

# When Mergers Become A Private Matter: An Updated Antitrust Primer

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**C**OMPANIES PURSUING MERGERS and acquisitions that raise potential antitrust issues typically obtain counsel on the likelihood of government investigations and enforcement actions. When it comes to assessing such risks, even businesses that only infrequently engage in M&A activity generally know the right questions to ask. In most instances, therefore, these issues are given appropriate advance consideration, minimizing the chance of surprises. Yet outside of the context of hostile acquisitions, the typical attorney-client dialogue about M&A antitrust risks only rarely focuses on the possibility of private legal actions. To be sure, the prospect of private parties complaining to the government is high on the list of topics routinely discussed with counsel. But business people might not think to ask about private antitrust litigation, and many lawyers would regard the risk of such litigation as so low that it need not be discussed, absent exceptional circumstances.

While the conventional wisdom that private merger suits are unlikely to stop a merger is still largely correct, recent developments serve as a reminder that antitrust merger challenges launched by private parties, though infrequent and often unsuccessful, do continue to arise and may be increasingly common going forward. Sprint's and Cellular South's recent suits opposing the proposed AT&T/T-Mobile merger are high-profile examples.<sup>1</sup> As those suits illustrate, competitors that bring private merger cases continue to face an uphill battle in overcoming rigorous antitrust injury requirements. Private merger actions filed on behalf of consumers, on the other hand, generally do not face the same legal hurdles and have become increasingly common in the past several years.

Private merger challenges may emerge before or after the government has completed its review and the parties have

consummated the transaction. While some courts are particularly skeptical of private lawsuits filed after the challenged transaction has obtained government clearance,<sup>2</sup> prior agency approval does not preclude a follow-on private lawsuit.<sup>3</sup> Whatever the timing, private suits can inject additional uncertainty and unexpected burdens on the merging parties. And private plaintiffs can sometimes use the threat of such disruptions to gain strategic advantage or elevate pressure to settle.

In merger-related client discussions, downplaying the prospect of private litigation may be perfectly reasonable in most cases; this still remains a relatively uncommon threat. However, no client or attorney wants to be surprised by litigation, so it pays to be alert for those situations posing a somewhat higher risk of private merger litigation and to stay abreast of relevant trends. Particularly with consumer lawsuits appearing to be on the rise, it is an appropriate time for antitrust counselors to take stock of the current law and recent developments in this area.

## Competitor Lawsuits

A competitor seeking to oppose a merger, either by attempting to influence the regulatory review process or by filing a separate private lawsuit, will normally be met with a high degree of skepticism. The Supreme Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>4</sup> and *Cargill, Inc. v. Monfort of Colorado, Inc.*<sup>5</sup> each dismissing Section 7 cases brought by competitors, are now firmly entrenched antitrust doctrine.<sup>6</sup> Under *Brunswick* and *Cargill*, whether a competitor seeks to enjoin the merger under Section 16 of the Clayton Act or seeks damages under Section 4 of the Clayton Act, it must allege and prove that its actual or threatened injury is "of the type the antitrust laws were designed to prevent."<sup>7</sup>

Specifically, even if the competitor is able to show that the merger otherwise violates Section 7, a competitor's lawsuit cannot be sustained absent a showing of antitrust injury. In the wake of *Brunswick* and *Cargill*, numerous competitor-driven merger challenges have been dismissed because the competitor failed to demonstrate that it would suffer antitrust injury.<sup>8</sup> The courts and the federal antitrust agencies often presume that a competitor opposing a merger between its rivals is doing so because it fears increased competition. The 2010 Merger Guidelines reflect this high degree of skepticism, stating that the views of a competitor are not "routinely relied on" by the agencies because "[t]he interests of rival firms often diverge from the interests of customers."<sup>9</sup>

For instance, in the *Sprint* case, among other claims, the plaintiffs alleged that they would be injured as competitors of the merging parties because "AT&T's acquisition of T-Mobile would [e]ffect an illegal concentration of market power and lead to higher retail wireless rates."<sup>10</sup> The court dismissed these claims, noting that, as the Supreme Court has long recognized, higher market-wide pricing "actually benefit[s] competitors by making supracompetitive pricing more attractive."<sup>11</sup>

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Although the Supreme Court in *Brunswick* and *Cargill* imposed significant barriers to merger challenges brought by competitors, it “has not rendered such attempts impossible.”<sup>12</sup> Competitors have been granted standing where they can demonstrate that their alleged injury flows from the “predatory aspects of [defendant’s] conduct, not by competition.”<sup>13</sup> For example, in *Sprint* and *Cellular South* the plaintiffs also alleged that AT&T’s merger with T-Mobile would enable AT&T to “foreclose” their “access to the most innovative handsets and raise their costs.”<sup>14</sup> By increasing AT&T’s customer base by 37 percent, the plaintiffs claimed the merger would enable AT&T to leverage handset manufacturers into signing exclusive agreements that would prohibit these manufacturers from selling cutting-edge handsets—such as Apple’s iPhone—to smaller rivals like Sprint and Cellular South. Judge Huvelle agreed that these allegations demonstrated the requisite harm to competition. This is by no means the first time that a competitor’s merger challenge has been deemed to satisfy the antitrust injury requirement.<sup>15</sup>

Of course, the antitrust injury requirement is only one of a number of factors relevant to the broader question of whether a competitor has antitrust standing.<sup>16</sup> Even where a competitor successfully claims it will suffer an injury the antitrust laws are designed to prevent, the court will not uphold standing if the claimed antitrust injury is unduly speculative.<sup>17</sup> Bare allegations that a merger will enhance the merged firm’s ability to engage in exclusionary conduct will not suffice.

Overcoming standing hurdles is one thing, but ultimate success in litigation is another. Nonetheless, we are aware of at least one competitor suit that resulted in abandonment of a completed transaction, and in that case, this result was achieved even after DOJ clearance.<sup>18</sup>

### Customer Lawsuits

While merger challenges filed by competitors continue to be rare, private merger litigation brought by customers of the merging parties appear to be on the rise. Of course, customers seeking to challenge a merger in court do not face the same antitrust injury hurdles as competitors. Direct purchasers of the merging parties’ products and services are generally thought to suffer antitrust injury if a merger violates Section 7 of the Clayton Act.<sup>19</sup> Indirect purchasers may be able to seek an injunction barring the merger or forcing the merged firm to divest assets, although they are generally barred from seeking damages.<sup>20</sup>

Historically, despite lower antitrust injury hurdles confronting customers, customer-driven merger lawsuits have been uncommon. Even customers that strongly oppose a merger may not be motivated to incur the costs of pursuing a private action. Though far from being decisive in all cases,<sup>21</sup> customer testimony frequently carries substantial weight with government regulators<sup>22</sup> and can be an important factor in agency-driven merger litigation.<sup>23</sup> Customers of the merging parties may find that vocal opposition to a merger directed

to the antitrust authorities in the U.S. or abroad is more cost effective and less burdensome than launching a separate private action. Another deterrent to such lawsuits is the diffuse interests of some groups’ customers. If the class of customers potentially affected by the merger is large, no single customer or group of customers may have an incentive to fund a separate lawsuit, particularly where the merger has not closed and damages from higher prices or reduced output have not yet accrued.<sup>24</sup>

But recently, customer-driven private actions have become somewhat more common. Over the past few years, customer lawsuits have arisen in the context of high-profile mergers where groups of customers seek broader relief than the government sought in its investigation. A class action filed on behalf of SiriusXM Radio customers illustrates the threat posed by such lawsuits. In 2008, the merger between Sirius and XM Radio—the only two providers of satellite radio services in the United States—was unconditionally cleared by the DOJ.<sup>25</sup> To secure FCC clearance, the merging parties made several voluntary commitments regarding future pricing, including a promise not to raise base satellite radio subscription rates for a year after the merger was consummated.<sup>26</sup>

More than a year after closing, a class action lawsuit was filed on behalf of consumers that claimed that the merger violated Section 7 of the Clayton Act and Section 2 of the Sherman Act. Among other allegations, the plaintiffs claimed that the transaction enabled the merged firm to implement an anticompetitive subscription rate increase, above the rates established by the merging parties’ commitments to the FCC. The court denied the defendant’s summary judgment motion and certified the class. The case then settled for a package valued at \$180 million for the customer class and \$13 million in attorney’s fees, along with other concessions.<sup>27</sup>

The settlement won by the SiriusXM Radio plaintiffs appears to be an outlier. The vast majority of customer-driven merger cases filed in recent years have been dismissed at an early stage because they were premised on antitrust claims that are significantly broader and more speculative than those embraced by the federal antitrust agencies. The agencies may have declined to pursue such theories because of litigation risk, or because a narrow negotiated divestiture remedy sufficiently addressed the agencies’ concerns.

For example, a private purchaser’s challenge to InBev’s 2008 acquisition of Anheuser-Busch sought relief far beyond the relatively small divestiture imposed by the DOJ.<sup>28</sup> Although Anheuser-Busch represented roughly half of all beer sales in the United States, InBev’s brands represented less than one percent. Due to InBev’s small nationwide presence, the DOJ concluded that the merger did not threaten competition in the U.S. beer market as a whole. Instead, DOJ’s concerns were limited to three small metropolitan areas where InBev and Anheuser-Busch were allegedly two of the three largest competitors. DOJ addressed these concerns through a narrowly-tailored consent decree in which InBev

committed to divest its Labatt brand, a popular beer in these three localities.

Shortly before the DOJ concluded its review, a group of beer consumers and purchasers filed a private suit alleging much broader consumer harms than were alleged in the DOJ's complaint. The plaintiffs claimed that InBev's acquisition of Anheuser-Busch threatened to harm consumers throughout the United States, not just in the three localities that concerned the DOJ.<sup>29</sup> The plaintiffs based their challenge on allegations that InBev was a "perceived potential competitor" whose presence as a potential entrant on the

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fringes of the U.S. market constrained Anheuser-Busch's pricing.<sup>30</sup> The plaintiffs further alleged that the merger would harm "actual potential competition" because, absent the transaction, InBev would have greatly expanded its presence in the U.S. beer market. The district court disagreed on both counts, citing evidence that InBev had taken concrete steps to withdraw from the U.S. market prior to the merger. Such evidence indicated that potential competition from InBev in the United States was not only speculative, but unlikely.<sup>31</sup> The district court's dismissal was later affirmed by the Eighth Circuit.<sup>32</sup>

Recent merger challenges involving Pfizer's acquisition of Wyeth, United Airlines' acquisition of Continental Airlines, and Southwest Airlines' merger with AirTran follow similar patterns.<sup>33</sup> In each of these cases, the reviewing federal agency cleared the deal conditioned on a narrowly-tailored remedy (or no remedy in the case of Southwest/AirTran), and a group of customers brought a private action seeking to augment a government action with far broader and speculative claims of competitive harm. Each of these actions was dismissed at an early stage and their dismissals were affirmed on appeal.<sup>34</sup>

Other customers may pursue a private lawsuit because they have unique preferences for the merging parties' offerings. In 2006, the City of New York filed a private action on the ground that a merger between two health plans—GHI and HIP—would have particularly harmful effects on its municipal employees because the merging parties' low-cost offerings differentiated them from the competition.<sup>35</sup> According to the City, even though the transaction was approved by federal and state agencies, the merger allegedly would result

in higher prices for health plans offered to its municipal employees. The district court and Second Circuit rejected these allegations, holding that an alleged relevant market defined by the preferences of a single customer is legally insufficient to support a claim under Section 7 of the Clayton Act.<sup>36</sup>

Customer lawsuits may also be brought by competitors that purchase the merging parties' products or services. Competitors, of course, may have sufficient strategic incentives to bear the cost of a separate private lawsuit. A competitor that also has a customer-supplier relationship with the merging parties may be able to overcome antitrust injury requirement, at least with respect to any claims of harm that are closely linked to its status as a customer. Certain claims in *Sprint* and *Cellular South* illustrate this point.<sup>37</sup> The plaintiffs alleged that the AT&T/T-Mobile combination would harm them as purchasers of wireless roaming services.<sup>38</sup> The court held that Cellular South had standing to pursue this claim because its subsidiary was a customer of both AT&T and T-Mobile, and could therefore suffer harm if the merger resulted in Cellular South paying higher prices for roaming services.<sup>39</sup>

In short, customer-driven private actions can take many forms. Customers dissatisfied with the outcome of a government investigation or remedy have increasingly sought their own injunctions, divestitures, and damages, sometimes after the parties have consummated their transaction. In some cases, competitors have leveraged their status as a customer of the merging parties to achieve standing.

### Target Lawsuits

Although rare, target companies present a third potential source of private merger challenges. A private lawsuit brought by the target—typically represented by its management—may arise in the context of a hostile transaction, where the lawsuit may be one of several efforts to prevent the takeover.<sup>40</sup>

As in private merger lawsuits brought by competitors, the central question in target lawsuits is often whether the target firm is threatened by antitrust injury from an anticompetitive merger. The minority view is set forth by the Second Circuit in *Consolidated Gold Fields*, which held that a tender offer target can suffer antitrust injury from a merger in which it loses its status as an independent competitor.<sup>41</sup> The Fifth Circuit, consistent with the majority of other courts that have addressed the question, has rejected the Second Circuit's reasoning and held that a target does not have antitrust standing even if there is evidence that the "takeover will dramatically decrease competition and raise prices."<sup>42</sup> According to the Fifth Circuit, *Cargill* and its progeny "narrowly interpret the meaning of antitrust injury."<sup>43</sup> The source of the target's injury—its loss of independence—would occur whether or not the merger resulted in reduced output or higher prices, so the target's injury would not flow from anticompetitive harm. Employing similar reasoning, other courts outside the Second Circuit have rejected targets' antitrust injury claims.<sup>44</sup>

Targets therefore face significant standing hurdles in most courts, and successful Section 7 cases brought by targets are few and far between. In any event, the target's management may prefer to pursue other takeover defenses.<sup>45</sup>

But the rare case in which a target opposes a merger through private antitrust litigation can present unique challenges to the buyer. One obvious challenge is that, unlike other private or government actions, the interests of the transacting parties are not aligned. Instead of gathering information regarding the target's business and competitive outlook through cooperative joint defense or common interest relationships, the buyer may need to compel production of such materials through discovery, which can be a costly and time-consuming process.

More importantly, the target may have intimate knowledge of the facts relevant to the merger and can use this knowledge to unearth antitrust theories that may be missed by the agencies or other private plaintiffs. In *Atlantic Coast Airlines v. Mesa Air Group, Inc.*,<sup>46</sup> the plaintiff target (ACA), a regional airline, successfully sued to enjoin a hostile takeover by Mesa, another regional airline. On the surface, Mesa's takeover did not appear to raise significant antitrust issues. Nevertheless, ACA succeeded in enjoining the takeover on antitrust grounds based on an unconventional claim under Section 1 of the Sherman Act: that United Airlines (a non-party to the transaction) and Mesa conspired to prevent ACA (a regional carrier operating under the United Express brand) from launching an independent airline that would compete with United. ACA alleged that following the takeover, Mesa planned to restore ACA's contract with United, effectively "keeping [ACA] in its traditional role as [United's] carrier."<sup>47</sup> The court concluded that ACA had standing to pursue a Section 1 claim but not its Section 7 claim and, ultimately, that ACA was entitled to injunctive relief.

The takeover of ACA only raised antitrust issues when viewed in light of ACA's and Mesa's prior history and relationship with United. Because of ACA's involvement in the negotiations with United leading up to Mesa's hostile bid, it was positioned to connect the dots regarding the alleged conspiracy and thereby convince the court to block the takeover. While *Atlantic Coast* presents a unique fact pattern, it does illustrate how a target lawsuit can succeed on unconventional (and unforeseen) legal theories.

### Being Alert for Potential Private Litigation Risks

When practitioners are asked to analyze the potential antitrust issues raised by a proposed transaction, the natural focus is on the likely reaction of government enforcers. The threat of private litigation is, very often, not an issue that warrants significant attention. Yet the subset of deals that do raise meaningful prospects of private challenges may be increasing, given recent trends. And when it does occur, private litigation can be both costly and disruptive. It therefore makes sense to be alert for situations where private merger litigation may be a realistic concern.

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The mere fact that a deal is likely to garner opposition is not in itself an indicator that private litigation may develop, considering that there are other less costly and potentially more effective avenues to voice such opposition. A more accurate predictor of the potential for private litigation may be the existence of an important third-party business relationship that is uniquely threatened by the merger, whether it be a customer's concerns about being cut off from access to key products or services or a rival's fears about its ongoing ability to compete. Both considerations were at play in Sprint's allegations against AT&T and T-Mobile. Similarly, a large customer that has a particularly strong preference for the merging parties' products may have an incentive to bring a private action, as New York City did in *Group Health*.

Another consideration is that federal and state antitrust enforcers may not pursue a legal theory or form of relief that specifically addresses a third-party concern, or enforcers may not pursue any relief at all. Although a third party contemplating litigation will typically not know the government's leanings early on, in some instances this may become known from behind the scenes discussions and may be apparent if the government goes public with a complaint that fails to capture one or more third-party concerns.

The timing of the potential private lawsuit can have a substantial impact on its outcome. A private merger challenge may arise after the deal is publicly announced, or during or after a government investigation has run its course. A private merger challenge filed shortly after the announcement or during the government's merger review can strain the merging parties' resources and inject additional risk.

In practice, most private actions are filed just before or shortly after the government's regulatory review has run its course and the agencies have cleared the deal, entered a consent decree with the parties, or filed suit seeking to block the merger in court. This timing may present significant challenges for the parties, which face new uncertainty as to whether the transaction can be consummated and, if so on what terms.

From the outset, the merging parties should be prepared for a private action at any point in the process, even long after a government investigation is over and the merger has been consummated. In the event a private action is filed, the merg-

ing parties (or the merged firm) should ensure that any applicable defenses are raised in a timely fashion. For example, plaintiffs that delay filing a Section 7 lawsuit for a period of time after the merger is publicly announced may waive certain claims. Courts often apply equitable doctrines such as laches to find that private plaintiffs that delay bringing a merger suit are barred from seeking injunctive relief, including divestitures.<sup>48</sup> However, defendants in such cases often must raise such defenses early in the litigation. For instance, the court in the SiriusXM Radio class action denied the defendants' laches defense because it was not raised in the defendants' answer.<sup>49</sup>

More broadly, bearing in mind the factors discussed above, the merging parties have the opportunity during the planning stages—before the deal is made public—to avoid or at least reduce the potential impact of a private challenge. The first line of defense is an effective communications strategy that should be in place in advance of a public announcement. As in most transactions, the communications should promote the benefits of the deal to stakeholders, such as customers, competitors, shareholders, and other business partners.

In cases where a private lawsuit may be looming from a third party with a special interest in the transaction, a conventional communications strategy may need to be aug-

mented. Specifically, if a merger is likely to impact a business relationship that is important to a third party, the merging parties may consider taking proactive measures to prepare the third party for the merger. This may mean reaching out to the third party to tout the specific benefits of the deal and, if feasible, offer assurances that important business dealings between the parties will continue. In addition, if a third party is dependent on a supply relationship with one of the merging parties, the merging parties might consider extending the term of any existing supply contract with that third party. Such actions may help deflect arguments that the supply arrangement will be affected by the merger and allay any third party concerns about the merger when it is announced. There are myriad other ways in which parties to a proposed merger can seek to reduce antitrust risk, but the key is to plan ahead of time for foreseeable contingencies.

A final consideration is accounting for any post-merger conduct that could trigger a private lawsuit. As the SiriusXM Radio example teaches, a post-merger price increase may draw unwanted scrutiny and possible damages lawsuits from private plaintiffs, even if the merger was cleared by the agencies. While it is certainly the case that a post-merger price increase may be unrelated to the merger, the increase may provide a tempting target for private plaintiffs. ■

<sup>1</sup> See *Sprint Nextel Corp. v. AT&T Inc.*, Nos. 11-1600, 11-1690, 2011 WL 5188081 (D.D.C. Nov. 2, 2011).

<sup>2</sup> See, e.g., *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at \*1 (N.D. Cal. Sept. 27, 2010) (determining that plaintiffs, who challenged the merger after it “received all necessary regulatory approvals from the Department of Justice [ ], the Department of Transportation and the European Commission, as well as the approval of their respective shareholders,” were not entitled to relief).

<sup>3</sup> See *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (“Courts do not generally defer to an agency’s decision not to challenge a merger” (internal citations omitted)).

<sup>4</sup> 429 U.S. 477 (1977).

<sup>5</sup> 479 U.S. 104 (1986).

<sup>6</sup> See, e.g., *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 103 (2d Cir. 1989) (reciting the threshold standard for a private party to bring an antitrust challenge to a merger “as required by” *Brunswick and Cargill*); *Atl. Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, 295 F. Supp. 2d 75, 88 (D.D.C. 2003) (same); see also 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 335e2 (3d ed. 2007) (explaining that “the Supreme Court itself has denied a plaintiff’s antitrust injury long after a full trial on the merits finding an antitrust violation” and citing *Brunswick and Cargill*).

<sup>7</sup> *Cargill*, 479 U.S. at 111.

<sup>8</sup> See, e.g., *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1033 (9th Cir. 2001) (“All that plaintiffs have claimed is that their alleged injuries are causally linked to defendants’ illegal activities. That is not enough to maintain a private antitrust action.” (citations omitted)); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) (“[T]he plaintiff [must] not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury. . . . [T]he notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.”).

<sup>9</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 2.2.3 (Aug. 19, 2010).

<sup>10</sup> *Sprint*, 2011 WL 5188081 at \*6.

<sup>11</sup> *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986)).

<sup>12</sup> *R.C. Bigelow*, 867 F.2d at 110.

<sup>13</sup> *Union Carbide*, 944 F. Supp. at 1149 (quoting *Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992)).

<sup>14</sup> *Sprint*, 2011 WL 5188081, at \*7 (internal quotation marks and citation omitted).

<sup>15</sup> See, e.g., *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999) (merger would foreclose its access to landing gear manufactured by one of the merging parties); *Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989) (competitor would suffer antitrust injury where merger between rival herbal tea supplier would foreclose plaintiff’s access to supermarket shelf space); *Union Carbide Corp. v. Montell N.V.*, 944 F. Supp. 1119 (S.D.N.Y. 1996) (competitor challenge to joint venture sustained based on evidence that plaintiff-competitor would no longer have access to necessary inputs supplied by joint venture partner, which would have forced plaintiff to exit the market); *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995) (competing newspaper could suffer antitrust injury where monopolistic pricing by merged firm would deprive customers of revenue to spend on competing advertisements); *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 878 (W.D.N.Y. 1994) (competing retail chain had standing where acquisition threatened retailers access to commercial real estate).

<sup>16</sup> See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 483 n.19 (1982) (explaining that antitrust injury, “as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury”).

<sup>17</sup> See *Cargill*, 479 U.S. at 119; *Associated Gen. Contractors of Cal., Inc. v. Ca. State Council of Carpenters*, 459 U.S. 519, 545 (1983) (“[T]he tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff’s] alleged injury . . . weigh heavily against judicial

- enforcement of the [plaintiff's] antitrust claim."); *Pool Water Prods.*, 258 F.3d at 1035 ("Absent proof of predation, it is immaterial whether the price reduction is the result of illegal price setting, illegal mergers and acquisitions, collusion, price discrimination or any other antitrust violation."). A separate injury claimed by Sprint illustrates this point. Sprint claimed that AT&T's acquisition would harm Sprint by removing T-Mobile as an independent business partner in joint industry efforts designed to "create substantial scale for the creation of new handsets." *Sprint*, 2011 WL 5188081, at \*13 (internal quotation marks and citation omitted). Judge Huvelle rejected this claimed injury as implausible because there were no facts suggesting that T-Mobile would withdraw from such joint efforts in the wake of the merger, and even if T-Mobile did withdraw, there would be sufficient alternative business partners.
- <sup>18</sup> *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1333 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir. 1985).
- <sup>19</sup> AREEDA ET AL., *supra* note 6, at ¶ 345 ("Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." (footnote omitted)).
- <sup>20</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977). See also *Kansas v. Utilicorp United, Inc.*, 297 U.S. 199, 212 (1990) ("The *Illinois Brick* rule also serves to eliminate multiple recoveries." (citations omitted)).
- <sup>21</sup> See, e.g., *United States v. Oracle*, 331 F. Supp. 2d 1098, 1158 (N.D. Cal. 2004) ("For reasons discussed above, the court cannot rely upon the testimony of the customer witnesses offered by plaintiffs in determining if plaintiffs have met their burden."); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 114–15 (D.D.C. 2004).
- <sup>22</sup> Horizontal Merger Guidelines, *supra* note 9, § 2.2.2, at 5 ("Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant . . .").
- <sup>23</sup> *FTC v. Lundbeck, Inc.*, Nos. 08-6379, 08-6381, 2010 WL 3810015, at \*14–21 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236, 1240, 1240–43 (8th Cir. 2011) ("In its fact-findings, the district court credited the testimony of five clinical pharmacists . . . [and] seven neonatologists . . . The district court's fact-finding was not clearly erroneous.").
- <sup>24</sup> See *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir. 1989) ("Consumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction.").
- <sup>25</sup> U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), available at [http://www.justice.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.justice.gov/opa/pr/2008/March/08_at_226.html).
- <sup>26</sup> FCC, Commission Approves Transaction Between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions (July 28, 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-284108A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284108A1.pdf).
- <sup>27</sup> Don Jeffrey, *SiriusXM Wins Subscriber Class-Action Accord Court Approval*, Bloomberg (Aug. 24, 2011), available at <http://www.bloomberg.com/news/2011-08-24/sirius-xm-wins-court-approval-of-subscriber-class-action-lawsuit-accord.html>. Objections to the settlement are now on appeal to the Second Circuit.
- <sup>28</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture in InBev's Acquisition of Anheuser-Busch (Nov. 14, 2008), [http://www.justice.gov/atr/public/press\\_releases/2008/239430.htm](http://www.justice.gov/atr/public/press_releases/2008/239430.htm) (last visited Dec. 20, 2011).
- <sup>29</sup> See *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943, 947–48 (E.D. Mo. 2010).
- <sup>30</sup> *Id.* at 948.
- <sup>31</sup> *Id.* at 948–51.
- <sup>32</sup> See *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1236 (8th Cir. 2010).
- <sup>33</sup> *Taleff v. Sw. Airlines Co.*, No. C 11-02179, 2011 WL 6157467, at \*4 (N.D. Cal. Nov. 30, 2011) ("Upon review, the Court does not find that Plaintiffs have demonstrated that they are entitled to the 'extreme remedy of divestiture.'" (internal citation omitted)); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at \*1 (N.D. Cal. Sept. 27, 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-2854, 2010 WL 1541257, at \*D (N.D. Cal. Apr. 16, 2010) ("[P]laintiffs have failed to sufficiently allege the existence of a cognizable product market . . ."), *aff'd*, 433 F. App'x 598 (9th Cir. 2011).
- <sup>34</sup> In addition to the cases cited above, the Seventh Circuit recently overturned a district court's denial of class certification in a consumer class action claiming that a 2000 merger involving hospitals in Illinois violated Section 7. See *Messner v. Northshore Univ. HealthSystem*, No. 10-2514, 2012 U.S. App. LEXIS 731, at \*59 (7th Cir. Jan. 13, 2012). Notably, although the allegedly injured class of customers was somewhat broader than in the corresponding FTC enforcement action, the alleged violation, relevant market, and injuries were similar to those in the FTC's action.
- <sup>35</sup> *City of New York v. Grp. Health, Inc.*, No. 06 Civ. 13122, 2010 WL 2132246 (S.D.N.Y. May 11, 2010).
- <sup>36</sup> *City of New York v. Grp. Health, Inc.*, 649 F.3d 151, 156 (2d Cir. 2011); *Group Health*, 2010 WL 2132246, at \*5.
- <sup>37</sup> See *Sprint*, 2011 WL 5188081, at \*5 ("Sprint and Cellular South allege threatened injuries that stem from both horizontal and vertical aspects of AT&T's proposed acquisition of T-Mobile.").
- <sup>38</sup> See *id.* at \*18.
- <sup>39</sup> Because Sprint's wireless network was incompatible with AT&T's and T-Mobile's, it was not (and could not be) a customer of either merging party's roaming services. In other words, Sprint could not plausibly suffer harm as a customer. Accordingly, Sprint's claim based on its status as a purchaser of roaming services was dismissed.
- <sup>40</sup> See, e.g., R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. STRATEGIC MGMT. EDU. 37 (2005) ("[A]n antitrust lawsuit may give the target firm time to execute other defenses like poison pills (spinning off valuable assets) or spending cash needed for a leveraged buy-out by the acquirer.").
- <sup>41</sup> *Consolidated Gold Fields*, 871 F.2d at 258.
- <sup>42</sup> *Anago, Inc. v. Technol. Med. Prods., Inc.*, 976 F.2d 248, 250–51 (5th Cir. 1992).
- <sup>43</sup> *Id.* at 250.
- <sup>44</sup> See *Atlantic Coast Airlines*, 295 F. Supp. 2d at 89 (rejecting a target's Section 7 challenge on standing grounds, but granting the target standing under Section 1 of the Sherman Act); *Moore Corp. Ltd. v. Wallace Computer Servs., Inc.*, 907 F. Supp. 1545, 1566 (D. Del. 1995); *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 805 (M.D.N.C. 1987) ("This court is of the opinion that the Fourth Circuit would now adopt the reasoning of those cases that deny standing to a target corporation. Denial of standing to a target corporation to seek an injunction preventing a hostile takeover makes imminent sense when one views the purposes behind the antitrust laws.").
- <sup>45</sup> Indeed, the target may be concerned about unintended consequences of filing a Section 7 lawsuit. For example, taking a public position that the merger is unlawful may prevent the target from pursuing the same merger after negotiating with the hostile bidder for better terms. And by taking a position that the merger is unlawful on the ground that the market is highly concentrated, the target may also hamper efforts to pursue alternative transactions with another a competitor.
- <sup>46</sup> 295 F. Supp. 2d 75. Author Sean Royall was counsel for ACA in this litigation.
- <sup>47</sup> *Id.* at 78.
- <sup>48</sup> See, e.g., *Taleff*, 2011 WL 6157467, at \*4 (N.D. Cal. Nov. 30, 2011) ("Plaintiffs filed this suit after Defendants had already consummated their merger. Thus, the only form of relief that is possibly available to Plaintiffs is an order of divestiture. . . ."); see also *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990) ("[E]quitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.").
- <sup>49</sup> *Blessing v. SiriusXM Radio Inc.*, 775 F. Supp. 2d 650, 659 (S.D.N.Y. 2011) (explaining that Defendant's laches argument is an affirmative defense, which was waived because "Defendant failed to assert it in its Answer.").