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Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act

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FIXING MERGER LITIGATION "FIXES": REFORMING THE LITIGATION OF PROPOSED MERGER REMEDIES UNDER SECTION 7 OF THE CLAYTON ACT

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I. INTRODUCTION

Before the Antitrust Division or the Federal Trade Commission sues to block an allegedly anticompetitive merger, the merging parties frequently seek to negotiate a merger remedy (sometimes referred to as a "fix" or "fix-it-yourself" solution) acceptable to the government.[1] Such negotiations often are complex and intense.[2] Understandably, the buyer may not wish to divest a successful ongoing business it either has built through considerable effort or acquired at great expense.[3] On the other hand, the government legitimately may be concerned about post-merger strategic behavior by the buyer that may tend to

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1. *See* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 181 ("Although merging firms can challenge an agency determination that a merger is anticompetitive in court, litigated Section 7 cases are relatively rare. Far more often, either a settlement is reached that allows the merger to go forward with certain conditions (usually a divestiture of certain overlapping businesses or assets), or the merging firms abandon the deal . . . ."); *see also* Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 946 (2003) ("Rather than endure a prolonged period of uncertainty while a proposed merger is contested in court, most parties either choose to negotiate with the agency to resolve competition issues or to abandon the transaction."); PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 739 (6th ed. 2004) (". . . complaints [sometimes] are not filed or cases are not tried because one of the competition agencies or another regulatory agency comes to an accommodation with the merging firms in an attempt to avoid adverse competitive effects.").

2. *See* AREEDA, ET AL., *supra* note 1, at 740 (discussing the "strategic costs" to potential merger partners "of needing to make business decisions without knowing whether the merger will be allowed"); Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 936-37 (2001) ("[T]he very process of discussing possible issues and possible remedies is seriously impacted by the fact that it is done by the people who are simultaneously responsible for preparing for possible litigation. . . . [N]o one likes to be embarrassed or to lose in public. . . . Humans being what they are, it should not be surprising that protection of a litigation advantage, and thus avoidance of a potentially embarrassing loss, frequently takes precedence over the best process for coming to an appropriate negotiated resolution . . . . The result has been, inevitably so, that the litigation preparation mentality has taken ever more control of the process . . . .").

3. *See* Sims & McFalls, *supra* note 2, at 947-48 ("First, there is the very substantial risk that divestitures will occur in a fire sale environment, particularly when potential buyers know that the parties cannot close a much larger deal until they get rid of a much smaller divestiture package. Second, there is the very real cost to the companies . . . of not being able to close their deal until they divest a smaller asset package. . . . Last, but certainly not least, there are large psychological costs borne by employees of the merging parties who often do not and cannot know their fates until the transaction has been closed.").

reduce output and increase prices.[4] Although the government's concerns frequently are resolved through such negotiations,[5] the government and the merging parties occasionally reach an impasse and the government threatens to sue to block the merger.[6]

On several notable occasions since 2000, instead of abandoning the proposed merger when the government filed suit, the merging parties have asked the courts, during the ensuing litigation, to bless their proposed merger remedies over the government's opposition.[7] With little or no rigorous analysis of the serious legal and evidentiary issues raised,[8] the district courts have been increasingly receptive to allowing defendants in Clayton Act section 7 merger cases to present evidence of proposed unilateral "fixes."[9] The fixes unilaterally

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4. *See* Thomas J. Horton, *A Comparison of Merger Remedies in the US and the EU*, *in* COMPETITION & ANTITRUST REVIEW 31, 32 (Jennifer Gibb ed., 2006) ("The DOJ's and FTC's current positions stem from their dual concerns that sellers are likely to engage in strategic behavior towards the buyers of divested assets, and that the close ties created by such agreements between competitors 'can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage.'" (quoting DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 18 n.26 (October 2004), http://www.justice.gov/atr/public/guidelines/205108.pdf)).

5. AREEDA, ET AL., *supra* note 1, at 741 (observing that "the threat of trial causes many firms to settle . . . .").

6. It is important to note that an overwhelmingly high percentage of reported mergers are quickly approved, and that only a handful of those that are closely investigated ultimately go to trial. *See* Frankel, *supra* note 1, at 163 n.17. As noted by the Antitrust Division, "[i]n fiscal years 1999-2005 the Division issued second requests in 248 merger investigations, but only 55 of those investigations resulted in the filing of a complaint, and only four of those complaints led to a trial." DEP'T OF JUSTICE, ANTITRUST DIVISION, BACKGROUND INFORMATION ON THE 2006 AMENDMENTS TO THE MERGER REVIEW PROCESS INITIATIVE, 8-9 (Dec. 14, 2006), http://www.usdoj.gov/atr/public/220241.htm; AREEDA, ET AL., *supra* note 1, at 738 ("The bulk of modern merger practice occurs before trial. For example, in 2001 there were 2,376 premerger notifications, with investigations instigated in 101 cases and complaints filed in only 7 cases.").

7. *See* Darren S. Tucker, *The Elephant in the Room: Litigating the Fix After* Arch Coal *and* Dairy Farmers, THE ANTITRUST SOURCE, Jan. 2006, at 1, *available at* http://new.abanet.org/antitrust/Searchable%20Antitrust%20Library/Jan06Tucker.pdf. ("Parties to proposed mergers are seeking with increasing frequency to eliminate competitive concerns by restructuring their transactions or selling overlapping assets to third parties. These efforts, however, do not always eliminate the concerns of the enforcement agencies, which have challenged a number of acquisitions involving these self-help, or fix-it-first, remedies. In a setback for the enforcement agencies, the courts have been willing to consider these self-help remedies in evaluating the overall competitive effects of acquisitions, thus blocking the agencies' attempts to exclude evidence related to these fixes at trial.").

8. *See, e.g.*, Arnold & Porter LLP Advisory, *The FTC Wins a Merger Preliminary Injunction:* FTC v. CCC Holdings, Inc., at 5, May 2009, http://www.arnoldporter.com/resources/documents/Advisory_TheFTCWinsMergerPreliminaryInjunction_051809.pdf ("Although the government often tries to preclude evidence of actions [d]efendants will take contingent on the merger closing, the court freely considered this evidence"); Order Denying Plaintiff's Motion *In Limine* to Exclude Evidence of Defendants' Proposed Post-Merger Licensing at 2-3, United States v. Franklin Elec. Co., No. 00-C-0334-C (W.D. Wis. July 19, 2000) (on file with author) ("Plaintiff contends that the licensing is irrelevant to the issue for trial, which is solely whether the proposed merger will violate §7[.] . . . I believe that it would be premature to hold prior to trial that the licensing arrangement has no effect upon the issue of liability and therefore should be excluded altogether. Rather, it appears relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially.").

9. *See* F.T.C. v. CCC Holdings, Inc., 605 F. Supp. 2d 26 (D.D.C. 2009); United States v. Dairy Farmers of Am., Inc., 2004 WL 2186215 (E.D. Ky. 2004), *rev'd*, 426 F.3d 850 (6th Cir. 2005); F.T.C. v.

proposed by defendants have run the gamut from structural remedies,[10] to the proposed licensing of new entrants,[11] to promises not to raise post-merger prices for a period of time.[12] Although the Antitrust Division and the Federal Trade Commission consistently have pursued aggressive motions *in limine* seeking to preclude the introduction of such evidence,[13] no district court has yet ruled in the government's favor.[14]

This article reviews the increasing receptivity of the courts and commentators[15] to the admission and consideration of evidence of proposed

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Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004); F.T.C. v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002); United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (W.D. Wis. 2000). *See also* White Consol. Indus., Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986); Chemetron Corp. v. Crane Co., 1977 WL 1491 (N.D. Ill. 1977); United States v. Conn. Nat'l Bank, 362 F. Supp. 240, 283 (D. Conn. 1973); *vacated and remanded*, 418 U.S. 656 (1974); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969), *injunction vacated*, 297 F. Supp. 1075 (S.D.N.Y. 1969), *aff'd sub nom*, Bartlett v. United States, 401 U.S. 986 (1971).

10. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d 109.

11. *See, e.g.*, *Franklin Elec.*, 130 F. Supp. 2d 1025.

12. *See* United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997). In *Long Island Jewish Medical. Center*, the merging parties reached an agreement with the Attorney General of New York shortly before the trial not to raise prices for two years after the merger, which was cited by the district court as evidence that a post-merger price increase was unlikely. *Id.* at 144. Not surprisingly, perhaps, the merged hospital system substantially increased its prices as soon as the two years elapsed. *Id.* *See also* F.T.C. v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708, 1997 WL 420543, at *2 (6th Cir. July 8, 1997) (observing that hospitals were prepared to make a "community commitment" involving price freezes). In *Butterworth*, the "hospitals had previously made the Community Commitment in an effort to 'assuage any purchaser concerns and to reiterate their strong conviction that the purpose and intent of the transaction [was] to reduce costs—and to pass those costs savings on to consumers—rather than to increase prices or unfairly disadvantage payers.' The Commitment was included as Appendix A to the Final Judgment. . . ." AREEDA, ET AL., *supra* note 1, at 755 n.56.

13. *See, e.g.*, Memorandum in Support of United States' Motion *In Limine* to Exclude Evidence Of Defendants' Post-Merger Licenses, United States v. Franklin Elec. Co., No. 00C-0334-C (W.D. Wis. June 27, 2000) (on file with author); Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, F.T.C. v. Arch Coal, Inc., No. 1:04CV00534 (D.D.C. April 8, 2004) (on file with author).

14. In *United States v. Franklin Electric Co.*, the district court ultimately sustained a trial objection to an attempt by a Franklin Electric executive to promise that it would not raise prices for a period of time if the merger was permitted to proceed. *See* Post-Trial Brief of the United States, Redacted-Public Version, at 18, United States v. Franklin Elec. Co., No. 00C-00334-C (W.D. Wis. Aug. 2002) (citing Trial Transcript at 4-A-115 to 119, United States v. Franklin Elec. Co.) (on file with author) ("Defendants' attempts to settle the case with the Court, instead of with the United States, reached comical proportions during the trial when Jess Ford, Senior Vice President at Franklin Electric, attempted to amend the licensing agreements in open court while on the witness stand."). *See also* *Chemetron*, 1977 WL 1491 (N.D. Ill. 1977); Consol. Gold Fields, P.L.C. v. Anglo Am. Corp. of S. Afr. Ltd., 698 F. Supp. 487 (S.D.N.Y. 1988). Both cases are discussed in Section II.A, *infra*.

15. To date, no commentator has seriously questioned the role of the courts in blithely admitting and crediting such evidence in Clayton § 7 merger cases. Instead, the commentators' positions have ranged from vigorously supporting the admission and review of such evidence to quiescent acquiescence. *See, e.g.*, *Antitrust Aspects of Mergers and Acquisitions*, Corporate Practice Series (BNA) No. 56-3d, at A-75 (Feb. 2006) [hereinafter "*Antitrust Aspects of Mergers and Acquisitions*"]. "[W]hen parties so amend a merger agreement, a court must evaluate the new agreement in deciding whether an injunction should be issued. . . . The same principle applies to the DOJ's merger challenges." *Id.* *See also* Arnold & Porter LLP, *supra* note 8, at 5; Tucker, *supra* note 7, at 5 ("Although the courts are consistent in their standards for admitting evidence of a proposed fix, there is some disagreement as to how this evidence affects the overall burden of proof under Section 7. The majority view, as exemplified by *Arch Coal*, *Libbey*, *Atlantic Richfield*, and *Connecticut National Bank*, is that the government bears the burden of showing that the entire transaction—the original transaction and the

unilateral fixes after an antitrust complaint has been filed, and analyzes whether there is a sound basis on jurisdictional, justiciability, evidentiary, and effectiveness grounds for crediting such evidence.[16] Section II first discusses the cases allowing merger defendants to present evidence of unilateral remedies or fixes as defenses. The author points out how the original precedents cited by the courts to justify their consideration of such evidence emanated almost entirely from a single mooted district court decision that itself cited no legal authority. The author concludes that the precedential support for such judicial review is shaky at best.

Section III then analyzes the jurisdictional and separation of powers issues raised under Article III of the United States Constitution. In section III.A, the author balances the arguments for allowing such evidence to be considered as an appropriate exercise of a district court's flexible equity jurisdiction in Clayton section 7 merger cases against the legislative histories of the Clayton[17] and Federal Trade Commission Acts,[18] as well as the more recent Hart-Scott-Rodino Antitrust Improvements Act of 1976.[19] The combined legislative histories and statutory language raise material questions about the jurisdictional propriety of

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proposed fix—will result in *a substantial lessening* of competition." (emphasis added)); Steven H. Schulman & E. Marcellus Williamson, *Litigating the Fix:* FTC v. Libbey, Inc.*—A Private Party Perspective*, A.B.A. ANTITRUST SECTION, CLAYTON ACT NEWSLETTER, Vol. III, No. 1, at 8 (Dec. 2002) ("While the 'fix-it-yourself' solution did not work for Libbey and Newell Rubbermaid, in the right context it might allow merging parties to overcome an FTC challenge."); Richard Liebeskind, *Litigating The Fix*: FTC v. Libbey, Inc.*—A Government Perspective*, A.B.A. ANTITRUST SECTION, CLAYTON ACT NEWSLETTER, Vol. III, No. 1, at 18 (Dec. 2002) ("In light of the court's decision, the *Libbey* case should not be taken as an invitation to urge on district courts the divestiture proposals rejected by the antitrust agencies. . . . [T]he district court is likely to evaluate it on the same standard as the agency; and the outcome is likely to be the same."); Sean F. Boland & Virginia R. Metallo, *Hear Our Divestitures: We Must Consider Parties' Own Proposed Remedies, Says District Court*, LEGAL TIMES, Nov. 6, 2000, at 2 ("The enforcement agencies now know that if they reject a restructured transaction, the parties may ask a court for a second opinion. . . . Now that the *Franklin* option is available, perhaps parties will be a bit more aggressive.").

16. The author previously has counseled merger attorneys on both sides to prepare for the admission of such evidence:

> Given the current state of the law, the astute antitrust lawyer trying a merger case must be prepared for almost anything. For example, a lawyer representing the merging parties must be prepared for the nightmarish possibility that the court will reject some or all of the evidence relating to the proposed fix. The lawyer also must be prepared to quickly tailor and effectively present potential alternative solutions based upon the evidence coming in at trial and the court's stated concerns and questions during the trial.
>
> On the other hand, a government antitrust lawyer seeking to block an acquisition cannot realistically count on keeping out evidence relating to a proposed fix. Consequently, the government team must focus on such potential evidence from the beginning and be prepared to show that the proposed fix will not cure the anticompetitive effects of the underlying transaction. The government lawyer also must be flexible and prepared to shoot at an ever shifting target, as the merging parties unilaterally attempt to fine tune their proposed remedies immediately before and during the trial.

Thomas J. Horton, *Negotiating Merger Remedies with the Antitrust Division and Litigating the Proposed Fix*, *in* OHIO STATE BAR ASSOCIATION—39TH ANNUAL ANTITRUST INSTITUTE: LITIGATING ANTITRUST CASES 2.4 (Oct. 28, 2005).

17. 15 U.S.C. § 12 (2008).

18. 15 U.S.C. § 41 (2008).

19. Pub. L. 94-435, Title II, § 201, 90 Stat. 1383, 1390 (1976). Title II became known as Section 7A of the Clayton Act, which is codified at 15 U.S.C. section 18a.

the courts' increasing judicial interjections into essentially extra-judicial settlement negotiations between executive branch enforcement agencies and merging companies. Section III.B reviews the substantial body of earlier Supreme Court decisions presciently warning against judicial overreaching in merger cases.[20] Section III.C considers whether the receptivity of the courts to such arguments and evidence may additionally undermine the carefully-crafted separation and balance of powers in merger cases re-emphasized by Congress through the Tunney Act (and other antitrust legislation).[21]

Section IV turns to the evidentiary issues raised when courts allow merger defendants to litigate their proposed fixes. Section IV.A considers the various cases in which merger defendants have sought to introduce post-acquisition evidence in support of their acquisitions,[22] and discusses whether such evidence, like evidence of the voluntary cessation of illegal activities by defendants in response to litigation, is inherently suspect.[23] Section IV.B then addresses whether the consideration of such evidence is consistent with Federal Rule of Evidence 408,[24] and whether allowing such evidence unnecessarily complicates and slows down Clayton Act litigation, and overrides the substantial interest in keeping merger cases as simple as possible.

Section V reviews the additional justiciability issues raised when courts allow merging parties to "litigate the fix." The author discusses whether the courts are as well-suited as the Antitrust Division or the Federal Trade Commission to evaluate, monitor, and enforce proposed merger settlements or fixes that have not been memorialized through the formal consent decree

20. *See, e.g.*, Brown Shoe Co.. v. United States, 370 U.S. 294 (1962); United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316 (1961); United States v. Borden Co., 347 U.S. 514 (1954).

21. 15 U.S.C. § 16(b)-(h) (2008). "Consent decrees entered into with the [Department of Justice] are subject to a sixty-day public notice and comment period and judicial scrutiny under the Tunney Act to determine whether they are in the public interest." ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 405 (6th ed. 2007).

22. *See, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486, 505 n.13 (1974) ("[P]ost-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded 'too much weight.'"); Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381, 1384 (7th Cir. 1986) ("We agree with the Commission that it was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position . . . . Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *cf.* Lekto-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981) ("Post-acquisition evidence is admissible since the probability of anticompetitive effects is judged at the time of trial."); F.T.C. v. Consol. Foods Corp., 380 U.S. 592, 598 (1965) (stating post-acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a section 7 case).

23. *See Gen. Dynamics*, 416 U.S. at 504-05 ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a s[ection] 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.").

24. FED. R. EVID. 408 (Compromise and Offers to Compromise). The Rule states in pertinent part:

> . . . Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount . . . :
>
> (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise the claim[.]

Id.

process. Section V also addresses whether such informal "fixes" are likely to lead to post-acquisition strategic behaviors, and considers whether barring such evidence likely will lead to more and better Clayton Act settlements that will consume fewer judicial and regulatory resources.

Based on the analyses above, the author concludes that by accepting and crediting merger defendants' unilaterally proffered "fix-it-yourself" solutions to illegal mergers, the courts are overstepping their constitutional Article III boundaries by rewriting the "case" filed by the government, and by encroaching upon the executive branch's congressionally delegated role in bringing and settling Clayton Act merger cases. The author consequently recommends in section VI a series of reforms for future Clayton Act section 7 merger cases brought by the United States or the Federal Trade Commission. First, it is recommended that merger defendants not be permitted to introduce evidence of their unilaterally proposed curative remedies in merger cases brought by the government. If Clayton section 7 defendants are allowed to offer such evidence, however, they should bear a heavy burden of proving no reasonable probability of post-acquisition anticompetitive impacts if the proposed fix is adopted. Moreover, the minimal threshold for allowing such evidence to be admitted and considered should be a full and effective divestiture of an ongoing business to a highly-qualified buyer. Furthermore, if such evidence is admitted and credited in allowing an otherwise illegal merger to go forward, no collateral estoppel or res judicata effects should bind the government in a subsequent divestiture suit if a serious threat of an anticompetitive impact arises after the proposed fix is adopted.

II. THE ORIGINS OF "LITIGATING THE FIX" IN CLAYTON SECTION 7 CASES

While the recent rash of "litigating the fix" merger cases began in 2000 with *United States v. Franklin Electric Co.*,[25] several cases prior to the "passage and unchallenged expansion of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ('HSR')"[26] allowed merger defendants to present evidence of proposed fixes in an effort to avoid liability. These cases, discussed below, were relied upon successfully by the defendants in *Franklin Electric* in arguing that

> [e]very court which has considered the issue has held that, in evaluating the "probable future" of competition in a relevant market, the court *must* look at the effects of the entire transaction on competition in the relevant market, not just that part of the transaction about which the government complains.[27]

A close investigation of these cases, however, raises a substantial question as to their precedential value in support of permitting merger defendants to

25. 130 Fed. Supp. 2d 1025 (W.D. Wis. 2000).

26. Sims & McFall, *supra* note 2, at 934. The Hart-Scott-Rodino Antitrust Improvements Act is codified at 15 U.S.C. section 18a (2008).

27. Opposition of Defendants to Motion of Plaintiff *In Limine* at 6, United States v. Franklin Elec. Co., No. 00C-0334-C (W.D. Wis. June 27, 2000) (on file with author).

"litigate their fixes."

A. PRE-*FRANKLIN ELECTRIC* CASES

1. United States v. Atlantic Richfield Co.

In *United States v. Atlantic Richfield Co.* (*Atlantic Richfield I*),[28] the United States sued "to enjoin the proposed merger of defendant Sinclair Oil Company (Sinclair) and defendant Atlantic Richfield Company (Atlantic) on the ground that the merger would violate Section 7 of the Clayton Act[.]"[29] The district court reviewed the potential anticompetitive effects of the proposed merger in four defined geographic markets, which included the Northeastern states, the Rocky Mountain and Central states, and the Southeastern states. Finding "that the Government ha[d] demonstrated reasonable probability of success on the issue of probability of substantial anti-competitive effects of the merger in the Southeast,"[30] the district court enjoined the entire transaction even though it found no "reasonable probability of success at trial on the issue of probable anti-competitive effects" [31] in the other three relevant geographic markets.[32] Several weeks later, the companies agreed to a divestiture settlement with the United States, and the court lifted its preliminary injunction allowing the revised deal to proceed.[33]

In assessing the potential anticompetitive effects of the merger in the Northeastern states, the court admitted evidence of defendants' unilaterally proposed "agreement for the sale by Atlantic of all of the Sinclair assets in the Northeast to B P (British Petroleum) for $300 [million] scheduled to be completed on the first day of the month following the month in which the merger takes effect."[34] The court held that the "sale of the Sinclair assets to B P would substitute a new and viable competitor for Sinclair in the Northeast."[35]

The district court failed to cite a single case or other legal source in overruling the United States' objection to the admission and crediting of evidence concerning Atlantic's proposed sale of the Northeastern assets to B P. Instead, the court simply stated:

> The Government takes the curious position that the sale to B P should be completely ignored by the court and that the merger should be treated as if it would result in a combined Atlantic-Sinclair operation in the Northeast. I see no merit in this position. The Government's contention is predicated on several grounds, none of which have substance.[36]

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28. 297 F. Supp. 1061 (S.D.N.Y. 1969).
29. *Id.* at 1064.
30. *Id.* at 1074.
31. *Id.* at 1070.
32. *Id.* at 1067-70.
33. *Id* at 1076. The court expressly observed in lifting its preliminary injunction "that the Government did not oppose defendants' application to vacate the preliminary injunction." *Id.* at 1075.
34. *Id.* at 1067.
35. *Id.* at 1068.
36. *Id.*

The court belittled defendants' possible abandonment of the proposed divestiture, as well as provisions in the agreement of sale the United States believed would "place B P in such dependence upon Atlantic as to prevent it from becoming a viable independent competitor in the Northeast."[37] The court summarily concluded that it saw "no reason why merging companies cannot eliminate probable anti-competitive effects by such a disposition of assets as will be made here."[38]

Although the court used strong language in criticizing the government's position, it provided no meaningful substantive discussion or analysis. As noted, the court failed to cite a single case or statutory authority in reaching its own sweeping conclusion. Moreover, it effectively mooted its sweeping partial ruling by enjoining the deal in its entirety. The court's subsequent acceptance of a deal between the United States and the parties further eroded whatever precedential value its mooted partial ruling might have had. Ironically, however, with little or no meaningful substantive analysis or discussion of *Atlantic Richfield I*, the commentators[39] and courts have accorded the decision substantial precedential value, and it has taken on a prolific organic life.

2. United States v. Connecticut National Bank

The second major case relied upon by defendants in the *Franklin Electric* case was *United States v. Connecticut National Bank.*[40] In that case, the district court denied the United States an injunction to prevent the merger of two of Connecticut's largest banks. In part, the district court was persuaded by a plan the defendants submitted to divest six overlapping branch banks.[41] Again, with little meaningful substantive discussion or analysis, the court rejected "plaintiff's argument that the defendants' evidence with respect to divestiture should not be considered by the Court because it [was] an attempt 'to negotiate a settlement in public' . . . ."[42] The court simply explained:

> It seems clear that the evidence, which is part and parcel of the merger agreement between the defendants, is an inseparable and relevant element of the entire proof on likely competitive effects. The Court must view the proposed consolidation as a complete picture; the divestiture is an intrinsic aspect of the merger. Therefore, the Court deems it appropriate and

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37. *Id.*

38. *Id.* at 1069. The district court effectively established a constructive precedent for courts to negotiate directly with the merging parties when it observed that with respect to a possible abandonment of the proposed divestiture,

> at the hearing Atlantic, Sinclair[,] and B P were entirely willing and indeed eager to make the sale contemporaneous with the closing of the merger if the court considered that of any consequence. In any event it is certainly within the province of the court to approve the merger only if the sale to B P is consummated simultaneously.

Id. at 1068.

39. *See, e.g.*, Liebeskind, *supra* note 15, at 13; Schulman & Williamson, *supra* note 15, at 6; Tucker, *supra* note 7, at 2-3.

40. 362 F. Supp. 240 (D. Conn. 1973), *vacated and remanded*, 418 U.S. 656 (1974).

41. *Conn. Nat'l Bank*, 362 F. Supp. 240.

42. *Id.* at 283.

proper to weigh the effect of the divestiture plan as a matter of plain common sense.[43]

Not surprisingly, the court cited *Atlantic Richfield I* in support of its decision.[44]

Under traditional legal analysis, the district court's opinion should be accorded no precedential value, since the Supreme Court ultimately vacated the court's decision allowing the merger to proceed because the district court had used the wrong geographic and product markets.[45] Moreover, the district court's citation of *Atlantic Richfield I* as support for its ruling that defendants' proposed divestitures of six banks could be considered over the United States' objection illustrates how dicta with no case or statutory support can begin to gain precedential momentum when later courts cite cases without carefully considering or reviewing the earlier records and holdings. Unfortunately, commentators and courts generally have simply accepted *Connecticut Bank's* implicitly overruled, mooted, and unsupported holding as strong precedent despite the lack of meaningful substantive discussion or analysis.[46]

3. F.T.C. v. Atlantic Richfield Co.

In *F.T.C. v. Atlantic Richfield Co. (Atlantic Richfield II)*,[47] the F.T.C. "commenced administrative proceedings challenging the merger [of Arco and Anaconda] on the ground that it would violate s[ection] 7 of the Clayton Act . . . because of its anticompetitive effect in the markets for copper ore and concentrates, the production and sale of refined copper and the production and sale of uranium oxide."[48] In a district court suit by the F.T.C. seeking an injunction during the pendency of the administrative proceedings, the court denied relief.

On appeal, the Fourth Circuit, early in 1977, affirmed the district court. The court discussed the proposed merger's likely effect on the production and sale of uranium oxide. In affirming the district court, the Fourth Circuit ruled that the F.T.C.'s concerns about lost horizontal competition between Arco and Anaconda were "moot because on November 1, 1976, Arco agreed to sell its only uranium oxide production and selling operation to United States Steel

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43. *Id.*

44. *Id.* The court additionally cited *Proctor & Gamble Co. v. F.T.C.*, 358 F.2d 74, 83 (6th Cir. 1966), *rev'd on other grounds*, 386 U.S. 568 (1967). The Sixth Circuit opinion in *Proctor & Gamble*, which was reversed, merely held that the F.T.C. "was in error in ruling that post-merger evidence [in a divestiture case] was admissible only in unusual cases . . . ." *Proctor & Gamble*, 358 F.2d at 82.

45. *Conn. Nat'l Bank*, 418 U.S. at 660 (holding ". . . the legality of a market extension merger must be determined against the backdrop of properly defined product and geographic markets . . . . In our view, the District Court erred in its definition of both concepts . . . ."). Furthermore, in setting out a list of "appropriate considerations to take into account in determining the legality under s[ection] 7 of the Clayton Act of geographic market extension mergers by commercial banks[,]" the Court did not list or discuss the lower court's acceptance of evidence of the potentially curative divestitures submitted by defendants. *Id.* at 659-60.

46. *See generally* Boland & Metallo, *supra* note 15; Tucker, *supra* note 7.

47. 549 F.2d 289 (4th Cir. 1977).

48. *Id.* at 291-92.

Corporation."[49] Even though Arco continued to hold an interest in the uranium operation at the time of the appeal, the court was persuaded by evidence "that after December 7, 1977, Arco [would] not be responsible for preparing programs and budgets; it [would] not conduct uranium exploration operations; and it [would] not act as a sales agent for the uranium production."[50]

Like the courts before it, the Fourth Circuit did not address in any depth the F.T.C.'s concerns about crediting such proffered evidence. Instead, citing *Atlantic Richfield I,* the Fourth Circuit blithely stated that "[d]ivestiture prior to merger is an acceptable technique to avoid an antitrust violation."[51] In effect, the unsupported and mooted "fix-it-yourself" language in *Atlantic Richfield I* continued its organic growth through aggressive citations.

4. Chemetron Corp. v. Crane Co.

Chemetron Corp. v. Crane Co.[52] additionally has been cited as precedent for courts to consider "proposed remedies" in Clayton section 7 cases.[53] In *Chemetron,* the district court, in September 1977, enjoined under the Clayton Act defendant Crane Company's proposed tender offer for the outstanding shares of its competitor-plaintiff Chemetron Corporation. One of the problematical overlapping businesses involved welding fittings.

Unlike the previous cases discussed above, however, the *Chemetron* court refused to admit or credit the "defendant's offer of a curative divestiture of its welding fittings business."[54] The court explained that, "[t]he offer was made in the midst of the hearing. No specificity attended it. We said at the time that such undefined proposals should not be considered in the heat of a hearing for preliminary injunction."[55] The court somewhat softened its stern holding, however, by citing *Atlantic Richfield I* and adding in dicta that:

> [s]uch a proposal might be considered on a motion to modify or vacate a preliminary injunction, but then only if it appears that the divested business will continue as an independent entity whose competitive position in the newly structured market is comparable to or better than its predivestiture position.[56]

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49. *Id.* at 298-99.
50. *Id.* at 299.
51. *Id.* at 299.
52. 1977 WL 1491 (N.D. Ill. 1977).
53. *See, e.g.,* Liebeskind, *supra* note 15, at 14 n.18; Tucker, *supra* note 7, at 2 n.5.
54. *Chemetron Corp.*, 1977 WL 1491, at *7.
55. *Id.*
56. *Id.* (citing United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd*, 385 U.S. 37 (1966)). The court failed to note that the determination of whether a divested business would "continue as an independent entity" is just the type of determination that should be made by the enforcement agencies with their knowledge of the specific industry and in their substantial experience in overseeing consent decrees. *Id.*

5. White Consolidated Industries, Inc. v. Whirlpool Corp.

In *White Consolidated Industries, Inc. v. Whirlpool Corp.*,[57] several appliance manufacturers sued under the Clayton Act to enjoin the sale of KitchenAid. The proposed transaction "consist[ed] of two parts—the acquisition of KitchenAid by Whirlpool and the spin-off sale of the KitchenAid manufacturing assets to Emerson."[58] With no discussion of whether to allow evidence of the proposed spin-off sale, the district court stated simply that it "consider[ed] the two stock purchase agreements and the supply contract to be all part of one transaction."[59] The court added, "the divestiture of the manufacturing assets of KitchenAid to Emerson and the accompanying supply agreement provide the key to determining whether anti-competitive effects [would] result from the proposed transaction."[60] Based on its review of the proffered supply agreement between Whirlpool and Emerson, the court found "that the features of the supply agreement . . . so hinder[ed] Emerson that Whirlpool [would] effectively control Emerson's level of production."[61] The court enjoined the transactions, but essentially invited "the parties, the business people" to try to cure the faults the court found with the proposed supply agreement.[62]

Approximately one month later, again with no discussion of the propriety of so doing, the court accepted over plaintiffs' objections an "amended supply contract," and found that under it, Emerson would likely "be a willing and viable competitor in the dishwasher market."[63] With no discussion of the serious issues raised, the district court essentially negotiated with the defendants a "fix" for an admittedly illegal merger over the strong opposition and objections of the plaintiffs. Missing from the court's opinion was any discussion of whether in suggesting a set of possible cures in its original opinion enjoining the transaction, which it later accepted unilaterally, the district court had overstepped its Article III role and assumed the constitutional and statutory role of an executive antitrust enforcement agency.[64]

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57. 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd,* 781 F.2d 1224 (6th Cir. 1986).

58. White Consol. Indus., Inc. v. Whirlpool Co., 612 F. Supp. 1009, 1028 (N.D. Ohio 1985).

59. *Id.*

60. *Id.*

61. *Id.* at 1029.

62. *Id.* at 1013.

63. White Consol. Indus., Inc. v. Whirlpool Co., 619 F. Supp. 1022, 1024 (N.D. Ohio 1985), *aff'd* 781 F.2d 1224 (6th Cir. 1986). Like the district court, the Sixth Circuit never discussed whether the admission or crediting of such evidence was appropriate. Instead, without citing a single case or statute, the Sixth Circuit simply ruled that it "agree[d] with the district court that the relevant inquiry [was] whether the amended curative divestiture [did] in fact leave Emerson as a willing, independent competitor capable of effective production in the dishwasher market." *White Consol. Indus., Inc.*, 781 F.2d at 1228.

64. *See, e.g.,* Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (urging that "antitrust courts [not] act as central planners . . . a role for which they are ill-suited"); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curium*, 347 U.S. 521 (1954). The district court in *United Shoe Machinery Corp.* observed that,

> Judges in prescribing remedies have known their own economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. They are not

6. Consolidated Gold Fields v. Anglo American Corp.

In 1988, Judge (and later Attorney General) Mukasey joined the *Chemetron* court in questioning the admission and consideration of evidence of allegedly curative fixes proposed by defendants to gain judicial approval of otherwise illegal mergers.[65] In a hostile tender offer case in the gold mining industry, the defendants sought to justify their proposed illegal acquisition through a "promise[ ] that, after the takeover, defendants [would] divest themselves of Gold Fields' South African Mines and Newmont."[66] Ironically, the court cited *Atlantic Richfield I* but held that defendants' "announced intention of selling Gold Fields' South African Mines or Newmont should properly be accorded no weight in a preliminary injunction hearing."[67] Unfortunately, Judge Mukasey's lucid opinion has been ignored or overlooked by the recent courts overruling the government's objections to "fix-it-yourself solutions" offered by defendants in Clayton section 7 cases.

B. *FRANKLIN ELECTRIC* AND RECENT CASES

1. United States v. Franklin Electric

As seen above, by July of 2000, when the case of *United States v. Franklin Electric Co., Inc.*[68] was tried before United States District Judge Barbara Crabb, the court potentially had before it a series of precedents seemingly supporting both the admission and exclusion of evidence relating to merger parties' proposed curative "fixes." As further seen, the precedents allowing such

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> so representative as other branches of the government. . . . Hearings in court do not usually give the remote judge as sound a feeling for the realities of a situation as other procedures do. . . . Above all, no matter with what authority he is invested, with what facts and opinion he is supplied, a trial judge is only one man, and should move with caution and humility.

United Shoe Machinery Corp., 110 F. Supp. at 347-48.

65. Consol. Gold Fields, P.L.C. v. Anglo Am. Corp. of S. Afr. Ltd., 698 F. Supp. 487 (S.D.N.Y. 1988).

66. *Id.* at 502.

67. *Id.* (citing United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957)). The *du Pont* case, discussed in detail *infra*, stands for the proposition that divestitures should be a product of negotiations between the executive enforcement agencies and defendants, and not the courts and defendants. F.T.C. v. PPG Indus., Inc., 798 F.2d 1500, 1508 (D.C. Cir. 1986) (citing F.T.C. v. Weyerhauser Corp. 665 F.2d 1072, 1085-86 (D.C. Cir. 1981)). The *PPG Industries* court held that in merger cases where the Commission has shown a likely violation of section 7 of the Clayton Act, "'a likelihood of success finding weighs heavily in favor of a preliminary injunction blocking the acquisition[,]'" as opposed to a hold separate order pending the completion of the Commission's review. *Id.* (quoting *Weyerhauser Corp.*, 665 F.2d at 1085-86). In *PPG Industries*, the D.C. Circuit added that "under the circumstances of this case, even a severe hold separate order could not certainly protect against interim competitive harm or ensure the adequacy of eventual relief." *Id.* The D.C. Circuit was unpersuaded by the district court's finding in that the F.T.C. ultimately might approve the merger, and a hold separate order could "preserv[e] the perceived public and private benefits that [might] flow[ ] from the merger." *Id.* at 1506. *See* Liebeskind, *supra* note 15, at 14 ("*Weyerhauser* and *PPG* laid out stringent conditions for a court to accept anything less than a full-stop injunction in an FTC preliminary injunction action, specifically that significant equities favored the transaction and that the alternative remedy would not prevent interim harm to competition and would assure the availability of ultimate relief following plenary administrative adjudication.").

68. 130 F. Supp. 2d 1025 (W.D. Wis. 2000).

evidence evolved and emanated almost entirely from *Atlantic Richfield I*, a case involving a mooted decision that rested upon no cited legal authority, and provided no meaningful substantive discussion or analysis.

Franklin Electric centered on a proposed merger to create a monopoly between the only two manufacturers of submersible turbine pumps ("STPs" – used for pumping gasoline from underground storage tanks to station pumps).[69] Following the lead of earlier courts, the court allowed the defendants to introduce evidence of a proposed post-acquisition third-party licensing scheme that was hastily put together shortly before trial and amended several times during the trial.[70] Without any substantial discussion (or citations to authority), the court simply overruled the United States' pre-trial motion *in limine* to exclude evidence of defendants' post-merger licenses, observing:

> I believe that it would be premature to hold prior to trial that the licensing arrangement has no effect upon the issue of liability and therefore should be excluded altogether. Rather, it appears relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially.[71]

Ultimately, the court found the evidence of defendant's proposed third-party licensing scheme unpersuasive and enjoined the merger. The court concluded that the United States had shown "the reasonable probability of substantial impairment of competition if defendants . . . [were] permitted to proceed with their planned joint venture, with or without its accompanying licensing and supply agreements with Environ."[72] The court reached "[t]he inescapable conclusion [ ] that Franklin Electric [was] willing to pay a premium price in order to control the development, production[,] and sale of all domestic submersible turbine pumps and that its various agreements with Environ [were] nothing more than insubstantial window dressing to conceal its monopolistic

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69. *Id.* at 1035 (" . . . defendants have failed to show that their agreements . . . should be viewed, that is, as anything other than a merger to monopoly that by definition will have an anticompetitive effect on the submersible turbine pump market."). Defendants also sought to portray their merger as a "joint venture," but the court ultimately viewed it as a proposed "merger." *Id.*

70. The author recalls one humorous incident where a newly amended licensing agreement was slipped under his hotel door in the middle of the night in the middle of the trial. *See* WILLIE L. HUDGINS, *Handling Evidence of Settlement/Divestiture Offers in Litigation*, ALI-ABA COURSE OF STUDY: TRYING AND WINNING A CIVIL ANTITRUST CASE 179, 183 (Nov. 29-30, 2001). Mr. Hudgins stated:

> On May 30, 2000, the day before the litigation was filed, the defendants amended the joint venture agreement to include the proposed third party license, although no license agreement existed at that time. On June 23, 2000, over three weeks after the litigation was filed, defendants signed a license agreement, a motor supply agreement, and an OEM supply agreement with Environ. The agreements [were to become] effective upon the closing of the joint venture.

Id. Mr. Hudgins further stated, "[i]n the *Franklin Electric* litigation, defendants [also] attempted to introduce evidence of the reasonableness of their licensing proposal and how it was crafted to address certain objections raised by the Government during settlement discussions. The court excluded this evidence under [Federal Rule of Evidence] 408." *Id.* at 187-88.

71. Order Denying the Plaintiff's Motion *In Limine* at 2-3, United States v. Franklin Elec. Co., No. 00C-0334-C (W.D. Wis. July 19, 2000) (on file with author).

72. *Franklin Elec.*, 130 F. Supp. 2d at 1035-36.

motives."[73]

2. F.T.C. v. Libbey, Inc.

As described by the Federal Trade Commission's lead trial attorney, Richard Liebeskind:

> On June 17, 2001, Libbey, Inc. [Libbey] and Newell Rubbermaid Co. [Newell] entered into a stock purchase agreement whereby Libbey would acquire a Newell subsidiary, the Anchor Hocking Co., [Anchor] from Newell. Both Libbey and Anchor [were] U.S.-based manufacturers and sellers of soda lime glassware.[74]

"Libbey [was] the largest manufacturer and seller of food service glassware in the United States."[75] "The food service glassware market in the United States [was] a 'highly concentrated' market . . . ,"[76] and "Anchor [was] Libbey's most formidable competitor in the food service glassware market."[77] Anchor also produced other types of glassware, and the original June 17, 2001, Stock Purchase Agreement would have allowed Libbey "to acquire all of Anchor's assets from Newell, Anchor's parent corporation, for $332 million."[78]

On December 18, 2001, the F.T.C. authorized its staff to sue to block the deal alleging "that the proposed acquisition would 'reduc[e] the limited competition that [existed] in th[e] highly concentrated [food service] market, which Libbey already dominate[d].'"[79] On January 14, 2002, the F.T.C. filed its preliminary injunction suit. One week later, the defendants amended their merger agreement along the lines of a prior settlement proposal rejected by the Commission.[80] According to United States District Judge Reggie B. Walton:

> On January 21, 2002, in response to the FTC's concerns, and in an attempt to salvage the merger, defendants amended the proposed merger agreement. The amended agreement eliminated the purchase of Anchor's food service business, which [was] worth an estimated $17.9 million,

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73. *Id.* at 1034.

74. Liebeskind, *supra* note 15, at 11 (citing F.T.C. v. Libbey, Inc., 211 F. Supp. 2d 34, 40 (D.D.C. 2002)).

75. F.T.C. v. Libbey, Inc., 211 F. Supp. 2d 34, 38 (D.D.C. 2002).

76. *Id.* at 38-39.

77. *Id.* at 39.

78. *Id.* at 40.

79. *Id.* at 41.

80. *See* Liebeskind, *supra* note 15, at 11-12. Mr. Liebeskind elaborated:

> After the Commission vote, Libbey and Newell told the FTC that they would amend their merger agreement—whether or not the FTC agreed—to provide that Newell would "retain" Anchor's food service business, and transfer that business to another division of Newell (Rubbermaid Commercial Products or "RCP"). Newell would still plan to sell Anchor Hocking, and its two glassmaking factories, to Libbey. Newell claimed that it would obtain glassware from a source that had not yet been determined (initially Newell intended to obtain glassware from Libbey, and sell it in competition with Libbey). The FTC rejected that concept as a fix for the competitive problems the Commission had found with the merger, and on January 14, 2002, filed its preliminary injunction lawsuit. Libbey and Newell then proceeded to amend their merger agreement in the manner they had described, and defended the preliminary injunction action on the basis that their new deal did not violate the antitrust laws.

Id.

while still permitting Libbey to acquire Anchor's retail and specialty/industrial business, worth an estimated $179.1million, for a total cost of $277.5 million.[81]

Judge Walton initially approached the defendants' amended acquisition agreement as a "jurisdictional question," and "issued an order demanding that the FTC tell the court whether or not the Commission had found reason to believe that the *amended* merger agreement violated the antitrust laws."[82] The F.T.C. "promptly obliged," the battle was joined,[83] and "the parties and the FTC were left litigating very different cases before the U.S. District Court in the District of Columbia."[84]

Although Libbey's defense counsel had characterized their amended agreements as a "fix-it-yourself solution,"[85] they argued to the court that "since they were no longer proposing an acquisition in the market defined by the FTC, the agency could not meet its burden to 'show a reasonable probability that the *proposed* transaction would substantially lessen competition in the future.'"[86] The F.T.C., on the other hand, "view[ed] the amended agreement as a 'sham' because, it contend[ed], Newell [did] not actually intend to continue as a competitor in the food service glassware market."[87] The F.T.C. contended "that the amended agreement was reached 'not for business reasons, but as the predicate for a defense to the merger presented to and challenged by the FTC.'"[88] The "FTC argued that the amended merger agreement was in essence

81. *Libbey*, 211 F. Supp. 2d at 41 (internal citations omitted). For alternative views of the *Libbey* merger agreement amendment process, see Liebeskind, *supra* note 15, at 11-12 and Schulman & Williamson *supra* note 15, at 4-5. Schulman and Williamson stated:

> In December 2001, Libbey proposed several divestiture plans to the FTC Bureau of Competition. Each proposal was for Libbey to sell, after closing, certain molds and other assets used to produce glassware sold to foodservice customers, not including either of Anchor Hocking's manufacturing plants. Each of the proposed post-closing divestitures was rejected by the Bureau, which insisted that, if any acquisition were to be approved, Anchor Hocking's foodservice business would have to be sold prior to closing or else Libbey would need to agree to a "crown jewel" of the divestiture of at least one manufacturing plant. Libbey countered that this remedy was out of proportion to the conjectured harm, as a plant could manufacture far more glassware than Anchor Hocking sold to foodservice customers.

Schulman & Williamson *supra* note 15, at 4-5.

82. Liebeskind, *supra* note 15, at 12 ("The district court perceived that a jurisdictional question was presented by the change of the merger agreement, since it was unclear (in the court's view) whether the FTC had ever found 'reason to believe' that the revised merger was likely to violate the antitrust laws.").

83. *Id.* at 12-13 (The Commission voted "unanimously to issue a statement that it found reason to believe the amended merger agreement violated the antitrust laws. Based on that statement, the district court concluded that the jurisdictional problem had been resolved.").

84. Schulman & Williamson, *supra* note 15, at 6.

85. *Id.*

86. *Id. See Libbey*, 211 F. Supp. 2d at 41 ("The defendants argue[d] that the amended agreement should have alleviated the FTC's concerns about the potential anti-competitive effect the original agreement would have [had] on the food service glassware market for several reasons.").

87. *Libbey*, 211 F. Supp. 2d at 42.

88. *Id.* at 43. As an interesting and somewhat amusing aside, defense counsel claimed that they "were surprised that the FTC rejected the January 2002 Agreement out of hand, characterizing it as a 'sham,' [and] were stunned when the FTC insisted that it could all but ignore the January 2002 Agreement and satisfy its burden by proving that the consummation of the abandoned June 2001 Agreement was likely to harm competition in the food service glassware market." Schulman &

a proffered alternative remedy to a full-stop injunction," and defendants "argued that the transaction challenged by the FTC had been abandoned, and that an entirely new merger was on the table."[89]

"Neither the FTC nor defendants could identify a case in which the merging parties purported to 'fix' an assertedly problematic merger by retaining (rather than divesting) assets."[90] Seizing upon that shallow assertion, the court ignored the potential judicial precedents previously discussed, as well as the statutory and historical guidance discussed *infra,* and jumped to the conclusion that it was "[o]perating on what appear[ed] to be a clear slate[.]"[91] Leveraging its shallow and somewhat derelict approach, the court, without any meaningful analysis or discussion, concluded that

> parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.[92]

Ostensibly evaluating the amended proposed acquisition agreement, the court found that "Anchor ha[d] provided effective competition against Libbey" in the food service glassware market, and "that, as a result of the amended agreement, what [was then] Anchor could effectively be eliminated from the food service glassware market."[93] The court thereby rejected defendants' contention "that the amended merger agreement would have *no* effect on competition, despite [their] argument that, since the food service business would not be sold, there would be no increase in concentration or effect on competition."[94] Cryptically, and somewhat confusingly, the court concluded "that the amended agreement would potentially have the same anti-competitive effect as the original agreement."[95]

Williamson, *supra* note 15, at 6.

89. Liebeskind, *supra* note 15, at 15-16 ("The FTC sought to persuade the district court to remember that, ultimately, the Commission would determine the final remedy, and that one possible final remedy (a full-stop injunction) must be preserved for that determination.").

90. *Id.* at 13. *See also Libbey*, 211 F. Supp. 2d at 46 ("The Court has not found, and neither party has identified, any precedent that has addressed how an amended merger agreement impacts the original agreement.").

91. *Libbey*, 211 F. Supp. 2d at 46. *See* Liebeskind, *supra* note 15, at 16 (The district court "did not discuss any of the cases cited by the parties . . . on this issue. The Court decided the case on the merits for itself . . . .").

92. *Libbey*, 211 F. Supp. 2d at 46.

93. *Id.* at 47.

94. Liebeskind, *supra* note 15, at 17.

95. *Libbey*, 211 F. Supp. 2d at 51. The court stated more fully:

> The "original" proposed merger announced on June 17, 2001, would have resulted in an HHI increase of 1052, thus resulting in a post-merger HHI of 6241. This is clear evidence that the original merger would have substantially lessened competition in the market. Defendants do not dispute the FTC's characterization of the impact the original proposed merger would have on the food service glassware market. Instead, they argue that the FTC must make an affirmative showing that the amended proposed merger will substantially harm competition. However, as already discussed [ ], the FTC's evidence, when considered cumulatively establishes that the amended agreement would potentially have the same anti-competitive effect as the original agreement. For these reasons, the Court concludes that the FTC has established a prima facie

Similar to the *Franklin Electric* court, the *Libbey* court bent over backwards (without any meaningful legal analysis of the potential consequences) to accommodate the merging parties' efforts to effectively settle their cases with the court through a "fix-it-yourself" solution. Why and to what end? Would it not have been more intellectually honest and judicially efficient to have simply evaluated the original proposed acquisition, and left any potential settlement to the F.T.C. and the defendants? As aptly noted by former F.T.C. competition official and commentator Richard Liebeskind:

> Having concluded that the amended agreement could result in the elimination of Newell as the effective competitor it had been, the court then analogized that effect to the effect of the original (purportedly abandoned) merger agreement. The original agreement would have eliminated Anchor as a competitor in the food service glassware business, and the amended agreement was likely to have the same effect (at least on the "likelihood of success" standard applicable in a preliminary injunction proceeding). Therefore, the court looked at the *original* merger as a proxy for the effect of the *amended* merger.
>
> As a result, defendants did not gain much (if anything) from the court's holding that the parties were allowed to amend their merger and have the court consider it. Even though the court claimed to evaluate the "amended" agreement rather than the original agreement, it evaluated it by asking whether the surviving competitor would be *as* viable and competitive as the firm that would have been eliminated in the original merger.[96]

The *Libbey* court is to be applauded for ultimately reaching the correct result in blocking the proposed anticompetitive acquisition. However, its facile and convenient conclusion to credit and ostensibly evaluate defendants' proposed "fix-it-yourself solution" set the table for further judicial overreaching in future Clayton section 7 merger cases.[97]

It is telling that immediately following both the *Franklin Electric* and *Libbey* decisions, defense counsel, whose proposed acquisitions had been blocked, immediately wrote self-congratulatory articles crowing about their precedent-setting victories on behalf of future merger defendants in government

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> case that the amended agreement may substantially lessen competition in the food service glassware market or that it would constitute an unfair method of competition.

Id. (internal citations omitted).

96. Liebeskind, *supra* note 15, at 17 (internal citations omitted).

97. *See, e.g.*, Schulmun & Williamson, *supra* note 15, at 8. The authors further stated:

> While the "fix-it-yourself" solution did not work for Libbey and Newell Rubbermaid, in the right context it might allow merging parties to overcome an FTC challenge. . . . Moreover, the *Libbey* court's analysis of the "fix-it-yourself" solution could be extended to a third-party divestiture.
>
> The Court's decision also presents merging parties with a strategic choice of when to submit the new deal to the FTC.

Id. *See also* Neal R. Stoll & Shepard Goldfein, *'FTC v. Libbey': A Pyrrhic Victory?*, N.Y. LAW JOURNAL, May 21, 2002, at 3 ("[T]he FTC was deprived of its opportunity to investigate fully whether the parties' agreement to exclude Anchor's food service business from the acquisition adequately addressed its competitive concerns.").

cases.[98] Indeed, *Franklin Electric* and *Libbey* defense counsel correctly prophesied that they had set the stage for an ultimate litigating the fix defense victory in which a court, citing the *Franklin Electric* and *Libbey* decisions as precedent, accepted and blessed defendants' proposed "fix-it-yourself" solution[99] over the government's strenuous objections. Within two years, their vision and dream was realized.

3. F.T.C. v. Arch Coal, Inc.

In May of 2003, Arch Coal, Inc., the owner of two Southern Powder River Basin (SPRB) mines in Wyoming agreed with New Vulcan Coal Holdings, LLC, to acquire New Vulcan's Triton Coal Company, LLC subsidiary (Triton), which also owned two SPRB coal mines.[100] Attempting to avoid an F.T.C. suit, Arch Coal "subsequently informed the FTC that it intended to divest one of the acquired mines (Buckskin) to Peter Kiewit Sons, Inc. ("Kiewit"), a large company with some mining interests outside the SPRB, and in January 2004 a firm asset purchase agreement was entered into by Arch and Kiewit."[101] The F.T.C., ultimately joined by the states of Missouri, Arkansas, Kansas, Illinois, Iowa and Texas, sought to enjoin the proposed acquisition, in what the court conceded was an oligopolistic market,[102] under section 13(b) of the Federal Trade Commission Act[103] and section 7 of the Clayton Act.[104]

Prior to the two week trial in the District of Columbia, the F.T.C. filed a motion *in limine* "to exclude, for the purposes of the preliminary injunction proceeding, all evidence and argument on the issue of Arch's proposed sale of the Buckskin mine to Kiewit."[105] From the court's perspective, "[t]he FTC argue[d] that the Kiewit transaction [was] merely a proposed remedy to the Arch-Triton merger, while defendants argue[d] that it [was] a central component of what they [were] proposing to do and hence what the FTC [was] challenging."[106]

The court saw its central "task [as] defining the transaction that [was] being challenged by the FTC."[107] Finding *Libbey* to be "[t]he case most directly on point[,]"[108] the court cited it heavily to rule in defendants' favor—finding that "[t]he uncontroverted facts, as presented to the Court by both parties, reveal[ed] that the Kiewit transaction was proposed as a good faith response to the

98. *See generally* Boland & Metallo, *supra* note 15; Schulman & Williamson, *supra* note 15.

99. Schulman & Williamson, *supra* note 15, at 6.

100. F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109, 114 (D.D.C. 2004).

101. *Id.*

102. *Id.* at 132. In fairness, the court ultimately found that the "SPRB market [was] currently a competitive non-cooperative oligopolistic market." *Id.*

103. 15 U.S.C. § 53(b) (2008).

104. 15 U.S.C. § 18 (2008).

105. Mem. Opinion Denying F.T.C.'s Motion *In Limine* at 2, F.T.C. v. Arch Coal, Inc., Civ. A. No. 04-0534 (JDB) (D.D.C. July 7, 2004) (on file with author).

106. *Id.* at 3.

107. *Id.*

108. *Id.*

Commission's investigation and concerns regarding the competitive effects of the Arch-Triton merger."[109] The court was untroubled by its own inconvenient recognition that "theoretically the parties could renegotiate the Kiewit deal[.]"[110] Instead, citing only the citation-less *Libbey* and *Franklin Electric* decisions, the court "conclude[d] that the transaction that [was] the subject of the FTC's challenge [was] properly viewed as the set of two transactions involving the acquisition of Triton by Arch and the immediate divestiture of the Buckskin mine to Kiewit."[111]

Having blessed defendants' proposed "fix-it-yourself solution" over the government's objections, the court went on to allow Arch Coal's ultimate acquisition of Triton and its two SPRB coal mines because "post-merger, there [would] still be five significant producers of SPRB coal, with Kiewit replacing Triton as an SPRB producing entity."[112] In effect, the court avoided evaluating Arch Coal's acquisition of Triton and its two SPRB mines by creating a fictional situation where the original acquisition was merely a step in a bigger overall transaction. In so doing, the court stepped outside its adjudicatory role and replaced the F.T.C. and Attorneys General of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas as executive regulators statutorily empowered to settle merger litigation cases.

C. THE POST-*ARCH COAL* WORLD

1. United States v. Dairy Farmers of America, Inc.

A little over a year after the district court's substantive decision in *Arch Coal*, the United States Court of Appeals for the Sixth Circuit addressed

> a challenge by the [United States and Kentucky] to the [already completed] acquisition of Defendant Southern Belle by Defendant DFA and the Allen Family Limited Partnership ("AFLP"). The government allege[d] that th[e] acquisition, as structured both in the original and revised agreements, ha[d] resulted in a monopoly on the market for school milk in over forty school districts in Kentucky and Tennessee, and that it ha[d] reduced competition substantially in almost fifty additional districts.[113]

In *Diary Farmers of America*, after the government filed a suit challenging the original acquisition, defendants "DFA and AFLP agreed that DFA would exchange its common member interest in Southern Belle for non-voting preferred capital interests, thus eliminating DFA's right to vote on any matter or to sit on the Southern Belle Representative Committee."[114] Defendants argued that their revised agreement had mooted the original acquisition agreement, and

109. *Id.* at 5.
110. *Id.*
111. *Id.*
112. F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109, 124 (D.D.C. 2004).
113. United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 852 (6th Cir. 2005).
114. *Id.* at 853.

that under their revised agreement, AFLP no longer had ownership or control over DFA, so that there was no danger of anticompetitive effects. The district court, without ever ruling "on the legality of the original Southern Belle agreement[,]" granted summary judgment for the defendants.[115]

On appeal, the Sixth Circuit immediately reversed the district court's failure to review the original acquisition agreement. The court found unpersuasive "the absence of any evidence that DFA intend[ed] to reinstate the terms of the original agreement[.]"[116] The Sixth Circuit explained:

> This agreement is unsuccessful because it misstates the burden in establishing that a claim is moot. The Supreme Court has repeatedly explained that [a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, unless subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur . . . .
>
> . . . The government's claim with respect to the original agreement was not mooted by the adoption of the revised agreement, and the district court should have considered it.[117]

The Sixth Circuit then reviewed the original acquisition agreement, which had not been reviewed by the district court, and concluded:

> DFA's acquisition of Southern Belle included a mechanism by which DFA exercised some control over the business activities of Southern Belle, and resulted in its controlling an undue percentage of the relevant market as well as a significant increase in the concentration of firms in that market. Here, DFA's control was sufficient to show that the acquisition caused anticompetitive effects . . . summary judgment should not have been granted with respect to the government's claim regarding the original agreement.[118]

After the Sixth Circuit reversed and remanded the district court's grant of summary judgment for defendants, plaintiffs the United States and Kentucky worked out a set of divestitures with the defendants, and stipulated to a "Final Judgment" that was entered by the district court on March 23, 2007.[119] Consequently, in overturning the district court's acceptance and approval of defendants' post-acquisition "fix-it-yourself solution," the Sixth Circuit put the settlement negotiations with defendants back into the hands of the United States and Kentucky, and a result satisfactory to all ultimately was achieved.[120]

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115. *Id.* at 857, 862. The Sixth Circuit observed that the district court did not rule on the legality of the original acquisition agreement, and "did not offer any explanation of its failure to do so." *Id.* at 857.

116. *Id.* at 857.

117. *Id.*

118. *Id.* at 861. The Sixth Circuit relied heavily on the Supreme Court's opinion of *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316 (1961), discussed *infra* in Section III.B.2.

119. United States v. Dairy Farmers of Am., Inc., 2007 WL 1200094 (E.D. Ky. 2007).

120. Unfortunately, the Sixth Circuit never discussed or addressed *Arch Coal, Libbey, Franklin Electric*, or any of the other "litigating the fix" cases discussed herein, including *White Consolidated Industries.*

2. F.T.C. v. CCC Holdings, Inc.

On March 18, 2009, United States District Judge Rosemary M. Collyer preliminarily enjoined a three-to-two merger between automobile insurance partial loss and total loss claims software providers CCC Information Services, Inc. (CCC) and Mitchell International, Inc. (Mitchell).[121] As part of their unsuccessful trial strategy, the defense team, which included *Arch Coal* legal veteran (and former F.T.C. Bureau of Competition Director) Richard G. Parker, took a page directly from the *Franklin Electric/Arch Coal* playbook, and sought to create a new post-acquisition entrant, Web-Est, as the "fix" to barriers to entry.[122] As the court observed, "Web-Est was formed in March 2008 with Mitchell's financial backing around the same time CCC and Mitchell announced the merger[.]"[123] Mitchell and Web-Est then "entered into a new licensing agreement which [was to] become effective as soon as the merger close[d]."[124] Defendants argued, using language eerily similar to that used by the *Franklin Electric* defendants, "that Web-Est's web-based product [would] make it a 'game changer' in the industry."[125]

Although the court asked, "Web-Est: The 'Fix' to Barriers to Entry?"[126] it never discussed whether such a unilaterally proffered "fix" should have been admitted or analyzed. Instead, it simply admitted defendants' proffered "fix" evidence, analyzed it thoroughly, and ultimately rejected it, concluding, "[w]hatever Web-Est's plans and aspirations for the future may be, it is very unlikely to be able to compete effectively, i.e., affect pricing, within five years or even soon thereafter."[127]

Like the *Franklin Electric* and *Libbey* courts, the *CCC Holdings* court rejected defendants' proposed merger "fix" on the merits. However, its similar unquestioning admission of such evidence without any meaningful discussion is troubling. Indeed, the *CCC Holdings* court seemed to treat the issue as settled by citing *White Consolidated Industries* for the proposition that "[i]n order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact . . . a willing, *independent* competitor capable of effective production in the . . . market."[128]

By not meaningfully discussing the issue, the *CCC Holdings* court joined a long list of other courts, including the *Franklin Electric*, *Libbey*, and *Arch Coal* courts, which blindly have followed the unsupported and ultimately moot reasoning of *Atlantic Richfield I* and its progeny. In essence, the courts consistently have chosen the path of least resistance. Unfortunately, in so doing, the courts have created a situation where "the astute antitrust lawyer trying a

121. F.T.C. v. CCC Holdings, Inc., 605 F. Supp. 2d 26 (D.D.C. 2009).
122. *Id.* at 56.
123. *Id.*
124. *Id.* at 57.
125. *Id.*
126. *Id.* at 56.
127. *Id.* at 59.
128. *Id* (quoting White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir. 1986)).

merger case must be prepared for almost anything."[129]

In Section II through IV, the author reviews the admission and consideration of proposed unilateral fixes after an antitrust complaint has been filed, and analyzes whether there is a sound basis on jurisdictional, constitutional, evidentiary, and effectiveness grounds for crediting such evidence. The author concludes that having crafted a world where "a government antitrust lawyer seeking to block an acquisition cannot realistically count on keeping out evidence relating to a proposed fix[,]"[130] the courts unwittingly have overstepped substantial constitutional, statutory, and judicial boundaries, and effectively declared their right to replace the executive branch as America's front-line Clayton Act merger enforcement authority.

III. JURISDICTIONAL AND SEPARATION OF POWERS ISSUES

A. STATUTORY LEGISLATIVE HISTORIES

1. The Clayton and F.T.C. Acts of 1914

"After Congress had, with the Sherman Act, enunciated the basic policy of maintaining competition in industrial markets, the market structure underwent a major change as small firms were combined into giant corporations during the great merger movement."[131] "The Sherman Act had been ineffective in counteracting the power granted by liberal state laws to newly created corporations."[132] Consequently, "[d]uring the early 1900s, public concern about corporate size and strength grew, and lawmakers introduced legislation to supplement and strengthen the Sherman Act."[133] "So pervasive was the public concern about corporate size that, in 1912, all three major parties—Republican,

129. Thomas J. Horton, *Negotiating Merger Remedies with the Antitrust Division and Litigating the Proposed Fix*, *in* OHIO STATE BAR ASSOCIATION—39TH ANNUAL ANTITRUST INSTITUTE: LITIGATING ANTITRUST CASES 2.4 (Oct. 28, 2005).

130. *Id.*

131. DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 18 (Univ. of Cal. Press 1959); *see* Debra A. Valentine, F.T.C. Assistant Dir. For Int'l Antitrust, Prepared Remarks at the INDECOPI Conference, The Evolution of U.S. Merger Law 1 (Aug. 13, 1996) (on file with author) ("Although the [Sherman] Act was somewhat successful in eliminating trusts and holding companies as vehicles for cooperation among companies, the Supreme Court did not extend its reach to mergers unless it could be shown that their very purpose was to restrain trade. Not surprisingly, businesses and barons adapted their techniques and the US saw its first great merger wave in the 1890's, after and perhaps because of the Sherman Act."); *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-5 (Feb. 2006) ("The Sherman Act, passed in 1890, failed to restrain the formation of large industrial combinations, and the period from 1897 to 1904 witnessed an all-time high rate of consolidation by small, independent firms into large holding companies. The Sherman Act failed as merger control legislation due largely to the fluctuating standards used in its enforcement.").

132. MARTIN, *supra* note 131, at 18. Ironically, in 1914, Democratic Senator Thompson lambasted former Republican President Theodore Roosevelt as "the great trust breeder." Senator Thompson argued: "There were more trusts formed under the Roosevelt administration than under any other administration in the history of the country. His policy seemed more to encourage than to arrest their creation." 51 CONG. REC. 14,200, 14,222 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2064 (Earl W. Kintner ed. 1978).

133. *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-5 (Feb. 2006).

Progressive, and Democratic—advocated legislation to strengthen the antitrust laws, and to supplement the broad but flexible prohibitions of the Sherman Act, in their platforms."[134]

Although the legislative histories of the original Clayton and Federal Trade Commission Acts are lengthy, complex,[135] and at time cacophonous,[136] "there is no doubt that Congress was concerned about the monopoly power of the great industrial trusts – it wanted to protect consumers and smaller firms from unfair use of that power."[137] A coherent theme of legislative distrust of the courts on antitrust issues additionally emerges. As noted by Judge Richard Posner:

> One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission.[138]

The Clayton and F.T.C. Acts grew out of "pressure to strengthen the Sherman Act[,]"[139] following the Supreme Court's 1911 decisions in *Standard Oil Co. of New Jersey v. United States*[140] and *United States v. American Tobacco Co.*[141] As aptly observed by David Dale Martin, "[t]he 1911 oil and tobacco cases were the most important pre-1914 cases, concerning the legality of combinations brought about by either stock or asset acquisitions, and they were important in creating demand for the passage of the Clayton Act."[142]

134. ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 5 (1981); *see id.* at 4 ("[E]arly proposals to control corporate acquisition activity varied widely. Proposals ranged from absolute prohibitions of stock acquisitions to mandatory disclosure aimed simply at preventing acquisitions from remaining secret.").

135. *See* AREEDA, ET AL., *supra* note 1, at 4 ("Antitrust study will occasion some close acquaintance with the use and abuse of legislative history. Committee reports often are no more precise than the statute itself. Comments made on the floor of the House or Senate may be even less useful: Debates often resemble discussions of motherhood or sin—one is either for or against; there are no subtle gradations of opinion.").

136. *See, e.g.*, ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 15 (1981) ("[T]he legislative history of original [Clayton Act] Section 7 provides murky guidance, at best, to the meaning of such terms of 'competition,' 'substantiality,' and 'relevant market.'"); *see also* Valentine, *supra* note 131, at 1 ("The legislative history [of the Clayton Act] is complex and often contradictory . . . .").

137. Valentine, *supra* note 131, at 1. As observed by President Woodrow Wilson: "We are all agreed that 'private monopoly is indefensible and intolerable,' and our program is founded upon that conviction." 51 CONG. REC. 14,200, 14,222 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2063 (Earl W. Kintner ed. 1978).

138. Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381, 1386 (7th Cir. 1986).

139. *House Hearings on Trust Legislation*, 62d Cong. (1912), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 997 (Earl W. Kintner ed. 1978).

140. 221 U.S. 1 (1911).

141. 221 U.S. 106 (1911).

142. MARTIN, *supra* note 131, at 16 (internal citations omitted). *See id.* at 25 ("All the [legislative] proposals discussed above were reactions to the enunciation of the rule of reason by the Supreme Court in 1911. . . . [A]ll were designed to be an enunciation by Congress of a policy toward combinations more stringent than the Sherman Act, as it was interpreted at the time.").

Following the Court's 1911 decisions, "[o]n July 26, 1911, the Senate adopted a resolution authorizing and directing its Committee on Interstate Commerce to conduct an investigation as to what changes were necessary or desirable" in the antitrust laws.[143] The Senate Committee's subsequent report calling for additional legislation left little doubt about the Senate's concern with what it saw as the Supreme Court's attempt to substitute itself for Congress in setting forth the federal antitrust laws.[144]

Congressional distrust of the judiciary was echoed throughout the Senate and House hearings. For example, during the Senate debate of August 25, 1914, Senator Shields gave a long speech urging that the courts' role was not to "administer" the antitrust laws, but to simply "prevent and restrain" their violation "when proceedings are instituted for th[e] purpose, by injunction or otherwise[.]"[145]

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143. *Senate Hearings on Trust Legislation*, 62d Cong. (1911-1913), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 999 (Earl W. Kintner ed. 1978) (citing S. Res. 98, 62d Cong., 1st Sess., 47 CONG. REC. 2695 (1911)).

144. *Id.* at 999-1000 (citing SENATE COMM. ON INTERSTATE COMMERCE, CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE, S. Rep. No. 1326, 62d Cong., 3d Sess., at 10-11 (1913)). The Senate committee elaborated:

> The committee has full confidence in the integrity, intelligence, and patriotism of the Supreme Court of the United States, but it is unwilling to repose in that court, or any other court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated. It substitutes the court in the place of Congress, for whenever the rule is invoked the court does not administer the law, but makes the law. If it continues in force, the Federal courts will, so far as restraint of trade is concerned, make a common law for the United States just as the English courts have made a common law for England.
>
> The people of this country will not permit the courts to declare a policy for them with respect to this subject. If we do not promptly exercise our legislative power, the courts will suffer immeasurable injury in the loss of that respect and confidence so essential to their usefulness. It is inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve. If we do not speedily prescribe in so far as we can a legislative rule by which to measure the forms of contract and combination in restraint of trade with which we are familiar or which we can anticipate, we cease to be a Government of law and become a Government of men, and, moreover, of a very few men, and they appointed by the President.

Id.

145. 51 CONG. REC. 14,200, 14,222 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2037 (Earl W. Kintner ed. 1978). Senator Shields raged in part:

> It is difficult to understand upon what principle or authority the United States circuit court assumed and exercised the power to administer a monopoly . . . .
>
> The Sherman law . . . does not confer such authority. The jurisdiction there conferred upon the courts of the United States is "to prevent and restrain violations of the act," when proceedings are instituted for the purpose, by injunction or otherwise, and not to administer them. Courts of equity have no general inherent jurisdiction to protect and enforce the interests of parties growing out of unlawful contracts, conspiracies, and monopolies.
>
> . . .
>
> I hope that the bill we have under consideration will be so amended as to prohibit courts from administering monopolies for the benefit of monopolists, and will require that all combinations adjudged to be unlawful be placed in the hands of receivers and dissolved.

Id. at 2036-37. Indeed, the attacks upon the courts during the Clayton Act legislative hearings were at times so heated that Senator Borah felt compelled to rise to their defense: "Mr. President, it is a common, and, I think a deplorably common thing in these days to be always assailing the courts. I do

During the same hearing, Senator Thompson similarly argued that the Federal Trade Commission, and not the courts, should have the primary "power and authority" over illegal combinations.[146] Senator Reed additionally referred in the debates to the power of the Attorney General (rather than the courts) to settle antitrust suits under the Clayton Act.[147] Furthermore,

> President Wilson threw his weight on the side of those who urged . . . . [that] there was to be administrative supervision which, combined with the sharper definitions of unlawful practices in the Clayton Act, would help the businessman to know where he stood.[148]

The legislative histories of the original Clayton and Federal Trade Commission Acts of 1914 thus provide strong support for the contention that courts adjudicating Clayton Act merger cases brought by the United States or Federal Trade Commission should decide only the merits of the original "case" before it. The courts should not seek to "administer" under the pretext of adjudication unilaterally proffered settlement proposals from defendants.

The conclusion that the courts should decide only the original section 7 "case" before them is bolstered strongly by the language Congress chose in dividing the authority for the administration of the Clayton Act between the judicial and executive branches. Section 15 of the Clayton Act was designed to be "a reenactment of sections 4 and 5 of the [Sherman] antitrust law—nothing more and nothing less."[149] Under Section 15 of the Clayton Act:

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not sympathize with this wholesale assault." 51 CONG. REC. 13,963, 13,978 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 1908 (Earl W. Kintner ed. 1978).

146. 51 CONG. REC. 14,200, 14,222 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2063 (Earl W. Kintner ed. 1978). Senator Thompson stated:

> I favor vesting power and authority over these combinations in a Federal trade commission, such as we recently created, with only restricted and limited review by the courts. The courts, in reviewing the commission's orders, will have the benefit of the findings of the commission after thorough investigation such as no court has the facilities to make. We have reached the point in our industrial history when we are compelled to decide between a commission created for the special purpose of handling this particular subject and the courts, which are already over laden with other great duties and are wholly unable to give the time and attention that such questions require. So after some reluctance I have been convinced that the best way to handle the subject for the present at least is by a Federal commission created for this special purpose and charged with the particular duty of destroying unlawful combinations already created and preventing the creation of new organizations.

Id. Senator Chilton, on October 1, 1914, stated: "In the last analysis the courts will be the gunners and may determine the direction in which the gun shall be pointed. . . . [W]hen it comes to legislation we cannot go every place where the heart would lead, but must follow the interpretation of the courts . . . ." 51 CONG. REC. 15,983, 15,997 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2618 (Earl W. Kintner ed. 1978).

147. Senator Reed stated: "This provision only applies where there is a final judgment; it does not interfere with a possible settlement; but when there has been a final judgment, the decree provides for the appointment of a receiver and the actual, good-faith dissolution of the combination." 51 CONG. REC. 14,513, 14,527 (1914), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2325 (Earl W. Kintner ed. 1978).

148. AREEDA ET AL., *supra* note 1, at 43 (quoting R. Cushman, *The Problem of the Independent Regulatory Commission*, *in* REPORT OF UNITED STATES PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 205, 211 (1937)).

149. Statement of Senator Nelson, 51 CONG. REC. 15,934, 15,944 (1914), *reprinted in* THE

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. *Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.* When the parties complained of shall have been duly notified of such petition, *the court shall proceed, as soon as maybe, to the hearing and determination of the case*[.][150]

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution."[151] "As required by Article III, courts may adjudicate only actual cases or controversies."[152] In *Flast v. Cohen*,[153] the Supreme Court observed that:

> Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations . . . in part those words define the role assigned to the judiciary in tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.[154]

Section 15 of the Clayton Act expressly states that the government's petition sets "forth *the case*" and that the court "shall proceed, as soon as may be, to the hearing and determination of *the case*[.]"[155] It is presumed that Congress understood the Article III implications of the term "the case" in drafting the Clayton Act. Thus, Congress statutorily left the shaping of "the case" under the Clayton Act to the executive branch, and the adjudication of "the case" as set forth in the Attorney General's petition to the district courts. By essentially allowing merger defendants to re-write "the case" before the court, and by accepting unilaterally proffered settlement proposals, the courts "encroach[ ] into areas reserved for"[156] the executive branch and "undermine the authority and independence" of the executive branch.[157] The courts thereby disrupt and interfere "with the Executive Branch's ability to execute its assigned tasks" of bringing and settling if possible the case under sections 7 and 15 of the

LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 2554 (Earl W. Kintner ed. 1978).

150. *Id.* (emphasis added).

151. Flast v. Cohen, 392 U.S. 83, 94 (1968). *See* Mistretta v. United States, 488 U.S. 361, 385 (1989) ("According to express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies.'").

152. Rhoades v. Avon Prod., Inc., 504 F.3d 1151, 1157 (9th Cir. 2007) (citing U.S. CONST. art. III, § 2, cl. 1).

153. 392 U.S. 83 (1968).

154. *Id.* at 94-95. The Court added that "[j]usticiability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." *Id.* at 95. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 395-96 (1980) (quoting *Flast*, 392 U.S. at 95).

155. 15 U.S.C. § 25 (2008).

156. *Mistretta*, 488 U.S. at 385.

157. *Id.* at 382. The *Mistretta* Court added that "[i]t is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressures inherent within each of the separate Branches to exceed the outer limits of its power.'" *Id.*

Clayton Act.[158]

Such a reading of Congress's statutory intent is buttressed by a congressional "factual survey of legislative action in the antitrust field from 1890 through 1966."[159] In the House of Representatives' Committee on Small Business Report, the committee discussed the jurisdiction to enforce the antitrust laws:

> Enforcement of the antitrust laws devolves primarily upon the Attorney General through criminal prosecutions or suits in equity by the Antitrust Division of the Department of Justice. . . .
>
> The Antitrust Division receives complaints and, in cooperation with the Federal Bureau of Investigation, conducts investigations which, where appropriate, lead to . . . suits in equity designed to break up monopolies and restraints of interstate or foreign trade.[160]

With respect to the Clayton Act, the House Committee Report added: "The Department of Justice possesses concurrent jurisdiction with the Federal Trade Commission to enforce the provisions of the Clayton Act. Section 15 of that act directs the Attorney General to institute proceedings in equity to prevent and restrain violations of the act."[161] The courts are therefore on shaky statutory and constitutional ground in expanding their Clayton Act jurisdiction to review and potentially accept defendants' unilaterally proffered settlement proposals.

2. *The 1950 Amendment to Section 7 of the Clayton Act*

As noted by the American Bar Association's Antitrust Section:

> Soon after the enactment of the Clayton Act in 1914, suggestions began to be made that the language of original Section 7 was inadequate. From 1927 until passage of the 1950 Amendment, the Federal Trade Commission recommended annually that the statute be amended.[162]

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158. Eugene Gressman, *Separation of Powers: The Third Circuit Dimension*, 19 SETON HALL L. REV. 491, 507 (1989).

159. SELECT COMMITTEE ON SMALL BUSINESS, 89TH CONG., CONGRESS AND THE MONOPOLY PROBLEM: HISTORY OF CONGRESSIONAL ACTION IN THE ANTITRUST FIELD xiii (Comm. Print 1966) [hereinafter CONGRESS AND THE MONOPOLY PROBLEM].

160. *Id.* at 129.

161. *Id.* at 130. The Report additionally referenced the power of "the Attorney General to intervene and appear in any proceeding brought by the Commission to enforce sections 2, 3, 7, and 8 of the [Clayton Act]." *Id.* at 137. Furthermore, the Report includes a portion of House Report 2352, part 2 (minority views) of the 80th Congress observing that:

> [t]he commingling of quasi-legislative, quasi-judicial, and quasi-executive functions in the Federal Trade Commission was not created inadvisedly and is not a denial of due process. The Commission's procedure was considered necessary in order to allow it to reach effectively the objectives of the basic legislation and the problems toward the solution of which the antitrust laws are directed.

Id. at 219.

162. ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 18-19 (1981) (internal citations omitted).The ABA Monograph further notes that,

> [i]n its 1927 report, the Commission suggested two amendments. First, that the statute be amended to cover assets acquisitions, and second, that premerger notification be required. This latter goal was realized nearly fifty years later with the passage of the Hart-Scott-Rodino Amendments to the Clayton Act, 15 U.S.C. § 18A (Supp. 1977).

Id. at 19 n.54.

By 1950, after sixteen bills to amend section 7 had been unsuccessfully introduced in Congress in the proceeding seven years,[163] a consensus emerged that it was time to stem "what was considered to be a rising tide of economic concentration in the American economy."[164] Members of the Senate observed:

> The purpose of the proposed bill, H.R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly.... [through] acquisition of assets ....
>
> While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.
>
> ...
>
> The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.[165]

"The Celler-Kefauver amendments, adopted in 1950, attempted to cure the deficiencies that had become so apparent."[166] The Senate's Report reveals that

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163. *Id.* at 19. None of the sixteen introduced bills "reached the floor for debate." *Id. See* MARTIN, *supra* note 131, at 221 ("From 1921 until 1949, twenty-one separate bills to amend Section 7 of the Clayton Act were introduced in Congress." (citing Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. LAW REVIEW 766 (1952))).

164. Valentine, *supra* note 131, at 2. *But see* ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 20 (1981) ("There was no unanimity in Congress that the 1950 Amendment to Section 7 of the Clayton Act was desirable or even necessary."). The A.B.A.'s Monograph concedes, however, that "[t]he legislative history of the 1950 Amendment reveals that Congress's overriding concern was with what it perceived as an already high and increasing level of economic concentration." *Id.* at 21. *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) ("The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."). One commentator stated:

> One fortunate aspect of the legislative history is the singleness of mind with which most proponents of the bill defended their handiwork. From the committee reports, and still more from the debates, there emerges a common definition of the problem at hand, a common philosophy as to its import, and a common notion, on a very general plane, of what the new act could do about it ....
>
> ... In the minds of the Congressmen, the growth of these large economic groups could lead only to increasing government control; freedom would corrode and the nation would drift into some form of totalitarianism ....
>
> ... [C]ompetition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.

Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-36 (1960).

165. S. REP. NO. 1775 (1950), *reprinted in* 2 U.S.C. CONGRESSIONAL SERVICE, MONOPOLIES IN RESTRAINT OF TRADE—SUPPLEMENTING EXISTING LAWS, at 4295 (1950); *see* Comment, *The Amendment to Section 7 of the Clayton Act*, 46 ILL. L. REV. 444, 445 (1951) ("It may be stated that the purpose of the Amendment's proponents was clearly to halt what they considered to be a rising tide of economic concentration.").

166. *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-6 (Feb. 2006); *see* MARTIN, *supra* note 131, at 227. It was noted that,

> the amendment was put through Congress by the twofold argument: (1) as a result of corporate mergers, corporate concentration was proceeding at a dangerously increasing rate, and (2) the

one of the key deficiencies that had to be cured was "the tendency of the courts in cases under [Clayton section 7] to revert to the Sherman Act test[,] . . . [and] to assure a broader construction of the more fundamental provisions that are retained than has been given [by the courts] in the past."[167]

As in 1914, the 1950 Congress expressed substantial disappointment with the judiciary in interpreting the antitrust laws. Indeed, a House Report from the 81st Congress ironically declared that "[r]ecent decisions of the Supreme Court have not made this proposed amendment unnecessary."[168]

Furthermore, in enacting the 1950 Celler-Kefauver amendment to the Clayton Act, Congress directly rebutted a "major legal objection to the 1950 Amendment [ ] that the FTC would be vested with too much discretionary enforcement power, which should be vested only in a court."[169] One Senate Report plainly stated that Congress expected that the issue of whether the effect of an acquisition "'may be' substantially to lessen competition or to tend to create a monopoly[ ]" was to be "determined by the Commission in accord with the Administrative Procedure Act."[170] Congress also expressly rejected the argument that "the bill would enlarge unnecessarily the authority and discretion of the Federal Trade Commission, since courts [were] competent to deal with the

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> failure of Section 7 of the Clayton Act to treat asset acquisitions *in the same manner* as stock acquisitions had provided the legal loophole by which corporate mergers were being effected.

MARTIN, *supra* note 131, at 227.

167. S. REP. NO. 1775 (1950), *reprinted in* 2 U.S.C. CONGRESSIONAL SERVICE, MONOPOLIES IN RESTRAINT OF TRADE—SUPPLEMENTING EXISTING LAWS, at 4296 (1950). *See* Brown Shoe Co.. v. United States, 370 U.S. 294, 318 (1962). The *Brown Shoe* Court stated that:

> Congress rejected, as inappropriate to the problem it sought to remedy, the application to [§] 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original [§] 7.

Id.

168. CONGRESS AND THE MONOPOLY PROBLEM, *supra* note 159, at 222.

169. ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 21 (1981). For example, Representative Jennings of Tennessee feared that "the FTC would have the power to deprive corporations of their 'breath and life' – freedom of contract." *Id.* at 21 n.65 (citing 95 CONG. REC. 11,491 (1949)). Similarly, "Representative Goodwin charged that the proposed legislation would grant [the] FTC 'discretionary power so vague, uncertain and indefinite as to vest that agency with almost unlimited control over the economic growth of a corporation no matter how small.'" *Id.* (citing 95 CONG. REC. 11,487 (1949)).

170. S. REP. NO. 1775 (1950), *reprinted in* 2 U.S.C. CONGRESSIONAL SERVICE, MONOPOLIES IN RESTRAINT OF TRADE—SUPPLEMENTING EXISTING LAWS, at 4298 (1950). The Senate Report further emphasized that "[t]he same theory should apply to the administrative agency findings of fact as that set forth above for the words 'may be.'" *Id.* In terms of deference to the agency's findings, "[t]he intent of the [ ] bill" was "to reaffirm existing standards." *Id.* at 4299. The Senate Report stated:

> The purpose of the proposed bill, H.R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly.

MARTIN, *supra* note 131, at 232 (quoting S. REP. NO. 1775, at 3). John D. Clark, member of the President's Counsel of Economic Advisors stated, "[t]he Clayton Act and the Federal Trade Commission Act established a non-judicial, but very effective administrative method of enforcing antitrust policy, and there is this loophole in that enforcement practice." *Id.* at 241 (quoting Senate Hearings on H.R. 2734, at 355).

matter of acquisition of assets under the Sherman Act."[171]

As it had done in 1914, Congress set forth a straightforward delegation of authority tasking the Department of Justice and the Federal Trade Commission with administering and enforcing the antitrust laws and presenting "the cases" for decision to the courts.[172] Congress further emphasized this intent by directing the F.T.C. to effectively coordinate with the Attorney General.[173]

President Truman displayed a similar understanding, issuing to Congress on September 28, 1950, a directive stating in part:

> It is requested that you consult with the Attorney General and the Chairman of the Federal Trade Commission for the purpose of determining and, to the extent consistent with the principal objectives of this Act, of eliminating any factors which may tend to suppress competition unduly, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power.[174]

3. *Title II of Public Law 94-435: The Premerger Notification Requirement Section of the Hart-Scott-Rodino Antitrust Improvements Act of 1976*

Decades of efforts to reform, modernize, and improve the Progressive Era antitrust laws culminated in 1976, when Congress passed, after furious debating, maneuvering, and infighting, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). Title II of the three-part Act reformed the 1914 Clayton Act by establishing "premerger notification and waiting period" requirements for many mergers and acquisitions.[175] Similar to the Clayton Act, and the 1950 Celler-Kefauver Amendments, the legislative history and language of the HSR Act supports the position that Congress squarely placed the primary enforcement and

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171. CONGRESS AND THE MONOPOLY PROBLEM, *supra* note 159, at 223 (citing H.R. 2734, 81st Cong. (1949), H.R. REP. NO. 1191 (1949)).

172. *See* Comment, *The Amendment to Section 7 of the Clayton Act*, *supra* note 165, at 462 ("The responsibility for enforcing the amendment will fall on the Federal Trade Commission and the Antitrust Division of the Department of Justice.").

173. *See id.* at 462 n.105. The coordination has been described as:

> One of the most important additions . . . made to Section 11, directing the agency in suing the complaint against an offender to serve such complaint upon the Attorney General who shall have the right to intervene and appear in the proceeding. Since the F.T.C. under Section 11 and the Department of Justice under Section 15 have the responsibility of enforcing Section 7, coordination between the agencies would appear plainly essential to obviate conflict and overlapping prosecutions.

Id. *See also* MARTIN, *supra* note 131, at 256-57 ("This provision was added to the Clayton Act in order to achieve better coordination between the Justice Department and the various commissions in the administration of the act.").

174. Comment, *The Amendment to Section 7 of the Clayton Act*, *supra* note 165, at 463 n.110 (quoting CCH, SYMPOSIUM ON BUSINESS PRACTICE UNDER FEDERAL ANTITRUST LAWS 44 (1951)). *See* MARTIN, *supra* note 131, at 2 (". . . the amendment of 1950 changed the standard of illegality in such a way that it is necessary for *the Department of Justice and the [FTC], in the process of administration of the section with the review of the courts,* to develop anew a workable policy with which to apply the general criterion of illegality to specific cases") (emphasis added).

175. H.R. NO. 94-1373, at 1 (1976), *reprinted in* 3 U.S.C. CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 2637 (1976). Title II became known as Section 7A of the Clayton Act, 15 U.S.C. § 18a (2008).

administration of the Clayton Act in the hands of the Department of Justice and F.T.C. subject to limited judicial review.

Under Title II of the HSR Act, companies with the requisite respective net assets or annual sales are required to notify the Federal Trade Commission and the Antitrust Division of the United States Department of Justice (DOJ) before merging.[176] Once the proper papers are filed, the F.T.C. and the DOJ have thirty days to decide whether to ask for more information, or to allow the merger or acquisition to proceed.[177] If the government quickly decides that there are no competitive problems with the acquisition, it can grant early termination, and allow the merger to proceed before the thirty days have passed.[178] Conversely, if the government believes there may be a competitive problem, it can issue a Second Request requiring the parties to submit additional information.[179] The government's Second Request stops the clock and stays the proposed acquisition while the parties gather the information necessary to respond.[180] "Gathering the information and documents called for by a Second Request can be time consuming and expensive for the parties."[181]

After the parties have fully responded to the government's Second Request, the government has an additional twenty days to decide whether to allow the acquisition to proceed unchallenged.[182] If the government decides, however, that the effect of the proposed acquisition may be substantially to lessen competition, or to tend to create a monopoly, the government may file a motion for a preliminary injunction blocking the acquisition in a "United States district court for the judicial district within which the respondent resides or carries on business[.]"[183]

Congress directed the F.T.C., "with the concurrence of the Assistant Attorney General [in charge of the Antitrust Division]" to prescribe such rules "as may be necessary and appropriate to carry out the purposes of this section."[184] Congress also directed the F.T.C. and Antitrust Division to

176. *See* 15 U.S.C. § 18a(a) (2008) ("Filing"). The precise jurisdictional requirements include: 1) a commerce test; 2) a size-of-the-parties test; and 3) a size-of-the-transactions test. *Id.* *See also* AREEDA, ET AL., *supra* note 1, at 685 ("The government has an opportunity (even though not always the resources) to review all mergers above a moderate size, because before such mergers can actually take place, the [HSR] Improvements Act requires the parties to notify the government competition agencies—the FTC and the Justice Department.").

177. *See* 15 U.S.C. § 18a(b) (2008) ("Waiting period; publication; voting securities").

178. The waiting time for cash tender offers is only fifteen days. 15 U.S.C. § 18a(e)(1)(A) (2008).

179. 15 U.S.C. § 18a(e)(1)-(2) (2008).

180. 15 U.S.C. § 18a(e) (2008) ("Additional information; waiting period extensions").

181. ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 154 (2d ed. 2001). *See* S. AXINN, B. FOGG, N. STOLL & B. PRAGER, ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT: A PRACTICAL ANALYSIS OF THE STATUTE AND REGULATIONS (3d ed. 2008).

182. 15 U.S.C. § 18a(e) (2008); 16 C.F.R. §§ 803.10, 803.20 (1988). In the case of cash tender offers, the additional waiting period is only ten days. Furthermore, in the case of tender offers, only compliance by the acquiring party, as opposed to both parties, is required to restart the waiting period. 15 U.S.C. § 18a(e)(2) (2008).

183. 15 U.S.C. § 18a(f) (2008) ("Preliminary injunctions; hearings").

184. 15 U.S.C. § 18a(d) (2008) ("Commission rules").

"annually report to the Congress on the operation of this section[,]" including an "assessment of the effects of this section," and "any recommendations for revisions of this section."[185] The F.T.C. published its final rules in the Federal Register on July 31, 1978.[186]

President Ford reluctantly signed the HSR Act into law on September 30, 1976.[187] Two months before, on July 28, 1976, the Committee on the Judiciary, "to whom was referred the bill (H.R. 14580) to amend the Clayton Act to provide for premerger notification and waiting requirement," observed in House Report No. 94-1373 in favorably reporting on the bill: "[t]he purpose of H.R. 14580 is to amend the federal anti-merger law, Section 7 of the Clayton Antitrust Act . . . by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions."[188]

To ease the concerns of the agitated business community, the Committee emphasized that, "[t]he bill in no way alters the substantive legal standard of Section 7: That statute's longstanding prohibitions against acquisitions that may substantially lessen competition or tend to create a monopoly, remain unaffected by this measure."[189] The Committee further explained:

> H.R. 14580 will, however, strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.[190]

Again attempting to placate a hostile and angry business community, the Judiciary Committee went on to highlight that the Act "does not eliminate this requirement of particularized factual proof in merger cases, nor does it ease in any way the traditional burden of proof that must be borne by the government when it seeks equitable relief."[191] The Judiciary Committee argued that the premerger notification reforms were critical to protect the goals of Section 7 of the Clayton Act, including avoiding costly and often ineffective post-acquisition divestiture suits by the government.[192]

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185. 15 U.S.C. § 18a(j) (1995) ("Report to Congress; legislative recommendations."). The annual report to Congress was terminated effective May 15, 2000. *See* 15 U.S.C.A. § 18a (2009).

186. 43 Fed. Reg. 33,450 (1978).

187. President's Statement on Signing H.R. 8532, 12 WEEKLY COMP. OF PRES. DOC. 1423 (Oct. 4, 1976) ("Hart-Scott-Rodino Antitrust Improvements Act of 1976: Statement by the President on Signing H.R. 8532 Into Law, September 30, 1976") [hereinafter "Presidential Statement of September 30, 1976"].

188. H.R. REP. NO. 94-1373, at 1, 5 (1976).

189. *Id.* at 5.

190. *Id.* (emphasis added).

191. *Id.* at 8.

192. *Id.* at 8-9. The Committee stated:

> But the bill is based on two fundamental propositions: First, the weight of this burden of proof, together with the present lack of any premerger notification and waiting requirements, has

President Ford's claim on September 30, 1976, that he was "pleased to see [Title II] enacted into law[,]"[193] and the Judiciary Committee's straightforward Statement of Interest masked a furious legislative battle and heavy Administration infighting against the bill, which caused the final bill to be substantially changed and "watered down" from its early iterations.[194] Indeed,

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> meant that many large and illegal mergers have been successfully consummated in recent years, before the government had any realistic chance to challenge them.
>
> Second, experience has shown that after consummation occurs, many large mergers become almost unchallengeable. The government may well file suit, and ultimately win the subsequent litigation on the merits of its Clayton Act case, by gaining a final judicial declaration of the merger's illegality.
>
> Yet by the time it wins the victory—and the government is successful in the vast majority of its litigated merger cases—it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.
>
> In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible."

Id. at 8. *See generally* 122 CONG. REC. 15,304 (1976). The Judiciary committee added:

> In all these cases, the result is the same: The acquired firm is never restored as a vigorous, independent competitor, and the damage to the marketplace is never repaired.
>
> Thus, divestiture cases are rarely successful. Even worse, they are staggeringly expensive and seemingly interminable. The average divestiture case lasts more than five years, and all the while, the acquiring firm retains the illegal profits and other fruits of the acquisitions, and its anticompetitive effects pervade the marketplace, injuring competitors and consumers alike.

H.R. REP. NO. 94-1373, at 9 (1976).

193. Presidential Statement of September 30, 1976, *supra* note 187, at 1424. Commentators have noted that:

> Press reports indicated that the Justice Department, the Office of Management and Budget, and [President] Ford's political advisors recommended that he sign the bill, while the Treasury Department, the Small Business Administration, and Attorney General Edward Levi (in a private communication to President Ford inconsistent with the official recommendation of his agency) recommended that he veto it.

Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 876 n.44 (1997) (citing WASH. POST, Nov. 1, 1976, at C10). Perhaps to protect his pro-business flanks, President Ford expressed ambivalence about signing the Bill:

> I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand, but by the bureaucrat. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

Statement of President Ford of Sept. 30, 1976, *supra* note 187, at 1423. President Ford's statement implicitly recognized the authority placed in the Department of Justice's and Federal Trade Commission's hands. The Senate proponents also showed great perspicacity in bundling into the final bill antitrust civil process reform, which the Ford Administration desired, to make the overall bill more palatable to its opponents. This bundling allowed President Ford to crow, as he signed the Final bill: "These amendments to the Antitrust Civil Process Act were proposed by my administration two years ago, and I am pleased to see that the Congress has finally passed them." *Id.* at 1424.

194. Senator Abourezk of South Dakota, a leading supporter of the bill, noted that in June of 1976, he had been

> opposed to any kind of compromise. But due to the illness of Senator Phillip A. Hart [cancer], who was no longer physically able to keep up with its pace at that time—because this is Senator Hart's bill[ ] . . . —a number of us who were involved in the legislation then agreed to go ahead with the weakening process.

122 CONG. REC. 28,569 (1976). Senator Gary Hart of Colorado similarly observed: "I will vote for [the

on September 8, 1976, Senator Edward Kennedy observed that "[p]erhaps only the tax reform bill has been the subject of such extensive committee and floor consideration as this legislation."[195]

Although such intensive opposition did not ultimately block passage of the bill, it led to numerous compromises, including reducing the initial stay period from sixty to thirty days,[196] putting the burden of proof on the government in any preliminary injunction proceeding, and requiring the government to get a stay from a United States District Court if it wanted to challenge the transaction after the final 20-day post-Second Request period expired.[197]

Institutional factors affecting the courts and the executive branch's antitrust regulatory agencies also played a key role in catalyzing the passage of the HSR Act. "The poster child in the legislative debate was the tortured litigation history of *United States v. El Paso Natural Gas Co.*"[198] As noted in the legislative history, "the litigation spawned by the El Paso Natural Gas merger lasted seventeen years, and went to the Supreme Court six times, before the illegally-acquired firm was successfully divested. But the costs—to the firms, the courts, and the marketplace—were immense."[199] The House Judiciary Committee concluded that it was crucial to expedite and simplify merger review and litigation by the government under Clayton section 7.[200]

A primary assumption of the premerger notification bill's opponents, on the other hand, was that the legislation and attendant rules would reach too many inconsequential transactions and impose unnecessary costs, burdens, and delays on business.[201] One commentator opined in 1979, shortly after the final

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legislation] despite the fact that I am disappointed at the compromises which had to be made during its consideration in the Senate." 122 CONG. REC. 29,163 (1976).

195. 122 CONG. REC. 29,334 (1976).

196. *See, e.g.,* 122 CONG. REC. 16,479 (referencing Senate Amendment No. 1747 and accompanying debate to change initial waiting period from sixty to thirty days).

197. *See* 122 CONG. REC. 16,911, 16,917 (1976). Testimony by FTC and DOJ officials stating that the Administration did not support an automatic stay provision. The Senate killed the proposed automatic stay provision on June 10, 1976. 122 CONG. REC. 17,426 (1976).

198. William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 826-27 (1997).

199. H.R. REP. NO. 94-1373, at 10 (1976).

200. The Committee stated:

> To avoid the worst of these protracted exercises in futility is the major purpose of this bill. Merger litigation simply need not always continue for years and even decades—but if it takes place after consummation, it generally will, for the acquiring firm has no incentive to litigate the issues speedily.
>
> In contrast, pre-consummation merger litigation proceeds rapidly and expeditiously, because all parties have a paramount interest in the quick resolution of the case. . . .
>
> In sum, the chief virtue of this bill is that its provisions will help to eliminate endless post-merger proceedings like the *El Paso* and *Papercraft* cases, and replace them with far more expeditious and effective premerger proceedings. It can be done, and the savings will be considerable, as the *AMAX* case indicates.

Id.

201. For a more detailed discussion of the objectives and values of each side in the HSR debate, see Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 THE ANTITRUST BULLETIN 195, 201-203 (2006). The author further noted:

accompanying rules were promulgated, that "regulation writers descended upon the scene, like a swarm of locusts[.]"[202] Opponents branded the bill's requirements as "unrealistic," and argued that it "covers far more than 'giant companies.'"[203] In fairness, hindsight has shown this assumption to be fairly accurate.

A second major assumption of the opposition was that the bill's requirements would "inhibit the competitive, efficient formation and allocation of capital resources."[204] Senator Buckley contended that his constituents in the investment community in New York understood "that the implications of this legislation of Title V will be to dramatically curtail the ability of people to move from one investment to another and all that this has meant down through the years to permit our system of capital formation and mobility of capital to perform its wonders."[205]

As seen, Congress went to great lengths in the HSR Act to establish a system whereby merging parties would meet and consult with the Antitrust Division or F.T.C. before any court proceedings would occur. Congress also expressed reasonable detailed concerns about the executive agencies having to continuously monitor or seek to break-up consummated mergers. Therefore, the HSR Act and its legislative history further support leaving the review and acceptance of proposed merger fixes to the Executive agencies, and not to the courts.[206] Indeed, given the active and intense opposition to the bill, which led to numerous material compromises, it would have been possible for the bill's opponents to incorporate into the legislation the express right of district courts to review unilaterally proposed fixes. That the opposition continued to lambast the legislation as placing too much authority in the hands of the executive agencies provides further compelling evidence that they never anticipated such a

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> In general, the HSR proponents shared such implied values as a belief in fair competition (equality of opportunity), diversity (smaller is better), and fairness (through governmental oversight). . . .
>
> . . . The HSR legislation's opponents shared such implied values as concentration (bigger is better), free market places (no government interference) and "the survival of the fittest."

Id. at 202-03.

202. Richard W. Pogue, *Effects on Other Merger Transactions: Does the Government Abuse Its Newly Granted Power?*, 48 ANTITRUST L.J. 1471 (1979).

203. S. REP. NO. 94-803, pt. 2, at 210 (1976) (minority views).

204. *See id.* at 205.

205. 122 CONG. REC. 16,928 (1976). The correctness of this assumption is called into serious question by the tens of thousands of acquisitions and mergers that have proceeded without challenge since the Act's passage in 1976. As an example, in 2002, the F.T.C. challenged only 24 transactions and the Antitrust Division challenged 10. Moreover, a number of the challenged transactions were allowed to proceed following limited divestitures of assets by the merging parties. *See* FEDERAL TRADE COMMISSION BUREAU OF COMPETITION & DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2002: PURSUANT TO SUBSECTION (J) OF SECTION 7A OF THE CLAYTON ACT HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 1-2 (2002), http://www.ftc.gov/os/2003/08/hsrannualreport.pdf.

206. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."); *see also* Green v. Frazier, 253 U.S. 233, 240 (1920) (". . . the courts have no general authority of supervision over the discretion which under our system is reposed in the people or other branches of government.").

development.[207]

B. RELEVANT SUPREME COURT CASES

The essential argument behind private defendants' "fix-it-yourself" solutions in Clayton section 7 cases seems to be that the government's case against the original merger or acquisition has been resolved or mooted by the defendants' affirmative actions.[208] Although the Supreme Court has not directly addressed the question, several of its Clayton Act decisions call into question whether such a view is appropriate or permissible under sections 7 and 15 of the Clayton Act.

1. United States v. Borden Co.

In *United States v. Borden Co.*,[209] the Supreme Court considered whether "the Government was [properly] refused an injunction [in a Clayton Act case] solely because of the existence of [a] prior decree entered against defendants in the course of a private action."[210] In finding that the district court had abused its discretion in denying the injunction, the Supreme Court first emphasized that "Section 15 of the Clayton Act[ ] . . . charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violation of certain of the antitrust laws[.]"[211] The Court then added that:

> [t]he private-injunction action, like the treble-damage action under [§] 4 of the [Clayton] Act, supplements Government enforcement of the antitrust laws; but *it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws.*[212]

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207. Moreover, given the proponents' oft-stated desire to simplify injunction proceedings under the Clayton Act as much as possible, it seems unlikely that they would have acquiesced to such a proposal. *See, e.g.*, Statement of Sen. Edward Kennedy, 122 Cong. Rec., Sept. 8, 1976, at 29,335 ("Enough is enough. We have compromised the bill down and down, severely narrowing or even eliminating substantial portions of the original S[enate bill]. What remains may not be the best possible bill, but it is a good one. It will help bring better enforcement of the antitrust laws. It will be a solid step in the right direction.").

208. *But see* Section IV.A *infra* (noting that defendants may alternatively be arguing that their transaction is legal because the original acquisition now includes their promises and ostensible future activities).

209. 347 U.S. 514 (1954).

210. *Id.* at 518.

211. *Id.*

212. *Id.* (emphasis added). The Court further explained:

> To hold that a private decree renders unnecessary an injunction to which the Government is otherwise entitled is to ignore the prime object of civil decrees secured by the Government – the continuing protection of the public, by means of contempt proceedings, against a recurrence of antitrust violations. Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a violated decree; for example, where the defendant's violation operated primarily against plaintiff's competitors. Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is

Thus, the Court stressed that Congress had tasked the executive enforcement agencies in the first instance with the protection of the public interest and the "policing [of] industry" under the Clayton Act.[213] The Court also highlighted the importance to the government agencies of being able to ensure "continuing protection" against ongoing or future Clayton Act violations.[214]

2. United States v. E.I. du Pont de Nemours & Co.

Four years after deciding *United States v. Borden Co.*, the Supreme Court again addressed the Clayton Act in *United States v. E.I. du Pont de Nemours & Co.*[215] In *du Pont*, the Supreme Court in 1957 first reversed a district court decision under section 7 of the Clayton Act upholding du Pont's completed acquisition of 23% of General Motors' stock.[216] The Court remanded the case to the district court "for a determination after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute."[217]

On remand, the district court rejected the United States' proposed complete divestiture plan, and instead accepted defendants' "plan for partial divestiture in the form of a so-called 'pass through' of voting rights, whereby du Pont would retain all attributes of ownership of the General Motors stock[.]"[218] In effect, the district court accepted and blessed defendants' unilaterally proposed "fix-it-yourself" solution over the government's strident objection.

On appeal, the Supreme Court overturned the district court's ruling, and directed the court "to enter an order requiring du Pont to file within 60 days a proposed judgment providing for complete divestiture of its General Motors stock[.]"[219] Writing for the majority, Justice Brennan observed that "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[220] The majority rejected the defendants' argument that the government could always seek an injunction if defendants' "fix-it-yourself"

> likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry. Yet the effect of the decision below is to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined.

Id. at 519 (emphasis added).

213. *Id.*

214. *Id.*

215. 366 U.S. 316 (1961).

216. U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588 (1957). *Du Pont* is properly viewed as a "vertical merger[ ]." *See* AREEDA, ET AL., *supra* note 1, at 763. That point, however, does not impact the above analysis.

217. *du Pont*, 353 U.S. at 607.

218. *du Pont*, 366 U.S. at 320.

219. *Id.* at 335.

220. *Id.* at 334.

solution proved inadequate. The Court stated that:

> under [part nine] of the decree, the Government may reapply in the future should this injunctive relief prove inadequate. . . . But the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy. Should a violation of one of the prohibitions be thought to occur, the Government would have the burden of initiating contempt proceedings and of proving by a preponderance of the evidence that a violation had indeed been committed. Such a remedy would, judging from the history of this litigation, take years to obtain. *Moreover, an injunction can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself. And the policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture. We think the public is entitled to the surer, cleaner remedy of divestiture.*[221]

Read together, *Borden* and *du Pont* provide strong support for the idea that the district courts should not substitute their judgments for the executive enforcement agencies in evaluating Clayton section 7 "fix-it-yourself" solutions unilaterally proposed by defendants.[222]

On the other hand, proponents of "litigating the fix" can find at least two potential points of support for their position in *duPont*. The first is footnote nine of the majority's opinion, which states in relevant part that "Congess would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent."[223] The second is Justice Frankfurter's vigorous dissent, asserting that in antitrust cases, "[f]ar-reaching responsibility is vested in the court charged with fashioning a decree and the decree it fashions must be judged on review in light of this responsibility."[224]

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221. *Id.* at 333-34. In a footnote, the Court added that "contempt citations are a poor method of restoring competition." *Id.* at 334 n.16 (citing Note, *Modification of Litigated Antitrust Decrees by the Supreme Court*, 56 COLUM. L. REV. 420, 430 (1956)).

222. *See* Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381, 1393 (1986). The court stated:

> Hospital Corporation argues that there is no justification for [advance notice of future acquisitions] relief. But as the Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and ensure against its repetition[.] . . . [T]he issue for us is not whether the Commission was right but whether it was reasonable. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Id. (internal citations and quotations omitted). *See also* In the Matter of Chevron Corp. and Gulf Corp., 104 F.T.C. 597, 615 (1984) (Pertschuk, Comm'r, dissenting) ("The law does not require that we go out of our way to restructure acquisitions that violate the antitrust laws, particularly when there is a cloud of uncertainty as to whether our restructuring will or will not work . . . ."); PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 325, at 8 (3d ed. 2007) ("Of course, the purpose of antitrust law is not to substitute for agency regulation but to make markets competitive and thus able to function without the need for ongoing supervision."); *id.* ¶ 326, at 23 ("Furthermore, leaving an illegal merger in place while trying to control its illegality by day-to-day regulation would hardly achieve the prophylactic purposes of Clayton Act §7 to prevent market concentration.").

223. *du Pont*, 366 U.S. at 328 n.9.

224. *Id.* at 363 (Frankfurter, J., dissenting). Justice Frankfurter added acerbically, "[s]urely there is merit to the notion of shaping the punishment to fit the crime, even beyond the precincts of the Mikado's

Balanced against these points, however, is the key point that the *du Pont* Court was addressing a remedy for a violation that already had taken place. Given that, it is difficult to read even Justice Frankfurter's *du Pont* dissent as favoring the positive intervention of a district court in blessing a "fix-it-yourself" solution unilaterally proffered by defendants over the objection of the government to clear the way for an otherwise illegal merger or acquisition to proceed.

C. THE TUNNEY ACT

As described by Professor Areeda:

> In 1974 § 5 of the Clayton Act was amended by the Tunney Act so as to require the government to propose a final judgment when cases are to be settled by a consent decree . . . from the interested public, publish them, and submit a written summary of the comments to the court. The court must then determine whether the proposed remedy is in the public interest.[225]

"Congress amended the Tunney Act in 2004 to make clear its intent that courts take a more active role in determining whether consent decrees are in the public interest."[226] The courts currently are struggling to define precisely their role in reviewing jointly proffered consent decrees in Clayton Act cases,[227] and Chief Justices Berger and Rehnquist and Justice White have argued that the Tunney Act may even be unconstitutional under Article III.[228] Nevertheless, it is fair to say that "[c]ourts have refused to enter consent decrees in relatively few instances."[229] It also is fair to say that:

> even those courts exercising greater scrutiny stop far short of attempting

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palace." *Id.* at 371.

225. AREEDA, ET AL., *supra* note 222, at ¶ 327d, at 32. For an excellent description and overview of the Tunney Act process and procedures, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 705-08 (6th ed. 2007). *See also* 88 Stat. 1706 (1974); 15 U.S.C. § 16(b)-(h) (2008).

226. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 705 (6th ed. 2007) (citing Pub. L. 108-237, § 221(b)(1) (2004)).

227. *See, e.g,*. AREEDA, ET AL., *supra* note 222, ¶ 327e, at 32-33. The authors stated:

> Although a judicial order entered by consent is more than a contract between the parties, the judge's role is far from clear, even since passage of the Tunney Act. The proposed decree must, of course, be approved by the court before it is formally entered, but such approval has ordinarily been perfunctory. Yet some judges have rightfully resisted the notion that they were mere clerks who had to rubber-stamp what the parties put before them.

Id. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 707 (6th ed. 2007) ("Some courts have held evidentiary hearings; others have refused and have entered consent decrees despite substantial opposition from third parties. The amended Tunney Act makes clear, however, that the court is not required to hold an evidentiary hearing or to permit any person to intervene.").

228. N. Am. Tel. Ass'n v. United States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting) ("It is not clear to me that this [Tunney Act] standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution.").

229. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 708 (6th ed. 2007). Moreover, in one of the few such instances, the D.C. Circuit held that the district court had "exceeded its authority under [the] Tunney Act, reassign[ed] [the] case, and remand[ed] with instructions to approve [the] proposed decree." *Id.* at 708 n.569 (citing United States v. Microsoft Corp., 159 F.R.D. 318, 330-38 (D.D.C.), *rev'd on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995)).

> to assess the competitive merits of one form of relief or another. The courts [have] refrained from an attempt to assess the merits of the government's decision to settle, because that decision, like the decision to prosecute, [is] largely held to be outside the scope of judicial review. The courts, furthermore, [have] recognized that routine intervention would drastically reduce the possibility of settlement and would thereby impose a significant litigation burden on the government.[230]

The Tunney Act reaffirms that the primary responsibility for negotiating settlements with defendants in Clayton Act cases rests in the hands of the Antitrust Division and the F.T.C.[231] The primary purpose of the Tunney Act is to have the courts serve as an additional check against government settlements that will result in "adverse antitrust consequences" that are against the public's interest.[232] Why would Congress set up a detailed mechanism under the Tunney Act for the courts to protect against "adverse antitrust consequences" to the public interest from government settlements, while leaving the courts free to singularly settle Clayton Act merger cases over the government's objection[233] by

230. AREEDA, ET AL., *supra* note 222, ¶ 327, at 33. *See also* United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975). The court noted:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.

Id.

231. Additional evidence of Congress's designation of the executive branch as the governmental branch primarily responsible for reaching agreements with parties seeking to combine competitive functions is found in the National Cooperative Research Act of 1984 (NCRA) (P.L. 98-462). NCRA expressly allows competitors to engage in joint research and development activities without the fear of possible treble damages antitrust liability. NCRA's 1993 Amendments (P.L. 98-462) extended to production joint ventures between competitors the protections from *per se* treatment, treble damages, and other aspects of the antitrust laws accorded to research and development joint ventures. Congress established "a voluntary notification system whereby parties to a joint venture may disclose the nature of the venture to the antitrust enforcement agencies and thereby receive reduced damages exposure from civil suits based on the activities disclosed." H.R. REP. NO. 103-94, at 5 (1993). Congress also required the Attorney General to begin reporting to Congress a list of joint venture proceedings under NCRA "to inform Congress and the American people of the effect of the National Cooperative Research and Production Act of 1993 on the competitiveness of the United States in key technological areas of research, development, and production." 15 U.S.C. § 4305 (2008).

A similar analysis applies to the Newspaper Preservation Act (NPA). Under the NPA, "[p]ost-enactment [newspaper joint operating agreements] enjoy [a partial antitrust] exemption only upon prior approval of the U.S. Attorney General and a finding that one of the newspapers involved is other than a failing newspaper." AREEDA, ET AL., *supra* note 1, at 709 (citing Newspaper Preservation Act, 15 U.S.C. § 1803 (1970)).

232. United States v. Enova Corp., 107 F. Supp. 2d 10, 16-17 (D.D.C. 2000). In *Enova*, the court perceptively added: "The balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *Id.* at 16 (citing United States v. W. Elec. Co., 993 F.2d 1572, 1577 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993)). "The court should therefore reject the proposed final judgment only if 'it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Id.* at 16-17 (citing United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (per curiam)).

233. *See* United States v. Columbia Artists Mgmt., 662 F. Supp. 865, 870 (S.D.N.Y. 1987). The court recognized:

> [T]hat the Department of Justice has broad discretion in controlling government antitrust litigation. . . .

accepting "fix-it-yourself" solutions?[234] The courts should follow the statutory language and legislative intent of Congress, as well as the Supreme Court's earlier Clayton Act precedents, and reject unilaterally proffered "fix-it-yourself" solutions over the government's objections in Clayton section 7 merger cases.

IV. EVIDENTIARY ISSUES

As discussed in Section II, most of the "fix-it-yourself" solutions evaluated by the courts in Clayton section 7 merger cases have involved promises by the defendants to engage in certain conduct (e.g. licensing new entrants) or to refrain from potentially anticompetitive activities (e.g. raising prices). Surprisingly, none of the courts that have admitted such evidence have seriously evaluated or discussed the evidentiary or justiciability bases for admitting the evidence or the standards by which to evaluate it. If courts are going to admit and potentially credit such evidence, other issues need to be seriously considered first.

A. POST-ACQUISITION EVIDENCE

Defendants' Clayton section 7 proposed "fix-it-yourself solutions" frequently involve promises not to raise prices for a period of time or to license and assist new entrants. It is unclear, and the courts have not materially addressed, whether defendants are arguing in such cases that their proposed solutions effectively "moot" the illegality of the original transaction, or whether the original merger or acquisition now includes their promises and future activities.[235] In either case, however, since such arguments involve future activities or conduct, they can be fairly analogized to "post-acquisition"

> This court may not substitute its opinion or views concerning the prosecution of alleged violations of the antitrust laws or the determination of appropriate injunctive relief for the settlement of such cases absent proof of an abuse of discretion.

Id.

234. It is also important to recognize that "[c]onsent decree settlements resolving Federal Trade Commission and Antitrust Division challenges to proposed acquisitions and other conduct are now much more the rule than the exception." Michael L. Wiener, *Antitrust and the Rise of the Regulatory Consent Decree*, ANTITRUST, Fall 1995, at 4. For an excellent article questioning whether the shift from a litigation-oriented "legalistic regulatory" antitrust scheme to a "bureaucratic regulatory culture" that emphasizes consent decrees is ultimately good for antitrust enforcement and consumers, see Harry First, *Is Antitrust "Law"?*, ANTITRUST, Fall 1995, at 9, 12. First notes:

> The antitrust laws are a legislative acknowledgement that a system of free market competition often requires saying "no" to powerful interests, be they major banks, communications companies, or computer software manufacturers. Unless antitrust enforcement officials have a strong body of law, enforceable in the courts, they will ultimately not be able to say no to these interests.

Id. at 12. For a somewhat different perspective, see A. Douglas Melamed, *Antitrust: The New Regulation*, ANTITRUST, Fall 1995, 13, 15 (". . . a regulatory inquiry is fundamentally nonlegal. It can thus erode the rule of law and leave government officials largely unconstrained.").

235. For discussions of mootness in Clayton Act cases, see United State. v. W.T. Grant Co., 345 U.S. 629 (1953) (holding that voluntary termination of interlocking directorates did not moot F.T.C.'s Clayton Act case); United States v. Mercy Health Service, 107 F.3d 632 (8th Cir. 1997) (holding that defendants' complete abandonment of proposed merger mooted government's Clayton Act challenge); R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir. 1989) (holding that abandonment of proposed merger did not moot plaintiff's Clayton Act challenge).

evidence, which generally is viewed with suspicion by the courts, for good reason.

In *du Pont*,[236] the Supreme Court was unimpressed by defendants' assertions that a divestiture of du Pont's voting rights would solve any future competitive issues.[237] The Court explained:

> We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest. Moreover, the General Motors management, which over the years has become accustomed to du Pont's special relationship, would know that the relationship continues to a substantial degree, and might well act accordingly. The same is true of du Pont's competitors. They might not try so vigorously to break du Pont's hold on General Motors' business, as if complete divestiture were ordered. And finally, the influence of the du Pont company itself would not be completely dissipated. For under the decree du Pont would have the power to sell its General Motors shares; the District Court expressly held that "[t]here would be nothing in the decree to prevent such dispositions." Such a sale would presumably restore the vote separated from the sold stock while du Pont owned it. This power to transfer the vote could conceivably be used to induce General Motors to favor du Pont products. In sum, the "pass through" of the vote does not promise elimination of the violation offensive to [section] 7.[238]

Similarly, in a Sherman Act case, *United States v. Parke, Davis & Co.*,[239] the Supreme Court reversed and remanded a price maintenance conspiracy injunctive proceeding decided against the United States by the district court. The district court had concluded in part that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and . . . [there was] no reason to believe, or even surmise, [that] the unlawful acts alleged c[ould] possibly be repeated . . . ."[240] The Supreme Court was suspicious, noting that "[s]o far as the record indicates any reason, it is that Parke Davis stopped its efforts because the Department of Justice had instituted an investigation."[241] The Court went on to use language that seems directly relevant to merger cases brought by the government under the Clayton Act involving unilaterally proposed "fix-it-yourself" solutions:

> On the record before us the Government is entitled to the relief it seeks. The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. *A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation*

236. *See supra* Section III.B.2.

237. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

238. *Id.* at 332 (internal citations omitted).

239. 362 U.S. 29 (1960).

240. *Id.* at 47 (quoting S.E.C. v. Cent. Foundry Co., 167 F. Supp. 821, 829-30 (D.C.N.Y. 1958)).

241. *Id.* at 48; *see* United States v. Nat'l Ass'n of Realtors, No. 05 C 5140, 2006 WL 3434263 (N.D. Ill. Nov. 27, 2006) (ruling that the National Association of Realtor's change in policies in response to the threatened filing of a complaint did not moot the Article III case or controversy).

which seems timed to anticipate suit.[242]

Even situations in which "a [ ] defendant, on its own volition and without discussion with the investigating agency, divests assets when it appears that a government challenge is imminent in an effort to moot the challenge . . ."[243] are problematical. For instance, in the *Matter of Hospital Corporation of America*,[244] "HCA terminated its management contract with one area hospital and then argued that the managed hospital's market share should not be attributed to HCA for purposes of assessing the merger's lawfulness."[245] The F.T.C. was unimpressed by defendant's "fix-it-yourself" solution, and "refused to subtract the managed hospital's market share from HCA's."[246] The Commission explained:

> Otherwise, an acquiring firm could make anticompetitive acquisitions and then, when confronted with liability, dispose of assets in a manner that best retains its market position while reducing statistical measures of concentration to more favorable levels . . . .
>
> We do not believe that respondents should be encouraged to make illegal acquisitions and then cure them with self-appointed remedies. Rather, we think it is up to the Commission and courts to determine the proper restoration of pre-acquisition levels of competitiveness once an illegal acquisition is made.[247]

On appeal, Judge Posner and his Seventh Circuit panel agreed with the F.T.C. In the very first paragraph of his lucid opinion, Judge Posner wrote:

> . . . one of the lesser issues raised by Hospital Corporation, which we might as well dispose of right now, is whether the Commission should have disregarded the assumption of that contract. We agree with the Commission that it was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position. . . . Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.[248]

Defendants seeking to introduce "post-acquisition" evidence in merger

242. *Parke,* 362 U.S. at 48 (citing United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952) (emphasis added)). In *United States v. Oregon State Medical Society*, the Supreme Court observed that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." 343 U.S. 326, 333 (1952). *See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (stating that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot").

243. *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-74 (Feb. 2006).

244. 106 F.T.C. 361 (1985), *aff'd sub nom*, Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381 (7th Cir. 1986).

245. *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-74 (Feb. 2006).

246. *Id.*

247. *Hosp. Corp. of Am.*, 106 F.T.C. at 473 n.10.

248. *Hosp. Corp. of Am.*, 807 F.2d 1381, 1384 (7th Cir. 1986) (internal citations omitted). In *Lekto-Vend Corp. v. Vendo Co.*, cited adversely by Judge Posner, the Seventh Circuit credited post-acquisition evidence that a merging party's "competitive position had declined significantly after the merger" in upholding a merger. 660 F.2d 255, 276 (7th Cir. 1981). However, the court noted that "[t]he post-acquisition evidence in th[at] case [wa]s the type which cannot arguably have been subject to the defendant's deliberate manipulation . . . ." *Id.*

cases can find some support in *United States v. General Dynamics Corp.*[249] In *General Dynamics*, the Supreme Court approved the district court's reliance in a coal mining merger "on evidence relating to changes in the patterns and structure of the coal industry and in United Electric's coal reserve situation after the time of acquisition in 1959."[250] However, in so doing, the Court went out of its way to note that extreme care must be used in crediting such evidence, and observed that the evidence accepted in the coal merger case "could not reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions . . . ."[251]

Most "fix-it-yourself" solutions unilaterally proffered by defendants in merger cases brought by the government involve one or more elements of evidence subject to defendants' heavy manipulation. If the courts are going to allow such unilaterally proffered evidence, at a minimum, such evidence should be "scrutinized carefully to determine whether it has been or could have been manipulated to serve the purposes of the party introducing it. If the evidence appears to have been [or could be] manipulated, it necessarily [should have] little probative value."[252] Furthermore, illusory promises by defendants not to raise prices or to treat licensees fairly should never be treated as credible evidence worthy of saving an anticompetitive merger or acquisition.[253]

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249. 415 U.S. 486 (1974).

250. *Id.* at 506.

251. *Id.* The Supreme Court also recognized that in two of its previous cases, *F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), and *United States v. Continental Can Co.*, 378 U.S. 441, 463 (1964),

> the probative value of such evidence was found to be extremely limited, and judgments against the Government were in each instance reversed in part because "too much weight" had been given to post-acquisition events. The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a [section] 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.

Gen. Dynamics Corp., 415 U.S. at 504-05.

252. *Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-74 (Feb. 2006). *See* Chi. Bridge & Iron Co. N.V. v. F.T.C., 534 F.3d 410, 435-36 (5th Cir. 2008). Defendant's proffered evidence that "post-acquisition, foreign competitors ha[d] made significant inroads into the four markets and won several bids" was not persuasive in that merger case. *Id.* at 435. "Assuming *arguendo* that the evidence should be considered[ ] . . . this post-acquisition evidence [wa]s likely not very probative, because it c[ould] arguably [have been] subject to manipulation." *Id.* at 436, 436 n.16. *See also Antitrust Aspects of Mergers and Acquisitions*, *supra* note 15, at A-74 (Feb. 2006). "While the FTC gave substantial weight to post-acquisition evidence tending to establish actual anticompetitive effects . . ., it characterized post-acquisition evidence of efficiencies as 'subject to manipulation by the party seeking to use it . . . .[and] entitled [it] to little or no weight.'" *Id.* (quoting In re MSC Software Corp., F.T.C. Dkt. No. 9299 (consent order entered Nov. 1, 2002)).

253. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698 (1978). The Court noted that,

> The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market."

Id. (quoting Int'l Salt Co. v. United States, 332 U.S. 392, 400 (1947)).

B. FEDERAL RULE OF EVIDENCE 408

No court admitting evidence of or relating to defendants' "fix-it-yourself" solutions in a Clayton Act merger case has discussed whether such evidence should be excluded under Rule 408 of the Federal Rules of Evidence. In relevant part, Rule 408 states that:

> Evidence of the following is not admissible on behalf of any party, when offered to prove . . . , invalidity of . . . a claim that was disputed as to validity . . .:
>
> (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise the claim[.][254]

It can be argued that merger defendants offering "fix-it-yourself" solutions are affirmatively seeking to offer evidence of their promises to furnish consideration (such as licensing agreements, partial divestitures, or promises not to raise prices) to prove the invalidity of the government's Section 7 case that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[255] The 2006 Amendment Advisory Committee notes to Rule 408 expressly affirm that "[t]he amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations."[256]

Importantly, the 2006 Amendment Advisory Committee notes cite approvingly of *Pierce v. F.R. Tripler & Co.*[257] *Tripler* is an age discrimination case in which the defendant affirmatively sought to introduce evidence that it had offered in settlement negotiations a different job to the defendant than the one he had applied for and been denied. Defendant argued that the purposes of Rule 408 of promoting the "'public policy favoring the compromise and settlement of disputes'" was not relevant to its affirmative use of its own offer.[258] The Second Circuit disagreed, and ruled against the defendant, noting:

> We believe that admission into evidence of settlement offers, even by the offeror, could inhibit settlement discussions and interfere with the effective administration of justice . . . .
>
> We prefer to apply Rule 408 as written and exclude evidence of settlement offers to prove . . . [the invalidity] of a claim regardless of which party attempts to offer the evidence.[259]

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254. FED. R. EVID. 408(a)(1) (emphasis added).

255. 15 U.S.C. § 18 (2008).

256. FED. R. EVID. 408 advisory committee's note.

257. 955 F.2d 820, 828 (2d Cir. 1992). The Federal Rules of Evidence indicate that "settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them[.]" FED. R. EVID. 408 advisory committee's note.

258. *Tripler*, 955 F.2d at 827 (quoting FED. R. EVID. 408 advisory committee's note).

259. *Id.* at 827-28. *See* McDevitt v. Guenther, 522 F. Supp. 2d 1272, 1285 (D. Haw. 2007) ("The Court is dubious about the wisdom of applying Rule 408 differently depending on whether the settlement evidence is offered to the advantage of the settling party or not."); CHARLES E. WAGNER, FEDERAL RULES OF EVIDENCE CASE LAW COMMENTARY 495 (2000-2001 ed.) ("Rule 408 prohibits the use of settlement negotiations and agreements as evidence of liability . . . regardless of whether a party or nonparty to the negotiations and settlement seeks its introduction. This prohibition applies even

Courts admitting evidence of and relating to defendants' unilaterally proffered "fix-it-yourself" solutions should fully explain why such evidence is being admitted under Rule 408. They also should clearly explain whether and why they are admitting such evidence to prove the invalidity of the government's case with respect to the original challenged merger or acquisition.[260] For example, is not an argument that defendants have solved or mooted the government's case against their original acquisition through a "fix-it-yourself" solution really an argument that the government's original "case" has become "invalid" because of defendants' settlement offer?

V. ADDITIONAL JUSTICIABILITY AND EFFECTIVENESS ISSUES[261]

As previously noted by this author:

> Competitors seeking to merge in the US and the EU increasingly are [accepting] structural and conduct remedies to resolve regulatory concerns about the potential anti-competitive impacts of their consolidations. Throughout the last decade [and beyond], in both the US and Europe, the competition regulatory authorities have welcomed and encouraged creative merger remedies as a reasonable compromise between blocking potentially pro-competitive and efficiency-enhancing mergers and permitting anti-competitive increases in market concentrations.[262]

Parallel with these developments, the F.T.C. and Antitrust Division, as well as their enforcement counterparts in Europe and Canada, have spent tens of thousands of hours studying whether and which "remedies truly are effective in maintaining aggressive competition in consolidating industries."[263] As then F.T.C. Chairman Robert Pitofsky stated in 2000, "there is no more important set

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where the settlement evidence favors the settling party[.]"); Jane Michaels, *Rule 408: A Litigation Mine Field*, LITIGATION, Fall 1992, at 34, 38.

260. A further reason for excluding such unilaterally proffered settlement evidence would be "to simplify the adjudication of merger cases generally . . . ." Hosp. Corp. of Am. v. F.T.C., 807 F.2d 1381, 1384 (7th Cir. 1986). *See* Todoro v. DCH Healthcare Auth., 921 F.2d 1438, 1451 (11th Cir. 1991) (recognizing the "'strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits.'" (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983))).

261. *See* Section III.A.1. *supra*, stating that justiciability is a "term of art" and defining the limits of judicial power vis-à-vis the legislative and the executive branches.

262. Horton, *supra* note 4, at 31. *See* William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*, 69 GEO. WASH. L. REV. 915 (2001) ("The policies the antitrust agencies adopt regarding settling merger investigations are particularly important because, in recent years, merger enforcement has largely been accomplished by negotiation rather than litigation."); Deborah Platt Majoras, Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme, Remarks before Canadian Bar Assn. Nat'l. Law Section, 2002 Annual Fall Conf. on Competition Law (Oct. 4, 2002) (on file with author) [hereinafter "Majoras"] ("During the mid-to-late 1990s, the topic of 'remedies' in U.S. merger enforcement was widely discussed, as members of the bar and the business community recognized that the vast majority of merger challenges were not litigated, but rather resolved through negotiation culminating in consent decrees.").

263. Horton, *supra* note 4, at 31. *See* Robert Pitofsky, The Nature and Limits of Restructuring in Merger Review, Remarks Before Cutting Edge Antitrust Conference (Feb. 17, 2000) (on file with author) [hereinafter "Pitofsky"] ("The question . . . is what factors the FTC [and DOJ] should rely upon in deciding whether and to what extent restructuring can save an otherwise anti-competitive transaction.").

of policy questions facing the antitrust community than defining the nature and limits of appropriate restructuring in merger review."[264] To help answer this question, the F.T.C. and Antitrust Division undertook "a top-to-bottom review of [their] practices and policies with respect to seeking and securing remedies in merger enforcement, whether in litigation or through consent decree."[265] The results have included "formal studies of merger remedies in the US by the Federal Trade Commission . . . in 1999,"[266] and the issuance by "competition and antitrust authorities in the US" of "statements and guidelines as to how they will evaluate proposed merger remedies going forward."[267]

The extensive, detailed, and thoughtful findings and recommendations of the various enforcement agencies are beyond the scope of this article. However, even a cursory review of these studies and guidelines confirms that the executive antitrust enforcement agencies and their extensive staffs of attorneys, economists, special agents, and investigators are far more experienced and better equipped than a district court to decide whether a proposed merger remedy is likely to be effective in nullifying potential anticompetitive concerns, or is likely to result in ongoing strategic or anticompetitive behavior.[268] They also are better situated and equipped to monitor post-acquisition conduct than a district court.[269]

Furthermore, by appropriately deferring to the executive enforcement agencies in Clayton section 7 cases, the courts will make it more attractive "for the agencies to encourage parties to proposed mergers presenting significant market power risks to submit remedy proposals during the initial HSR waiting

264. Pitofsky, *supra* note 263, at 2.

265. Majoras, *supra* note 262, at 2.

266. Horton, *supra* note 4, at 31.

267. *Id.* *See* STAFF OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999) (public version) (on file with author); U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (October 2004), http://www.justice.gov/atr/public/guidelines/205108.pdf; Federal Trade Commission's Bureau of Competition, *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*, *available at* www.ftc.gov/bc/bestpractices/bestpractices.030401.htm (last visited Mar. 24, 2010). For a listing of the European and Canadian parallel guidelines, see Horton, *supra* note 4, at 31 n.1, n.3. For an excellent summary of the study process, see Albert A. Foer, *Toward Guidelines for Merger Remedies*, 52 CASE W. RES. L. REV. 211 (2001).

268. *See* Horton, *supra* note 4, at 32. The author stated:

> Both the FTC's Statement and the DOJ's Guidelines emphasi[z]e that where conduct relief such as a supply agreement is appropriate, the relief should be "short-term." The DOJ's and FTC's current positions stem from their dual concerns that sellers are likely to engage in strategic behavio[ ]r towards the buyers of divested assets, and that the close ties created by such agreements between competitors "can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage."

Id. (quoting U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 18 n.26 (October 2004), www.usdoj.gov/atr/public/guidelines/205108.htm)).

269. *See id.* "[T]he DOJ's Guidelines warn that 'conduct remedies generally are not favo[red] in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis, and impose direct, frequently substantial, costs upon the government and the public that structural remedies can avoid.'" *Id.* (quoting U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 18 (October 2004), www.usdoj.gov/atr/public/guidelines/205108.htm)).

period."[270] Currently, the perverse litigation incentives favor merger defendants holding their cards close to the vest, and presenting their "fix-it-yourself" solution at the last possible moment in litigation, as happened in *Franklin Electric*. Indeed, even commentators like Joe Sims and Michael McFalls, who are highly critical of the HSR Act and what they perceive as too intrusive regulation, recognize that:

> If the process is used correctly and the agencies and parties have a truly open dialogue with the disclosure of all facts and a clear discussion of the provable probable competitive effects, it will require either bad lawyering or the very rare case where the merits are almost equally balanced to produce a failure to agree on the appropriate remedy (assuming some remedy is appropriate). More and better disclosure early will produce less confusion, fewer mistakes, and, more important, better results. When there are legitimate competitive problems that should be remedied, the parties will have great incentives to try to find a remedy that will fix the problem; if none can be found, they will be more likely to abandon the transaction if they believe that the agency has done its work properly and correctly because at that point, the chances of prevailing in litigation in most cases will be very small. In this context, most settlements will come as close to being the correct remedies as we can get under such predictive circumstances.[271]

From an overall justiciability and effectiveness standpoint, therefore, the courts, whose jurisdictional basis for hearing a defendant's unilaterally proposed "fix-it-yourself" solutions is questionable at best,[272] should defer to the executive enforcement agencies in evaluating and reaching settlement agreements in Clayton section 7 cases subject to the Tunney Act's limited review procedures.[273]

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270. Foer, *supra* note 267, at 218. Interestingly, Mr. Foer recommends:

> The Agencies recognize that, despite best efforts to resolve concerns presented by a proposed transaction . . ., a mutually acceptable resolution may not emerge and the parties may ultimately opt to defend their transaction in litigation. In that event, no party's statements, proposals or other actions . . . will be used as an admission or otherwise used against or to the prejudice of the parties' defense of their transaction in any such ensuing litigation. On the other hand, should the parties wish to litigate the defensibility of their proposed transaction as modified by their proposed divestiture plan, the Agency challenging the proposed transaction will not object to the court's consideration of the adequacy of the divestiture plan in its adjudication of the Agency's objections to the transaction at issue. Specifically, the Agencies will waive any objections to admissibility under the Federal Rules of Evidence should the parties opt to present their divestiture plan as part of their defense of the transaction at issue.

Id. at 229. The author disagrees with Mr. Foer's proposal, but commends its thoughtfulness and creativity.

271. Sims & McFalls, *supra*, note 2, at 939-40.

272. *See supra* Sections II.A and III.A.

273. For an excellent discussion of the "[b]enefits of the [c]onsent [d]ecree [a]pproach," see MAKAN DELRAHIM, FORCING FIRMS TO SHARE THE SANDBOX: COMPULSORY LICENSING OF INTELLECTUAL PROPERTY RIGHTS AND ANTITRUST 12-13 (May 10, 2004), Remarks presented at the British Institute of International and Comparative Law, *available at* http://www.justice.gov/atr/public/speeches/203627.pdf. Such benefits include "[i]nput from interested parties[;]" "[b]uy-in by interested parties[;]" "[i]mproved enforcement[;]" and "[f]ocus on future conduct[.]" *Id.* at 13.

VI. CONCLUSION

Whether through choosing the path of least resistance, benign indifference, or aggressive overreaching, the results are the same. The courts increasingly are overstepping their statutory and constitutional boundaries in Clayton section 7 cases by allowing merger defendants to rewrite the government's "case" through unilaterally proffered "fix-it-yourself" solutions over the government's consistent objections. In so doing, the courts are wrongfully decreeing themselves as the governmental branch with statutory authority to present the "case" for adjudication, and usurping the government's "settlement authority."

It is time to end this judicial overreaching. Neither the statutory language nor the legislative history of the Clayton Act and its progeny support allowing merger defendants to litigate their "fix-it-yourself" solutions. The current judicial aggressiveness is also inconsistent with the Supreme Court's earlier Clayton Act decisions in cases such as *Borden* and *du Pont*, as well as the Federal Rules of Evidence, and other recognized evidentiary doctrines.

No court to date has even attempted to address the myriad of serious issues raised when it allows merger defendants to "litigate their fixes." Instead, the courts have blindly followed the reasoning of *Atlantic Richfield I*, a mooted decision that cited no authority or precedent.

Going forward, the courts should follow the Clayton Act's express language and adjudicate the merger "case" set forth in the government's complaint. In so doing, they should reject defendants' unilaterally proffered settlement proposals and evidence, and leave the settlement of merger cases to the executive branch.

Should the courts continue aggressive overreaching in hearing such evidence, however, merger defendants should bear a heavy burden of proving that there will be no reasonable probability of post-acquisition anticompetitive impacts if the proposed fix is adopted. Moreover, the minimal threshold for allowing such evidence to be admitted and considered should be a full and effective divestiture of an ongoing business to a highly-qualified buyer. Furthermore, if such evidence is admitted and credited in allowing an otherwise illegal merger to go forward, no collateral estoppel or res judicata effects should bind the government in a subsequent divestiture suit if a serious threat of an anticompetitive impact arises after the proposed fix is adopted.