ARTICLE

LITIGATING THE REMEDY

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In recent years, merging parties have with increasing frequency proposed divestitures during litigation in attempts to address competitive concerns with their mergers. These proposals raise the question: How should a court evaluate a challenge to a merger once such a divestiture has been proposed? In particular, should the court evaluate the competitive effects of the merger with or without the proposed divestiture factored in? Looking at the text of the Clayton Act and the Hart-Scott-Rodino Act, federal court precedent, and the antitrust laws' procompetitive goals, this Article argues that courts should evaluate mergers as structured at the time of the complaint, and if the merging parties propose a divestiture to address potentially anticompetitive effects of the merger during litigation, the divestiture should properly be treated as a proposed remedy to be considered after a liability determination.

I. INTRODUCTION

The namesake of this lecture—William Howard Taft—was a great antitrust jurist and president, and he continues to inspire us. *Addyston Pipe*,[1] which Taft wrote as a circuit judge, continues to be one of the most important cases on per se illegality and ancillary restraints. And as President, his Administration filed more antitrust cases in four years than his predecessor Teddy Roosevelt's did in his seven-plus years in office.[2]

Ironically, we can perhaps look to one of the Taft enforcement *failures* to help illustrate the arc of the antitrust laws in terms of addressing and remedying anticompetitive mergers. In *United States v. United States Steel*,[3] the Taft Administration challenged under Section 1 of the Sherman Act both the formation of the U.S. Steel holding company—which combined previously competing firms that made up around 80% of the steel industry in 1901—and its subsequent acquisition of Tennessee Coal in 1907, a major rival.[4]

Despite those great facts, the Supreme Court in 1920 held that the government failed to prove a case—the steel trust was allowed to remain in place. According to the Court, J.P. Morgan and his associates did not act with monopolistic intent, and the falling market shares and lack of substantial price increases apparently suggested that the company did not reach monopoly or trade restraint proportions.[5] Perhaps the case would have turned out differently if initiated under the

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1 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

2 Peri E. Arnold, *William Taft: Domestic Affairs*, MILLER CTR. AT UNIV. OF VA., https://millercenter.org/president/taft/domestic-affairs [https://perma.cc/9NRD-VAVC]; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 16 (2003) (noting that Roosevelt brought forty-five antitrust cases in less than eight years).

3 United State v. U.S. Steel Corp., 251 U.S. 417 (1920).

4 *Id.* at 411 (1920); *see generally* John W. McLaughlin, The Acquisition of the Tennessee Coal, Iron and Railroad Company by the United States Steel Corporation: A legend Re-examined (1971) (M.A. thesis, University of Nebraska at Omaha).

5 *See U.S. Steel Corp.*, 251 U.S. at 432–33.

Clayton Act, which was passed in 1914, but as the Taft Administration brought the case in 1907, that more aggressive statute was not an option.[6] U.S. Steel successfully exploited a loophole in the Sherman Act, at least as then interpreted by the courts.

In passing the Clayton Act in 1914, Congress intended to plug the gaps that antitrust reformers saw left open by the Sherman Act. As the *U.S. Steel* decision illustrates, those reformers were not wrong to believe that more was needed at that time. Accordingly, the Clayton Act—rather than embodying a general standard such as the rule of reason—targeted specific practices, such as Section 7's prohibition of stock acquisitions and holding companies that may substantially lessen competition or tend to create a monopoly.[7] However, there came to be a problem in the Clayton Act too. In *Arrow-Hart & Hegeman Electric Co. v. FTC*,[8] the Supreme Court announced that the Clayton Act "does not forbid the acquirement of property, or the merger of corporations pursuant to state laws, nor does it provide any machinery for compelling a divestiture of assets acquired by purchase or otherwise, or the distribution of physical property brought into a single ownership by merger."[9] This provided another loophole—enough for well-counseled big businesses that wanted to get bigger and more powerful: as long as the businesses merged with their competitors (or simply acquired the competitors' assets) rather than just acquired their stock or combined via holding company, Section 7 was powerless to protect competition.

[6] Congress passed the Clayton Act, 15 U.S.C. § 12 *et seq.*, in order to "to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act] of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. REP. NO. 63-698, at 1 (1914).

[7] 15 U.S. Code § 18; *see also generally* Richard B. Blackwell, *Section 7 of the Clayton Act: Its Application to the Conglomerate Merger*, 13 WM. & MARY L. REV. 623 (1972).

[8] 291 U.S. 587 (1934).

[9] 291 U.S. at 595.

Congress finally acted to plug that loophole in 1950 with the passage of the Celler-Kefauver Anti-Merger Act,[10] allowing government enforcers to invoke Section 7 of the Clayton Act to target not just anticompetitive stock acquisitions, but also asset acquisitions and mergers with reasonably probable anticompetitive effect.[11] In cases such as *Brown Shoe*,[12] *Philadelphia National Bank*,[13] and *Continental Can*[14]— a few of the government merger victories of the 1960s and early 70s—the United States Department of Justice fulfilled its Congressionally assigned role to stop anticompetitive mergers, a role this amended statute helped realize. Yet, another loophole became apparent. As the Senate Judiciary Committee observed in 1974:

> Presently, the Government can stop few illegal mergers before they take place. Once a merger is consummated, the average case takes 5-6 years to resolve, during which time the acquiring entity retains the illegal profits and other fruits of the transaction. Securing adequate relief after the assets, management, and technology of the two merged firms have been together for that 5-6 year period is virtually impossible. As a result, the original state of competition is rarely restored upon ultimate disposition of the judicial proceeding . . . . The incentive is to delay because every day of delay means another day of illegal profits.[15]

Accordingly:

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10 64 Stat. 1125 (1950).

11 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 312–23 (1962) (reviewing the legislative history of the 1950 Celler-Kefauver Anti-Merger Act); William J. Baer, Origins of the Species: The 100 Year Evolution of the Clayton Act, Address at the American Bar Association Clayton Act 100th Anniversary Symposium 3, 6 (Dec. 4, 2014), https://www.justice.gov/atr/file/517721/download [https://perma.cc/CX6G-6QS4]; *see also* Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

12 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

13 United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

14 United States v. Cont'l Can Co., 378 U.S. 441 (1964).

15 S. REP. NO. 94-803, at 61, 70 (1974).

> [T]he remedial provisions of the merger decrees have almost invariably failed to restore the competitive conditions existing before the merger. The result of a final divestiture decree usually is the divestiture of a stripped down and empty shell-truncated assets that never were and never could be a viable firm-or the sale to a buyer who, had he sought to acquire the divested firm at the outset, would himself have violated section 7. Furthermore, in a surprising number of cases, the court orders no divestiture at all.[16]

Thus, we can observe a pattern in the sweep of antitrust law. The Sherman Act was passed in 1890 to end the monopolistic trusts and other large business "combinations" that had come to dominate much of the economy in the Gilded Age. But later court decisions—such as the *U.S. Steel* decision—watered down the Act's effectiveness.[17] The Clayton Act was passed in 1914 to target specific business practices, but it turned out to be too targeted—businesses could avoid its aggressive approach through anticompetitive consolidations outside of its scope.[18] The Celler-Kefauver Act helpfully expanded the coverage of the Clayton Act to mergers, but the inability to stop mergers before they happened meant the government often couldn't prevent serious harm to competition from occurring.[19] The Hart-Scott-Rodino Act ("HSR" Act)[20] was passed to address that deficiency in the enforcement regime.[21]

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[16] *Id.* at 71.

[17] United States v. U.S. Steel Corp., 251 U.S. 417, 432–33 (1920); *see also supra* note 5 and accompanying text.

[18] 15 U.S.C. § 12 *et seq.*; *see also supra* note 9 and accompanying text.

[19] 64 Stat. 1125 (1950); *see also supra* notes 15, 16 and accompanying text.

[20] 15 U.S.C. § 18a.

[21] William J. Baer, Former Deputy, Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act, Address Before the Conference Board, D.C. (Oct. 29, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act [https://perma.cc/DV5Q-3VJZ].

Today, we are witnessing arguments for the creation of another loophole. Many merging parties insist that they should be allowed to control the shape of merger litigation by proposing last-minute "fixes" during the course of litigation—after the investigating agency has spent many months (and allocated a substantial amount of resources) to review and analyze the main transaction—and the parties insist these fixes must be addressed in plaintiffs' prima facie cases.[22] If courts take up these invitations, then antitrust enforcers will be hampered in their remedial objectives. Parties will then have little incentive to propose procompetitive or competitively neutral mergers up front or to offer robust remedy proposals early in the review process.[23] They can propose anticompetitive deals, with the knowledge that government enforcers lack the resources to challenge every anticompetitive deal, and hope their merger will slide past authorities and yield anticompetitive rents. And the parties may anticipate little additional costs if they are caught—other than having to reformulate the proposal and litigate the so-called fix.

But government enforcers, the private bar, and courts can get to the right solution based on what this Article argues is the best reading of the governing statutes. As this Article will discuss, the solution to this problem is to treat these "fix" proposals as true remedy proposals—proper for the court's consideration in a remedial phase of litigation after the filed or initially proposed merger has been held unlawful. This solution not only makes good sense, but it is also the most faithful to the operative text and to binding precedent.

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[22] Eleanor Tyler, *ANALYSIS: How 'Litigating the Fix' is Upending Merger Review*, BLOOMBERG L. (May 11, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review [on file with the Columbia Business Review]; Hugh Hollman, Elaine Johnston &Nicholas Putz, *Parties are More Willing Than Ever to 'Litigate the Fix' in the United States*, GLOBAL COMPETITION REV. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states [https://perma.cc/ZNP4-UUQC].

[23] Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 86 ANTITRUST L. J. (forthcoming 2024).

II. LITIGATING THE FIX – THE PROBLEM AND THE SOLUTION

"Litigating-the-fix" scenarios come in many different flavors, and there is definitely some ambiguity in the labelling.[24] To avoid confusion, this Article focuses explicitly on a particular class of cases: where, just before or any time after the filing of a lawsuit challenging a horizontal merger, the merging parties present a new and separate transaction (whether fully inked in a contract or outlined in a more inchoate proposal) that allegedly avoids or lessens the competitive concerns with the challenged deal, which itself will remain in place. How should the law treat such proposed fixes? Broadly speaking, antitrust practitioners and commentators have proposed three possible approaches, which this Article will refer to as the remedy option, the rebuttal option, and the prima-facie case option.[25] Although there are colorable legal arguments from the proponents of each option, this Article argues that only the remedy option coheres fully with the relevant statutory text, judicial precedent, and the statutory goal of competition.

But first, it is important to spell out the different options a little more fully. The "remedy option" is an approach where the court would first determine whether the initially proposed

[24] For example, litigating-the-fix can refer to "fix-it-first" solutions, such as transfer of assets or completing the merger prior to filing for HSR review, *see* Leon B. Greenfield et. al., *Fix-It-First: Navigating a Seismic Shift in US Antitrust Agency Approaches to Merger Remedies*, WILMERHALE (Apr. 20, 2023), https://www.wilmerhale.com/insights/client-alerts/20230420-fixitfirst-navigating-a-seismic-shift-in-us-antitrust-agency-approaches-to-merger-remedies [https://perma.cc/ASU8-TR3W], or to unilateral or contractual promises offered to allegedly fix vertical mergers, *see* Illumina, Inc. v. FTC, 88 F.4th 1036, 1044–45, 1055–57 (5th Cir. 2023). Among other differences from the horizontal-merger context on which this Article focuses, in the latter example, where the proposed fix does not come in the form of a divestiture, the question whether to treat the proposed fix as a separate transaction subject to its own Clayton Act review cannot arise.

[25] *See* Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 166–68 (2010).

merger violates Section 7 of the Clayton Act.[26] Only if the court concluded that proposal would violate the law would the court go on to determine how best to remedy the anticompetitive proposal. Accordingly, the defendants' proposed fix is best seen as a proposed *remedy* to a planned anticompetitive merger. When the court makes its remedy determination, a full-stop injunction prohibiting the initial proposal is an important option, but the court could also consider a range of possibilities in which the proposed acquisition is followed by divesture to some extent. In this context, the merging parties' proposed fix could be one of the possibilities the court considers.

The "rebuttal option" arises if the court considers the proposal a possible means of rebutting a plaintiff's prima facie case proven through the establishment of a presumption of illegality under the structural framework set forth in the seminal case *Philadelphia National Bank*.[27] In *Philadelphia National Bank*, the Supreme Court held 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 presumptively unlawful and "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[28] Accordingly, a plaintiff can establish a prima facie case on the basis of combined share and increased concentration alone.[29] Following that structure, some cases have allowed defendants to present arguments that their proposed fixes are likely to transpire and alleviate competitive concerns as a means of overcoming a prima facie case of illegality.[30] This approach shares features of both the

[26] *See id.*, at 170.

[27] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 321 (1963).

[28] *Id.* at 363.

[29] In practice, plaintiffs generally introduce other evidence of likely anticompetitive effect during the case in chief as well. *See, e.g.,* Complaint at 28–37, United States v. UnitedHealth Grp. Inc., 1:22-cv-00481-CJN (D.D.C. Feb 24, 2022), ECF No. 1.

[30] *See, e.g.,* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition' lost by the merger counteracting

remedy option and the *prima facie* case option, elaborated below. Like the remedy option, the rebuttal option would place a burden on defendants to show the proposed fix would address competitive concerns with the original transaction. Like the prima facie option, however, if the defendant carried that burden, the court would not issue a judgment holding the original transaction to be unlawful—even if it would harm competition were it unremedied. Rather, the court would consider the potential for anticompetitive effects of the merger as altered by the remedy proposal.

The last option, the "prima facie case option," is the least protective of competition. That would require—even where defendants submitted the initial transaction for agency review and proposed a fix only after the commencement of a government lawsuit—the government to establish in its prima facie case that the transaction *as remedied by the fix* is reasonably probable to substantially lessen competition.[31]

As discussed above, there are strong reasons to believe the remedy option is most faithful to the operative statutory text, both of the Clayton Act and of the HSR Act. It also best makes sense of the binding case law and provides the best approach for competition more broadly.

A. Text

Section 7 of the Clayton Act, as amended by the Celler-Kefauver Anti-Merger Act of 1950, prohibits any "person" from engaging in an acquisition where, in any relevant market, "the effect of such *acquisition* may be substantially to lessen competition, or to tend to create a monopoly."[32] The HSR Act, Section 7A of the Clayton Act, which Congress passed in order to make sure the government had the tools

the anticompetitive effects of the merger . . . . Defendants in a merger challenge bear the burden of producing evidence tending to rebut the government's prima facie case." (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972))).

31 *See, e.g.*, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022) (disagreeing with view that a prima facie case can be established with market-share statistics not taking fix into account).

32 15 U.S.C. § 18 (emphasis added).

necessary to enforce the Clayton Act fully, prohibits any "person" from carrying out an "acqui[sition]" over a certain size, except pursuant to the procedural framework it sets forth.[33] Section 7A further provides special procedures under which the DOJ or FTC may seek a preliminary injunction to block the "proposed acquisition" when they have sued under Section 7 (or the FTC or Sherman Acts).[34]

The two statutory provisions must be read together. The Clayton and HSR Acts are not just *in pari materia*—they are part of the same statute, as the HSR Act is defined to be part of the Clayton Act. And it is a fundamental rule of statutory interpretation that, as the Supreme Court has said, "[a] term appearing in several places in a statutory text is generally read the same way each time it appears."[35] Accordingly, in the context of a merger submitted to the agencies for HSR review, the "acquisition" challenged under Section 7 should be coextensive with the "proposed acquisition" on which the parties made an HSR filing under Section 7A. This point is worth reiterating—the HSR Act not only refers to the proposed transaction that must be notified to the agencies; it also specifies in subsection (f) that it is this proposed transaction that may be challenged under Section 7.

Given these textual indicia—where there is one and only one transaction that parties have submitted to the agencies for HSR review (in other words, the proposed fix has not been submitted for HSR review)—the statute requires that the government be able to challenge that transaction under Section 7. That means that the court must determine whether that acquisition (the initially proposed one) violates Section 7. To do this means that the court must ask whether it *would* violate Section 7, as compared to the but-for world in which no transaction transpires, for the parties to complete that transaction.

[33] 15 U.S.C. § 18a.

[34] *Id.* § 18a(f).

[35] Ratzlaf v. United States, 510 U.S. 135, 143 (1994).

B. Precedent

As far as the author can tell, no court of appeals (or Supreme Court) case has addressed the exact issue at issue here. There have been, it is true, a string of district court cases on this topic. But it is important to look closely at higher court binding precedent to get a sense of the fundamental principles before turning to those district court cases.

First, there are the Supreme Court cases on antitrust remedies for anticompetitive mergers. According to the 1961 *du Pont* decision, antitrust relief must be "effective to restore competition."[36] And, "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[37] Thus, according to the 1972 *Ford Motor* decision, "[t]he relief ordered should 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance . . . ."[38] While these cases did not address the precise question of litigated fixes, they do highlight the importance of vigorous remedies in Clayton Act cases.

Second, the courts of appeals have issued decisions on analogous issues. The most relevant case is the Sixth Circuit's 2005 decision in *United States v. Dairy Farmers of America, Inc.*, addressing the Dairy Farmers of America's ("DFA's") acquisition of a 50% stake in dairy processor Southern Belle.[39] There, the DOJ and the Kentucky Attorney General sued DFA and Southern Belle under Section 7, claiming that the transaction "had significant anticompetitive effects on the market for school milk in dozens of school districts in Kentucky and Tennessee" because DFA also had a partial stake in Southern Belle's main competitor.[40] During the district court litigation,

36 United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

37 *Id.* at 334.

38 Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (quoting United States v. U.S. Gypsum Co., 340 U.S. 76, 88 (1950)).

39 United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 853, 855 (6th Cir. 2005).

40 *Id.* at 852.

DFA and Southern Belle revised the challenged agreement, converting DFA's interests from voting to non-voting and eliminating an option which would have allowed Southern Belle's other owner to sell its stake to DFA at a fixed price. The district court decided on summary judgment that only the revised agreement was properly before it and that the agreement was not anticompetitive under Section 7.

The Sixth Circuit reversed.[41] The government argued that the district court erred by not addressing the claims before it, challenging the initial transaction, whereas DFA insisted the government's challenge to the original deal was moot.[42] The Sixth Circuit concluded that the government had the better argument. The Court cited Supreme Court precedent that "'[a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,' unless 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[43] Moreover, it is the party asserting mootness who "'bears a 'heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to stand up again.'"[44] Thus, "the government [was] not required . . . to present evidence that the terms of the original agreement might be resorted to."[45] And since DFA failed to argue an issue on which it had the burden, "[t]he government's claim with respect to the original agreement was not mooted . . ., and the district court should have considered it."[46]

Dairy Farmers of America charts out the correct course for the problem before us. Courts must decide the claims before

41 *Id.* at 863.

42 *See* Brief for the Appellants United States and Commonwealth of Kentucky, United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (2005) (No. 04-6318).

43 *Dairy Farmers of Am.*, 426 F.3d at 857 (quoting Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc., 528 U.S. 167, 189 (2000)).

44 *Id.* at 857 (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 191, 203 (1968)).

45 *Id.*

46 *Id.*

them. When the parties propose—and the government challenges—an initial transaction, the court should address the challenge to that transaction unless and until it has become moot.[47] But we are, or often are, in a slightly different situation from *Dairy Farmers of America*. There, DFA had completed the initial transaction, already acquiring a partial stake in Southern Belle.[48] Although DFA and Southern Belle's other owner amended that agreement, thereby lessening DFA's control over Southern Belle, the fact remained that the initial transaction had transpired.[49] In that context, the court held that the challenge to the initial transaction was not moot.[50] But because, under the HSR framework, most merger litigation happens pre-merger,[51] we are often confronted with a situation where a fix is proposed before the initial transaction is consummated. Nevertheless, the difference between the *Dairy Farmers* facts and the more typical pre-merger litigating-the-fix case is not material to the question of how to treat the fix.

The Second Circuit's decision in *R.C. Bigelow, Inc. v. Unilever N.V.* helps show how the *Dairy Farmers* decision can be applied straightforwardly in the pre-merger setting. In *Bigelow*, a private company brought a Section 7 case challenging a proposed merger between tea companies Lipton and Celestial Seasonings.[52] The district court granted summary judgment to defendants based on its view of the case's substantive merits.[53] But, while the case was on appeal, the defendants canceled the proposed transaction, and instead Celestial Seasonings' parent Kraft agreed to sell it to a different company, which specialized in leveraged buy-outs.[54]

47 *See id*.

48 *Id*. at 855.

49 *Id*. at 853.

50 *Id*. at 857.

51 *See* Baer, *supra* note 21 ("[T]he vast majority of merger challenges are initiated at the premerger stage.").

52 R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 104 (2d Cir. 1989).

53 *Id*. at 103.

54 *Id*. at 105.

Despite this subsequent history, the Second Circuit held that the case had not become moot.[55] The Court said the matter was properly treated under the "voluntary cessation" doctrine, under which the defendant bears a "heavy burden" to show "that there is no 'reasonable expectation' the same controversy will recur."[56] Applying that standard, the Court concluded that the defendants failed to establish "that the in-house buyout of Celestial is the sort of arms-length transfer that removes the alleged threat of combination facing Bigelow."[57] In particular, the Second Circuit explained that "[w]hen abandonment of challenged conduct seems timed to head off an adverse determination on the merits . . . [,] it cannot be said that the possibility of repetition of such activity is merely abstractly conceivable."[58]

Bigelow did not exactly involve a proposed fix, but it did involve a closely analogous situation, where a challenge to a proposed merger was heard by the court despite the parties' changing of the underlying merger agreement. Given the court's focus on the parties' attempt to avoid scrutiny, this precedent has direct applicability to the litigating-the-fix situation, at least where parties adopt divestiture agreements at the last minute in a way calculated to avoid, or at least minimize, direct trial review of the initial transaction. Indeed, in situations where the original transaction agreement is still in place, and defendants have merely proposed a separate divestiture to remedy harms to competition from that original agreement, there is even less an argument for mootness than in *Bigelow*: with the original agreement still in place, the defendants may not have ceased the anticompetitive activity at all.

Moving from the court of appeals level down to the district courts, this Article now arrives at decisions directly addressing head on the litigating-the-fix legal question. Nevertheless, this Article cautions against trying to glean binding principles

55 *Id.* at 107.

56 *Id.* at 106.

57 *Id.*

58 *Id.* at 106–07.

from this landscape. The district courts are mostly focused on resolving the case in front of them.[59] In many of the cases, they have followed frameworks proposed by the parties, or they have evaluated the issues from multiple points of view where there is disagreement.[60] And this shouldn't be surprising—since it is the role of appellate courts, not district courts, to issue precedential decisions.

With this caveat in mind, this Article will examine some of the major district court decisions. On this judicial landscape, there are decisions falling more or less into each of the three potential options that this Article sketched out above. First, there are the early decisions, which applied a variety of standards, including some that considered the proposed divesture as a rebuttal issue. Second, there are the decisions—perhaps the biggest category of recent cases—in which the courts *essentially* treat merging parties' proposed fixes as a remedial issue. Now, the modifier "essentially" is italicized in the last sentence because, while the courts have applied remedial standards from *du Pont* and *Ford Motor*,[61] they have done so in the context of a liability determination—still locating this analysis in the rebuttal step of a burden-shifting framework. And third, there are the decisions where judges have—either fully or in the alternative—required plaintiffs to account for proposed divestitures in their prima facie cases.

As a general matter, the early cases tended to view proposed fixes either through an ordinary rebuttal or prima-facie lens. Some courts applying a rebuttal approach analogized fix proposals to entry arguments, on which defendants bear a

[59] *See, e.g.*, United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) ("A single district court decision . . . has little precedential effect [, and i]t is not binding on . . . other district judges in the same district.").

[60] *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72–73 (D.D.C. 2015) ("[B]oth sides cite to the 2004 U.S. Department of Justice's 'Policy Guide to Merger Remedies.'"); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 134 (D.D.C. 2022) (stating that "the evidence leads to the same result under either standard").

[61] *See* United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326, 334 (1961); Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972); *see supra* notes 37–39 and accompanying text.

burden in rebuttal, as the divested asset (or other fix proposal) would be used to create a new or improved competitor in the market. In *United States v. Franklin Electric Co.*, the DOJ challenged the formation of a joint venture between "the only two companies in the United States that develop, manufacture and sell submersible turbine pumps used for pumping petroleum products out of underground storage tanks at service stations."[62] The joint venture would essentially be a merger to monopoly; but the parties proposed a fix: a service and product supply agreement supporting a new competitor.[63] The district court appeared to treat the argument as essentially one of *entry*, holding that "defendants have the burden of proving their contention that because of the proposed licensing and supply agreements with [the proposed competitor] the number of competitors will not change."[64] The court concluded that the uncertainty of the new company's success was too great, especially given that the merger was to true monopoly levels.[65]

By contrast, the courts in *FTC v. Libbey, Inc.* and *FTC v. Arch Coal, Inc.* required the plaintiff to address a proposed divestiture in its *prima facie* case, but these cases must be understood in light of their unique facts. In *FTC v. Libbey, Inc.*, the defendant revised the actual merger transaction, carving out an additional business line from the proposed acquisition.[66] There, where the district court held that the revision was not an attempt to avoid judicial review, it concluded that "the amended agreement [was] properly before the Court for judicial review . . . ."[67] Moreover, in *FTC v. Arch Coal, Inc.*, Judge Bates on the D.C. District Court concluded—where two merging coal mine operators had agreed to divest a mine to a third party prior to the FTC's issuance of a complaint[68]—that the divestiture transaction "would be considered as part of the

[62] 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000).
[63] *Id.*
[64] *Id.* at 1033.
[65] *Id.* at 1035–36.
[66] 211 F. Supp. 2d 34, 41 (D.D.C. 2002).
[67] *Id.* at 46.
[68] 329 F. Supp. 2d 109, 114 (D.D.C. 2004).

challenged transactions" in the court's review.[69] But since the original transaction agreement was still in place—and the divestiture was presented in a separate agreement—it was arguably error for the court to avoid considering the FTC's claims regarding the original transaction. And, as discussed below, the same district judge in a later case—*United States v. Aetna, Inc.*[70]—applied a different and (as this Article will explain, more appropriate) framework.

Later district court decisions landed on a stricter approach, drawn from the law of antitrust remedies. The first decision in this category came in 2015, in *FTC v. Sysco Corp.*[71] The FTC had challenged the proposed merger of the "two largest foodservice distribution companies in the country."[72] Fourteen months after the merger agreement was announced, and just weeks before the FTC filed suit, the parties agreed to divest 11 distribution facilities to the third largest competitor if the merger received approval.[73] The adequacy of that remedy was a key issue at trial. The FTC had proven a structural prima facie case, focused on increased concentration levels caused by the merger before accounting for the proposed divestiture.[74] In deciding the case, Judge Mehta observed that, other than the Supreme Court's decisions in *du Pont* and *Ford Motor*, there was "a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[75] Nevertheless, both parties pointed to the standards in the 2004 U.S. Department of Justice's "Policy Guide to Merger Remedies," and that litigation choice proved influential. The Policy Guide—which followed the Supreme Court's decisions in *du Pont* and *Ford Motor*—taught that "[r]estoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing

69 *Id.* at 115 n.2.
70 240 F. Supp. 3d 1, 1 (D.D.C. 2017).
71 113 F. Supp. 3d 1 (D.D.C. 2015).
72 *Id.* at 15.
73 *Id.*
74 *Id.* at 61.
75 *Id.* at 72.

narrowly on returning to premerger HHI levels."[76] Judge Mehta then incorporated this standard in the rebuttal step—allowing defendants to overcome a prima facie case if their proposed divestiture adequately restores competition threatened by the merger as shown by the government's prima facie case.[77] *In Sysco*, the divestiture was inadequate—it didn't cover all the relevant geographic markets and didn't fully restore competition in those areas it did cover.[78] As a result, the merger was enjoined.[79]

The approach of *Sysco* became fairly standard in the D.C. District Court. In the following years, district courts in *FTC v. Staples*,[80] *United States v. Aetna*,[81] and *FTC v. RAG-Stiftung*[82] all applied these remedial standards drawn from *Ford Motor and du Pont*. *Aetna* was particularly interesting because Judge Bates, who had required the FTC to address a proposed divestiture in its prima facie case in *FTC v. Arch Coal*,[83] adopted the *Sysco* approach in *Aetna* instead.[84] Although Judge Bates did not expressly say why he was not following his earlier approach from *Arch Coal*, he did mention another case that analyzed a proposed divestiture at the

[76] *Id.* (quoting U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (Oct. 2004)).

[77] *Id.*

[78] *Id.* at 73–76.

[79] *Id.* at 88.

[80] 190 F. Supp. 3d 100, 138 n.15 (D.D.C. 2016) ("Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger . . . ."); *FTC v. Sysco Corp.*, 113 F. Supp. 3d at 72 (considering divestiture on rebuttal).

[81] 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition' lost by the merger counteracting the anticompetitive effects of the merger . . . . Defendants in a merger challenge bear the burden of producing evidence tending to rebut the government's prima facie case." (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972))).

[82] 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity.").

[83] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 114–15 (D.D.C 2004) (divestiture of entire coal mine factored into prima facie case).

[84] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

prima facie step, *FTC v. Libbey*.[85] Judge Bates concluded that that case was only "marginally relevant" and provided "little guidance," because in *Libbey* "the merging parties revised their agreement."[86]

But this equilibrium was questioned during the DOJ's challenge to UnitedHealth's acquisition of Change Healthcare.[87] The DOJ's complaint alleged anticompetitive effects from both horizontal and vertical aspects of the deal.[88] As for the horizontal aspects, the parties proposed a fix—divesting one of the two parties' businesses to eliminate the horizontal overlap.[89] The DOJ claimed that the initial transaction was prima facie unlawful—yielding a company with around 90% of the relevant market in first-pass claims editing[90]—and that the divestiture proposal was inadequate because the divestiture buyer lacked the incentive and proven ability to compete as effectively with the divested business.[91] Judge Nichols observed that he "agree[d] with [the defendant] UHG that the relevant transaction here is the proposed acquisition agreement including the proposed divestiture."[92] In other words, Judge Nichols disagreed with the framework applied in *Sysco*, *Aetna*, *Staples*, and *RAG-Stiftung*. But he applied that framework anyway and found that it did not matter—as he analyzed the issues, Judge Nichols concluded that the defendants successfully rebutted the government's prima facie showing.[93]

85 211 F. Supp. 2d 34 (D.D.C. 2002).

86 *Aetna*, 240 F. Supp. 3d at 80 n.39.

87 United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 132–34 (D.D.C. 2022).

88 Complaint at 28, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) (No. 1:22-cv-00481-CJN).

89 *Id.* at 39; *see also UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 128.

90 Proposed Findings of Fact and Conclusions of Law of the United States, State of Minnesota, and State of New York at 21, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) (No.1:22-cv-00481-CJN).

91 *Id.* at 20–22.

92 *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 134 n.5.

93 *See id*. at 140.

It is understandable why Judge Nichols sensed some tension in applying the remedy standards from the Supreme Court's decisions in *du Pont* and *Ford Motor* in the rebuttal step of merger litigation.[94] But the answer is not to force the government to address the proposed fix within the prima facie step. As the *Dairy Farmers* decision underscores, the government is entitled to a court decision on its legal claims.[95] Where the complaint challenges the original transaction, the court should evaluate the originally proposed transaction so long as the challenge has not become moot.[96] And in cases like *UnitedHealth*, where the original merger agreement was still in place (and only supplemented by a separate proposed divestiture agreement), there is little merit to a mootness claim. Indeed, the situation is far removed from the Second Circuit's decision in *Bigelow*, where the parties went as far as canceling their initial merger agreement, and the circuit court still allowed a merger challenge to go forward as not moot.[97] Under this approach, the proposed divestiture would become relevant after a finding of liability, when the court considers the relief needed to remedy the violation. In this scenario, there is no doubt that *du Pont* and *Ford Motor* set forth the requisite standard courts must apply in determining the necessary relief. In other words, courts should be satisfied with no less than whatever is necessary to fully protect and restore competition.

The correctness of this approach is confirmed by something unusual Judge Nichols did in the *UnitedHealth* decision. Despite finding no liability, Judge Nichols *ordered* the parties' proposed divestiture, apparently sensing the parties at least needed to be held to their word.[98] But Judge Nichols pointed to no provision in the Clayton Act that gives courts authority to order divestiture in such a situation. Section 15 of the

[94] *See id.* at 133–34.

[95] United States v. Dairy Farmers of America, Inc., 426 F.3d 850, 857 (6th Cir. 2005); *see also supra* note 48 and accompanying text.

[96] *Id.*

[97] R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 106–07 (2d Cir. 1989); *see also supra* notes 55–56 and accompanying text.

[98] *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 155.

Clayton Act provides that the "several district courts of the United States are invested with jurisdiction to *prevent and restrain violations* of this Act[.]"[99] Furthermore, the Attorney General is to institute proceedings "praying that such *violation* shall be enjoined or otherwise prohibited."[100] That is, under the Clayton Act, courts are empowered to order divestiture or other permanent equitable relief *after* finding a violation. This perspective suggests a straightforward path not taken. It was clear the merger as proposed by the parties (creating one firm with 90% of the relevant market) would have been unlawful.[101] The ordered divestiture could have been justified if the court had analyzed the claim put before the court, namely, that the originally proposed transaction would be unlawful.[102] Following that approach, the court could have issued an order holding that transaction would be unlawful, and ordering the remedy proposal it viewed as sufficient.

C. Competition

In addition to text and precedent, this Article proposes that we approach our question through a third lens—that of competition. In this Article's view, the consideration of competition also appears to point decisively toward the same conclusion. As the Supreme Court has emphasized, under the antitrust laws, "[t]he heart of our national economic policy long has been faith in the value of competition."[103] Accordingly, advancing the interests of competition is advancing the expressed intent of Congress. Moreover, as this Article mentioned above, under Section 15 of the Clayton Act, it is the role of the federal government to bring suits to "prevent and restrain" anticompetitive mergers, and it is the role of courts to

99 15 U.S.C. § 25 (emphasis added).

100 *Id.* (emphasis added).

101 *See supra* note 96 and accompanying text.

102 The Government had factual arguments that the proposed divestiture was insufficient, *see* United States' Proposed Findings of Fact and Conclusions of Law, United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118 (D.D.C 2022) (No. 1:22-cv-00481 (CJN)), but at least that would have been a more legally defensible approach.

103 Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

issue orders to "prevent and restrain" those mergers when it finds that anticompetitive effects are reasonably probable.[104] Accordingly, our primary concern in enforcement policy is effective enforcement against anticompetitive mergers. On this point, it's worth repeating Congress's view in passing the HSR Act that, due to the government's inability to obtain pre-merger preliminary injunctive relief (in the years prior to the HSR Act's passage), "the remedial provisions of the merger decrees have almost invariably failed to restore the competitive conditions existing before the merger."[105] Accordingly, the Senate Judiciary Committee agreed that "the government wins the opinions . . . [but] the defendants win the decrees."[106] We are potentially faced today with a similar threat.

In particular, this Article aims to focus especially on three subsidiary issues to the overall question of competition: deterrence, resource allocation, and administrability. Now, when using the term "deterrence," this Article speaks not of the deterrent effect of a punishment. Equitable relief under the antitrust laws is not punitive.[107] But there is a proper deterrent effect from remedies designed to *prevent* as well as restrain violations.[108] If the enforcement regime is effective enough, parties will have little incentive to propose anticompetitive deals because they can expect those deals to be detected and stopped. But alternative proposals on litigating the fix (especially those that would require plaintiffs to address divestitures in their prima facie cases) invite gamesmanship that could derail effective enforcement, thus frustrating Congress's intent to empower agencies to prevent and restrain

[104] 15 U.S.C. § 25.

[105] S. REP. NO. 94-803, at 71 (1976).

[106] *Id.* (quoting Donald Dewey, *Romance and Realism in Antitrust Policy*, 63 J. POL. ECON. 93, 93 (1955)).

[107] United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316, 326 (1961) ("[R]elief must not be punitive.").

[108] That is, while equitable remedies should avoid general deterrence goals (to which *punishments* are properly directed), specific deterrence is an appropriate goal of equitable relief. *See* Steel Co. v. Citizens for A Better Env't, 523 U.S. 83, 108 (1998) (explaining that injunctive relief may be "aimed at deterring [parties] from violating [the statute] in the future").

anticompetitive mergers. So long as government enforcement resources are constrained, it will be impossible for the agencies to detect and challenge every anticompetitive merger proposal. And as long as parties know that they can propose last minute remedies that will shift the ground on which litigation proceeds, they will have little incentive to propose competitively neutral or procompetitive mergers initially or to propose robust remedies early in the agency-review process. They can propose anticompetitive mergers and hope the authorities miss them, with the expectation of increased anticompetitive rents. And if the anticompetitive proposal is detected, there may be little additional cost to proposing a last-minute divestiture in that event.

The second subsidiary consideration is whether the HSR Act's goals are being fulfilled or frustrated, especially when considering whether the approach makes efficient use of the government's investigative resources. The HSR Act is designed to give the DOJ and FTC sufficient time to investigate a merger proposal before commencing litigation.[109] When the parties can submit one proposal for review but then pivot to a new proposal in litigation, the government's investigation is thwarted because it must litigate a proposal it was not given the time or means to investigate fully. That is not what Congress intended. It is no accident that the HSR Act refers to a "proposed acquisition" that is subject to (1) a waiting period, (2) notification requirements to allow government investigation, and (3) potential litigation in the event the agency decides that acquisition would violate the Clayton, Sherman, or FTC Acts.[110] This policy is embodied in the text: the same proposed transaction that is investigated is the one that the government may challenge, and it is this proposed transaction

[109] *See* Public Statement, William J. Baer, Former Director, Bureau of Competition, Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act (Oct. 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act [https://perma.cc/DV5Q-3VJZ].

[110] *See* 15 U.S.C. §§ 18a(a), (b), (d), (f).

that would undergo court scrutiny for a potential Section 7 violation.

Third, this Article argues that the remedy option is the most administrable for courts. That is, this approach best harnesses courts' unique skillsets: designing remedies crafted to fit an identified violation.[111] Indeed, this role is not unique to antitrust; it arises any time a party asks a judge sitting as chancellor in equity to issue an order remedying an alleged wrong. The other two options—the rebuttal option and the prima-facie option—require, in one form or another, courts to "put the cart before the horse." In other words, they require courts to apply remedial principles before they have assessed a transaction's anticompetitive effect. This makes little sense. How can one judge the adequacy of a remedy without first identifying and assessing the harm it is meant to address? In essence, that is what the district court attempted in *UnitedHealth*—ordering a divestiture without filing a violation; but, as we saw, there is scant legal support for that approach.

III. WHAT IS THE STANDARD?

So far, this Article has focused mainly on the central question of where the burden should lie. This is a critical issue, as so often in litigation legal burdens can be outcome determinative. But this Article will conclude with a brief discussion on what the proper standard is.

111 Courts have for centuries taken on questions of the proper remedy for particular deprivations of legal rights. *See* Marbury v. Madison, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."). Indeed, for centuries before the United States' founding, English courts in equity applied practical considerations to these questions. *See, e.g.*, Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 849 (1918) (explaining that a chancellor applied "the principles of reason and conscience" in crafting appropriate remedies). Antitrust law's remedial focus on "prevent[ing] and restrain[ing] violations," 15 U.S.C. § 4, § 25, "is to be exercised according to the general principles which govern the granting of equitable relief." De Beers Consol. Mines v. United States, 325 U.S. 212, 218–19 (1945).

Under the best approach, courts must choose a remedy designed to protect and restore competition effectively.[112] That is the first and foremost priority. Although remedies must not be intentionally punitive, they can impose harsh costs on parties if in service of competition.[113] Other values—the public interest more generally and the private interests of the parties—are relevant only in deciding between multiple options that effectively prevent competition.[114] Competition may not be traded off against those values. Although district courts are given large discretion in fashioning appropriate relief, they are also instructed to resolve all doubts in favor of the government as to the proper relief.

Accordingly, where defendants propose remedies different from those the government seeks, they must clearly establish (so as to resolve such doubts) that their favored fix sufficiently restores any competition lost. Courts must look not only to concentration statistics post-fix, but they must also look under the hood of those numbers. After all, even if a fix will bring concentration down to premerger levels, if the divested business will not compete as vigorously and effectively as it had previously, the fix fails to *restore* the competition that would be lost as a result of the merger. In doing this analysis, courts have identified a number of relevant factors, including "the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture[;] the independence of the divestiture buyer from the merging seller[;] and the purchase price."[115] But some courts have mistakenly approached these factors as a checklist to be ticked through one by one.[116] But

112 *See Du Pont*, 366 U.S. at 326 ("The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition.").

113 *Id.*

114 *Id.* at 327–28 (quoting United States v. Am. Tobacco Co., 221 U.S. 106, 185 (1911)).

115 FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) (citing United States v. Aetna Inc., 240 F. Supp. 3d 1, 60–74).

116 *See id.* at 27–32 (analyzing each factor in determining whether the divesture would restore competition); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 135–40 (D.D.C. 2022) (adopting the factors established in *RAG-Stiftung* "to assess whether a divestiture w[ould] restore

that approach misses the forest for the trees. The ultimate question is a holistic one—does the court have sufficient confidence that the remedy will fully restore competition? If the court cannot answer this question with sufficient certainty, there is no alternative but a complete injunction blocking the initial merger (and similar combinations in the future). As Judge Posner wrote in *FTC v. Elders Grain*, under Section 7 of the Clayton Act, "doubts are to be resolved against the transaction."[117]

competition" to conclude that "each of the[] metrics . . . demonstrated that the divestiture w[ould] preserve competition in the market").

[117] FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989).