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ENERGIZING ANTITRUST

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Doubt is being cast on whether America's antitrust laws are fit for today's economy. There have been plenty of proposals for rewriting them, some more realistic than others.

But antitrust law—particularly the "incipiency" standard—already packs far more punch than gets used. Whether or not consensus ever is reached to amend the rules, a reinvigorated implementation of a statute already on the books would go a long way toward addressing today's concerns.

The question for Congress is how to make this happen.

"Incipiency" describes the test under which mergers, acquisitions, and certain anticompetitive practices are prohibited by the Clayton Antitrust Act, 15 U.S.C. §§ 14, 18, when the effect may be substantially to lessen competition or tend to create a monopoly. Applied intelligently, the incipiency test can satisfy most of the calls that are coming from across the political spectrum to strengthen antitrust enforcement. What's more, this can be accomplished without changing the statute. And, if there is consensus that the Clayton Act needs to be sharpened, there are means to accomplish that too. *See* Richard M. Steuer, *Incipiency,* 31 LOYOLA CONSUMER L. REV. 155 (2019).

Reinvigorating the incipiency standard would not address every issue being raised today, including whether the offense of "monopolizing" should be broadened to include "abuse" of monopoly power, whether past mergers should be broken up, or whether certain industries should be subject to greater regulation. But it would make the greatest difference with the least upheaval.

What's the Problem?

Humans—like practically every species—are competitive by nature. There's no denying it. The challenge is how to channel that instinct constructively, without either squelching initiative or countenancing bad behavior. Every form of competition—from cage fighting to football to chess—needs effective rules; business competition is no different.

The rules of competition look complex but really are simpler than most people think. *See* Richard M. Steuer, *The Simplicity of Antitrust,* 14 U. PA. J. OF BUS. LAW 543 (2012). Essentially, the antitrust laws—like competition laws around the world—prohibit two things everyone learned about on the playground: bullying and ganging up. In this instance, bullying takes the form of a single firm's misuse of dominant power to harm competition. Ganging up takes the form of

collusion among multiple actors to harm competition. The antitrust laws are directed almost entirely against bullying, ganging up, and mergers that facilitate either one.

Some behavior, like competitors fixing prices, is per se illegal, without the need for evidence of the impact on competition. Other behavior requires proof of realized harm to competition. But mergers, acquisitions, and many forms of behavior are subject to the incipiency test, requiring instead proof of a *threat* to competition.

The immediate problem today is how tentatively the incipiency test is being applied. Courts have hesitated to find illegality without evidence of more than a threat to competition—a discouraging development for enforcers weighing their prospects for winning lawsuits in those courts. As a result, the incipiency standard has been diluted and marginalized.

This can be remedied, without radical surgery to the antitrust laws. The incipiency standard already provides the power to bolster the effectiveness of antitrust if Congress is prepared to reconfirm it, enforcers are prepared to employ it, and courts are prepared to apply it.

Incipiency

Section 7 of the Clayton Act forbids acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in any relevant market.[1]

Section 3 forbids conditioning the sale (or lease) of a commodity, or a price, discount, or rebate, on the buyer (or lessee) not using the goods of competitors where the effect "may be to substantially lessen competition or tend to create a monopoly" in any relevant market.[2]

These forward-looking tests reach anticompetitive harm in its incipiency, and apply to those activities that, beside price fixing conspiracies, trigger the greatest number of challenges—specifically, mergers, acquisitions, exclusive dealing, and tying. These are offenses that can harm the economy in two ways. Not only can they harm consumers by elevating prices, but they can prevent competitors from competing effectively while foreclosing new competitors from entering.

Properly interpreted and applied, the incipiency test can and should be highly effective in combating these activities without the need to add new standards. But if the incipiency test is not being applied effectively enough, the surest way to restore its potency is to reconfirm the prospective nature of the test in terms that courts cannot misconstrue or misapply.

The Clayton Act

The Clayton Act was adopted in 1914 to supplement the 1890 Sherman Act, which prohibits anticompetitive contracts, combinations, or conspiracies. While the Sherman Act addresses anticompetitive practices that unreasonably restrain trade in the here and now, the Clayton Act was

[1] 15 U.S.C. § 18.

[2] 15 U.S.C. § 14. Note that in section 3, the infinitive is split—"to substantially lessen competition"—and one "to" is omitted. See also 15 U.S.C. § 13 (1914) (utilizing the same language in Clayton Act provision on price discrimination, which was substantially amended by the Robinson-Patman Act in 1936 and then codified, but that provision has followed its own path of judicial application and interpretation).

designed to halt anticompetitive acquisitions and foreclosure before the harm they threaten is achieved.

The Clayton Act was designed to fill gaps that had appeared in the coverage of the Sherman Act. At that time, troubling mergers and acquisitions were escaping the reach of the Sherman Act, and exclusive dealing and tying persisted in closing off competition.

The Clayton Act did not change the goals of the antitrust laws. Instead, it amplified those laws by changing the time horizon for analysis in crafting what became known as the incipiency standard.

According to the House Report accompanying the Clayton bill, the purpose was "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[3] The "may be substantially to lessen competition" or "tend to create a monopoly" tests were drafted to go beyond the more static standard that was being applied under the Sherman Act.

This represented a compromise worked out between one block of legislators who wanted certain acquisitions and practices to become criminal violations, and another block of legislators who saw no need for the Clayton Act at all. In the second block's view, the newly created Federal Trade Commission could adequately pursue and prohibit those acquisitions and practices.

Originally, the Clayton bill's provision on acquisitions made it a crime to acquire another company where the effect "is" to "eliminate or substantially lessen competition" or "create a monopoly." The Senate rejected the criminal approach and unanimously changed this language to "where the effect may be to lessen competition." The conference committee reconciled the House and Senate versions by combining "may be" from the Senate version and "substantially" from the House version.

The original provision on exclusive dealing and tying similarly made those practices crimes. It also treated price discrimination as a crime. In removing the penal consequences for these practices, Congress incorporated the "substantially lessen competition or tend to create a monopoly" language from the section on acquisitions.

> We took the language that had been already approved by both the House and the Senate in another section [i.e., the section on acquisitions] . . . and applied it to . . . [the section on exclusive dealing and tying, and the section on price discrimination] so that the three sections . . . are in harmony now, all dealing with the question of contracts, the same principle being applied to each one of them.[4]

As enacted, the Clayton Act applied the "may be" to "substantially" lessen language and the "tend to" create a monopoly language both to acquisitions and to exclusive dealing and tying.[5]

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[3] S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914).
[4] Hon. H.C. Floyd, Adoption of Conference Report on the Clayton Antitrust Bill 5 (Oct. 8, 1914) in ANTITRUST LEGISLATION: SPEECHES IN THE U.S. SENATE AND HOUSE OF REP'S 63d CONGRESS 118 (2014). The assumption here was that—unlike price fixing conspiracies—acquisitions, exclusive dealing, tying, and price discrimination offenses all involve contracts of some variety.
[5] It also applied to price discrimination. *See* 15 U.S.C. § 13 (1914).

Judicial Interpretation

In the courts, the incipiency doctrine began to swing first in one direction and then the other over the years. Initially, lower courts interpreted Section 3 of the Clayton Act to embody the rule of reason test being applied under the Sherman Act and contemplated a wide-ranging examination of the facts and history, balancing any procompetitive and anticompetitive effects, with emphasis on the present and the immediate future.[6]

This changed in *Standard Fashion Co. v. Magrane Houston Co.,*[7] where the Supreme Court held that Section 3 had "tests of its own," which were intended to reach agreements within its sphere "in their incipiency."[8]

This result was not reached without a fight. Charles Evans Hughes, representing a manufacturer in *Standard Fashion,* had argued that Section 3 of the Clayton Act only applied to a challenged contract if that contract were "seriously to threaten or actually to accomplish a substantial lessening of competition or an actual tendency toward monopoly," and did not outlaw his client's exclusive dealing contracts with retailers.[9]

The Court held otherwise. It observed that the "may" be to substantially lessen competition or tend to create a monopoly standard deals with the "consequences to follow" a restrictive agreement.[10] At the same time, addressing substantiality, the Court opined that Section 3 did not prohibit the "mere possibility" of anticompetitive consequences. Rather, according to the Court, the Act was intended to prevent agreements shown to "probably lessen competition, or create an actual tendency to monopoly," though not reaching every "remote lessening" of competition, as demonstrated by the requirement that the lessening of competition must be "substantial."[11]

Notably, the Court found that there was no need to consult the legislative history. It remarked that although the parties had made much of the 1914 committee reports, "the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."[12]

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[6] *See, e.g.,* Standard Oil Co. of New York v. Fed. Trade Comm'n, 273 F. 478, 482 (2d Cir. 1921) (explaining no violation "at present" where effect "is not" to substantially lessen competition); Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206, 210 (S.D.N.Y. 1917) (illustrating failure to establish that contract "causes an unreasonable restraint of trade"); Breck P. McAllister, *Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly,* 3 ABA SECTION OF ANTITRUST LAW 124, 136-37 (1953); *see also* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 57-58 (1911); Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918). *But see* Standard Elec. Mfg. Co., 5 F.T.C. 376 (1923) (the Federal Trade Commission applied a rule of virtually per se illegality to exclusive dealing under Section 3 of the Clayton Act in a number of cases); B.S. Pearsall Butter Co., 5 F.T.C. 127 (1922); Stanley Booking Corp., 1 F.T.C. 212 (1918).

[7] 258 U.S. 346 (1922).

[8] *Id.* at 356.

[9] Brief for the Petitioner at 31-32, Standard Fashion Co. v. Magrane Houston Co., 258 U.S. 346 (1922); *see* McAllister, *supra* note 6, at 133-34.

[10] *Standard Fashion Co.,* 258 U.S. at 356.

[11] *Id.* at 356-57.

[12] *Id.* at 356.

"May" and "tend" are modal verbs, indicating the likelihood of something happening in the future or over a period of time. Perhaps because of this, and because of the contrast between the language of the Clayton Act and the language of the earlier Sherman Act (whereby contracts "in restraint of trade" are declared illegal), the Court had no hesitation in applying the plain meaning rule of construction.

In *Standard Fashion,* the lower court had found that the petitioner controlled some 40 percent of the available outlets. Subsequently, the pendulum swung toward applying the incipiency doctrine in situations where the degree of foreclosure was less. In the 1949 *Standard Stations* case,[13] the degree of foreclosure was 16 percent of the available outlets, although the major suppliers in the industry collectively foreclosed 58 percent. In the 1962 *Brown Shoe* case,[14] which was a merger case, the degree of foreclosure varied from city to city, from as much as 57 percent to as little as five percent.

In the 1961 *Tampa Electric* case,[15] addressing another exclusive dealing arrangement, the Court explained that "substantiality" in a given case depends upon the "probable effect" on competition, including "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein."[16] This became known as the rule of "qualitative substantiality" because it allowed for consideration of more than just percentages.

At the same time, the Court made clear that the Clayton Act has a broader reach than the Sherman Act, holding that if an exclusive arrangement "does not fall within the broader proscription of § 3 of the Clayton Act," it is not forbidden by the Sherman Act.[17]

Nevertheless, in subsequent years the incipiency test began to become indistinguishable from the Sherman Act rule of reason test again. Lower courts went so far as to opine that there no longer was any meaningful difference between the degree of foreclosure required to prove a violation under the Sherman Act test or the Clayton Act test. For example, in one recent case the court of appeals held, "[i]n substance, the *Tampa Electric* standard for Clayton Act Section 3 claims differs very marginally, if at all, from the fact intensive rule-of-reason analysis that applies to this case under Section 1 of the Sherman Act."[18]

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[13] Standard Oil Co. v. United States (*"Standard Stations"*), 337 U.S. 293 (1949).
[14] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
[15] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).
[16] *Id.* at 329.
[17] *Id.* at 335.
[18] ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 327 n.26 (3d Cir. 2012); *cf.* In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2017 WL 6524839, at n.4 (D. Kan. Dec. 21, 2017)("Although *Tampa Electric* involved a Clayton Act claim, courts also apply its analysis to exclusive dealing claims asserted under the Sherman Act."); *see also* K-Flex, Inc. v. Armacell, Inc., 299 F. Supp. 3d 730, 736 (E.D.N.C. 2017) ("Plaintiff has stated a Clayton Act claim for substantially the same reasons as it has stated Sherman Act claims.").
The antitrust treatise of the American Bar Association's Section of Antitrust Law summarizes the court and Federal Trade Commission decisions as "effectively merging the mode of analysis" under Section 3 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the FTC Act into a rule of reason standard. 1 A.B.A. SEC. OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 210 (8th ed. 2017).

In effect, this represents a return to the interpretation that appeared in judicial opinions prior to the *Standard Fashion* decision in 1922. While this approach purports to derive from *Tampa Electric,* it is not altogether consistent with that decision, where the Supreme Court compared the Sherman Act to the Clayton Act and confirmed the "broader prescription of § 3 of the Clayton Act."[19]

Mergers and Acquisitions

Meanwhile, Section 7 of the Clayton Act, the section applying to acquisitions, also evolved. A loophole in the 1914 act left the new law applicable to acquisitions of stock but not of assets, and deals routinely were structured to avoid the law.

Litigation tended to focus not on how to apply Section 7, but whether Section 7 applied at all. In 1950, Congress closed the loophole by passing the Cellar-Kefauver Act,[20] which amended Section 7 to make it applicable to acquisitions of assets as well as stock.

Congress took the occasion to reiterate that the Clayton Act reaches threats to competition in their incipiency. The Senate Committee report explained that the purpose of the bill "was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act, . . . framing a bill which . . . reaches far beyond the Sherman Act."[21] At the same time, the report made clear that Congress understood the word "may" to mean reasonable "probability" rather than "possibility." The bill "would not apply to the mere possibility but only to the reasonable probability of the

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The International Guidelines issues by the U.S. Department of Justice and Federal Trade Commission state, "In evaluating transactions, courts use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant's liability under Section 3 of the Clayton Act." U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L ENFORCEMENT & OPERATIONS 7 (2017). As authority, the Guidelines cite a Seventh Circuit opinion where the court observed, "Though some old cases say otherwise, the standards for adjudicating tying under the two statutes are now recognized to be the same." Sheridan v. Marathon Petrol. Co., 530 F.3d 590, 592 (7th Cir. 2008). However, none of the cases cited in *Sheridan* actually stands for the proposition that the incipiency doctrine no longer exists. Nor do any of the authorities relied on by those cases. *See, e.g.,* IX PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1719b (4th ed. 2018). Each case relies on an earlier case that draws upon both statutes but, upon analysis, not one of those precedents holds that the incipiency doctrine has been abandoned. Even if any of them did, no judicial opinion—even that of the Supreme Court—can abrogate a constitutional act of Congress. The fact is that although the elements of proof of an offense under Section 3 of the Clayton Act and Section 1 of the Sherman Act (and Section 5 of the FTC Act) are largely the same—market power, conditioning, etc.—the degree to which a plaintiff must demonstrate that competition has been impeded is different. There is a material difference between needing to prove an unreasonable restraint of competition and needing to prove that the effect of a practice or transaction "may be" to substantially lessen competition or "tend to" create a monopoly. Indeed, Areeda & Hovenkamp explicitly acknowledge that, with regard to exclusive dealing, not all courts apply the same test under the Clayton Act and the Sherman Act, with "a probable majority of courts hold[ing] that the Clayton Act test is easier for a plaintiff to meet than the Sherman Act test." *Id.* ¶ 1719b n.22. *See also id.* ¶ 1800c4 ("In tying arrangement cases a few courts have followed the rule suggested in *Times-Picayune* of applying a more aggressive test under the Clayton Act than under the Sherman Act, but most apply the same test under both statutes. Clearly this would be the most sensible approach to exclusive dealing as well. Nevertheless, the cases are divided, with a likely majority stating that the Clayton Act requires a smaller showing of anticompetitive effects.") (citations omitted).

[19] *Tampa Elec. Co.,* 365 U.S. at 335.

[20] Act of December 29, 1950, ch. 1184, 64 Stat. 1120, 81st Cong., 2d Sess. (H.R. 2734, Public 899).

[21] S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950).

prescribed effect, as determined by the [Federal Trade] Commission in accord with the Administrative Procedure Act."[22]

The 1950 House Report noted that acquisitions by which a "restraint of trade is created are forbidden by the Sherman Act" already. "The present bill is not intended as a mere reenactment of this prohibition."[23] Instead, it explained that acquisitions "have a cumulative effect" and the 1950 bill was intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.[24]

Subsequently, the Supreme Court applied the incipiency standard in the few merger cases that it decided. In a series of cases decided in the 1960s, the court applied the incipiency test to block acquisitions involving combined market shares as low as seven percent where there was evidence of a trend towards increasing concentration in the market. *Brown Shoe, Philadelphia National Bank, "Alcoa/Rome," Pabst Brewing,* and *Von's Grocery* all concerned acquisitions that involved some degree of incipiency.[25]

In *Brown Shoe,* the Court observed that in drafting the Clayton Act, Congress was concerned "with probabilities, not certainties" and that "[m]ergers with a probable anticompetitive effect were to be proscribed" by the Act.[26] In *Philadelphia National Bank,* the Court stated that the incipiency test "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[27] The Court added that the incipiency doctrine "lightens the burden of proving illegality" but cautioned that this applies "only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration."[28]

The Court also took the occasion to reject the possibility of weighing "social or economic debits and credits" in reviewing an acquisition that substantially lessens competition, on the ground that "[a] value choice of such magnitude is beyond the ordinary limits of judicial competence."[29]

Brown Shoe, Philadelphia National Bank, and *Von's Grocery,* have been heavily criticized for blocking acquisitions that involved small market shares in certain markets. In certain other markets, however, the market shares in these same cases would have reached over 50 percent. All

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[22] *Id.* at 5.
[23] H.R. REP. NO. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[24] *Id.*
[25] *Brown Shoe Co.,* 370 U.S. at 294; United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963); United States v. Aluminum Co. of America (*"Alcoa Rome"*), 377 U.S. 271 (1964); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery, 384 U.S. 270 (1966).
[26] 370 U.S. at 323.
[27] 374 U.S. at 362.
[28] *Id.* at 363.
[29] *Id.* at 371.

of these cases were decided years before enactment of the Hart-Scott-Rodino Act,[30] which requires that large mergers and acquisitions be reported to the Federal Trade Commission and Department of Justice prior to closing, enabling those agencies to review the pertinent facts and decide whether or not to challenge a deal in court. As a practical matter, the result has been that in most instances today, concerns about anticompetitive consequences of acquisitions are addressed through negotiations and settlements between the parties and the enforcers prior to closing. If there are serious issues concerning certain discrete relevant markets, those often are resolved through partial divestitures that allow the rest of the deal to proceed. Accordingly, it is fair to ask whether a case like *Von's Grocery* would be resolved the same way today.[31]

The Supreme Court's next, and most recent, antitrust decision on mergers and acquisitions came in the 1974 *General Dynamics* case,[32] where the Court held that if, because of capacity constraints, currently high market shares are not meaningful indicators of competitive dynamics in the future, a realistic assessment of future conditions should control, not a static assessment of current conditions. This is the other side of the incipiency test, recognizing that where there is a tendency toward *less* concentrated market power, there is a reduced threat to competition.

The Supreme Court has not decided any substantive merger cases since, and it never undertook to retreat from the incipiency standard of Section 7 of the Clayton Act.

Meanwhile, the Department of Justice and Federal Trade Commission began issuing merger guidelines in 1968. These guidelines assumed growing importance, particularly after the adoption of premerger notification under the Hart-Scott-Rodino Act. Although the guidelines were published to explain the agencies' methodology in making enforcement decisions, lower courts increasingly have applied the guidelines to decide merger cases in the absence of more recent guidance from the Supreme Court.[33]

The guidelines devote limited space to the incipiency doctrine. They do, however, recognize that most merger analysis is "predictive" and consequently the guidelines "reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[34] They also explain that "[w]hen evaluating a consummated merger, the ultimate issue is

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[30] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a).

[31] *See* Koninklijke Ahold N.V., 81 Fed. Reg. 51888 (Aug. 5, 2016) (aid to public comment), decision and order in 2016 FTC LEXIS 189; Dollar Tree, Inc. & Family Dollar Stores, 80 Fed. Reg. 42,810 (July 20, 2015) (aid to public comment), decision and order in 2015 FTC LEXIS 216.

[32] United States v. General Dynamics Corp., 414 U.S. 486 (1974).

[33] *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse,* 48 WM. & MARY L. REV. 771 (2006).

[34] U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N, GUIDELINES FOR HORIZONTAL MERGERS 1 (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/mergerreview/100819hmg.pdf.

not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future."[35]

Recent Interpretations

Since the introduction of premerger notification, most merger cases have been settled and most of the rest have been decided on motions for preliminary or permanent injunctions. The lower courts have not been entirely uniform in their approach to mergers but generally have acknowledged, to a greater or lesser degree, that the "may be substantially to lessen" language must be taken into account.

For example, in the 2014 decision in *United States v. Bazaarvoice, Inc.,*[36] where the court blocked a merger, the judge observed that "to establish a violation of Section 7, the government need not prove that the merger has resulted in higher prices or had other anticompetitive effects. Rather, the government must show a 'reasonable likelihood' of anticompetitive effect in the relevant market."[37] In the 2004 decision in *United States v. Oracle Corp.,*[38] where the court declined to block a merger, the judge observed that "Section 7 does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future."[39]

In the 2018 decision in *United States v. AT&T Inc.,*[40] where the district court declined to block AT&T's acquisition of Time Warner Inc., the trial judge characterized the Justice Department's definition of incipiency as a "moving target," vacillating between a requirement to show that the transaction is "likely" to harm competition and a requirement to show a "reasonable probability" or "appreciable danger" of harm to competition.[41] The judge saw no real difference, citing the Supreme Court and concluding, "[i]n the final analysis, each alternative formulation appears aimed at clarifying the central point that Section 7 does not require 'certain' harm, but instead permits courts to use predictive judgment to 'arrest anticompetitive tendencies in their "incipiency."'"[42]

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[35] *Id.* at 3. See also *id.* at 25 ("Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.").
[36] United States v. Bazaarvoice, Inc., 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. 2014).
[37] *Id.* at *5 (citing United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964) (noting that a Section 7 violation is shown when "the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown") (citation omitted)).
[38] 331 F. Supp. 2d 1098, 1109-10 (N.D. Cal. 2004).
[39] *Id.* at 1109; *see also* FTC v. Whole Foods Market, Inc., 533 F.3d 869, 882 (D.C. Cir. 2008)(Tatel, J. concurring, citing *Brown Shoe* language on "probabilities"); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001) (citing *Brown Shoe* language on "probabilities"); United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) ("By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities."); FTC v. Sysco Corp., 113 F. Supp.3d 1, 52 (D.D.C. 2015) (assessing "likely effects"); United States v. H&R Block, Inc., 833 F. Supp.2d 36, 49 (D.D.C. 2011) ("All that is necessary is that the merger create an appreciable danger" of higher prices in the affected market "in the future," citing Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)); United States v. SunGard Data Systems, Inc., 172 F. Supp.2d 172, 180 (D.D.C. 2001).
[40] United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd,* 916 F.3d 1029 (D.C. Cir. 2019).
[41] *Id.* at 189, n.16.
[42] *Id.* (citing *Penn-Olin Chem. Co.,* 378 U.S. at 171 (quoting *Philadelphia Nat. Bank,* 374 U.S. at 362 (internal quotation marks omitted)).

The judge wrote that "Section 7 'demand[s] that a plaintiff demonstrate that the substantial lessening of competition will be "sufficiently probable and imminent" to warrant relief.'"[43] He concluded that "'antitrust theory and speculation cannot trump facts'; the Government must make its case 'on the basis of the record evidence relating to the market and its probable future.'"[44] He determined that even if the correct standard is "reasonable probability" of harm or "appreciable danger" of harm—requiring "more than a 'mere possibility' but less than a 'more likely than not' showing of harm"[45]—the government had not met its burden.

Yet rather than ending the analysis there, the judge went on to cite four "but see" cases suggesting that the more correct standard is "likely" to lessen competition substantially.[46]

The Court of Appeals for the D.C. Circuit affirmed, noting that the district court had "acknowledged the uncertainty regarding the measure of proof for the government's burden," and that the government "had used various phrases" to describe that burden, including the need to show "an 'appreciable danger' of competitive harm" or that "harm is 'likely' or 'reasonably probable.'"[47] The court pointed out that the district court found no need to "articulate the differences" among these formulations and that there was "no need to opine on the proper legal standards" on appeal either, because "neither party challenge[d] the legal standards the district court applied."[48] The court did offer the observation that Congress had "left to the courts the difficult task of assessing probabilities" and that "[a]lthough Section 7 requires more than a 'mere possibility' of competitive harm, it does not require proof of certain harm." But then, quoting from the parties' joint statement on the burden of proof at trial, the court added that in order to establish a *prima facie* case, "the government must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'"[49]

Where does that leave the incipiency doctrine today? The Clayton Act still applies to acquisitions, exclusive dealing, and tying that "may" substantially lessen competition or "tend to" create a monopoly. The incipiency standard has been fortified by Congress with the Cellar-Kefauver Act and never jettisoned by the Supreme Court. But the standard plainly has assumed less prominence in exclusive dealing and tying cases over the years, and it has been applied with less certainty in merger cases, with requirements that the harm to competition must be "likely" and "imminent" appearing in more and more opinions.

The question now is what the future should be for the incipiency test. Does it need a boost?

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[43] *Id.* at 190 (citing FTC v. Arch Coal, 329 F. Supp.2d 109, 115 (D.D.C. 2004) (quoting United States v. Marine Bancorporation, 418 U.S. 602, 623 n.22 (1974)).
[44] *Id.* at 221.
[45] *Id.* at 189, n.16
[46] *Id.* (citing United States v. Baker Hughes, 908 F.2d 981, 991 (D.C. Cir. 1990); United States v. Anthem, Inc., 236 F. Supp.3d 171, 215 (D.D.C. 2017); United States v. Aetna, Inc., 240 F. Supp.3d 1, 9 (D.D.C. 2017); FTC v. Staples, Inc., 190 F.Supp.3d 100, 110 (D.D.C. 2016)).
[47] United States v. AT&T, Inc., 916 F.3d 1029, 1037 (D.C. Cir. 2019).
[48] *Id.*
[49] *Id.* at 1032.

Applying the Incipiency Standard Today

If Congress concludes that antitrust enforcement has not been effective enough, the simplest solution can be found in assuring more resolute application of the incipiency test, which Congress created for this purpose over a hundred years ago. The incipiency standard does not alter the degree to which a merger or practice ultimately must harm competition in order to be unacceptable; rather it extends the time horizon for assessing anticompetitive harm.

In so doing, the incipiency test addresses the concerns being expressed today that antitrust enforcement too often comes too late to spare consumers from years of inflated prices, inadequate innovation, stalled entry, and inefficiency. The incipiency standard serves to interdict harmful mergers and practices earlier, preventing significant harm to competition before that harm reaches its full fury. Application of the incipiency standard also should have a positive effect on jobs (since a greater number of competing employers will operate), concentration of power (since a greater number of competing businesses will exist), and small business (because less foreclosure will be permitted), as well as having a positive effect on prices, output, quality, and efficiency.

If Congress believes that the courts have grown too reluctant to apply the incipiency standard, Congress has the power to reinvigorate the standard by Congressional resolution or clarifying legislation. Congress has deliberated antitrust resolutions to clarify its intent on more than one occasion.[50] The passage of the Cellar-Kefauver Act served as an opportunity to reconfirm the view of Congress on the incipiency test, resulting in renewed enforcement. This can be done again.

Whatever approach is taken, it will not bring about change unless it impacts outcomes in court. As described above, courts put their own interpretations on legislation and a piece of legislation can be interpreted in any number of ways unless its requirements are made unmistakable. Also, because the vast majority of decisions about mergers and business practices are made in conference rooms, not courtrooms, company executives and their legal counsel need to be able to anticipate what the law will permit and what it forbids in order to avoid uncertainty and costly litigation.

Another alternative would be to amend the Clayton Act itself to make it more explicit. This would require little change in language, which might help such a clarification to win broad support. If Congress wants to assure that courts apply the Clayton Act effectively, it could amend Section 7—which now forbids acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly"—by changing the word "lessen" to "threaten," so that Section 7 would forbid acquisitions, the effect of which **"is substantially to threaten competition, or to tend to create a monopoly"** in any relevant market. The phrase "is substantially to threaten"

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[50] See H.R. Res. 303, 99th Cong., 1st Sess. (1985) (House resolution articulating congressional intent; "Resolved, That is the sense of the House of Representatives" that the Justice Department's 1985 vertical restraints guidelines "are not an accurate expression of the Federal antitrust laws or of congressional intent" and "shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive"); S. Con. Res. 56, 99th Cong., 1st Sess. (1985) (same); Pub. L. No. 99-180, § 605, 99 Stat. 1170 (1985) (providing that no appropriated funds may be used to advocate altering the per se rule against resale price maintenance and incorporating the resolution on the vertical restraints guidelines); H.R. REP. 99-399 (1st Sess. 1985) (accompanying H. R. Res. 303); Pub. L. No. 98-166 § 510, 97 Stat. 1102 (1983) (cutting off funding for the Department of Justice to advocate for changing the per se rule against minimum resale price maintenance).

would reinforce the prospective nature of the harm that would need to be demonstrated.[51] This should eliminate the interpretation some courts give to the phrase "may be substantially to lessen competition" to mean that the substantial lessening of competition must be "likely" and "imminent."[52]

It is noteworthy that the Clayton Act already incorporates the concept of a threat, providing that private parties may sue for injunctive relief against "threatened" loss or damage.[53] In contrast, parties seeking monetary recovery may sue for damages "sustained."[54] From the beginning, then, the Clayton Act included the word "threatened" to convey the concept of prospective harm. Consistent with that connotation, substituting the word "threaten" in Section 7 would not alter, but could clarify in more explicit terms, the intended character of the phrase "may be substantially to lessen competition."

This change should suffice to halt the creep toward narrower interpretations of the incipiency doctrine. But if there is concern that changing "lessen" to "threaten" would not be enough to move the needle in the courts, there is an additional revision that could be considered. It is clear that the incipiency standard reaches probabilities—what the trial judge in *AT&T* called "more likely than not"—and does not reach mere possibilities, but it cannot fairly be said to require the "likelihood" of harm to competition. This is because between likelihoods and mere possibilities there is the reasonably foreseeable prospect of harm to competition that is less than "likely" but more than merely "possible." In other words, there is harm that is "as likely as not," rather than "more likely than not."

If Congress wants to strengthen the interpretation of incipiency, it could amend Section 7 to reflect this distinction by not only inserting the word "threaten" but by explicitly including the element of foreseeability. The Section would then provide that Section 7 forbids acquisitions where **"the reasonably foreseeable effect of such acquisition is substantially to threaten competition, or to tend to create a monopoly"** in any relevant market.

This would make clear that the threat to competition must be more than a mere possibility and must be reasonably foreseeable, but without requiring a plaintiff to demonstrate that competitive harm is *more* likely than not. If the threat of substantial harm to competition is reasonably foreseeable, even if not imminent, making it as likely as not to occur, the incipiency test should be

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[51] Substitution of the word "threaten" also eliminates the need for the word "may." Prohibiting acquisitions, the effect of which "may" be to "threaten" competitive harm, might be interpreted to encompass so much as to prohibit virtually every acquisition.

[52] Note that the phrase "sufficiently probable and imminent" derives from United States v. Marine Bancorporation, 418 U.S. 602, 623 n.22 (1974) (quoting United States v. Continental Can Co., 378 U.S. 441, 458 (1964)), where the Court referred to the fact that "the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent." However, this phrase more recently has been cited for the proposition that "a plaintiff must demonstrate that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." *Arch Coal,* 329 F. Supp.2d at 115, cited in AT&T, Inc., 310 F. Supp.3d at 189. In other words, this phrase is being reinterpreted to mean not that the *competition* to be protected may be either existing or imminent, but that the *harm* to competition must be imminent.

[53] Section 16 of the Clayton Act, 15 U.S.C. § 26.

[54] Section 4 of the Clayton Act, 15 U.S.C. § 15; *see also* 15 U.S.C. § 15a (the United States also may sue for damages "sustained").

satisfied without the need to show that the harm is more likely than not to occur, and is likely to occur imminently.

Foreseeability is a concept that is familiar in the law,[55] distinguishing the foreseeable from the speculative. An occurrence need not be more likely than not to occur in order to be foreseeable. Rather, it needs to be reasonably probable, which is exactly what the incipiency doctrine requires.

These clarifications would reflect the test that Congress crafted in 1914 and reconfirmed in 1950. If Congress concludes that this is not always the test being applied under Section 7 in America's courts, these clarifications should help to return the law to what Congress intended.

Other Issues

It should be noted that although reenergizing the incipiency standard would make the greatest difference with the least disruption, it would not address every issue being raised today about the adequacy of antitrust enforcement.

First, there still would be controversy over whether Section 2 of the Sherman Act,[56] which makes it unlawful to "monopolize" a market, forbids "abuse of dominance" that harms consumers without constituting the "willful acquisition or maintenance" of monopoly power. The Supreme Court has held that the offense of monopolizing is limited to the willful acquisition or maintenance of monopoly power.[57] Abuse of dominance is a broader offense than monopolizing. It was developed in Europe, where—unlike the United States—offenders are not subject to automatic treble damages.[58] If the incipiency standard were reinvigorated, this would strengthen the prohibition against conduct that harms consumers by "maintaining" monopoly power, which includes most of the unlawful conduct undertaken by monopolists. But the issue of whether the monopolization offense should extend as far as the abuse of dominance offense would not be resolved.[59]

Second, there still would be debate over challenging completed mergers and acquisitions where anticompetitive effects only manifest themselves after a deal has closed. Even if the incipiency standard were to block every deal posing a probability of substantially lessening competition, it still would not prevent deals posing only a possibility of lessening competition, even though some of those deals later might prove destructive of competition. Some commentators complain that antitrust enforcers should not interfere with acquisitions that present only a small possibility of harming competition while other commentators complain that it is not fair for antitrust enforcers to revisit such acquisitions when some prove to be anticompetitive later on. If both positions were valid, such acquisitions forever would be immune from antitrust enforcement.

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[55] *See, e.g.,* the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(1) (applying to conduct having a "direct, substantial, and reasonably foreseeable" effect on specified trade or commerce); H.R. REP. NO. 97-686, at 8 (contrasting effects that are "highly unlikely" with consequences that are "reasonably foreseeable"); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 856 (7th Cir. 2012).
[56] 15 U.S.C. § 2.
[57] *See* United States v. Grinnell Corp., 384 U.S.563, 570-71 (1966).
[58] DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE, 306-16, 341, 345, 356-57, 365-67, 421 (1998).
[59] See also § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, forbidding unfair methods of competition and unfair or deceptive acts or practices, which might reach as far as abuse of dominance, without a private right of action.

Third, there still would be calls for greater regulation in some areas, especially of social media, search, and other Internet platforms. Even if the incipiency standard were fortified, this would not provide all the answers on such issues as privacy, interoperability, or data portability. Antitrust is not the answer to every market imperfection in the economy. Issues arising in the communications sector but beyond the limits of competition law have traditionally been subject to regulation. If the public interest requires constraints, and antitrust law is not the solution, regulation may be worthwhile to consider.

And, even if the incipiency standard is stiffened, there still would be proposals to create new presumptions, per se rules, and limits on size. But these would require a substantive shift in the law, affecting every industry, and realistically could not be accomplished without considerable reflection and debate.

One day, it may make sense to overhaul America's antitrust statutes from top to bottom. *See* Richard M. Steuer, *Antitrust Overhaul,* 80 ANTITRUST L. J. 681 (2016). Until then, a more energized application of the incipiency standard, with or without some adjustment by Congress, offers the most practical approach.

CONCLUSION

Over the years, antitrust enforcement has suffered from repeated efforts to dilute the incipiency standard. Whether or not that standard is rebooted by Congress, it will continue in effect and its future vitality goes to the heart of the controversy over the effectiveness of antitrust enforcement.

Regardless of whether the Clayton Act is reaffirmed by resolution or amended again by statute, it already outlaws acquisitions and practices that "may substantially lessen" competition in the future or "tend to" diminish competition by threatening monopoly power. To borrow the words of the Supreme Court, this is the very essence of what is "meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[60]

Applied with conviction and interpreted faithfully, the incipiency test should be up to the job in today's economy.

So, whether there is a Congressional resolution or not, whether there is new legislation or not, application of the incipiency standard can boost antitrust enforcement without any doctrinal leap. If Congress finds that greater clarity is needed, the means to make the incipiency test more explicit are here for Congress to consider.

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[60] *Phila. Nat. Bank,* 374 U.S. at 363.