Developments in Merger Litigation: The Government Doesn't Always Win

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DEVELOPMENTS IN MERGER LITIGATION: THE GOVERNMENT DOESN'T ALWAYS WIN*

STEPHEN CALKINS**

"The sole consistency that I can find is that under Section 7, the Government always wins." When this famous antitrust apothegm was pronounced in 1966 by Justice Stewart, dissenting in United States v. Von’s Grocery, it had the ring of truth. It is less true today: of the (admittedly few) reported Justice Department merger cases decided since William Baxter assumed responsibility as Assistant Attorney General, the Government has lost all but one. The Federal Trade Commission’s court record in merger cases has been substantially better. Even in private cases, usually involving challenges to mergers to which the federal antitrust agencies did not object, plaintiffs have won about half of the decisions on the merits.

1. REVIEW OF MERGER LITIGATION IN THE COURTS

My assignment was to review recent merger litigation in the courts. A brief examination of cases brought by the Justice Department, private parties, and the FTC reveals that success rates vary substantially, that

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2 See, e.g., Kauper, The Warren Court and the Antitrust Laws: Of Economics, Populism and Cynicism, 67 MICH. L. REV. 325, 338 (1968); see also id. at 335 ("under the standards of recent horizontal merger cases, the decision by the Department to proceed in a given case is viewed as virtually determinative of the outcome").

3 See infra notes 39–54.

4 See infra notes 73–94.

5 See infra notes 56–72.
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traditional case law continues to be applied, and that several cases appear to turn on that trusty but unglamorous staple of antitrust litigation, internal documents. Although the Division's poor "won-lost" record is based on a sample far too small for it to be statistically significant, the continued vitality of traditional case law may offer a possible partial explanation of the Division's poor record. FTC and Antitrust Division briefs show that Division lawyers are somewhat more faithful to the Division's Merger Guidelines, and less willing to rely on traditional case law; they also suggest that Division lawyers appear to be relatively more concerned with shaping the law and relatively less concerned with case outcomes, as such. Of course, even if the Division's approach has contributed to its relative lack of success, it may not be inferior, since Government prosecutors have a mission that is broader than merely winning cases.

For ease of reference, a comparison of the Guidelines and traditional case law precedes the review of merger decisions and the discussion of the antitrust agencies' approaches to merger litigation.

A. COMPARISON OF JUSTICE DEPARTMENT GUIDELINES AND TRADITIONAL CASE LAW

There are numerous published comparisons of the Guidelines and traditional case law, and this subsection does not attempt to improve upon them. Instead, it is intended merely to facilitate the discussion that follows by offering a reminder of a couple of differences.

According to the Justice Department, "[p]erhaps the single most important contribution of the 1982 Guidelines" was their approach to market definition. Market definition under the 1982 and 1984 Guidelines is a process of identifying a group of firms that could profitably raise prices were they replaced by a single firm, and a geographic area within

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8 Department of Justice Statement (June 14, 1984), reprinted in 2 Trade Reg. Rep. (CCH) ¶ 4490, at 6879-2 ("Market definition has historically played a crucial role in merger analysis; however, before the 1982 Guidelines, markets often were defined largely on an ad hoc basis. The 1982 Guidelines developed a general framework for market definition that can be objectively applied to a myriad of factual circumstances."); see also Baxter, Responding to the Reaction: The Draftsman's View, 71 Calif. L. Rev. 618, 622 (1983) ("The most innovative and controversial aspect of the Guidelines is their approach to market definition."); Baker & Blumenthal, The 1982 Guidelines and Preexisting Law, 71 Calif. L. Rev. 311, 322 (1984).
which they could do so. Operationally, the Guidelines explain that the Division will expand proposed product markets so long as “a significant percentage of the buyers of products already included would be likely to shift to those other products in response to a small but significant and non-transitory increase in price,” and will expand proposed geographic markets to include all firms that “could make significant sales” to customers of previously-included firms “in response to a small but significant and non-transitory increase in price.” This is a “foiling” test.

The Guidelines’ approach can be contrasted with the leading “traditional” test for product markets, which is provided by Brown Shoe Co. v. United States:10

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because §7 of the Clayton Act prohibits any merger which may substantially lessen competition “in any line of commerce” (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.

In addition to Brown Shoe, the leading Supreme Court cases include United States v. E.I. du Pont de Nemours & Co. (Cellophane), United States v. Aluminum Co. of America (Rome Cable), United States v. Continental Can Co., and United States v. Philadelphia National Bank. 11

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9 1982 GUIDELINES, 2 Trade Reg. Rep. (CCH) at 6881-8, 6881-10; see also 1984 GUIDELINES, 2 Trade Reg. Rep. (CCH) at 6879-9, 6879-11. The 1982 Guidelines state that the Division will implement the test by hypothesizing a 5% price increase; and the 1984 Guidelines state that the Division usually will do this. In fact, the Division currently normally hypothesizes 10% price increases, which had always been the preference of Division economists. Salop, Symposium on Mergers and Antitrust, 1 J. Econ. Perspectives 3, 10 (1987); White, Antitrust and Merger Policy: A Review and Critique, 1 J. Econ. Perspectives 13, 15 (1987).


11 351 U.S. 377 (1956) (market not limited to cellophane).

12 377 U.S. 271 (1964) (aluminum cable separate from equally effective copper cable).

13 378 U.S. 441 (1964) (metal cans and glass jars included in same market).

14 374 U.S. 321 (1963) (commercial banking “cluster market”). For a discussion of these cases, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 150–53 (2d ed. 1984) (hereinafter ANTITRUST LAW DEVELOPMENTS); MERGER MONOGRAPH, supra note 7, at 68–78.
The traditional case law’s approach to geographic market definition is ad hoc. The leading case again is Brown Shoe, which said that “Congress prescribed a pragmatic, factual approach,” and that a geographic market must “both ‘correspond to the commercial realities’ of the industry and be economically significant.” 15 “The proper question to be asked,” according to the Court in Philadelphia National Bank, “is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” 16 Finally, the Court in United States v. Pabst Brewing Co. wrote that the Government need only demonstrate an effect on competition “somewhere in the United States.” 17 In applying the Court’s teaching, lower courts have looked at a number of factors, including customer locations, industry recognition, pricing zones and patterns, and patterns of shipments. 18

Although the distinction between the Guidelines’ approach to market definition and that of traditional case law should not be exaggerated, since both approaches look to many common factors, 19 the focus of the

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15 370 U.S. at 336–37 (merger evaluated nationwide and in numerous metropolitan areas).
16 374 U.S. at 357 (market limited to counties in Philadelphia’s metropolitan area). Quoting an earlier decision, the Court explained that “the ‘area of effective competition . . . must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies.’” Id. at 359 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)) (emphasis omitted).
17 384 U.S. 546, 549 (1966) (adding that the Act “does not call for the delineation of a ‘section of the country’ by metes and bounds as a surveyor would lay off a plot of ground”) (markets included each of the country, three states, and Wisconsin). Any suggestion that Pabst makes proof of geographic market unnecessary was rejected in United States v. Marine Bancorporation, Inc., 418 U.S. 602, 621 n.20 (1974), a potential competition case.
18 For discussions of the cases and these factors, see Antitrust Law Developments, supra note 14, at 154–57; Merger Monograph, supra note 7, at 82–88, 99–100. A “pattern of shipments” standard which achieved considerable acceptance, was championed in Elzinga & Hogarty, The Problem of Geographic Market Delineation Revisited: The Case of Coal, 23 Antitrust Bull. 1 (1978); Elzinga & Hogarty, the Problem of Geographic Market Delineation in Antimerger Suits, 18 Antitrust Bull. 45 (1973).
19 After setting forth the foiling test, the 1984 Guidelines concede that although evidence of the likely effect of a future price increase may sometimes be available, it usually will be necessary for the Department to infer the likely effects of a price increase from various types of reliable, circumstantial evidence. . . . Thus, in evaluating product substitutability, the Department will consider all relevant evidence but will give particular weight to the following factors:

[1] Evidence of buyers’ perceptions . . . ;
[2] Differences in the price movements . . . ;
[3] Similarities or differences between the products in customary usage, design, physical composition, and other technical characteristics; and

1984 Guidelines, 2 Trade Reg. Rep. (CCH) at 6879-9; see also id. at 6879-11 (in drawing geographic markets, the Division will “give particular weight” to “shipment patterns,” “evidence of buyers having actually considered shifting,” “differences in the price move-
inquiries are somewhat different. The difference is exemplified by one of the central tenets of the Guidelines: the general disavowal of that over-used prosecutorial drug, the submarket. The Guidelines presume that there will be a single market, and explain that "the Department will consider defining additional, narrower relevant product markets" only when a hypothetical monopolist could discriminatorily (and profitably) raise prices to those who "cannot easily substitute away." As suggested in the discussion of case law above, traditional case law relied heavily on submarket analysis.

The Guidelines differ less sharply from traditional case law in their evaluation of competitive effects, except that the Guidelines use a different measure of concentration. Again the major change is one of focus. Traditional case law is generally hostile to increases in concentration, for a variety of social and economic reasons. Mergers were condemned principally on the basis of market shares, concentration, and, frequently, trends in concentration, in such leading cases as *Brown Shoe, Alcoa (Rome Cable), Pabst Brewing, Philadelphia National Bank,* and *Von's Grocery.* Several of these opinions stated that Section 7 of the Clayton Act was intended "to arrest anticompetitive tendencies in their 'incipiency.'" In contrast to traditional case law's more amorphous concerns about concentration, the Guidelines focus more sharply on the prevention of

ments," "[t]ransportation costs," "[c]osts of local distribution," and "[e]xcess capacity."); Baxter, *Responding to the Reaction: The Draftsman's View,* 71 CALIF. L. REV. 618, 624 (1983) ("[i]t will of course be true that available data may not allow a direct determination of whether a significant, nontransitory increase in price would be profitable. However, where such data are not available, there is at least a theoretical framework for analyzing the relevance of indirect or second-best evidence.").

Several of the factors listed in the Guidelines are found, or have parallels, in the *Brown Shoe* factors quoted above. The factors listed by the 1982 and 1984 Guidelines are identical except that only the 1984 Guidelines refer to shipment patterns, and the 1982 Guidelines did not include the frank recognition that it will not usually be possible directly to apply the Guidelines' test. 1982 GUIDELINES, 2 Trade Reg. Rep. (CCH) at 6881-8, 6881-10.

See *Werden, Market Delineation and the Justice Department's Merger Guidelines,* 1983 DUKE L.J. 514, 575 ("The Guidelines reflect a preference for a theoretically correct approach, logically derived from the ultimate goal of merger enforcement, over the simplicity of *Brown Shoe*.").

See, e.g., *Panel Discussion: The New Merger Guidelines,* 51 ANTITRUST L.J. 317, 320 (1982) (comments of Assistant Attorney General Baxter) ("the *Brown Shoe* concept of submarkets has been terribly abused," and "the sooner we see the end of that kind of chatter the better"); *Werden,* supra note 20, at 574-75. A good discussion of submarkets is included in *MERGER MONOGRAPH,* supra note 7, at 128-31.

1984 GUIDELINES, 2 Trade Reg. Rep. (CCH) at 6879-9 to 6879-10.


Principal attention is given to market shares and concentration, but the Division also will consider ease of entry and a number of other factors that "relate to the ease and profitability of collusion." The 1984 Guidelines expanded the number of these factors and made clear that the Division "will not challenge mergers solely on the basis of concentration and market share data without considering other relevant factors." The Guidelines deliberately refrain from mentioning concentration trends.

On the same day the 1982 Guidelines were issued, the Federal Trade Commission released its Statement Concerning Horizontal Mergers. In this Statement, the FTC generally endorsed the Guidelines, declaring that they would be "given considerable weight by the Commission and its staff." The approach the Commission would take, as described by

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25 1982 Guidelines, 2 Trade Reg. Rep. (CCH) ¶ 4501 (June 14, 1982):
The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise. . . . Where only a few firms account for most of the sales of a product, those firms can in some circumstances coordinate, explicitly or implicitly, their actions in order to approximate the performance of a monopolist. This ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time is termed "market power."

See also Department of Justice Explanation and Summary, reprinted id. at ¶ 4500 ("The purpose of the guidelines is to prevent the monopolization or cartelization—control by one or by several firms—of any significant economic markets."); Panel Discussion, 54 Antitrust L.J. 31, 33 (1985) (comments of William Baxter) ("The criteria that show up in the Merger Guidelines represent a sort of prophylactic approach to conspiratorial collusion."); Baker & Blumenthal, supra note 8, at 316 ("Under the Guidelines, the likelihood of enforcement is tied to the extent that the risk of collusion is significantly enhanced by a particular merger. . . . Unlike the 1960’s cases, . . . the Guidelines view concentration as mattering not for its own sake, but only because it increases the likelihood of collusion."). See generally Hospital Corp. of Am. v. Federal Trade Comm’n, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.) ("When an economic approach is taken in a section 7 case, the ultimate issue is whether the challenged acquisition is likely to facilitate collusion."). cert. denied, 107 S. Ct. 1975 (1987); R. Posner, Antitrust Law: An Economic Perspective 102 (1976) ("The real significance of concentration, which is obscured by the term 'market power' . . . is that it facilitates collusion, explicit or tacit, among the firms in the market by reducing the costs of collusion and of detecting cheating.").

The Guidelines also contain a "leading firm proviso," applicable when a party to a merger has a market share of at least 35% that is twice as great as that possessed by the next largest firm; this proviso responds to a concern about mergers that may create or enhance single-firm market power. 1984 Guidelines at 6879-14; 1982 Guidelines at 6881-13.

27 Department of Justice Statement, supra note 8, at 6879-83.
28 Kauper, supra note 2, at 515 n.43. As Professor Kauper notes, few commentators regard such trends as a proper consideration (and they note that, if they are to be considered, they could cut either way). See, e.g., P. Areeda & H. Hovenkamp, Antitrust Law ¶ 914 (Supp. 1986).
29 2 Trade Reg. Rep. (CCH) ¶ 4516 (June 14, 1982) [hereinafter FTC Statement].
30 Id. at 6901. According to a (then) associate director of the FTC’s Bureau of Competition,
its Statement, is similar but not identical to that of the Guidelines. (An important difference between the FTC Statement and the Guidelines is one of tone: the FTC Statement cites numerous cases and secondary sources; the Guidelines cites none.) For product market definition, the Statement uses a cross-elasticity (of demand and supply) test, although it also seems to approve of a foiling approach such as that used by the Guidelines; for geographic market definition, it uses a Guidelines-like foiling approach. For both product and geographic market definition, the Statement lists a number of specific relevant factors to be considered. Submarkets are not mentioned.

FTC staff evaluating mergers apply both the 1984 Guidelines and the FTC Statement, which he views as "entirely consistent." McCarty, Merger Policy and Enforcement at the Federal Trade Commission: The Lawyer's View, 54 Antitrust L.J. 103, 106 (1985).

1 2 Trade Reg. Rep. (CCH) at 6901-6 ("Where the cross-elasticity of demand for separate products or services is high, they normally will be within the same product market. Similarly, a high cross-elasticity of supply tends to suggest the existence of a common product market."); cf. Grand Union Co., 102 F.T.C. 812, 1038-41 (1983) (Miller, Ch.) (markets ideally would be defined by supply and demand elasticity and cross-elasticity, although information to compute these accurately usually will be lacking); Weyerhaeuser Co., 106 F.T.C. 172, 273-75 (1985) (same).

2 Trade Reg. Rep. (CCH) at 6901-6. ("the issue of whether related products or services place a significant constraint on the ability of merging firms to raise prices, limit supply or lower quality is central to evaluating the competitive effects of a horizontal merger"). For a good comparison of the cross-elasticity test and the Guidelines' "hypothetical monopolist" test, see Merger Monograph, supra note 7, at 90-96, 105-10.

3 Id. at 6901-7 ("[T]he issue is whether producers of the merged firm's product in other geographic areas place a significant constraint on the ability of the merged firm to raise price or restrict output. As a general proposition, an area is a separate geographic market if a change in the price of the product in that area does not, within a relevant period of time, induce substantial changes in the quantity of the product sold in other areas."); cf., e.g., Grand Union Co., 102 F.T.C. 812, 1047 (1983) ("the area within which sellers of the product(s) sold by the merged firm place a significant constraint on the merged firm's ability to raise prices").

4 2 Trade Reg. Rep. (CCH) at 6901-6:

[T]he existence of separate product markets may be evidenced by: the persistence of sizeable price disparities for equivalent amounts of different products; the presence of sufficiently distinctive characteristics which render a product suitable only for a specialized use; the preference of a number of purchasers who traditionally use only a particular kind of product for a distinct use; or the judgment of purchasers or sellers as to whether products are in fact competitive.

Id. at 6901-7:

The Commission will consider the following factors relevant to this [geographic market] determination: the relationship between price and quantity . . .; barriers to trade flows, e.g., high transportation costs, time required to make deliveries or municipal, state or federal regulation; and shipping patterns . . . . Evidence of shipments may be particularly probative when it reflects long-held patterns of trade and industry perceptions.

5 No discussion of submarkets, as such, can be found in recent FTC opinions, even where the term is used in the complaint and initial decision. See, e.g., Grand Union Co., 102 F.T.C. 812 (1983). However, in American Medical Int'l, Inc., the Commission approved
The FTC Statement's discussion of competitive effect shares the Guidelines' central concern with collusion. The Statement differs from the Guidelines—particularly the 1982 Guidelines—in that it calls for consideration of numerous "qualitative factors" that may influence the ability of firms to collude or otherwise exercise market power. One of these factors is "concentration trends (including the volatility of market shares)."

B. ANTITRUST DIVISION CASES

Under the leadership of Assistant Attorney General William Baxter and his successors, the Antitrust Division has won only one reported merger decision—and that was a case in which the defendants did not introduce "any substantial evidence." To be sure, the Division has en-

an administrative law judge's finding of two markets, one a county and one a city within that county, which the Commission described as a "narrower geographic market definition." 104 F.T.C. 1, 196 (1984).

56 FTC Statement, 2 Trade Reg. Rep. (CCH) at 6901–2 ("Legal analysis of horizontal mergers, however, has focused on the extent to which these mergers confer market power on the acquiring firm or enhance the ability of firms to collude, either expressly or tacitly.").

57 See also American Medical Int'l, Inc., 104 F.T.C. 1, 200 (1984) (Calvani, Comm'r):

[A]lthough market share evidence is an important starting point in merger analysis, it alone is not conclusive in determining the legality of a merger under Section 7. ... Although the Commission has expressed an intent to give "considerable weight" to the Justice Guidelines, it has not endorsed either the analytical approach or the numerical thresholds and tests for analyzing mergers contained in the Justice Guidelines. More importantly, the Commission emphasizes certain "qualitative" factors over strict "quantitative" industry concentration measures.


59 United States v. Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) ¶ 67,288, at 61,465 (E.D.Cal.), motion for reconsideration denied, 1986-2 Trade Cas. (CCH) ¶ 67,287, at 61,458 (E.D. Cal. 1986). My tabulation does not count as a "win" the Ninth Circuit's vacating a dismissal of a merger case on grounds of government attorney misconduct (but upholding award of monetary sanctions), United States v. National Medical Enter., Inc., 792 F.2d 906 (9th Cir. 1986). Cf. United States v. National Medical Enter., Inc., 1987-1 Trade Cas. (CCH) ¶ 67,640 (E.D. Cal. 1987) (consent decree limited to ten-year ban on acquisitions without approval). It also does not count the hold separate order won in United States v. Acorn Eng'g Co., 1981-2 Trade Cas. (CCH) ¶ 64,197 (N.D. Cal. June 18, 1981)—like Rice Growers, by lawyers from the Division's San Francisco office. The case had been filed in August, 1980, and the hearing was held on May 4, 1981, so it is unlikely that the new leadership in Washington substantially contributed to the trial strategy (Assistant Attorney General Baxter was confirmed by the Senate on March 26). The opinion's substantive discussion is devoted almost exclusively to market definition ("vandal-resistant (stainless steel and aluminum) plumbing fixtures"), and accepted a government argument that it described as exclusively based on traditional Brown Shoe factors.
tered into numerous settlements, but whether or not these are "wins" is inevitably moot since lawyers on both sides of settlements frequently claim victory—indeed, one of the allures of settlement is that it permits this. What is clear is that when the Division has litigated merger cases recently, it has generally been unsuccessful. The number of cases is so small that nothing is proven by this, but it raises intriguing questions, some of which are discussed below.

The Division lost two cases when the court found ease of entry. In United States v. Waste Management, Inc., the court of appeals reversed the district court and upheld a merger creating a firm with a 49 percent market share. The court rested its decision on ease of entry, explicitly relying on the Guidelines: "If the Department of Justice routinely considers ease of entry as relevant to determining the competitive impact of a merger, it may not argue to a court addressing the same issue that ease of entry is irrelevant." Similarly, in United States v. Calmar, Inc.,

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41 Accord G. Werden, Market Delineation under the NAAG Horizontal Merger Guidelines: Realities or Illusions?, at 8 (unpublished manuscript 1987).


43 743 F.2d 976 (2d Cir. 1984).

44 Id. at 981.

45 Id. at 983. The Division had argued as follows:

While high "entry barriers amplify the anticompetitive price effects caused by seller concentration," this does not mean that a merger which produces a 50 percent aggregate share of the merged firms in a concentrated market is legal if entry barriers are low. At bottom, ease of entry is but one of a number of structural factors relevant to the likely competitive impact of a merger . . . .

DOJ Waste Management Appeal Brief at 49 (citations and footnote omitted). For Division reaction, see Leddy, Entry Issues in Merger Analysis, 54 ANTITRUST L.J. 1257, 1258–59 (1986) (Second Circuit misunderstood entry issue and improperly engaged in fact-finding). The surprising nature of the result is suggested by the minimal attention given to the entry issue in the briefs, see DOJ Waste Management Appeal Brief at 49–51, Brief of Defendants-Appellants at 41–46, Waste Management, and at oral argument, see letter from Patrick J. Roach to Stephen Calkins at 1 (Oct. 19, 1987) ("One of the ironies of the case is that, to my recollection, the entry issue was not addressed by either side at oral argument in the Second Circuit.").

the court upheld a merger creating a Herfindahl-Hirschman Index ("HHI") of over 3,000 principally because entry was easy.\footnote{612 F. Supp. at 1305-07 (court was particularly impressed with the ability of major purchaser of pumps to integrate backward).}

The other basis on which the Antitrust Division has lost cases has been market definition. (The Division also lost market definition issues in \textit{Waste Management} and \textit{Calmar},\footnote{\textit{Waste Management}, 588 F. Supp. at 502 (rejecting the Government's proposed markets—trash collection by "front-load" trucks, and trash collection by "roll-off containers"—and the defendants'—all trash collection—and defined the market as "trash collection from commercial establishments"); \textit{Calmar}, 612 F. Supp. at 1303-05 (rejecting Government attempt to separate "regular dispensers" from "regular sprayers," and defendants' attempt to include aerosol valves and flip top closures). In \textit{Waste Management}, the Government prevailed on a hotly disputed geographic market issue, when the court excluded Fort Worth from the Dallas market. 588 F. Supp. at 503-04.} and, in the single litigated Division victory, \textit{United States v. Rice Growers Ass'n},\footnote{1986-2 Trade Cas. (CCH) \# 67,288, at 61,465 (E.D. Cal. 1986), \textit{motion for reconsideration denied}, 1986-2 Trade Cas. (CCH) \# 67,287 (E.D. Cal. 1986).} two of the Division's three proposed markets were rejected.) In two small bank merger cases, \textit{United States v. Virginia National Bankshares, Inc.}\footnote{1982-2 Trade Cas. (CCH) \# 64,871 (W.D. Va. 1982).} and \textit{United States v. Central State Bank},\footnote{817 F.2d 22 (6th Cir. 1987).} the Department lost on grounds of geographic market definition. In the first case, the court ruled that banks in small towns seven miles apart were in separate geographic markets;\footnote{Plaintiff's Pretrial Brief at 22, \textit{Virginia National Bankshares} (Giv. No. 82-0083B). The court based its opinion primarily on the testimony of local bankers, who testified that people like to bank locally and that travel between the two towns can be difficult in winter. 1982-2 Trade Cas. (CCH) at 72,352-53. The court added that the Division had failed to make out a case "under the traditional [market definition] standards that are set forth by . . . the Supreme Court in the various cases, or under some economic standard that has not yet been defined." \textit{Id.} at 72,351.} in the second, the court ruled that banks in a regional center 32 to 40 miles away from two small towns were in the same geographic market as banks in those towns.\footnote{United States v. Central State Bank, 621 F. Supp. 1276, 1281 (W.D. Mich. 1985), \textit{aff'd}, 817 F.2d 22 (6th Cir. 1987).} Finally, in an unreported case currently on appeal, \textit{United States v. Archer-Daniels-Midland Co.},\footnote{Civ. No. 83-51-D (D. Iowa May 29, 1987), \textit{appeal noticed}, No. 87-2343-SI (8th Cir. Oct. 1, 1987). While associated with Covington & Burling, I worked on the preliminary stages of this proceeding. This paper is not based on anything other than publicly available briefs and opinions, and it does not express, nor should it be read as expressing, any opinion on the merits of any decision in the proceeding.} the district court granted the defendants' motion for summary judgment solely on the basis of market definition, ruling that the product market for evaluating the competitive effect of a combination...
of high fructose corn sweetener businesses included at least sucrose (which ruling, all agreed, determined the outcome of the litigation).

C. Private Cases

Why has the Division been so unsuccessful? Is it simply that it is difficult to win merger cases? Although some have argued this, the experience of private litigants and the FTC suggests otherwise. The FTC's experience is discussed below. In cases brought by private parties and decided since the Guidelines were issued, plaintiffs have won about half the substantive decisions. Several of these cases followed federal agency

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There is simply less confidence in the presumption that concentration automatically means poor performance. The "other factors," entry being predominant, have made the scrutiny of an acquisition into a kind of rule of reason inquiry that seeks to determine whether or not the effect of the transaction will be to lower output.

That, in turn, has made the bringing and winning of these cases very difficult.

Others might suggest that the Guidelines have clarified the law, as a consequence of which very troubling mergers (i.e., easy Government cases) are not attempted. This is simply not true, as any lawyer actively practicing in the area will attest, given confidentiality. To be sure, advocates are prone to exaggerate their triumphs, but simply noting a few of the litigated cases gives the lie to any such claim. For instance, in a discussion of Federal Trade Comm'n v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984), Federal Trade Comm'n v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986), vacated without opinion, 829 F.2d 191 (D.C. Cir. 1987), and United States v. LTV Corp., 1984-2 Trade Cas. (CCH) ¶ 66,135 (D.D.C. 1984) (consent judgment), Assistant Attorney General Baxter's chief economist wrote that "if the enforcement agencies had not brought these actions, one might have concluded Section 7 had been effectively repealed." White, supra note 9, at 19 (noting that he was an expert witness for the FTC in Coca-Cola).

54 This includes only reported decisions in which the substantive § 7 count predominates, and excludes those decided on procedural grounds (e.g., standing). Obviously, the results would differ were standing cases included. See, e.g., Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484 (1986) (denying standing); Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235 (3d Cir. 1987) (same); O'Neill v. Coca-Cola Co., 669 F. Supp. 217 (N.D. Ill. 1987) (same). But cf. Gia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985) (standing found). For a review of recent standing cases, see Kolasky, Merger Enforcement by States and Private Parties, 56 Antitrust L.J. 839 (1988).

Cases excluded because the substantive merger count did not appear to predominate include the $5 million verdict for monopolization by merger in Langenderfer, Inc. v. S.E. Johnson Co., Dkt. C 76-425 (N.D. Ohio Oct. 2, 1986), and the following: Cine 42nd Street Theater Corp. v. Nederlanders Org., Inc., 790 F.2d 1032 (2d Cir. 1986) (state action immunity); North Carolina ex rel Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984) (state action), cert. denied, 105 S. Ct. 1865 (1985); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 737 F.2d 505 (5th Cir. 1984) (affirming summary judgment in franchise case including § 7 count where no market data had been introduced); Sun Newspapers, Inc. v. Omaha World-Herald Co., 713 F.2d 428 (8th Cir. 1983) (affirming injunction where newspaper's purchase of printer probably was illegal extension of monopoly); Reazin v. Blue Cross & Blue Shield, Inc., 663 F. Supp. 1360, 1461 (D. Kan. 1987) (fourth count of "defensive ploy" counterclaim); Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 658 F. Supp. 1514 (E.D. Mich. 1987) (in what was a monop-
“clearance” of the merger (and some featured opinions declining to defer to that clearance).

Typical of these cases is the Tenth Circuit’s opinion in *Monfort of Colorado, Inc. v. Cargill, Inc.*, \(^5\) which the Supreme Court later reversed for want of standing. The Tenth Circuit’s decision on the merits turned on market definition: the court found a violation because it approved a “submarket” that consisted of “boxed beef” and excluded imports and captive consumption. \(^5^8\) The district court had based that finding on the directive of traditional merger cases “to consider the functional and reasonable interchangeability of the products, the cross-elasticity of demand for the products, and the interchangeability of the products’ production facilities.” \(^5^9\) The court of appeals expressly rejected the Guidelines’ approach to market definition: “We agree with the district court’s decision not to rely on these Guidelines. On the issue of market definition, a decision based on these guidelines remains as inexact as the data gathered to make the assessment. . . . [t]hese Guidelines are more useful for setting prosecutorial policy than delineating judicial standards.” \(^6^0\)

Another court gave a ringing rebuff to the Antitrust Division’s view of the law and condemned a merger principally by means of market

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\(^{57}\) 761 F.2d 570 (10th Cir. 1985), reversed for want of standing, 107 S. Ct. 484 (1986).

\(^{58}\) 761 F.2d at 578. In addition to the high resulting market shares, the Tenth Circuit approved the trial court’s finding of high entry barriers because it would take “twelve to eighteen months” and cost $20 to $40 million to build an integrated plant, profit margins were low, and there were “psychological barriers to entry.” *Id.* at 579.

\(^{59}\) *Monfort*, 591 F. Supp. 683, 697 (D. Colo. 1983) (citing, e.g., *Brown Shoe and du Pont (Cellophane)*).

\(^{60}\) 761 F.2d at 579 (citation omitted).
definition in Laidlaw Acquisition Corp. v. Mayflower Group, Inc. The court delimited a "submarket" consisting of private bus contracting, relying on an expert witness, one of the defendant's internal documents, and Brown Shoe, and, relying on Pabst Brewing, identified three narrow geographic markets: the Pacific Northwest, Alaska, and California. To the plea that both antitrust agencies had declined to challenge the acquisition, the court responded as follows:

The agency's opinion of a merger is not binding on this Court, and their enforcement decisions do not necessarily reflect the current state of antitrust law. . . . Perhaps the best response to the argument that the Attorney General, rather than the Supreme Court, is the final authority on the meaning of the antitrust laws, is set out in the appendix to the concurring opinion of Mr. Justice Douglas in Pabst. We suggest that it should be required reading for every judge who wants to put his own gloss on the simple language of Section 7.

Justice Douglas's Pabst appendix reprints an Art Buchwald column caricaturing lax antitrust enforcement by ostensibly justifying the merger of the nation's last two firms.

As did Monfort and Laidlaw, the Tasty Cake case turned on a narrow product market definition, namely, "snack cakes and pies," which consists largely of such delicacies as Hostess Twinkies, Drake Ring Dings, and Tasty Cake Krimpets, and narrow definitions of geographic markets and submarkets (Boston, New York, Washington, D.C., Philadelphia, New England, and the Mid-Atlantic states), after which it was easy to find a

61 636 F. Supp. 1513 (S.D. Ind. 1986). In addition to high market shares, the court found what it considered "significant barriers to entry" in the form of the cost of insurance, the length of the contracts (3–5 years), performance bond requirements, and experience requirements in bid specifications. Id. at 1520.

62 The court was persuaded that "school districts rarely, if ever, return to public school bus transportation once they have 'gone private,' " and, even if they could, their ability to do so only imposed "an undefined ceiling" on the pricing discretion of private contractors. 636 F. Supp. at 1519.

The court's market definition rested on testimony, documentary evidence, and the apparent practice of the parties to price against each other.\footnote{67} A California district court showed greater deference to the Justice Department in \textit{McCaw Personal Communications, Inc. v. Pacific Telesis Group},\footnote{68} but the court nonetheless declined to grant a defense motion for summary judgment. Apparently the Justice Department had been persuaded that entry into the beeper industry was easy, so that high market shares were not a matter of concern. The court was not convinced, because the incumbents' beeper frequencies provided quality and cost advantages.

Previous Justice Department approval also was insufficient to prevent condemnation of G. Heileman Brewing Co.'s proposed acquisition of Pabst Brewing Co. in \textit{Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.}\footnote{69} Although the Justice Department had approved the transaction, as somewhat restructured,\footnote{70} the district court and the court of appeals relied on \textit{Pabst Brewing} to define a 12-state upper Midwest region in which


\footnote{67} The documents produced in \textit{Tasty Cake} are striking evidence of hostile intentions. In a memorandum recording a meeting with the chairman of Ralston's then-new subsidiary, Continental Baking Co., Ralston's vice-president for consumer products business development "wrote that acquisitions were needed to '[t]ake competition out." 653 F. Supp. at 1271. A letter between these two individuals promoted the purchase of McKee Baking Company, a less prominent manufacturer of "snack cakes and pies," as likely to contribute to "the '[a]bility to control pricing in a basically non-competitive atmosphere." "\textit{Id.} at 1271. Other evidence showed that Continental Baking's "[b]read strategy is to take competition out and then increase price." "\textit{Id.}

Perhaps the most remarkable aspect of the opinion is that the trial court continued by writing that the "most telling evidence of an illegal specific intent comes not from any discovered documents, however, but from the non-discovery of any documents wherein defendants considered the antitrust consequences of the Drake deal." \textit{Id.} at 1272. The court reasoned that the absence of such documents suggested either that the transaction was so clearly illegal that it was unnecessary to analyze it, or they had destroyed the records, either of which would have demonstrated illegal intent. \textit{Id.} at 1272. The court is clearly misinformed, since numerous documents analyzing such a transaction could have been protected by the attorney-client privilege, and not all discovered documents are submitted to the court, so that analyses of the merger could have been produced but not brought to the Court's attention. Cf. Brief for Appellants, Tasty Baking Co. v. Ralston Purina, Inc., Nos. 87-1091, 87-1132 (3d Cir., brief filed Apr. 15, 1987), at 21 n.* (An analysis prepared for the antitrust agencies had been produced to plaintiffs who had not filed it with the Court.)

\footnote{68} 645 F. Supp. 1166 (N.D. Cal. 1986).


\footnote{70} United States v. G. Heileman Brewing Co., 1983-1 Trade Cas. (CCH) ¶ 65,399 (D. Del. 1983) (consent judgment).
concentration levels were sufficiently high to be of concern. Again, plain-
tiffs won on market definition grounds.\textsuperscript{71}

In short, private parties have achieved notable success in winning
merger cases\textsuperscript{72} during the same time period in which the Division has
had little success in challenging mergers it presumably regarded as more
troubling. The opinions in these printed cases are quite traditional, re-
ylying on settled precedents (particularly for defining markets) rather
than the Guidelines.

\textbf{D. Federal Trade Commission Cases}

The Federal Trade Commission has won five of the six reported district
court merger cases filed since Chairman James Miller assumed office at

\textsuperscript{71} Private plaintiffs also won at least a nominal victory in White Consolidated Indus.,
Ohio 1985), \textit{aff'd}, 781 F.2d 1224 (6th Cir. 1986). Although the FTC did not object to the
transaction, given a certain amount of restructuring, the court was not persuaded that
competition would be protected. After additional restructuring, the court lifted its in-
junction. The most persuasive exposition of the plaintiffs' position is O. Williamson, De-
limiting Antitrust (remarks presented at The Antitrust Policy Institute's Conference on
the Antitrust Alternative (Mar. 27, 1987).

The Northern District of Ohio also decided one of the early and celebrated successful
private challenges to a merger that apparently did not trouble the antitrust agency. See
Marathon Oil Co. v. Mobil Corp. 530 F. Supp. 315 (N.D. Ohio), \textit{aff'd}, 669 F.2d 378 (6th

\textsuperscript{72} Cf. Mr. Frank, Inc. v. Waste Management, Inc., 591 F. Supp. 859 (N.D. Ill. 1984)
(motion to dismiss \S 7 count denied; creditor relationship could provide sufficient control
to implicate \S 7). \textit{But see} Cable Holdings, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th
Cir. 1987) (affirming district court's upholding of jury verdict for defendant cable television
companies, because it was not clearly erroneous for jury to define market as including all
203 (N.D. Tex. 1984) (denying preliminary injunction sought by target firm where ac-
quiring firm was not yet a viable competitor in relevant market and competitiveness of
market prevented application of potential competition doctrine); Joseph Ciccone & Sons,
plaintiff's case centered on an expert's testimony that was rejected as totally flawed); Chem-
Nuclear Sys., Inc. v. Waste Management, Inc., 1982-2 Trade Cas. (CCH) \$ 64,860 (W.D.
Wash. 1982) (denying target firm preliminary injunction where it and raiding firm were
found to be separate geographic markets); cf. Mideo Corp. v. Freeport-McMoran, Inc.,
625 F. Supp. 1475 (N.D. Ill. 1986) (preliminary injunction denied where target made no
showing that competition would be harmed were acquiring firm to require it to purchase
high priced natural gas); Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx, 1985-2 Trade
Cas. (CCH) \$ 66,768 (S.D.N.Y. 1985) (dismissing challenge to Hart Schaffner & Marx's
acquisition of the Pierre Cardin license principally because plaintiff, a contract suit man-
ufacturer, lacked standing, but also because post-merger HHI was only 884, entry was
easy, and demand and supply substitutability defeated plaintiff's attempt to define a market
consisting of "better quality" suits); Carter Hawley Hale Stores, Inc. v. The Limited, Inc.,
587 F. Supp. 246 (C.D. Cal. 1984) (dismissing target company's challenge to tender offer
for want of standing, and denying preliminary injunction where demand and supply
substitutability prevented plaintiff from establishing market consisting of "moderate-priced
women's fashion apparel" and "special-sized women's apparel" sold in those shopping malls
where plaintiff and defendant both had stores).
the end of September, 1981, and the Commission prevailed in the only appeal from the merger opinions it issued during that time period. The cases are significant in part for their continued reliance on traditional case law. The cases are intriguing because, with some exceptions, Commission lawyers have invited this reliance.

In Federal Trade Commission v. Warner Communications Inc., the trial court denied the FTC's application for an injunction against the formation of a joint venture that effectively would have merged two businesses. The trial court, apparently inspired by the Guidelines' central concern with the effect of mergers on the likelihood of "collusion," denied an injunction because it found that collusion was unlikely. On appeal, the Ninth Circuit reversed, specifically rejecting the trial court's approach: "Since Section 7 required only a showing of reasonable probability of anticompetitive effect and the district court required a showing of collusion, we conclude that the court applied an incorrect legal standard." The court went on to accept the FTC's proposed product market (prerecorded music, which excludes "home taping") based on Brown Shoe factors, and to enjoin the venture because it found moderate concentration, a trend toward increased concentration, and barriers to entry such as high capital costs and the need for special expertise.

In addition to the cases discussed in the text, see Federal Trade Comm'n v. Pacific Resources, Inc., No. C-87-1390 (W.D. Wash. Nov. 6, 1987) (granting preliminary injunction); the case is counted as "reported" because it should be reported shortly. The only defeat among the reviewed cases was Federal Trade Comm'n v. Occidental Petroleum Corp., 1986-1 Trade Cas. (CCH) ¶ 67,071 (D.D.C. 1986) (preliminary injunction denied where entry was easy and price competition was vigorous).


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742 F.2d 1156 (9th Cir. 1984).

75 Federal Trade Comm'n v. Warner Communications Inc., 1984-1 Trade Cas. (CCH) ¶ 66,025 (C.D. Cal.), rev'd, 742 F.2d 1156 (9th Cir. 1984) (per curiam).

76 See text accompanying notes 25-28, supra.

77 742 F.2d at 1160 (summarizing trial court's findings and conclusion, which are not reported).

78 742 F.2d at 1160.

79 742 F.2d at 1163-64. The Ninth Circuit also ruled that it was error for the trial court
One of the FTC's most recent successful injunction efforts featured even more striking reliance on traditional case law. In *Federal Trade Commission v. Coca-Cola Co.*, Judge Gesell relied on the submarket concept to define both a national and a regional geographic market (the South and Southwest United States), and accepted the FTC's proposed product market, carbonated soft drink products. However, he ruled that the FTC had failed to establish the factual basis for what he perceived to be its principal theory of illegality, namely, that the merger would lessen the vigor of competition between Coca-Cola Co. and Pepsi Co. Thus, the FTC's collusion-based argument was unsuccessful. Nonetheless, the court condemned the merger on traditional grounds, in strong language:

> Section 7 of the Clayton Act was not designed to support a particular economic theory; it was directed at what Congress in the exercise of its own common sense perceived. . . . given this dominant legislative desire to curb the economic concentration of power, it is unnecessary to speculate about the economic effect of the proposed acquisition. Without more, substantial mergers of this kind in heavily concentrated industries are presumed illegal.

In a conclusion reminiscent of that written by the *Laidlaw* court, Judge Gesell wrote as follows:

> Any federal judge considering regulatory aims such as those laid down by Congress in Section 7 of the Clayton Act should hesitate before grafting onto the Act an untried economic theory such as the wealth-maximization and efficiency-through-acquisition doctrine expounded by Coca-Cola Company. . . . Surely Congress had a variety of considerations in mind when it enacted the major public policy enunciated by this Section. There were concerns about size as such, about opportunity for small business, about concentration trends; there was also a belief that a diversified competitive market assures a healthy economy and encourages innovation. To be sure, efficiencies that benefit consumers were recognized as desirable but they were to be developed by dominant concerns using their brains, not their money by buying out troubling

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80 641 F. Supp. 1132–33.

81 Id. at 1138. Although the FTC's oral presentations may have focused on collusion, its brief also included more traditional arguments. *See infra notes* 115, 117.

82 Id. at 1138. Judge Gesell rejected Coca-Cola's argument that its output would expand after the merger (thus assertedly proving that it would not lessen competition and raise prices) as proving "too much":

> The inherent ability of a dominant company in a heavily concentrated industry to expand its sales after eliminating a competitor from the market and acquiring its products cannot justify a presumptively illegal acquisition. [citing Justice Douglas's concurring opinion in *Pabst Brewing*] Wider sales of a soft drink by eliminating competition is not a benefit which Section 7 affords to dominant concerns.

*Id.* at 1139 n.25.
competitors. The Court has no authority to move in a direction neither the Congress nor the Supreme Court has accepted. In contrast to Warner Communications and Coca-Cola, the importance of the possibility of collusion was taken seriously by the court in Federal Trade Commission v. Bass Bros. Enterprises, Inc. In an opinion quite responsive to the FTC's brief (discussed below), the court both cited traditional case law to find a "prima facie" violation based on concentration statistics, and conducted a further examination of the industry involved which concluded that market power probably could be exercised. This examination discussed the factors mentioned in the Guidelines and the FTC Statement, including (from the FTC Statement) the "tendency toward concentration."

Reliance on traditional case law is not confined to judges with long tenures and who were appointed by Democrats. In two decisions involving FTC challenges to mergers, Judges Bork and Posner, who are not noted for liberal tendencies, condemned the mergers in opinions relying principally upon high market shares.

Judge Bork's opinion, in PPG Industries, limited its analysis to market definition and market shares. As had the district court, the D.C. Circuit based its finding of market definition principally on defendants' documents or the testimony of industry witnesses. Although PPG discusses

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84 Id. at 1141.
85 1984-1 Trade Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984).
86 Id. at 68,620-21. Entry was found to be difficult based on sunk capital costs ($50 million), a three-to-five year lead time, customer loyalty, and regulatory uncertainty. Id. at 68,613-14.
87 Hospital Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 107 S. Ct. 1975 (1987); Federal Trade Comm'n v. PPG Indus., Inc., 798 F.2d 1900 (D.C. Cir. 1986). Both opinions may have been written with particular care, because both judges had been on numerous lists of possible Supreme Court nominees.
88 Post-merger HHI's ranged from 3184 to 5213. Judge Bork observed that the merger might reduce the number of "strong competitors in the high technology market" from 3 to 2. 798 F.2d at 1505. Although he did not note this, such a reduction would condemn the merger under the presumptive rule espoused in his book, R. BORK, THE ANTITRUST PARADOX, 221-22 (1978) (Section 7 should be interpreted "as making presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies"). For an earlier example of Judge Bork's apparent willingness to give great weight to market shares, see Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230 n.11 (D.C. Cir. 1986) (Bork, J.) ("Antitrust adjudication has always proceeded through inferences about market power drawn from market shares."). cert. denied, 107 S. Ct. 880 (1987) (citation omitted).
89 The court of appeals in PPG Industries affirmed the trial court's finding of probable illegality, but reversed that part of the district court's opinion that allowed a hold separate order rather than a preliminary injunction.
86 The trial court cited a PPG document that advocated acquiring Swedlow (the other party to the merger) in order to "position . . . PPG as the dominant force in the free world
the Guidelines' HHI thresholds at length, it does not cite the Guidelines’ approach to market definition.

Judge Posner’s opinion in *Hospital Corporation of America v. Federal Trade Commission*, is one of the most charming merger opinions ever. He complimented the Commission on writing an opinion that was “a model of lucidity,” although he wryly observed that “[t]he Commission may have made its task harder (and opinion longer) than strictly necessary... by studiously avoiding reliance on any of the Supreme Court’s Section 7 decisions from the 1960s except *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which took an explicitly economic approach to the interpretation of the statute.” Judge Posner explained that even if the precedent from the 1960s had been weakened by the changing emphasis in antitrust law, the modern, economic approach to merger law might have permitted the Commission to rely simply on evidence of high market shares and barriers to entry (here, market for high technology transparencies which could prevail for several decades.” *PPG Industries*, 628 F. Supp. at 884 n.5. PPG’s 1984 long-range plan “refers to Swedlow as one of our two largest competitors.” Id. In a letter to employees, “David Swedlow states, ‘[o]ur major competitor is [PPG].’” Id. And “in its 1982 long-range plan, PPG notes that ‘the air frame manufacturer has a choice of glass, plastic, or composite windows, offering him a variety of material options.’” Id.


91 807 F.2d at 1385. (In fact, the Commission’s opinion, which was written by Commissioner Calvani, cites three other merger cases from the 1960s, but only on the advisability of considering post-acquisition evidence. 106 F.T.C. at 473 n.10.) It is interesting to note that Judge Posner clerked for Justice Brennan, author of *Philadelphia National Bank*, during the term in which it was written. Association of American Law Schools, Directory of Law Teachers 1978-79, at 592.

92 Judge Posner noted that the Supreme Court had never repudiated its 1960s merger cases, 807 F.2d at 1385, but they may have been undermined by the elevation of “the economic concept of competition” as “the lodestar that shall guide the contemporary application of the antitrust laws.” Id. at 1386. Given this, “it was prudent for the Commission, rather than resting on the very strict merger decisions of the 1960s, to inquire into the probability of harm to consumers.” Id.

93 See 807 F.2d at 1388:

In showing that the challenged acquisitions gave four firms control over an entire market so that they would have little reason to fear a competitive reaction if they raised prices above the competitive level, the Commission went far to justify its prediction of probable anticompetitive effects. Maybe it need have gone no further. [citing *Philadelphia Nat’l Bank* and *Monfort* (10th Circuit)]

The Seventh Circuit nonetheless reviewed the other factors considered by the Commission (“the low elasticity of demand, the exceptionally severe cost pressures under which American hospitals labor today, the history of collusion in the industry,” id. at 1389), and found that they supported the Commission’s conclusion.

For antitrust counselors, it is significant that Judge Posner considered HCA’s “most telling point” to be “that the impetus for the Commission’s complaint came from a competitor.” 807 F.2d at 1391-92. He reasoned that a competitor normally would complain only about mergers that would lead to lower prices, thus suggesting that the mergers were
the certificate of need program\textsuperscript{94}). Judge Posner did not cite the Guidelines at all.

II. ANTITRUST AGENCY BRIEFING STRATEGIES

Why is the FTC's record in adjudicated merger decisions better than the Antitrust Division's? The FTC may have been fortunate in the assignment of judges. It may have been blessed with attractive cases.\textsuperscript{95} Its "won-lost" record on appeals from Commission adjudicative decisions undoubtedly has benefited from the skepticism with which the Commission has greeted the arguments of complaint counsel.\textsuperscript{96} In addition, however, the Commission's record probably has benefited from its staff's comparatively pragmatic approach to litigating merger cases, an approach that is complemented by the imprecision of the FTC Statement and by the Statement's greater harmony with traditional case law.\textsuperscript{97} Even if the FTC's approach has not resulted in unexpected successes, it may have prevented some unexpected defeats. In contrast, the Division has adhered more closely to the Guidelines, particularly with respect to market definition, and has exhibited a greater interest in shaping the law, and this may have hurt its record.

Because the FTC's approach is more traditional, it will be discussed first.

A. FTC BRIEFING PATTERNS\textsuperscript{98}

The FTC staff has generally followed case law when litigating market definition. Perhaps the strongest indication of this is the staff's almost

\textsuperscript{94} Both of the states involved, and many others, require "certificates of need" before health care providers may build or increase beds in acute care hospitals. \textit{See generally} P. Joskow, \textit{Controlling Hospital Costs: The Role of Government Regulation} chs. 5, 7 (1981). The Commission found that certificate of need laws "pose a very substantial obstacle to both new entry and expansion of bed capacity in the Chattanooga market." \textit{See} Hospital Corp. of Am., 106 F.T.C. at 495.

\textsuperscript{95} \textit{Cf.} White, supra note 9, at 19 (noting egregiousness of \textit{Warner Communications} and Coca-Cola. However, records of the hearings in \textit{Warner Communications} and Coca-Cola (and PPG) suggest that the issues were seriously disputed.

\textsuperscript{96} At the Commission level, complaint counsel have prevailed in less than 25% of recent merger decisions. \textit{See supra} note 73. This may have prevented some appellate losses. \textit{Compare} Yamaha Motor Co. v. Federal Trade Comm'n, 657 F.2d 971 (8th Cir. 1981) (enforcing with minor modification August 1980 Commission order finding a joint venture illegal) \textit{with} Tenneco, Inc. v. Federal Trade Comm'n, 689 F.2d 346 (2d Cir. 1982) (vacating September 21, 1981 potential competition order) \textit{and} Kaiser Aluminum & Chem. Corp. v. Federal Trade Comm'n, 652 F.2d 1324 (7th Cir. 1981) (vacating May 1979 order where Commission erred in market definition and in its interpretation of United States v. General Dynamics Corp., 415 U.S. 486 (1974)).

\textsuperscript{97} \textit{See} text accompanying notes 29–38, \textit{supra}.

\textsuperscript{98} The discussion that follows makes reference to the following FTC briefs and submis-
routine invocation of the "submarket" concept,99 in spite of the general rejection of the concept in the Guidelines and the FTC Statement.100 More generally, and with a few notable exceptions, on market definition issues the FTC staff has paid ceremonial obeisance to the Guidelines' 5

99 See FTC Coca-Cola Brief at 16 ("There are also local markets in which concentrate companies could exercise market power."); FTC Occidental Proposed Findings at 32-33 ("Within broadly defined relevant geographic markets, there may also be other geographic markets with Section 7 significance. [citing Brown Shoe and Pabst]"); FTC PPG Proposed Findings at 12 ("It is well settled that, within a broad overall market, there may be well defined narrower markets that, in themselves, constitute appropriate markets for antitrust purposes. [citing Brown Shoe]."); see also id. at 46-47 ("In addition, it is possible to have several narrower product markets within the outer scope of a more encompassing overall market. ... Just as the relevant product market may be considered both as an overall one and various narrow ones, so, too, can the geographic market."). (citations of, among other cases, Continental Can, United States v. Aluminum Co. of Am., 377 U.S. 271, 275 (1964), and Brown Shoe, omitted); FTC Warner Appeal Brief at 31 n.25 ("Whether or not there is a broader product market inclusive of both prerecorded music and home taped music is irrelevant to the question of whether prerecorded music alone is also a distinct line of commerce.") (citations omitted); FTC Warner Trial Brief at 11 ("The impact of the challenged merger must then be measured in each economically significant market. ... When, as here, a merger may have anticompetitive ramifications in any market, it must be found to violate the law."); FTC Bass Bros. Brief at 15 ("The impact of the challenged acquisition must then be measured in each economically significant market. ... If the acquisition may substantially lessen competition in any market, it violates the law.").

100 See supra notes 21-22, 35. In other respects, however, case law and the FTC Statement use comparable tests for market definition. Id.
percent "foiling" test, and then ignored it as of little practical relevance. FTC briefs generally employ a standard format: open with the traditional market definition standards, acknowledge the approach of the Guidelines, and then retire to the traditional approach, while referring occasionally to responses to price increases.

The proposed findings of fact in PPG provide a good example. The discussion of product market definition opened by saying a product market "may be defined in terms of the 'cross-elasticity of demand' or the 'reasonable interchangeability of use' between the product in question and potential substitutes," citing Continental Can and duPont (Celophane). This was followed by a paragraph describing the significance of customers' ability to respond easily to price increases by turning to alternatives, but the submission explains that "direct evidence of the likely effect of a price increase . . . will not usually be available," so "it will usually be necessary to infer the likely parameters of a relevant product market by evaluating other evidence relating to product substitutability." Although the proposed findings referred to a witness's testimony about likely responses to a price increase, the great bulk of the argument focused on physical attributes of the products and on the perceptions of the sellers. Finally, the proposed conclusions of law failed to mention the Guidelines at all.

Not surprisingly, the PPG defendants expended considerable energy arguing that "the Commission here ig-

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101 But see FTC Occidental Brief at 9–21 (principally relying on statements of witnesses concerning responses to price changes). Whether or not because of the FTC's approach to the issue, the FTC's proposed product markets were not accepted by the court. Occidental Petroleum Corp., 1986–1 Trade Cas. (CCH) at 62,512–13.

102 FTC PPG Proposed Findings at 5; see also FTC Coca-Cola Brief at 9 (same opening); FTC Occidental Brief at 9 (same opening); FTC Bass Bros. Brief at 16 (same opening); FTC Warner Trial Brief at 11 (same opening). For a comparison between the Guidelines' approach to market definition and "reasonable interchangeability-cross-elasticity of demand" approach, see Werden, supra note 20, at 572–75.

103 FTC PPG Proposed Findings at 5–6. Of course, as noted above, see supra at note 19 the 1984 Guidelines, unlike the 1982 Guidelines, also recognize this.

104 FTC PPG Proposed Findings at 46–47. Compare FTC Warner Trial Brief at 12–13 (given huge difference in price between prerecorded music and home taped recordings, a 5% price increase would be inconsequential) with FTC Warner Appeal Brief at 30–36 ("criteria include: industry or public recognition of the market as a separate economic entity; peculiar characteristics; distinct customers; distinct vendors; distinct prices; and sensitivity to price changes;" Guidelines relegated to two footnotes). Some other FTC briefs devote greater proportions of their arguments to the consequences of a hypothetical price increase. See FTC Coca-Cola Brief at 11 (heading reads: "A Significant Increase in the Price of Concentrate or CSD Would Not Result in Significant Substitution to Other Beverages;" argument uses this as well as more traditional factors); FTC Bass Bros. Brief at 16–20 (principal focus on lack of interchangeability, but secondary attention to (related) question of response to price increases).
nores this [the Guidelines'] general framework for defining a product market and in fact fails even to cite the Guidelines in this respect."

The FTC's PPG discussion of geographic markets also did not refer to the Guidelines; instead, the submission relied on *Brown Shoe* and *Pabst Brewing.* Other briefs are similar. Another example of FTC litigation strategy is provided by its proposed findings in *Federal Trade Commission v. Occidental Petroleum*, which argued geographic market under both a Guidelines' "foiling" approach and the Elzinga-Hogarty "pattern of shipments" approach.

The FTC's approach to litigating competitive effect appears to have been influenced by its experience in *Federal Trade Commission v. Warner Communications*. Much of the trial court brief was devoted to explaining why "[c]haracteristics of the market" facilitated the "interdependent, anticompetitive conduct or tacit collusion" that was likely to result from the challenged joint venture—an approach that is consistent with the FTC Statement. As noted above, the trial court denied the FTC's request for a preliminary injunction because it found that collusion was unlikely. On appeal, the Commission vehemently protested that this was an improper standard. "Section 7 of the Clayton Act was specifically intended by Congress to arrest restrictions of competition in their incipiency," the FTC argued, citing *du Pont (Cellophane)* and *Brown Shoe*;
a "prima facie violation" had been "firmly established" by evidence that the two defendants were substantial competitors, concentration would be increased in an industry witnessing a trend toward increased concentration and no recent entry, and some interdependence already was evident among the major firms.\textsuperscript{112} The Ninth Circuit reversed.

The pattern for more recent FTC briefing of "competitive effect" was set by its brief in \textit{Federal Trade Commission v. Bass Bros. Enters., Inc.},\textsuperscript{113} which the FTC filed nine days after the Warner Bros. trial court defeat. In the brief, the FTC both relied on traditional case law and told a collusion story. The brief first presented a four-page, traditional section captioned "This Acquisition Would Eliminate Substantial Competition and Unduly Increase Concentration in the U.S. Carbon Black Market."\textsuperscript{114} Cases cited include \textit{Brown Shoe}, \textit{Continental Can}, \textit{Philadelphia National Bank}, and \textit{Aluminum Co. (Rome Cable)}. Reference was made to "incipiency," to preventing even small increases in concentration in concentrated markets, and to the advantages of having many sellers;\textsuperscript{115} alleged market

\textsuperscript{112} FTC Warner Appeal Brief at 37. The FTC's occasional reliance on "trends towards increased concentration" also is suggestive of its continued use of pre-Guidelines thinking about competitive effect, although, as noted above, the FTC Statement refers to concentration trends. In addition to the Warner Appeal Brief, see FTC Bass Bros. Brief at 41–45; id. at 44:

The carbon black industry is not merely witnessing a trend toward higher concentration; the trend is a stampede. ... A tendency toward concentration has long been held to be a significant factor in judging the legality of an acquisition, recognized not only in the case law but also in the more recent guidelines of the antitrust enforcement agencies. United States v. Continental Can Co., 378 U.S. 441, 461 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964); ... Marathon Oil Co. v. Mobil Corp., supra, 530 F. Supp. at 324–25; FTC Statement, supra, at [6901-3].)

\textsuperscript{113} FTC Bass Bros. Brief at 25–29.

\textsuperscript{114} FTC Bass Bros. Brief at 25–29.

\textsuperscript{115} The discussion features a lengthy quotation from an earlier decision by the District Court for the Northern District of Ohio, Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 319 (N.D. Ohio), aff'd, 669 F.2d 371 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982), which quotation has been featured in a number of FTC briefs:

[T]he greater the degree of concentration in a particular industry, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." "It is the basic premise of [Section 7] that competition will be most vital when there are many sellers, none of which has any significant market share."

... What Congress intended in enacting Section 7 was to arrest restraints of trade and/or monopolistic tendencies "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."
shares were compared to the Guidelines and to an assortment of cases. This section was followed by an even longer section arguing that "[t]he increased concentration resulting from this acquisition creates opportunities for interdependent, anticompetitive conduct or tacit collusion" and that barriers to entry are substantial. In short, FTC briefs now include substantial doses of both traditional concern with concentration and of the more "au courant" concern with collusion.

B. ANTITRUST DIVISION BRIEFING PATTERNS

Although the Division's approach to merger litigation has not been altogether consistent, in general the Division has adhered more closely easier to conceal where concentration is high, the Guidelines' presumptive approach to highly concentrated markets is justified on the basis of explicit collusion alone.".).


117 Id. at 35–40. The "competitive effect" argument in the FTC's briefs in Coca-Cola in Occidental Petroleum closely follow the Bass Bros. pattern, although the discussion of collusion is only a small part of the Coca-Cola brief and in Occidental Petroleum it is largely limited to discussion of ease of entry. In FTC PPG Proposed Findings, the conclusions of law emphasize concentration, the loss of inter-firm competition, and entry barriers, rather than collusion as such, id. at 47–51, but the proposed findings of fact include a discussion of the market's susceptibility to collusion, id. at 20–21.

The FTC's brief in Hospital Corp. of Am. v. Federal Trade Comm'n, is an exception to the usual pattern. Much of the traditional rhetoric is absent, although the brief, unlike Commissioner Calvani's opinion, makes passing references to the principal holdings of Brown Shoe, Continental Can, and Federal Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 577 (1967), FTC HCA Brief at 39–41, 55 n.79. The brief explicitly states that "market share data alone are not conclusive," Brief at 40, and gives significant attention to the various qualitative factors on which the Commission relied, id. at 42–37 (entry barriers, low price elasticity of demand, ease of engaging of price discrimination, tradition of information exchanges and of coordinated behavior). See generally Hospital Corp. of Am., 106 F.T.C. at 489–511.

to the Guidelines—particularly in their approach to market definition—than the FTC. For instance, at least two briefs proclaim that their "legal analysis . . . is drawn primarily from the case law and the United States Department of Justice 1984 Merger Guidelines." Division briefs also have tended to be less adversarial, more balanced or even academic, and more directed toward changing the law.

1. Faithfulness to the Guidelines

The Division's comparative faithfulness to the Guidelines, and the resulting contrast with the FTC, is seen most sharply on issues of market definition. Whereas FTC briefs typically feature cases and merely acknowledge the Guidelines, Division briefs typically feature the Guidelines. Although several Division briefs cite or quote Brown Shoe's "reasonable interchangeability" and "cross-elasticity of demand" standards, the briefs typically devote substantially more attention to whether or not consumers would change consumption patterns in response to a "small but significant and non-transitory increase in price."
The Division's dedication to the Guidelines' approach to market definition is strikingly illustrated by its recently filed appellate brief in *Archer-Daniels-Midland*. This case featured cross-motions for summary judgment on product market definition, with the Division arguing for a market limited to high fructose corn syrup ("HFCS") and defendants arguing that sucrose and other sweeteners should be included. The Division lost, and the trial court issued a lengthy and quite traditional opinion holding that "undisputed evidence of interchangeability, cross-elasticity and price correlation between HFCS and sugar" supported the broader market.\(^{122}\)

The Division's appellate brief made an unenthusiastic argument that the court misapplied these tests,\(^{123}\) but boldly centered its appeal on the trial court's failure to apply the Guidelines' approach to market definition. Thus, the first, and predominant, issue on appeal is said to be "[w]hether the district court erred in holding legally irrelevant abundant evidence that a small but significant and non-transitory increase in the price of HFCS would not cause HFCS users to switch to sugar . . . ."\(^{124}\) To overstate the matter only slightly, the trial court was said to have erred because it failed to apply the Guidelines.\(^{125}\)

issued by the time the trial brief was filed and the Division was still citing and quoting the case law of the 1960s, Brief at 10–11, 14. The heart of the Division's case was a survey that was to "demonstrate that customers would respond to a significant extent to price changes by shifting their business to banks in other nearby communities." Id. at 27. The importance of approaching the issue consistently with the Guidelines is suggested by a prominent statement of the test of a geographic market—a statement that is consistent with the Guidelines but quite unhelpful in a case in which the Government is seeking to expand the market proposed by defendants: "The key question is what is the smallest area in which a group of sellers would likely be able explicitly or tacitly to coordinate their actions and raise prices or otherwise depart from competitive market performance." Id. at 14 (emphasis added; footnote omitted).


\(^{123}\) *DOJ ADM Appeal Brief* at 37–43.

\(^{124}\) *DOJ ADM Appeal Brief* at 2; see also id. at 16 ("the court applied an improper test of market definition in holding that undisputed evidence of interchangeability, cross-elasticity, and significant price correlation precluded the government from proving that the relevant product market consists of HFCS alone"). The Division modestly noted that "[t]he district court . . . was not obligated to use the Merger Guidelines," as such, id. at 27, but it clearly is asking the Eighth Circuit to hold that the trial court erred in not using them.

\(^{125}\) *Archer-Daniels-Midland* provides another example of the Division's faithfulness to the Guidelines. Although the Division argued that HFCS suppliers chose an "underpricing strategy . . . for displacing sugar," and this was a cause of the correlation between the prices of HFCS and sucrose, *DOJ ADM Motion Brief* at 36, the Division's market definition theory addresses only the possibility that an HFCS monopolist could increase prices from today's level. See *DOJ ADM Appeal Brief* at 22 n.24. This is in accord with the Guidelines, which are concerned only with prospective increases in a group of competitors' ability to raise prices. Both the 1982 and 1984 Guidelines define markets by postulating hypothetical price increases (usually 5%, although in practice the Division is now using 10%), and then measuring buyer responses (usually within one year). 1982 *GUIDELINES*, 2 Trade Reg. Rep. (CCH) at 6881-8; 1984 *GUIDELINES*, 2 Trade Reg. Rep. (CCH) at 6879-9.
The best illustration of the difference between the Division's and the FTC's approach to litigating mergers is their treatment of the "submarket" concept. Division briefs are markedly more faithful to the Guidelines' abandonment of this concept. In Calmar, Rice Growers, and Central State Bank the Division was arguing for narrow markets, but did not resort to the submarket concept. The Division's Virginia National Bank brief mentioned submarkets but did not rely on them. The Archer-Daniels-Midland appellate brief also is a good example of the Division's distaste for submarkets. In the district court, the Division had argued that HFCS and sucrose, and only these two products, "are functionally interchangeable for virtually every known use of HFCS." In classic submarket reasoning, Division trial lawyers further argued that "[t]he existence of a market including both HFCS and sucrose would not negate the existence of a market including only HFCS, since narrow relevant product markets may be carved out of broader product markets." The Division's appellate brief firmly disassociated itself from this use of the submarket concept. The brief argued that the relevant market—the only relevant market—is HFCS.

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126 **DOJ Virginia National Brief** at 11 ("Within a broad product market, there may also exist relevant product sub-markets which will be adversely affected by a merger or acquisition.") (quoting at length from Brown Shoe). The brief also claimed that each of a number of banking services could constitute a separate submarket, Brief at 13, but this possibility did not affect the outcome of the litigation. See infra note 141.

127 Since the Division was advocating a broader geographic market than defendants (although only a single county), the submarket concept would not have been directly applicable, but it might have been useful as part of an explanation of why merger of banks in separate towns could lessen competition even if each town, separately, was a focus of competition.

128 **DOJ ADM Motion Brief** at 15.

129 **DOJ ADM Motion Brief** at 34 (citing Continental Can, Rome Cable, and Brown Shoe). The Division's rechristening of the concept of submarkets as "narrow relevant product markets" is indicative of its reluctance to rely on the concept, as is its relegation of any mention of the concept to the last half of the brief. Cf. id. n.20 ("Narrow relevant product markets contained within broader markets are sometimes described as 'submarkets' in antitrust cases"). See generally Complaint at 6, United States v. Industrial Asphalt, Civ. No. 85 4631 (RC) (C.D. Cal. filed July 15, 1985) (merger complaint alleging submarkets rechristened as "smaller geographic markets within the greater Los Angeles market").

130 See **DOJ ADM Appeal Brief** at 13 ("The court, thinking that the government proposed HFCS as a relevant product 'submarket,' . . . .") The appellate brief was written by an entirely new group of attorneys (including the assistant attorney general and one of his deputies). The district court brief had been signed by five staff attorneys; the senior one is listed as "of counsel" on the appellate brief.

131 Involvement of high-ranking attorneys also was associated with decreased attention to submarkets in Waste Management. On appeal, the Government was trying to preserve trash collection markets that separated Fort Worth from Dallas and commercial from residential service. The post-trial brief, which had been written in Fall 1981, by six trial attorneys, relied heavily on the submarket concept. **DOJ Waste Management Trial Brief** at 7 ("Nor is the existence of a broad market inconsistent with a relevant geographic sub-
Although Division briefs are quite faithful to the Guidelines in their approach to market definition, they generally follow traditional case law when arguing likely competitive effect. Division briefs rely heavily on the presumption flowing from high market shares and concentration, and tell less of a “collusion story” than does the FTC. However, recent Division briefs do not discuss concentration trends.

2. Shaping the Law

Antitrust Division briefs also differ from FTC briefs in that more of them appear concerned with issues somewhat extraneous to the litigation immediately in question. To oversimplify, the FTC seems more interested in winning, the Division seems more interested in shaping the law.

The bank cases are the best examples of the Division’s concern with shaping the law. For quite some time now—indeed, since before Phil...
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Philadelphia National Bank1 — economists and other commentators have concluded that competition in financial services can best be understood by considering a number of separate, "disaggregated" product markets, e.g., consumer transaction accounts, business transaction accounts, consumer loans, commercial loans (and maybe small business commercial loans).2 The Antitrust Division has been converted and has preached this gospel in several forums, including in its comments to the banking regulatory agencies, which initially decide the lawfulness of most proposed mergers of banks and thrift institutions.3 Although the Division's position is analytically sound, these agencies remain unpersuaded and continue to use "commercial banking" product markets.4

Having failed to convince the banking agencies, the Division has sought to advance its view of banking market definition at trial.5 Thus, in Virginia National Bankshares, the Division asserted separate "wholesale" and "retail" banking markets, and numerous service-specific submarkets within each market, and it freely admitted that it had "defined the lines antitrust cases, might have been particularly enchanted with the prospect of winning summary judgment on such a fact-specific issue as market definition. See generally Calkins, Summary Judgment, Motions to Dismiss, and other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986). However, the Division's interest in deciding a central issue on summary judgment also may have been stimulated by its perception that defendants were planning an imposing "efficiencies defense," the burden of which could have "dwarfed" the burden of market definition. See DOJ ADM Trial Brief at 2 n.2.

Appellees in Central State Bank pointedly noted that the Government's chief economist "disagreed with the Supreme Court in 1963 when it first defined the relevant product market in bank cases to be commercial banking." Appellees' Brief at 38.


See supra note 136; see also ANTITRUST LAW DEVELOPMENTS ch. 3.G (2d ed. 1984 & Supp. 1986); S. Calkins, Bank Mergers and Competition (Sept. 9, 1987) (prepared for the Banking Law Institute sponsored by the University of Texas School of Law and the Texas Department of Banking).

However, these agencies are increasingly including some or all of the deposits of thrift institutions in their calculations of market shares, and they have started to consider, in an unquantified way, the presence of non-depository institutions. Numerous cases are reviewed in the authorities cited in the preceding two footnotes.

See, e.g., Philadelphia Nat'l Bank, 201 F. Supp. at 361 (Government alleged the following markets: "Commercial banking, commercial and industrial loans, installment lending to individuals, single payment loans to individuals, real estate loans, personal trusts, time deposits of partnerships and corporations, time and savings deposits, demand deposits, and IPC (Individual, Partnership and Corporation) demand deposits").
of commerce...differently than it has in most bank cases." What is intriguing about the Division's advocacy of these markets—advocacy on which it expended considerable effort—is that product market definition did not appear likely to affect the outcome of the litigation.

The Division's campaign to reform bank merger law also appears to have influenced its strategy in United States v. Central State Bank. The extent of this influence can be best understood in light of the facts. The two largest banks in rural Benzie County, Michigan, combined to control over 60 percent of total deposits. Although the defendants initially argued that thrifts and nondepository institutions should be included in the market, this argument was unlikely to affect the outcome significantly since Benzie County had no thrifts and had only two insignificant credit unions (and the court ultimately defined the product market as commercial banking). The defendants' only hope of prevailing was to expand the geographic market to include at least a second county, Grand Traverse County—including, as the determinative location, Traverse City, a regional center 32 miles away from one bank, and 40 miles away from the other. Between Traverse City and the two banks lies mostly farm land; the connecting ribbon is a two-lane country road, and the land is snow-covered much of the year.

The record appeared favorable to the Government. Simple geography compelled a one-county market: who would travel 45 minutes to do their banking when alternatives were at hand? The merging banks drew almost all of their business from within the county, and the Division had assembled what appeared to be impressive testimony from local

140 DOJ Virginia National Brief at 11.
141 See Virginia Nat'l Bankshares, 1982-2 Trade Cas. (CCH) at 72,350 (after noting that the parties would not agree to a stipulated product market, the court reviewed a number of proposed market definitions and then concluded that "it really doesn't make any difference which of these definitions you wanted to go to"); Wertheimer, DOJ Tries Out its 5-Percent Geographic Market Test, Legal Times, Aug. 30, 1982, at 17 ("the case was tried solely on the geographic market issue").
142 817 F.2d 22 (6th Cir. 1987).
143 621 F. Supp. at 1280, 1286. The combination was effected only indirectly, through the acquisition of a bank by an individual controlling another bank.
144 Defendants' Trial Brief at 16 (brief filed Nov. 1, 1984), United States v. Central State Bank, 621 F. Supp. 1276 (W.D. Mich. 1985) (No. G82-72-CA7) ("The Government will contend that the relevant product market is limited to commercial banks. Defendants contend that, with the advent of deregulation in the banking industry, all institutions that offer financial services and products to the public must be included in the market.").
145 DOJ Central State Appeal Brief at 5 n.4.
146 Computed and recorded by a government-sponsored videotape introduced as evidence. DOJ Central State Appeal Brief at 16.
147 DOJ Central State Trial Brief at 43-44.
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bankers that they looked only to in-county banks when setting loan rates. Even one of the defendants had testified (in another proceeding) that the relevant market was limited to the county!

Somehow the defendants won a bench trial by persuading the trial court to find that the geographic market nonetheless included Grand Traverse County. The court essentially relied on only three pieces of evidence. First, the 1980 census showed that 17.2 percent of Benzie County's residents were employed in Grand Traverse County. Second, a market study comprised of a survey of 400 people funded by the Traverse City newspaper (hardly an unbiased sponsor) found that almost 30 percent of Benzie County residents use a Grand Traverse supermarket as their sole or primary food source, and an additional 27 percent use it as a secondary food source, and a substantial minority of Benzie County residents had made their last clothing purchase in Traverse City. Third, banks located in Grand Traverse County held 15.03 percent of the deposits of Benzie County residents. Based on these three facts, the court concluded that "Benzie residents may practicably turn to Grand Traverse banks for banking services."

The Division appealed, but not on geographic market grounds. Instead, it argued that the trial court had committed a single error of law, namely, holding "that the Supreme Court has established, as a matter of law, that the product market within which the effect of an acquisition involving commercial banks must be evaluated is a 'cluster' of all commercial banking services." The Division then devoted 10 of the 20 pages of

148 DOJ Central State Appeal Brief at 17.
149 DOJ Central State Appeal Brief at 17 n.22. Other evidence included the Michigan Employment Security Commission's definition of the Grand Traverse labor market, which included two other counties but not Benzie County, Id. at 18 n.26, and the failure of banks outside Benzie County to advertise or be listed in the Benzie County telephone directory, Id. at 17 n.24.
150 621 F. Supp. at 1280, 1293. The court relied essentially on only three pieces of evidence. First, the 1980 census showed that 17.2 percent of Benzie County's residents were employed in Grand Traverse County. Id. at 1280, 1293. Second, a market study comprised of a survey of 400 people funded by the Traverse City newspaper (hardly an unbiased sponsor) found that almost 30 percent of Benzie County residents use a Grand Traverse supermarket as their sole or primary food source, and an additional 27 percent use it as a secondary food source, and a substantial minority of Benzie County residents had made their last clothing purchase in Traverse City. Id. at 1281, 1293 (numbers multiplied by author). Third, banks located in Grand Traverse County held 15.03 percent of the deposit of Benzie County residents. Id. at 1281-82, 1983. On page 1293, the court misstates the percentage as 18.72 percent, but from page 1282 it is clear that this figure refers to holdings at all Grand Traverse financial institutions, not just commercial banks.) Based on these three facts, the court concluded that "Benzie residents may practicably turn to Grand Traverse banks for banking services." Id. at 1294.
151 DOJ Central State Appeal Brief at 2. According to the Division, the first "issue presented" on appeal was "whether the district court correctly held that the product market in
its argument to explaining why the traditional "commercial banking" market must be expanded to include thrifts and nondepository institutions. Finally, the Division argued that the trial court should have defined several separate product markets—"small business loans, consumer transaction accounts, and business transaction accounts"—and then argued that had it done so, the court would have defined a one-county market for each of these three product markets.

Although the Division's characterization of the lower court's opinion was a little unfair, the Division's position was correct as a matter of legal theory. Geographic markets should be defined in light of product markets; consumers and businesses purchase a number of different financial services; a merger of financial service providers can best be evaluated by considering its effect on competition to provide each of several services, each in an appropriate geographic market; and, had the trial court done this, it might well have found for the Division (and improved bank merger law in the process).

Even if the Division's position was sound as a matter of theory, however, it was not the strategy best calculated to achieve reversal of the lower court's opinion. A commercial banking market is not inconsistent with finding a one-county geographic market, according to traditional case law. In both Philadelphia National Bank and Phillipsburg National Bank, trial courts had reasoned that the ability of major commercial banking customers to borrow statewide or even nationwide compelled a finding of a broad geographic market. In both cases the Supreme Court reversed, using reasoning quite consonant with that currently advanced by the Division, except that the Court used geographic submarkets to respond to the special needs of small consumers, whereas the Division would commercial bank merger cases is predetermined as a matter of law and that it was precluded from considering the issue as a question of fact." Id. at 1. The other issue was "[w]hether this case should be remanded for findings of fact by the district court with respect to the effect of the challenged acquisition on competition in product and geographic markets defined on the basis of the record." Id.

152 DOJ Central State Appeal Brief at 28-32, 33-37.

153 DOJ Central State Appeal Brief at 38 (relying almost exclusively on its expert witness).

154 The Government had jumped on the lower court's finding "as a matter of law" that the product market was the traditional cluster market, and asserted that "the court believed that it was not at liberty to take account of the effect of the acquisition on individual bank services." DOJ Brief at 3. In fact, the trial court discussed some of the relevant evidence and appears merely to have mischaracterized a fact-finding as a finding of law; the court of appeals recognized this and applied a "clearly erroneous" standard. 817 F.2d at 24 ("Because the trial court anchored its decision upon the facts developed during the course of trial, its relevant product market definition is reviewable by this court under the clearly erroneous standard.") (citation omitted); cf. Fed. R. Civ. P. 52(a) ("Finding of fact shall not be set aside unless clearly erroneous . . . ").
respond to those needs more elegantly with disaggregated product markets.

In *Philadelphia National Bank*, the trial court had dismissed the action after finding that the geographic market substantially exceeded the four-county Philadelphia metropolitan area where the merging firm had offices, because bank customers—and particularly larger ones—could turn to suppliers outside the area. The Supreme Court reversed, and, based on its own review of the record, limited the market to the metropolitan area. The Court grounded its decision squarely on the inability of small customers to obtain certain banking services at significant distances.

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Not only must the Court consider the origin of the bank's business, but equally as important are the alternatives available to the customer. Borrowers are not limited by political boundaries, although the smaller ones are limited in range. The alternatives available necessarily depend on the size and financial condition of the customer.

The larger customers definitely have alternatives ranging from regional to national. It was very surprising to learn at the trial of this case that not only New York banks solicit and receive substantial business from customers within the four-county area, but also large banks from all the larger cities in the nation do likewise. Further, the Court is satisfied that PNB and Girard derive a substantial amount of business from without the four-county area.

What then is the "section of the country"?... It probably would be more accurate to state that the relevant geographic market includes the greater part of the northeastern United States.

156 In now-famous language, the Court wrote as follows:

The proper question... is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. See Bok, Mergers and Markets (1960), 42. In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. [citing, in a footnote, testimony that 'small business concerns known primarily locally... may consider that their market is a strictly local one," 374 U.S. at 358 n.35]

We recognize that the area within which appellees have their offices does not delineate with perfect accuracy an appropriate "section of the country"... Large borrowers and large depositors... may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood;... So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.

374 U.S. at 357-58, 360-61. In response to the defendants' claim that large banks outside the Philadelphia area provided competition, the Court reasoned that "competition from
The Court noted the high percentage of the defendants' business that originated in the metropolitan area (between 54 percent and 93 percent, for various kinds of loans), and discounted even the relatively small percentage of business that the merging firms earned outside Philadelphia, since most of that business was with large customers, which "reinforces the thesis that the smaller the customer, the smaller is his banking market geographically." Similarly, in Phillipsburg, the district court had upheld a merger based upon its finding that an area surrounding the two towns in which the banks had offices, including towns from one to 16 miles away, was an area of "economic integration" with "[r]egular movement of population to and from places of business and employment and to stores for consumer goods throughout the entire area." The Supreme Court reversed, in an opinion that (1) defined the product market as commercial banking, but (2) defined the geographic market by emphasizing the needs of small depositors and small borrowers. The Court explained that "it is important to consider the places from which it [a bank] draws its business, the location of its offices, and where it seeks business.

outside the area would only be important to the larger borrowers and depositors. If so, the four-county area remains a valid geographical market in which to assess the anticompetitive effect of the proposed merger upon the banking facilities available to the smaller customer—a perfectly good "line of commerce," in light of Congress' evident concern ... with preserving small business." 374 U.S. at 360 n.37 (citation omitted).

The Court's emphasis on a submarket approach is made clear from the referenced discussion by Dr. Betty Bock: "Any geographic area where an acquisition makes, or may make, a substantial competitive difference is an appropriate one for scrutiny. The areas closest to a company's plants may be relevant if competition there is affected. But a showing that competition is not substantially affected in such an area will not validate an acquisition if there may be substantial competitive effects elsewhere." B. Bock, MERGERS AND MARKETS: AN ECONOMIC ANALYSIS OF CASE LAW 42 (1960) (emphasis in original).

157 374 U.S. at 359 & n.36. The Court also referenced non-binding geographic market definitions by the banking agencies. Id. at 361 (citing reports by the FDIC and the FRB to the Comptroller of the Currency, and the Comptroller's statement approving the merger).

158 374 U.S. at 321 & n.36.


160 399 U.S. 350, 359–60 (1970) (reversing district court, which appeared to have considered competition from other financial institutions).

161 399 U.S. at 363. Also emphasizing the importance of where the merging firms draw their customers is a potential competition case, United States v. Connecticut National Bank, 418 U.S. 656 (1974). There the trial court, finding for defendant, had defined the state of Connecticut as the relevant geographic market. This was improper, the Court wrote, because the two banks "are not direct competitors on that basis." 418 U.S. at 667. Their offices were in and most of their business was from southwest Connecticut. "Common sense ... would indicate that the relevant market areas of CNB and FNH [the two banks] generally coincide with where each has established branch offices." 418 U.S. at 656, quoting the trial court, 362 F. Supp. 240, 250 (D. Conn. 1973). In a potential competition case, "the relevant geographic market of the acquired bank is the localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank."
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As for where customers might turn, the Court was impressed by one witness' testimony that one town's families all "deal with one or another of the three commercial banks in that city" and "[t]he town's businessmen prefer to do the same." Finally, quoting its earlier opinion in Philadelphia National Bank, the Court reasoned that in banking, "convenience of location is essential to effective competition," particularly for the business of small customers.

Although the market definition discussions of Philadelphia National Bank and Phillipsburg are not models of elegance, they are clear precedent for defining commercial banking geographic markets based upon the needs of small businesses and of consumers desiring transaction accounts. Accordingly, the disaggregation of banking services was not necessary to prevail on geographic market definition. Nor was disaggregation important for measuring market shares. Thus, the Division's approach must be explained by its interest in reforming bank merger law.

418 U.S. at 667; see also United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622 (1974) (market is "the area in which the acquired firm is an actual, direct competitor") (potential competition case).

162 Id. at 363.
163 399 U.S. at 356.
164 399 U.S. at 364:

The small borrower . . . must often depend upon his community reputation and upon his relationship with the local banker. PNB [one of the merging banks], for instance, has made numerous unsecured loans on the basis of character, which are difficult for local borrowers to get elsewhere. And, as we said in Philadelphia Bank, supra, at 369, "[s]mall businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs . . . ."

The Court also reasoned that small depositors may patronize convenient banks even at the price of foregoing higher interest rates offered elsewhere. 399 U.S. at 363.

165 Cf. DOJ Virginia National Brief at 17–18 (quoting Philadelphia National Bank's language about small customers, without making clear the relation of this argument to the Division's product market argument). Compare DOJ Central State Trial Brief at 40–42, 49 (quoting much of the Philadelphia Nat'l Bank and Phillipsburg language discussed above) with DOJ Central State Appeal Brief (language not quoted).

166 See DOJ Central State Trial Brief at 60 ("courts have generally relied on shares of total deposits as a reasonable proxy for the relative strength of banking competitors in consumer and business banking and for such specific products as transaction accounts and business loans as well"); DOJ Virginia National Brief at 30 ("Since deposits support loan portfolios as well as other services, they have traditionally been used as a proxy for various services which can comprise lines of commerce.").

167 That the Division was interested in reforming bank merger law also is suggested by the Division's assembling, prior to the filing of the Central State appeal, a series of letters from the banking agencies that the Division characterized as supporting its views: "Before pursuing the present appeal, the Antitrust Division took steps to confirm that its reading of Philadelphia was shared by the federal banking agencies. All three agencies informed us by letter that they agreed with this legal position." DOJ Central State Reply Brief at 7–8 (citing letters); see also Hauberg, supra note 136, at 11 nn.17–19 (citing letters). If this
3. Effect of Division's Approach on Outcomes

It seems reasonably clear under the Antitrust Division's approach to merger litigation, winning is a subsidiary concern, subsidiary to an interest in adhering to the Guidelines' approach to market definition, and, on occasion, to an interest in shaping the law in other respects. It would be surprising if this relative deemphasis on winning did not adversely affect the Division's record in court, and in fact, this appears to have been the case. The reliance on established case law in the numerous recent opinions condemning mergers at least suggests that a plaintiff who foreshadows reliance on this law places itself at a disadvantage.168

To the extent that the Division's approach handicaps it, much of the problem is attributable to the difficulty of litigating the Guidelines' approach to market definition.169 The 1984 Guidelines themselves recognize that evidence directly relevant to their central foiling inquiry usually will be unavailable, and numerous observers have concurred or have more strongly emphasized the challenges of applying this test in an adversarial context.170 Although the Guidelines' measure of concentration, the Herfindahl-Hirschman Index, has been widely used, the Guidelines are rarely cited regarding market definition.171 The Guidelines' characterization was meant to suggest that the agencies agreed with the Division's approach to defining banking markets, it is something of an exaggeration, since the letters do little more than express a willingness to consider markets other than commercial banking.

168 As is discussed further below, the Division could not completely ignore the Guidelines in litigation, even though the Guidelines were "designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring." 1984 GUIDELINES, 2 Trade Reg. Rep. at 6879-7; 1982 GUIDELINES, 2 Trade Reg. Rep. at 6881-7. Indeed, the Second Circuit's perception that the Division was being unfaithful to the Guidelines' concern with ease of entry may have contributed to the Division's defeat in Waste Management. See Waste Management, 743 F.2d at 983 (if Government regularly considers ease of entry, may not argue that it is "irrelevant"). The question is thus not whether the Division should mention the Guidelines in litigation, but whether and to what extent it should emphasize them.

169 But cf. Waste Management, 588 F. Supp. at 502 (rejecting both Government's and defendant's proposed markets in case litigated before the Guidelines were issued). It is interesting that the FTC's only defeat among the reviewed cases occurred when it featured the Guidelines' foiling approach to market definition. See supra note 101.


171 But cf. Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493 (S.D. Fla. 1987) (following Guidelines to define market in monopolization case); Rice Growers Ass'n, 1986-2 Trade Cas. (CCH) at 61,462 (Guidelines-like language mentioned without citation); Occidental Petroleum Corp., 1986-1 Trade Cas. (CCH) at 62,512-13 (in opinion largely written by defense counsel, Guidelines cited on geographic market definition, and foiling concept
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foiling test may serve a useful role in internal Division deliberations (and it may pose what usually is the right ultimate question), but the test is unwieldy in litigation.172

The Division has advocated the Guidelines' approach to market definition in several cases, without success. In both Calmar and ADM the courts showed disregard for the Guidelines' approach (this disregard is the basis of the Division's ADM appeal).173 The most colorful expression of dubiety about the Division's approach was in Virginia National Bankshares.174 This was the first case tried after the new Guidelines had been issued, and the judge was unimpressed by the economic theorizing reflected in them.175 The court reviewed with admiration the testimony of local bankers, who described the realities of banking competition as they saw it, and the court contrasted this with the Division's approach: "[W]hen we consider the fact that what the government has here is speculative based on what might happen as distinguished from the real world which has been testified by the bankers in this case who are down at the grass-roots and know what's going on," it would be "utterly foolish to go off chasing rainbows."176

The Division's record also appears to have suffered from the Division's occasional concern with legal questions not central to the case at hand.

discussed, with interchangeability, on product market definition); Calmar, 612 F. Supp. at 1301 (words similar to Guidelines' used, without citing Guidelines, but principal reliance placed on product interchangeability); Bass Bros., 1984-1 Trade Cas. (CCH) at 68,820 ("cross-elasticity of demand" and "reasonable interchangeability of use" tests used for product market, but Guidelines-like language (without citing Guidelines) used for geographic market definition).

In contrast, the 1982 Guidelines' suggested concentration standards have been widely cited. See, e.g., ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 86 (2d ed. Supp. 1986). By switching to a new measure of concentration (the Herfindahl-Hirschman Index), the 1982 Guidelines achieved widespread attention to their recommended thresholds, because no alternative HHI thresholds were available. See Calkins, The New Merger Guidelines and the Herfindahl-Hirschman Index, 71 CALIF. L. REV. 402 (1983).

172 Accord Wertheimer, supra note 141, at 20.

173 See Calmar, 612 F. Supp. at 1301, 1303-04 (court used language of interchangeability and of cross-elasticity, and, without citing Guidelines, of a foiling test; Government's proposed market rejected because court perceived the products as interchangeable).

174 For the best post-mortem of this case, see Wertheimer, supra note 141.

175 The court also was unimpressed with the economist the Division retained to explain its theory, whom the judge labeled "the poorest expert witness that I have seen," 1982-2 Trade Cas. (CCH) at 72,352, and with the Government's consumer survey, which was the Guidelines-oriented heart of its case. The court found "that this statistical data is unreliable." Id.

176 Id. at 72,353. Of course, the Division might have lost had it relied more heavily on traditional tools of market definition. The Guidelines provided a convenient justification for expanding the geographic market beyond the limits of much current competition, and the Division could have been unsuccessful had it not relied on them.
Judicial attention is limited. The court in Virginia National Bankshares may have found it distracting or confusing for the Division to litigate novel product market categories not determinative of the outcome. The court in Central State Bank may have been confused by the Division's emphasis on product market: the court's opinion devotes more space to product market definition than to geographic market definition. (Certainly the Division's approach confused the defendants, whose pretrial brief argued vigorously for expanding the product market beyond the commercial banking market they assumed the Division would assert.177) On appeal, a straightforward approach to litigating would have based an appeal on geographic markets—perhaps even referring to submarkets—whereas the Division lost the appeal per curiam when it characterized the case as turning on product market definition (and then championed a theory that, even if sound, is at least arguably at odds with four Supreme Court cases).178 And although my involvement in ADM five years ago makes it imprudent for me to venture an opinion as to the merits of the case, it is at least unorthodox for a plaintiff to respond to a summary judgment motion with a cross-motion. Thus, in several merger cases the Division may have handicapped its litigation efforts.

C. Comment

The Division appears to have litigated with a self-imposed handicap, by adhering to its Guidelines and by pursuing ends other than simple victory. Does this call for accolades or condemnation, bouquets or brickbrats? Does it reflect a far-sighted strategy to shape the law, at the possible expense of immediate litigated cases? Is it an exemplary example of high

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177 See supra note 144.
178 817 F.2d at 22 (citation omitted):

The record disclosed that the district court evaluated the evidence of record and concluded that the government failed to factually support its claim that existing circumstances in this case warranted a departure from the definition of the relevant product market as the cluster of banking services traditionally offered in the commercial banking industry adopted by the Supreme Court in United States v. Philadelphia National Bank.

Never has there been so gleeful a brief as that filed by the appellees. It joyfully characterized the Division's brief as raising 'only one issue,' namely, did the trial court err when it followed three Supreme Court cases and found that commercial banking was the relevant product market, in a geographic area in which no thrifts and only inconsequential credit unions competed? Asking the question almost answers it. The brief also accused the Government of misleading the court (see above), argued that the lower court's independent finding of a two-county geographic market made the definition of the product market academic, and argued that product market definition also was made academic by the lower court's separate finding that competition had not been harmed. Brief of Defendants-Appellees, Central State Bank.
principle prevailing over a baser instinct to notch "kills"? Or is this an example of a prosecuting office that has strayed impermissibly—or at least unwisely—from its central mission, and may have lost its orientation in the process?

As with so many issues, there is truth on both sides. The virtues of the Division's approach are substantial. Even though the Guidelines warn that they are merely internal standards that will not necessarily be followed in litigation, that disclaimer was written with false modesty. From the beginning, the Division has proselytized, advertising the virtues of the Guidelines as a superior method of antitrust analysis. Having proceeded in this fashion, it would be inconsistent for the Division to ignore the Guidelines in its own litigation. The Division's credibility would be compromised were it to campaign against a particular concept—"submarkets" is the most obvious example—and then seek refuge in the concept for litigation purposes. Moreover, as seen in Waste Management, defendants will not hesitate to use the Division's Guidelines against it, and courts may compel adherence.

Even apart from the Guidelines, an enforcement agency has a higher calling than simply winning cases. Beyond the ethical imperative to seek justice, not simply victory, the Division's mission is to educate as well as to punish, and how better to educate than by example? In addition, Division litigators ought to be cognizant of agendas larger than particular cases. It can be entirely proper to advance an important novel theory (important either for future litigation or as a deterrent), or to strive to avoid harmful precedent.

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179 Cf. J.J. Rousseau, DISCOURSE ON POLITICAL ECONOMY 294 (1755) (Everyman's Library Edition, G.D.H. Cole trans. 1950) ("For his [the ruler's] example is of such force, that even if the people were willing to permit him to release himself from the yoke of the law, he ought to be cautious in availing himself of so dangerous a prerogative, which others might soon claim to usurp in their turn, and often use to his prejudice.").

180 E.g., Berger v. United States, 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. See also Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall."); Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2135 (1987) ("The distinctive role of the prosecutor is expressed in Ethical Consideration 7-13 of Canon 7 of the American Bar Association Model Code of Professional Responsibility (1982): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

Nonetheless, there are troubling aspects to the Division’s approach to merger litigation. The more the Division regards itself as advancing a broad policy agenda, rather than simply winning meritorious cases, the further it strays from its principal role as a law enforcer. Professor Kauper has long and eloquently warned that if the Division is viewed as merely another economic regulator, it risks slipping its moral anchor and becoming subject to political gusts that formerly might have passed it by. Also at risk when the Division forsakes simple law enforcement is the performance of the Division’s duties to courts, to defendants, and to its own staff.

The Division owes a duty to the court before which it practices. Merger cases are factually complicated, and the application of legal standards to these facts is even more challenging. A government lawyer should assist a court to reach a correct result. The Division may not have been as helpful as it could. For instance, the Central State Bank appellate brief was not especially useful. The trial court erred in defining the geographic market (in my opinion), but the Division appealed on the basis of product market definition—and somewhat misstated the holding of the court below, in the process. The ADM appeal brief is another example. That brief argued essentially that the district court erred because it failed to apply the Guidelines’ “foiling” approach to market definition. But, as the Division acknowledged, that approach is not the law. If the district court erred, it did so by applying accepted legal principles to the facts. Although the Division also asserted that the court erred in its application of the law, the argument was given short shrift. Thus, the Division has not provided as much assistance to trial courts as it might have.


Persons associated with the Division have been known to quote T.S. Eliot: “The last temptation is the greatest treason: To do the right deed for the wrong reason.” T.S. Eliot, Murder in the Cathedral 44 (1935).


This is only the second basis for appeal and only six pages are devoted to it. DOJ ADM Appeal Brief at 37–43.

It also is unhelpful to allow subtle mischaracterizations of the law to go unchallenged. This may have occurred in Central State Bank. In reasoning that the product market should be commercial banking, and not specific banking services as the Government urged, the trial court stood traditional “submarket” analysis on its head. The court quoted the submarket discussion in two Supreme Court cases, United States v. Greater Buffalo Press, 402 U.S. 549 (1971), and Phillipsburg National Bank: “While there may be within the market of
The Division also has a duty to defendants not to conscript them unfairly into intellectual excursions or law reform efforts, at their substantial expense. Much of a prosecutor's responsibility is to identify the cases not to bring, the cases that do not deserve to be tried. Partly this discretion reflects the limits of government resources, but partly it also is a deliberately intended buffer in our legal system: some conduct does not merit government challenge, even though the government could prevail. Is it right for a prosecutor to file a suit that may shape the law when that suit would not otherwise be filed? It is one thing to attempt to expand the law to condemn particularly troubling conduct by major corporations.\(^8\) It is quite another to file a lawsuit against two tiny banks, or to appeal a defeat in such a suit, without strongly believing the banks' plans deserve to be stymied. One worries that *Virginia National Bankshares* was brought to test the Guidelines' approach to market definition, and to advance the Division's agenda for reforming bank product market definition, and that *Central State Bank* was brought or at least appealed as part of that product market reform effort. The outcome of a case cannot be a government lawyer's only concern, but it should remain the dominant concern.\(^8\)

commercial banking identifiable submarkets, 'submarkets are not a basis for the disregard of a broader line of commerce that has economic significance.' " 621 F. Supp. at 1291, quoting *Greater Buffalo Press*, 402 U.S. at 554; *Phillipsburg National Bank*, 399 U.S. at 360. Of course, in both instances it was the defendant that was arguing for a narrow market definition, and the Supreme Court neatly disposed of that argument by ruling that there could be narrower submarkets as well as broader markets. Neither in those cases nor in others has the Supreme Court ever suggested that an anticompetitive effect in a properly defined submarket may be ignored where competition would not be adversely affected in some broader market. Cf. *Philadelphia National Bank*, 374 U.S. at 370 ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violation of sec. 7, embark on a series of mergers that would make it in the end as large as the industry leader."). Yet nowhere in its appellate briefs did the Antitrust Division point out the extent to which this language had been wrenched out of context.


\(^8\) Moreover, courts may react adversely to a perception that a prosecutor is relatively unconcerned about prevailing. Certainly defense lawyers believe this. The defendants' pretrial brief in *Virginia National Bankshares* pointedly protested that "the Division seeks to use this modest bank merger case as a vehicle for changing Section 7 law." Pretrial Brief of the Defendant Banks at 3, *Virginia Nat'l Bankshares* (No. 82-0083B). So also, in *Central State Bank*, the defendants prefaced their appeal brief by quoting Justice Harlan's dissenting opinion in *United States v. Phillipsburg National Bank & Trust Co.*: "How could . . . [the Justice Department] be efficiently allocating its own scarce resources if it chose to attack a merger between two banks as small as those involved in this case? . . . With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?" 399 U.S. 350, 373 (1970), quoted in Brief of Defendants-Appellees, at page preceding i, *United States v. Central State Bank*, 817 F.2d 22 (6th Cir. 1987). The perception that a government agency has filed a case it would not bring but for an extraneous concern inevitably will infect, at least in a minor way, the litigation of that case.
Finally, a government agency owes a duty to its trial staff. If agency leadership is relatively indifferent about a case's outcome, and is willing to win it only the "right" way, how will this affect the trial staff's ability to litigate even the approved approach? Few things are more demanding than trial, and if staff lawyers perceive that the outcome of a case is relatively unimportant to their superiors, will they be motivated to make the sacrifices needed to try a case successfully?

How, then, should the balance be struck? Having announced its preferred approach to merger analysis, can the Antitrust Division rely on different, albeit still valid, cases or theories to challenge mergers it has concluded are harmful? (Obviously, the Division has no business challenging mergers it does not regard as harmful, whether it could block them or not.) No one would suggest that the Division should act as can a private lawyer, who is able to allege markets for which there is only tenuous support and to rely on an unthinking application of cases that have lost the respect of much of the antitrust community. But that is not to say that the Division should never argue alternative markets or invoke more traditional case law. There must be room for compromise between principle and practicality, and the Division's course may have veered too far from practicality.

FTC lawyers have been more pragmatic, perhaps in part because this is sanctioned by the FTC Statement. The FTC Statement promises to give weight to the Guidelines, but that is not the same as incorporating them; instead, the Statement is somewhat less precise, is more respectful of case law, and is not wedded to the foiling approach to market definition. Commission opinions are similar.

There also may be an institutional explanation for the FTC's greater pragmatism. The Assistant Attorney General for Antitrust ("AAG") is responsible for the positions the Division takes in litigation, and personally reviews all important briefs. Even if the AAG were permitted to adopt divergent approaches when announcing policy and when litigating cases, any such inconsistency inevitably would create personal dishar-

189 See C. Wolfram, Modern Legal Ethics 757 (1986) ("Decisions abound in which an action by a government lawyer has been criticized because, although it would have been acceptable for a lawyer for a private-practice client to take the step in question, a government lawyer is said to owe a higher standard of discretionary fairness than do private lawyers.") (citing cases).

190 Of course, if the Division were to win its appeal in Archer-Daniels-Midland in an opinion squarely adopting the Guidelines as law, presumably it would regard its approach as entirely vindicated.

191 Cf. DOJ ADM Appeal Brief (signed by Charles F. Rule); DOJ Central State Appeal Brief (signed by Douglas H. Ginsburg); DOJ Waste Management Appeal Brief (signed by J. Paul McGrath).
mony. Moreover, it is relatively easy for Division staff to know and incorporate the views of the AAG. The FTC's structure is quite different. It is comprised of five members with fixed, over-lapping terms, so a president can change the dominant thinking at the Commission only over time. The Commission is represented in court by the general counsel's office or, as is typical at the trial court level, by staff lawyers from the appropriate Bureau. These lawyers are charged with representing "the Commission," which may mean representing a group that regularly experiences internal disharmony. Even where the commissioners are in accord on an issue of policy, there is distance between policy pronouncements and litigation strategy, because policy pronouncements are issued by commissioners, but no commissioner is personally responsible for a position in litigation. (For instance, no commissioner's name appears on a brief.) The chairman of the Commission appoints the general counsel, and a commissioner with a particular interest (for instance, the author of an opinion being appealed) occasionally will review a draft of a brief, but the briefing responsibility even of a chairman who authored an opinion being defended is considerably more attenuated than the comparable responsibility of an AAG. Accordingly, Commission staff enjoy somewhat more autonomy than do their counterparts at the Division.

Have the Commission's lawyers exercised their autonomy wisely? Certainly they have enjoyed great success in the cases they have litigated. The Commission merger briefs reviewed for this article are effective, helpful statements of the law as applied by courts, and, simultaneously, are generally consistent, or at least not inconsistent, with the FTC Statement and with Commission merger decisions. The briefs are not works of high theory and do not purport to be; they are designed to win the case, not change the law. Commission lawyers write briefs with humility, and one hesitates before criticizing so scarce a virtue, even though the humble path is not the only honorable one. On the other hand, several

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192 16 C.F.R. § 0.11 (1987).
193 I understand the practice is different for amicus briefs, which are approved by the Commission as a whole.
194 This distance between the Commissioners and staff lawyers may help explain how, in HCA, staff lawyers could defend a decision using several cases on which the Commission had studiously declined to rely (or so thought Judge Posner). Commission lawyers defending a decision have only limited discretion, to be sure; when the Commission has based its conclusion squarely on one rationale, a reviewing court may not approve it based on another. E.g., Federal Trade Comm'n v. Indiana Federation of Dentists, 106 S. Ct. 2009, 2016 (1986); Hospital Corp. of Am. v. Federal Trade Comm'n, 807 F.2d at 1386. But it is discretion nonetheless.
195 See also Briggs & Calkins, supra note 40, at 322–23. (Commission has enjoyed great success in recent court cases).
Commission briefs contain arguments that might not garner majority support at the Commission (for instance, concerning submarkets). If this is true, it is anomalous, at best, and suggests that the Commission staff may be erring too far toward practicality.

III. CONCLUSION

A review of recent merger litigation shows that, at least in the small sample of decisions reported since William Baxter assumed responsibility for the Justice Department's Antitrust Division, the Antitrust Division has differed from private parties and even the FTC in its close adherence to the Justice Department's Merger Guidelines, particularly with respect to market definition, and, at times, in its greater concern with shaping the law rather than merely prevailing on the merits. The Division's approach may have contributed to its unimpressive "won-lost" record in court, although the approach has plausible justifications.

Recent merger litigation also shows that the established case law remains extant, available for use by private parties and, significantly, a more activist Antitrust Division. Courts continue to cite the familiar Supreme Court precedents—especially Philadelphia National Bank and Brown Shoe. Even economically sophisticated judges continue to view merger litigation as turning principally on market shares and barriers to entry. Recent decisions serve as a reminder that the reports of the demise of traditional merger law may have been exaggerated. Of course, an approach focusing on market shares and entry barriers promises considerable latitude for skillful lawyering, since neither market definition nor the measurement of entry conditions is governed by law that is binding or precise. The private cases of the past few years show that markets can be defined quite narrowly and that rather modest impediments to entry can be sufficient to raise antitrust concern, at least if the judge is sympathetic.

Finally, it is evident that documents remain central to merger litigation. It is astounding that after decades of counseling by the antitrust bar, business people continue to generate paper as damaging as that found

196 The Antitrust Division implicitly recognized this when it attempted (unsuccessfully, it appears) to amend Clayton Act § 7 more or less to reflect the Guidelines. See Ginsburg, The Reagan Administration's Legislative Initiative in Antitrust, 31 Antitrust Bull. 851, 855 (1986) ("the current language of section 7 carries the baggage of decades of inconsistent and economically unsophisticated judicial merger analyses").

197 This should not be entirely surprising, since even the author of the 1982 Guidelines, William Baxter, has said that these two factors should be the essence of most merger litigation. Counseling Your Client on Monopolization, Mergers, and Joint Ventures, 55 Antitrust L.J. 321, 328, 330–31 (1986) (comments of William Baxter).
in *Tasty Cake* and *PPG*. Although many have disparaged the importance of allegedly incriminating documents, documents are difficult to refute and can undercut the persuasiveness of the most brilliant theoretician. In light of this, any firm that views antitrust counseling as unnecessary in the modern era is sorely misinformed.

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198 See supra notes 67, 89.