"Give The Lady What She Wants" -- As Long As It's Macy's

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by
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I. INTRODUCTION

Chicago burned to the ground in the Great Fire of 1871. But like a phoenix rising from the ashes, the city was quickly rebuilt, and rebuilt better than before.

Marshall Field, the great merchant prince of Chicago, began construction of a grand new department store just a few years after the fire. His goal was to create a store that set a tone of elaborate courtesy, where the customer was always right.

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I. INTRODUCTION

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2 LLOYD WENDT & HERMAN KOGAN, GIVE THE LADY WHAT SHE WANTS 102 (1952).
6 See supra note 2, at 223.
Soon after the first portion of the beautiful new store opened in 1892, while Chicago was hosting the World’s Fair, celebrating the city’s rise from the ashes, Field toured his store – as he did every morning to insure that his business was operating properly. He came to observe a manager in a heated discussion with a female customer. Field asked the manager “what are you doing here?” The manager replied “I am settling a complaint.” “No you’re not,’ snapped Field. ‘Give the lady what she wants.’

This admonition to a manager became so strongly obeyed that the oft-repeated “Give The Lady What She Wants” became corporate policy and the store motto of Marshall Field & Co. And it remained so – until September 9, 2006 when the name Marshall Field & Co. was banished to the dustbin of history in favor of the name Macy’s, recognizing the store’s new corporate owner.

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8 See supra note 2, at 223.
9 Id.
12 Susan Chandler, Pain of a Name Change Cutting Deeper In Chicago, CHI. TRIB, June 4, 2006.
13 Macy’s” is a registered trademark of Federated Department Stores, Inc. Macy’s, Legal Notice at http://www1.macys.com/service/start/safeshopping/legal.jsp (last accessed December 20, 2006).
14 Sandra Jones, Field’s Green Fades to Red, CHI. TRIB, Sept. 9, 2006, at 1. On February 27, 2007, Federated Department Stores (“FDS”), the owner of Macy’s, Bloomingdales and the former May Department Stores, announced that it would seek shareholder approval to change its corporate name to Macy’s Inc., recognizing the 90% of its sales come from Macy’s (the other 10% coming from its other department store chain, Bloomingdale’s). Federated Department Stores, Inc., Federated Plans Corporate Name Change (Feb. 27, 2007), http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle&ID=967632&highlight (last accessed Mar. 13, 2007). That name change was approved by stockholders and became effective June 1, 2007. Sandra Jones, Macy’s State St. Store ‘Doing Badly,’ CHI. TRIB, May 19, 2007, at C1. The mixed lineage and nomenclature of the various entities discussed in this article can be confusing because FDS and Macy’s both had long independent histories before finally merging in 1993. While many of the events discussed occurred while Macy’s was part of FDS, this article will only refer to FDS when necessary for historical clarity, particularly relating to the period prior to 1994 when FDS bought Macy’s.
A change in ownership for Field’s was not all that unusual. Since Marshall Field’s descendants and other stockholders sold the department store in 1982, the chain was owned in turn by British American Tobacco,15 Dayton Hudson/Target16 and May Department Stores (“May”).17 Each new successor to the Field’s legacy made similar pledges that many Chicagoans considered critical.18 Frango Mint chocolates, sold only at Field’s, would still be featured in each store;19 shoppers would receive their purchases in Field’s singular green shopping bag featuring a drawing of the big clock on the flagship downtown store;20 and of course, the name Marshall Field & Co. would live forever.21

The federal antitrust authorities reviewed these and indeed all large department store mergers, and pronounced each free of antitrust concern.22

15 JEFFREY A. TRACHTENBERG, THE RAIN ON MACY’S PARADE 152 (1996). BATUS owned several other American department stores chains, including Gimbels, Kohl’s, Ivey’s and Saks Fifth Avenue.
16 Susan Chandler, Pain of a Name Change Cutting Deeper in Chicago, CHI. TRIB. (June 4, 2006); CBS2Chicago, Remembering Marshall Field’s at http://cbs2chicago.com/vault/local_story_252085543.html (last accessed Dec. 19, 2006); Ameet Sachdev and Lorene Yue, Macy’s Clock? Loyal Shoppers Ticked Off, CHI. TRIB., Sept. 21, 2005, at Business 1. Dayton Hudson Corp. took the name of its two department store chains, Dayton’s in Minneapolis and Hudson’s in Detroit. Id. The corporation was later renamed Target, for its successful discount chain store. In 2001, the Dayton and Hudson department stores were all renamed Marshall Field’s. Id.
This time, however, was different. Upon hearing of Macy’s plan to change the name of downtown Chicago’s iconic anchor to – of all things – a New York department store, hundreds of Chicagoans took to the streets in protest.\textsuperscript{23} Film critic Roger Ebert told Macy’s in a newspaper editorial “[d]on't mess with Chicago, and don't mess with the name Marshall Field's. You will generate rage beyond your wildest nightmares.”\textsuperscript{24} Pulitzer Prize winning author Studs Terkel said “it’s a big mistake.”\textsuperscript{25} But after its merger with May Department Stores (“May”), Macy’s determined that one national department store name brand – Macy’s – would be its best marketing tool, and a better strategy than continuing the legacy of Marshall Field and the other regional department store names memorializing his merchant prince peers.\textsuperscript{26}

Macy’s began similarly to every other department store in the United States– as a single store in a single city – in Macy’s case, New York City.\textsuperscript{27} Despite a national reputation – due in no small part to an enormous and high profile flagship store in Manhattan’s Herald Square and a nationally televised Thanksgiving Day parade, Macy’s was a regional chain with stores in the New York City metropolitan area and a few other states.\textsuperscript{28} Despite these modest beginnings, Macy’s was so well known that it was


\textsuperscript{24} Roger Ebert, \textit{It's Time to Save Field's}, CHICAGO SUN-TIMES, Feb. 1, 2005, at 29.


\textsuperscript{26} Macy’s also owns Bloomingdales, an upscale department store, with thirty nine stores in twelve states. Federated Department Stores, About Bloomingdale’s, http://wwwfds.com/retail/blm_1_2.asp (last visited May 22, 2007).

\textsuperscript{27} See \textit{supra} note 15.

\textsuperscript{28} ISADORE BARMASH, MACY’S FOR SALE 32 (1989); HENDRICKSON, \textit{supra} note 7, at 69.
featured (and immortalized) in the Academy Award winning movie, *Miracle on 34th Street.*

In 1994 Macy’s merged with Federated Department Stores (“FDS”), creating a national retail behemoth spanning the continent, although leaving an important coverage gap in America’s heartland. Soon afterwards, Macy’s embarked on a new strategy changing its historic regional brand names to its two marquee brand names: Macy’s and (for a select few upscale locations) Bloomingdales. In 2005, Macy’s acquired May for $17 billion, filling Macy’s Midwest gap and resulting in a nationwide chain of 1000 department stores, most now operating as Macy’s.

Several states ordered Macy’s to divest a few stores to satisfy antitrust concerns. But the Federal Trade Commission, which reviewed the transaction, took no action beyond its extensive investigation into the merger.

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29 See Internet Movie Database, *Awards for Miracle on 34th Street*, http://www.imdb.com/title/tt0039628/awards (last visited Dec. 19, 2006). One of the most famous lines in *Miracle on 34th Street* was “does Macy’s tell Gimbels?” That line refers to the lack of cooperation between business competitors, and how the two famous department stores actually did cooperate in the spirit of Christmas. David K. Randall, *Only The Store Is Gone*, N.Y. TIMES, Feb. 19, 2006, §14, at 12. While it is unclear whether Macy’s ever actually did “tell” Gimbels very much, today Macy’s owns Gimbels, or at least some of its most important property. See e.g. Terry Pristin, *Remaking the Manhattan Mall; Owner Sees Stern’s Departure as Chance to Freshen Up*, N.Y. TIMES, Sept. 30, 2000, at B1; Barry Adams, *End of An Era; Retail Icon Leaves Landscape For Good as Marshall Field’s Morphs Into Macy’s*, WISCONSIN STATE JOURNAL (MADISON), Aug. 27, 2006, at B1; 11 Gimbels Stores Are Sold By BATUS*, N.Y. TIMES, June 18, 1986, at D4.

30 David Moin, Vicki M. Young, Meredith Derby and Joanna Ramey, *Macy’s Coast-To-Coast: Federated-May Deal Forges New Retail Giant*, WOMEN’S WEAR DAILY, Mar. 1, 2005 at 1; TRACHTENBERG, supra note 15, at 226-32.


Earlier mergers and name changes by Macy’s had eliminated Bullock’s in Los Angeles, Wanamaker’s in Philadelphia, Jordan Marsh in Boston, Rich’s in Atlanta, Burdines’s in Florida, A&S in Brooklyn and Lazarus in Ohio, as well as many others, almost all rebranded as Macy’s. Most of these famous names had been around for at least a century, the legacy of “immigrant entrepreneurs who moved to America and helped build the nation’s cities.” In most instances the founding families had sold out years earlier, but their names lived on, tightly intertwined with individual and family memories of wedding and Christmas gifts, interview suits and other memorable purchases. While consumer reaction in Chicago was particularly intense, shoppers across the nation expressed reluctance to trade Macy’s for their local department store, even if long divorced from its original founders.

According to Chicago School antitrust dogma, none of this is particularly relevant. Chicago School antitrust lawyers and economists – were they to consider this issue at all – would likely declare that department stores are a mere basket of goods, because department stores are essentially a collection of goods mostly available at other stores. And were a department store to impose anticompetitive price increases, shoppers

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35 Sandra Jones, *Hoarding Names No Game*, CHI. TRIB., July 23, 2006, § 5, at 1. A few were rebranded as Bloomingdales.
36 Id.
39 The Chicago School world view, boiled down to its most simplistic description, would argue that “[a]ntitrust concerns should kick in only when a firm had a dominant market share in a market protected by entry barriers, and entry itself could be relied upon to solve most competitive problems, except when government action protected incumbents.” Jonathan Baker, *A Preface to Post-Chicago Antitrust* 20 (June 2001), available at SSRN: http://ssrn.com/abstract=296119.
should, at least in Chicago School theory, make wise decisions for allocative efficiency and maximization of consumer welfare. In this idealized perfect market, department store shoppers would then flock to the myriad of stores that offer similar wares. Even if that were not to happen, the lack of entry barriers in something as simple as retail would invite a host of new competitive entrants to vie for the business of the incumbents.

An incongruity therefore exists between the reaction of consumers to Macy’s absorption of the majority of department stores in the United States and the Chicago School’s belief in its irrelevance. Particularly in the city of Chicago, was it pure emotionalism, driven by fond memories of Marshall Field’s as an independent and elegant store? Or did Chicagoans – the real denizens, not those just attached to the University of Chicago and Chicago School thinking -- have good reason to anticipate higher prices as well as reduced output in the form of less service and fewer choices?

Several noted antitrust scholars have suggested that the time is ripe for “merger retrospectives”... reviews of the actual competitive effects of mergers that were

40 The term “consumer welfare” is confusing to some because it does not mean that the welfare of the majority of consumers is maximized. Stephen F. Ross, Principles of Antitrust Law 3-4 (Foundation 1993). Consumer welfare means maximization of societal wealth, not that of individuals, which can simply mean there is more wealth, but it is concentrated among the already wealthy. Similarly, “allocative efficiency” does not mean “competition.” Id. at 4. The Chicago School usually focuses on short-term rather than long-term efficiencies. Id.


42 This incongruity highlights one of the major disputes between the Chicago School and the so-called Post-Chicago School. See Jonathan Baker, A Preface to Post-Chicago Antitrust 20 (June 2001), available at SSRN: http://ssrn.com/abstract=296119. Several Post-Chicago School cases have considered the role of a non-monopolistic yet dominant firm and its potentially exclusionary conduct. Id. See also Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000).
consummated despite having raised serious antitrust concerns." This article will examine the antitrust ramifications of Macy’s growth and conclude that the real Chicagoans are in fact correct: Macy’s acquisition of May has led to market power, manifested by both an increase in prices and a reduction in output.

Part II of this article will provide the analytical framework for antitrust analysis of department stores, including product market definition, as well submarkets, cluster markets and price discrimination markets. This section will also analyze previous antitrust decisions concerning department stores. Part III of this article will review the results of an empirical study designed to carefully examine some of the assumptions and conclusions made by the FTC. The study offers significant proof that Macy’s has increased its prices since the merger, suggesting that the firm has market power. Part IV of this article contains conclusions, appropriate remedies and suggestions for additional research.

III ANTITRUST FRAMEWORK AND ANALYSIS

A. Background

For over a century, courts and commentators have stated that the purpose of the antitrust laws is to promote competition, or at least “to ensure that markets are competitive.”45 But according to Robert Bork, one of the leading lights of the Chicago School of antitrust, while “preservation of competition was often cited as the aim of the law, there seemed no agreed definition of what, for the purposes of antitrust, competition is.”46

The Chicago School of antitrust is named for its proponents’ connection to the University of Chicago.47 “The Chicago School offered an elegant, pro-market and largely anti-government vision of antitrust policy,”48 firmly embedded in neoclassical price theory and begun with an assumption of perfect competition.49 The Chicago School assumes that in the long run, most markets tend to correct their own imperfections, and to interject government interference will only prolong the distortion or create new imperfections.50 Just three firms can make a market dynamically competitive; if that is insufficient, supracompetitive pricing will be undermined by new entrants into the

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46 Id.
47 According to Judge Bork, the books and articles that transformed and infused antitrust with economics began at the University of Chicago Law School and to a lesser extent, the Department of Economics and Graduate School of Business. BORK, supra note 302, at xi. But see Herbert Hovenkamp, Post-Chicago Antitrust: A Review and Critique, 2001 COLUM. BUS. L. REV. 257, 259 (2001) (“Contrary to common perception, the Chicago School was hardly the first time that United States antitrust law confronted economic theory.”).
50 Hovenkamp, supra note 48, at 257, 269-270; Greaney, supra note 49, at 857, 860-861.
market.\textsuperscript{51} And “court-ordered antitrust fixes actually make markets less rather than more competitive, or injure consumers for the benefit of competitors.”\textsuperscript{52}

The question of whether a department store merger is anticompetitive is just one of many battlefronts in the war between the Chicago School and so-called Post-Chicago antitrust. Post-Chicago antitrust arose from a belief that markets were “somewhat messier” than the Chicago School claimed, and that Chicago School economics was less robust in explaining all behavior that arose through competition, or lack thereof.\textsuperscript{53}

Post-Chicago antitrust is “fearful of strategic anticompetitive behavior by dominant firms,” and also believes that government intervention can be successful.\textsuperscript{54} It is not that Post-Chicago antitrust ignores or seeks to reverse the Chicago School; rather Post-Chicago antitrust seeks different explanations and solutions when a Chicago School answer is not enough alone.\textsuperscript{55}

These two often opposing views of antitrust conflict when scrutinizing Macy’s acquisition of May. Although the Chicago School and Post-Chicago antitrust agree on a great many things within this broad area of law, there are some very important and substantial differences.\textsuperscript{56} One of those differences is whether competition is significantly

\begin{footnotes}
\item[51] Hovenkamp, \textit{supra} note 48, at 257, 266.
\item[52] Hovenkamp, \textit{supra} note 48, at 257, 267; Greaney, \textit{supra} note 49, at 857, 861.
\item[53] Hovenkamp, \textit{supra} note 48, at 257, 258.
\item[54] Hovenkamp, \textit{supra} note 48, at 257, 267.
\end{footnotes}
diminished in oligopolistic markets.\textsuperscript{57} Another difference is whether something like retail can have significant entry barriers.\textsuperscript{58}

Macy’s 2005 merger with May is specifically impacted by two separate antitrust laws, the Sherman and Clayton Acts. Sherman § 1 concerns price fixing and other collusive activities. Clayton §§ 7 and 7A, regulates large corporate mergers\textsuperscript{59} and related government reporting requirements.\textsuperscript{60} It was under Clayton §§ 7 and 7A that the FTC came to review Macy’s merger of May.

Antitrust actions in the United States can be brought by the federal or state governments, or private parties acting as private attorneys’ general.\textsuperscript{61} Federal antitrust enforcement is the rubric of the FTC and U.S. Department of Justice Antitrust Division (“DOJ”) operating in an unusual situation where both have sole jurisdiction over some matters and shared jurisdiction over others.\textsuperscript{62} Generally speaking, the FTC is empowered to enforce the Clayton Act and the FTC Act; the DOJ enforces the Clayton Act and the Sherman Act.\textsuperscript{63} Because the FTC Act outlaws “unfair methods of competition and unfair or deceptive acts or practices,” the FTC has been permitted to bring suits under the FTC Act that could otherwise be brought by the DOJ under the Sherman Act.\textsuperscript{64}

\textbf{B. Sherman § 1}

\textsuperscript{58} See Hovenkamp, \textit{supra} note 48, at 257, 267, 278.
\textsuperscript{59} The term “merger” in antitrust means “the purchase of one firm of some or all of the assets of another firm.” \textit{Supra} note 45.
\textsuperscript{60} 15 U.S.C. §§ 18, 18A.
\textsuperscript{61} Hovenkamp, \textit{supra} note 45, at 584, 590, 593-94.
\textsuperscript{62} See Hovenkamp, \textit{supra} note 45, at 587.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} Hovenkamp, \textit{supra} note 45, at 584.
Sherman § 1 outlaws price-fixing and related offenses by two or more firms acting in concert.\textsuperscript{65} Although this area is one of the chief disagreements between the Chicago School and Post-Chicago thinking, both agree to some degree that when there are fewer competitors, there is a greater chance of illegal price coordination and agreement between firms.

Price-fixing is one of the greatest harms antitrust laws seek to cure; one of the reasons the Sherman Act was passed in the first place was because of the proliferation of these types of agreements.\textsuperscript{66} "[F]irms acting in concert can earn monopoly profits just as a single-firm monopolist."\textsuperscript{67} Even without an actual price-fixing agreement, when markets are highly concentrated oligopolies, "firms cannot reasonably ignore the price and output decisions of competitors."\textsuperscript{68}

\textbf{B. Department Stores And Sherman § 1 Case law}

Whether department stores are easy targets for investigation because of their high profile consumer-oriented operations, or because of an unusually high incidence of actual price fixing, there have been a large number of price-fixing and other suits brought under Sherman § 1, although most have been dismissed\textsuperscript{69} or settled\textsuperscript{70} without any clear

\textsuperscript{65} 15 U.S.C. § 1. Sherman § 2 deals with monopolization and attempted monopolization by a single firm. 15 U.S.C. § 2. This article does not consider whether Macy’s is a monopoly or attempting to monopolize, but only the lesser and related standard under Clayton § 7 of whether the merger substantially reduced competition.

\textsuperscript{66} \textit{STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW} 117 (1993).

\textsuperscript{67} \textit{HOVENKAMP, supra} note 45, at 144.

\textsuperscript{68} \textit{Id.} at 37.

\textsuperscript{69} See, e.g. Toys “R” Us, Inc. v. R.H. Macy & Co., Inc., 728 F. Supp. 230 (S.D.N.Y. 1990) (Macy’s and a clothing manufacturer engaged in a boycott of a Toys “R” Us, but boycott was not a per se violation of Sherman § 1); Kendler v. Federated Department Stores, Inc., 88 F.R.D. 688 (S.D.N.Y. 1981) (FDS accused of price fixing following an FTC investigation; class denied certification); Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919 (2d Cir. 1985) (FDS pressure on manufacturer to boycott off-price retailer did not violate Sherman § 1); Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972) (Exclusive arrangements between FDS and suppliers did not violate Sherman § 1).
disposition of the original claim. The highly concentrated nature of the department store product market, however, suggests continuing need for close scrutiny.

A class action lawsuit was filed by consumers against Nine West, a shoe manufacturer/retailer, and Macy’s, as well as several other traditional department store chains for price fixing. The class plaintiffs alleged that Nine West and the department stores met regularly at semi-annual trade shows to set minimum retail prices, to determine which shoes would be discounted, and on which dates the discounts would occur. The FTC investigated the allegations as well.

After surviving a motion to dismiss, counsel withdrew the class lawsuit and deferred to ongoing settlement negotiations between the defendants and the attorneys general of the fifty states, District of Columbia, commonwealths and possessions. The defendants agreed to pay $34 million in damages.

Macy’s and May were alleged to have conspired with one another to fix the price of fine tableware and to ensure that the manufacturers (Lenox and Waterford) boycott Bed, Bath and Beyond. Macy’s, May, Lenox and Waterford paid a combined $2.9 million

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71 See, e.g. Axelrod v. Saks & Co., 77 F.R.D. 441 (E.D. Pa. 1978) (Class was certified against several department stores accused of price-fixing).
72 In re Nine West Shoes Antitrust Litigation, 80, F. Supp. 2d 181, 183-84 (S.D.N.Y. 2000). The ten department stores were FDS [since renamed Macy’s], Dayton Hudson [now part of Macy’s], May [now part of Macy’s], Lord and Taylor [recently divested from Macy’s], Nordstrom, Macy’s, The Bon-Ton and Bloomingdales [part of Macy’s]. Id. at 184.
73 Id.
76 Id.
fine as a settlement. The retired chairman and chief executive of Macy’s was indicted for perjury in the tableware investigation, although that charge was later dismissed.

I. Magnin, a Macy’s-owned department store that has since been converted to Macy’s or Bloomingdale’s, was alleged to have fixed the price of upscale women’s clothing in Northern California with Sak’s Fifth Avenue. Macy’s paid a $50,000 fine to the DOJ and $1.4 million to a certified class of customers.

Broadway-Hale, now owned by Macy’s, entered into an agreement with suppliers of appliances to refuse to sell appliances to a local retailer, or to do so only at unfavorable prices. The Supreme Court held that this group boycott, or concerted refusal to deal, was per se illegal. Although the trial court characterized this as a “purely private quarrel,” the Supreme Court held that such a boycott was unlawful as the first step toward a monopoly.

i. Other Collusive Conduct

There are allegations of anticompetitive conduct that have never been litigated. For example, May maneuvered for years to keep Macy’s from expanding in the Washington, D.C. area.

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81 Id.
83 Id. at 212.
84 Id. at 210.
85 Id. at 213.
D.C. area. The result was that May operated twenty nine department stores in the region while Macy’s operated seven.

May would “pressur[e] mall owners and scarf[] up empty space out of concern the competition would acquire it.” Macy’s and Bloomingdale’s first expanded to the Washington area in 1990; May demanded that when new malls were developed that Macy’s and Bloomingdale’s stores be kept out. In 2001, after J.C. Penney left a Bethesda, Maryland mall, May blocked Macy’s from entering and the mall agreed to split the space – the lower level becoming an Old Navy and the upper level becoming an annex to Hecht’s. When hometown Washington, D.C. department store Woodward & Lothrop ceased operations in 1995, May and J.C. Penney formed a successful alliance to keep Macy’s from acquiring any of the stores.

The situation in the Washington, D.C. area may not be uncommon. According to an industry trade magazine, “[a]lternative anchors [such as Target] are certainly welcomed at malls by department stores that have survived industry consolidation and are loath to see direct competitors at the same center.” Dillard’s was “blackballed” by Macy’s and May whenever it tried to expand into a Southern California mall. Similarly, Von Maur, a small independent department store chain in the Midwest, has been unsuccessful in its efforts to enter the Milwaukee market. Apparently The Bon-

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87 Id.
88 Id. FDS operated five Macy’s and two Bloomingdale’s; May operated twenty one Hecht’s and eight Lord & Taylor stores.
89 Id.
90 Id.
91 Id.
Ton, which is in every mall in the Milwaukee area, has “veto power on new anchor tenants at the malls” and it is using that veto power to “keep competition out.”95

Another example can be found at the Christiana Mall in Newark, Delaware (suburban Philadelphia), which prior to the Macy’s/May merger was anchored by Macy’s and two May brands: Hecht’s and Lord & Taylor.96 Two Macy’s would be “overkill,” according to one retail expert and Macy’s would prefer the space be sold to a non-competitor.97 “Long-standing reciprocal easement agreements between the landlords and [Macy’s] will also play a big part in how the stores are repositioned, because . . . [of] agreements that give anchors a lot of say in the matter.”98

At the time this article was written, both the former Hecht’s and Lord & Taylor spaces at Christiana Mall are empty.99

ii. Antitrust Violations and Recidivism

A concern in antitrust, and indeed, in all unlawful conduct, is recidivism. Repeated antitrust violations by a corporate entity may demonstrate that fines and even the possibility of prison sentences are considered good business risks when compared with the possibility of high rewards.100

96 Id.
97 Id. (quoting Stuart Kessler, president of Clear Thinking Group, Hillsborough, New Jersey).
98 Id.
Macy’s and its predecessor companies have been involved in a number of price fixing cases. The fewer the number of competitors, the easier it is to fix prices and the more likely it is that a corporation will do so.\footnote{See James M. Clabault & Michael K. Block, Sherman Act Indictments 1955-1980 901-911 (Federal Legal Publications 1981); Richard Posner, A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365, 394-95 (1970).} In fact, fines may not be an effective deterrent to a profit maximizing corporation; the decision to engage in such illegal conduct may simply be a logical conclusion to a cost-benefit analysis based on the possible profit versus the risk of prosecution, conviction and fine. One Supreme Court justice noted that fines were an ineffective deterrent to antitrust violators and that the impact has been negligible.\footnote{U.S. v. South-Eastern Underwriters Ass’n., 322 U.S. 533, 591, n.11 (1944) (Jackson, J., dissenting in part).}

There may be reason for concern that with fewer department stores, such behavior – and recidivism -- will increase.

D. \textit{Clayton §§ 7 and 7A}

It was never clear if – and to what extent – mergers were regulated by Sherman § 1\footnote{Ross, supra note 66, at 320. Sherman § 1 would be the relevant law as it declares unlawful “contract, combination . . . or conspiracy” in restraint of trade, and a merger agreement could theoretically be considered such a contract, combination or conspiracy. See 15 U.S.C. § 1. Sherman § 2 is not invoked unless the merging parties are monopolizing or attempting to monopolize.} One of the earliest Supreme Court antitrust cases held by a bare majority\footnote{Northern Securities Co. v. United States, 193 U.S. 197, 327-328 (1904).} that § 1 applied to mergers, although it was disputed by four members of the Court in a strong dissent.\footnote{193 U.S. at 400 (Holmes, J., dissenting)} To shore up this and other weaknesses in the Sherman Act, the Clayton Act was enacted in 1914.\footnote{See Marc Winerman, The Origins Of The FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 53-55 (2003).}
The critical language in Clayton § 7 empowers the government\textsuperscript{107} to block acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”\textsuperscript{108} This allows the government to challenge mergers before they are consummated and lead to actual anticompetitive effects, “arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.”\textsuperscript{109}

Clayton Section 7 reflected a Congressional intent to use antitrust laws to more aggressively block anticompetitive mergers.\textsuperscript{110} Clayton § 7 was further strengthened in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, § 7A, which requires parties to certain large mergers to notify the DOJ and FTC prior to the merger and submit to a waiting period while the government collects information about the proposed transaction.\textsuperscript{111}

\textsuperscript{107} Private parties also may sue to enjoin a merger. 15 U.S.C. § 15. Private parties would, however, have a difficult time bringing a claim under Clayton § 7 before a merger, because only the government is given access to confidential transaction materials and a waiting period prior to consummation of the merger. See generally 15 U.S.C. § 7A. Retrospective merger reviews may present few choices for an appropriate remedy because it would require a court to “unscramble integrated business assets and activities.” ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE 420 (2002). See also HOVENKAMP, supra note 45, at 492-93.

\textsuperscript{108} 15 U.S.C. § 18. As originally enacted, Clayton § 7 contained a significant weakness by not attempting to regulate asset acquisitions or merger of firms that were not direct competitors.\textsuperscript{108} In 1950, the Celler-Kefauver Act was passed to amend the Clayton Act and address these issues. Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (1982 and Supp. V 1987).

\textsuperscript{109} Brown Shoe Co. v. U.S., 370 U.S. 294, 317 (1962). See also GAVIL supra note 107, at 419.

\textsuperscript{110} HOVENKAMP, supra note 45, at 589. See requirements for Hart-Scott-Rodino reporting at Federal Trade Commission, Pre-Merger Introductory Guides, available at http://www.ftc.gov/bc/hsr/introguides/introguides.htm (last visited Feb. 11, 2007). The “size of person” and “size of transaction” tests were increased to higher dollar amounts effective February 21, 2007. 72 Fed. Reg. 2692-93 (January 22, 2007). The tests are quite complicated, but, generally speaking, they capture transactions where one party has assets in excess of $239.2 million, or one party has assets in excess of $119.6 million and the other party has assets in excess of $12 million. Id.; 15 U.S.C. § 18a(a)(2)(A-B).
E. Market Definition Standards For Clayton § 7 Review

A horizontal merger raises potential antitrust concerns when both the acquiring firm and the acquired firm produce the same product and both firms compete against one another in the same geographic market. Federal enforcement has focused mostly on horizontal mergers because it can be an obvious path to monopolization, or at least oligopoly. One of the most difficult components of antitrust analysis is determining the relevant product market. In fact, there is no subject in antitrust more confusing than defining markets; “[o]ne reason is that the concept, even in the pristine formation of economists, is deliberately an attempt to oversimplify – for working purposes – the very complex interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes . . . .”

i. Definition of Product Market and Recognizing Submarkets

Under Clayton §7, one must determine the relevant market to assess competitive harm. The relevant antitrust market is comprised all the firms that participate and compete in the market and is broken down into a product market and a geographic market. An antitrust product markets includes goods that buyers consider reasonable substitutes, or the cross-elasticity of demand. A geographic market is the trade area in which buyers might reasonably turn to purchase the relevant product or services. That

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113 HOVENKAMP, supra note 45, at 492; Baker, supra note 112, at 129, 130.


115 Id. at 575-76.

analysis leads to estimates of market share for the competitors in the relevant market, which is then used to discern market power and potential anticompetitive effects.117

The first exposition of market definition came after Clayton § 7 was amended in 1950 in the Supreme Court’s decision in Brown Shoe Co. v. United States.118 In Brown Shoe, the Supreme Court stated that “[t]he outer boundaries of a market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”119

The Court also held that within a broad product market, “well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”120 Because Congress had created no single standard for defining a product market, the Court instructed that “practical indicia” be used, including “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique product facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”121 By these “practical indicia” in Brown Shoe, the Court found distinct submarkets for men’s, women’s, and children’s shoes.122

The practical indicia have often been used by courts erroneously, leading modern courts and commentators to be hostile to the concept of submarkets.123

117 Id.
119 370 U.S. at 325.
120 Id. (citing U.S. v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593-95 (1957) (as there are two du Pont antitrust cases in the mid-1950s, this case is usually referred to as “General Motors”)
121 Id.
122 Id. at 325-26.
Department stores may well be a submarket of a greater product market including sales of clothing and home goods. While most categories of products sold in department stores are sold elsewhere, many consumers indicate a clear preference to make their purchases in department stores, suggesting at least some inelasticity of demand substitution.\textsuperscript{124} A number of cases have recognized antitrust product markets based on the distribution channel for the product.\textsuperscript{125}

\textbf{ii. Cluster Markets}

One year after \textit{Brown Shoe}, in \textit{United States v. Philadelphia National Bank}, the Supreme Court embraced the concept of cluster markets.\textsuperscript{126} A cluster market is a cluster of services that could theoretically be purchases separately, but for a variety of reasons, including convenience, consumers prefer to buy them together.

\textit{Philadelphia National Bank} involved the proposed merger of two commercial banks and the Court found that banks offered a “cluster of services.”\textsuperscript{127} Consumers purchased various banking services separately, or in packages, and it was theoretically possible to acquire most services separately through the cheapest or best provider of the service.\textsuperscript{128} This was not, however, what happened in reality.


\textsuperscript{127} \textit{Id.}

\textsuperscript{128} See generally \textit{Id.} at 326-27.
Although some banking services, such as checking accounts, were only offered by commercial banks, other banking services, including savings accounts, were offered by commercial banks and savings banks.\textsuperscript{129} The Court, however, excluded savings banks from the relevant antitrust product market because it found that consumers chose to purchase a cluster of related banking services from one purveyor, despite superior interest rates on savings accounts from savings banks.\textsuperscript{130} As an explanation, the court quoted a trial witness who said:

> There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3 1/2. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get 1/2 of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level.\textsuperscript{131}

In other words, a “settled consumer preference” insulated individual commercial banking products from competition.\textsuperscript{132}

The economic principle of “complementarity” underlies the concept of cluster markets, and lower courts have applied the concept to a variety of industries, including department stores.\textsuperscript{133}

\textbf{iii. Merger Guideline Definitions and Price Discrimination Markets}

\textsuperscript{129} \textit{Id.} at 356-57, n. 34
\textsuperscript{130} \textit{Id.} at 357. When this case was decided, only commercial banks were permitted to offer checking accounts. \textit{Id.} at 326.
\textsuperscript{131} \textit{Id.} at 357, n. 34.
\textsuperscript{132} \textit{Id.} at 357.
\textsuperscript{133} ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 61-62 (2d ed. 2004). Cluster markets have also been used to challenge mergers involving supermarkets, beauty products, office supplies, ammunition, rotary drills, marine engines, industrial gasses and a variety of medical services. Id. at 62. \textit{See also} Gregory J. Werden, \textit{The History Of Antitrust Market Delineation}, 76 MARQ. L. REV. 123, 166 (1992); James A. Keyte, \textit{Market Definition And Differentiated Products: The Need For A Workable Standard}, 63 ANTITRUST L.J. 697, 727 (1995); \textit{But see generally} Baker, \textit{ supra} note 368, at 129, 157-58 (cluster market approach inappropriate for market definition because clusters include products and services that are no demand or supply substitutes).
In 1992, the DOJ and FTC jointly issued “Horizontal Merger Guidelines” (“Guidelines”) discussing and describing the two agencies’ policies toward enforcement of Clayton § 7.134 The Guidelines remain an administrative guidance document and antitrust law is still governed by the Clayton Act itself, as well as court decisions interpreting the Clayton Act.135 But the Guidelines are influential to judges and routinely cited by courts considering mergers.136

The Horizontal Merger Guidelines consider market-wide concentrations as a generally satisfactory proxy for market power; market power and anticompetitive effects can be presumed from high market shares.137 After considering a relevant product and geographic market, the Guidelines hypothesize a small but significant and nontransitory increase in price (“SSNIP”) of five percent, and then question whether consumers would switch to competing substitutes.138 If sales remain constant or even grow after a SSNIP, then there is a possibility that the firm has market power.

Additionally, the Horizontal Merger Guidelines recognize the practice of price discrimination, where firms charge different prices to different buyers of the same

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135 Hovenkamp, supra note 45, at 493.


137 Horizontal Merger Guidelines at 1.0 – 1.11.

138 Horizontal Merger Guidelines at 1.11.
product. 139 “The term price discrimination is applied when a seller can “raise price profitably to a class of targeted buyers, notwithstanding the incentive of buyers to substitute to other products or more distant sellers.” 140 One example of price discrimination is airline tickets, where different passengers – even adjacent seatmates – may pay enormously different prices to travel to the same destination, depending on when the ticket was purchased and the outlet the ticket was purchased from.

Department store pricing strategies do not fit neatly into traditional and conventional definitions of price discrimination. But hypothetically, if there is only one middle market department store in a mall, city or other geographic market, 141 the department store could engage in price discrimination in situations that include the following: 1) pricing clothing directed at older, non-computer using customers, at a supra-competitive level where the only significant competition is through the internet; 2) pricing professional clothing aimed at those with little time to shop several specialty stores, as opposed to one department store, at higher margins; 3) pricing tailored clothing, particularly men’s and women’s business attire, at a higher margin than casual clothing in the same stores if there are few alternatives to that one department store in that geographic market; and 3) pricing items commonly listed in gift registries for babies and weddings at higher margins than other items in the store because the gift registrant needs to list items in a store accessible to friends and family across the nation, including non-computer users. 142

139 Baker, supra note 112, at 129.
141 This hypothesis would also be appropriate if there were more than one middle-market department store and oligopolistic behavior, conscious parallelism or collusion.
142 The challenge is charging a high price (and selling only to consumers who do not search other stores), versus charging a low price (and potentially also selling to consumers bargain hunt). See Daniel S. Hosken
iv. Unilateral Effects

The Horizontal Merger Guidelines describe so-called “unilateral effects,” whereby a single merged firm may find it profitable to alter behavior unilaterally following a merger by elevating price and suppressing output.143 The Guidelines express particular concern if one party to the merger is a first choice for consumers and the other party is a second choice, and hence “a competitive constraint to the first choice.”144 Once the second choice is eliminated is eliminated by the merger, the competitive restraint is gone.

“As an economic matter, unilateral effects do not turn on market definition. The economic analysis is the same regardless of whether the case is framed as a merger generating high concentration within a narrow market or as the loss of direct competition between the merging firms within a broader market where concentration is lower.”145

As a hypothetical example, Macy’s and May could be compared to Mercedes and BMW.146 If Mercedes and BMW were to merge, the change in concentration in a “new

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143 Horizontal Merger Guidelines at 2.2; Marc G. Schildkraut, Oracle And The Future Of Unilateral Effects, 19-SPG ANTITRUST 20, 21 (2005). The Guidelines also restrict unilateral effects analysis to situations in which the combined firm has over a 35% market share. Id. See also United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1113 (N.D. Cal. 2004).
144 Horizontal Merger Guidelines at 2.111.
146 With all due respect to Macy’s and May, a Honda Accord and Toyota Camry might be more appropriate comparisons, but Professors Lande and Langenfeld used Mercedes and BMW in their excellent example. Robert H. Lande & James Langenfeld, The Evolution Of Federal Merger Policy, ANTITRUST 5 (Spring 1997).
automobile” market would be insignificant, while the new concentration in a “luxury car market” would likely raise serious antitrust concerns. At the same time, at least some reasonable arguments could be made that there is no such thing as a “luxury car market” for antitrust purposes, because at least some consumers would be dissuaded by a price increase and buy a non-luxury car.

Merger analysis works best when dealing with fungible commodities; differentiated products with subtle variations complicate market definition because even closely related products may be not be substitutes for all people at all times. The critical question is whether the differentiated products “provide effective pricing constraints on one another.” In other word, does Mercedes constrain price increases by BMW (or vice versa), or are both affected more by every other car seller, including subcompacts and trucks. Similarly, did Macy’s or May constrain the other’s prices before the merger for any customers in any geographic market? The FTC found no evidence that Macy’s and May priced their good strategically to one another, although the results of the empirical study conducted for this article suggest otherwise.

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147 Lande & Langenfeld, supra note 146, at 5. See also Jonathan B. Baker, Mergers Among Sellers Of Differentiated Products, ANTITRUST 23 (Spring 1997) (essay comparing hypothetical “Crunchies” versus “Fruities.”). Similarly three economists, one with the FTC, found that “merger effects are not well understood when firms compete in multiple dimensions, such as price, product, place and promotion.” Steven Tenn, Luke Froeb & Steven Tschantz, Mergers When Firms Compete By Choosing Both Price And Promotion 1 (Apr. 11, 2007), available at http://ssrn.com/abstract_id=743167. Reviewing the effects of the 2003 merger between Haagen-Dazs and Dreyers, both super-premium ice creams, the economists found that a model “which ignores promotion under-predicts the price effects of a merger . . . .” Id. at 2.

148 See generally Id.

149 See generally Id.

150 Christopher A. Vellturo, ANTITRUST 16 (Spring 1997). With an enormous amount of data and minions to perform the calculations, several models have been developed to analyze such markets, including the Residual Demand Elasticity Model (Jonathan Baker and Timothy F. Bresnahan), the Antitrust Logit Simulation Model (Gregory J. Werden and Luke M. Froeb), and the Almost Ideal Demand System (Jerry Hausman). Id. See also Gregory J. Werden, Simulating Unilateral Competitive Effects From Differentiated Products Mergers, ANTITRUST 27, (Spring 1997).

151 Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005); See Part V, infra.
E. Department Stores And Clayton § 7 Before Bon-Ton

There have been a few merger cases involving department stores over the years. Most federal courts considering the matter have implicitly or explicitly recognized department stores as a distinct antitrust product market.152

In 1962, the U.S. Department of Justice (“DOJ”) brought an action under Clayton § 7 to enjoin Gimbels Department Store from purchasing Ed Schuster & Co. (“Schuster’s”), a Milwaukee department store chain. Citing affidavits that stated that Schuster’s business was in decline, that it had closed one of its stores, and that some of its remaining stores were in declining neighborhoods, and that it had no downtown store to compete directly against Gimbels, the court found that the merger would not substantially lessen competition in retail merchandising in Milwaukee County.153

In the late 1970s, Marshall Field & Co. was sued by Carter Hawley Hale (“CHH”), a nationwide department store holding company, after an unsuccessful takeover bid for Field’s.154 Marshall Field’s maintained that rejecting a takeover by CHH was necessary because a merger between the two firms would violate the antitrust laws.155 Although decided on securities law, the court held that such antitrust concerns

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153 U.S. v. Gimbel Brothers, Inc., 202 F. Supp. 779, 780 (E.D. Wis. 1962). Although the procedural posture of the case was preliminary injunction and no testimony of economists (or anyone other than the affiants) was heard, the court found that there were “literally hundreds of effective competitors of department stores.” Id. The DOJ did not appeal the decision. Gimbels’ downtown Milwaukee store was closed with the rest of the chain 1986. The store was acquired by Marshall Field’s, which then shuttered it in 1997. The store is now offices, apartments and a Border’s Bookstore.
154 Panter v. Marshall Field & Co., 486 F. Supp. 1168, 1172, 1175 (N.D. Ill. 1980), aff’d 646 F.2d 271 (7th Cir. 1981). CHH, the owner of Neiman Marcus, filed for bankruptcy in 1991 after taking on considerable debt to avoid several hostile takeover attempts. Neiman Marcus was spun off as a separate company and most of the remaining department store chains were sold to FDS.
were within the appropriate purview of directors deciding whether merger was in the best interests of stockholders.\textsuperscript{156}

In 1986, May acquired Associated Dry Goods, including its Joseph Horne Company department stores in Pittsburgh, Pennsylvania. The City of Pittsburgh sued to enjoin the merger claiming it would substantially lessen competition or tend to create a monopoly in violation of Clayton § 7.\textsuperscript{157} May already owned Horne’s Pittsburgh competitor, Kaufmann’s.

The City of Pittsburgh and May stipulated to a court ordered dismissal which required May to divest Horne’s “as a viable competitive entity in the type of department store business operated by Horne’s or Kaufmann’s or Gimbel’s [sic].”\textsuperscript{158}

In 1984, CHH was the subject of a hostile takeover by The Limited, Inc.\textsuperscript{159} CHH argued that it had standing to sue The Limited under Clayton § 7 since the merger contemplated would substantially lessen competition in a department store product market under Clayton § 7.\textsuperscript{160}

F. The \textit{Bon-Ton} Case

\textsuperscript{158} \textit{Id}. Horne’s was eventually acquired by a local investor group, which attempted to sell the chain to Dillard’s and real estate developer Edward J. DeBartolo, Sr. After several years of litigation, Dillard’s acquired the Ohio Horne’s stores and FDS acquired the Pennsylvania stores.
\textsuperscript{160} \textit{Id}. at 248. The court held alternatively that a tender offer target did not have standing to challenge the acquisition under § 7 and that, inter alia, CHH’s proffered relevant product market of “moderate-priced women’s fashion apparel” and “special-sized women’s apparel” did not withstand economic scrutiny. \textit{Id}. at 252-53.
A federal district court in New York held in 1994 that traditional department stores were a distinct antitrust product market. The case involved a § 7 challenge to May’s proposed acquisition of the McCurdy department store chain in upstate New York, mostly in the Rochester metropolitan area.

McCurdy’s was founded in 1901 and was one of Rochester’s premier department stores. The company was closely-held and elected to sell its assets in 1994. The two most serious bidders were May and Bon-Ton. McCurdy’s accepted May’s bid of $17.75 million. At the time, May’s forty-unit Kaufmann’s chain operated four stores in Rochester – at each of the four major shopping malls. The Bon-Ton had no presence in Rochester but had recently acquired ten stores in Buffalo, New York, approximately 75 miles away.

May’s plan was to take over the McCurdy’s space and operate two separate Kaufmann’s stores at two of the Rochester malls (converting the former McCurdy’s into a Kaufmann’s, but continuing to operate the existing Kaufmann’s at the same mall – thus

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162 Id. at 863.
163 Id.
164 Id. at 864.
165 Id.
166 Id. May offered to buy eight of the twelve McCurdy’s stores, six of which were in Rochester, one in Elmira, New York, and the other in Syracuse, New York. Id. The Elmira and Syracuse stores were not at issue in the antitrust case, and May had agreed to convey three of the six Rochester stores to a local real estate developer. Id.
167 Id. at 863.
preventing the possibility of a new entrant). At the third mall, Kaufmann’s would take over McCurdy’s store and convey the existing Kaufmann’s store to the mall owner. At the fourth mall, May planned to continue operating it’s existing Kaufmann’s store and to convert the former McCurdy’s store into another May chain, Lord & Taylor.

i. The Bon-Ton and the State of New York Sue May

The Bon-Ton and the State of New York sued May alleging that the acquisition would result in a monopoly “in the traditional department store market in the Rochester area,” violating federal and state antitrust laws. If the transaction were to proceed as planned, May would have over a 50% market share for traditional department stores and would also have acquired all the available space for a department store in the four major regional malls in metropolitan Rochester.

May made two critical arguments, both of which the court found unpersuasive. The first was that the product market included all stores selling “general merchandise, apparel and furniture (‘GAF’).” The second was that Bon-Ton could enter the Rochester market in numerous suitable sites outside the four regional malls: “other shopping malls, strip malls and ‘stand-alone’ locations where space is available for a department store.”

169 881 F. Supp. at 864, 876.
170 Id.
171 Id.
172 Id. at 865.
173 Id. Plaintiffs disputed defendants’ contention that J.C. Penney should be included in the product market, but May would have over a 50% market share even with the inclusion of J.C. Penney. Id. Defendants disputed the existence of a traditional department store antitrust product market, but argued that if one existed, it must include J.C. Penney. Id.
174 Id. at 875-77.
175 Id. at 865.
176 Id. May also argued that The Bon-Ton had no standing because it had no recognized antitrust injury. Id. The court held that The Bon-Ton did in fact have antitrust injury, and regardless, the State of New York was conceded to be a proper plaintiff by the defendants. Id. at 878.
With regard to the proper definition of the product market, the court admitted considerable evidence from both sides, heard three days of testimony and was “carpet bombed” with hundreds of pages of documents, exhibits, affidavits, declarations and lengthy legal memoranda.\textsuperscript{177} The court noted that the Supreme Court’s seminal decision on product markets, \textit{Brown Shoe}, was still controlling thirty years later, and that product market was defined in terms of the reasonable interchangeability of use by consumers, “or the cross-elasticity of demand between the product itself and substitutes for it.”\textsuperscript{178}

The court also discussed \textit{Brown Shoe’s} admonition that broad product markets “may be subdivided into well-defined submarkets,” and those “submarkets themselves constitute product markets for antitrust purposes.”\textsuperscript{179}

In what can be described as a Post-Chicago analysis, the court stated that “[h]ypothetical formulas and paradigms are less important . . . than concrete economic realities. Thus, in defining the relevant product market, the reality of the marketplace must serve as the lodestar,” and “actual market realities are of key significance.”\textsuperscript{180} In plain terms, “[t]o paraphrase Justice Potter Stewart’s often-quoted comment made in another context, customers know a department store when they see it. Anyone who has ever shopped in a department store, specialty store or discounter certainly knows that there is a difference” and that difference is significant.\textsuperscript{181}

\begin{itemize}
  \item [ii.] Expert Testimony to Define Product Market
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\textsuperscript{177} \textit{Id.} at 863.
\textsuperscript{178} \textit{Id.} at 868 (citing Brown Shoe Co. v. U.S., 370 U.S. 294, 325 (1962)).
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 869 (internal citations omitted).
\textsuperscript{181} \textit{Id.} at 869-70. \textit{But see} Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 1 (2005).
\end{flushleft}
The court reached this conclusion by relying on expert witnesses and May internal documents.\textsuperscript{182} Robert Warner, President of Robert M. Warner Associates had worked as an executive in several major retail concerns, and been employed by Macy’s for twenty three years, during which time he served as general manager of Macy’s flagship store in Herald Square, Manhattan.\textsuperscript{183} He testified that department stores were “a distinct type of retailer.”\textsuperscript{184} “Customers shop department stores . . . primarily to obtain upscale, brand name fashion merchandise, especially women’s fashion apparel. The department store is distinguished by its wide assortment of brands as well as the quantity and quality of merchandise in addition to its emphasis on cutting-edge fashion.”\textsuperscript{185}

Mr. Warner distinguished department stores from specialty stores and discount stores and said they were not primary competitors of department stores.\textsuperscript{186} “Discount stores deal mostly in hard goods as opposed to the soft goods and fashion items sold by department stores. Specialty stores also provide a narrower focus and appeal to one or very few types of customers. They are much smaller, often deal with private brand labels and cannot compete with the upper-level brand names and high fashion items sold principally in department stores.”\textsuperscript{187}

Bernard Olsoff was another expert with over forty years experience in the retail industry, including twelve years as president of May’s merchandising division. Mr. Olsoff stated that specialty shops and discount stores do not fill customer demand or sell

\textsuperscript{182} Id. at 870-875. The reported decision did not discuss any expert testimony that May may have proffered.

\textsuperscript{183} Id. at 870.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} Id.
the same product that department stores do. 188 “Department stores are the primary and, in
some instances, exclusive outlet for [Liz Clairborne, Polo, Nautica and other well-known
brand merchandise]” as well as “the principal source for higher priced, brand-name
cosmetics such as Estee Lauder, Clinique, Lancome and Elizabeth Arden.” 189

Mr. Olsoff also testified that “to protect their image, many manufacturers try to
sell their merchandise exclusively to department stores.” 190 Selling exclusively to a
department store allows manufacturers of brand-name items to “maintain the image of the
brand name as being of high quality and at the cutting-edge of fashion.” 191 The choice of
a broad range of brand-name merchandise is the distinctive feature of a department store,
particularly in women’s clothing and cosmetics. 192

Frederick R. Warren-Boulton, a professor of economics at Washington University
in St. Louis and the former chief economist for the Antitrust Division of the DOJ testified
that the relevant antitrust market was all traditional department stores plus J.C. Penney. 193
Professor Warren-Boulton predicted that prices would increase if May were permitted to
purchase the McCurdy’s stores. 194 He noted that toys, books and most large appliances
were no longer sold at most traditional department stores, but department stores still
provided “a distinctive type of product to an identifiable type of consumer.” 195 Dr.

Douglas F. Greer, an expert in industrial economics, testified that department stores have

188 Id. at 871.
189 Id. at 870.
190 Id. at 871.
191 Id.
192 Id.
193 Id. Although the case as reported does not discuss Professor Warren-Boulton’s reasons for including
J.C. Penney in the traditional department store market, it may be because of the chain’s decision to
reposition itself as a purveyor of fashion. See id. at 875. See generally Andrea K. Walker, A 3-Store
Offensive, THE BALT. SUN, Mar. 12, 2006, at 1C; Maria Halkias, Dillard’s Plan Is A Puzzle, THE DALLAS
MORNING NEWS, May 30, 2005, at 1D; Maria Halkias, Fashion Lines Lifting Penney, THE DALLAS
MORNING NEWS, Feb. 23, 2005, at 9D.
194 Id.
195 Id.
responded to marketplace changes by “concentrating on establishing their dominance in several key areas, particularly women’s apparel and cosmetics.”

Despite the fact that consumers can sometimes obtain some brand-name goods at other types of retail establishments, consumers recognize that these alternatives are not in the same product market, particularly for fashion-conscious consumers. Furthermore, manufacturers of brand-name goods will distribute their products only to traditional department stores because it allows them to maintain an aura of status and exclusivity that they would lose if the products were sold at other stores. While customers can obtain a “functionally similar product through some effort . . . . a non-branded or private-label jacket may not be the equivalent of a designer jacket, regardless of whether its physical properties are the same.” Thus for the core customer of department stores, shopping mostly for women’s clothing, there is no true substitute for a traditional department store. Department store shoppers may also shop at a discount store, but there is a recognition that department stores have peculiar characteristics and uses and serve a function distinct from that of other types of stores.

Expert testimony as well as May internal documents supported the view that department stores only look to other department stores as competition. Mr. Olsoff

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196 Id. at 868, 871.
197 See Id. at 871-72.
198 Id. at 872.
199 Id. Brand-name apparel sold by discount and outlet stores is priced lower because it is an older and less fashionable style. Id. at 874. Unbranded and private-label clothing may be priced lower because it lacks the cachet of brand-name clothing. Id.
200 See Id. It should be noted, however, that the court never considered whether the fact that non-core customers of department stores’ demand elasticity protected the core customers from price increases. This question could conceivably be answered through empirical pricing and marketing studies, as well as econometric analysis.
201 Id. at 873.
202 Id. at 873. But see generally Geoffrey A. Manne & E. Marcellus Williamson, Hot Docs Vs. Cold Economics: The Use And Misuse Of Business Documents In Antitrust Enforcement And Adjudication, 47
testified that “other department stores located in shopping malls” were May’s
competition, and it was “to those stores that May would adjust its prices.”203 May
documents cataloged the respective market shares of its competitors (including a post-
merger analysis), but counted only traditional department stores.204

Other May internal documents showed a “preoccupation” with what would
happen if Bon-Ton took over the McCurdy stores.205 May did not believe it would
experience any adverse effect in its existing Kaufmann’s stores if a non-department store
retailer took over the McCurdy’s stores, but May’s sales would drop 5% if Bon-Ton
bought the McCurdy’s stores.206 Even McCurdy’s own internal documents analyzing
competitive dynamics stated that the company’s “primary competitors” were Kaufmann’s
and J.C. Penney.207 Both Kaufmann’s and McCurdy’s carefully monitored the prices and
sales at the other department store; there was no monitoring of specialty stores and no
price fluctuations based on their activities.208

The court held, therefore, that the relevant antitrust product market was
“traditional department stores including J.C. Penney.”209 As such, the increase in the
Herfindahl-Hirschman Index was sixteen times higher than the threshold for which the
merging parties are likely to create or enhance market power.210

The court also held that the barriers to entry were significant and substantial with
grave anticompetitive effects; even some of the defense witnesses agreed with that

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203 Bon-Ton at 873.
205 Id.
206 Id. at 864.
208 Id. at 875.
209 Id. at 876.
Regional malls were the only viable locations for department stores. With even just two locations, breaking into the Rochester market would be “very difficult” and locations in strip centers would undermine the image of upscale fashion. The court noted that the “mere fact that May wants to expand into vacant McCurdy’s space at malls where May already has stores is an indication of the significance that May attaches to malls.”

The court granted The Bon-Ton and the State of New York an injunction against May and voided the asset purchase between May and McCurdy’s. The Bon-Ton now operates four department stores in the Rochester area; Macy’s continues to operate four stores (then Kaufmann’s, now Macy’s) at the same four regional malls.

G. Macy’s Acquisition Of May

In 2005, Macy’s announced it would acquire May for $11 billion in cash and Macy’s stock, and assumption of $6 billion in May debt, for a total of $17 billion.

211 Id. at 877-78.
212 Id. at 876.
213 Id.
214 Id. at 877.
215 Id. at 878.
217 Brenon Daly, Federated, May To Tie Knot, DAILY DEAL, March 1, 2005; See supra note 30.
Although the FTC took no action to enjoin or modify the merger, it conducted a lengthy investigation, resulting in a rare public statement explaining its rationale for permitting the merger to occur.\textsuperscript{218} 

The FTC’s investigation considered Macy’s and May’s pricing strategies\textsuperscript{219} and FTC “[s]taff found no evidence that Federated and May have priced their goods strategically in relationship to each other. The absence of such pricing patterns provides the most compelling, objective demonstration that these conventional department stores are not in a distinct product market.”\textsuperscript{220} 

The Commission further stated:

“Equally compelling is the fact that Federated and May, like other department store chains, set prices that are uniform over very broad geographic areas – typically, multi-state regions. These firms do not appear to vary local prices based on the number or identity of conventional department stores in malls or metropolitan areas. This fact distinguishes the Federated/May acquisition from \textit{FTC v. Staples, Inc.}, 970 F. Supp. 1066, 1076 (D.D.C. 1997), where a narrow “office superstore” market definition was buttressed by proof of differential prices, depending on the number of superstores in a particular city or [metropolitan area].\textsuperscript{221} 

The results of the empirical study in this article, however, yielded very different conclusions.

Several state attorneys general, however, determined that the merger between Macy’s and May would end competition and hurt consumers through diminished choices

\textsuperscript{218} Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005). In high profile matters since 1997, the FTC has infrequently acknowledged that a particular merger was being investigated under the Clayton Act, usually where a party to the transaction had disclosed its existence in a press release or other public filing. \textit{Notice of Policy of Disclosing Investigations of Announced Mergers}, 62 FR 18630 (April 16, 1997); \textit{FTC: Merger Acknowledgement} at \url{http://www.ftc.gov/opa/1997/04/mergdisc.htm} (last accessed January 11, 2007).

\textsuperscript{219} It is unknown whether the FTC reviewed coupons or relied on other pricing data.

\textsuperscript{220} Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005).

\textsuperscript{221} \textit{Id.}
and higher prices.\footnote{222} The Attorneys General of California, Maryland, Massachusetts, New York and Pennsylvania required Macy’s to divest twenty six duplicate stores in malls, but required that the stores could only be sold to other traditional department stores.\footnote{223} The settlement required Macy’s to sell the duplicate stores to other department stores as long as the offer was “commercially reasonable,” even if Macy’s received higher offers from other parties.\footnote{224} 

New York’s former attorney general (and now governor) Eliot Spitzer said that were it not for the divestiture agreement, Macy’s acquisition of May would end department store competition for some consumers.\footnote{225} “With the divestitures, consumers will benefit from lower prices, greater choice, and increased services that will result from the competition generated by placing the divested department stores under new ownership.”\footnote{226} James Sluzewski, a spokesman for Macy’s, said “the agreement with state antitrust regulators was expected, given the large number of Macy’s and Bloomingdale’s stores that overlap in malls with May stores.”\footnote{227}


\footnote{223} The traditional department stores acceptable to the attorneys general included Nordstrom, Dillard’s, Gottschalk’s, Neiman Marcus, Saks Fifth Avenue, Sak’s Department Store Group (which included Parisian), Bon-Ton, Elder-Beerman, Boscov’s, Belk and Von Maur. Terence O’Hara, \textit{Federated Must Sell Stores To Rivals}, WASH. POST, Aug. 31, 2005, at D1.

\footnote{224} See Id; See O’Hara, supra note 222. William T. Lifland and Elai Katz, \textit{Department Store Combination Scrutinized By States}, \textit{New York Law Journal} 3, (Sept. 22, 2005); Supra note 32. Another copy of the Assurance can be found at http://ag.ca.gov/newsalerts/cms05/05-071_0a.pdf (last accessed May 22, 2007).


\footnote{226} Id.

\footnote{227} See O’Hara, supra note 222. While Mr. Sluzewski’s comment is interesting, it does not explain why the FTC reached such a different conclusion after its own investigation.
In addition to the stores ordered divested by the attorneys general of five states, Macy’s divested an additional eighty stores, or in total twenty percent of the entire May purchase.228 A number of stores were sold or swapped with other department stores, such as Boscov’s and Belk.229 A few were converted to Macy’s upscale department store, Bloomingdales.230 But the majority of stores were sold to Target or back to the mall owners.231 Without options for new department store entry, many of these former department store locations were turned into multi-tenant outlets, restaurants, food courts, movie theaters, or sporting goods stores, eliminating the possibility of department store entry and competition, perhaps forever.232

Macy’s also sold off the entire remainder of the Lord & Taylor chain to NRDC, a private equity group, for $1.08 billion.233

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232 Id.
H. The Department Store Product Market

Market definitions, market shares, Herfindal-Hirschman Index, Elizinga-Hogarty Test,\(^{234}\) the 1992 U.S. Government Horizontal Merger Guidelines and others\(^ {235}\) are all just proxies for market power or a means of assessing market power.\(^ {236}\) And without nearly impossible measurements of cross-elasticity of demand, the best way to assess market power is to apply one of these proxies or tests.\(^ {237}\) Any merger or market analysis is always going to include a certain amount of guesswork and common sense.

With regard to Macy’s, there are two diametrically opposite views proffered by two esteemed authorities. The first, offered by the federal district court for the Western District of New York, is that traditional department stores are a distinct product market.\(^ {238}\) The second, offered ten years later by the FTC, is that “the product market must be defined to include, at the very least, all department stores and all specialty stores that collectively sell substantially similar products . . . .”\(^ {239}\) To reconcile the two, the FTC seemed to suggest that the world had been turned upside down since the Bon-Ton decision, and that the case had no \textit{stare decisis} value.\(^ {240}\)

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\(^{234}\) Kenneth G. Elzinga & Thomas F. Hogarty, \textit{The Problem of Geographic Market Delineation In Antimerger Suits}, 18 \textit{Antitrust Bull.} 45 (1973) (assessing the Geographic market based on shipment data).


\(^{237}\) See \textit{generally} Geoffrey A. Manne & E. Marcellus Williamson, \textit{Hot Docs Vs. Cold Economics: The Use And Misuse Of Business Documents In Antitrust Enforcement And Adjudication} 47 \textit{Ariz. L. Rev.} 609, 633 (2005) (since we are limited in our ability to measure economic activity we must rely on proxies).


\(^{239}\) Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005).

\(^{240}\) Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 2 (FTC 2005).
Product market definitions, however, are most important for Clayton §7A\textsuperscript{241} – when the government is using Hart-Scott-Rodino reporting requirements to predict the future and determine whether a proposed transaction is likely to substantially lessen competition. In a merger retrospective, it critical only to assess whether there have been anticompetitive consequences to the already approved transaction; the product market may thus speak for itself. Just as the FTC suggested the world had changed drastically since *Bon-Ton*, it is also possible that the world has changed since its Macy’s/May decision, or simply that despite a heroic investigation into the merger, the FTC’s Clayton § 7A crystal ball did not predict the future perfectly.

Antitrust scholar Jonathan Baker, noting that neither the Sherman nor Clayton Acts require market definition and market share proxies to measure competitive effects, wrote:

The possibility of observing and measuring market power more directly suggests a new motion for Clayton Act doctrine: the *res ipsa loquitur* market definition. When a piano crashes onto the sidewalk, the law does not ask whether someone was negligent; instead it goes right to the question of who. This approach could translate to antitrust. Suppose that a merger or other practice can be shown, directly, to harm competition, for example by making an increase in price likely. But suppose also that it is hard to draw lines around a market, because the array of differentiated products is broad and seamless. If competition will be harmed, some market must exist within which competition takes place. Just exactly where the market’s boundaries are may not be very important, though. Nor may it matter much whether the market in which the harm occurs is large or small. All that should matter to the doctrine is that the “market” contain the products and locations that circumscribe the consumer injury.\textsuperscript{242}

\textsuperscript{241} Product market definitions are also important for the substantially identical analysis undertaken in a Sherman § 2 case.

There is ample precedent for discounting the importance of precise product market definition in light of later developments. The Supreme Court held in *F.T.C. v. Indiana Federation of Dentists* that “[s]ince the purpose of [] inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”243 Indeed, the FTC said in a later case, “defin[ing] a relevant market, calculat[ing market] shares, and then drawing] inferences from these shares and from other industry characteristics -- is not the most appropriate way to proceed in cases . . . where more direct evidence of competitive effects is available.”244  

*Indiana Federation of Dentists* was not the first time the Court suggested that market shares may be less relevant than other factors affecting a market. In *U.S. v. General Dynamics*, one of the seminal Chicago School cases that altered antitrust’s earlier reliance on structuralism,245 the Supreme Court noted that market shares were merely a static snapshot of one aspect of market power, and not necessarily indicative of a company’s future ability to compete.246 Indeed, “market share is just a way of estimating market power, which is the ultimate consideration”; “when there are better ways to estimate market power, the court should use them.”247 Another court summarized that the “mere fact that a firm may be termed a competitor in the overall

marketplace does not necessarily require that it be included in the relevant product
market for antitrust purposes.”248

In another case where the FTC prevailed in an argument discounting the
importance of a precise product market definition, the Seventh Circuit held “[Toys R Us]
seems to think that anticompetitive effects in a market cannot be shown unless the
plaintiff, or here the [FTC], first proves that it has a large market share. This, however,
has things backwards. As we have explained elsewhere, the share a firm has in a properly
defined relevant market is only a way of estimating market power, which is the ultimate
consideration. The Supreme Court has made it clear that there are two ways of proving
market power. One is through direct evidence of anticompetitive effects. The other, more
conventional way, is by proving relevant product and geographic markets and by
showing that the defendant's share exceeds whatever threshold is important for the
practice in the case.”249

The substantive question that must be answered about Macy’s is not the definition
of the product market -- we are long past that. The real question is whether harm has
resulted to consumers since the merger between Macy’s and May and indeed, whether
even more harm is likely in the future.

IV.  EMPIRICAL STUDY OF DEPARTMENT STORE DISCOUNT

COUPONS250

a.  Basis For The Study

Based on the products and quality of items sold, there does seem to be at least some
overlap between middle-market department stores (e.g. Macy’s, Dillard’s, Boscov’s, The

249 Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (internal citations omitted).
250 All raw data supporting this empirical study is on file with the author.
Bon-Ton, Belk) and upscale department stores (e.g. Saks Fifth Avenue, Neiman-Marcus, Nordstrom, Bloomingdale’s, Lord & Taylor), as well as with discount stores (e.g. Wal-Mart, Target, K-Mart) and chain stores (e.g. J.C. Penney, Sears, Kohl’s, Mervyn’s).\footnote{251} Indeed, on an item by item basis, there is also overlap between middle-market department stores and certain products sold at specialty stores (e.g. Linens & Things, Limited, Gap, Ann Taylor, Best Buy).

Middle-market department stores may, however, be a submarket or cluster market\footnote{252} based on consumer preference for this distribution channel.\footnote{253} In many respects, this analysis is very similar to that undertaken by the court in \textit{FTC v. Staples, Inc}.\footnote{254}

In 1997, the Federal Trade Commission reviewed and blocked a merger between two of the three large office supply “superstore” companies, Staples and Office Depot.\footnote{255} The FTC’s case was based in large part on data that showed where Staples was the only office supply superstore, its prices were higher than in markets where it competed against

\footnote{251} So-called “chain stores” have some attributes of middle-market department stores and some of discount stores. They focus on clothing and household wares like the middle-market department stores (although Sears’ greatest success is in hard lines, like Kenmore major appliances and Craftsman tools), but generally have identical floor plans, formats, prices and selection, like the discount stores, not varied by the demographics or tastes of the individual market. J.C. Penney has traditionally been considered a chain store, but has repositioned itself in many ways over the past few years to be more like a middle-market department store. \textit{See generally Richard C. Schragger, The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution}, 90 IOWA L. REV. 1011 (2005). Michael Barbaro, \textit{Showing A New Style, Department Stores Surge}, N.Y. TIMES, Nov. 17, 2006, at A1. Andrea K. Walker, \textit{A 3-Store Offensive, THE BALT. SUN}, Mar. 12, 2006, at 1C; Maria Halkias, \textit{Dillard’s Plan Is A Puzzle, THE DALLAS MORNING NEWS}, May 30, 2005, at 1D; Maria Halkias, \textit{Fashion Lines Lifting Penney, THE DALLAS MORNING NEWS}, Feb. 23, 2005, at 9D.

\footnote{252} It is also possible that department stores are cluster markets because of the unique attributes created by the totality of the products sold under one roof. It is also possible that department stores are price discrimination markets because certain demographic groups are likely to shop in them regardless of a significant but non-transitory price increase. Regardless, these classifications are helpful to deconstruct a market, but are not germane to the final analysis.

\footnote{253} See generally Staples at 1075-76; Bon-Ton, 881 F. Supp. 860, 869-70. Some products sold at department stores, such as tailored clothing, cosmetics, and bridal registry items, may have price discrimination aspects as well.


Office Depot or Office Max. Specifically, prices in Staples-only markets were 13% higher than in three-firm markets, and prices in Office Depot-only markets were 5% higher than in three firm markets. Documents obtained from both Staples and Office Depot established that the firms set prices according to the number of office supply superstores in the market.

None of this would be surprising were it not for the fact that at least at “first blush,” the concept of an office supply superstore made about as much sense as a middle-market department store market. Substantially every item available at Staples, Office Depot or Office Max is available at other chain stores, including Wal-Mart, Target, Best Buy, CompUSA and Circuit City. Many items are available at supermarkets and convenience stores and every item can be purchased via the internet.

Despite the plethora of buyer alternatives, Staples and Office Depot found it profitable to set prices only in relation to other office supply superstores. Clearly customers chose these stores for their office supply needs based on convenience, comprehensiveness, variety, reputation or some factor beyond, or in addition to, price. Customers may view middle-market department stores the same way and be less sensitive to price increases.

257 Id.
258 Id.
259 Jonathan B. Baker, Stepping Out In An Old Brown Shoe: In Qualified Praise of Submarkets, 68 ANTITRUST L.J. 203, 207-08 (2000) (citing Horizontal Merger Guidelines at § 1.12). “The trial judge recognized that his market definition had to ‘overcome’ a ‘first blush’ or ‘initial gut reaction’ that the product market must include all retailers of office supplies.” Id. (citing Staples, 970 F. Supp. at 1075).
Like *Staples*, in *Bon-Ton*, expert testimony as well as May internal documents stated that department stores only look to other department stores as competition.\(^{262}\) May documents reviewing the Rochester, New York geographic market cataloged the respective market shares of its competitors (including a post-merger analysis), but counted only traditional department stores.\(^{263}\)

Other May internal documents showed a “preoccupation” with what would happen if Bon-Ton took over the McCurdy stores.\(^{264}\) May did not believe it would experience any adverse effect in its existing Kaufmann’s stores if a non-department store retailer took over the McCurdy’s stores, but May predicted it’s sales would drop 5% if Bon-Ton bought the McCurdy’s stores.\(^{265}\) Both Kaufmann’s and McCurdy’s carefully monitored the prices and sales at the other department store; there was no monitoring of specialty stores and no price fluctuations based on the activities of specialty stores.\(^{266}\)

In *Staples*, in addition to presenting internal documents, the FTC conducted an empirical study capturing Staples’ prices for ninety percent of the items it sold, and compared prices in markets where Staples faced no office superstore competition, to markets where Staples faced competition from one or both of the other two office superstores.\(^{267}\) Replicating the same type of empirical study for department stores proved challenging because department stores generally sell similar but not identical merchandise. The price of a legal pad at two different stores is easy to compare; two

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\(^{262}\) *Id.* at 873. But see Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005).

\(^{263}\) *Id.*

\(^{264}\) *Id.*

\(^{265}\) *Id.*

\(^{266}\) *Id.*

\(^{267}\) Staples at 1075-76.
similar private label women’s blouses at two different department stores may be as
different as night and day for many purchasers.

Rather than create a sample basket of goods for price comparison, this empirical
study looked at discount coupons in newspapers before and after Macy’s purchased May
to determine whether Macy’s discounting behavior was affected by the existence of May,
and whether Macy’s changed its behavior after the acquisition. In theory, if there were
no antitrust product market for middle-market department stores, and Macy’s faced
competition from upscale, discount and chain stores, as well as specialty stores, there
should have been no significant difference in Macy’s discounting policies before or after
it acquired May; indeed, both the number of coupons and the discount itself should have
been substantially the same268 in every city in the United States before and after the
merger with May.

B. Explanation Of The Study

The study collected coupons in newspapers for May and Macy’s in thirteen cities
from September 2004 through January 2005 (before the merger), and then again from
September 2006 through January 2007 (after the merger).269 The goal, with Staples as

268 Minor variations from city to city in frequency and face value of coupons could be explained by
overstocking items less popular in one city than another, or a depressed economy in a particular city that
lowered sales, necessitating promotional discounting. The differences found in this study, however, were
not minor.
269 A study using somewhat similar methodology was conducted by Professor Margaret E. Slade, currently
with the University of Warwick (U.K.). She examined saltine crackers at supermarkets to determine the
relationship between price, advertising and goodwill. Margaret E. Slade, Product Rivalry With Multiple
Strategic Weapons: An Analysis of Price and Advertising Competition, 4 JOURN. ECON. & MANAGE. 445,
445-46 (1995). She concluded, inter alia, that at least for supermarkets, price (and discount) is just one
factor in competition, and that consumers make highly personal choices that include the location of a store,
the proximity to home and work, the quality and ambience of the store, the breadth of product offerings and
the overall pricing policies of the store. Id. at 456-58. If Professor Slade’s work is applicable to
department stores, it would suggest that at least some consumers are demand inelastic and will continue to
shop at Macy’s regardless of a decrease in coupon discounts. See also Steven Tenn, Luke Froeb and
Steven Tschantz, Mergers When Firms Compete By Choosing Both Price And Promotion (May 24, 2007),
inspiration, was to measure Macy’s and May’s couponing policies in different geographic markets before the merger, and then to see how those policies may have changed after the merger. Several economists have used similar methodology to determine whether coupons drive store traffic in supermarkets.270

For the 2004-2005 period, microfilm of each newspaper was reviewed; for the 2006-2007 period, subscriptions were purchased for each of the thirteen newspapers and they were reviewed upon arrival.271

Newspaper research has become more challenging since the widespread use of the internet. While newspaper content is available at the click of a mouse – and often at no charge – the banner and other advertisements that appear on web pages are generally not the same advertisements that appear in actual print media. But because of the easy access to newspaper content on line, few libraries continue to collect microfilm. Even major research libraries were found to be unlikely to purchase a newspaper of record on microfilm unless that newspaper is based in the same city. Ordinarily generous libraries were found to be very reluctant to part with these rare spools of microfilm through interlibrary loan.272

Newspaper subscriptions present challenges as well. Several newspapers are not very interested in participating in the mail-order subscription business. Mailed

271 When the review was finished, the newspapers were placed in Stetson University College of Law recycling bins.
272 This study never could have been completed were it not for the fact that the Stetson University College of Law Library reference librarians, and its library director, Professor Rebecca Trammel, have many good friends throughout academia.
newspapers are often sent by bulk mail, which often meant arrival months after the publication date, and a few papers just never arrived at all.\textsuperscript{273}

These challenges dictated both the total number of cities surveyed and the cities actually chosen; availability was a critical factor. Nonetheless, within each category, as the data below shows, the results were generally consistent suggesting that the data would not have been substantially different had greater or fewer newspapers been surveyed. Furthermore, the cities chosen represent many of the largest metropolitan areas in the United States; ten cities chosen are in the top twenty and the remaining three are large metropolitan areas as well.\textsuperscript{274}

The cities chosen for the study represent four different department store categories: 1) cities where Macy’s was the only middle-market department store for the entire study period; 2) cities where Macy’s faced May during the first half of the study period, and owned the former May stores during the second half of the study period, but there were no other middle-market department stores; 3) cities where Macy’s faced one or more middle-market department store (e.g. Dillard’s, but not May) during the entire study period;\textsuperscript{275} and 4) cities where May faced an independent middle-market department store during the first half of the study period (but not Macy’s), and was owned by Macy’s during the second half of the study period. Table 1 lists the city, the category it falls into and the newspaper surveyed.

\textsuperscript{273} While creating headaches and requiring many phone calls to customer service, in the end only 34 newspapers out of 3,978 never arrived. This is less than 1% of the total and is unlikely to have changed any of the results.

\textsuperscript{274} Denver is ranked 22, Cleveland is ranked 23 and Indianapolis is ranked 34. By another measure of importance, all the cities chosen have NFL football teams (except Los Angeles) and all have MLB baseball teams (except Indianapolis).

\textsuperscript{275} In only one city (Dallas) did Macy’s face May and a second middle-market department store (Dillard’s) – but the one or two Macy’s in Dallas during the first half of the study period engaged in no newspaper advertising (no advertisements with or without coupons) in the \textit{Dallas Morning News} at all.
The fact that middle-market competition exists in some form cannot be interpreted as a sweeping statement that the stores face each other head-on for all purposes. For example, in Indianapolis, Belk and Carson Pirie Scott (owned by the Bon-Ton) each have just one store, and many consumers may not consider those stores a viable option because of distance and convenience. In Chicago, Carson Pirie Scott operates twenty-five department and furniture stores throughout the metropolitan area, but some consumers may consider Carson’s to be of lesser quality than Macy’s.\footnote{See generally Sandra Jones, \textit{Pleased With Growth, Carson’s To Expand}, CHI. TRIB., Dec. 22, 2006, at C1; Mary Ellen Podmolik, Chain Finds Might In Middle, CHI. TRIB. ONLINE EDITION, Mar. 11, 2006.} Von Maur has only two stores in the Chicago suburbs and one store in a distant ex-burb, and may not be considered a viable alternative for most consumers in the city, or even in most suburbs.\footnote{It is not entirely clear whether Von Maur, a family owned department store, is middle-market or upscale. See generally Lorene Yue, \textit{Low Key Opens Way to High Profits}, CHI. TRIB., Apr. 25, 2003, at C1. See generally Carons’s, Store Locator, http://www.carsons.com (last visited Apr. 1, 2007). Macy’s operates at least five stores in metropolitan Indianapolis and at least fourteen stores in metropolitan Chicago, depending upon the definition of the metropolitan area. See \textsc{Corporate Fact Book}, \textsc{Federated Department Stores, Inc.} 69, 71, 75 (2006). See also Sandra Jones, \textit{Pleased With Growth, Carsons To Expand}, CHI. TRIB., Dec. 22, 2006, at C1.} Macy’s operates substantially more stores in both Indianapolis and Chicago. Nonetheless, the study does not attempt to weigh any of these variables; if a middle-market department store is within a metropolitan area, then it is viewed as competition.

### Table 1

<table>
<thead>
<tr>
<th>City</th>
<th>Category</th>
<th>Other Middle-Market Competition</th>
<th>Newspaper</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>(3) Macy’s and Independent</td>
<td>Dillard’s, Parisian/Belk\footnote{Belk acquired two Parisian stores from Saks Fifth Avenue during the study period and converted them to Belk’s. Belk and Parisian, \textit{available at} <a href="http://www.belkandparisian.com/press/2006-08-02.html">http://www.belkandparisian.com/press/2006-08-02.html</a> (last visited Mar. 31, 2007).}</td>
<td>\textit{Atlanta Journal- Constitution}</td>
</tr>
<tr>
<td>Boston</td>
<td>(2) Macy’s and May</td>
<td>None</td>
<td>\textit{Boston Globe}</td>
</tr>
<tr>
<td>Chicago</td>
<td>(4) May and</td>
<td>Bon-Ton (d/b/a)</td>
<td>\textit{Chicago Tribune}</td>
</tr>
</tbody>
</table>

\footnotetext[276]{See generally Sandra Jones, \textit{Pleased With Growth, Carson’s To Expand}, CHI. TRIB., Dec. 22, 2006, at C1; Mary Ellen Podmolik, Chain Finds Might In Middle, CHI. TRIB. ONLINE EDITION, Mar. 11, 2006.}
\footnotetext[277]{It is not entirely clear whether Von Maur, a family owned department store, is middle-market or upscale. See generally Lorene Yue, \textit{Low Key Opens Way to High Profits}, CHI. TRIB., Apr. 25, 2003, at C1. See generally Carons’s, Store Locator, http://www.carsons.com (last visited Apr. 1, 2007). Macy’s operates at least five stores in metropolitan Indianapolis and at least fourteen stores in metropolitan Chicago, depending upon the definition of the metropolitan area. See \textsc{Corporate Fact Book}, \textsc{Federated Department Stores, Inc.} 69, 71, 75 (2006). See also Sandra Jones, \textit{Pleased With Growth, Carsons To Expand}, CHI. TRIB., Dec. 22, 2006, at C1.}
\footnotetext[278]{Belk acquired two Parisian stores from Saks Fifth Avenue during the study period and converted them to Belk’s. Belk and Parisian, \textit{available at} http://www.belkandparisian.com/press/2006-08-02.html (last visited Mar. 31, 2007).}
<table>
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<th>City</th>
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<th>Newspapers</th>
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<td>Dillard’s</td>
<td>Cleveland Plain Dealer</td>
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<td>Dallas</td>
<td>(2) Macy’s(^{280}) and May</td>
<td>Dillard’s</td>
<td>Dallas Morning News</td>
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<td>Denver</td>
<td>(4) May and Independent</td>
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<td>Denver Post</td>
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<td>Indianapolis</td>
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<td>Parisian/Belk, Bon-Ton (d/b/a Parisian/Carson Pirie Scott)(^{282})</td>
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<td>Miami</td>
<td>(3) Macy’s and Independent</td>
<td>Dillard’s</td>
<td>Miami Herald</td>
</tr>
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<td>Tampa/St. Pete</td>
<td>(3) Macy’s and Independent</td>
<td>Dillard’s</td>
<td>St. Petersburg Times</td>
</tr>
<tr>
<td>San Francisco</td>
<td>(1) Macy’s alone</td>
<td>None</td>
<td>San Francisco Chronicle</td>
</tr>
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<td>Washington, D.C.</td>
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</tbody>
</table>


\(^{280}\) Dallas and Indianapolis are an enigma because of the existence of only one or two Macy’s stores in either city during the first half of the study period. The category of “Macy’s and May” might be described as “Macy’s, May and Independent” in Dallas and Indianapolis. Dallas is unusual because there was at least one Macy’s store during the first half of the study period but that store had no newspaper advertisements at all, coupons or no. Indianapolis, however, had only one Macy’s store during the first half of the study period, but that store heavily advertised. It is possible that because the Indianapolis Macy’s had been converted from another FDS department store, Lazarus, Macy’s maintained its predecessor’s couponing and discount policies. But because of the incongruity, there was no reason to groups these two cities together as fifth category. Regardless, the results of the study show that Macy’s substantially changed it’s discounting policies after acquiring May, regardless of the continued existence of an independent store. The decision not to create a fifth category of cities does not change any of the conclusions.

\(^{281}\) See n. 521, supra.

\(^{282}\) Parisian was owned by Saks Fifth Avenue and sold to Belk and Bon-Ton during the study period. The Parisian at the Fashion Mall at Keystone at the Crossing in northern Indianapolis is being converted to Belk; the Parisian at Circle Center Mall in downtown Indianapolis was converted to a Carson Pirie Scott, owned by Bon-Ton. It is not clear whether Parisian was middle-market or upscale; indeed, the chain’s struggle with that question may have led to its sale by Saks Fifth Avenue to Belk and Bon-Ton. See supra note 520. Regardless, Parisian is grouped with the middle market department stores if only because Belk and Bon-Ton are middle market department stores.
Each newspaper is the leading newspaper of the city surveyed, having a higher circulation than competitors (if any). Each is a traditional newspaper format, except for the *San Francisco Chronicle*, which is a tabloid.²⁸³

Regardless of the number of coupons in any single day’s newspaper, the study counted that as one coupon. While a single day’s newspaper might contain several coupons, during the study period substantially all the coupons on a single day were for the same discount.²⁸⁴ Furthermore, initial reviews showed that there were never coupons in a special sales insert unless there were also coupons in the first section of the newspaper, so only the first section of each newspaper was reviewed. In the case of the tabloid *San Francisco Chronicle*, the entire newspaper was reviewed for coupons.

The first half of the study period represents a time just after FDS had changed the brand names of all its regional stores to Macy’s. No newspaper advertisements reflected the former regional FDS name; it is possible, however, that some store signage may still have been changing during this period, and thus the former FDS regional name is provided in the following Table 2.

<table>
<thead>
<tr>
<th>City</th>
<th>2004-05 FDS Store Name</th>
<th>Old FDS Regional Store Name</th>
<th>May Department Store Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>Macy’s</td>
<td>Rich’s or Rich’s-Macy’s</td>
<td>-----</td>
</tr>
<tr>
<td>Boston</td>
<td>Macy’s</td>
<td>-----</td>
<td>Filene’s</td>
</tr>
<tr>
<td>Chicago</td>
<td>-----</td>
<td>-----</td>
<td>Marshall Field’s</td>
</tr>
</tbody>
</table>

²⁸³ The *Chronicle’s* competition in San Francisco, the *San Francisco Examiner*, is also a tabloid.

²⁸⁴ A exception -- which happened only a few times during the study period, and in a small number of cities -- was there was one special coupon for a specific category of products, generally oriental rugs. On the same day, there would be one or more coupons with identical discounts for all merchandise or sales and/or clearance merchandise. Those special coupons were not counted in the survey.
Cleveland | Macy’s | ----- | Kaufmann’s |
Dallas | 285 | ----- | Foley’s |
Denver | ----- | ----- | Foley’s |
Indianapolis | Macy’s | Lazarus or Lazarus-Macy’s | L.S. Ayres |
Los Angeles | Macy’s | Bullock’s or Macy’s-Bullock’s or Bullocks Wilshire or The Broadway | Robinsons-May |
Miami | Macy’s | Burdine’s or Burdine’s-Macy’s | ----- |
Tampa/St. Pete | Macy’s | Burdine’s or Burdine’s-Macy’s | ----- |
San Francisco | Macy’s | ----- | ----- |
Seattle | Macy’s | Bon Marche or Bon-Macy’s | ----- |
Washington, DC | Macy’s | ----- | Hecht’s |

b. Data Definitions

<table>
<thead>
<tr>
<th>Data Field</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coupons</td>
<td>The number of days on which a coupon was found in the newspaper.</td>
</tr>
<tr>
<td>ATCD</td>
<td><strong>AVERAGE TOTAL COUPON DAYS</strong>: The average number of coupons days over the five month period.</td>
</tr>
<tr>
<td>ACDM</td>
<td><strong>AVERAGE COUPONS DAYS PER MONTH</strong>: The average number of days per month in which there were coupons, over the five month period.</td>
</tr>
<tr>
<td>AMD</td>
<td><strong>AVERAGE MONTHLY DISCOUNT</strong>: The sum of all the discounts per month (including months with zero discounts) averaged by month.</td>
</tr>
<tr>
<td>AMFV</td>
<td><strong>AVERAGE MONTHLY FACE VALUE</strong>: The sum of the face values of all the coupons each month (not including any months with zero discounts) averaged by month.</td>
</tr>
</tbody>
</table>

---

285 Macy’s operated one or two stores in Dallas starting in 1985. Macy’s in Dallas placed no newspaper ads at all in the Dallas Morning News during the first half of the study in 2004-2005 and was not counted in the results. But Macy’s in Indianapolis which operated one store during the 2004-2005 study period and did place newspaper ads and issue coupons and was therefore counted in the results.

286 There were many days and even months, particularly during the second half of the study period in which there were no discounts at all.
**AMMFV**

**AVERAGE MONTHLY MEDIAN FACE VALUE:** The median of the average monthly face value of all coupons (not including any months with zero discounts) averaged by month.

C. Data By City

**ATLANTA**

<table>
<thead>
<tr>
<th></th>
<th>2004-05 Macy's</th>
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<th>2006-07 Macy's</th>
</tr>
</thead>
<tbody>
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<td>Coupons</td>
<td>AMFV</td>
<td>Coupons</td>
</tr>
<tr>
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<td>9</td>
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<tr>
<td>October</td>
<td>11</td>
<td>13.18</td>
<td>10</td>
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<tr>
<td>November</td>
<td>24</td>
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<tr>
<td>AMMFV</td>
<td>15.31</td>
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<td>12.00</td>
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**Macy's to Macy's**

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<thead>
<tr>
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<tbody>
<tr>
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</tr>
<tr>
<td>Δ AMD</td>
<td>-17.61%</td>
</tr>
<tr>
<td>Δ AMFV</td>
<td>-17.61%</td>
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<tr>
<td>Δ AMMFV</td>
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**BOSTON**

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<tr>
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<th>2004-05 Macy's</th>
<th>2004-05 Filene's</th>
<th>2006-07 Macy's</th>
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<tbody>
<tr>
<td></td>
<td>Coupons</td>
<td>AMFV</td>
<td>Coupons</td>
</tr>
</tbody>
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287 Missing newspapers: 9/2/06, 9/4/06  
288 Missing newspaper: 11/17/06
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<tr>
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<th>AMD</th>
<th>AMMFV</th>
<th>AMFV</th>
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<tr>
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<td>15</td>
<td>18.00</td>
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<td>15.95</td>
<td>14</td>
<td>15.54</td>
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<th>AMD</th>
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<table>
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<th>AMD</th>
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<th>AMFV</th>
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<table>
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</tr>
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<tbody>
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<td>Coupons</td>
<td>AMFV</td>
</tr>
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<td>September</td>
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<td>19.00</td>
</tr>
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<tr>
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<th>2006-07 Macy’s</th>
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</table>

289 Missing newspapers: 10/4/06, 10/5/06, 10/9/06, 10/15/06, 10/18/06, 10/20/06, 10/21/06, 11/20/06
<p>| | | | | | |</p>
<table>
<thead>
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<th></th>
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**Field’s to Macy’s**

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<table>
<thead>
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<td>Δ ACDM</td>
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**CLEVELAND**

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<th>2006-07</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Kaufmann’s</td>
<td></td>
<td>Macy’s</td>
<td></td>
</tr>
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<td>AMFV</td>
<td>Coupons</td>
<td>AMFV</td>
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<td>October</td>
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</table>

**Kaufmann’s to Macy’s**

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<table>
<thead>
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<tbody>
<tr>
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<tr>
<td>Δ AMD</td>
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<td>Δ AMFV</td>
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</tr>
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<td>Δ AMMFV</td>
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**DALLAS**

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<tr>
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<th>2006-07</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Foley’s</td>
<td></td>
<td>Macy’s</td>
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</tr>
<tr>
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<td>Coupons</td>
<td>AMFV</td>
<td>Coupons</td>
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290 Missing newspapers: 11/30/06, 12/26/06

291 Missing Newspapers: 9/6/06, 11/26/06
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<tbody>
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</tr>
</tbody>
</table>

NOTE: Because no coupons were issued by Macy’s in Dallas during the first half of the study, comparisons to the second half of the study are not statistically relevant.

DENVER

<table>
<thead>
<tr>
<th></th>
<th>2004-05 Macy's</th>
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</thead>
<tbody>
<tr>
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<td>September</td>
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<td>15.00</td>
</tr>
</tbody>
</table>

Foley’s to Macy’s

\[\Delta \text{ACDM} = -48.74\%\]
\[\Delta \text{AMD} = -6.15\%\]
\[\Delta \text{AMFV} = -6.15\%\]
\[\Delta \text{AMMFV} = -7.41\%\]

DENVER

\[^{292}\text{Missing newspapers: 9/9/06, 10/7/06, 1/2/07, 1/16/07}\]
### Macy's

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### INDIANAPOLIS

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293 Missing newspaper: 1/18/07
294 Missing newspaper: 11/10/07

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**Macy's to Macy's**

Δ ACDM  -6.90%
Δ AMD  -30.86%
Δ AMFV -7.82%
Δ AMMFV -12.47%

**Robinsons-May to Macy's**

Δ ACDM  -77.12%
Δ AMD  -52.67%
Δ AMFV -21.11%
Δ AMMFV -19.94%

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**MIAMI**

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295 Missing newspapers: 9/1/06, 9/2/06, 9/3/06, 1/30/07

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**Macy's to Macy's**

Δ ACDM -39.39%
Δ AMD -30.52%
Δ AMFV -7.36%
Δ AMMFV -10.40%

**SAN FRANCISCO**

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**Macy's to Macy's**

Δ ACDM -6.90%
Δ AMD -5.53%
Δ AMFV -5.53%
Δ AMMFV -10.01%

**SEATTLE**

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296 Missing newspapers: None
297 Missing newspaper: 12/15/06.
### NOTE:
Because no coupons were issued in Seattle during the first half of the study, comparisons to the second half of the study are not statistically relevant.

### TAMPA/ST. PETERSBURG

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**Macy's to**

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| WASHINGTON, D.C. 299 |

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D. Analysis

299 Missing newspapers: 9/9/06, 10/12/06, 12/17/06
This study’s conclusions are directly at odds with the FTC’s conclusions.\textsuperscript{300}

Today, in cities where Macy’s faces no middle-market competition\textsuperscript{301} coupons are issued on 31.03\% fewer days than in cities where Macy’s faces middle market competition.\textsuperscript{302} In all cities surveyed where Macy’s acquired a May store,\textsuperscript{303} the number of coupons issued by Macy’s has declined by 62\% and the average monthly face value of the coupons that Macy’s does issue has decreased 13\%.

Even before the merger, Macy’s discounted at different levels and frequency based on the middle market department store competition present in those cities. In cities where Macy’s faced May before the merger,\textsuperscript{304} there were an average of 7.1 coupons days per month with a median face value of 16.43\%. In cities where Macy’s faced Dillard’s before the merger,\textsuperscript{305} there were an average of 9.33 coupon days per month with a median face value of 15.11\%. In the two cities where Macy’s faced no middle-market department store competition before the May merger,\textsuperscript{306} there were an average of 2.9 coupons days per month with a median face value of 6.72\%.

Today, in cities where Macy’s faces no middle market competition,\textsuperscript{307} there are an average of 5.8 coupon days per month with a median face value of 14.42\%. In cities where Macy’s faces another middle-market department store,\textsuperscript{308} there are 7.6 coupon

\textsuperscript{300} Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005).
\textsuperscript{301} Boston, Los Angeles, San Francisco, Seattle and Washington, D.C.
\textsuperscript{302} Atlanta, Chicago, Cleveland, Dallas, Denver, Indianapolis, Miami and Tampa/St. Petersburg. Interestingly, the average median face value is currently 2.82\% higher in cities where Macy’s faces no independent store middle market department store, which suggests that Macy’s may still be favoring customers used to a much higher level of coupons at both the Macy’s and May stores when the two faced each other.
\textsuperscript{303} Boston, Chicago, Cleveland, Dallas, Denver, Indianapolis, Los Angeles, and Washington, D.C.
\textsuperscript{304} Boston, Indianapolis, Los Angeles and Washington, D.C.
\textsuperscript{305} Atlanta, Miami and Tampa/St. Petersburg.
\textsuperscript{306} San Francisco and Seattle.
\textsuperscript{307} Boston, Los Angeles, Seattle, San Francisco, and Washington, D.C.
\textsuperscript{308} Atlanta, Chicago, Cleveland, Dallas, Denver, Indianapolis, Miami and Tampa/St. Petersburg.
days per month with a median face value of 14.02%. Eliminating Chicago (where Macy’s competes against Bon-Ton and Indianapolis (where Macy’s competes against Bon-Ton and Belk) and leaving the remaining cities in this group (where Macy’s competes against Dillard’s), there are 7.97 coupon days per months with a median face value of 13.79%.

i. Coupons generally, “Everyday Low Pricing” and coupons to cardholders

One obvious question that defies an easy answer is the value of coupons as a dispositive metric. One way to respond is by looking at it as res ipsa loquitur. Even with a 62% decline in the number of coupons Macy’s prints in newspapers, Macy’s still runs coupons on almost seven days of every month. The enormous cost of this advertising suggests that Macy’s still benefits from these promotions in terms of attracting shoppers and assisting inventory control; it just appears that Macy’s needs to less of it now in order to make the same or greater sales.

There are no publicly available figures on distribution and redemption of department store coupons nationwide. Coupon trade reports – which include all coupons, such as supermarkets and direct mail – state that overall distribution declined by 12% in 2006 with a corresponding 13% decline in redemption.309 Macy’s 62% decrease is substantially greater than the national average.

Macy’s has not hidden its agenda to decrease coupons and all promotions.310 “Our first price simplification initiative is to reduce our level of public couponing.

Coupons will not disappear from Macy's, but we are issuing fewer of them."311 This “brings a measure of simplicity to pricing and reliability assuring shoppers that what they can buy today will never be offered at a lower price,” said Jim Sluzewski, FDS spokesman.312 Macy’s does, however, issue additional coupons to its credit card holders.313

Although Macy’s income and stock price have steadily increased since the May merger, its sales growth has been uneven.314 It is unclear whether these problems are related to the retiring of the historic department store names, a change in name brands and private labels, the remodeling of stores, a decrease in coupons – or some combination of all of these factors.315 Over time Macy’s expects customers to simply get used to the fact that there are fewer coupons and fewer promotions.316 For example, on New York’s Long Island, Macy’s has reduced coupons gradually since 2002, for a total drop of 25%.317 Nationally, according to Macy’s, promotions have been reduced by 20%,318 -- a substantially lower number than the 62% found in this study.

Regardless “[e]ven if Macy’s sells a little less volume, but at a higher price, its stores will make more money,” said Marshal Cohen, a financial analyst tracking department stores.319 But a reduction in output -- selling less but making more -- is one

311 Id. Another “price simplification” announced by Macy’s at the same time was to create “everyday value” for selected items from its private brands and market brands, although Macy’s does not explain what that means, what it covers, or how significant the everyday value is. See id.
312 Madhusmita Bora, Macy’s Cuts Out Ayres Culture, THE IND. STAR, Feb. 8, 2006, at 1C.
313 Id. Information about Macy’s distribution of coupons to private-label credit card holders is not publicly available and was not included in this study.
314 See e.g. Teresa F. Lindeman, Learning Curve: After A Year Of Change, Shoppers Show Signs They’re Starting TO Accept Macy’s, PITTSBURGH POST-GAZETTE, Feb. 28, 2007, at E1.
315 Id.
316 Id. Query whether this suggests that Macy’s has market power.
318 Jayne O’Donnell, Beloved Stores Get A Lot More Than A New Name, USA TODAY, June 8, 2006, at 1B; Melissa Levy, Who Exactly Is Federated Department Stores, Inc.?, MINN. STAR TRIB., May 31, 2004, at 1D.
319 Id.
example of market power. “A merger may diminish competition even if it does not lead
to increased likelihood of successful coordinated interaction, because merging firms may
find it profitable to alter their behavior unilaterally following the acquisition by elevating
price and suppressing output.” By eliminating May as a competitor, Macy’s may have
found it easier to diminish promotions nationwide, and particularly in the cities where it
formerly faced May.

ii. The anomaly of Dallas, Los Angeles, San Francisco and Seattle

The cities of Dallas, San Francisco and Seattle are anomalies, at least as compared
to the other ten cities surveyed. In Dallas, Macy’s only had one or two stores in the first
half of study period and faced Dillard’s and Foley’s. Macy’s opened a store at the
Galleria in Dallas in 1985. Foley’s in Dallas had a complicated lineage; in 1987, FDS
merged Dallas-based Sanger-Harris into the larger Houston-based Foley’s. In 1988, May
acquired Foley’s. Perhaps because there was only one Macy’s in Dallas during the
first half of the study period, it chose to do no advertising.

Macy’s in San Francisco and Seattle had long been the lone middle market
department store. In Los Angeles, Macy’s faced middle market department store

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320 Horizontal Merger Guidelines at 2.2. See also United States v. E.I. du Pont de Nemours & Co., 351
U.S. 377 (1956) (The term “cellophane fallacy” suggests that almost anything can be a substitute if the
desired product’s price grows high enough. But that fails to negate the existence of market power).
321 Heather Staible, The Name Game, WOMEN’S WEAR DAILY, May 18, 2006, at 6S.
322 There were only two Macy’s in Indianapolis during the first half of the study period, but the
Indianapolis Macy’s advertised heavily. It is possible that because both had just been converted from
another FDS store, Lazarus, Macy’s continued its predecessor’s discount policy.
323 In San Francisco, several middle-market department stores competed, the last two of which were
Macy’s and Emporium. Emporium was acquired by FDS and converted to Macy’s in 1995. In Seattle,
Frederick & Nelson was a middle market department store that competed against FDS’ Bon Marche, which
was renamed Macy’s in 2003. Frederick & Nelson was founded in 1890 and acquired by Marshall Field’s
in 1929. Frederick & Nelson was the original owner of the famous Frango Chocolate recipe so closely
identified with Marshall Field’s today. Frederick & Nelson joined its parent company in 1982 when it was
sold to BATUS. Local investors bought Frederick & Nelson in 1986 and it was liquidated in 1992. In
1998, Nordstrom abandoned its original store and moved its home store into the more beautiful former
flagship of Frederick & Nelson.
Robinsons-May, owned by May. The number of coupons and discounts in all three cities in the first half of the study period were lower than any other city surveyed. Los Angeles and San Francisco both had 5.8 coupons days per month and Seattle had zero coupon days per month. In the second half of the study, Los Angeles and San Francisco had 5.4 coupon days per month and Seattle increased to 1.8. The median face value of discounts decreased from 14.24% to 13.13 in Los Angeles, and 13.43 to 12.69 in San Francisco, which is lower than the national average of 14.17%.

While Dillard’s has no stores in any of the three cities, Dillard’s does have a store in Palmdale, California, sixty miles from downtown Los Angeles. Dillard’s has been trying to enter the Los Angeles area market, but has been thwarted by Macy’s exclusive arrangements with local shopping malls.\textsuperscript{324} The threat of entry of Dillard’s into the Los Angeles market may explain the difference in discounting between Los Angeles and San Francisco. In Seattle, the home of upscale Nordstrom, it is possible that Macy’s used the city – indeed, San Francisco and Los Angeles as well – as a laboratory for fewer coupons and lower discounts over the past few years.

\textbf{VI. CONCLUSION}

In 1994, when considering the antitrust ramifications of Macy’s and Rich’s merging in Atlanta, Allen Millstein,\textsuperscript{325} retail consultant and former editor of \textit{The Fashion Network Report} said: “[t]here is no precedent for separate department store chains owned by the same company operating in the same mall . . . Otherwise, The Gap would open multiple


stores in the same malls and compete against themselves, and you don't see them doing that.”

With all due respect to Mr. Millstein, his prediction proved to be very wrong. Department stores can and do operate multiple stores profitably in a single mall (either as separate brands, such as Macy’s and Bloomingdales, or by separating out a men’s store or a furniture store), and Gap not only operates Gap, Banana Republic, and Old Navy in many malls, it also has been known to operate Gap, Baby Gap, Gap Kids, Gap Maternity, Gap Body, Banana Republic Men and Banana Republic Women adjacent to one another.

Retail consultants, Wall Street analysts and the FTC have much in common, including a desire to peer into the future; for consultants and analysts, they do so to make money, and the FTC uses its crystal ball as mandated by Clayton § 7. But the most important thing they have in common is the fact that they can be wrong; no one can predict the future with any certainty.

Repeated claims that department stores are “dinosaurs” or “dying” should be taken with a grain of salt. Department stores have been around for one hundred and fifty years and are too intricately connected to too many facets of our society to disappear anytime soon. A few years ago Wall Street seemed ready to write off department stores;

since Macy’s acquired May, its stock price has increased 43%.328 Such an outcome in a large department store merger was in fact predicted by two FTC economists, who studied May’s earlier acquisition of Associated Dry Goods and found that May experienced “positive abnormal returns,” suggesting the merger had lessened competition and led to higher prices for consumers.329

What is most important is not the opinion of experts, consultants and analysts, but the opinion of consumers, many of whom remain loyal and continue to shop at department stores through bankruptcies, name changes, customer service debacles and decreased selection.330 These loyal customers continue to make department stores profitable and popular.331 The mere fact that the stores generally have remained profitable despite frequent mergers and name changes is likely a testament to the overall strength of the institution.332

This article reflects the tension between law and economics. If markets behaved as rationally as the Chicago School suggests, then Macy’s acquisition of May would not have been problematic. But as the empirical study conducted for this article suggests, the

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331 See e.g. Robert Berner, *Is Federated As Flush As It Looks?*, BUSINESS WEEK, May 28, 2007, at 71;
market is not behaving rationally, or at the very least, Macy’s is exercising market power.\footnote{See generally Nicholas G. Georgakopoulos, Principles and Methods of Law and Economics 12-17 (2005) (when formal logic fails, jurists must use informal normative reasoning).}

In the end, there are two basic questions: 1) what choices do consumers reasonably have as an alternative to Macy’s;\footnote{See U.S. v. E.I. du Pont de Nemours & Co. 351 U.S. 377, 395, 404 (1956). This case is usually referred to as “Cellophane” – a reference to its subject matter, as opposed to another du Pont antitrust case the following year.} and 2) how much would Macy’s have to raise prices before consumers availed themselves of substitutes – even less desirable ones.\footnote{See 1992 U.S. Government Horizontal Merger Guidelines at 1.11 (“small but significant an non-transitory increase in price”).}

Those two basic questions, however, have a plethora of subparts. For example, do certain demographic groups have alternatives to Macy’s that others do not? Do consumers in some geographic areas have alternatives to Macy’s that are not present in other areas? Will consumers choose stores other than Macy’s for certain needs but return to Macy’s for other reasons, regardless of the price? It is no wonder that in the end, the judge in the Bon-Ton case said “[t]o paraphrase Justice Potter Stewart’s often-quoted comment made in another context, customers know a department store when they see it. Anyone who has ever shopped in a department store, specialty store or discounter certainly knows that there is a difference” and that difference is significant.\footnote{The Bon-Ton Stores, Inc. v. The May Department Stores Company, 881 F. Supp. 860, 869-70 (W.D.N.Y. 1994).}

Another way to look at this is to imagine making certain purchases. If one needs to buy a basic t-shirt, many choices exist for American consumers. A t-shirt from Macy’s may be as acceptable as one from Gap, Target or J.C. Penney – or even a plethora of
internet options including eBay. But if one needs to buy a business suit for an interview or a new job for a professional position, the choices may be more limited.\textsuperscript{337}

Many professionals undoubtedly would like to buy that suit at an upscale store like Nordstrom or Sak’s Fifth Avenue – and many certainly do. But those department stores are not present in most geographic markets\textsuperscript{338} and their prices may be higher than someone buying a business suit for an interview or a new job can afford. But at the same time, would this hypothetical fledgling professional be comfortable buying that same suit at Wal-Mart or Target?\textsuperscript{339} Does the name Macy’s allow the purchaser to feel more confident than he or she would in a specialty store, if there even is one that is convenient, in the right price range, and sells appropriate attire?\textsuperscript{340} Will the service, security and fashion safety that department stores are known for mandate that many consumers will continue to make at least some purchases in a department store, even if the price increases 5\% or more?

Common sense suggests that after more than one hundred years of being “a part of [our] life,” to paraphrase an old Macy’s advertising campaign, Americans will continue

\textsuperscript{337} Certain groups, such as car-less city dwellers, the elderly, persons needing certain sizes, those without computers and the ability to make purchases on the internet, downtown workers without time on weekends to shop, for example, may be forced to shop in downtown department stores regardless of the price of goods. Similarly, if one seeks something stylish yet affordable, what options exist for most suburban Americans?


\textsuperscript{339} In any case, Wal-Mart and Target do not currently sell tailored clothing.

\textsuperscript{340} Several cases state that brand recognition alone may be a barrier to entry sufficient to allow anticompetitive effects. See e.g. U.S. v. Pabst Brewing Co., 384 U.S. 546, 559-60 (1966) (Harlan, Stewart, concurring) (consumer preference based on brand recognition a barrier to entry); Southern Pac. Communications Co. v. Am. Tel. and Tel. Co., 740 F.2d 980, 1002 (D.C. Cir. 1984) (brand preference a barrier to entry); A.G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585, 618, 620 (3d Cir. 1962) (reputation for quality a barrier to entry); Ansell Inc. v. Schmid Laboratories, Inc., 757 F.Supp. 1128, 1137 (D.D.C. 1986) (brand name recognition a barrier to entry); Tasty Baking Co. v. Ralston Purina, Inc. 653 F. Supp. 1250, 1263 (E.D. Pa. 1987) (same).
to make purchases at department stores, even if prices go up. The fact that Macy’s has seen healthy increases in its sales and profits since the May merger, despite a reduction in both the number and value of coupons, supports this theory.

It appears that consumers were injured when Macy’s acquired May. The differentiated products sold by these two department store companies are hard to compare specifically, but they both sold similar men’s and women’s clothing, house wares and bedding, in roughly the same price range, targeted at essentially the same demographic groups. And the empirical study in this article shows that Macy’s has definitively changed its couponing policies more than the company has acknowledged; the degree to which it has made changes in individual cities appears related to the competition from other middle market department stores.

Certainly more research is necessary. The empirical study could yield more dispositive results were it expanded to more cities, or to cover greater time periods. A more inclusive study that examined coupons at more department stores, including Dillard’s and Bon-Ton would provide greater context. And it is possible that another study including pricing data on popular items could be undertaken that would replicate that which the FTC undertook in *Staples*.

In the Spring of 2007, Macy’s announced that the former Marshall Field’s stores were performing consistently with all the former May stores, with one exception: the former Marshall Field’s flagship in downtown Chicago was doing “badly.” Long a tourist destination, the Macy’s brand was not driving traffic to the store. To compensate, Macy’s advertised fifty percent discounts on clearance merchandise and

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342 Id.
total savings of forty to ninety percent on spring fashions – but only at the downtown Chicago store.\footnote{Id.} In at least one situation, when Macy’s found it did not have market power, it brought back promotions.

No one’s crystal ball is perfect. The FTC can and should review Macy’s conduct since acquiring May and reassess whether the merger has led to an increase in prices and a reduction in output.\footnote{The FTC has authorization to issue subpoenas to corporations whose business affects commerce. 15 U.S.C. § 46(b).}