Antitrust, Vol. 34, No. 3, Summer 2020.

Philadelphia National Bank Meets Wireless Telecom: Overcoming the Structural Presumption in T-Mobile/Sprint

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IN PURSUIT OF VICTORY, PLAINTIFFS challenging mergers—usually the federal antitrust agencies—do not hesitate to embrace antitrust merger case law dating to the 1960s. At the center of nearly every merger challenge is the structural presumption of *United States v. Philadelphia National Bank*, which provides that a plaintiff can establish a prima facie case of Section 7 illegality by proving the transaction would yield "undue concentration" in an antitrust market.[1]

The structural presumption has become controversial, especially when applied to unilateral effects theories of harm.[2] And, as we will see, the presumption's origins cast into some doubt its continuing vitality in light of subsequent Supreme Court jurisprudence that insists on proof of harm to competition rather than to rival companies and eschews reliance on categorical liability rules. But the presumption remains on the books; it has echoes in the 2010 Horizontal Merger Guidelines;[3] and it is a consistent part of the horizontal merger-challenge playbook that in the last decade has almost always led to plaintiff victory.

The most recent merger trials, however, ended in defense wins. In *FTC v. RAG-Stiftung*[4] and *United States v. Sabre*,[5] failures of market definition doomed the government case. With no proper market, there can be no structural presumption and, ordinarily, no prima facie case.[6]

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And in two separate challenges to the T-Mobile/Sprint transaction—styled by its opponents as a blatantly anticompetitive "4-to-3" transaction—district courts ruled for the defendants by moving past concentration statistics to embrace a holistic view of competitive effects. The decision by Judge Marrero in the Southern District of New York following a ten-day bench trial, and the subsequent denial of a TRO by Judge Freeman in the Northern District of California, shed light on how debate over structure and the plaintiffs' prima facie case need not get in the way of the courts' assessment of all of the evidence relevant to the real question at hand: whether the world with the transaction is likely to be less competitive than the world without.[7]

What might be surprising against the backdrop of merger plaintiffs' previous string of successes, however, is that the defense wins in the T-Mobile/Sprint cases did not flow from any new-fangled Chicago-school-style approach. On the contrary, they applied settled law dating to *Brown Shoe*,[8] *General Dynamics*,[9] and the D.C. Circuit's seminal decision in *Baker Hughes*.[10] There is nothing novel in the recent decisions rebuffing challenges to the T-Mobile/Sprint merger—just a reminder that defendants armed with good facts should not be foreclosed from presenting them by plaintiffs' invocation of the bias against increased concentration that underlay the Supreme Court's 1960s merger decisions. The T-Mobile/Sprint decisions offer practical lessons for parties evaluating the antitrust litigation risks of potential transactions and for litigants enmeshed in the defense of challenged mergers.

The Structural Presumption Is Born

The structural presumption of *Philadelphia National Bank* traces to the Supreme Court's merger decisions of the early 1960s. In a series of cases beginning with *Brown Shoe* in 1962 and continuing through *Von's Grocery* in 1966,[11] the plaintiff—the U.S. Attorney General in these cases—always won,[12] and the Court delivered those victories accompanied by sweeping language about the "evils" of growing concentration that had animated Congress's 1950 Clayton Act amendments.[13] That worry led Congress to "erect[] a barrier to what [it] saw was the rising tide of economic concentration" by giving courts the authority to "arrest[] mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[14]

The Court's ensuing string of merger cases took a dim view of transactions that increased concentration even marginally. *Brown Shoe* emphasized that "[t]he market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market."[15] Next in line was *Philadelphia National Bank*, which doubled down on this concern using language of near-per se prohibition:

> [W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that

> market, is *so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*.[16]

Though this stringent test was to apply only "to mergers whose size makes them inherently suspect,"[17] the Court was "clear that 30% [combined share] presents that threat."[18]

In subsequent cases, the road got even tougher for mergers among competitors. In *Pabst Brewing*, the Court reversed a district court ruling approving a merger of national brewers that created a firm with a 4.49% share and four larger rivals.[19] In the same year, in *Von's Grocery*, the Court reversed another district court ruling to invalidate the combination of two supermarket chains that formed a firm with fewer than 9 percent of sales.[20] Why were these mergers illegal? "Simply" because they combined "two already powerful companies merging in a way which makes them even more powerful than they were before."[21] As *Von's Grocery* explained:

> If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.[22]

The Structural Presumption Softens

As every antitrust lawyer knows, the 1960s merger decisions are not the end of the story. By 1974, there was a new "antitrust majority" on the Court,[23] enabling Justice Stewart, who dissented from both *Philadelphia National Bank* and *Von's Grocery*, to hand the government a defeat in *General Dynamics*.

General Dynamics did not overrule the 1960s cases. Instead, it returned to *Brown Shoe* and first principles in emphasizing that merger litigation must focus on the ultimate legal test established by Section 7: whether, looking forward, a merger is likely to substantially lessen competition. The *General Dynamics* Court acknowledged that its earlier merger decisions "ha[d] found prima facie violations" based on aggregate market concentration statistics.[24] But it also noted that *Brown Shoe* had already "cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects."[25] *Brown Shoe* in fact emphasized, albeit in a footnote, that whatever market concentration statistics might show, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."[26] *Brown Shoe* also explained that concern about concentration was not the only thing on Congress's mind when it amended the Clayton Act. "[A]t the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers."[27]

Applying these principles to the *General Dynamics* facts, it was easy to see why the government lost. Its structural case was built on statistics showing past levels of coal production. The district court was unpersuaded in light of evidence of the acquired mining company's "present and future reserve prospects—and thus [its] probable future ability to compete," which revealed it as a "far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate." The Court endorsed this approach as consistent with *Brown Shoe*'s admonition to focus on competitive effects rather than on market structure alone.[28] "[F]undamental changes in the structure of the market for coal," and the impact of those changes on the competitive potential of the acquired firm, justified the district court "in viewing the statistics relied on by the Government as insufficient to sustain its case."[29]

The next significant judicial step away from the 1960s merger cases came in 1986 in Judge Posner's decision for the Seventh Circuit in *Hospital Corporation of America v. FTC*.[30] That decision affirmed an FTC order unwinding two acquisitions by HCA of competing hospitals. The FTC had studiously avoided reliance on the Supreme Court's 1960s merger decisions, but Judge Posner (who argued *Von's Grocery* for the government) addressed them directly. Why should the FTC not prevail based on those cases alone? The answer: driven by Supreme Court cases outside the merger realm, antitrust law had moved decisively towards the view that "the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act."[31] This shift meant that the district court (or the FTC) must "make a judgment whether the challenged acquisition is likely to hurt consumers." As a result, "[I]t was prudent for the [FTC], rather than resting on the very strict merger decisions of the 1960s, to inquire into the probability of harm to consumers."[32]

By 1990, when a D.C. Circuit panel that included now-Justices Thomas and Ginsburg decided *Baker Hughes*, the "basic outline of a section 7 horizontal acquisition case [was] familiar."[33] The structural presumption remained on the books: "By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition."[34] But "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness."[35] The government's prima facie case merely shifts the burden to the defendants to come forward with evidence that rebuts the presumption.

The *Baker Hughes* defendants successfully rebutted the presumption with evidence that entry was easy,[36] but the court made clear that successful rebuttal evidence can take many forms and need not rise to a "clear" showing.[37] When defendants' rebuttal is sufficient, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[38]

[T]he State Plaintiffs' trial strategy borrowed heavily from the merger challenge playbook of the preceding decade. Front and center was the impact on market structure

The Supreme Court's 1960s decisions were no obstacle to this inquiry into effects. The Court had "cut [those cases] back sharply," with *General Dynamics* beginning "a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence."[39]

The Structural Presumption's Role in Plaintiffs' Merger Challenge Playbook

Lower courts embraced this softening of the structural presumption to the point that, by the early 2000s, the government had lost several merger cases. Courts were probing well beyond the proffered evidence of market concentration and often found unpersuasive the government's evidence of likely competitive harm. Most notable were defeats in *FTC v. Arch Coal*, a case litigated on a coordinated effects theory,[40] and *United States v. Oracle*,[41] primarily a unilateral effects case. Then the FTC lost again (on appeal) in *Whole Foods* when the court rejected the agency's proposed market definition (the infamous "premium natural and organic supermarket" market) and concluded that the FTC had not tried to block the merger on any basis other than that it was "presumptively unlawful" under *Philadelphia National Bank*.[42]

The agencies reacted with concern, if not alarm.[43] Then, in a series of decisions beginning with *FTC v. CCC Holdings* in 2009,[44] and *United States v. H&R Block* in 2010,[45] a fairly consistent government winning pattern emerged.[46] Courts applying the structural presumption continued to look past the presumption at defendants' rebuttal evidence,[47] but the government was winning. How did this happen?

Case selection was part of the story, no doubt. Many of the agencies' cases were brought against transactions involving market-leading firms. Mergers to duopoly,[48] acquisitions by the leading firm of its closest competitor,[49] and market shares that "spectacularly exceed" those required by the structural presumption[50] can be fertile grounds for merger plaintiffs.

The agencies also upped their game. They paid closer attention to pleading and proving a proper antitrust market in which to invoke the structural presumption based on applicable concentration statistics. And they almost always went beyond this threshold showing, typically by proving (often with econometric evidence) substantial head-to-head competition that would be lost and taking advantage of internal company documents that shed light on the parties' competitive incentives or otherwise supported the theory of competitive harm. These showings frequently "strengthen[ed]" the government's presumption of illegality.[51] The agencies also successfully argued against the sufficiency of the rebuttal evidence defendants tried to offer to overcome the presumption. Court after court examined defense rebuttal evidence and found it unpersuasive or legally unavailing:[52] efforts to show that industry dynamics would rule out coordination or unilateral competitive effects fell flat;[53] entry was insufficiently timely, likely, or sufficient;[54] efficiencies were too speculative or not merger-specific;[55] weakened competitor evidence did not measure up;[56] and proffered remedies were insufficient to overcome competitive concerns.[57]

The result: in not one of the horizontal merger cases litigated after *Arch Coal* where the agency succeeded in invoking the structural presumption did the court find that defendants had sufficiently rebutted the government's presumption to force plaintiff to meet its ultimate burden of proving anticompetitive effects. That is, until a group of states led by New York and California sought to block the T-Mobile/Sprint merger in the Southern District of New York in June 2019,[58] and a separate group of individual plaintiffs filed a parallel suit in the Northern District of California in November 2019.[59]

The Role of Structure in the T-Mobile/Sprint Merger Litigation

The T-Mobile/Sprint Transaction. The proposed T-Mobile/Sprint merger, announced in April 2018, involved the third and fourth largest sellers of mobile wireless communications services in the United States, behind Verizon and AT&T. These four companies were seen as operating the only nationwide wireless networks (referred to as "mobile network operators" or "MNOs"), although other companies ("mobile virtual network operators" or "MVNOs") sold wireless service nationwide via arrangements giving them access to the MNOs' networks, while others operated regional networks.

The merger proposal arrived at the cusp of the wireless industry's transition from fourth generation technology (known as "LTE") to the fifth, referred to as "5G." The transition to 5G had tremendous potential to unlock quality improvements and innovation but would also impose intensive demands on available wireless spectrum (the radio waves used to transport data wirelessly) and require many billions of dollars of investment in new infrastructure by the MNOs. T-Mobile and Sprint believed that by combining their complementary assets they would be able to build a far more capable 5G network at lower cost than either could achieve separately.

By the time the State Plaintiffs filed their lawsuit challenging the merger in June 2019, the proposed deal had already undergone intensive review by DOJ and the Federal Communications Commission. In May 2019 the FCC Chairman indicated his intention to vote to approve the transaction on the strength of commitments made by T-

Mobile, including the divestiture of Sprint's Boost brand.[60] The DOJ soon filed a Tunney Act complaint and proposed final judgment (PFJ) resolving its concerns.[61] The PFJ required the sale to DISH of all of Sprint's prepaid business, along with additional MVNO and other rights to assist DISH in entering the mobile wireless market immediately as a 5G service provider.[62] The DOJ explained that this relief would "ensure the development of a new national facilities-based mobile wireless carrier competitor" while simultaneously "allow[ing] the potential benefits of the merger to be realized, including expanding American consumers' access to high quality networks."[63] Then, in November, the full FCC entered its order formally approving the transaction, imposing additional requirements obligating DISH to enter the wireless market using its own spectrum, and specifically finding that, "as conditioned, the transaction would not substantially lessen competition, and would be in the public interest."[64]

Plaintiffs' Attacks and the Role of Structure. Against this backdrop, the State Plaintiffs' trial strategy borrowed heavily from the merger challenge playbook of the preceding decade. Front and center was the impact on market structure: they positioned the transaction as a "4-to-3" merger in a concentrated industry characterized by high barriers to entry.[65] State Plaintiffs asserted not only a national wireless market but dozens of local markets (typically urban areas like New York, Chicago, and Los Angeles) in which T-Mobile and Sprint had even higher shares. The presumption of illegality that flowed from these statistics, the States argued, required the defendants to show why, despite the expectation imbedded in the presumption that coordination would result from "the undue concentration we're going to have, for some reason this market's different, and for some reason in this market, we won't expect that kind of coordination."[66]

But the State Plaintiffs did not stop with structure. To bolster their structural case, they presented economic testimony outlining why unilateral effects and coordinated effects were likely and made extensive use of company documents purporting to shed light on the companies' motivations to reduce competition by merging.[67] The plaintiffs also pushed back hard on the defendants' rebuttal evidence, characterizing defendants' case as a series of "affirmative defenses" entailing burdens defendants could not satisfy.[68] The network synergies defendants anticipated from the merger became an "efficiencies defense."[69] The diminished competitive role Sprint would likely play going forward became a "weakened competitor defense."[70] And the role of DISH as a disruptive new entrant became defendants' burden to "negate any anticompetitive effects of the merger."[71]

The individual plaintiffs in *Bradt v. T-Mobile*, by contrast, placed all of their chips on the structural presumption. They asserted in bald terms that the 1960s "Supreme Court cases have not been overruled nor even diminished by later opinions and they dictate beyond any doubt that the proposed Sprint/T-Mobile combination is unlawful."[72]

The T-Mobile/Sprint decisions show how a structural presumption can be overcome. Before turning to those lessons, though, it is worth pausing to ask whether the case is sui generis because of its unusual context. After all, it was the first transaction to be challenged by state attorneys general after being cleared by the DOJ and approved as in the public interest by a federal regulatory agency.

The Defense. The defendants' case emphasized three principal themes: (1) no structural presumption was triggered once MVNOs (like Tracfone, Comcast, and Altice) were considered as market participants and plaintiffs' local market allegations were rejected;[73] (2) regardless whether market structure might help establish plaintiffs' prima facie case, the court needed to consider all of the facts in assessing the ultimate question whether the marketplace was likely to be less competitive with the transaction than without;[74] and (3) three core sets of facts showed that the merger would strengthen competition relative to a world without the merger: (a) melding the parties' complementary spectrum and other assets would unlock a massive expansion in available capacity and performance at lower marginal cost, providing strong incentives for the combined company to lower prices and offer improved service, in turn spurring greater competition with Verizon and AT&T;[75] (b) Sprint's declining effectiveness as an independent competitor heralded a future of diminished competitive intensity absent the merger;[76] and (c) DISH's entry as a carrier armed with its own spectrum would augment the expansion of capacity and ensure a fourth competitor with strong incentives to disrupt any adverse competitive effects.[77]

The Courts' View.

New York v. Deutsche Telekom. On February 10, 2020, Judge Marrero rendered judgment for defendants in the case brought by the states. At the outset the decision sided with the plaintiffs on structural issues, namely that shares of MVNOs should "be attributed to the MNOs from which the MVNOs lease network access" and that competition should be assessed not only in a national market but in dozens of local markets as well.[78] As a result, concentration statistics were "more than enough to establish a presumption that the Proposed Merger would be anticompetitive."[79]

But the court quickly emphasized the limited role the presumption should play in assessing competitive effects: "presumptions are not self-executing; for the circumstances presumed to transform into actual effects would require real-world conduct and decisions by the actors involved.

[C]ourts continue to tiptoe around "efficiencies" evidence, but the T-Mobile/Sprint decisions nonetheless show how that evidence can be pivotal to a favorable result.

Accordingly, depending on the affirmative practices and actions taken by market participants, highly concentrated markets can nevertheless be quite competitive."[80] This was particularly so in the wireless industry:

> Despite the strength of Plaintiff States' prima facie case, which might well suffice to warrant injunction of mergers in more traditional industries, a variety of considerations raised at trial have persuaded the Court that a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry.[81]

The court specifically relied on "the combined weight of the three different forms of rebuttal evidence Defendants presented."[82] The lower costs and greater capacity achieved through network efficiencies "will cause T-Mobile to continue competing vigorously," "Sprint's ability to compete . . . will continue to decrease without the Proposed Merger;" and "the FCC and DOJ remedies, and particularly those designed to ensure that DISH becomes an aggressive fourth national MNO, significantly reduce the concerns and persuasive force of … market share statistics."[83]

Thus, for the first time since the *Arch Coal* case in 2004, a district court found the structural presumption sufficiently rebutted in order to proceed to evaluate whether the plaintiffs had "satisfied their ultimate burden of proof through evidence beyond concentration and relevant market share data."[84] Judge Marrero answered that question in the negative. To be sure, plaintiffs' evidence of both coordinated and unilateral effects—such as their economic testimony about upward pricing pressure and factors relevant to likely coordination—necessarily incorporated the fact that the post-merger world would be somewhat more concentrated.[85] But this structural fact was swamped by the salient features of the defense rebuttal evidence showing that, for *this particular* merger in *this particular* "concentrated" market, the transaction would strengthen competition rather than weaken it.[86]

Bradt v. T-Mobile US. With the Southern District of New York ruling allowing the merger to proceed, Judge Freeman promptly ruled on the *Bradt* plaintiffs' pending request for a TRO. Notwithstanding the 1960s Supreme Court precedents on which plaintiffs relied, and an analysis of market concentration that triggered the structural presumption, the plaintiffs' showing was "not enough" against the backdrop of the "mitigating requirements imposed by the DOJ and the FCC."[87] That "evidence was sufficient to rebut the *prima facie* case established by Plaintiffs, and on that basis the Court determined that the burden shifted back to Plaintiffs to demonstrate the likely anticompetitive effects of the merger in its ultimate form, taking into account the DOJ and FCC requirements."[88] Plaintiffs failed to meet that burden because they did "not present[] any new evidence related to the 'structure, history and probable future' of the wireless communications market that would support their argument that the T-Mobile-Sprint merger *in its current form* [i.e., post-remedy] would have probable anticompetitive effects."[89]

Lessons from the Defense Win in T-Mobile/Sprint

The T-Mobile/Sprint decisions show how a structural presumption can be overcome.[90] Before turning to those lessons, though, it is worth pausing to ask whether the case is sui generis because of its unusual context. After all, it was the first transaction to be challenged by state attorneys general after being cleared by the DOJ and approved as in the public interest by a federal regulatory agency. Judge Marrero accorded the views of those agencies "some deference."[91] And it is clear that both he and Judge Freeman in *Bradt* placed considerable weight on the binding obligations undertaken by both T-Mobile and DISH with respect to the DISH remedy and two federal agencies' oversight of those obligations. But it would be a mistake to discount the courts' analysis on this basis. For example, Judge Marrero made clear that the federal approvals provided no "immunity," he was charged with "independently reviewing the legality of the Proposed Merger," and the "views of the FCC and DOJ" were merely "informative but not conclusive."[92]

These courts' analyses of the evidence and arguments of the parties thus provide insights that ought to be useful in cases where prior federal agency approval is lacking. A detailed catalog of the host of strategic and tactical decisions that led to the defense victory, and the specific arguments and evidence that proved most powerful in carrying the day, is beyond the scope of this article. But in seeking to understand how two district courts were persuaded to look past the supposed "evils" of concentration, several features stand out.

- First, these outcomes remind us that the presumption can be overcome within the framework of the Supreme Court's 1960s precedents. This should not be news. *General Dynamics* and *Baker Hughes*, along with other cases of the late 20th century,[93] were defense victories that embraced rather than eschewed the structural presumption. Not surprisingly, both of the rulings on the T-Mobile/Sprint merger relied on those same cases for the legal framework in which the courts concluded that plaintiffs had not carried their Section 7 burden.
- Second, fighting the presumption's application can pay dividends even if the court ends up invoking it. Defendants in T-Mobile/Sprint argued unsuccessfully that their shares were too low to trigger the presumption, in part because they competed against two much larger rivals and in part because MVNOs were meaningful competitors. Those arguments did not persuade the court to reject the

presumption, but they almost certainly had a bearing on its assessment of competitive effects. The court repeatedly noted that "compet[ing] more effectively with the current market leaders AT&T and Verizon" was a central feature of the deal.[94] Arguments about the effectiveness of MVNOs similarly enabled the court to find that DISH could be an effective competitor immediately despite initially operating as an MVNO riding on the new T-Mobile network.[95]

- Third, courts continue to tiptoe around "efficiencies" evidence, but the T-Mobile/Sprint decisions nonetheless show how that evidence can be pivotal to a favorable result. The Supreme Court's admonition that "[p]ossible economies cannot be used as a defense to illegality"[96] remains an obstacle to the full embrace of an efficiencies "defense."[97] But, properly framed, efficiencies evidence can help persuade courts that a proposed merger's effect is unlikely to be anticompetitive in the first place. Defendants in T-Mobile/Sprint framed their case that way: network synergies driving expanded capacity and higher quality at lower cost were not benefits "offsetting" potential consumer harm but instead were transformative features of the post-merger enterprise's incentives and capabilities.[98] The court agreed, finding that "the significant capacity benefits enabled by the merger can and likely will galvanize competition with AT&T and Verizon."[99]
- Fourth, and closely related to the efficiencies point, the decisions highlight the "predictive" nature of merger review and confirm the value of building the case for the merger around the ways that static market concentration statistics are a poor predictor of future market performance. In other words, looking forward, what are the key drivers of market competitiveness that today's concentration statistics cannot capture? In T-Mobile/Sprint defendants consistently emphasized such factors: market developments like 5G, limitations on the effectiveness of the merging companies as standalone firms (like Sprint's structural weaknesses), and changes flowing from the merger itself (such as massive network efficiencies and the facilitated entry by DISH). With an understanding of the significance of these factors, the court could appreciate that the wireless industry was not a "traditional" one where static concentration statistics might carry the day.[100]
- Fifth, the SDNY decision suggests that the business plans of the merged firm—and evidence showing how those plans line up with the firm's incentives—can play a vital role in persuading the court that the merger will not harm competition. Exactly how to present a winning case in this regard is surely more art than science. In T-Mobile/Sprint this showing centered on persuasive and well-prepared company executives who could speak directly to the court's questions about the procompetitive steps they planned to take if allowed to merge and why their incentives would compel them to act in those ways.[101] Even as to the network efficiencies that would drive down post-merger costs, the core evidence was presented by company engineers based on their own internal planning efforts rather than outside consultants or economic experts.[102] The court found these witnesses credible and, in the process, was persuaded to brush aside a variety of snippets from internal documents that plaintiffs tried to argue cast doubt about post-merger behavior.[103] One way or the other, forceful testimony by business executives about how the competitive dynamic will unfold in the world with the merger seems almost indispensable to overcoming a presumption that higher concentration will lead to less competitive outcomes.[104]
- Finally, far less certain is the role or importance of expert economic testimony. Economic experts in T-Mobile/Sprint sparred on a range of issues, including market definition and the calculation of shares, factors relevant to coordination, a "GUPPI" analysis of unilateral effects, and the quantification of marginal cost savings likely to flow from anticipated network synergies. The court considered such evidence as at best secondary to the testimony of business personnel regarding future wireless competition.[105] Not every court will share this perspective, and even when other evidence is primary economists will continue to play a key role in presenting evidence that cannot be marshaled effectively by other witnesses. The quantification of marginal cost savings offered by the defendants' expert is one such example. Likewise, economists likely are uniquely suited to present analyses based on natural experiments[106] or other data that would be beyond the capability of any individual company fact witness.

Conclusion

The plaintiffs in the T-Mobile/Sprint challenges sought to invoke the "4-to-3" label as though it were a magic incantation that would lead to illegality unless the defendants could prove up some sort of affirmative defense or show how wireless telecommunications differed from every other market. The defendants' wins show that—consistent with the long-standing agency approach to merger investigations—increases in concentration are not a talisman for merger plaintiffs. Concentration is just one set of facts in the overall mix. The structural presumption can—if deployed correctly—allow plaintiffs to survive dismissal, but it does not end the case or preclude a full evaluation of the evidence bearing on the transaction's competitive impact. ■

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1 374 U.S. 321 (1963); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

2 *E.g.*, Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015), and other articles in the Antitrust Law Journal's symposium issue addressing "*Philadelphia National Bank* at 50."

3 See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1.3 (2010) ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be

likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

[4] FTC v. RAG-Stiftung, Civ. No. 19-2337 (TJK) (D.D.C. Jan. 24, 2020) (declining to enjoin merger of hydrogen peroxide producers).

[5] United States v. Sabre Corp., C.A. No. 19-1548-LPS (D. Del. Apr. 8, 2020) [hereinafter *Sabre/Farelogix* Decision] (declining to enjoin acquisition of Farelogix by Sabre in the alleged market for airline booking services sold through travel agents).

[6] When plaintiff bases its theory of anticompetitive harm on a substantial increase in concentration it makes "market definition key" and will lose if the market is improperly defined. FTC v. Whole Foods Mkt., Inc., 548 F. 3d 1028, 1037 (D.C. Cir. 2008).

[7] New York v. Deutsche Telekom AG, No. 19 Civ. 5434 (VM) (S.D.N.Y. Feb. 10, 2020) [hereinafter SDNY Decision]; Bradt v. T-Mobile US, Inc., Case No. 19-cv-07752-BLF (N.D. Cal. Feb. 28, 2020) [hereinafter *Bradt* TRO Ruling] (denying TRO); *Bradt* (Mar. 13, 2020) [hereinafter *Bradt* Injunction Decision] (denying motion for injunction pending appeal).

[8] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[9] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[10] 908 F.2d 981.

[11] United States v. Von's Grocery Co., 384 US 270 (1966).

[12] "The sole consistency that I can find is that in litigation under § 7, the Government always wins." 384 U.S. at 301 (Stewart, J., dissenting).

[13] *E.g.*, *Von's Grocery*, 384 U.S. at 274–77.

[14] 370 U.S. at 317–18.

[15] *Id.* at 343.

[16] 374 U.S. at 363 (emphasis added).

[17] *Id.*

[18] *Id.* at 364–65.

[19] United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966).

[20] *Von's Grocery*, 384 U.S. at 280–81 (White, J., concurring).

[21] *Id.* at 278.

[22] *Id.*; *see also Pabst*, 384 U.S. at 552–53 ("trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be").

[23] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 643 (1974) (White, J., dissenting). By 1974, the Court had lost four members of the majorities in *Pabst* and *Von's* (Justices Black, Clark, Fortas, and Warren) and gained four (Justices Blackmun, Burger, Powell, and Rehnquist), who joined the pro-defendant majorities in *Marine Bancorporation* and *General Dynamics*.

[24] 415 U.S. at 496.

[25] *Id.* at 498.

[26] 370 U.S. at 322 n.38 (emphasis added) (quoted in *General Dynamics*, 415 U.S. at 497, 498).

[27] 370 U.S. at 319 (emphasis added).

[28] 415 U.S. at 497, 498, 503.

[29] *Id.* at 501.

[30] 807 F.2d 1381 (7th Cir. 1986).

[31] *Id.* at 1386. Emblematic of the Court's prior fixation with "preserv[ing] rivals as such," *Philadelphia National Bank* cited only one case in support of its 30% market share threshold, *United States v. Koppers Co.*, 202 F. Supp. 437, 450 (W.D. Pa. 1962). In *Koppers*, the district court found that the merger would "substantially lessen competition" not because consumers would pay higher prices (or receive lower quality), but because the resulting efficiencies would "inevitably [] squeeze" smaller rivals. By increasing "its percentage of the market from 23.0% [t]o 28.8%," Koppers would be able to devote "more money for research and development" and "utilize its own personnel in its sales force with comparatively little added expense and with major savings in commissions, *all to the detriment of competing manufacturers*." *Id.* at 449 (emphasis added).

[32] 807 F.2d at 1386.

[33] 908 F.2d at 982.

[34] *Id.* at 982 (footnote omitted).

[35] *Id.* 984 (emphasis added).

[36] 908 F.2d at 988–89.

[37] *Id.* at 984–85, 989–90.

[38] *Id.* at 983; *see also* FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).

[39] 908 F.2d at 990–91.

[40] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004). In *Arch Coal*, the court found that the FTC had established a "not strong" prima facie case based on concentration statistics, but then, citing *General Dynamics*, *HCA*, and *Baker Hughes*, proceeded to rule for the defense based on its assessment of the unlikelihood of coordination and factors relating to potential efficiencies and the weakness of the acquired firm. *Id.* at 116–17.

[41] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). In *Oracle*, the court rejected the government's market definition and, in the absence of concentration statistics relating to the market as found by the court, declined to apply the presumption. It then concluded that the government had not provided sufficient "direct evidence" of likely anticompetitive effects to establish a prima facie case. *Id.* at 1165.

[42] 548 F. 3d at 1037.

[43] Indeed, in the aftermath of the *Oracle* loss, the agencies hosted a workshop on litigating unilateral effects cases that asked, among many other questions, "how to increase judicial understanding of unilateral effects theory and the way different forms of evidence supports such a theory of harm." Unilateral Effects Analysis & Litigation Workshop (Feb. 12, 2008), Agenda at 2, https://www.ftc.gov/sites/default/files/documents/public_events/unilateral-effects-analysis-and-litigation-workshop/agenda.pdf.

[44] FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009).

[45] United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011).

[46] I focus here on cases outside the hospital merger realm. The only agency defeats in the decade from 2009 to 2019 (other than a handful of hospital case losses) came in *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015), a potential competition case, and *FTC v. Lundbeck, Inc.*, 650 F.3d 1236 (8th Cir. 2011), where the court found that the merging firms did not compete in the same market.

[47] In *CCC Holdings* the FTC had established a "strong *prima facie* case" under *Philadelphia National Bank*, but that "that is just the beginning of the inquiry." 605 F. Supp. 2d at 46. Likewise in *H&R Block*, the government had established a prima facie case based on concentration statistics, but, relying on *Baker Hughes*, the court proceeded to "evaluate the parties' evidence and arguments about the likely effect of the transaction on competition." 833 F. Supp. 2d at 73.

[48] *CCC Holdings*, 605 F. Supp. 2d at 46.

[49] *E.g.*, United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

[50] United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 441 (D. Del. 2017); *see also* United States v. Aetna Inc., 240 F. Supp. 3d 1, 47 (D.D.C. 2017) ("not a stretch to call the government's prima facie case based on the HHI analysis under the Guidelines an overwhelming one, given how high the concentration figures are").

[51] *See, e.g.*, FTC v. Wilhelm Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 65 (D.D.C. 2018) ("GUPPI analysis and merger simulation model strengthen the FTC's *prima facie* case"); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 131 (D.D.C. 2016) ("Plaintiffs presented additional evidence of harm" . . . "to strengthen their prima facie case"); FTC v. SYSCO Corp., 113 F. Supp. 3d 1, 67 (D.D.C. 2015) ("Dr. Israel's merger simulation model strengthens the FTC's *prima facie* case").

[52] Many of the agency victories were on motions for preliminary injunction where the court's entry of an injunction did not necessarily rule out the potential for a defense victory on a full trial record. *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 67 ("Defendants' arguments may ultimately win the day when a more robust collection of economic data is lain before the FTC").

[53] *Wilhelmsen*, 341 F. Supp. 3d at 70–71; FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 213–15 (D.D.C. 2018); *SYSCO*, 113 F. Supp. 3d at 78–80; *Bazaarvoice*, 2014 WL 203966, at *76; *H&R Block*, 833 F. Supp. 2d at 77–89; CCC Holdings, 605 F. Supp. 2d at 60–72.

[54] *Wilhelmsen*, 341 F. Supp. 3d at 66–70; *Energy Solutions*, 265 F. Supp. 3d at 443–44; *Aetna*, 240 F. Supp. 3d at 52; *Staples*, 190 F. Supp. 3d at 133; *SYSCO*, 113 F. Supp. 3d at 80; *Bazaarvoice*, 2014 WL 203966, at *71–72; *H&R Block*, 833 F. Supp. 2d at 76–77; *CCC Holdings*, 605 F. Supp. 2d at 47–60.

[55] *Wilhelmsen*, 341 F. Supp. 3d at 71–73; *Tronox*, 332 F. Supp. 3d at 215–17; *Anthem*, 855 F. 3d at 353–67; *SYSCO*, 113 F. Supp. 3d at 81–85; *Bazaarvoice*, 2014 WL 203966, at *62–64, *73; *H&R Block*, 833 F. Supp. 2d at 89–92; *CCC Holdings*, 605 F. Supp. 2d at 72–75 ("too far afield and too speculative").

[56] *Energy Solutions*, 265 F. Supp. 3d at 444–46; *Bazaarvoice*, 2014 WL 203966, at *3, *39.

[57] *Aetna*, 240 F. Supp. 3d at 73; *SYSCO*, 113 F. Supp. 3d at 72–78.

[58] Complaint, New York v. Deutsche Telekom AG, Case No. 1:19-cv-05434 (S.D.N.Y. filed June 11, 2019) [hereinafter *New York v. DT*].

[59] Complaint, Bradt *v. T-Mobile US* (Nov. 25, 2019).

[60] FCC Release, Chairman Pai Statement on T-Mobile/Sprint Transaction (May 20, 2019), https://docs.fcc.gov/public/attachments/DOC-357535A1.pdf.

[61] United States v. Deutsche Telekom AG, No. 1:19-cv-02232-TJK (D.D.C. Complaint filed July 26, 2019) [hereinafter DOJ Tunney Act Case].

[62] DOJ Tunney Act Case, Proposed Final Judgment (July 26, 2019).

[63] *Id.*, Competitive Impact Statement at 3, 8 (July 30, 2019).

[64] FCC WT Docket No. 18-197, In the Matter of Applications of T-Mobile US, Inc.,& Sprint Corp. for Consent to Transfer Control of Licenses & Authorizations, Memorandum Opinion & Order, Declaratory Ruling, & Order of Proposed Modification 5 (Nov. 5, 2019).

[65] Plaintiff States' Pretrial Memorandum at 1, *New York v. DT* (Nov. 26, 2019) [hereinafter States' Pretrial Memorandum] ("Unsurprisingly, this 'four to three' merger would dramatically increase market concentration in an already highly concentrated industry and, under well-established law, is presumptively illegal.").

[66] *New York v. DT*, Transcript of Closing Argument 2468 (Jan. 15, 2020) [hereinafter Closing Transcript].

[67] States' Pretrial Memorandum, *supra* note 65, at 15 ("Plaintiff States need not and do not rest their case solely on this presumption.").

[68] *Id.* at 6 ("*Defendants* have the burden to substantiate their key defenses") (emphasis in original).

[69] *Id.* at 18–21.

[70] *Id.* at 21–23.

[71] *Id.* at 23.

[72] Plaintiffs' Application for TRO at 13, *Bradt v. T-Mobile US* (Nov. 25, 2019).

[73] Defendants' Pretrial Memorandum at 17–20, *New York v. DT* (Nov. 26, 2020) [herreinafter Defendants' Pretrial Memorandum].

[74] Closing Transcript, *supra* note 66, at 2398–400.

[75] Defendants' Pretrial Memorandum, *supra* note 73, at 12–15, 21–28; Closing Transcript, *supra* note 66, at 2416–18, 2393–95.

[76] Defendants' Pretrial Memorandum, *supra* note 73, at 8–9; Closing Transcript, *supra* note 66, at 2440–46.

[77] Defendants' Pretrial Memorandum, *supra* note 73, at 11–12, 26–27; Closing Transcript, *supra* note 66, at 2447–50.

[78] SDNY Decision, *supra* note 7, at 38, 47–52.

[79] *Id.* at 53.

[80] *Id.* at 53–54.

[81] *Id.* at 168.

[82] *Id.* at 127.

[83] *Id.* at 126–27.

[84] *Id.* The decision was not the first to address evidence offered to rebut the [presumption. In one hospital merger case the district court suggested that such evidence was powerful after concluding that the FTC failed to establish a prima facie case based on the structural presumption. *See* FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 2d 552, 556–57 (M.D. Pa. 2016), *rev'd*, 838 F.3d 327 (3d Cir. 2017) (ordering entry of PI).

[85] SDNY Decision, *supra* note 7, at 130, 139.

[86] *Id.* at 127–28, 142. Moreover, since plaintiffs' evidence (beyond concentration statistics) addressed national-level competition, the court's analysis likewise focused on the national market rather than any specific local geographic markets. *See also id.* at 166–67, 52 n.11 ("evidence demonstrating that differences in concentration do not and likely will not affect local competition remains relevant to the broader analysis of competitive effect").

[87] *Bradt* TRO Ruling, *supra* note 7, at 5. The court also took note of the findings set forth in the SDNY Order. *Id.*

[88] *Bradt* Injunction Decision, *supra* note 7, at 5.

[89] *Id.* (quoting *General Dynamics*, 415 U.S. at 498).

[90] They are not alone among recent cases. A few months after the SDNY Decision, the district court in *United States v. Sabre* opined that defendants would have successfully rebutted plaintiff's prima facie case had one been established. The court pointed to the lack of entry barriers preventing effective competition by rivals of the target and evidence that past concerns about Sabre's incentive to extinguish the target as an alternative to bypass Sabre's own airline distribution services would not obtain in a future world that was rapidly moving toward "pass-through" instead of "bypass" solutions. *Sabre/Farelogix* Decision, *supra* note 5, at 87–90.

[91] SDNY Decision, *supra* note 7, at 103.

[92] *Id.* at 103, 104, 106 (quoting S. Austin Coalition Cmty. Council v. SBC Commc'ns, Inc., 191 F.3d 842, 844 (7th Cir. 1999)).

[93] *E.g.*, United States v. Waste Management, Inc., 743 F.2d 976, 984 (2d Cir. 1984) (presumption overcome by evidence of easy entry).

[94] SDNY Decision, *supra* note 7, at 129; *see also id.* at 69 n.14.

[95] *Id.* at 45–46 (noting that "preliminary market share analysis may not adequately reflect the role of MVNOs" as to DISH, and that "[c]onsiderations like this . . . may ultimately reduce the persuasive force of market share statistics in the final analysis").

[96] FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

[97] *See* SDNY Decision, *supra* note 7, at 57, 83 ("mindful of the uncertainty in the state of the law regarding efficiencies and Plaintiff States' pertinent criticisms, the Court stresses that the Proposed Merger efficiencies it has recognized constitute just one of many factors that it considers and do not alone possess dispositive weight in this inquiry"); *Bradt* Injunction Decision, *supra* note 7, at 4 (clarifying that TRO ruling "did not turn solely or even primarily on evidence of post-merger efficiencies").

[98] *E.g.*, Defendants' Pretrial Memorandum, *supra* note 73, at 21 n.13; Closing Transcript, *supra* note 66, at 2416–18.

[99] SDNY Decision, *supra* note 7, at 69 n.14; *see also id.* at 80.

[100] *Id.* at 168.

[101] *Id.* at 100, 137, 138 (addressing credibility of T-Mobile, Sprint and DISH executives).

[102] *Id.* at 76–77.

[103] *Id.* at 133–36.

[104] Such evidence was also important to the district court's assessment of likely effects in *United States v. Sabre*, even though the court doubted the credibility of company executives in other respects. *See. e.g.*, *Sabre/Farelogix* Decision, *supra* note 5, at 63.

[105] SDNY Decision, *supra* note 7, at 5 ("expert witnesses' reports and testimony . . . do not constitute the only or even the primary source of support for the Court's assessment of" competitive effects).

[106] Although not presented primarily by economists, evidence from T-Mobile's previous acquisition of MetroPCS offered a persuasive indication of the Sprint merger's likely network efficiencies and their impact on post-merger competitive incentives. *Id.* at 82–83.