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Incipiency

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INCIPIENCY

Richard M. Steuer∗

"Incipiency" is the term describing the test by which mergers, acquisitions, and certain anticompetitive practices are prohibited under the Clayton Antitrust Act[1] when the effect may be substantially to lessen competition or tend to create a monopoly. Properly applied, the incipiency test can satisfy demands that are coming from across the political spectrum to strengthen antitrust enforcement. If the Act needs to be clarified in order to assure proper application, there are means available to achieve greater clarity.

Washington is resonating with calls to amend America's antitrust laws to combat concentration, encourage innovation, and protect start-ups. These proposals include bills to introduce a "public interest" standard for certain transactions[2] and shift the burden of proof for large mergers.[3]

They also include a legislative proposal to revise the legal standard of the antitrust law applicable to mergers. Specifically, proposed legislation would change the standard in Section 7 of the Clayton Act from prohibiting mergers that may "substantially" lessen competition to prohibiting mergers that may "materially" lessen competition.[4]

Sometimes overlooked in the debate is recognition that the Clayton Act is already designed to provide a potent antitrust tool that can accomplish most of the objectives of the new proposals. If

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[1] Clayton Antitrust Act, 15 U.S.C. §§ 14, 18 (1914).

[2] *See infra* note 12 and accompanying text; *cf.* H.R. 2932, 115th Cong. § 3 (2017) (proposing inclusion of a "net benefit" test in foreign investment reviews); H.R. 5665, 114th Cong. § 3 (2016) (same); H.R. 5581, 113th Cong. § 3 (2014) (same); s*ee also* Letter from Charles E. Grassley, United States Senator to Hon. Gene L. Dodaro, Comptroller Gen., U.S. Gov't Accountability Off. (Sept. 15, 2016) (on file with the U.S. gov't Accountability Off.) (requesting report on adding net benefit test to CFIUS mandate).

[3] S. 307, 116th Cong. § 2(b) (2019); *see also* S. 1812, 115th Cong. § 2(b) (2017).

[4] S. 307, 116th Cong. § 3(1) (2019); *see also* S. 1812, 115th Cong. § 3(1) (2017).

Congress believes that the Act needs to be clarified to make it more effective, there is another way to amend the Act's standard. Instead of changing the word defining the degree of harm to competition from "substantial" to "material"—words that are not likely to be interpreted very differently from one another by the courts—it would be more effective to clarify the temporal element of the standard, to specify that "may be" to lessen competition requires a less static analysis than some courts may be inclined to apply today. If Congress believes that the Clayton Act has not been sufficiently effective in curbing anticompetitive mergers, the solution is not simply to swap the word "materially" for "substantially," but to confirm unmistakably that the Act reaches not only mergers that "lessen" competition to a significant degree but also mergers that *threaten* to lessen competition to a significant degree.

THE CLAYTON ACT STANDARD

For decades, two of the most knocked-around phrases in antitrust have been "may be substantially to lessen competition" and "tend to create a monopoly." These tests—which reach anticompetitive harm in its incipiency—comprise the standard for judging mergers and acquisitions, as well as most exclusive dealing and tying, under the Clayton Act.[5]

These are offenses that can harm the economy in two ways. Not only can they harm consumers by elevating prices, but they can foreclose competitors from competing effectively and foreclose new competitors from entering.

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.[6]

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.[7]

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[5] 15 U.S.C. §§ 14, 18; *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).

[6] 15 U.S.C. § 18.

[7] 15 U.S.C. § 14. Note that in section 3, the infinitive is split – "to substantially lessen competition" – and one "to" is omitted.

The Clayton Act was enacted 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 designed to halt anticompetitive acquisitions and foreclosure in their incipiency, before the harm they threaten is achieved.

THE CURRENT DEBATE

There has been increasingly heated debate over the need to strengthen America's antitrust laws. Price fixing cartels have long been subject to a standard of per se illegality and criminal enforcement, but during the 2016 presidential election campaign, and continuing thereafter, a chorus of complaints arose about industrial concentration and perceived abuses by major businesses. Firms in the tech and airline industries became frequent targets of critics on both the left and the right.[8] Proposals have been advanced by commentators, think tanks, and members of Congress for new measures to invigorate antitrust enforcement and do more to protect the public.

Some of these proposals include broadening the standards by which competitive activity is judged. Certain critics want antitrust analysis to include more than the "consumer welfare" standard, which became the principal touchstone by which anticompetitive activity has been judged since the 1970s. Others simply want to make the antitrust laws more robust.

When the first antitrust laws were adopted at the end of the Nineteenth Century, supporters of the new legislation were motivated by a desire not only to protect consumers, but to limit the power of big business and to preserve small businesses.[9] Over the years, commentators defended the inclusion of "political" or "public interest" objectives in antitrust law, including Professor, and later Federal Trade Commission Chairman, Robert Pitofsky,

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[8] Examples have grown too numerous to collect. To illustrate, both Fox News host Tucker Carlson and commentator William Kristol reportedly have called for investigations of Google and other tech leaders, as have Democrats in Congress, while travelers of all stripes have complained about the effects of concentration in the airline industry. On September 25, 2018, Attorney General Jeff Sessions met with Justice Department officials and fourteen state attorneys general to discuss competition concerns regarding tech companies. *See* Katie Benner and Cecilia Kang, *Justice Dept. and State Officials Explore Ways to Keep Tech Giants in Check,* N.Y. TIMES, Sept. 26, 2018, at B2, col. 1.

[9] *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY, 180-85 (1955).

who wrote, in a widely-cited article, "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[10]

The "consumer welfare" standard, which eschews political values as too subjective, gained prominence in the 1970s. It was championed by Professor, and later Judge, Robert Bork in his influential 1978 book, *The Antitrust Paradox.* Professor Bork advocated that consumer welfare—low prices, high output, good quality, and maximum efficiency—is the only legitimate goal of antitrust, and that no other objectives should be recognized.

In the ensuing years, courts interpreting the antitrust laws have increasingly come to adopt the consumer welfare standard as the sole standard for judging alleged antitrust violations. Likewise, enforcement agencies have come to rely on the consumer welfare standard as the only standard for assessing mergers and acquisitions, and deciding whether to challenge allegedly anticompetitive conduct in court. During the Obama administration, leaders of both the Federal Trade Commission and the Antitrust Division of the Department of Justice defended adhering to the consumer welfare standard, asserting that antitrust agencies are "ill equipped" to consider other objectives and that enforcement decisions should be "based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed."[11]

More recently, however, critics began complaining that the consumer welfare standard has allowed too many mergers to create too much concentration in too many markets, allowing powerful companies to engage in practices that harm the economy. They contend that consumer welfare should be considered alongside other considerations, including market "openness," the impact on employment and employees, concentration of political power, and innovation.[12]

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[10] Robert Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979).

[11] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address at the Antitrust in Asia Conference 8 (May 22, 2014); Bill Baer, Assistant Att'y Gen., Antirust Div., U.S. Dep't of Justice, International Antitrust Enforcement: Progress Made; Work To Be Done 4 (Sept. 12, 2014).

[12] *See, e.g.*, CENTER FOR AMERICAN PROGRESS, REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY, 17 (2016); ROOSEVELT INST., UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER 23 (Nell Abernathy, Mike Konczal & Kathryn Milani eds., 2016); Stacy Mitchell, *The View From the Shop—Antitrust and the Decline of America's Independent Businesses,* 61 ANTITRUST BULL. 498, 511 (2016).

The debate has not been dispassionate. Proponents of broadening antitrust analysis have called the consumer welfare test "narrow" and "misguided."[13] Opponents have labeled proposals that range beyond the consumer welfare test as "hipster antitrust."[14]

The reality is that effective enforcement of the antitrust laws, even under the consumer welfare standard, should result in more jobs, less concentrated political power, and greater opportunity for small businesses. These are all legitimate objectives behind adopting and enforcing antitrust laws and all of these outcomes can be achieved, at least in part, through effective antitrust enforcement. But this does not mean that job creation, dispersion of political power, or preservation of small business need to become independent goals of antitrust enforcement regardless of whether there is harm to competition, or that they need to be added to the statutory antitrust standards. What it does mean is that in enforcing the antitrust laws, it is important to recognize that preventing the extinguishing of jobs and skills, preventing undue concentration of production and decision-making, and preventing the foreclosure of new entrants and small business, are all manifestations of antitrust enforcement that is accomplishing its objectives. Concerns with jobs, political power, and small business should not become antitrust criteria in themselves in the absence of harm to a competitive economy, but if the antitrust laws are enforced effectively, all of these goals will be furthered together.[15]

So, if Congress believes that the antitrust laws are not effective enough today, do the statutes themselves need to be revised? And, if so, are the revisions that are being proposed the best approach?

There may be a better way. The Clayton Act's incipiency test already applies to the activities—other than price fixing conspiracies—that trigger the greatest number of challenges—specifically, mergers, acquisitions, exclusive dealing, and tying. Properly interpreted and applied, the incipiency test can and should be highly effective in combating these activities without the need to add new tests. If the incipiency test is not being applied

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[13] ROOSEVELT INST., *supra* note 12, at 23; Brian Beutler, *How Democrats Can Wage War on Monopolies—and Win,* NEW REPUBLIC (Sept. 16, 2017) (quoting Lina Khan), https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win.

[14] The term has been popularized by Professor Joshua Wright of the Antonin Scalia Law School, George Mason University.

[15] Of course, these goals also can be furthered with more targeted programs.

effectively enough, the surest way to make it more potent is to reconfirm the prospective nature of the Clayton Act in terms that courts will recognize and will have to apply.

THE CLAYTON ACT

The Clayton Act was adopted in 1914 to fill gaps that had appeared in the coverage of the Sherman Act. 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 purport to change the goals of the antitrust laws. Instead, it amplified those laws by changing the time horizon for analysis in adopting what would become known as the "incipiency" doctrine.

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."[16] 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

[16] S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914).

> 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.[17]

As enacted, the Clayton Act applied the "may be" to "substantially" language and the "tend to" create a monopoly language both to acquisitions and to exclusive dealing and tying.[18]

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.[19]

This changed in *Standard Fashion Co. v. Magrane-Houston Co.,*[20] 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."[21]

This result was not reached without a fight. Charles Evans Hughes, representing the 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

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[17] 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.

[18] It also applied to price discrimination. *See* 15 U.S.C. § 13 (1914) .

[19] *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).

[20] 258 U.S. 346 (1922).

[21] *Id.* at 356.

actually to accomplish a substantial lessening of competition or an actual tendency toward monopoly," and did not outlaw the manufacturer's exclusive dealing contracts with retailers.[22]

The Court disagreed. It held that the "may" be to substantially lessen competition or tend to create a monopoly standard deals with the "consequences to follow" a restrictive agreement.[23] 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, it 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."[24]

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."[25]

"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 with 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.

In *Standard Fashion*, the lower court 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,[26] 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,[27] 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.

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[22] Brief for the Petitioner, *supra* note 19, at 11-32*; see* McAllister, *supra* note 19, at 133-34.

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

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

[25] *Id.* at 356.

[26] Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293 (1949).

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

In the 1961 *Tampa Electric* case,[28] 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."[29] 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.[30]

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 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."[31]

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."[32]

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.

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[28] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[29] *Id.* at 329.

[30] *Id.* at 335.

[31] 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.").

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

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,[33] 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."[34] 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 prescribed effect, as determined by the [Federal Trade] Commission in accord with the Administrative Procedure Act."[35]

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."[36] 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.[37]

Subsequently, the Supreme Court applied the incipiency doctrine in the few merger cases that it decided. In a series of cases decided in the 1960s, the court applied the incipiency doctrine 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

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

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

[35] *Id.* at 5.

[36] H.R. REP. NO. 1191, 81st Cong., 2d Sess. 12-13 (1950).

[37] *Id.*

incipiency.[38]

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.[39] 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.'"[40] 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."[41]

The Court also rejected 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."[42]

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 of these cases were decided years before enactment of the Hart-Scott-Rodino Act,[43] 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

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[38] *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).

[39] 370 U.S. at 323.

[40] 374 U.S. at 362.

[41] *Id.* at 363.

[42] *Id.* at 371.

[43] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a).

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.[44]

The Supreme Court's next, and most recent, antitrust decision on mergers and acquisitions came in the 1974 *General Dynamics* case,[45] where the Court held that if, because of capacity constraints, current 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* concentration, there is a reduced threat to competition.

The Supreme Court has not decided any substantive merger cases since, and it never undertook to judicially repeal the incipiency doctrine from 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.[46]

The guidelines do not explicitly address the incipiency doctrine. Instead, they provide that "the Agencies normally evaluate mergers based on their impact on customers"[47] and recognize that even "[w]hen evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future."[48]

Since the introduction of premerger notification, most

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[44] *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.

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

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

[47] *Guidelines for Horizontal Mergers*, U.S. Dep't of Justice and Federal Trade Comm'n 1, 2 (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[48] *Id.* at 3.

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.,*[49] 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."[50] In the 2004 decision in *United States v. Oracle Corp.,*[51] 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."[52]

In the 2018 decision in *United States v. AT&T Inc.*,[53] 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.[54] The judge saw

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[49] United States v. Bazaarvoice, Inc., 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. 2014).

[50] 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)).

[51] 331 F. Supp. 2d 1098, 1109-10 (N.D. Cal. 2004).

[52] *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).

[53] 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).

[54] *Id.* at 189, n.16.

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."'"[55] The judge held that "Section 7 'demand[s] that a plaintiff demonstrate that the substantial lessening of competition will be "sufficiently probable and imminent" to warrant relief.'"[56] 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.'"[57] The judge 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"[58]—the government had not met its burden. Yet rather than ending the analysis there, he went on to cite four "but see" cases suggesting that the more correct standard is "likely" to lessen competition substantially.[59]

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.'"[60] 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."[61] 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

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[55] *Id.* (citing *Penn-Olin Chem. Co.*, 378 U.S. at 171 (quoting *Philadelphia Nat. Bank*, 374 U.S. at 362 (internal quotation marks omitted)).

[56] *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)).

[57] *Id.* at 221.

[58] *Id.* at 189, n.16

[59] *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)).

[60] United States v. AT&T, Inc., 916 F.3d 1029, 1037 (D.C. Cir. 2019).

[61] *Id.*

require proof of certain harm." And 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.'"[62]

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 doctrine has never been repealed by Congress or jettisoned by the Supreme Court. But the doctrine plainly 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 cases.

So, what should the future be for the incipiency doctrine? Does it need a boost?

APPLYING THE INCIPIENCY DOCTRINE 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 doctrine, which Congress created for this purpose over a hundred years ago. The incipiency doctrine does not alter the degree to which a merger or practice ultimately must be harmful to competition in order to be unacceptable; rather the doctrine extends the time horizon for assessing anticompetitive harm.

In so doing, the incipiency doctrine serves to interdict harmful mergers and practices earlier, preventing significant harm to competition before that harm reaches its full potential. This should have a beneficial effect on jobs (since a greater number of competing employers will operate), concentration of power (since a greater number of business owners will exist), and small business (because less foreclosure will be permitted), as well as on prices, output, quality, and efficiency. This also should obviate the need to enact more controversial legislative solutions, such as injecting a "public interest" standard into antitrust law.

If Congress believes that the courts have grown too reluctant to apply the incipiency doctrine, Congress has the power to reinvigorate the doctrine by Congressional resolution or

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[62] *Id.* at 1032.

clarifying legislation.[63] The Celler-Kefauver Act itself served to reconfirm the view of Congress on the incipiency doctrine, resulting in renewed enforcement, and this can be done again. Whatever approach might be taken, however, it will not bring about change unless it impacts outcomes in court. As described above, courts can and do put their own interpretations on legislation and a single piece of legislation can be interpreted in any number of ways unless its requirements are unmistakable.

How can this be accomplished? As noted at the outset, one proposal—part of a bill introduced in 2017 and reintroduced in 2019 by Senator Klobuchar, titled the "Consolidation Prevention and Competition Promotion Act"—is to amend Section 7 to change from a requirement of proving that the effect of an acquisition may be "substantially" to lessen competition, to a requirement of proving that the effect may be "materially" to lessen competition.[64] The stated purpose of this change would be to "clarify" that the Clayton Act prohibits consolidations that may materially lower quality, reduce choice, reduce innovation, exclude competitors, heighten entry barriers, or increase price.[65] The bill specifies that "inserting the phrase 'materially'" is intended "to establish that the plaintiff need not show an acquisition may cause a substantial amount of harm to competition, but rather show that an acquisition may cause more than a de minimis amount of harm to competition."

The question this raises is whether the terms "substantially" and "materially" are distinct enough to make a difference in the application of Section 7 in court.

Apparently, the assumption behind the bill is that the term

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[63] *Cf.* 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).

[64] S. 307, 116th Cong., 1st Sess. (2019); S. 1812, 115th Cong., 1st Sess., § 3(1) (2017).

[65] The bill would not amend Section 3 of the Clayton Act, on exclusive dealing and tying.

"substantially" lessen competition has come to mean something more than a "material" lessening of competition. As described earlier, it is true that, 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." This might suggest that originally, inclusion of the word "substantially" was meant to raise the bar for illegality (and criminality). Congress removed the criminal penalties and added "may be" and "tend to," but without removing "substantially."

Assuming that "materially" means "more than a de minimis amount," as specified in the bill itself, the bill would prohibit acquisitions, the effect of which may be to lessen competition by more than a de minimis amount, or tend to create a monopoly.

But would this alter the outcome of merger challenges? Would it require courts to block acquisitions involving market shares smaller than those involved in *Brown Shoe* and *Von's Grocery,* which were decided under the current "substantially" lessen competition standard? Would it require rewriting the merger guidelines which, although technically limited to an expression of the enforcement intentions of the two federal antitrust agencies, have become the de facto code followed by some federal courts? Of course, changing the word "substantially" to "materially" would not weaken the applicability of the Clayton Act, but it is not clear that when courts would apply the law to the facts, the two words would be interpreted very differently. How much daylight would courts find to exist between "substantially" and "more than a de minimis amount?"[66]

The more important concept behind the incipiency doctrine is its time horizon, which requires courts to assess the impact on competition further into the future than the Sherman Act requires, and to assess tendencies toward creation of monopoly rather than fully ripened attempts to monopolize or the completed acquisition and exercise of monopoly power. More important than whether "substantially" means something more than "materially" is whether "may be" and "tend to" are being applied by the courts as Congress intended. The Supreme Court has made the point that, in adopting the Celler-Kefauver Act amendments to Section 7, Congress was concerned "with probabilities, not certainties" and that "[m]ergers with a probable anticompetitive effect were to be

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[66] *Cf. AT&T Inc.*, 310 F. Supp. 3d at 189, n.16 ("I need not further toil over discerning or articulating the daylight, if any, between 'appreciable danger,' 'probable,' 'reasonably probable,' and 'likely' as used in the Section 7 context").

proscribed" by the Act.[67] Changing "may be substantially to lessen" to "may be materially to lessen" might address the degree of harm required but would not change the degree of "probability" required. As pointed out in the Senate Report that accompanied the 1950 amendments, Section 7 is supposed to apply to "the the reasonable probability of the prescribed effect."[68]

If Congress wants to assure that courts apply the Clayton Act effectively, a more meaningful amendment to the Act would be to **change the word "lessen" to "threaten," so that Section 7 would forbid acquisitions, the effect of which "is substantially [or "materially" if that term is preferred] to threaten competition, or to tend to create a monopoly" in any relevant market.** The phrase "substantially to threaten" (or "materially to threaten") would reinforce the *prospective nature* of the harm that would need to be demonstrated rather than only modifying the *degree* of competitive harm that would need to be demonstrated.[69] It also 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."[70]

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.[71] In contrast, parties seeking monetary recovery may sue for damages "sustained."[72] From the beginning, then, the Clayton Act included the word "threatened" to convey the concept of prospective harm.

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[67] *Brown Shoe*, 370 U.S. at 323.

[68] S. REP. NO. 1775, at 5 (2d Sess. 1950).

[69] Substitution of the word "threaten" also can eliminate 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.

[70] 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 it 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).

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

[72] 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").

Consistent with that connotation, substituting the word "threaten" in Section 7 would not alter, but could clarify in no uncertain 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 doctrine 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 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 [or 'materially' if that term is preferred] 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 (or material) harm to competition is reasonably foreseeable, even if not imminent, making it as likely as not to occur, the incipiency test should be 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, [73] 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

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[73] *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).

crafted in 1914 and reconfirmed in 1950. If this is not the test currently being applied under Section 7 in every court, these clarifications should help to return the law to what Congress intended.

CONCLUSION

Over the years, there have been repeated efforts to water down the "may be substantially to lessen competition" and "tend to create a monopoly" tests, but whether those tests are rebooted again or not, they will continue in effect and go to the heart of the present controversy over the effectiveness of antitrust enforcement. Whether or not the Clayton Act is amended once more, the Act already is meant to outlaw 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 essence of what is "meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[74]

So, whether there is new legislation or not, the incipiency doctrine provides a powerful tool that is capturing attention once again. The latest revival of incipiency, it seems, has just begun.

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