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The Problem with Baker Hughes and Syufy: On the Role of Entry in Merger Analysis

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THE PROBLEM WITH *BAKER HUGHES* AND *SYUFY*: ON THE ROLE OF ENTRY IN MERGER ANALYSIS

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The subject of this article is a decision that has not yet been written by the Supreme Court. It is a decision that must be written sooner or later, though, to remove a shadow that has fallen over the treatment of entry in merger analysis under Clayton Act Section 7. The problem the Supreme Court must solve is created by two appellate opinions handed down in 1990: one by the D.C. Circuit in *Baker Hughes* and the other by the Ninth Circuit in *Syufy*.[1] These opinions encourage an analytical confusion that invites courts to overstate the significance of entry in curing the competitive problems of mergers. This article begins at an earlier time, when the circuit courts took the lead in correcting antitrust's neglect of supply-side forces, before explaining how the lower courts more recently may have begun to go off track.

I. THE SUPPLY SIDE BEFORE CHICAGO

Antitrust has long understood that a firm's attempt to exercise market power could be defeated by new supply entering the market. Entry, or just the potential for entry, might prevent even so-called monopolists from actually exercising market power. Thus, the Supreme Court's *Columbia Steel* decision, handed down a half-century ago, rejected the government's challenge to the Kaiser-Columbia Steel acquisition, in part, on the ground that supply substitution resulted in a broad product market.[2] Even in *Brown Shoe*, a Supreme Court merger decision that predates antitrust's Chicago School revolution, the competitive importance of

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[1] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990); United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990).

[2] United States v. Columbia Steel Co., 334 U.S. 495, 510–11 (1948).

supply substitution was recognized—albeit as dictum relegated to a footnote.[3] Likewise, the product market definition in the Supreme Court's 1966 *Grinnell* decision, a monopolization case, arguably accounted for supply substitution, although the Court did not acknowledge this interpretation.[4]

Until the mid-1970s, however, these important insights about supply substitution (or production flexibility, as it is also called) were neglected by mainstream antitrust jurisprudence. In the postwar, pre-Chicago School era product market definition was based almost exclusively on demand substitution, consistent with the doctrinal formulation of the Supreme Court's *Cellophane* case that product markets are collections of goods with "reasonable interchangeability" in demand.[5] Judicial focus on demand substitution was reinforced by the Court's 1964 *Rome Cable* decision, which placed insulated copper conductor and insulated aluminum conductor in separate markets, despite a strong dissent by Justice Potter Stewart highlighting the extensive supply substitution between the two.[6] Given the Court's emphasis on demand substitution, the federal circuits were understandably reluctant during the 1960s to accept supply substitution as a basis for product market definition, even when confronted by reasonable economic arguments for doing otherwise.[7]

II. THE SUPPLY-SIDE REVOLUTION IN THE CIRCUIT COURTS

During the 1970s lower courts took the lead in moving antitrust to recognize the role of new supply in constraining the exercise of market power. Indeed, judicial adoption of the economically oriented Chicago School approach—the distinctive feature of the contemporary antitrust landscape—arguably began in 1975 in the appellate courts on the issue of supply substitution. The leading modern decisions recognizing the role of supply substitution in market definition were issued in separate circuits less than one month apart: the Tenth Circuit's *Telex* opinion

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[3] Brown Shoe Co. v. United States, 370 U.S. 294, 325 n.42 (1962).

[4] United States v. Grinnell Corp., 384 U.S. 563, 571–73 (1966) (placing central station burglar alarm and fire alarm services in the same product market).

[5] United States v. E.I. du Pont de Nemours Co., 351 U.S. 377, 404 (1966) (*Cellophane*).

[6] *Compare* United States v. Aluminum Co. of Am., 377 U.S. 271, 276–77 (1964) (*Rome Cable*) (insulated copper conductor and insulated aluminum conductor placed in separate markets because of insufficient demand substitution), *with id.* at 285 (Stewart, J., dissenting) (district court's broad market definition should be upheld based on both demand substitution and "complete manufacturing interchangeability").

[7] *See, e.g.*, L.G. Balfour Co. v. FTC, 442 F.2d 1, 11 (7th Cir. 1971); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 812–13 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

and the Ninth Circuit's opinion in *Twin City Sportservice*.[8] This happened two years before the Supreme Court handed down *GTE Sylvania* and *Brunswick*, and four years before *BMI*, to name some of the other early Chicago School landmarks.[9]

Neither *Telex* nor *Twin City Sportservice* involved a merger, but monopolization allegations called for market definition in each. *Telex* found a market for all computer peripherals rather than only IBM plug-compatible ones. This made no sense from the demand side: a consumer could not substitute a peripheral device that was incompatible with its existing large and expensive computer. But a supplier could add compatibility, probably without much difficulty.[10] Similarly, *Twin City Sportservice* questioned a lower court's market for "concession services for major league baseball" that did not consider how concession operators at other kinds of facilities could offer the same service.[11] Again, from the demand side this does not make sense: the fan at the ballpark could not substitute a hot dog from the vendor at the zoo. But the operator of the zoo's food concessions surely could figure out how to serve the ballpark without much trouble. After these decisions, supply substitution rapidly was incorporated into product market definition by other circuit courts and the Federal Trade Commission, and the new approach was endorsed in commentary.[12]

This supply-side Chicago School revolution was accomplished by the circuit courts with little instruction or guidance from the Supreme Court. To be sure, *General Dynamics* had come down the year before.[13] But that case did not turn on supply substitution. *General Dynamics*, instead, holds that the presumption that concentration lessens competition, set forth

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[8] Telex Corp. v. IBM Corp., 510 F.2d 894, 914–19 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271–74 (9th Cir. 1975), *aff'd after remand*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982).

[9] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (*BMI*).

[10] *Telex*, 510 F.2d at 916–17.

[11] *Twin City Sportservice*, 512 F.2d at 1272–73.

[12] Budd Co., 86 F.T.C. 518, 569–72 (1975); Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); RICHARD POSNER, ANTITRUST LAW 127–28 (1976); Note, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129 (1979); Note, *Potential Production: A Supply Side Approach for Relevant Product Market Definitions*, 48 FORDHAM L. REV. 1199 (1980); *cf.* Tenneco, Inc., 98 F.T.C. 464, 582 n.7 (1981) (recognizes principle), *rev'd on other grounds*, 689 F.2d 346 (2d Cir. 1982); Kaiser Aluminum & Chem. Corp., 93 F.T.C. 764 (1979) (considers production flexibility), *aff'd*, 652 F.2d 1324, 1330–32 (7th Cir. 1981) (refusing to consider production flexibility).

[13] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

in *Philadelphia National Bank*, can be rebutted by evidence that a merging firm's historic market share overstates its future competitive significance.[14] This sounds like a Chicago School decision more in retrospect than it likely appeared at the time,[15] and the circuit courts did not rely on it to justify incorporating supply substitution in market definition. Instead, the circuit courts reached back to *Columbia Steel*, the *Brown Shoe* footnote, and *Grinnell* for authority.[16] But they really were acting on their own in recognizing that a monopolist or cartel cannot successfully raise price above competitive levels if enough other firms readily could alter their production processes to make a competing product.

III. UNCOMMITTED ENTRY IN THE MERGER GUIDELINES

The 1982 Merger Guidelines, drafted a few years after *Telex* and *Twin City Sportservice*, took a different approach to incorporating supply responses in merger analysis, and that approach has been maintained and more fully articulated by the 1992 Guidelines.[17] In the Guidelines, supply substitution is not considered in defining markets. Markets are defined, instead, based solely on demand substitution considerations, much as the Supreme Court suggested in the *Cellophane* case. But, unlike the courts in the pre-Chicago School era, the Merger Guidelines consider the possibility that new supply would defeat the exercise of market power.

To discuss the role new supply plays, it is useful to adopt the terminology of the 1992 Merger Guidelines, which distinguish between "uncommitted" and "committed" entry. The concept of uncommitted entry generalizes the idea of supply substitution. Uncommitted entry is hit-and-run. Uncommitted entrants are firms that can enter quickly and with little sunk expenditure.[18] They can take advantage of any short-run

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[14] *Id.* at 501–02.

[15] *See, e.g., The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 257 n.39 (1974) (observing simply that the Court's 1974 merger decisions, which also included two bank merger cases, paid more attention to actual competitive effects than had previous cases).

[16] *Telex* justified its result by *Grinnell.* 510 F.2d at 919. *Twin City Sportservice* relied on *Columbia Steel* and the *Brown Shoe* footnote. 512 F.2d at 1271.

[17] *See generally* Janusz A. Ordover & Jonathan B. Baker, *Entry Analysis Under the 1992 Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 139 (1992).

[18] The supply responses of uncommitted entrants "must be likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992) § 1.32, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 Merger Guidelines]. A significant sunk cost is one that would not be recouped within one year of the commencement of the supply response. *Id.* Supply responses that take longer or require significant sunk expenditures are considered committed entry.

profit opportunities that anticompetitive behavior by incumbent firms might offer, and get out rapidly and cheaply if those opportunities disappear.[19] Committed entrants, in contrast, are in for the long haul. Once they enter, they expect to stay because to abandon the market would mean walking away from a substantial sunk investment. Because they are in for the long haul, they must consider what competition will look like after they enter in deciding whether it is profitable for them to enter in the first place.

The 1992 Guidelines recognize several forms of uncommitted entry. The simplest is production substitution, perhaps, for example, using a canning plant to pack fruit instead of pudding, using a retail space to sell sweatshirts instead of shoes, or using a machine shop and engineering team to make heavy-duty drills instead of milling machines. The Guidelines also recognize that a brand name also might be applied quickly to a new use without significant additional sunk expenditures—perhaps the way Minute Maid, known for orange juice, added carbonation to create a soft drink product.[20] If de novo entry can be accomplished quickly and at little sunk cost, that too would constitute uncommitted entry.

Under the 1982 and 1992 Guidelines, uncommitted entry is important in determining the identity of market participants and market shares, but not in defining the market itself. The scope of the relevant product market is determined entirely by demand substitution. In contrast, the *Telex* and *Twin City Sportservice* approach to recognizing supply substitution expands the market.

While the appellate panels had the right insight—that supply substitution can constrain the exercise of market power—and adopted a simple approach to incorporate it into antitrust analysis, the Guidelines found a better means of implementation. To see the difference, consider a hypothetical merger of firms selling aluminum cable. Assume that aluminum cable and copper cable are not demand substitutes; and assume that manufacturers of copper cable quickly can switch their cable capacity to produce the aluminum product with little or no sunk expenditure. In thinking about whether the price of aluminum cable would rise, it is necessary to take into account the competitive constraint imposed by the copper cable producers. The circuit courts would do so by defining an

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[19] A market in which even a small number of incumbent firms is led to behave competitively as a result of the potential competition from uncommitted entrants is termed contestable.

[20] But some of the marketing expenditures used to extend the brand name to a new product category may have been sunk.

all-cable market and calculating market shares that ignore the difference between copper and aluminum cable. Even if aluminum cable production is highly concentrated today, the all-cable market could be unconcentrated, in which case the courts would infer that the aluminum cable producers could not exercise market power.

That often may be the right answer, but not always. The market definition approach to accounting for supply substitution is biased toward understating the potential for exercise of market power in aluminum cable because it implicitly assumes that in the event aluminum cable prices were to rise, all copper cable production assets would be available to shift to the production of aluminum cable. This assumption may not be realistic because the opportunity cost of diverting cable from copper to aluminum may be high. To be sure, if copper cable capacity is not being utilized and can be pressed into service inexpensively to make aluminum cable, supply substitution may come at low opportunity cost. But that is not the only possibility. It may be costly to divert copper cable production tied up in long-term contracts; even absent contracts, a copper cable supplier may be reluctant to undermine its long-term customer relationships by cutting off copper cable buyers to make aluminum cable sales; and copper cable producers may find that the price of copper cable rises as production shifts to aluminum cable, lowering margins in the copper cable market and increasing the opportunity cost of shifting production to service aluminum cable buyers. When diversion is costly, it can be misleading to assume all copper cable production assets are available to defeat a rise in the price of aluminum cable and to compute market shares in an all-cable market on that basis.[21]

The Merger Guidelines avoid the all-or-none problem created by the circuit court approach to accounting for supply substitution by assigning market shares to uncommitted entrants based on divertible capacity[22]—in the example, the capacity at which the copper cable producer would find it profitable to shift into aluminum cable production in the event of a small aluminum cable price rise. The resulting market shares will avoid making concentration look low when little copper cable capacity readily would shift into the production of aluminum cable. This approach avoids underestimating the competitive problem from a merger of two aluminum cable producers under such circumstances.

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[21] A sophisticated analysis of competitive effects within an all-cable market could account for the limitations in the ability of some producers to expand. But a court would not reach this issue if concentration was low in the all-cable market.

[22] 1992 Merger Guidelines, *supra* note 18, § 1.41.

The Guidelines' approach also avoids overestimating the potential for entry to deter or counteract the competitive problem from a merger, unlike the circuit court approach. The problem arises if an entrant has a new technology for making copper cable that—unlike the existing production processes—would not permit the firm to produce aluminum cable. The prospect of that entry may well be insufficient to solve a competitive problem resulting from a merger of aluminum cable producers, but the circuit court approach of defining an all-cable market naturally would not rule out that suggestion. Moreover, an analysis of demand-side substitution is required to delineate price-discrimination markets based on the idea of targeted buyers, as the Merger Guidelines permit.

Despite these problems, it is hard to fault the circuit courts for choosing in 1975 to use market definition as the vehicle for incorporating supply substitution into antitrust analysis. The *Telex* and *Twin City Sportservice* approach may have been easier and more natural than the Guidelines' approach. After all, the Clayton Act seems to call explicitly for the definition of markets, while it says nothing about entry. In many cases there may be little practical difference between the results achieved through the two methodologies. In short, the lower courts led antitrust in the right direction in 1975, even though they employed a less-than-perfect compass.

IV. ENTRY ANALYSIS IN THE COURTS BEFORE *BAKER HUGHES* AND *SYUFY*

Around the mid-1980s, after addressing the problem of incorporating supply substitution into market definition, the lower courts and the enforcement agencies turned their attention to the role of entry in merger analysis. When they examined entry the courts continued on the right track for a while, but they eventually began to take a wrong turn, potentially undermining merger enforcement by overstating the significance of entry.

The Supreme Court's 1963 decision in *Philadelphia National Bank*[23] establishes that Clayton Act Section 7 confers a presumption of anticompetitive effect on an acquisition that increases concentration in an already concentrated market. The Court confirmed that conclusion in 1974, in *General Dynamics.*[24] Following these decisions, lawyers considering the role of entry under Clayton Act Section 7—a topic that became interesting after the lower courts commenced their supply-side revolution in

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

[24] *Philadelphia National Bank* and *General Dynamics* remain the leading authorities structuring merger analysis under Clayton Act § 7.

market definition—naturally asked: Does easy entry merely dilute or weaken the inference of anticompetitive effect? Or does easy entry trump everything else, so that once it is shown, the plaintiff must lose regardless of any other evidence?

In the mid-1980s the courts decided to treat easy entry as a trump.[25] That was the doctrinal implication of the Second Circuit's 1984 *Waste Management* decision.[26] The district court had blocked this merger involving waste haulers after concluding that easy entry merely weakens the inference of anticompetitive effect arising from concentration. The lower court noted that "there is no persuasive authority" for allowing low entry barriers and potential competition "to overcome a strong prima facie showing of concentration in the *existing* competitive structure."[27] The Second Circuit rejected this legal proposition and reversed the district court. It held that a finding of easy entry into trash collection trumped the other evidence relied upon below.

A year later, in the *Calmar* case, a district court reached a similar result: it refused to be concerned about a merger in pump sprayers once it found that any firm in the injection molding business could make them easily.[28] Meanwhile, the Federal Trade Commission decided *Echlin,* in which it dismissed a complaint, despite high concentration in the carburetor kit product market, on the view that any new entrant could set up shop in a backyard garage.[29] All three cases stand for the proposition that easy entry trumps high concentration—that a merger is unlikely to harm competition if entry is sufficiently easy, regardless of market concentration.[30]

In all three cases the trump was applied to entry envisioned (rightly or wrongly) as uncommitted and unlimited—low sunk cost, rapid hit-and-

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[25] The result was foreshadowed in United States v. MPM, Inc., 397 F. Supp 78, 92, 94 (D. Colo. 1975) (listing ease of entry as one of many reasons why an acquisition did not violate § 7, despite creating concentration over the *Philadelphia National Bank* standard), and by dicta in *United States v. Tracinda Inv. Corp.,* 477 F. Supp. 1093, 1108 (C.D. Cal. 1979).

[26] United States v. Waste Management, Inc., 743 F.2d 976, 978, 983–84 (2d Cir. 1984).

[27] United States v. Waste Management, Inc., 588 F. Supp. 498, 513 (S.D.N.Y. 1983) (emphasis added), *rev'd,* 743 F.2d 976 (2d Cir. 1984).

[28] United States v. Calmar Inc., 612 F. Supp. 1298, 1306–06 (D.N.J. 1985).

[29] Echlin Mfg. Co., 105 F.T.C. 479 (1985). A carburetor kit is a collection of parts used to "tune up" a defective carburetor. In dissent, Commissioner Bailey questioned the majority's "single-minded focus" on the entry issue as "dispositive . . . where the prima facie case for antitrust concern . . . is as strong as it is here." *Id.* at 493.

[30] Moreover, the 1982 Merger Guidelines already had stated the same proposition. U.S. Department of Justice Merger Guidelines (1982) § III.B., *reprinted in* 47 Fed. Reg. 28,493 at 28,498.

run entry by hordes of potential new competitors.[31] It was not necessary to attempt to analyze this uncommitted entry through market definition because, the courts found, entry was practically unlimited. Instead, the courts effectively observed that so many potential hit-and-run entrants were available as to make the market appear unconcentrated.

As of the mid-1980s, therefore, the courts had worked out an approach to dealing with uncommitted entry, whether limited or unlimited. They treated limited uncommitted entry possibilities—as when only certain specified supply substituters are poised to enter, each with a limited amount of divertible capacity—by expanding the product market definition. This was a plausible, though imperfect, approach to recognizing the competitive significance of supply substitution. They recognized that unlimited uncommitted entry possibilities mean that mergers are unlikely to harm competition because markets are effectively unconcentrated. Thus, they treated unlimited uncommitted entry possibilities as a trump.

The mid-1980s entry cases technically left undecided the treatment of committed entry, which requires significant sunk investments and is in for the long haul. But the opinions never articulated a difference between committed and uncommitted entry, largely because they were not asked to do so.[32] By not noting such a distinction these opinions

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[31] The Second Circuit may have been wrong to picture entry as uncommitted and unlimited in *Waste Management*. The district court had found that entry into trash collection was "relatively easy" for small-scale startups and that most such entrants had remained small or disappeared from the market. 588 F. Supp. at 513. Accordingly, it found "no showing of any circumstance, related to ease of entry or the trend of the business, which promises in and of itself to materially erode the competitive strength" of the merging firms, which together accounted for half of the business in the market. *Id.* In its brief seeking to uphold the district court on appeal, the Justice Department plausibly interpreted these statements, in light of the trial record and the lower court's conclusion that the merger would harm competition, as recognizing that neither new entrants nor small-scale incumbents successfully could compete at the large scale necessary to undermine market power exercised by the merging market leaders. Brief of the United States at 49–53, United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir., Nos. 83-6365, 84-6001) (Apr. 23, 1984). But the Second Circuit read the lower court's factual findings in an alternative way: as not distinguishing between large- and small-scale entry and, thus, as concluding that entry quickly would eliminate "any anti-competitive impact of the merger." *Id.* at 983. Thus, the Second Circuit understood the district court as finding that entry into trash collection was uncommitted and unlimited.

[32] *Waste Management* offered an opportunity because the government saw entry as committed while the circuit court saw it as uncommitted. But the issue was not truly joined because of ambiguities in the district court opinion, as described *supra* note 31, and the circuit court did not purport to deal with committed entry. The *Echlin* majority briefly addressed the significance of committed entry in dicta (having dismissed on the facts complaint counsel's argument that entry would require significant sunk expenditures). But the discussion was no more than a place holder, offering little guidance. The Commission rejected the argument that sunk costs and scale economies "necessarily" create entry

inadvertently may have led the circuit courts astray in *Baker Hughes* and *Syufy*. In both, the courts wrote as though they were explaining how the legal doctrine devised to handle unlimited uncommitted entry—that ease of entry is a trump—should be applied to factual settings in which entry could be committed as well as uncommitted. The *Baker Hughes* and *Syufy* panels may have been correct in their application of the doctrine on the facts as they found them, for both appear to have concluded that the entry possibilities were uncommitted, contrary to what the government argued. But their analysis seemed to sweep in committed entry as well, thereby creating an analytical confusion that threatens to take entry analysis down the wrong path. To see how this happened and why it creates a problem, it is useful to begin by examining the economic analysis of committed entry in the 1992 Merger Guidelines.

V. COMMITTED ENTRY IN THE 1992 MERGER GUIDELINES

On the surface, the 1992 Merger Guidelines might appear to take the same route the courts began to follow. After all, the Guidelines effectively declare ease of entry a trump, even when entry is committed. There is a subtle but critical difference, however, between the Guidelines' approach, which is sensible, and the more troublesome approach some courts may be suggesting.

The Guidelines say that committed entry is a trump—as long as the entry would be timely, likely, and sufficient.[33] As shown further below, a great deal of economic analysis is embedded into that qualification.[34] From a legal point of view, the Guidelines should be read as insisting—quite properly—that entry should not be thought of as some abstract property of a market. In conducting merger analysis, it is not right to conceive of entry barriers as either high or low and to set the courts off to determine which. Rather, the Guidelines' formulation—timely, likely, and sufficient—emphasizes something simple and critical: committed entry is relevant to merger analysis only insofar as it will deter or counteract the competitive problem the merger otherwise would create. The language of Clayton Act Section 7, which makes a merger illegal only if its effect "may be substantially to lessen competition, or to tend to create a monopoly," demands no less.

barriers without contending that they necessarily do not, and it did not consider whether sunk costs and scale economies could create an entry "impediment." 105 F.T.C. at 486, 487–89.

[33] 1992 Merger Guidelines, *supra* note 18, § 3.0.

[34] *See generally* Ordover & Baker, *supra* note 17.

In a sense, the sufficiency element sums up the entire Guidelines analysis: entry analysis asks whether entry will be sufficient to cure a merger's competitive problem. This element is stated separately to highlight the possibility that even rapid and profitable entry might not be sufficient. It might be limited in "magnitude, character and scope," to use another Guidelines phrase,[35] even if it is not delayed in time.[36]

Analysis of the likelihood of entry, which may have created some confusion, asks whether an entry plan would be profitable to carry out.[37] This is an important question because entry matters to merger analysis only if it likely would cure the competitive problem arising from an acquisition.[38] An entry plan that would not be profitable for a prospective competitor to execute in the postmerger environment will not help deter or counteract anticompetitive conduct, even if it is technically feasible. In shorthand slogan, the Guidelines pick "would" over "could." They care about whether a firm would enter, not merely whether it could enter.

The 1992 Guidelines articulated a then-novel conceptual framework for thinking about the likelihood of entry. The underlying principle is simple: committed entry is considered likely if it would be profitable in the postmerger environment. But recall that committed entry is in for the long haul. If the committed entry solves the competitive problem, the postmerger price will quickly return to the premerger level or fall below it. Thus, the prospective committed entrant must determine whether its entry plan would be profitable assuming that it would receive no more than the premerger price.

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[35] 1992 Merger Guidelines, *supra* note 18, § 3.0. Entry might be insufficient, for example, if incumbents control many of the assets required for entry. In differentiated product settings, to provide another example, entry might be insufficient if entrants would not introduce products similar or close to the products whose price, it is feared, would rise.

[36] Timeliness is related to sufficiency. "As a matter of theory, the timeliness requirement can be thought of as an intertemporal sufficiency requirement; entry will not be sufficient if it is delayed." Ordover & Baker, *supra* note 17, at 145 n.23.

[37] It is appropriate to equate "likelihood" with "profitability" when considering the behavior of profit-maximizing firms. Here "profitability" is used in an economics sense and, thus, takes into account the opportunity cost of capital to the firm.

[38] Entry and exit also occur for many reasons other than in response to a potentially anticompetitive merger. For example, entrants may believe that they have developed a cheaper or better product, or that growing market demand creates an attractive business opportunity. The Merger Guidelines do not purport to present an analysis of when entry would take place in all circumstances. Rather, merger analysis properly is concerned with the limited issues of whether the proposed change in market structure alters incentives to enter, and whether in consequence anticompetitive conduct would be deterred or counteracted. The dynamic backdrop to the acquisition is not ignored. Competitive effects analysis compares the likely price path with the merger to the likely price path without it, in both cases incorporating the influence of planned entry or exit. When the Merger Guidelines turn to entry, they ask an additional question about the dynamics of market

This observation immediately raises questions, whose answers turn out to be the heart of the likelihood analysis. If entry at premerger prices would be profitable after the transaction, wouldn't it have been profitable before? And wouldn't the firm have entered already? In short, does the "likelihood" analysis guarantee that we will never find a likely entrant because all likely entrants already would be incumbents?

The answer to the first two questions is "not necessarily" and the answer to the last is "no." Mergers change industry structure and, thus, can change incumbent behavior and entrant incentives. The market after the merger is not the same as the market before it. The exercise of market power leads to higher prices and lower industry output and thereby creates additional potential sales for an entrant beyond what had been available before the merger. The result is to make entry more attractive than it previously had been; as the Guidelines put it, a merger can create an additional "sales opportunity" for an entrant.[39] Entry, therefore, may be profitable after the merger even if it had not been profitable before.

But is the additional sales opportunity resulting from a potentially anticompetitive merger large enough to make entry profitable? That depends on the extent to which the entry itself will depress price. Committed entry depresses price because the entrant adds output to the market, which buyers will not absorb unless other sellers cut back or price falls. How much output does the entrant add to the market? At least enough output for the entrant to reach "minimum viable scale"—i.e., the annual sales an entrant must make to guarantee that it can cover its fixed investment, given that prices will not exceed premerger levels if anticompetitive conduct successfully is deterred. "Minimum viable scale" is the entrant's break-even annual sales at premerger prices, and is typically expressed as a fraction of the industry's annual sales.[40]

The Guidelines point out that whether a particular firm's minimum viable scale is small enough, such that entry would likely deter or counteract the competitive problem, depends upon the sales opportunities created by the feared anticompetitive effect and other factors, including the extent to which the entrant can divert sales from incumbents. The Guidelines even suggest a rule of thumb: when minimum viable scale

structure: whether the merger will induce sufficient additional entry (including speedup of existing entry plans or slowdown of exit plans) to solve the potential competitive problem.

[39] 1992 Merger Guidelines, *supra* note 18, § 3.3.

[40] The significance of minimum viable scale was first explained in Steven C. Salop, *Measuring Ease of Entry*, 31 ANTITRUST BULL. 51 (1986). The 1992 Merger Guidelines adopt a slightly different definition from Salop's.

substantially exceeds 5 percent of total market sales, we might question whether the entry plan will be profitable; but when minimum viable scale is markedly less than 5 percent of total market sales, profitability may seem more plausible.[41]

In demonstrating to a court that entry sufficient to cure the competitive problem would not be likely, the government will not necessarily try to prove "minimum viable scale" and "sales opportunities" quantitatively—nor should it. Yet, even when judges and juries would not find mathematical calculations valuable, these concepts can structure the analysis and frame the testimony of those experienced in actual entry efforts in the industry. For example, industry witnesses who believe that an entrant would need a minimum market share to break even postmerger can be asked to explain why that share is so low or high. That will allow the court to see whether the entry plan the witnesses have in mind is plausible by evaluating alternative views about the nature and the magnitude of the fixed expenditures required for entry. Such witnesses also might discuss how far prices are likely to fall following entry at a particular scale. The point is to focus the entry inquiry on the factors that determine whether committed entry in the postmerger market environment is likely to be profitable and, thus, on whether entry is likely to deter or counteract the anticompetitive problem.

The 1992 Merger Guidelines highlight the way the analysis of committed entry differs from the analysis of unlimited uncommitted entry. The idea that ease of entry is a trump can apply to both, but it must be applied with particular care when entry is committed: committed entry is not a trump unless it would be timely, likely, and sufficient to deter or counteract the competitive harm from merger.[42]

VI. *BAKER HUGHES* AND *SYUFY*

With this background we can appreciate the significance of the two problematic entry opinions written by circuit courts in 1990, *Baker Hughes* and *Syufy*. It is the *opinions* that appear problematic, not the *decisions*; the problem may be more with the language than the holdings. The opinions will be discussed using the committed and uncommitted entry terminology introduced by the 1992 Merger Guidelines two years after

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[41] 1992 Merger Guidelines, *supra* note 18, § 3.3. A rule of thumb is just that. If other factors cited in the Guidelines are significant, these benchmarks may no longer be appropriate.

[42] Uncommitted entry is timely by definition, and it is likely because it does not require significant sunk expenditures. It could be limited, though, in which case it may or may not be sufficient.

the opinions were published. Although this terminology would have been unfamiliar to the circuit courts, the concepts should have been understood as they were highlighted in the government's entry argument.

These two opinions encourage an analytical confusion in three related, perhaps equivalent, ways. First, they could be read to suggest that it is appropriate to apply the doctrine that ease of entry is a trump to evaluate committed entry cases without considering whether the committed entry would be timely, likely, and sufficient. Doing so could lead courts to overestimate the ability of entrants to cure competitive problems from mergers. Second, they could be read to presume that any firm that *could* enter post merger likely *would* enter, even when shown evidence that minimum viable scale is so large as to make it implausible that the entrant would receive a price high enough for profitability. Doing so could lead courts to overestimate the likelihood of entry. Third, they appear to analyze the height of entry barriers in the abstract, without connecting the entry analysis to the question of whether new competition solves a competitive problem—that is, without asking the sufficiency question. Doing so loses sight of the purpose of entry analysis: under the statute, entry is relevant only insofar as it bears on whether an acquisition's effect "may be substantially to lessen competition, or to tend to create a monopoly."

In both *Baker Hughes* and *Syufy* the Justice Department accepted the legal proposition that entry could trump high concentration, but attempted to demonstrate that whatever entry there might be would not, or did not, cure the competitive problem. In both cases, the government had lost at trial and, thus, was required to accept the facts as found by the trial judge or else prove those findings "clearly erroneous." The courts dismissed the government's arguments out of hand in both cases, seeming to believe that the Justice Department was ignoring the principle, established in *Waste Management* and its own Guidelines, that entry could be a trump card. If this result represented simply a difference of opinion about the weight of the evidence, there would be little reason for concern. But the language the opinions use to explain the decisions could be read to stand for broad and troublesome propositions about the analysis of committed entry. And the *Baker Hughes* panel in particular is unusually influential: the D.C. Circuit's decision was written by Clarence Thomas and joined by Ruth Ginsburg.[43]

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[43] David Sentelle also served on the panel.

Baker Hughes involved a challenge to a merger among firms selling a high-tech product—custom-built drilling machines for underground mining—with a very small U.S. market.[44] In describing the facts on entry the appellate opinion emphasized that two firms had recently entered the U.S. market, Canadian firms were available to enter, and volatility in market shares suggested that successful entry was possible.[45] Thus, the court arguably considered this an uncommitted entry case with enough potential uncommitted entrants to make plausible the application of the trump. The court, nevertheless, did acknowledge "some facts suggesting difficulty of entry."[46] These were facts tending to suggest that entry would require significant sunk investments and that such committed entry would not be likely to cure the competitive problem. In particular, the court recognized that the products at issue were custom made, creating strong customer loyalty that an entrant would need to overcome. It also noted that buyers depended on assurances of product quality and reliable future service, assurances that an entrant could not easily provide. The Justice Department had noted these latter points in its briefs.[47] In short, the court, arguably, viewed the most plausible entry alternatives as uncommitted, while the government almost surely considered *Baker Hughes* to be a committed entry case.

In *Baker Hughes* the government argued that, because it had shown high concentration and other elements supporting a presumption of anticompetitive effect, the defendants could avoid an injunction on the ground of easy entry only by a clear showing that entry would be "quick and effective" at undermining postmerger market power.[48] Perhaps because it saw the entry as uncommitted, the court seems to have missed what the government was arguing. The opinion asserts that the government was trying to disavow its burden of proof of likely anticompetitive effects and interprets the government as claiming that the sole way to rebut a presumption derived from high concentration is by showing ease

[44] Unit annual sales could be counted on three figures, while dollar sales totaled only a few million. The trial judge reportedly took the government to task for having wasted resources on such a small target, admonishing the Justice Department to go after bigger fish, like the FTC was doing in challenging soft drink mergers. But there is no "small market" exemption from Clayton Act § 7 that would permit a court to second guess the government's exercise of prosecutorial discretion.

[45] United States v. Baker Hughès Inc., 908 F.2d 981, 988–89 (D.C. Cir. 1990).

[46] *Id.* at 989.

[47] Brief of the United States at 19–25, United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir., No. 90-5060) (Mar. 30, 1990). The Justice Department also explained why it was not impressed by the examples of recent entry relied upon by the district court.

[48] *Id.* at 14; *see id.* at 16 (entry must be "sure, swift, and substantial" to be cognizable).

of entry, when the government was merely setting forth an analysis that should be applied when entry is the subject of the rebuttal argument.[49] The court also rejected the government's insistence that entry must be "quick and effective," on the ground that this requirement overlooks the way potential competition, never resulting in actual entry, nevertheless can exert competitive pressure on a market.[50] Yet the court made this point seemingly without noticing that potential competition cannot play this role unless entry, whether committed or uncommitted, would in fact be quick and effective.[51] In short, the court, in effect, viewed the government as having missed the point of *Waste Management* and its own Guidelines, that ease of entry is a trump. The *Baker Hughes* opinion also is noteworthy for its strong rhetoric. It reads like an exasperated effort to rein in a runaway agency thought to have willfully ignored the teaching of *Waste Management.*[52]

The court of appeals in *Syufy* also seemed to believe that the government could not read its own Guidelines[53] and would not recognize easy entry at high noon, let alone in a dark movie theater.[54] The case deals with a movie theater owner named Syufy, who acquired all of his significant competitors in the Las Vegas movie theater market. The government charged that Syufy exercised monopsony power against distributors of

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[49] *Compare* 908 F.2d at 983 (the government's proposed standard is flawed because it "assumes that ease of entry by competitors is the *only* consideration relevant to a section 7 defendant's rebuttal") *with* Brief of the United States, *supra* note 47, at 13–14.

[50] 908 F.2d at 988. The court also rejected the "quick and effective" test on the ground that it could not be applied in practice without effectively, and inappropriately, imposing on defendants the burden of proving that entry actually will occur. *Id.* at 987.

[51] *But cf. id.* at 988:

> If the totality of a defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the prima facie case rebutted. This is a far cry, however, from insisting that the defendant must *invariably* show that new competitors will enter quickly and effectively.

[52] The court highlights the alleged sarcasm of a rhetorical question, when the government asked whether "slow and ineffective entry" could rebut a prima facie case—even while conceding, in the next sentence, that the government's prima facie case would stand unrebutted if defendant had shown only that entry would be slow and ineffective. *Id.* at 987–88. The court twice describes itself as "at a loss to understand" the basis for a government argument, *id.* at 986–87; points out what it sees as an inconsistency in the government's brief, *id.* at 988; notes where the government "misses a crucial point," *id.*; "refers the government to its own merger guidelines," *id.* at 992 n.13; and peppers the opinion with phrases like "no merit," *id.* at 983; "devoid of support," *id.*; "flawed on the merits," *id.*; "misplaced" reliance, *id.* at 987; and "novel and unduly onerous," *id.*, to describe the government's views, while endorsing the district court's analysis as "fully consonant with precedent and logic." *Id.* at 986; *see also* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 112 & n.286 (1991).

[53] United States v. Syufy Enters., 903 F.2d 659, 666 n.11 (9th Cir. 1990).

[54] The opinion is of interest to puzzle aficionados, as Judge Kozinski reportedly buried over 200 movie titles in it.

first-run films in violation of both Sherman Act Section 2 and Clayton Act Section 7.[55] The alleged competitive problem was the reduction in prices paid to sellers of a key input, not higher ticket prices for moviegoers.[56] The trial court found for the defendant on the view that the case offered a "prime example" of the application of the legal proposition that ease of entry is a trump.[57]

One problem with the government's case was that Syufy faced large-scale actual entry from the Roberts Company barely a year later. As a result, Syufy's market share was declining substantially. It is worth pausing on this point. Although the appearance of actual entry here, as in *Baker Hughes*, may have encouraged the courts to think entry was easy, that inference does not necessarily follow.[58] In any event, the circuit court dismissed as inconsistent with the district court's factual findings the government's arguments that Roberts Company (and its successor, United Artists) was not an effective competitor,[59] and, as with the court in *Baker Hughes*, the *Syufy* court arguably viewed the likely entry alternatives as uncommitted. It saw "a rough-and-tumble industry, marked by easy market access, fluid relationships with distributors, an ample and continuous supply of product, and a healthy and growing demand."[60] Accordingly, the Ninth Circuit upheld the trial court.

Like the *Baker Hughes* opinion, the *Syufy* opinion seems to have misunderstood what the government argued. The government presented an argument similar to the likelihood analysis for committed entry set forth in the 1992 Guidelines: it contended that entry at a scale large enough to achieve low costs would turn out to be unprofitable because entry at that scale would depress market prices.[61] The Ninth Circuit's opinion responds to this argument in two ways. The first response hides in a footnote: the court disputes the accuracy and meaning of evidence about market overcapacity and market growth for assessing sales opportunities available to an entrant.[62] Had the opinion stopped here, dealing only

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[55] 903 F.2d at 662 n.3.

[56] *Id.* at 663.

[57] United States v. Syufy Enters., 712 F. Supp. 1386, 1401 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990).

[58] Past committed entry was not necessarily undertaken with the expectation of receiving the premerger price in the long run, so does not prove that committed entry would be likely in response to the merger. Ordover & Baker, *supra* note 17, at 144 n.21.

[59] 903 F.2d at 665 n.8, 669.

[60] *Id.* at 667.

[61] Brief for the United States at 37–39, United States v. Syufy Enters., 903 F.2d 659 (9th Cir., No. 89-1575) (Apr. 21, 1989).

[62] 903 F.2d at 667 n.13.

with a difference of opinion about the weight of the evidence, the decision would not be remarkable.

But the opinion continues by arguing that the government rejects basic, long-established economic principles. The telling moment occurs when the opinion quotes government counsel's oral argument about the likelihood of committed entry.[63] The court interpreted the government as endorsing what it calls "a shopworn argument we had thought long abandoned: that efficient, aggressive competition is itself a structural barrier to entry."[64] Perhaps because the court viewed entry as uncommitted, it did not recognize that the government was making a point about how to analyze committed entry. The government's argument was about the scale necessary for an entrant to do business efficiently and whether committed entry at that scale would be profitable; the court instead heard, and rejected, an argument about whether the incumbent was performing efficiently.

The *Syufy* opinion misses the committed entry point in part because it conceives of entry in terms of abstract structural barriers rather than connecting entry analysis to the question whether new competition solves the competitive problem created by merger. Once the government "concedes that there are no structural barriers to entry into the market,"[65] the court's entry analysis is complete, as it is not appropriate to "speculate as to the details of a potential competitor's performance."[66] As with the *Baker Hughes* court, the *Syufy* court apparently believed that it needed to discipline an out-of-control government agency. The government's complaint was, for the court, a counterproductive attack on an "efficient, vigorous, aggressive competitor," not the protection of competition.[67]

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[63] The opinion quotes the government counsel as arguing:

> [E]ntry must hold some reasonable prospect of profitability for the entrant, or else the entrant will say . . . this is not an attractive market to enter. . . . [T]he reason is very clear. You have to compete effectively in this market. And witness after witness testified you would need to build anywhere from 12 to 24 theaters, which is a very expensive and time consuming proposition. *And, you would then find yourself in a bidding war against Syufy.*

Id. at 677–78.

[64] *Id.* at 667.

[65] *Id.* at 666.

[66] *Id.* at 667 n.13.

[67] *Id.* at 669. The opinion also observes that: "In a free enterprise system decisions such as [merger agreements among competitors] . . . should be made by market actors responding to market forces, not by government bureaucrats pursuing their notions of how the market should operate." *Id.* at 673. On the lookout for ways in which antitrust enforcement creates "a real danger of stifling competition and creativity in the marketplace," *id.*, Judge Alex Kozinski thought he found one in the government's analysis of the role of entry. *Cf.* Kovacic, *supra* note 52, at 112 (the *Syufy* opinion "dispatched the

The appellate decisions in *Baker Hughes* and *Syufy* may undermine merger enforcement to the extent their language encourages courts to overestimate the ability of committed entrants to cure competitive problems. The idea that ease of entry is a trump must be applied with care, particularly when committed entry is at stake. Blind application of the doctrine may encourage courts to analyze the height of entry barriers in the abstract and not recognize that entry is relevant only to the extent that it cures the competitive problem at issue. As a result, it may lead courts to presume that a firm that *could* enter the market likely *would* find it profitable to do so. Yet, when entry requires significant sunk investments, its profitability is a matter for analysis, not presumption. A court that disregards the entry likelihood issue, or presumes that examples of past entry are dispositive on the issue of the profitability of future entry, may find itself wrongly allowing anticompetitive mergers to proceed.

VII. RECENT DECISIONS

Several merger cases in which entry played a role have been decided since the *Baker Hughes* and *Syufy* opinions were handed down, and the early returns suggest that some of the potential for analytical confusion is being realized. Three district courts considered whether a seller's need to develop a reputation for quality makes committed entry unlikely, evaluating a view similar to the argument the government made in *Baker Hughes*. In two of the opinions, *Russell Stover*[68] and *Gillette*,[69] entry was not the primary focus of the court's analysis; these were mainly product market definition cases. The *Gillette* court treated entry in much the way the D.C. Circuit did in *Baker Hughes*: it noted instances of actual entry, declared the technological, legal, and regulatory barriers low, and allowed the merger. The court acknowledged that a significant investment of time and money may have been required to build market share, but did not evaluate entry likelihood in light of that observation.[70] The *Russell Stover* court saw its task as determining the height of entry barriers,

government's case in a torrent of ridicule" and "depict[ed] the Justice Department's decision to prosecute as virtually irrational"); Stephen Calkins & Frederick Warren-Boulton, The State of Antitrust in 1990, Paper Presented at Cato Institute Conference, A Century of Antitrust: The Lessons, The Challenges, Washington, D.C. (Apr. 1990) (noting ways in which "the opinion exudes antipathy for merger enforcement").

68 Pennsylvania v. Russell Stover Candies, 1993-1 Trade Cas. (CCH) ¶ 70,224, at 70,093–94 (E.D. Pa. 1993).

69 United States v. Gillette Co., 828 F. Supp. 78, 84–85 (D.D.C. 1993).

70 The opinion's brief entry discussion merges the analysis of a competitive effects issue—the competitive threat to the merged firm from existing rivals, including recent entrants—with an analysis of whether potential competition from committed entrants would deter the merged firm from raising price. *See id.* at 85 & n.11.

and concluded that they were low. The court found unpersuasive the testimony of multiple witnesses, including a frustrated entrant, that successful entry would require brand equity, name recognition, and a substantial monetary investment because the same witnesses acknowledged that many prospective entrants had the manufacturing and marketing resources necessary for success. In short, the court analyzed whether prospective entrants *could* enter, and did not see a need to inquire as to whether they *would* do so in response to the feared competitive harm from merger.

In the third case, *United Tote*,[71] the evidence that entry would not cure the competitive problem was overwhelming. Even the best-situated potential competitors could not surmount the technical and reputational problems facing them in less than two and one-half to four years.[72] The district court nevertheless felt obliged to acknowledge that *Baker Hughes* and *Syufy* seemed to point the other way before concluding that entry would not be sufficient.[73]

On the other hand, the Federal Trade Commission routinely asks whether committed entry would cure the competitive problem and whether the scale needed for low-cost entry would make it profitable.[74] But Commission opinions on this subject may be less influential than one would hope because they employ the entry barriers/entry impediments distinction developed in *Echlin*,[75] which has not been adopted by the

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[71] United States v. United Tote, Inc., 768 F. Supp. 1064 (D. Del. 1991).

[72] *Id.* at 1079. Even the best-situated potential competitors, foreign firms supplying totalisator systems for parimutuel wagering to racetracks abroad, were incapable of modifying their systems to achieve the technical capability of serving North American customers in less than 18 to 24 months. *Id.* at 1072–75. Were they to do so, they would still have difficulty selling to medium and large racetracks; the tracks had demonstrated their unwillingness to use a totalisator system unproven through one to two years of flawless operation at a comparable track. *Id.* at 1077–79. Moreover, one firm that was trying to enter the market was having no success, and its entry effort was not influencing the price of incumbents. *Id.* at 1080–82.

[73] *Id.* at 1075–76, 1079.

[74] Notably the 1994 *Coke-Dr Pepper* opinion, The Coca-Cola Co., Dkt. 9207, Trade Reg. Rep. (CCH) ¶ 23,625 (F.T.C. 1994), but also *Occidental Petroleum Corp.*, 115 F.T.C. 1010, 1241–43 (1992), and, in an opinion predating *Baker Hughes* and *Syufy*, *B.F. Goodrich Co.*, 110 F.T.C. 207, 295–303 (1988).

[75] *See, e.g.*, The Coca-Cola Co., Dkt. 9207, Trade Reg. Rep. (CCH) ¶ 23,625, at 23,342 (F.T.C. 1994) (Commission combines the vocabulary of "barriers and impediments," focusing on time and practicability, with Guidelines' "timely, likely, and sufficient" test, focusing on constraints that would prevent "entry" from being competitively significant). The Commission defines an entry impediment as "any condition that necessarily delays entry . . . and thus allows market power to be exercised in the interim," and an entry barrier as "additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms." *Id.* (citing *Echlin*, 105 F.T.C. at 485–86).

federal courts.[76] And last year a Ninth Circuit panel chose not to take its cue from that circuit's earlier *Syufy* decision. The *Rebel Oil* panel recognized that entry, though easy for some firms, may be insufficient to solve a competitive problem "if the market is unable to correct itself despite the entry of small rivals."[77] The court even cited the 1992 Merger Guidelines standard for testing committed entry—that it be "timely, likely, and sufficient"—as authority. But this decision does not control in merger reviews because it was written in a monopolization case.[78]

VIII. LOOKING FORWARD

When the next merger case turning on committed entry comes along the government will face a difficult litigation problem. Two circuit courts have instructed the government to recognize that ease of entry is a trump, with language that appears to apply even when the entry involves significant sunk expenditures. Both courts wrote as if they needed to rein in an out-of-control Justice Department. The D.C. Circuit told the government directly that there is no basis in law for a requirement that entry be "quick and effective." The *Baker Hughes* and *Syufy* decisions remain the leading lower court precedents on entry.

The response of the government enforcers may be misunderstood. Two years after *Baker Hughes* and *Syufy*, the Justice Department and the Federal Trade Commission together issued revised Merger Guidelines that refrain from requiring that committed entry be "quick and effective" in favor of something sounding nearly identical: that it be "timely, likely, and sufficient." A court already persuaded that government enforcers are out of control could read this language as a direct challenge to judicial authority by unrepentant agencies.

That reading would be a mistake. The government is not thumbing its nose at the courts. A principled basis for the government's approach in the Merger Guidelines is that the courts that decided *Baker Hughes* and *Syufy* effectively concluded that uncommitted entry was easy on the facts of those cases. As understood by the courts, these were not committed entry decisions. Once a court concludes that entry was uncommitted

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[76] *But cf. United Tote*, 768 F. Supp. at 1072 (using "impediments" vocabulary to describe government argument).

[77] Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1440 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995).

[78] One circuit court that treated entry in a merger case in the wake of *Baker Hughes* and *Syufy* reached the unremarkable conclusion that legal barriers—hospital certificate of need laws—would preclude entry from solving the competitive problem. FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991). On these facts the court had no need to grapple with the details of entry analysis.

and easy, it is appropriate to dismiss the case on the basis of the *Waste Management* doctrine that ease of entry is a trump. But where committed entry is at issue, Clayton Act Section 7 requires that the government and the courts evaluate whether entry would be profitable in order to determine whether entry would likely cure the competitive problem. When the Supreme Court says so, in a decision that has not yet been written, it will remove the shadow that the opinions in *Baker Hughes* and *Syufy* have placed over the treatment of entry in merger analysis.