a hospital merger completed in January 2000, just over four years before suit was filed. Complaint at 11-12, Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Feb. 10, 2004), available at http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf. As of this writing, the Administrative Law Judge has rendered an initial decision holding that the FTC had met their burden of proof as to the anticompetitive effects of the merger. Initial Decision at 1, Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Oct. 20, 2005), available at http://www.ftc.gov/os/adjpro/d9315/051020initialdecision.pdf. The ALJ’s decision is currently on appeal to the full Commission. Notice of Appeal at 1, Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Nov. 2, 2005), available at http://www.ftc.gov/os/adjpro/d9315/051102ehmedgrpnotofappeal.pdf. The ALJ’s opinion relies heavily (and unnecessarily) upon DuPont’s time-of-suit holding. See Initial Decision, supra, at 152-53 (citing DuPont standard for determining when a violation of section 7 of the Clayton Act has occurred).}
federal antitrust enforcers can be expected to act in accordance with their perception of the public interest. More importantly, the great bulk of federal government enforcement has shifted to the premerger context. DuPont is largely irrelevant in an HSR world.

But lower courts have not been content to limit DuPont to government challenges. Instead, they have expanded the DuPont doctrine to cover private merger challenges as well. In fact, the first such extension occurred in connection with the same DuPont/GM stock acquisitions, when the Second Circuit Court of Appeals authorized private shareholders' treble damages suit under section 7 almost forty years after DuPont's last GM stock purchase in 1919. More recently, other courts have explicitly or implicitly endorsed DuPont in the private challenge context. The extension of the doctrine to private challenges creates substantial opportunity for opportunistic behavior.

364. Like all government actors, the antitrust agencies are of course subject to capture by special interests; however, few would disagree that the public choice risks associated with agency behavior are less than the personal utility-maximization risks associated with private behavior.

365. However, see supra note 362 for an example of the continued application of the DuPont rule in government challenge cases.

366. See infra note 368 for examples of the DuPont rule applied in the private merger challenge context.

367. See Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969) (finding that a section 7 violation can constitute grounds for awarding treble damages to private parties).

368. See, e.g., California ex rel Lockyer v. Mirant Corp., 266 F. Supp. 2d 1046, 1055 (N.D. Cal. 2003) (citing Cont'l Baking, 420 U.S. 223). The Mirant opinion represents the best recent example of the atomism-promoting nature of the DuPont doctrine. In that case, plaintiff sued under section 7 seeking divestiture of power plants defendants had purchased from a regulated monopoly in a deregulation auction. Id. at 1053. Despite the fact that the acquisitions actually increased competition in comparison to the predecessor monopoly, the court allowed the plaintiff's claims to go forward. Id. at 1056. The Mirant holding implicitly endorses the atomistic worldview—that the fact of an acquisition is enough to open the door to "corrective" market intervention. See BORK, supra note 13, at 209-10, discussing how the courts' interpretations of section 7 of the Clayton Act lead to differing results depending on whether a firm has had a merger in its history or not. See also U.S. Gypsum Co. v. Indiana Gas Co., 350 F.3d 623, 628 (7th Cir. 2003) (Easterbrook, J.) (citing DuPont to conclude that a private party was not barred from bringing a claim under sections 1 and 2 of the Sherman Act more than four years after the merger); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1051 (8th Cir. 2000) (explaining that private section 7 claims can be filed after an acquisition because it is often difficult to "evaluate the real impact and effect of an acquisition until the transaction has been completed"); S. Austin Coal. Cnty. Coun. v. SBC Comm. Inc., 191 F.3d 842, 845 (7th Cir. 1999) (Easterbrook, J.) (in a private section 7 suit filed before merging parties obtained final government approval, Easterbrook rejected defendants' purported fear of a laches defense in postcompletion suit, questioning whether a laches risk "was ever substantial in light of DuPont"); Midwestern Mach., Inc. v. Nw. Airlines, Inc. (Midwestern Mach. I), 167 F.3d 439, 443 (8th Cir. 1999) (citing to DuPont to illustrate the continuing vitality of private section 7 claims even after an acquisition occurs), rev'd, 392 F.3d 265, 268 (8th Cir. 2004) (Midwestern Mach. II); Reading Int'l, Inc. v. Oaktree Capital Mgmt. I.L.C., 317 F. Supp. 2d 301, 310-11 (S.D.N.Y. 2003) (dismissing section 7 claim on antitrust standing grounds, but citing DuPont time-of-suit holding approvingly in context of mergers as much as fourteen years old); Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F. Supp. 1016, 1023-24 (S.D.N.Y. 1979) (denying motion to dismiss section 7 claims based upon fifteen-year-old and six-year-old acquisitions because, under DuPont, "in addition to prohibited acquisitions giving rise to immediate section 7 claims, subsequent anticompetitive acts committed by the merged enterprise give rise to separate causes of action.").

369. See infra Part III.B.4 for a discussion of the consequences of the drawbacks in private merger challenge law.
3. The Zenith Radio "Accrual" Standards Cause the Same Problem

Despite its throwback reasoning, the substance of DuPont cannot easily be dismissed today. In fact, without congressional intervention, the heart of the DuPont holding—that a merger can be challenged whenever it "threatens to ripen into a prohibited effect"—is likely to live on indefinitely. There are at least two reasons for the DuPont rule's persistence. First, courts have explicitly endorsed the DuPont "time-of-suit" holding repeatedly in recent years. In fact, Judge Diane Wood recently acknowledged the vitality of the holding in a law review article. In criticizing the lack of certainty the U.S. system affords merging parties after completion, she noted that "there is always a risk... that any plaintiff will challenge a merger... many years after its consummation on the grounds that it now appears to have had anticompetitive effects." Second, DuPont lives on implicitly in the law governing the time at which a private merger claim "accrues" as to private plaintiffs. Moreover, the "accrual" doctrine appears in the form of a generally accepted rule imported reflexively from the world of more traditional lawsuits. Accordingly, accrual standards enjoy a veneer of modern respectability and reflexive acceptance that may be difficult to strip away. Appearances notwithstanding, the DuPont line and the section 7 accrual cases create the same practical problem.

The cases governing "accrual" under section 7 originate in a different branch of the antitrust family tree than the DuPont cases. In fact, the section 7 accrual rules have been imported wholesale, with little apparent forethought or analysis, from cases governing "accrual" in the context of antitrust conduct violations like price fixing or monopolization. The policy concerns that may justify relatively liberal "accrual" rules for antitrust conduct cases do not apply to private merger claims.

a. Zenith Radio and Section 7

In Zenith Radio Corp. v. Hazeltine Research, Inc., the Supreme Court addressed when an action "accrues" under the antitrust laws for purposes of starting the four-year limitations period. Plaintiff Hazeltine Research had filed patent

370. See DuPont I, 353 U.S. at 597 (concluding that a section 7 claim may be brought "any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce").

371. See supra note 368 for a discussion of recent cases endorsing the time-of-suit rule.


373. Id. (citing DuPont I, 353 U.S. at 607).

374. See Zenith Radio Corp. v. Hazeltine Res., Inc., 401 U.S. 321, 339 (1971) (holding that each time a private plaintiff is injured by a violation of section 7, a separate cause of action accrues and the statute of limitations is extended); Midwestern Mach. II, 392 F.3d at 275-76 (finding that a cause of action for a section 7 violation accrues on the date that damages are suffered); Concord Boat, 207 F.3d at 1051 (stating that the statute of limitations for a section 7 action starts to run at the moment the act causes injury).

375. See, e.g., Zenith Radio, 401 U.S. at 339 (involving conduct by radio and television manufacturer using patent pools to exclude competitor from foreign markets in violation of the Sherman Act).


infringement claims against Zenith in 1959. In 1963, Zenith filed an antitrust counterclaim alleging that Hazeltine’s participation in certain patent pools violated the Sherman Act. The Supreme Court’s opinion addressed whether Zenith’s June 1, 1963 suit would support recovery for damages suffered after June 1, 1959, “as the consequence of pre-1954 conspiratorial conduct.”

The Court allowed Zenith to recover damages in connection with Hazeltine’s pre-1954 conduct, even though Zenith had filed the lawsuit over nine years later. The Court held that an antitrust cause of action accrues “each time a plaintiff is injured by an act of the defendants.” Accordingly, a potential antitrust plaintiff has four years from the date of each injury it suffers within which it must file suit to recover for that injury. The Court referenced the “hornbook law, in antitrust actions as in others” that “even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.” Accordingly, the Court reasoned, a refusal to award future profits as too speculative in an antitrust treble damages action is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

The Court justified this holding on the basis of congressional intent, noting that “[o]therwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve ‘as a bulwark of antitrust enforcement.'”

Zenith Radio has itself become the “hornbook law” governing the time at which all private antitrust claims “accrue” for the purpose of starting the limitations clock. Zenith Radio is defensible in the context of antitrust conduct cases where (1) plaintiffs’ injuries are often by their very nature concealed and difficult to uncover, and (2) the enforcement paradigm heavily favors deterrence. But as discussed below, the Zenith Radio accrual rule is wholly indefensible when applied to modern merger claims. Unfortunately, it has been adopted wholesale in several lower court merger

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378. Id. at 338.
379. Id.
380. Id. at 338.
381. Id.
385. Id.
386. See id. at 340, (quoting Perma Life Mufflers, Inc. v. Int’l Parts Corp., 392 U.S. 134, 139 (1968)).
387. See, e.g., ALD 5TH, supra note 76, at 893 n.314 (citing Zenith Radio for the proposition that a cause of action does not accrue until damages are ascertainable).
cases without any significant consideration of the substantial differences between section 7 claims and other antitrust violations.\textsuperscript{388}

b. Zenith Radio and DuPont Effectively Announce the Same Rule for Private Merger Claims

In the context of private suits, the DuPont rule governing the time a violation of section 7 occurs is functionally identical to the Zenith Radio rule governing accrual. There are, of course, facial differences between the two standards. For example, DuPont's "incipiency" orientation countenances prophylactic challenge without a showing of actual damage, while Zenith Radio ties accrual to the time plaintiff suffered harm.\textsuperscript{389} But in the end, these distinctions are relevant only on the margins. As a result of both rules, private plaintiffs can challenge mergers many years after the limitations period should have run and need only allege recent harm under Zenith Radio (or recent threat of a "prohibited effect" under DuPont) to circumvent the statute of limitations completely.

Recent cases have made this convergence explicit. For example, in December 2004, the Eighth Circuit reversed its initial opinion in Midwestern Machinery I,\textsuperscript{390} in which the court had held that DuPont authorized private plaintiffs to challenge Northwest Airlines' acquisition of Republic Airlines eleven years after the merger was completed.\textsuperscript{391} In its 2004 opinion, the Eighth Circuit demonstrated the functional congruence of the two rules in an odd way, partially closing the DuPont door\textsuperscript{392} while endorsing Zenith Radio as authorizing section 7 claims for a period of four years after the plaintiff first suffers injury.\textsuperscript{393} In fact, the DuPont portion of the opinion offers an incisive and telling criticism of the DuPont rule, especially as it has been applied to private claims over time.\textsuperscript{394} Because the plaintiffs in Midwestern Machinery based

\textsuperscript{388} See, e.g., Midwestern Mach. II, 392 F.3d at 276 (applying the Zenith Radio rule but distinguishing the case factually because plaintiff, Midwestern Machinery, suffered injury immediately upon completion of the merger in question); Concord Boat, 207 F.3d at 1051 (citing Zenith Radio in an antitrust action brought by a group of boat builders against a boat engine manufacturer); Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 843-44 (S.D.N.Y. 1988) (applying Zenith Radio to deny defendant's summary judgment motion based on the claim that the statute of limitations for plaintiff's section 7 cause of action had expired).

\textsuperscript{389} Compare DuPont I, 353 U.S. at 607 (finding section 7 violation at the moment when an action "threatens to ripen into the prohibited effect"), with Zenith Radio, 401 U.S. at 339 (section 7 violation occurs on "date [anticompetitive harms] were inflicted").

\textsuperscript{390} See Midwestern Mach. II, 392 F.3d at 268 (reversing its decision in Midwestern Machinery I by affirming the district court's granting of summary judgment to defendant because the statute of limitations on plaintiff's section 7 action had run).

\textsuperscript{391} Midwestern Mach. I, 167 F.3d at 443.

\textsuperscript{392} See Midwestern Mach. II, 392 F.3d at 269-276 (distinguishing DuPont, as it involved "whether an acquisition that did not violate section 7 at the time that it occurred could be the basis for a later suit" rather than a statute of limitations issue).

\textsuperscript{393} See id. at 276 (applying the Zenith Radio rule for when the statute of limitations should be tolled).

\textsuperscript{394} See, e.g., id. at 271 ("Midwestern's theory would expose merged firms to potential liability in private suits as long as the firm remained merged because, assuming that the initial merger violated the Clayton Act, every subsequent action by the merged firm would be a continuing violation designed to maintain the merged firm's viability."); see also Concord Boat, 207 F.3d at 1050 (refusing to extend four-year statute of limitations under DuPont rule because plaintiff's injuries occurred at the time of acquisition).
their claims solely upon the market power Northwestern allegedly obtained as a result of the merger, the court held that the violation occurred at the time of completion, and that the limitations period had run. But in dicta following its holding, the court offered potential plaintiffs a roadmap for the future, noting that Midwestern's claims would not have been time-barred under Zenith Radio had it first suffered injury within four years of suit. Thus, even in the Eighth Circuit, where DuPont arguably has the least current sway, a private plaintiff can challenge a long-completed transaction by simply alleging that the damages it suffered as a result of the acquisition first began to accrue within the four-years before it filed suit.

The continued viability of any rule authorizing private claims decades after a merger has been completed makes no sense and creates powerful negative incentives for potential plaintiffs and potential defendants alike. As one commentator has put it, "For the mergers that were permitted and turn out to be anticompetitive, the remedy must lie in either the single-firm part of the law [Sherman Act § 2] or the concerted action part [Sherman Act § 1], if any such harm can be proven." Moreover, given the persistent power of stare decisis in antitrust law and the coming increase in private merger claims, this is not an issue that can be cast aside in hopes that it will fade away.

4. What's Really Wrong with DuPont and Zenith Radio?

DuPont likely owes its continued existence primarily to historical accident—the Chicago School revolution was rewriting the common law just as HSR premerger review dramatically reduced the number of postmerger challenges that would have offered an opportunity to modernize the rule. DuPont survives at least in part because

396. Id. at 276. The court also perpetuated DuPont to a limited extent, stating that the DuPont rule would apply "[i]f assets are used in a different manner from the way that they were used when the initial acquisition occurred" Id. at 273; see also Nasso, 467 F. Supp. at 1023 (applying DuPont to conclude that the cause of action for plaintiff's claims of specific anticompetitive behaviors arose when these events occurred rather than when the "mergers that made these actions possible" were completed).
397. See Midwestern Mach. II, 392 F.3d at 276 (explaining that plaintiff's cause of action filed eleven years after a merger was barred by statute of limitations because plaintiff claimed to have realized injury immediately upon completion of the action).
398. Wood, supra note 372, at 322. See also BORK, supra note 13, at 209-210 (arguing that section 7 discourages growth among firms that have merged with other businesses by applying "more severe standards to size by merger than to size by internal growth"). Areeda & Hovenkamp appear to take a different view, and would authorize a section 7 suit long after completion if the defendant eventually uses the merger "in a way that is not inherent in the merger itself." AREEDA & HOVENKAMP, supra note 1, ¶ 320c at 224. This view establishes a double standard discriminating against growth by merger. Instead, if a party acquires market power and uses it to, for example, engage in actionable predatory pricing after the limitations period has expired, the law should condemn only the predatory pricing, and not the method of growth that allegedly provided the power to engage in inappropriate conduct.
399. See, e.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1404-05 (1989) (explaining that several Supreme Court antitrust holdings have been questioned but that "[i]inferior federal courts, in order to provide equal justice under law, must apply the holdings of cases still on the books").
400. See supra Part II for a discussion of the coming wave of private merger claims.
a large percentage of merger claims are now handled premerger through agency review. 401

*Zenith Radio* owes its continued application to private merger claims in part to the advent of the HSR process as well. *Zenith Radio* also persists out of reflexive habit and good breeding—its importation from antitrust *conduct* cases has gone virtually unquestioned because it "comes from a good family." But understanding why these rules persist does not answer the fundamental question: Why are *DuPont* and *Zenith Radio* bad rules?

At first blush, the *DuPont* and *Zenith Radio* doctrines may appear quite reasonable. After all, couldn't the Supreme Court's fears that section 7 violators will simply wait until the coast is clear before behaving badly be well founded? And shouldn't the government and the courts have the ability to step in at any time when a market becomes, in their opinion, less than perfectly competitive? That worldview dominated for many years, 402 but it is demonstrably wrong. Common sense, basic economics, the experience of the last ten years, and the statute itself prove the doctrines' infirmities. If left unchanged, the coming increase in private suits will amplify their ability to do substantial harm to the American economy.

a. *DuPont* and *Zenith Radio* Are Inconsistent with the Text of Section 7

As Justice Burton noted in his *DuPont* dissent, the text of section 7 does not support claims where there was no realistic threat of restraint of commerce at the time of the acquisition. 403 Rather, "the offense described by section 7 is the acquisition," and "[w]hen the acquisition has been made, the offense, if any, is complete." 404 It is manifestly inequitable to extend the window for private suit indefinitely into the future, doubly so if the transaction did not raise competitive concerns at the time of completion. 405

b. The Repose/Redress Continuum

American law has long recognized that wrongdoers should be entitled to protection from suit after a reasonable time has passed since their commission of an allegedly illegal act. 406 The Clayton Act makes this explicit as to the antitrust laws: damages claims are not allowed more than four years after a cause of action accrues. 407

401. See, e.g., Sher, *supra* note 341, at 41 (claiming that HSR's requirements of premerger agency approval have minimized the need for postmerger challenges).

402. See *supra* Part I.C.1 for a discussion of the mid-twentieth century paradigm of atomism.

403. *DuPont* I, 353 U.S. at 622 (Burton, J., dissenting). *Cf. General Dynamics*, 415 U.S. at 242 (explaining that a merger may be challenged if its "effect on competition not apparent immediately after the merger subsequently appears").


405. See *id.* at 623 ("The Court's holding is unfair to the individuals who entered into transactions on the assumption, justified by the language of section 7, that their actions would be judged by the facts available to them at the time they made their decision.") (citing Phil C. Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 220-21 (1953)).


Although the concept of repose inherently implies that certain injured parties may be denied relief if their suit comes too late, that social cost is judged acceptable in light of the benefits accruing from offering alleged wrongdoers a clean slate after some period of time.

In the context of private merger challenges, the repose/redress tradeoffs favor a hard and fast limitations period. Although there is substantial value to allowing private postmerger suits, the very fact that merger activity is often inherently desirable counsels against extension of the limitations period beyond that applicable to deliberately wrongful acts. Equity requires that we grant merging parties repose rights equal to or greater than the repose rights enjoyed by the criminal and the careless.

c. The Importance of Precedent

Precedent is peculiarly powerful in antitrust law. After the introduction of premerger review, it is arguably doubly powerful in the context of section 7. The Supreme Court has not decided a merger case on the merits since General Dynamics in 1974. This is unlikely to change anytime soon because the likely appellants (especially government enforcers) are unlikely to pursue certiorari, few pending mergers would survive a lengthy appeal process, and the Supreme Court typically accepts only a small fraction of the cases in which the parties seek review. Accordingly, DuPont and Zenith Radio are likely to remain the law of the land for the foreseeable future.

As Judge Easterbrook has explained, it is often difficult if not impossible for lower courts to discard still-valid Supreme Court precedent, no matter how firmly the lower Court believes that the Supreme Court “would not reach the same decision today if the question were open anew.” Disregarding Supreme Court precedent is dangerous: “it is presumptuous—more, it produces uncertain and unequal application of the law—for an inferior court to act on a belief that a given decision will be among the handful that the Supreme Court overrules or significantly limits.”

Accordingly, the power of precedent suggests that DuPont and Zenith Radio are in need of legislative attention.

d. Market Dynamism

Markets are inherently dynamic. Although so-called “post-Chicago” learning suggests that certain anticompetitive equilibria may be more stable and persistent than the Chicago School’s more strident adherents suggest, there is little genuine debate (imposing a four-year statute of limitations on claims brought under the Sherman Act).

408. See supra notes 291-98 and accompanying text for a discussion of why private merger challenges are an important part of the antitrust system.

409. See General Dynamics, 415 U.S. at 500-01 (affirming the finding of no violation of section 7 in acquisition of coal company stock).

410. Incremental judicial erosion of both doctrines is possible, but the coming increase in private merger litigation demands a quicker and more decisive response. See, e.g., Midwestern Mach. II, 392 F.3d at 276 (attempting to limit the application of the DuPont time-of-suit rule).

411. A.A. Poultry, 881 F.2d at 1405.

412. Id.
regarding the underlying changeability of markets. Market dynamism weakens any justification for the DuPont/Zenith Radio approach in two important ways.

i. Dynamism renders “lying in wait” unreasonable

There are essentially two possible justifications for the DuPont/Zenith Radio time-of-suit rules. First, as the Supreme Court suggested in General Dynamics, the rules theoretically could prevent merging parties from waiting until the “coast is clear”—until the limitations period has passed—before beginning to reap the anticompetitive benefits of an illegal transaction. Under this theory, potential plaintiffs would experience no harm and, thus, have no incentive to enforce section 7 until after their window of opportunity had closed.

But the vast majority of merging parties would have little prospect of “lying in wait” successfully throughout the duration of a reasonable limitations period. The Supreme Court’s “predatory pricing” jurisprudence helps explain why. Under current predatory pricing law, a plaintiff must do more than show that the defendant priced below cost in an attempt to drive it out of business. It must also prove that the defendant had a reasonable expectation of recouping its foregone profits after its predatory pricing program succeeded in knocking out its competitor(s). If the defendant cannot reasonably expect to recoup its losses, then its low prices during the alleged predatory period are nothing more than a windfall to consumers that should not be discouraged. Most predatory pricing claims fail the recoupment test.

Even if a merger provides the surviving entity with market power, that entity would find it exceedingly difficult to wait until a reasonable limitations period had passed to begin flexing its muscles. Modern markets change quickly, and it is prima

413. See General Dynamics, 415 U.S. at 504-05 (expressing concern that potential defendants could avoid a section 7 claim merely by “refraining from aggressive or anticompetitive behavior” for the four-year statute of limitations); see also Consol. Foods, 380 U.S. at 598 (arguing that the statute of limitations should not be manipulated by the parties in a way that they “bid[e] their time” until the anticompetitive effects of a merger are “allowed fully to bloom”).


415. Id. at 225-27. See also Kenneth G. Elzinga & David E. Mills, Testing for Predation: Is Recoupment Feasible?, 34 ANTITRUST BULL. 869, 871-72 (1989) (proposing an “investment test” for predation and establishing a formal economic model for assessing the likelihood of recoupment for rational economic actors).

416. Brooke Group, 509 U.S. at 224.

417. See, e.g., United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (concluding that defendant airline’s pricing was not predatory because the government failed to establish that defendant’s pricing was below an appropriate measure of cost); Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 271-72 (2d Cir. 2001) (denying airline’s claim of predatory pricing against competitor because plaintiff was unable to provide proof of competitor’s recoupment losses); Taylor Pub’g Co. v. Jostens, Inc., 216 F.3d 465, 477 (5th Cir. 2000) (finding that defendant school yearbook manufacturer’s attempts to lure customers through what plaintiff characterized as “sham pricing” was not predatory); see also Elzinga & Mills, supra note 415, at 878-89 (demonstrating that in two of three then-recent cases, recoupment period would have been too long to have been reasonable).

418. This Article does not recommend that the existing four-year statutory limitations period be altered, but rather that it be enforced rigidly from the date of completion. It is possible that a merging party could wait
facie unreasonable to assume that anticompetitive market dynamics at the time of completion will persist for more than four years in the absence of anticompetitive conduct by the merged entity. Moreover, the existence of a hard and fast limitations period would not ultimately eliminate the prospect of a remedy—the government is not subject to a limitations period and could be encouraged to take action in the unlikely event that a party successfully executed a “lying in wait” strategy. Assuming an anticompetitive merger, the merging party’s incentive is to take advantage of its market power before market forces erode it. The merged entity would almost always act well within the four-year limitations period and would cause damages triggering an incentive to sue.

ii. Dynamism renders suspect the causal link between the merger and market performance

In addition to a “lying in wait” justification, one could argue that section 7’s prophylactic purpose and “incipiency” focus demand a remedy that can be implemented at the first sign of poor market function, no matter how late the date. But it would be virtually impossible to extract the effects of an allegedly anticompetitive transaction from other variables affecting market price when suit is filed more than four years after completion. Moreover, while the “prophylactic purpose” of section 7 is important, it no longer justifies ex post speculative intervention when the merged parties have become “too successful” by some subjective measure. This is especially true in the utility-maximizing context of private merger litigation.

Any justification dependent upon a court’s ex post imperative to “correct” perceived market failures carries no weight in a post-Chicago world. This is particularly true with respect to mergers, which the law now encourages far more than it discourages. Because markets are ever-changing, any attempt to authorize private merger challenges more than four years after completion is necessarily an “ends justify the means” end-run around modern antitrust analysis and inherently would be little more than a naked attempt to impose a subjectively more desirable structure on a market. The antitrust law cannot countenance such a result.

e. Postmerger evidentiary problems and predictability

_DuPont_ and (in the merger context) _Zenith Radio_ implicitly encourage courts to assess the effects of a challenged transaction at or near the time of suit, rather than at the time of completion. Justice Burton’s _DuPont_ dissent highlights the irrationality of any analysis based solely upon postmerger conditions. Professors Areeda and

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419. See _DuPont_, 353 U.S. at 877 (the test for establishing a section 7 violation is whether at time-of-suit there is reasonable probability that the acquisition will result in prohibited effects); _Zenith Radio_, 401 U.S. at 338-40 (concluding that plaintiffs injured by antitrust conspiracy can recover damages suffered prior to date of claim and reasonably expected future damages).

420. See _DuPont_, 353 U.S. at 623 (illustrating factors which would be included in an analysis relying out a significantly shorter limitations period before beginning to raise prices. Although there is no magic time threshold beyond which “lying in wait” is automatically economically infeasible, four years is more than enough.
Hovenkamp have ably identified the myriad problems attendant with section 7 assessments that stray from analyzing the competitive effects of a transaction at the time of completion.\footnote{See AREEDA & HOVENKAMP, supra note 1, ¶ 1205, at 296-320, for a discussion of the use of post-acquisition evidence in merger challenges.} This Article cannot add substantially to their analysis, but does note that the “time of assessment” concerns Professors Areeda and Hovenkamp articulate are yet another reason to reject DuPont and Zenith Radio.

\section{Traditional justifications for accrual rules do not apply to merger challenges}

The traditional justifications for “time of injury” accrual rules in other kinds of cases do not apply in the merger context. First, the law now encourages the vast majority of mergers.\footnote{Kolasky & Dick, supra note 19, at 208.} To the extent the Zenith Radio accrual rule (or the DuPont “time of violation” rule for that matter) has some deterrent purpose, that purpose is largely at odds with the law’s overall attitude toward mergers.

Second, most mergers are public knowledge before or near the time of completion. Because the potential harm associated with an allegedly anticompetitive transaction can be assessed at or near the time of completion, potential parties can monitor any harm associated with that transaction (e.g., increased prices, exclusionary conduct, etc.).

Finally, any alleged harm arising from a merger challenged outside the four year limitations period is too speculative to justify upsetting the repose/redress continuum discussed above.

\section{Consequences of the Weaknesses in Private Merger Challenge Law}

The law of private merger challenges must minimize the negative implications of two separate incentives. First, the law must recognize that private plaintiffs act out of self-interest, not altruism. The procedural and substantive law should therefore work together to minimize private parties’ ability to act opportunistically without eliminating the value inherent in the private enforcement system.

Second, the law must explicitly address the tension inherent in the American competition norm, and it must eliminate or at least mitigate the courts’ ability and willingness to countenance “buyer’s remorse” once a firm has reached an arguably objectionable size. The “disproportionate costs” issue and the “time-of-suit” problem each implicate both concerns.

\subsection{Risks Associated with Disproportionate Imposition of Costs}

The differential cost structure associated with private merger litigation encourages plaintiffs to engage in opportunistic behavior.\footnote{See supra Part III.A for a discussion of the imposition of costs in antitrust cases.} Private plaintiffs can impose massively disproportionate costs on defendants throughout the pretrial phase of litigation and are also entitled to treble damages and attorneys’ fees if they are

solely on post-merger conditions and stating that result could be legitimate transactions being declared illegal).
successful. Defendants, on the other hand, find it difficult to impose balancing costs upon private merger plaintiffs. Because plaintiffs can impose massive costs upon defendants without incurring proportional costs themselves, the risks of opportunist behavior are substantial.

The differential cost structure associated with private merger challenges also subtly invites a return to atomism, albeit indirectly. The entire private merger challenge framework inherently promotes an atomistic competition policy by overdetering potential merging parties from engaging in what is now recognized to be socially beneficial behavior. The treble damages remedy in particular serves only atomistic ends because it is pointed toward a “maximum deterrence” norm that the law has discarded as unnecessary and counterproductive in the context of merger law.

b. Timing of Challenges

DuPont and Zenith Radio also encourage opportunist behavior and economic opportunism on the part of private plaintiffs. By allowing private parties to challenge mergers many years or even decades after completion, the law currently provides undue incentives for private suit. Moreover, the more distant a suit from the date of completion, the less likely that any alleged market imperfections or “anticompetitive” outcome was actually merger-induced. Coupled with the disproportionality of costs inherent in the private merger enforcement paradigm, the time-of-suit rules announced by DuPont, Zenith Radio, and their progeny provide perverse incentives for private suit.

DuPont is an explicit product of the long-discredited atomism norm, and Zenith Radio is implicitly so in the merger context. Taken to their logical ends, these two lines of cases encourage courts and private parties both to treat any merger as a potential “back door,” allowing direct intervention into markets they regard as functioning improperly. By implicitly divorcing the liability inquiry from the liability event, these time-of-suit rules allow private merger challenges in perpetuity.

Ironically, the DuPont/Zenith Radio doctrine becomes more dangerous as a party with a merger in its corporate history becomes more successful. As discussed above, the American competition norm emphasizes both the freedom to succeed and the freedom from success. When a party with a merger somewhere in its background begins to succeed, DuPont and Zenith Radio offer an opportunity to reel it back in. But while this may be attractive in the abstract, it makes no sense as a matter of iterative policy. For if the brass ring of success—high profits—is denied to parties whose route involves mergers or acquisitions, those potentially efficient and productive stops will be avoided next time around.

424. See supra Part III.A.1 for a discussion of the inequitable imposition of costs in private merger challenge cases.

425. See supra notes 306-10 and the accompanying text for a discussion of a defendant’s inability to recover costs of litigation upon defeating a plaintiff’s post-merger challenge.

426. See supra Part III.A.2 for arguments against imposing treble damages in merger cases.


428. See supra Part I.A for a discussion of the development of the American competition norm.
Neither the current time-of-suit rules nor the continued availability of treble damages and disproportionate cost imposition in merger suits comport with sound antitrust policy. As the frequency of private merger challenges increases in years to come, these structural flaws in the current regime are likely to overdeter legitimate merger activity. They will also encourage opportunistic behavior among private parties, and they will encourage courts to attempt to "fix" markets in which the presence of a past merger opens doors that are appropriately unavailable in the context of traditional single-firm antitrust standards.

IV. A Few Proposals for Reform

A. Solving the Disproportionate Costs Riddle

1. Pretrial Phase

The private plaintiff's ability to impose disproportionate costs upon merger defendants begins with the filing of the lawsuit, continues through the pretrial discovery phase, and ultimately culminates with the prospect of a treble damages award and divestiture order. As discussed above, the application of a "unidirectional British rule"—attorneys fees awarded to prevailing plaintiffs, but not to prevailing defendants—substantially exacerbates the problem.\(^4\) Even more disturbing, there is absolutely no basis in the public policy governing merger regulation for the uniform imposition of treble damages in connection with the typical merger case.

Though it may not be practicable to level the playing field completely, there are several possible changes Congress could make to tilt the scales back in favor of merger defendants. Because merger defendants' underlying conduct is substantively different from that of the price-fixers and bid-riggers at whom the existing cost structure is aimed, they are entitled to different treatment.

To deal with the issue of pretrial costs, Congress should consider imposing the English rule, under which the prevailing party receives some or all of its reasonable attorneys' fees from the loser, or under which there is formal cost sharing during the pretrial phases of litigation. Congress has already adopted "loser pays" rules for antitrust suits challenging qualified export companies\(^4\) or research joint ventures.\(^4\) The "loser pays" rules exist in these contexts to "reduce the threat of litigation against such favored activities."\(^4\) Because merger and acquisition activity is also favored and

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429. See supra note 306 and accompanying text for an articulation of the rule concerning recovery of attorney's fees in merger challenge cases.


because of the massive disparities in cost associated with private section 7 claims, a "loser pays" solution is also appropriate here.

Of course, one could argue that "loser pays" is the glib answer to virtually any problem involving unbalanced incentives favoring a plaintiff or defendant. But the circumstances counseling such a radical departure from the American rule in this case are almost unique to modern antitrust merger law. Unlike many other types of claims (whether antitrust "conduct," contract, tort, or otherwise), antitrust merger claims tread on extremely thin ice, and the risks and costs associated with overdeterrence are enormous. The law in fact encourages most merger activity as efficient and socially beneficial, but the current cost litigation cost structure can discourage beneficial activity. Thus, an English rule "loser pays" statute would help level the playing field and encourage an optimal level of private enforcement far more reliably than it would in the context of wrongs for which the law seeks a much higher level of ex ante deterrence.

In addition, the traditional justifications for the current rule do not apply to private merger challenges. The one-way American rule currently applicable to all antitrust damages claims exists in part to encourage small plaintiffs to enforce their legal rights without facing the risk of bearing a much larger adversary's costs. This justification does not apply to the typical merger suit, whether brought by a competitor, a target, or aggregated purchasers pursuing a class action. These parties are typically sophisticated and have substantial resources—additional financial incentives are unnecessary.

Alternatively, a "cost sharing" approach, spreading pretrial costs among plaintiffs and defendants, could ameliorate the problems with the pretrial framework. Although such a program would be subject to its own opportunism concerns, the incentives for opportunistic suit would be mitigated significantly if plaintiffs were to bear some of the responsibility for defendants' discovery costs. The prospect of cost sharing would substantially temper plaintiffs' incentive to impose massive pretrial costs upon defendants, secure in the knowledge that there is little a defendant can do to it in return. If the plaintiff faces cost sharing, it will affect his willingness to file suit in the first place.

2. Toward an Appropriate Level of Damages

The concerns motivating the adoption of a treble damages remedy for antitrust violations simply do not apply to the traditional merger case today. Most mergers are either competitively neutral or are actually procompetitive, and the law is now designed to encourage rather than discourage merger activity. Mergers do not take place via coded conversations in smoky hotel rooms, but are instead announced on the pages of the Wall Street Journal. Because treble damages increase the risk of opportunistic suit

433. AT&T Wireless, PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1330 (11th Cir. 2000) (Carnes, J. concurring) (discussing similar civil rights provision makes private suits financially feasible and provides incentives for private enforcement).

434. See id. (Carnes, J. concurring) (explaining that fee-shifting statute "was intended to help the civil rights Davids of the world do battle with the governmental Goliaths. AT&T Wireless is a $7 billion subsidiary of a $62 billion multi-national corporation. My, how the Davids have grown.")
without any accompanying increase in valuable enforcement or deterrence, the law must change.

But again, the answer is not so easy as simply imposing a “single damages” remedy for section 7 violations. Given the peculiar nature of the merger law, intent actually matters in the context of section 7. It is possible (and with the revised HSR thresholds, perhaps even likely) that parties will pursue intentionally anticompetitive transactions. Intentionally anticompetitive conduct should be deterred. Borrowing from tort law, therefore, we should impose single damages for the typical anticompetitive merger—that is, a merger in which the parties were merely “negligent” in failing to comprehend the impact of the transaction.

Treble damages, by contrast, should be reserved for deliberately anticompetitive behavior paralleling the intentionally anticompetitive conduct forbidden under sections 1 and 2 of the Sherman Act. If the plaintiff proves by a preponderance of the evidence that one or both of the merging parties knew or believed that the merger would have anticompetitive effects, the court should award treble damages.

B. Solving the Time-of-Suit Problem

The “time-of-suit” issue reveals inherent tension between two antitrust policy goals. The law encourages private enforcement, especially when circumstances seem to portend greater need for private enforcement. But it also seeks an environment in which procompetitive mergers are encouraged and merging parties can enjoy repose without constantly worrying that their merger might be subject to a treble damages suit or a divestiture action.

Where there’s tension, there’s compromise. It is possible to argue in good faith that the limitations period for private merger challenges should be short indeed. The vast majority of competitively problematic transactions are highly public. Moreover, most mergers are procompetitive, and the public policy concerns that countenance lengthy limitations periods for obvious wrongs (e.g., breaches of contract, antitrust conduct violations, patent infringement, etc.) do not apply to mergers where illegality is a matter of degree rather than type. It makes little sense to allow lengthy reachback when (1) the conduct giving rise to the cause of action is public, and (2) general deterrence goals are subsidiary to other concerns, especially vis-à-vis other types of claims.

Indeed, both the prospective “in their incipiency” nature of section 7 itself and the well-developed analytical tools associated with prospective merger review make it

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435. Contra Cavanagh, Detrebling Antitrust Damages, supra note 312, at 829-30 (arguing against limiting treble damages to cases where plaintiffs prove intentional violations). The concerns Cavanagh identifies which lead him away from recommending detrebling do not apply to merger challenges. Similarly, the difficulties he envisions with limiting treble damages to cases involving “covert acts” would not overwhelm a merger regime in which trebling was tied to evidence of intent to injure competition. See id. at 831-33 (explaining that overt anticompetitive activity can cause as much damage as covert, and that such cases result in losses that warrant treble damages). Factfinders have successfully categorized wrongdoing by degree for centuries, and an “intent” inquiry is not as inherently complex as the “covert acts” condition Cavanagh posits and rejects. See id. (discussing reasons to reject a “coverts acts” limitation on treble damages).

436. See Wood, supra note 372, at 321-22 (expressing concern about risk under the time-of-suit rule challenging a merger many years after it has occurred).
possible for private plaintiffs to step into the breach quickly and effectively in the event of a failure of government enforcement. The law expressly allows for full substantive recovery on a showing of likely prospective harm, and Guidelines and economic principles allow sophisticated predictions concerning whether a particular transaction will cause problems in the future. These factors suggest that an extremely short limitations period may be appropriate.

On the other hand, private enforcement must be attractive to potential plaintiffs if it is to serve as an effective complement to public enforcement. Despite the availability of attorneys’ fees and powerful injunctive relief (up to and including divestiture), it may be difficult to persuade appropriate private enforcers to file suit in the absence of substantial financial incentives. The law appropriately prevents plaintiffs from recovering speculative future damages they have not yet suffered. Moreover, the availability of effective injunctive relief (and the bar on speculative damages) necessarily implies that the early-filing private plaintiff will not suffer any future damages for which it can be compensated anyway.

Accordingly, a substantial limitations period during which damages can accrue is necessary. Private plaintiffs generally will be called upon to challenge anticompetitive mergers that somehow slip through the cracks of government enforcement. A very short limitations period only makes sense, therefore, when there exist sufficient incentives for an optimal level of enforcement during the period. A too-short limitations period is unlikely to create sufficient incentives for appropriate plaintiffs to file suit. Moreover, in the short term, the Supreme Court’s “lying in wait” concerns are potentially valid. The parties to an anticompetitive merger would have at least some ability and incentive to forego the anticompetitive benefits of an acquisition in the short term. Accordingly, it is not wrong or inequitable to allow damages to accrue long enough to (1) increase plaintiffs’ incentive to sue, and (2) make it extremely difficult for potential defendants to “lie in wait.”

For these reasons, Congress should explicitly do away with the DuPont “time of violation” analysis and the Zenith Radio “accrual” rule as to private merger challenges. Although any specific limitations period is admittedly somewhat arbitrary, the existing four-year statute of limitations upon private section 7 claims likely will strike the right balance between providing private enforcement incentives and limiting opportunistic behavior. This period should run from the date the transaction is completed, and should not be subject to any extension under DuPont or Zenith Radio principles. The same concerns suggest that Congress should amend section 16 of the Clayton Act to limit suits for injunctive relief to a period of four years following the completion of an allegedly anticompetitive merger or acquisition. Moreover, it is absolutely critical

437. See Zenith Radio, 401 U.S. at 339 (holding that a cause of action for damages accrues only on the date that the injury is actually suffered).

438. See supra notes 414-19 and accompanying text for a discussion of lying-in-wait and the four-year statutory limitations period.

439. See Int’l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 928 (9th Cir. 1975) (using the statute of limitations under section four of the Sherman Act as a guideline for determination of whether the doctrine of laches applies to private suits seeking injunctive relief under section 16 of the same act); AREEDA & HOVENKAMP, supra note 1, ¶ 1205b, at 298-99 (advocating the position that “where the anticompetitive effects of the merger are known or readily predictable, the same four-year period that applies to damages...
that liability attach only for transactions that were foreseeably anticompetitive at the
time of completion. Although the limited use of postacquisition evidence may be
appropriate to demonstrate anticompetitive effect, any other “time of assessment”
creates additional overdeterrence problems.

CONCLUSION

Over the past thirty years, the majority of American antitrust law has settled into
an efficient equilibrium that has largely passed by the law governing private merger
challenges. Although the modest history of private merger litigation under section 7 of
the Clayton Act seems to suggest that this oversight is of limited importance, storm
clouds are gathering. As forces combine to produce more private challenges in the
future, it is incumbent upon Congress to ensure that those private challenges will not
cause more problems than they solve. Current law allows plaintiffs to impose
proportionate costs upon defendants, and it allows private suits too long after the
completion of a merger. These problems are vestiges of antitrust law’s atomism-
seeking past that inherently encourage atomistic goals by overdetering beneficial
merger activity and give courts and private enforcers the ability and incentive to
intervene inappropriately wherever they conclude that a market in which a defendant
with a merger in its history participates is insufficiently competitive. Neither rule is
consistent with the efficiency norm of the current antitrust equilibrium.

Accordingly, Congress should adopt “loser pays” or cost-sharing rules to address
the pretrial cost disproportionality problem inherent in the current regime. Congress
should also eliminate the treble damages remedy for most section 7 cases, reserving
multiple damages for cases in which plaintiffs prove that defendants knowingly
completed an anticompetitive merger. To resolve the time-of-suit problem, Congress
should impose a firm four-year limitations/laches period for private merger actions
without extension under the “accrual” or “ripening” principles announced in Zenith
Radio and DuPont.

should apply to laches against a private party as well”).

440. See Areeda & Hovenkamp, supra note 1, ¶ 1205f, at 319-20, for a claim that when using market
share data it may be appropriate to include statistics for the years immediately after a merger as well as the
years prior to a merger. But see Sher, supra note 341, at 64-68 (arguing that the use of post-acquisition
evidence of anticompetitive effect should only be used when it is a result of anticompetitive behavior taken
after a merger rather than post-merger market forces).