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Lessons from AT&T's Flop: How to Grow in the Technology Industry While Avoiding Section 7 Antitrust Obstacles

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LESSONS FROM AT&T’S FLOP: HOW TO GROW IN THE TECHNOLOGY INDUSTRY WHILE AVOIDING SECTION 7 ANTITRUST OBSTACLES

JOHN SOMA*

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I. INTRODUCTION

In March of 2011, AT&T announced that it would buy T-Mobile USA.¹ In

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August of that year, the Department of Justice (“DOJ”) filed a suit to stop the purchase.² After four months of obstacles and setbacks, AT&T announced that it was withdrawing its bid.³ The DOJ had won this time. The DOJ does not, however, always succeed when challenging high profile mergers. In 2003, Oracle initiated its tender offer for PeopleSoft, and the DOJ filed suit to halt the purchase.⁴ Oracle was not dissuaded, went to trial with the DOJ, and the DOJ lost.⁵

As these two mergers indicate, the outcomes of cases concerning Section 7 of the Clayton Act are no longer predictable.⁶ If the interpretation of Section 7 was predictable, AT&T would not have pursued T-Mobile, in which the deal fell apart

also the Executive Director of the University of Denver Privacy Foundation. After completing his Ph.D. in Economics in 1975, Soma served from 1976 to 1979 as trial attorney for the U.S. Department of Justice, Antitrust Division, Washington, D.C., where he was primarily assigned to the Department of Justice trial team in the United States v. IBM litigation. In 1979, he joined the University of Denver Sturm College of Law faculty. In addition to seven books, Soma has authored more than forty professional articles in the antitrust and computer law area. My thanks to Daniel Graham for his extensive help on this article. All views, opinions, as well as any errors, are of course, the author’s.

¹ Paul Barbagallo, *DOJ Moves to Block AT&T-Mobile Merger; AT&T Vows ‘Vigorous’ Court Fight on Issue*, DAILY REP. EXECUTIVES (Sept. 1, 2011), http://www.dailyreport.bna.com/drpt/display/batch_print_display.adp. AT&T and other wireless phone companies have consistently complained that the wireless phone industry is suffering from a lack of spectrum (the airwaves upon which wireless phone signals travel), and AT&T claimed that this shortage was forcing it to purchase T-Mobile to acquire the spectrum it needs. See Defendant’s Answer at 2, United States v. AT&T, Inc., (D.D.C., Dec. 20, 2011) (No. 11-CV-01560), 2011 WL 3966103; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-352, SPECTRUM MANAGEMENT: NTIA PLANNING AND PROCESSES NEED STRENGTHENING TO PROMOTE THE EFFICIENT USE OF SPECTRUM BY FEDERAL AGENCIES 35–36 (2011), available at <http://www.gao.gov/assets/320/318264.pdf>; Brian X. Chen, *AT&T: We Need Spectrum or Prices Are Going Up*, N.Y. TIMES (Jan. 26, 2012), <http://bits.blogs.nytimes.com/2012/01/26/att-fcc/> (“Smartphones and tablets are squeezing data networks. And because of the limited amount of spectrum available to expand wireless services, the nation may face a data network shortage in the coming years.”); Gina Chon, Anton Troianovski & Anupreeta Das, *AT&T Hunts Spectrum*, WALL ST. J. (Feb. 16, 2012), <http://online.wsj.com/article/SB10001424052970204880404577225611179231968.html> (discussing AT&T’s need to find a new source of spectrum after its deal with T-Mobile fell apart and as consumers’ demand for mobile data increases).

² Michael J. De La Merced, Jeffrey Cane & Ben Protess, *U.S. Moves to Block AT&T Merger with T-Mobile*, N.Y. TIMES (Aug. 31, 2011), <http://dealbook.nytimes.com/2011/08/31/u-s-moves-to-block-att-merger-with-t-mobile/> (describing the DOJ’s complaint, which contended that “AT&T’s elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market.”).

³ See Michael J. De La Merced, *AT&T Ends \$39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011), <http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/>.

⁴ United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1100–01 (N.D. Cal. 2004).

⁵ *Id.* at 1175–76; see also Steve Lohr & Laurie J. Flynn, *Judge Allows Oracle to Bid for PeopleSoft*, N.Y. TIMES (Sept. 10, 2004), <http://www.nytimes.com/2004/09/10/technology/10soft.html?pagewanted=all> (“A federal judge ruled yesterday that Oracle, the nation’s second-largest software company, could proceed with its hostile bid for PeopleSoft, handing the Justice Department a rare defeat in a legal challenge to a corporate merger.”).

⁶ 15 U.S.C. § 7 (2012); see E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1606–07 (2004) (describing the shift in Supreme Court jurisprudence that occurred in *General Dynamics* and the resulting increased difficulty for the DOJ to win an antitrust case); see also United States v. Gen. Dynamics Corp., 415 U.S. 486, 510–11 (1974); United States v. Von’s Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under [Section] 7 since the passage of the 1950 amendment. The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins.”).

and AT&T ended up losing a \$4 billion breakup fee.⁷ Obviously it is too late for AT&T to avoid the mistakes it made as it attempted to buy T-Mobile. There are lessons to be learned. A comparison of AT&T's unsuccessful purchase of T-Mobile with Oracle's successful purchase of PeopleSoft reveals the elements of a successful approach to large-scale mergers. By comparing these two deals, legal counsel to companies that are pursuing, or are contemplating pursuing, a large-scale acquisition can learn the current, successful elements to approach growth by acquisition.

This article sets forth the lessons to be learned from the comparison of these two deals. Part I sets out an explanation of Section 7 case law, and Part II describes the outcomes of the Oracle trial and the AT&T failed purchase. Part III describes the lessons that can be learned from this comparison. Based on these lessons, Part IV makes recommendations for companies seeking to grow and avoid an AT&T outcome.

II. SECTION 7 LAW

1. *The Statute*

The “ultimate question” in a Section 7 analysis is “whether the effect of the merger ‘may be substantially to lessen competition’ in the relevant market.”⁸ In order to make this determination, courts have to establish two foundational concepts relating to the merger. Courts must first establish the relevant product market—what the parties are selling.⁹ Courts must also establish the relevant geographic market—where the parties are competing.¹⁰ After answering these fundamental questions, the courts can then consider whether the merger or acquisition will substantially lessen competition. Courts do this by considering how much market share the combined firm will possess¹¹ and whether future competition in the industry is likely to decrease due to the merger.¹²

⁷ See Jenna Wortham, *AT&T In \$6.7 Billion Loss on Failure of T-Mobile Deal*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/27/technology/atts-net-loss-tied-to-t-mobile-merger-fees.html> (describing AT&T's \$4 billion breakup fee and other losses associated with its attempted purchase of T-Mobile).

⁸ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963); see also 15 U.S.C. § 18 (2006) (“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).

⁹ See, e.g., *Phila. Nat'l Bank*, 374 U.S. at 356 (defining the product market as the “relevant product or services market” in which the merging companies compete).

¹⁰ See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–39 (1962).

¹¹ See, e.g., *id.* at 343–44.

¹² See, e.g., *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497–98 (1974) (emphasizing the importance of a showing of “anticompetitive effects” in order for the government to establish a Section 7 violation).

2. *The Classic Cases*

A. *Brown Shoe Company*

The first case that dealt with a Section 7 violation after the 1950 amendment was *Brown Shoe Co. v. United States*,¹³ in which two shoe companies—G.R. Kinney Company and Brown Shoe Company—sought to merge.¹⁴ The Court evaluated the merger based on two main factors: (1) the product market,¹⁵ and (2) the geographic market.¹⁶ After defining the product market and the geographic market, the Court determined what percentage of this market Brown and Kinney would control post merger.¹⁷ Based on this degree of market share, the Court determined that the merger “may tend to lessen competition substantially in the retail sale of men’s, women’s, and children’s shoes in the overwhelming majority” of towns where Brown and Kinney had shoe stores.¹⁸ The Court also indicated that “tendency toward concentration in the industry” was another factor that weighed in favor of blocking the Brown-Kinney merger.¹⁹ Given the shoe industry had a demonstrated trend toward concentration, the Court affirmed the lower court’s holding and found that the merger would substantially lessen competition in violation of Section 7 of the Clayton Act.²⁰

B. *United States v. Philadelphia National Bank*

The Court’s next noteworthy Section 7 case was *United States v. Philadelphia National Bank*,²¹ which arose when Philadelphia National Bank sought to merge with Girard Trust Corn Exchange Bank (“Girard”).²² After the Comptroller of the Currency approved the merger, but before the banks moved forward to finalize the merger, the United States brought suit to stop the combination.²³ In its analysis, the Court determined that the relevant product

¹³ *Brown Shoe Co.*, 370 U.S. at 311.

¹⁴ *Id.* at 296.

¹⁵ *Id.* at 335–36 (establishing the product market as men’s, women’s, and children’s shoes because this was the market within which the two companies actually competed).

¹⁶ *Id.* at 336 (concluding that the relevant geographic market was comprised of towns with populations greater than 10,000, and their “immediate contiguous surrounding territory” where both Brown and Kinney had retail stores because this definition covered the area where the merging companies competed).

¹⁷ *Id.* at 343–44 (stating that the combined shoe company would control over 57% of the woman’s shoe market in one city, and 5% of the market share over the entire geographic area). The Court stated that even though 5% of a market share may not seem like a large share, it can be a damaging share when it is held by a large national chain. *Id.* at 344–45.

¹⁸ *Id.* at 346.

¹⁹ *Id.* at 344–45 (“Other factors to be considered in evaluating the probable effects of a merger in the relevant market lend additional support to the District Court’s conclusion that this merger may substantially lessen competition. One such factor is the history of tendency toward concentration in the industry.”).

²⁰ *Id.* at 346.

²¹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963).

²² *Id.* at 323.

²³ *Id.* at 330–34 (stating that the government alleged that the merger would result in concentration within the commercial banking industry and that concentration would have adverse effects on

market was commercial banking, including checking accounts, savings accounts, and loans.²⁴ The Court next determined that the relevant geographic market was the four-county region including and surrounding Philadelphia.²⁵ The appropriate test to apply in geographic market determination was “where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”²⁶ Philadelphia National Bank and Girard only had branches in the four-county region around Philadelphia and because consumers sought nearby (convenient) banking options, the Court decided that this four-county region was the correct geographic market.²⁷

After making these two foundational determinations, the Court moved to assess the effect of the merger on competition.²⁸ The Court added a new analytical twist to the Section 7 analysis established in *Brown Shoe*²⁹ by establishing a presumption in favor of finding a Section 7 violation based on the percentage of market share enjoyed by the merged companies after the merger.³⁰ The Court then decided that if the Philadelphia National Bank-Girard merger went through, the combined bank would control “at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area.”³¹ The Court did not say at what percentage of control a company passed the threshold into the realm of the anticompetitive presumption, but the Court stated that 30% control was enough to trigger the presumption.³² After these two premier cases, there developed a strong trend of courts ruling in the government’s favor.³³ Up until the outcome in *United States v. General Dynamics Corp.*, it was hard for the government to lose a Section 7 case.³⁴

competition).

²⁴ *Id.* at 356–57 (stating that “the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking,’ composes a distinct line of commerce.”) (citation omitted).

²⁵ *Id.* at 361.

²⁶ *Id.* at 357 (citing BETTY BOCK, *MERGERS AND MARKETS* 42 (1960)).

²⁷ *Id.* at 358–59.

²⁸ *Id.* at 362 (“Having determined the relevant market, we come to the ultimate question under [Section] 7: whether the effect of the merger ‘may be substantially to lessen competition’ in the relevant market.”).

²⁹ *Id.* at 362–63.

³⁰ *Id.* at 363 (“[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”).

³¹ *Id.* at 364.

³² *Id.*

³³ See Scott A. Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 51–52 (2004) (“[F]ollowing 1950, the Supreme Court interpreted the amended [S]ection 7 in such a manner that antitrust authorities were granted the power to challenge even the most incipient of concentrations.”).

³⁴ See *id.*; see also *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under [Section] 7 since the passage of the 1950 amendment. *The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins.*”) (emphasis added).

C. *General Dynamics*

After a long trend of winning their Section 7 appeals, the government lost in *General Dynamics*.³⁵ In this case, the government challenged General Dynamics's acquisition of a coal mining company, United Electric Coal Companies.³⁶

The government sought to prove its case in the same way it had won its previous cases—by showing evidence that the coal industry's number of competitors was decreasing and the merger resulted in a greater market share for General Dynamics.³⁷ In this case the Court, however, did not accept this reasoning.³⁸ In contrast with prior cases where the Court had found this reasoning to be persuasive, here the Court upheld the District Court's determination that the statistics relied upon by the government only indicated the nature of the past competitive nature of the industry and were not indicative of the future competitive nature of the industry.³⁹ The acquired company, United Electric Coal Companies, had depleting coal resources and most of its production had already been allocated to long-term contracts, and thus, the Court held that the government's evidence failed to show that the merger would have a future negative impact on competition.⁴⁰

3. *The DOJ Merger Guidelines*⁴¹

In addition to case law, the Horizon Merger Guidelines (the "Guidelines") have had a significant impact on the outcome of antitrust cases.⁴² The Guidelines are "intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions."⁴³ The Guidelines describe how the DOJ and FTC (the "Agencies") define the relevant product market.⁴⁴ The Agencies evaluate whether two merging firms have products that compete with each other and whether there are substitutes for that product.⁴⁵ By evaluating the competition between the

³⁵ *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 510–11 (1974).

³⁶ *Id.* at 488–89. Note that, technically, the acquiring company had been Material Service Corporation. *Id.* However, by the time of this decision, Material Service Corporation had been bought by General Dynamics Corporation. *Id.* at 489.

³⁷ *See id.* at 494, 496.

³⁸ *Id.* at 503–04; *see also* Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 280–81 (2005) (describing the shift in *General Dynamics Corp.* as a shift away from politics toward functionality in the Court's antitrust analysis).

³⁹ *Gen. Dynamics Corp.*, 415 U.S. at 503–04.

⁴⁰ *Id.* at 502–04.

⁴¹ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>. The DOJ and the FTC jointly promulgated these Guidelines. *Id.*

⁴² *See* Amanda J. Parkison Hassid, *An Oracle Without Foresight? Plaintiffs' Arduous Burdens Under U.S. v. Oracle*, 58 HASTINGS L.J. 891, 893–94 (2007) ("[T]he Guidelines have been a persuasive force since their enactment, and any radical departure from them constitutes a major policy shift.").

⁴³ *Id.* at 1. "The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." *Id.* at 2.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

merging companies' competing products, the Agencies can start to determine whether the proposed merger will be beneficial or harmful for competition involving that product. The Guidelines also discuss the geographic market.⁴⁶ The purpose of this evaluation is to determine the geographic limits of the competition relating to the product market.⁴⁷ Factors that affect the geographic market determination include transportation costs, language, regulation, and tariffs.⁴⁸

After discussing product market and geographic market, the Guidelines treat the topic of concentration in the market by various tools including the Herfindahl-Hirschman Index ("HHI").⁴⁹ The Agencies' Guidelines set thresholds of concentration at which market dominance is presumed.⁵⁰ The Agencies' Guidelines also state that the Agencies evaluate a merger based upon the change in the HHI that it produces.⁵¹ While these thresholds are not strictly adhered to, they do provide general guidance.⁵²

The Guidelines also indicate that the Agencies will look beyond product markets, geographic markets, and HHI numbers to consider other factors.⁵³ Notably, the Guidelines emphasize a proposed merger's effect on innovation in the industry.⁵⁴ This is an important consideration because there is the potential that a combination of two key players in an industry will remove the combined firm's motivation to create new products and designs because the level of competition that it is facing has decreased with the removal of a strong competitor. The Guidelines also emphasize that the Agencies have wide latitude to act to prevent mergers that will have anticompetitive effects.⁵⁵ These Guidelines and classic cases make up the legal backdrop for both Oracle's and AT&T's recent attempts to grow, and they will help explain why Oracle succeeded and AT&T did not.

⁴⁶ *Id.* at 13.

⁴⁷ *Id.* ("The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers.")

⁴⁸ *Id.*

⁴⁹ *Id.* at 18–19. HHI is used to measure market concentration. *Id.* Under the index, market concentration numbers are calculated by squaring then summing all market participants' market share percentages. *Id.* at 18. So the smaller the individual market shares of the market participants, the smaller the HHI. *Id.* at 19. Conversely, the larger the market share of a market participant, the larger the HHI. *See id.* at 18–19; *see also* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 71–72 (D.C.C. 2011) (providing an explanation and examples of HHI calculations).

⁵⁰ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 41, at 19 (indicating that a market is not concentrated when its HHI is below 1500, moderately concentrated when its HHI is between 1500 and 2500, and highly concentrated when its HHI is above 2500).

⁵¹ *Id.* (changes less than 100 "are unlikely to have adverse competitive effects," changes of greater than 100 in a "moderately concentrated market" "raise significant competitive concerns and often warrant scrutiny," while an increase of greater than 200 in a "highly concentrated market" "will be presumed to be likely to enhance market power.").

⁵² *See id.*

⁵³ *Id.* at 20–34.

⁵⁴ *Id.* at 23 ("Competition often spurs firms to innovate.").

⁵⁵ *See id.* at 1 ("[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.").

III. WINNERS AND LOSERS: ORACLE AND AT&T

1. *Oracle Bests the DOJ*

In *United States v. Oracle*, Oracle went to trial with the DOJ over its proposed purchase of PeopleSoft and won.⁵⁶ Both Oracle and PeopleSoft produced software called “enterprise resource planning” software.⁵⁷ In its complaint, the DOJ attempted to narrow the product market to a specific type of “enterprise resource planning” software characterized as high function software relating to both “human relations management” and “financial management systems.”⁵⁸ In its complaint, the government argued that only Oracle, PeopleSoft, and one other company produced these two types of high function software.⁵⁹ Allowing Oracle and PeopleSoft to merge, therefore, would result in anticompetitive effects in this corner of the software market.⁶⁰ The district court was not persuaded by the government’s narrow product market definition.⁶¹ It stated that it was not convinced that if the Oracle-PeopleSoft merger were allowed to go forward, consumers would have no option “but to submit to a small but significant non-transitory price increase by the merged entity.”⁶² Rather the court found that consumers would be able to choose from substitute products, thus eliminating or at least significantly limiting, the merged entity’s monopoly power.⁶³

With regard to the geographic market, the government attempted to have the court limit it to the United States.⁶⁴ Arguably, the government urged this geographic market definition to make one of Oracle and PeopleSoft’s competitors—SAP—appear smaller.⁶⁵ The court, however, found that the geographic market was the worldwide market because competition for this type of software was not limited to the United States.⁶⁶ Rather, foreign-based companies and U.S.-based companies compete worldwide for business relating to this type of software.⁶⁷ In regard to market concentration, the court had no applicable statistics to consider because the government had only provided statistics based on their

⁵⁶ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098,1100–01 (N.D. Cal. 2004).

⁵⁷ *Id.* at 1101. This type of software “integrates most of an entity’s data across all or most of the entity’s activities.” *Id.*

⁵⁸ *Id.* at 1101–03.

⁵⁹ *Id.* at 1107.

⁶⁰ *See id.*

⁶¹ *Id.* at 1131–32, 1158.

⁶² *Id.* at 1132. In its evaluation of the government’s product market definition, the court discussed at length the various witnesses that testified on the government’s behalf in an attempt to help substantiate the government’s product market definition. *Id.* at 1131. Unfortunately for the government, the court did not find many of these witnesses to be credible. *Id.* at 1132.

⁶³ *See id.* at 1159–61 (citing outsourcing possibilities, mid-market vendors, and Microsoft ERP products as possible substitutes for the merged entity’s ERP product).

⁶⁴ *Id.* at 1161.

⁶⁵ *Id.* at 1162.

⁶⁶ *Id.* at 1164–65 (finding that although relationships are important in the sale of ERP, competition for this product is not limited to the United States, just like competition in other product markets that involve relationships is not limited to the United States).

⁶⁷ *Id.*

product market definition, which was not accepted by the court.⁶⁸ The court also considered the anticompetitive effects of the proposed merger.⁶⁹

Lastly, the court considered Oracle's increased efficiencies defense.⁷⁰ Here, Oracle argued that the merger would allow it cost savings, and would allow it to pursue greater innovations because it would have a larger customer base and greater revenue.⁷¹ The court found these efficiencies arguments to be speculative and unsubstantiated.⁷² The court, however, found in favor of Oracle because the government had failed to carry its burden of showing that the proposed merger was likely to substantially "lessen competition in a relevant product and geographic market."⁷³

This case struck two blows against the DOJ.⁷⁴ First, the DOJ lost, and second, the court articulated a standard that calls for the government to show a "likely" substantial lessening of competition when proving a Section 7 violation.⁷⁵ This is not the standard that the government wants. Its Guidelines highlight that that the language of Section 7 emphasizes possibilities and not certainties when it comes to proving a Section 7 violation.⁷⁶ Before AT&T's attempt to purchase T-Mobile, *Oracle* was the last major antitrust showdown for the DOJ.

2. AT&T Withdraws Its Bid

Unlike Oracle, AT&T did not get the better of the DOJ. AT&T announced its proposed purchase of T-Mobile in March of 2011.⁷⁷ In August of that year, the DOJ filed suit to stop the merger.⁷⁸ AT&T continued to push forward, but it met a back-breaking obstacle when the FCC appeared ready to stall the deal. In order for the purchase to go forward, AT&T had to obtain FCC approval.⁷⁹ In April of

⁶⁸ *Id.* at 1165.

⁶⁹ *Id.* at 1165–76. Here, the court focused on the government's evidence regarding (1) coordinated effects and (2) unilateral effects. *Id.* The court determined that the government had not proven either of these claims. *Id.* at 1175.

⁷⁰ *Id.* at 1173–75; see also U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 41, at 29 (describing the possibility that a merged entity will be able to achieve greater efficiencies due to its larger size and therefore provide better products, better service, and other benefits to consumers).

⁷¹ *Oracle*, 331 F. Supp. 2d at 1173–74.

⁷² *Id.* at 1175 ("The court finds Oracle's evidence on the claimed cost-savings efficiency to be flawed and unverifiable.").

⁷³ *Id.* at 1175–76.

⁷⁴ The DOJ decided not to make the situation even worse and chose not to appeal to the Ninth Circuit out of fear the District Court's factual rulings would negatively impact any Ninth Circuit appealed decision. See Press Release, Department of Justice, Justice Department Will Not Appeal Oracle Decision (Oct. 1, 2004).

⁷⁵ See *Oracle*, 331 F. Supp. 2d at 1175–76.

⁷⁶ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 41, at 1.

⁷⁷ *Back to the Future for AT&T*, N.Y. TIMES (Mar. 21, 2011, 8:42 PM), <http://dealbook.nytimes.com/2011/03/21/back-to-the-future-for-att/> (describing AT&T's bid to buy T-Mobile).

⁷⁸ De La Merced, Cane & Protess, *supra* note 2 (describing the challenge by the DOJ to AT&T's attempt to purchase T-Mobile because "AT&T's elimination of T-Mobile as an independent, low-priced rival would remove a significant competitive force from the market.").

⁷⁹ Jim Puzanghera, *FCC Allows AT&T to Withdraw Application to Purchase T-Mobile*, L.A.

2011, AT&T filed its application with the FCC, seeking permission to merge with T-Mobile.⁸⁰ AT&T encountered more push back from the FCC than it expected because, after learning that the FCC Chairman wanted to thoroughly review the proposed merger with a “rare, trial-like hearing,” AT&T withdrew its application for FCC approval.⁸¹ It seemed that AT&T wanted to focus on the opposition it was facing from the DOJ and then worry about the FCC after it won in court or was able to settle with the DOJ.⁸² Even though the FCC initially appeared like it was not going to let AT&T withdraw its application without prejudice, it eventually did allow AT&T to withdraw without prejudice.⁸³ Despite being allowed to withdraw its application, this setback from the FCC was the beginning of the end for AT&T’s bid for T-Mobile.

After the FCC setback, the DOJ argued that “without an F.C.C. application there was no [deal] for the government to oppose” because AT&T needed FCC approval to carry out its merger.⁸⁴ The DOJ then wanted to withdraw its lawsuit until the FCC application was resubmitted and there actually was a deal to oppose.⁸⁵ The judge agreed with the DOJ and scheduled a hearing for mid January, at which time AT&T had to inform the court and the DOJ if it planned to proceed with its deal in its current form, restructure it, or drop it completely.⁸⁶ Before that hearing came, AT&T had thrown in the towel. By mid December, AT&T announced that it was giving up its purchase of T-Mobile.⁸⁷ AT&T would not—at least at this point—be returning to its Ma Bell glory days.

TIMES (Nov. 29, 2011, 2:46 PM), <http://latimesblogs.latimes.com/technology/2011/11/att-t-mobile-deal-acquisition-federal-communications-commission-.html>.

⁸⁰ See Cecilia Kang, *AT&T, T-Mobile File Merger Application; Q&A with James Cicconi*, WASH. POST (Apr. 12, 2011, 11:14 AM), http://www.washingtonpost.com/blogs/post-tech/post/atandt-t-mobile-file-merger-application-qanda-with-james-cicconi/2011/04/11/AFhzCTQD_blog.html (stating that AT&T filed its application with the DOJ on April 8, 2011 and planned to have its FCC application filed on April 21, 2011).

⁸¹ See Greg Bensinger, *AT&T Bickers with FCC on Merger Review*, WALL ST. J. (Nov. 26, 2011), <http://online.wsj.com/article/SB10001424052970204452104577060400382853704.html> (describing how the FCC at first resisted allowing AT&T to withdraw its application without prejudice).

⁸² See Michael J. De La Merced, *AT&T Spars With FCC Over Withdrawal of T-Mobile Deal*, N.Y. TIMES (Nov. 25, 2011, 7:44 PM), <http://dealbook.nytimes.com/2011/11/25/att-spars-with-f-c-c-over-withdrawal-of-t-mobile-deal/?scp=1&sq=at&t%20fcc&st=cse>.

⁸³ Puzzanghera, *supra* note 79 (stating that the withdrawal can occur without prejudice but that the FCC is going to release its report regarding the proposed merger, which finds that “the purchase was not in the public interest”). The FCC will also share its findings with the DOJ and make its report available to the public. *Id.* Because the report does not look favorably upon the AT&T deal, AT&T understandably opposed its release. *Id.*

⁸⁴ See Edward Wyatt, *U.S. Judge Grants Delay in Challenge to AT&T Deal*, N.Y. TIMES, (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/technology/judge-grants-delay-in-challenge-to-att-merger.html?partner=rss&emc=rss>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Nicola Leske, *AT&T Drops \$39 Billion Bid to Buy T-Mobile USA*, REUTERS (Dec. 19, 2011, 6:34 PM), <http://www.reuters.com/article/2011/12/19/us-att-t-mobile-idUSTR7B11YZ20111219>; see also Wortham, *supra* note 7 (discussing the \$4 billion breakup fee that AT&T owed to T-Mobile as a result of the deal’s failure).

IV. LESSONS LEARNED FROM THESE TWO DEALS

1. Objective Factors

A. Market Share

A company's market share is an obvious consideration for antitrust regulators. Antitrust law and regulations works to preserve competition,⁸⁸ therefore, a company that possesses a large market share and is seeking to grow even larger through an acquisition will obviously raise antitrust concerns. Oracle's market share was not nearly as large an obstacle to its purchase of PeopleSoft as AT&T's was to its proposed purchase of T-Mobile. The judge in Oracle made it clear that the expert witnesses for the government were not credible or persuasive.⁸⁹ The government had attempted to narrowly define the product and geographic market which would result in Oracle controlling a larger percentage of the market.⁹⁰ The court did not accept either of these characterizations.⁹¹ The government had provided market share statistics based only on the product and geographic market definitions that it had proposed and because the court did not accept these product and geographic market definitions, the court did not have market concentration statistics based on the market definitions that it had ultimately accepted.⁹²

In contrast, AT&T's market share appeared to be fairly well understood. Numerous articles written about the proposed merger summed up the market share division in the mobile phone market by stating that if the deal went forward, the number of large mobile phone companies would decrease from four to three.⁹³ The DOJ's complaint also argued that AT&T's proposed purchase would excessively increase its market share, resulting in anticompetitive effects. Specifically, the complaint provided Herfindahl-Hirschman Index ("HHI") calculations that indicated that the merger would produce a presumptively anticompetitive market share in AT&T.⁹⁴ In particular, the complaint alleged that if the merger was allowed to go ahead, the HHI for the industry on a national basis

⁸⁸ 58 C.J.S. Monopolies § 7 (2012) ("[T]he purpose behind both state and federal antitrust law is to protect and promote competition for the benefit of consumers.").

⁸⁹ United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1158 (N.D. Cal. 2004).

⁹⁰ See *id.* at 1148, 1162–63. The government's expert calculated the post-merger HHI in the industry to be 5700—well above the Guidelines' threshold for a presumption of anticompetitive effect. *Id.* at 1112, 1148.

⁹¹ See *id.* at 1158, 1164.

⁹² See *id.* at 1165 ("Not surprisingly, plaintiffs did not offer any market share data other than those of Elzina [an expert witness].").

⁹³ See *e.g.*, De La Merced, *supra* note 3 ("And the deal's end leaves T-Mobile, the weakest of the four national operators, with an uncertain future."); De La Merced, Cane & Protess, *supra* note 2 (stating that the DOJ was arguing that the deal would harm competition by reducing the number of national carriers from four to three); Barbagallo, *supra* note 1 ("If regulators define the geographic market as national, the presumptive finding will be that a combined AT&T-T-Mobile would control a 40 percent market share and reduce the number of competitors in the market from four to three.").

⁹⁴ Second Amended Complaint at 11–12, United States v. AT&T, Inc., (D.D.C., Sep. 30, 2011) (No. 11-CV-01560), 2011 WL 4806971.

would be greater than 3,100 and increase by nearly 700.⁹⁵ The complaint also reported the post-merger HHI in ninety-six of the country's largest CMAs would top 2,500.⁹⁶ In ninety-one of ninety-seven representative CMAs, the complaint argued that the HHI would increase by 200 and this "increase is presumed to be likely to enhance market power."⁹⁷ The complaint addressed separately the HHI for business and government contracts and reported that post merger the HHI in that market would be 3,400 or greater, showing an increase of at least 300.⁹⁸ With these calculations, the DOJ was able to show how oligopolistic the wireless phone market is and would become with the consummation of the AT&T purchase of T-Mobile – especially considering that AT&T is the second largest wireless carrier in the country and T-Mobile is the fourth largest.⁹⁹ For a court, numbers like these would be very persuasive.

In its answer to the DOJ's complaint, AT&T admitted the HHI calculations, but AT&T stated that the HHI calculations are only one factor in a merger analysis.¹⁰⁰ AT&T also did not provide alternate HHI calculations of its own. In its answer, AT&T tried to minimize the importance of HHI figures generally.¹⁰¹ This latter statement by AT&T indicated that AT&T was aware that it was fighting an uphill battle in regard to market concentration. By trying to take the emphasis off of HHI figures and market concentration, AT&T was revealing that it was aware that the market concentration numbers were a major obstacle. AT&T's market share fight differed drastically from Oracle's. Against Oracle, the government failed to persuade the court to accept its product market and geographic market definitions. The court had no way to consider market share. In contrast, AT&T's market share and the concentration of the mobile phone industry were fairly well established and likely to persuade a court should the deal have gone to trial.

The first lesson from this comparison is that the government has to win the battle over product market and geographic market definitions, and the defense has to prevent the court from accepting the government's definitions. This first stage is crucial because it will determine how the market share calculations are performed and market share remains a critical factor in a court's Section 7 analysis.

B. Unilateral Effects

The next critical factor in the court's evaluation of a merger is potential unilateral effects. Consideration of unilateral effects has not always been a prominent portion of merger analysis, but it has become a central element in recent

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 11–12.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 4–5.

¹⁰⁰ Defendant's Answer, *supra* 1, at 14–15.

¹⁰¹ *Id.* at 15 ("HHI analysis is only one factor in merger analysis, and . . . a complete analysis must take full account of competitive dynamics and efficiencies not captured by such simplistic calculations.").

years.¹⁰² Unilateral effects analysis began its climb to prominence with its appearance in the 1992 Horizontal Merger Guidelines.¹⁰³ In short, merger analysis that incorporates a consideration of unilateral effects evaluates whether the merged entity will be able to raise prices for its products without market dominance or coordinated efforts because other entities' products, while similar to the merged entities' products, are not feasible substitutes for the products of the merged entity. For example, the *H&R Block* court stopped a merger between H&R Block and TaxAct and based its ruling in part on the absence of substitute products for those offered by H&R Block and TaxAct and on the fact that the competitors of the two entities would not be likely to develop such substitutable products.¹⁰⁴ Because of this, it was more likely that the merged entity would be able to raise its prices independent of its competitors' actions and without coordinating its actions with others.

In contrast, the *Oracle* court found that the government had failed to show a likelihood of anticompetitive unilateral effects.¹⁰⁵ After a long discussion of unilateral effects analysis,¹⁰⁶ the court found that the government had failed to show the first element of a unilateral effects argument—"plaintiffs have failed to prove that there are a significant number of customers (the 'node') who regard Oracle and PeopleSoft as their first and second choices."¹⁰⁷ Because the government had failed to show a sufficient degree of "localized competition" between Oracle and PeopleSoft, the court did not have to take its unilateral effects analysis any further and consider whether the merged entity would be able to raise prices and reduce production irrespective of its competitors' actions.¹⁰⁸ The divergent outcomes in these two important cases undoubtedly influenced the arguments relating to unilateral effects—or rather the lack of such arguments—made in the AT&T suit.

In the case of AT&T and T-Mobile, the DOJ did not make allegations relating to unilateral effects in its complaint. Instead, the DOJ focused on market concentration.¹⁰⁹ DOJ may have chosen this approach because they felt that their market concentration argument was strong enough to win by itself or because they

¹⁰² See Scott A. Sher & Andrea Agathoklis Murino, *Unilateral Effects in Technology Markets: Oracle, H&R Block, and What It All Means*, 26 ANTITRUST 46, 46 (2012) ("Merger enforcement policy has not always acknowledged the theory of unilateral effects. . . . By the time a federal court decided Oracle in 2004, the theory of unilateral effects had become the mainstay of merger analysis at the FTC and DOJ.").

¹⁰³ *Id.*; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2 (1992), available at <http://www.ftc.gov/bc/docs/horizmer.shtm> ("A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.").

¹⁰⁴ See *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 81-89 (D.D.C. 2011) (finding that unilateral effects were likely as a result of the merger); Sher, *supra* note 102, at 48.

¹⁰⁵ *United States v. Oracle, Corp.*, 331 F. Supp. 2d 1098, 1172-73 (N.D. Cal. 2004) ("In sum, the court finds that plaintiffs have failed to show an area of localized competition between Oracle and PeopleSoft.").

¹⁰⁶ *Id.* at 1113-23.

¹⁰⁷ *Id.* at 1172.

¹⁰⁸ *Id.*

¹⁰⁹ Second Amended Complaint, *supra* note 94, at 11.

did not think they had a strong unilateral effects argument to make. DOJ likely did not have a strong unilateral effects argument to make because the merged AT&T and T-Mobile would have still faced stiff competition from Verizon and Sprint, both of whom offer substitutable products to those offered by AT&T. Both offer similar plans and identical devices—i.e. the iPhone. Therefore, it is unlikely that AT&T would have been able to raise prices after its proposed merger independent of the prices and products offered by its competitors. Consequently, the DOJ did not raise the unilateral effects issue, but focused on the market concentration argument.¹¹⁰

Even though the issue did not arise in AT&T's attempted acquisition of T-Mobile, the importance of unilateral effects analysis has not decreased. Companies seeking to merge must be ready to show that their merged entity will not be able to raise prices and reduce output independent of the actions of its competitors because its competitors will have substitute products that will force the merged entity to compete. Counsel for companies contemplating a merger must continue to emphasize the importance of unilateral effects analysis and evaluate whether the merged entity would be able to operate more like H&R Block and TaxAct, or more like AT&T and T-Mobile, with Verizon and Sprint ready to supply substitute products.

C. Regulated Industries Pose a Double Obstacle

In its proposed purchase of PeopleSoft, Oracle faced one main adversary—the DOJ. In its proposed purchase of T-Mobile, AT&T faced two—the DOJ and the FCC. Two adversaries are naturally worse than one. The DOJ brought suit to stop AT&T's purchase of T-Mobile.¹¹¹ In all likelihood, AT&T foresaw opposition from the DOJ.¹¹² Given the size of its market share and the nature of the mobile phone market, it is likely that AT&T expected DOJ opposition to arise after AT&T gave notice of its proposed merger, as required by the Hart-Scott-Rodino Act.¹¹³

¹¹⁰ Note that although the DOJ did not raise the unilateral effects argument in its complaint, Sprint raised it in its complaint. See Plaintiff's Complaint at 62, 64, 66, *Sprint Nextel Corp. v. AT&T, Inc.*, (D.D.C. Sept. 6, 2011) (No. 1:11-cv-01600), 2011 WL 3891692 (making conclusory arguments that the post-merger AT&T would be able to unilaterally raise prices).

¹¹¹ De La Merced, Cane & Protess, *supra* note 2. Note however that both the FTC and the DOJ have the authority to bring suit under Section 7 of the Clayton Act. See 15 U.S.C. § 18a(f) (2006). The two agencies work together to decide which agency will bring a particular action. If one of the agencies hears of possible anticompetitive activity before the other, then it may ask for "clearance" from the other agency so that it can take action. The other factor that influences which agency will take action is the industry in which the suspected anticompetitive activity is occurring. Both agencies have areas of expertise and if a case arises in an agency's area of expertise, it will probably be pursued by that agency. Telephone Interview with Allen Freedman, Attorney with the Office of Policy & Coordination for the Bureau of Competition, Fed. Trade Comm'n (Dec. 2, 2011).

¹¹² However, AT&T claimed to have been blindsided by the DOJ's suit. See Anton Troianovski, *Blindsided and Besieged, AT&T's Lawyer Fights On*, WALL ST. J. (Sept. 22, 2011), <http://online.wsj.com/article/SB10001424053111903791504576584774123453618.html>.

¹¹³ Whenever a merger of this size is proposed, the participants must notify both the DOJ and FTC before they close the deal. This way the participants do not have a chance to *scramble the eggs* before the merger can be reviewed. See Antitrust Improvement Act of 1976, 15 U.S.C. § 18a (2006); AT&T, Inc., Quarterly Report (Form 10-Q) at 16 (May 6, 2011), available at <http://www.sec.gov/Archives/edgar/data/732717/000119312511130267/d10q.htm> ("On March 31, 2011

It is less likely that AT&T anticipated all the grief that it ended up receiving from the FCC. In April 2011, AT&T filed its application seeking the agency's approval for the deal.¹¹⁴ In late November 2011, the FCC indicated that it wanted to hold a hearing to review AT&T's proposed purchase.¹¹⁵ At that point, AT&T requested to withdraw its application.¹¹⁶ The FCC decided to allow AT&T to withdraw its application without prejudice but also publicly released its report, which AT&T fought.¹¹⁷ The report "outlined the \$39 billion deal's shortcomings," focusing on why the alleged benefits of the deal would not outweigh its costs.¹¹⁸ The combination of the FCC's release of its report and AT&T's withdrawal of its application meant that the merger was not going to succeed.¹¹⁹

The lesson from AT&T's stand off with the FCC is that a larger merger is more difficult to accomplish in a regulated industry where the deal will have to win the blessing of not only the DOJ, but of a regulatory agency as well. Appeasing a regulator like the FCC adds an extra burden to an acquisition. AT&T had to divert time and resources from its fight with the DOJ to answer the FCC's inquiries and demand for additional information.¹²⁰ This additional opposition to the deal meant that AT&T's resources were spread more thinly than if AT&T had only one agency to satisfy. Second, there is safety in numbers and it was easier for the DOJ to strongly oppose the deal as long as the FCC was opposing it, and vice versa. As it became apparent that AT&T was going to face double the opposition, it became twice as hard for it to justify to shareholders its fight for T-Mobile. Fourth, once a second government body stated its opposition to the deal, negative public sentiment was reinforced and positive public sentiment was weakened. For these reasons, the fact that AT&T had two opponents to its deal made it much more difficult for it to push its deal through to completion.

In contrast, Oracle only had one main adversary with which to deal. This allowed Oracle to focus its resources on its fight with the DOJ. Furthermore, in its fight with Oracle, the DOJ did not have a partner against whom it could lean. DOJ

we filed with the U.S. Department of Justice notice of the transaction [the purchase of T-Mobile] as required under the Hart-Scott-Rodino Antitrust Improvements Act.").

¹¹⁴ Quarterly Report, *supra* note 113, at 16

¹¹⁵ Amy Schatz & Greg Bensinger, *FCC Blasts AT&T Deal*, WALL ST. J. (Nov. 30, 2011), <http://online.wsj.com/article/SB10001424052970204449804577068562250634398.html>; *see also* Anton Troianovski, Greg Bensinger & Amy Schatz, *AT&T's T-Mobile Deal Teeters*, WALL ST. J. (Nov. 25, 2011), <http://online.wsj.com/article/SB10001424052970204452104577057482069627186.html> (describing the hearing that the FCC was seeking as "rare").

¹¹⁶ Schatz & Bensinger, *supra* note 115.

¹¹⁷ *Id.* ("[T]he staff report . . . gives chapter and verse on the agency's contention that the deal isn't in the public interest.").

¹¹⁸ *F.C.C. Report Details Merger Shortcomings*, N.Y. TIMES (Nov. 29, 2011), <http://www.nytimes.com/2011/11/30/business/media/fcc-report-on-att-deal-details-merger-shortcomings.html>.

¹¹⁹ *See* Cecilia Kang, *AT&T and T-Mobile Pull FCC Merger Application, Shift Focus to Justice Dept. Case*, WASH. POST (Nov. 24, 2011), http://www.washingtonpost.com/business/economy/atandt-and-t-mobile-pull-fcc-merger-application-shift-focus-to-justice-dept-case/2011/11/24/gIQAs8QytN_story.html (stating that the FCC opposition to the deal created a "major regulatory hurdle that all but ended the chances for a wireless mega-merger in the near term.").

¹²⁰ *See* Amy Schatz, *FCC Asks AT&T for More Info on LTE*, WALL ST. J. (Aug. 25, 2011), <http://online.wsj.com/article/SB10001424053111904787404576528613428221284.html> (describing a request by the FCC for more information regarding AT&T's proposed purchase of T-Mobile).

did not have the benefit of FCC opposition to help stir up negative consumer sentiment. A large company that is seeking to grow by acquisition in a regulated industry therefore faces the additional burden of multiple heavyweight opponents. Large scale growth by acquisition will be less likely to succeed when a company has to appease not only the DOJ but a regulator as well.

D. Industry Trends and Their Effect on Attempts to Grow by Large-Scale Acquisition

The Court also considers the trend of concentration in an industry when determining whether a proposed acquisition will violate Section 7.¹²¹ A district court will not disregard the trend surrounding market share numbers, but rather may find against a company with a low market share if that company's industry is experiencing a trend of concentration. This factor also cut against AT&T. The telecommunications industry is a prime example of consolidation and concentration.¹²² AT&T itself has played a large role in this concentration.¹²³ Under *Von's Grocery*, a court will find this industry trend toward concentration to be a strike against a company seeking to acquire and grow in that industry.

In contrast, Oracle found itself in an industry with significantly less concentration than the telecommunications industry. To begin, the computer software industry is much younger than the telecommunications industry and has had less of an opportunity to develop a history of concentration.¹²⁴ During its early years, the high demand for software and software innovation allowed for entry into the market of many different software producers, and thus industry consolidation was not an issue. Lastly, entry into the software market is arguably easier than entry into the mobile phone industry.¹²⁵ The software industry will

¹²¹ *United States v. Von's Grocery Co.*, 384 U.S. 270, 275–77 (1966) (“[T]he basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. . . . Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress’ intent to protect competition against ever-increasing concentration through mergers.”).

¹²² Barney Warf, *Mergers and Acquisitions in the Telecommunications Industry*, 34 GROWTH & CHANGE 321, 325 (2003) (arguing that in recent years, the telecommunications industry “witnessed an unprecedented number of mergers and acquisitions.”).

¹²³ From early in its history, AT&T has faced antitrust scrutiny from the DOJ. Since the 1940s, the DOJ has periodically made allegations of monopolization against AT&T. See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 135 (D.D.C. 1982). The DOJ’s claims culminated in the 1980s when AT&T agreed to settle an ongoing suit by giving up its local telephone service providers in order to be able to keep its national, long distance service. See *id.* at 141; Paul W. MacAvoy & Kenneth Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. ON REG. 225, 225 (1985) (explaining that the DOJ “filed suit under Section Two of the Sherman Act challenging American Telephone and Telegraph Company’s (AT&T) regulated monopoly. . . . AT&T formally divested its local Bell Operating Companies (BOCs), pursuant to a consent decree ending the government antitrust suit.”).

¹²⁴ Development of business software began in the 1950s. Robert L. Glass, *The First Business Application: A Significant Milestone in Software History*, 48 COMMS. ACM 25, 25–26 (Mar. 2005). Larry Ellison did not found Oracle until 1976. David Millstone & Guhan Subramanian, *Oracle v. PeopleSoft: A Case Study*, 12 HARV. NEGOT. L. REV. 1, 3 (2007). In contrast, the telecommunications industry began prior to the 20th century and AT&T itself formed in 1885. See *Milestones in AT&T History*, AT&T (2013), <http://www.corp.att.com/history/milestones.html>.

¹²⁵ The *Oracle* court considered ease of entry in its determination that Oracle’s merger with PeopleSoft would not lessen competition. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1134–

always have new companies forming and competing, lowering the level of concentration in the software industry and easing the concerns of the antitrust regulators.¹²⁶ In contrast, entry into the mobile phone industry requires significant initial investment and appropriate regulatory licensing approval, and this will keep the number of new competitors low and the trend toward consolidation high.

The lesson to take away is that a company operating within an industry with a trend toward consolidation will have a more difficult time gaining the approval of the DOJ and antitrust regulators. A company that wants or needs to grow must consider all the factors stacked against it before deciding to proceed with major acquisitions. It is very likely that a company like AT&T would be better advised to pursue growth by a method other than major acquisitions.

2. Subjective Factors

A. Risk Versus Reward: What Did Oracle Have to Lose?

Oracle's decision to buy PeopleSoft was reactionary. It made this decision after PeopleSoft announced a merger with J.D. Edwards.¹²⁷ It is arguable then that Oracle did not want PeopleSoft so much as it did not want anyone else to have them. Oracle had succeeded for a long time by growing on its own and making small acquisitions.¹²⁸ So Oracle made a move for PeopleSoft to prevent its merger with J.D. Edwards. It was a win-win situation for Oracle. If its bid for PeopleSoft was successful, it would be able to grow and gain more market share; if its bid was not successful, then its attempt would likely inhibit J.D. Edwards merger with PeopleSoft.

In contrast, no other suitor was courting T-Mobile when AT&T announced its desire to purchase it. AT&T's motivation was neither reactionary nor preventative. Rather, AT&T wanted to buy T-Mobile mainly because it wanted to acquire T-Mobile's spectrum.¹²⁹ Its move was proactive. All major mobile

36 (N.D. Cal. 2004). The court determined that other companies such as Microsoft would be able to fairly easily enter the software market occupied by Oracle, PeopleSoft, and their main competitors. *Id.* at 1135. Thus the court in Oracle did not consider the barriers to entry to this market to be significant. This compares with the more difficult entry into the wireless telecommunications industry which results from the scarcity and high price of spectrum. *See* Chen, *supra* note 1 (stating that AT&T has argued that spectrum is in short supply and government regulators are not adequately meeting the demand). *But see* Holman W. Jenkins, Jr., *How AT&T Miscalculated*, WALL ST. J. (Dec. 21, 2011), <http://online.wsj.com/article/SB10001424052970204791104577110393277495270.html> (arguing that "the [spectrum] shortage is grossly overplayed.").

¹²⁶ In fact, for most of its history Oracle had grown from within, without needing to acquire other companies in order to get larger. *See* Millstone & Subramanian, *supra* note 124, at 3–4 ("Over its first two decades, the company had so much organic growth—doubling in size in some years—that acquisitions were at best an afterthought. Within Oracle the conventional wisdom was that integrations required too much management attention when so much growth could be achieved just by executing well.").

¹²⁷ *Id.* at 1–2.

¹²⁸ *See supra* text accompanying note 124.

¹²⁹ *See* De La Merced, *supra* note 3 ("The company [AT&T] wanted T-Mobile's cellular airwaves, or spectrum, to relieve its congested network and offer faster service for data-hungry devices like the iPhone.").

telecommunications companies have identified the shortage of spectrum as a problem, and given that these companies vigorously maneuver to acquire spectrum and to keep their competitors from acquiring it,¹³⁰ it is possible that AT&T thought that acquiring T-Mobile was worth a try. If AT&T succeeded in its bid, then it would have acquired the spectrum it desired. If AT&T failed, then it would have made a competitor's acquisition of T-Mobile or another small wireless carrier much more difficult. However, AT&T risked more in its bid for T-Mobile than Oracle risked in its pursuit of PeopleSoft—\$4 billion more.¹³¹ After the deal fell apart, AT&T owed T-Mobile a hefty \$4 billion breakup fee. Part of this fee was comprised of spectrum that AT&T had to turn over to T-Mobile.¹³² The total breakup fee was one of the biggest in corporate history.¹³³

The lesson here is obvious, but apparently worth articulating, because the executives at AT&T missed it. A company has to weigh what it is risking against what it stands to gain when pursuing a large-scale merger. Both AT&T and Oracle risked time and resources by pursuing a merger, but unlike AT&T, Oracle did not have \$4 billion on the line. When attempting a large merger, a company needs to cautiously consider what it is risking so that it does not find itself owing a large breakup fee and having to turn over valuable resources like spectrum as a part of that fee.

B. Good Luck and Bad Luck: The Vagaries of Litigation

Twists of fate can help push a deal forward or can stop it in its tracks, and no matter how intelligent or talented the leaders at Oracle or AT&T are, they are not immune from misfortune. AT&T had its share of misfortune, which contributed to the failure of its bid for T-Mobile. There was a leaked document. In August of 2011, AT&T lawyers accidentally released an unredacted copy of a letter to the FCC.¹³⁴ The letter explained that AT&T could accomplish its extension of its network into rural communities—one of its purported main reasons for its acquisition of T-Mobile—at about one tenth of the price that it was willing to pay for T-Mobile.¹³⁵ This revealing fact made regulators question AT&T's motives.¹³⁶ Creating this distrust of its motivations hindered AT&T's pursuit of T-Mobile.

Second, the presidential election cycle did not help AT&T as much as it could have. It was no coincidence that AT&T chose to pursue this acquisition with a presidential election on the horizon.¹³⁷ AT&T sought to use this upcoming

¹³⁰ See, e.g., Lucas Shaw, *T-Mobile Asks FCC to Block Verizon's Spectrum Deals with Comcast*, *Time Warner*, REUTERS (Feb. 22, 2012, 3:05 PM), <http://www.reuters.com/article/2012/02/22/idUS104885420720120222> (describing T-Mobile's opposition to Verizon's bid to buy spectrum).

¹³¹ See Wortham, *supra* note 7 describing AT&T's 4 billion dollar breakup fee).

¹³² Greg Bensinger, *FCC Approves Transfer of AT&T Breakup Fee Airwaves to T-Mobile*, *WALL ST. J.*, Apr. 25, 2012, at B8, (discussing the \$1 billion worth of spectrum that AT&T paid to T-Mobile as part of its breakup fee).

¹³³ *Id.* ("The breakup fee is among the largest in corporate history, in terms of size and percentage, according to Dealogic.")

¹³⁴ Schatz, *supra* note 120.

¹³⁵ *Id.*

¹³⁶ See *id.*

¹³⁷ See Lucas Shaw, *AT&T's T-Mobile Deal: Could the Election Tip the Scales Again?*, REUTERS

election to its advantage, and force the presidential administration to favor it—by highlighting the American jobs that would be created by the deal.¹³⁸ With this rhetoric, AT&T tried to gain favor for its deal and push it through during an election year when President Barack Obama was undoubtedly concerned about how the White House was perceived by the American business community. AT&T's job-creation projections, however, were questioned and called into doubt when AT&T provided unsatisfactory answers.¹³⁹ As a result, the FCC came to believe that the deal would actually cause a loss of American jobs.¹⁴⁰

Unfortunately AT&T miscalculated President Obama's administration's response to its proposed purchase of T-Mobile. Instead of kowtowing to the corporate giant during an election year due to insecurities about the American economy and unemployment rate, the Administration pushed back against the deal.¹⁴¹ As with the document it leaked to the FCC, this was probably bad luck for AT&T. The lesson, then, is that fortune can play a role in the success or failure of a deal like this one. Although it may not play a big role, the leaders of companies should expect bouts of bad luck as they pursue acquisitions, and they need to be ready to deal with these bouts.

C. Media Coverage and Consumer Sentiment

AT&T had more working against it than the government regulators. In addition, media coverage and consumer sentiment worked against AT&T's deal.¹⁴² Not every proposed merger draws the focus of the American public or the media. The AT&T deal gained atypical, widespread media attention as well as attention from the general public.¹⁴³ Not only was the business community watching the deal—cell phone users were too. Undoubtedly the widespread media attention that the deal drew was due in part to most Americans' familiarity with these companies and use of their products. Not only do most people use cellular phones,¹⁴⁴ but

(Nov. 28, 2011, 1:18 PM), <http://www.reuters.com/article/2011/11/28/idUS356503073020111128> (describing how a Republican administration would help AT&T push its purchase forward).

¹³⁸ Michael J. De La Merced, *AT&T Plans to Bring Back Jobs Sent Abroad*, N.Y. TIMES (Aug. 30, 2011, 11:45 PM), <http://dealbook.nytimes.com/2011/08/30/att-plans-to-bring-back-jobs-sent-abroad/>; cf. Edward Wyatt & Jenna Wortham, *AT&T Merger with T-Mobile Faces Setbacks*, N.Y. TIMES (Nov. 25, 2011), <http://www.nytimes.com/2011/11/25/technology/att-deal-with-t-mobile-takes-a-step-back.html?bl> (“F.C.C. officials have said that AT&T's confidential filings indicate the merger would eliminate jobs.”).

¹³⁹ Edward Wyatt, *F.C.C. Seeks Review of AT&T Merger with T-Mobile*, N.Y. TIMES (Nov. 22, 2011), <http://www.nytimes.com/2011/11/23/business/media/fcc-seeks-review-of-att-merger-with-t-mobile.html?pagewanted=all>.

¹⁴⁰ *Id.*

¹⁴¹ See De La Merced, *supra* note 2 (referring to President Obama's administration's opposition to the deal as “stiff”).

¹⁴² See Eleanor M. Fox, *AT&T-Mobile: Will Consumer Intuition Prove Correct?*, REUTERS (Sept. 2, 2011), <http://blogs.reuters.com/mediafile/2011/09/02/att-mobile-will-consumer-intuition-prove-correct> (“In the last 48 hours the media have reported consumer intuitions that this merger is seriously anticompetitive.”).

¹⁴³ Barry Goodstadt, Alan Pearce & Martyn Roetter, *Forty Questions that Will Make or Break AT&T's Acquisition of T-Mobile*, DAILY REP. EXECUTIVES (Apr. 18, 2011), http://www.dailyreport.bna.com/drpt/display/batch_print_display.adp (stating that AT&T's proposed acquisition was receiving a great deal of attention from regulators, the media, and the public).

¹⁴⁴ *Id.* (“Today there are more than 300 million wireless handsets in use in America, and more than

many people use AT&T and T-Mobile cellular phones. This meant that many people felt connected to the merger and took an interest in it. This fact led to considerable media coverage of AT&T's bid to buy T-Mobile.

If the coverage and the news had been positive, then that would have cut in favor of AT&T, but most of the news was negative.¹⁴⁵ The resulting effect was that consumers' opinions regarding the deal were often negative, which in turn led to additional negative media coverage. A cycle of negative media coverage and negative consumer reaction began to weigh down AT&T's proposed purchase. In contrast, Oracle's bid for PeopleSoft received substantially less media attention. This, no doubt, is a result of most people's greater familiarity with AT&T and T-Mobile. Although many companies use Oracle and PeopleSoft products, these two entities do not have the brand name recognition of AT&T and T-Mobile. There is less general interest in a story about a merger between these two entities because even though a merger would affect a large number of people—employees of companies who use either Oracle or PeopleSoft software—many people would not even be aware that this merger deal would affect them. This means that companies like Oracle and PeopleSoft can worry less about media coverage and instead focus more on making their case to government regulators, not the American public.

The lesson from this evaluation of the media coverage and consumer sentiment surrounding AT&T's proposed purchase of T-Mobile is that when a large scale merger is going to affect a large number of consumers who are familiar with the companies involved, the deal will attract a good deal of media attention and public attention. If that attention is positive, then that can help the deal move forward. If the attention is negative, this negative reaction will impede the deal. Company leaders need to be ready to promote a positive public reception to these large-scale deals. If a company can create a positive reception for its deal, the chances of success for the deal will increase.

D. Emotion: AT&T's Winning History May Have Clouded Its Judgment

AT&T had faced DOJ antitrust complaints in the past.¹⁴⁶ More importantly, AT&T had a history of winning these disputes with the DOJ and continuing to prosper and expand.¹⁴⁷ Having this history of positive outcomes relating to DOJ antitrust litigation may have created a feeling of invincibility in AT&T. The company's leaders may have believed, incorrectly, that they had favorably settled these disputes in the past and they would be able to do so again. Unfortunately for AT&T, this time they did not reach a favorable settlement with the DOJ. Rather,

5 billion throughout the rest of the world.”).

¹⁴⁵ See, e.g., Ian Shapira & Jia Lynn Yang, *AT&T, T-Mobile Merger Blasted*, WASH. POST (Mar. 21, 2011), http://www.washingtonpost.com/business/economy/atandt-t-mobile-merger-blasted/2011/03/21/ABHs3Y9_story.html (“A day after AT&T announced it would buy T-Mobile USA to create the biggest wireless carrier in the country, consumer advocates and some members of Congress blasted the deal, arguing the \$39 billion merger would lead to higher prices and fewer choices for cellphone users.”).

¹⁴⁶ See *supra* text accompanying note 124.

¹⁴⁷ *Id.*; see also Warf, *supra* note 122, at 325–32 (describing AT&T's multiple acquisitions of communications companies in the 1990s).

they abandoned their purchase and as a result owed a \$4 billion breakup fee to T-Mobile.¹⁴⁸ AT&T's past litigation success may have blinded them to the failure that awaited them on this deal.

By contrast, Oracle did not have a winning history regarding battles with antitrust regulators.¹⁴⁹ This fact quite possibly put Oracle in a better position than AT&T, when it came time to meet the DOJ's antitrust allegations. Oracle did not have a history of battling and persevering against the DOJ, and Oracle did not underestimate the DOJ.¹⁵⁰ This in turn may have led Oracle to succeed against the DOJ where AT&T has now failed. The lesson here is that a company needs to objectively view its chances for success for each individual deal it pursues. When a company has a history of success in antitrust litigation it is possible for it to develop a feeling of invincibility. This feeling may well cause it to overestimate its chances for success. This in turn will cause it to waste resources—time, money, and talent—pursuing deals that are not likely to succeed.

V. HOW TO GROW IN THIS REGULATORY CLIMATE

1. Make Smaller Acquisitions

Large acquisitions—like the one AT&T just attempted—are costly. Not only did AT&T have to pay out a \$4 billion breakup fee to T-Mobile,¹⁵¹ it also lost time and other resources while pursuing this deal. When companies attempt big acquisitions they spend key employee time and talent, and they also risk losing quality employees who do not want to wait around to find out if they will have a job post-merger or what their new role will be after the merger succeeds.¹⁵² A company needs to carefully weigh the total cost of attempting a merger or acquisition.

An alternative to a large-scale merger that is more likely to succeed and have a lower overall cost is a series of small acquisitions. A smaller purchase is less likely to draw the scrutiny of antitrust regulators due to the low market concentrations. Any associated breakup fee will also likely be lower, thus easing the penalty if the deal fails to reach completion. Third, the associated costs such as

¹⁴⁸ See Wortham, *supra* note 7 (discussing AT&T's \$4 billion breakup fee).

¹⁴⁹ See *supra* text accompanying note 125.

¹⁵⁰ Additionally, the personalities of the leaders at Oracle and AT&T, Larry Ellison and Wayne Watts respectively, may have been a factor in Oracle's success and AT&T's failure. Larry Ellison is a "brilliant and fiercely competitive college dropout." Millstone & Subramanian, *supra* note 124, at 3. He has been quoted as saying, "It is not sufficient that I succeed; all others must fail." *Id.* (quoting Andrew Pollack, *Fast-Growth Oracle Systems Confronts First Downturn*, N.Y. TIMES (Sept. 10, 1990), <http://www.nytimes.com/1990/09/10/business/fast-growth-oracle-systems-confronts-first-downturn.html>). By contrast, Wayne Watts is more methodical. See *Watt's Happening: As General Counsel of AT&T, Wayne Watts Instills a "We are One" Culture Among his Team and Clients*, INSIDECOUNSEL (Nov. 2009) (describing Watts' method for managing the AT&T legal department). Furthermore, Watts has been at AT&T since 1983, and therefore has seen AT&T's litany of successes against the DOJ's antitrust complaints. See *id.*

¹⁵¹ Wortham, *supra* note 7 (discussing AT&T's \$4 billion breakup fee).

¹⁵² Kelley Holland, *Life After a Merger: Learning on Both Sides*, N.Y. TIMES (June 24, 2007), <http://www.nytimes.com/2007/06/24/business/yourmoney/24mgmt.html> (discussing the danger of losing key employees once a merger is proposed).

talent drain and time consumption will likely be lower due to: (1) employees will be less skittish regarding a small acquisition as opposed to a big acquisition or merger and (2) smaller deals will likely taken less time to complete.

Oracle now appears to be operating under this model. Soon after AT&T's bid for T-Mobile fell apart, Oracle agreed to purchase a relatively small company called Taleo, which produces online-based software, for \$1.9 billion.¹⁵³ Additionally, in the fall of 2011, Oracle announced its intent to purchase cloud-computing company RightNow Technologies for \$1.43 billion.¹⁵⁴ Both of these acquisitions were relatively small. Neither of them has drawn near the antitrust scrutiny that AT&T's attempted purchase of T-Mobile did. Additionally, the deals likely have not cost Oracle as much near the time and money as AT&T's attempted purchase of T-Mobile cost it. Lastly, the deal for RightNow Technologies has gone through and the deal for Taleo will likely go through as well, meaning that Oracle has avoided the risk of paying out a costly breakup fee.

Juxtaposing AT&T's attempted purchase of T-Mobile and Oracle's recent purchases of these two smaller companies reveals that smaller is likely better. A company wishing to grow can make multiple smaller acquisitions, as Oracle is doing, to achieve similar growth results. A company employing this strategy risks less because each deal is more likely to succeed and will have lower resource and talent costs.

2. Get Creative with Structure

There are other ways to grow without running afoul of antitrust regulations. Many companies are avoiding the complications of mergers and acquisitions, and instead opting for joint ventures and combined marketing agreements. A prime example is Verizon's proposed plan to purchase spectrum from various cable companies.¹⁵⁵ The deal calls for a joint-marketing agreement between Verizon and Comcast, wherein the two companies will promote each other's products.¹⁵⁶ Far from attempting to purchase a national mobile phone company like T-Mobile and thus further concentrating market share in the mobile telecommunications industry, Verizon is only buying what it wants—spectrum—from cable companies who are not even using it.¹⁵⁷

Admittedly, Verizon's proposed purchase is drawing some antitrust attention.¹⁵⁸ This deal is smaller however and involves mainly just the sale of an

¹⁵³ Ben Worthen, *Oracle Broadens Reach in Web-Based Software*, WALL ST. J. (Feb. 10, 2012), <http://online.wsj.com/article/SB10001424052970203646004577212820539133232.html>.

¹⁵⁴ Ben Worthen, *Oracle Continues Push Into Cloud Computing with RightNow Deal*, WALL ST. J. (Oct. 25, 2011), <http://online.wsj.com/article/SB10001424052970204644504576650840030555666.html>.

¹⁵⁵ Amy Schatz, *Verizon, Comcast Defend Spectrum-Purchase Plan*, WALL ST. J. (Mar. 22, 2012), <http://online.wsj.com/article/SB10001424052702304636404577295703761555914.html> (describing Verizon's attempt to purchase spectrum from Comcast, Time Warner, Bright House Networks, and Cox Communications for \$3.6 billion).

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* The spectrum is not being used because the holders of the licenses that cover this spectrum have "abandoned plans to build their own wireless networks." *Id.*

¹⁵⁸ *See id.* (discussing a recent Senate hearing on the proposed purchase and one Senator's

asset and not the sale of a whole company, meaning it is more likely that this deal will succeed, providing Verizon with the asset it needs to maintain its position in the mobile telecommunications industry. Examples of creative structure exist outside the telecommunications industry as well. Comcast recently completed a joint venture with NBC Universal. In January of 2011, Comcast received approval from the FCC and the DOJ to purchase 51% of NBC Universal.¹⁵⁹ After a year of regulator review and a DOJ suit to stop the joint venture, Comcast and the DOJ reached a settlement that allowed the deal to go forward.¹⁶⁰ Comcast agreed to certain restrictions that the DOJ imposed in order to maintain competition in the media industry.¹⁶¹ This Comcast success came despite the fact that both Comcast and NBC Universal are huge players in the media industry.¹⁶²

Although the media market is not identical to the mobile telecommunications market, Comcast's successful deal with NBC Universal still provides a valuable comparison to AT&T's attempt to buy T-Mobile. The fact that two large companies were able to successfully see their deal through to completion while still getting what they wanted, and without having to withstand a drawn out antitrust trial, demonstrates that successful combinations can be done. The lesson is that large companies like AT&T, T-Mobile, Comcast, and NBC Universal need to think creatively. Antitrust regulators will more fervently resist a full-scale acquisition compared to a more limited combination such as a joint venture. Companies that want to combine forces need to be willing to consider alternatives to a full merger.

VI. CONCLUDING REMARKS

AT&T's failed attempt to buy T-Mobile provides valuable lessons for companies wanting to grow while avoiding Section 7 scrutiny. The costs for large-scale acquisitions are high, and they get even higher when the deals fall through and the would-be acquirer owes a large breakup fee. In order to minimize these risks and still obtain the benefits that growth can provide, companies need to consider growing via a series of smaller acquisitions or structuring their combinations as joint ventures rather than as mergers. Companies like Oracle, Verizon, and Comcast have already begun to employ these strategies that allow them to grow without wasting excessive time and money pursuing large-scale mergers that fail.

comparison between this deal and the failed AT&T - T-Mobile deal); *see also* Brian X. Chen, *T-Mobile Urges U.S. to Block Verizon's Spectrum Purchase*, N.Y. TIMES (Feb. 22, 2012), <http://www.nytimes.com/2012/02/23/technology/t-mobile-files-request-to-block-verizons-planned-spectrum-deal.html> (discussing the opposition to Verizon's purchase raised by other mobile phone companies including T-Mobile).

¹⁵⁹ Jessica E. Vascellaro & Thomas Catan, *Comcast Wins Regulatory Approval for NBC Deal*, WALL ST. J. (Jan. 19, 2011), <http://online.wsj.com/article/SB10001424052748703954004576090121707066828.html>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Plaintiff's Complaint at 18–19, *United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. Sept. 1, 2011) (No. 11–cv–00106) (discussing Comcast's large market share in the cable television industry and the importance of NBC Universal).