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I. INTRODUCTION

In *United States v. AT&T, Inc.*,[1] the United States Court of Appeals for the District of Columbia Circuit addressed whether the proposed merger between AT&T Inc. ("AT&T") and Time Warner Inc. ("Time Warner")[2] violated antitrust laws.[3] The proposed merger would combine the video programming distribution services of AT&T with the content creation and programming services of Time Warner, thereby condensing all three stages of production for the video programming and distribution industry into the single, merged company.[4] Ultimately, the D.C. Circuit Court held that the merger did not have anticompetitive effects and denied a permanent injunction for the merger.[5] The court correctly found that the merger would not substantially reduce industry competition because (1) behavioral remedies imposed on the merger, such as irrevocable arbitration agreements, would curb a tendency towards anticompetitive actions,[6] and (2) the merger would

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1. 916 F.3d 1029 (D.C. Cir. 2019).

2. Time Warner changed its name to WarnerMedia in 2018 following the district court's approval of AT&T's acquisition of Time Warner. Katharine Schwab, *Time Warner is Now WarnerMedia*, FAST CO. (June 15, 2018), https://www.fastcompany.com/40586059/time-warner-is-now-warnermedia.

3. *AT&T*, 916 F.3d at 1031.

4. *Id.* at 1033, 1035.

5. *Id.* at 1047. Following completion of this Note, in May 2021, AT&T announced that it would unwind its acquisition of WarnerMedia to combine WarnerMedia with Discovery in a deal for $43 billion. Steve Kovach & Sam Meredith, *AT&T Announces $43 Billion Deal to Merge WarnerMedia with Discovery*, CNBC (May 17, 2021, 4:03 PM), https://www.cnbc.com/2021/05/17/att-to-combine-warnermedia-and-discovery-assets-to-create-a-new-standalone-company.html.

6. *See infra* Section IV.A. Behavioral remedies "seek to address the identified competition concerns by requiring certain conduct from the undertakings concerned," which can include a requirement to refrain from

prevent the individual elimination of either AT&T or Time Warner from an increasingly competitive, innovative market.[7] The final decision of the court to allow the merger has since led to price increases for the merged entity's customers, an increase in the number of vertical mergers and acquisitions in the United States, and new merger guidelines to govern future vertical mergers.[8]

This Note begins by introducing the factual background of *United States v. AT&T, Inc.* and the video programming and distribution industry.[9] Next, it outlines the governing antitrust law and various courts' treatment of vertical mergers.[10] Subsequently, it details the D.C. Circuit Court's reasoning in *United States v. AT&T, Inc.*[11] Then, it analyzes the D.C. Circuit Court's holding and the impact of the holding on consumers and future mergers and acquisitions.[12] Finally, this Note concludes by addressing recent Big Tech antitrust lawsuits and the impact of *United States v. AT&T, Inc.* on pending cases.[13]

II. FACTUAL BACKGROUND

A. The Case

On October 22, 2016, AT&T announced a proposed merger with Time Warner.[14] AT&T was a distribution company with two multichannel video programming distributor ("MVPD") products: DirecTV and U-verse.[15] Time Warner was a content creator and programmer with three units, including Home Box Office Programming ("HBO"), Warner Bros., and Turner Broadcasting.[16] Including debt, the transaction was valued at nearly $108 billion.[17] Following the announcement of the proposed

certain actions. Frank Maier-Rigaud & Benjamin Loertscher, *Structural vs. Behavioral Remedies*, COMPETITION POL'Y INT'L (Apr. 20, 2020), at 3.

7. *See infra* Section IV.B.
8. *See infra* Section IV.C.
9. *See infra* Section I.
10. *See infra* Section II.
11. *See infra* Section III.
12. *See infra* Sections IV.A–IV.C.
13. *See infra* Section IV.C.4.
14. United States v. AT&T, Inc., 916 F.3d 1029, 1031 (D.C. Cir. 2019).
15. *Id.* at 1035.
16. *Id.*
17. United States v. AT&T Inc., 310 F. Supp. 3d 161, 181 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019). The deal was valued at $85 billion not including debt. Tiernan Ray, *AT&T to Buy Time Warner for $107.5/Sh in Cash and Stock; $85 Equity Value*, BARRON'S (Oct. 22, 2016, 8:41 PM), https://www.barrons.com/articles/at-t-to-buy-time-warner-for-107-5-sh-in-cash-and-stock-85-equity-value-1477183327.

merger, the Department of Justice's Antitrust Division conducted an investigation of the proposed merger and its competitive effects.[18]

The United States sued to stop the merger, relying on Section 7 of the Clayton Act.[19] At trial, evidence displayed that AT&T and Time Warner sought the merger as a response to evolving industry dynamics, including "the increasing importance of web- and mobile-based content offerings; the explosion in targeted, digital advertising; and the limitations attendant with AT&T and Time Warner's respective business models."[20] The government conceded to the trial court that an immediate benefit to the vertical integration was a cost savings to then-current AT&T subscribers of about $350 million annually for video distribution services.[21] However, the government also alleged that the merger would "substantially lessen competition in the video programming and distribution market nationwide."[22] To support this allegation, the government advanced three antitrust violation theories: (1) that under an increased leverage theory, the merger would enable Turner Broadcasting to charge AT&T rival distributors and consumers higher prices for its content; (2) that the merger would "substantially lessen competition" by hindering the rise of lower-cost, virtual MVPDs that threatened the traditional pay-TV model; and (3) that the merged entity could "harm competition by preventing AT&T's rival distributors from using HBO as a promotional tool to attract and retain customers."[23]

The United States District Court for the District of Columbia denied the government's request to enjoin the vertical merger.[24] The district court found that the government could not show that the proposed merger was "likely to increase Turner [Broadcasting]'s bargaining leverage in affiliate negotiations."[25] Additionally, the district court found more "probative" real-world evidence was offered by AT&T than by the government, including real-world data from prior vertical mergers in the industry that demonstrated a decrease in content prices.[26] Finally, the district court found that the opinion of the government's expert witness, Professor Carl Shapiro, was not sufficiently supported by real-world evidence and

18. *AT&T*, 310 F. Supp. 3d at 183.

19. *AT&T*, 916 F.3d at 1031. The Government also sought to permanently enjoin any other agreement, plan, or understanding that would allow AT&T to gain control over Time Warner or its assets. *AT&T*, 310 F. Supp. 3d at 184. Section 7 of the Clayton Act is codified in 15 U.S.C. § 18. 15 U.S.C. § 18.

20. *AT&T*, 310 F. Supp. 3d at 181.

21. *Id.* at 182.

22. *Id.* at 164.

23. *Id.* at 194. The increased leverage theory suggested that the costs for Turner Broadcasting's content would increase post-merger, and that the increased prices would be passed off to consumers. *AT&T*, 916 F.3d at 1031.

24. *AT&T*, 916 F.3d at 1031.

25. *Id.* at 1037 (citing *AT&T*, 310 F. Supp. 3d at 199).

26. *Id.* at 1038.

that his quantitative model, which estimated that the merger would increase consumer prices in the future, lacked sufficient reliability and factual credibility.[27]

The government appealed the district court's rejection of a permanent injunction and challenged only the district court's holding on the government's increased leverage theory.[28] On appeal, the government argued that the district court "(1) misapplied economic principles, (2) used internally inconsistent logic when evaluating industry evidence, and (3) clearly erred in rejecting Professor Shapiro's quantitative model."[29]

B. Horizontal Mergers Versus Vertical Mergers

Two types of mergers are relevant to antitrust law: horizontal mergers and vertical mergers. A horizontal merger results when two companies that operate in the same or similar industry merge together to create a common ownership and control.[30] A horizontal merger of two or more companies can enhance the merged entity's market power by eliminating market competition.[31] Conversely, a vertical merger is a merger between two companies within the same supply chain that operate at different stages in the production process.[32] Vertical mergers occur to create: (1) operating synergies by improving supply chain coordination; (2) financial synergies by reducing capital costs and realizing higher profits; and (3) managerial synergies.[33] There are many benefits of vertical mergers, including the elimination of double-marginalization ("EDM"), decreased pressure on pricing, and an inherent "likelihood of improving competition [more] than horizontal mergers."[34]

Vertical mergers create the potential for several anticompetitive effects.[35] First, a vertical merger may create an entity that is powerful enough to dominate one or

27. *Id.*

28. *Id.* at 1031.

29. *Id.* at 1038.

30. Horizontal mergers can occur to utilize economies of scale and scope and increase diversification. *What is a Horizontal Merger?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/strategy/horizontal-merger/ (last visited Oct. 28, 2020).

31. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010).

32. *What is a Vertical Merger?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/strategy/vertical-merger-integration/ (last visited Sept. 20, 2020).

33. *Id.*

34. D. Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, Vertical Merger Enforcement at the FTC, Remarks Before the Credit Suisse 2018 Washington Perspectives Conference 3 (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

35. Lawrence P. Postol, *Evaluating Vertical Mergers under Section 7 of the Clayton Act*, 31 HASTINGS L.J. 371, 377 (1979).

both of the merged firms' singular markets.[36] Secondly, if the merged firms elect to purchase and sell their products between each other exclusively, a part of the capacity of the acquired firm and of the acquiring firm may be foreclosed from the relevant market.[37] Lastly, vertical mergers may increase barriers to entry or trigger more vertical mergers.[38] However, vertical mergers often face less scrutiny than horizontal mergers, as although they have the potential to pose a threat to competition, they are not inherently anticompetitive, unlike horizontal mergers.[39]

C. Anticompetitive Merger Remedies

The Antitrust Division of the United States Department of Justice ("Antitrust Division") is responsible for enforcing antitrust laws.[40] The Antitrust Division may impose various remedies on a merger if the Antitrust Division finds that the merger would violate § 7 of the Clayton Act and that the resulting harm justifies remedial action.[41] Remedies must: (1) preserve competition, not protect competitors; (2) not create ongoing government market regulation; and (3) be enforceable.[42]

The Antitrust Division may seek an injunction to prevent the merger from being consummated.[43] Or, the parties involved in the transaction may seek to avoid litigation by instead offering to "cure the [Antitrust] Division's concerns."[44] In this scenario, the Antitrust Division could choose to agree to a settlement that allows the merger to proceed with modifications that prevent anticompetitive effects.[45] Modifications can come in the form of structural or behavioral remedies.[46] A structural remedy generally involves the sale of businesses or assets by the merging firms.[47] A behavioral remedy typically involves injunctive provisions that regulate and restrain the merged entity's post-merger business conduct or pricing authority.[48] Behavioral remedies "may restrain potentially procompetitive behavior, prevent a firm from responding efficiently to changing market conditions,

36. *Id.*

37. *Id.*

38. *Id.*

39. Herbert J. Hovenkamp, Competitive Harm from Vertical Mergers, FAC. SCHOLARSHIP AT PENN L. (Oct. 24, 2020), at 5; *see also* Postol, *supra* note 35, at 377.

40. 15 U.S.C. § 25; U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL (2020).

41. U.S. DEP'T OF JUST., *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Behavioral remedies, also referred to as conduct remedies, are often difficult to make and enforce, and thus are inappropriate except in narrow circumstances. *Id.*

and require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure."[49]

D. The Video Programming and Distribution Industry

The video programming and distribution industry that AT&T and Time Warner participated in has three stages of production.[50] In stage one, studios or networks create content.[51] In stage two, programmers package the content into networks and license the networks to distributors.[52] In stage three, the distributors sell bundles of networks to subscribers.[53] Looking more closely at stage two, programmers license content to distributors via affiliate agreements, and distributors pay affiliate fees to programmers.[54] During this affiliate negotiation process, if an agreement cannot be reached, there may be a "blackout" where the distributor loses the ability to share content from the programmer with its customers.[55] Generally, if there is a blackout, the programmer risks losing affiliate fee revenues and the distributor risks losing subscribers.[56] However, the risks and corresponding costs are so high that blackouts are rare, even though they are often used as a threat during negotiations.[57]

The video programming and distribution industry has been evolving recently in tandem with technological advancements.[58] One advancement has been seen in the MVPD realm. Traditionally for MVPDs, channels were distributed to subscribers over cable or satellite, similar to how DirecTV or U-verse distributed channels.[59] However, virtual MVPDs, such as YouTube TV, have been gaining market share and distribute live and on demand videos to subscribers via the internet, which is low-cost and easy to use.[60] In addition, subscription video on demand services ("SVODs") have also grown competitive in the industry.[61] SVODs, like Netflix, do not offer live content, but maintain a library of content that viewers can access on

49. *Id.*

50. United States v. AT&T, Inc., 916 F.3d 1029, 1033 (D.C. Cir. 2019).

51. For example, in stage one, a studio could create a television show and sell it to Turner Broadcasting. *Id.*

52. In stage two, Turner Broadcasting, a programmer, could package the content into a network, such as CNN, and license the network to its distributors, including DirecTV. *Id.*

53. *Id.*

54. *Id.* at 1034.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

demand, and are gaining market share with their low-cost subscription plans.[62] Many leading SVODs are vertically integrated, allowing them to both create and distribute content to consumers.[63]

III. LEGAL BACKGROUND

Antitrust law dates back to the late 1800s, and currently consists of three core federal antitrust laws: the Sherman Act, the Federal Trade Commission Act, and the Clayton Act.[64] The three antitrust laws share the same objective: "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[65] Section II.A introduces Section 7 of the Clayton Act.[66] Section II.B describes amendments to the Clayton Act.[67] Lastly, Section II.C discusses the treatment of vertical mergers by various courts.[68]

A. Section 7 of the Clayton Act

The Clayton Act was originally passed in 1914 to address the limitations of the scope of the Sherman Act, which had failed to constrain the number of anticompetitive trusts and monopolies.[69] Section 7 of the Clayton Act stated that:

"No person engaged in commerce or in any activity affecting commerce shall acquire . . . the whole or any part of the stock or other share of capital and . . . 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*."[70]

62. *Id.*

63. *Id.*

64. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Dec. 18, 2020) (the Sherman Act is codified in 15 U.S.C. § 1–7, the Federal Trade Commission Act is codified in 15 U.S.C. § 41–58, and the Clayton Act is codified in 15 U.S.C. § 12–27). The Sherman Act was passed as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id*. The Federal Trade Commission Act established the Federal Trade Commission ("FTC"). *Id.*

65. *Id.*

66. *See infra* Section II.A.

67. *See infra* Section II.B.

68. *See infra* Section II.C.

69. 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, 47 (2004). The Sherman Act declared that any contract, trust, or conspiracy that restrained trade or commerce was illegal, but the Supreme Court limited the scope of the Sherman Act in early decisions and often ruled against the government, who had sought to restrict early monopolistic mergers. *Id.* at 45.

70. 15 U.S.C. § 18.

Section 7 applied a stringent standard, prohibiting mergers with probable anti-competitive effects, rather than requiring proof of certain harm.[71] To prevent a merger under Section 7, the government had to show that the effect of the proposed merger "may be substantially to lessen competition."[72] For example, to enjoin a merger on the basis of anti-competitive effects, the government would not have to precisely quantify the size of an alleged price increase, but rather, the government would only need to prove that the price would increase due to the merger.[73]

B. Amendments to Section 7 of the Clayton Act

Section 7 of the Clayton Act has been amended to expand its scope and notice requirements. In 1950, the Celler-Kefauver Act was passed as an amendment to Section 7 of the Clayton Act, which had an original scope of only horizontal mergers.[74] The Celler-Kefauver Act enabled the Clayton Act to additionally cover vertical mergers.[75] In 1976, the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") was passed as another amendment to Section 7.[76] The HSR Act required companies planning mergers or acquisitions to notify the government of merger or acquisition plans in advance.[77] The purpose of the HSR Act was to "improve and facilitate the expeditious and effective enforcement of the antitrust laws."[78]

C. Treatment of Vertical Mergers by Courts

Since 1950, the United States Supreme Court has only decided three vertical merger cases under Section 7 of the Clayton Act.[79] In 1957, the Court upset the general assumption that Section 7 did not apply to vertical mergers.[80] In *United States v. E.I. du Pont de Nemours & Co.*,[81] the Court referenced the 1950 Celler-Kefauver Act to evidence the congressional intent that Section 7 apply to all types

71. United States v. AT&T, Inc., 916 F.3d 1029, 1031 (D.C. Cir. 2019) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 294, 323 (1962)).

72. *Brown Shoe Co.*, 370 U.S. at 323.

73. Hovenkamp, *supra* note 39, at 13–14.

74. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125, 1125–26 (1950).

75. *Id.*

76. *The Antitrust Laws*, *supra* note 64.

77. *Id.*

78. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 1311).

79. *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

80. *E.I. du Pont de Nemours & Co.*, 353 U.S. at 590, 592. Prior to this case, the Federal Trade Commission said that Section 7 did not apply to vertical acquisitions. *Id.* at 590.

81. 353 U.S. 586.

of mergers, whether vertical, horizontal, or conglomerate.[82] The Court concluded that du Pont's acquisition of 23% of General Motor's stock foreclosed sales to General Motors by other suppliers, thereby creating illegal, anticompetitive effects.[83]

The Court continued to expand on its vertical merger rulings by identifying additional factors to consider in determining whether a merger was anticompetitive. When the leading vertical antitrust case, *Brown Shoe Co. v. United States*,[84] came before the Court in 1962, the Court was tasked to determine whether a merger of two shoe companies violated Section 7 of the Clayton Act by foreclosing competition of the acquired company's retail market while enhancing the acquiring company's competitive advantage over other producers, distributors, and sellers of shoes.[85] With regards to the vertical aspects of the merger, the Court stated that the market share percentage foreclosed by the merger alone was not decisive; additional economic and historical factors also had to be considered to determine if the merger was one that Congress sought to prevent through the Clayton Act legislation.[86] The most important additional factor was "the very nature and purpose of the arrangement."[87] Notably, the Court indicated that it must look to the probable effect of the merger in the present as well as in the future to determine if there was a Clayton Act violation.[88] In *Brown Shoe Co.*, it was clear that Brown Shoe Co. ("Brown"), the fourth largest manufacturer in the shoe industry, was trying to acquire ownership of G.R. Kinney Company, Inc. ("Kinney") to force Brown's shoes into Kinney's stores.[89] The Court ultimately held that this vertical merger would substantially lessen competition if left unchecked, given the trend in the shoe industry toward vertical mergers and Brown's historic policy of forcing its shoes on its retail subsidiaries, thereby foreclosing competition from current and future market share.[90]

As vertical merger jurisprudence grew, the Court tackled a growing area of concern—the balance between the costs and benefits of mergers. In the year following *Brown Shoe Co.*, the Court in *United States v. Philadelphia National Bank*[91] stated, "[w]e are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate

82. *Id.* at 590.
83. *Id.* at 592, 602, 606–07.
84. 370 U.S. 294 (1962).
85. *Id.* at 296–97.
86. *Id.* at 329.
87. *Id.*
88. *Id.* at 333.
89. *Id.* at 332.
90. *Id*. at 334.
91. 374 U.S. 321 (1963).

reckoning of social or economic debits and credits, it may be deemed beneficial."[92] The Court continued by noting that while a choice between the benefits of the merger and its anticompetitive effects was beyond the ordinary judicial question, Congress, via its own legislation in Section 7 of the Clayton Act, made the choice: prioritizing preserving market competition.[93] "Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid."[94]

In the only other vertical merger case decided by the Supreme Court, the Court examined the unique dichotomy of a vertical merger between two entities which each dominated their respective markets. In *Ford Motor Co. v. United States*,[95] Ford Motor Co. ("Ford"), which accounted for 90% of automobile production in the United States, sought to acquire the assets of Electric Autolite Co., which was only one of two independent players left in the replacement market.[96] The Court held that the acquisition of Electric Autolite Co. violated Section 7 because it would substantially lessen competition for two reasons: (1) prior to the acquisition, Ford already had a "pervasive impact on the aftermarket," potentially deterring current competitors; and (2) it raised barriers to entry in the market and reduced the chances of future de-concentration in the market.[97] When Ford acquired the assets, the only independent player left in the replacement market was Champion, whose market share declined from 50% to 33% following the anticompetitive acquisition.[98]

The Department of Justice historically won vertical merger cases it tried under the Clayton Act, and prior to 2018, the last time that the Department of Justice lost a vertical merger case was in 1977.[99] In *United States v. Hammermill Paper Co.*,[100] a Pennsylvania District Court found that the Hammerhill Paper Co. ("Hammerhill") did not violate Section 7 when it acquired the assets and stock of two paper merchants, based on historically low industry barriers to entry, corporate practices, and previous mergers.[101] The court found that the vertical merger was lawful because entry barriers in the paper merchant business were historically low, so it was improbable that the merger would foreclose access of manufacturers to distribution through paper merchants.[102] If Hammerhill tried to foreclose access of

92. *Id.* at 371.
93. *Id.*
94. *Id.*
95. 405 U.S. 562 (1972).
96. *Id.* at 565–66.
97. *Id.* at 567–68.
98. *Id.* at 566.
99. *See* United States v. Hammerhill Paper Co., 429 F. Supp. 1271, 1294 (W.D. Pa. 1977).
100. *Id.*
101. *Id.* at 1294.
102. *Id.* at 1285–86, 1293.

competitors, the foreclosed could establish new firms or branches.[103] The court also found that competition would not be impacted, because irrespective of the merger, Hammerhill historically had a policy of distributing through a wide variety of paper merchants, not just through one singular merchant.[104] Lastly, because previous mergers in the industry did not approach "monopolistic proportions," the court found that this merger would not reach monopoly status and lessen industry competition.[105]

Notably, a merger in the video distribution industry was greenlit in 2011 after being challenged by the Department of Justice and several states. In 2011, the United States and the States of California, Florida, Missouri, Texas, and Washington sought to permanently enjoin the merger of Comcast Corporation ("Comcast") and NBC Universal, Inc. ("NBCU"), contending that the proposed merger would reduce competition by allowing Comcast to obtain majority control of the video distribution market.[106] The vertical merger was allowed to proceed forward as of February 20, 2011, with certain remedies proscribed by the Government on the merger, to prevent "anti-competitive behavior."[107] The remedies that the Government ultimately agreed to included an arbitration mechanism to prevent blackouts during arbitration, mitigating concerns that the merger would withhold NBCU programming from other distributors to benefit Comcast's distribution subscriptions.[108]

IV. THE COURT'S REASONING

When *United States v. AT&T, Inc.* reached the United States Court of Appeals for the District of Columbia Circuit, the court was tasked with determining whether the district court erred in holding that the government did not meet its burden of showing that the merger between AT&T and Time Warner was likely to increase Turner Broadcasting's bargaining leverage.[109] In examining the government's appeal on the increased leverage theory, the circuit court reviewed the district court's application of two economic principles: (1) the Nash bargaining theory and (2) corporate-wide profit maximization.[110] Additionally, the circuit court assessed

103. *Id.*

104. *Id.* at 1293.

105. *Id.* at 1293–94.

106. United States v. Comcast Corp., 808 F. Supp. 2d 145, 146–47. (D.D.C. 2011).

107. *Id.* at 147.

108. *Id.* at 148; George S. Ford, *A Retrospective Analysis of Vertical Mergers in Multichannel Video Programming Distribution Markets: The Comcast-NBCU Merger*, PHX. CTR. FOR ADVANCED LEGAL & ECON. PUB. POL'Y STUD.: PHX. CTR. POL'Y BULL. 2-4 (Dec. 2017), https://www.justice.gov/atr/page/file/1046221/download.

109. United States v. AT&T, Inc., 916 F.3d 1029, 1033 (D.C. Cir. 2019).

110. *Id.* at 1038–39.

the district court's decision to reject the governmental expert witness' bargaining model at trial.[111]

A. The Nash Bargaining Theory

The government alleged in the district court that under the Nash bargaining theory, an economic theory of bargaining, Turner Broadcasting's bargaining position in affiliate negotiations would increase after the merger, because its relationship with AT&T would lower its blackout costs.[112] With lower blackout costs and greater negotiation leverage, the government alleged Turner Broadcasting could increase the cost of its content for distributors and consumers.[113] The Nash bargaining "theory posits that . . . when a party would have a greater loss from failing to reach an agreement, the other party has increased bargaining leverage" and "is more likely to achieve a favorable price in the negotiation."[114] In the district court, the government heavily relied on statements made by AT&T and DirecTV executives during an earlier FCC regulatory review, that a vertical integration could give distributors an incentive to charge higher affiliate fees.[115] However, AT&T's expert conducted an econometric analysis using real-world data, demonstrating that content pricing in prior vertical mergers had not increased like the Nash bargaining theory had predicted.[116] In light of this reliable, real-world evidence, the district court rejected the Nash bargaining theory.[117]

The circuit court made two findings on the topic of the Nash bargaining theory. First, it held that the district court was correct in concluding that the Nash bargaining theory inaccurately predicted a post-merger increase in content costs during affiliate negotiations.[118] The circuit court relied on evidence of similar mergers in a dynamic market that did not result in a "statistically significant increase in content costs."[119] Relatedly, the circuit court agreed that the district court was correct to find that Turner Broadcasting's bargaining leverage would not increase enough to charge higher prices for content.[120] The circuit court reasoned that because blackouts were expensive, real-world evidence did not show that Turner

111. *Id.* at 1045–46. The circuit court also evaluated the government's argument that the district court reasoned inconsistently when evaluating trial testimony, but this Note will not cover that argument. *Id.* at 1045.

112. *Id.* at 1035–36.

113. *Id.* at 1040.

114. *Id.* at 1039.

115. *Id.*

116. One CEO testified that the video programming and distribution industry had become so dynamic that there was a "null effect of vertical integration on affiliate negotiations." *Id.*

117. *Id.*

118. *Id.* at 1040.

119. *Id.*

120. *Id.*

Broadcasting would or *could* drive up prices by threatening long-term blackouts for distributors.[121]

Additionally, the circuit court emphasized Turner Broadcasting's irrevocable offer of arbitration agreements with a no-blackout guarantee.[122] The "baseball style" arbitration agreements, a self-imposed conduct remedy on the merger, were a means of addressing the government's concern that Turner Broadcasting would be incentivized to increase prices and enter a blackout during affiliate negotiations.[123] In a "baseball style" arbitration agreement, each party would make a final offer, and the arbitrator would then decide which offer to select; the distributor would have the right to continue to carry Turner Broadcasting networks pending an arbitration decision.[124] The circuit court referenced the Comcast-NBCU merger, a similar vertical merger, where the government recognized that "'especially in vertical mergers, . . . conduct remedies' . . . 'can be a very useful tool to address the competitive problems while preserving competition and allowing efficiencies' that 'may result from the transaction.'"[125]

The combination of blackout costs, the lack of statistically significant evidence supporting the allegation that consumer prices would increase from such a merger, and the arbitration agreements led the circuit court to affirm the decision of the district court, holding that Turner Broadcasting's bargaining leverage would not increase from the merger.[126]

B. Corporate-Wide Profit Maximization

On appeal, the government also argued that the district court misunderstood and failed to apply the principle of corporate-wide profit maximization.[127] Corporate-wide profit maximization "posits that a business with multiple divisions will seek to maximize its total profits" and is a principle of antitrust law.[128] The government argued that the district court misapplied this principle because the district court found that evidence suggested that vertically integrated companies historically had decided that corporate profit maximization was best accomplished

121. Such evidence included testimonies from an AT&T Executive, the President of Turner Broadcasting, and the CEO of Time Warner. *Id.* at 1040–41.

122. *Id.* at 1041. Turner Broadcasting offered nearly 1,000 distributors arbitration agreements, enabling the distributors to engage in "baseball style" arbitration for seven years with Turner Broadcasting. *Id.* at 1035.

123. *Id.* at 1041.

124. *Id.* at 1035.

125. *Id.* at 1041 (citing United States v. AT&T Inc., 310 F. Supp. 3d 161, 169 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019)).

126. *Id.* at 1042–43.

127. *Id.* at 1043.

128. *Id.*; *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (noting that a parent and its subsidiary must be viewed as a single enterprise for Sherman Act purposes, must have a complete unity of interest, common objectives, and will act for the benefit of each other with a single "corporate consciousness").

by programming and distribution components separately maximizing their respective revenues, which was contrary to this profit maximization theory.[129] However, the district court was just noting that this theory was not inconsistent with testimony that the identity of the programmer's owner did not affect affiliate negotiations because it would be in Turner Broadcasting's best interest to spread its content among distributors and to not impose blackouts to maximize the merged firm's profits.[130] The circuit court agreed with the district court, holding that during negotiations, it was in the best interest of the merged entity to license programing broadly to other distributors to maximize profit because withholding content would lead distributors to seek out other programmers for content, hindering corporate profit maximization for the merged entity of AT&T and Time Warner.[131]

The district court, circuit court, and government also agreed that there would be cost savings from the merger by eliminating double-marginalization ("EDM").[132] Pre-merger, Turner Broadcasting earned a profit margin when licensing content to AT&T, and AT&T earned a profit margin from selling content to customers.[133] Post-merger, Turner Broadcasting would no longer earn the profit margin from licensing content to AT&T, and that cost savings could be passed to consumers to attract more subscribers.[134] The circuit court found that Turner Broadcasting licensing its programming to AT&T at a lower cost post-merger aligned with the corporate-wide profit maximization theory, because the merged firm would be maximizing its unified profit at the expense of Turner Broadcasting maximizing its individual revenue.[135]

C. Errors in the Government Expert's Quantitative Bargaining Model

The circuit court also ruled against the government and found that the district court did not err in rejecting the government expert's quantitative bargaining model.[136] The government's expert, Professor Carl Shapiro, presented a model to the district court that predicted an annual net increase of $286 million in costs

129. *AT&T*, 916 F.3d at 1043.

130. *Id.* The Chair of Content Distribution at NBC Universal previously had testified that at Comcast-NBCU, he "never once took into account the interest of Comcast cable in trying to negotiate a carriage agreement for NBC Universal." *Id.* (citation omitted).

131. *Id.* at 1044.

132. *Id.*

133. *Id.*

134. The profit margin would be eliminated for Turner Broadcasting because it would be licensing its content to AT&T post-merger at a lower cost than pre-merger. *Id.*

135. *Id.*

136. *Id.* at 1045–46.

passed onto consumers in 2016, which would increase in future years.[137] The district court found that the evidence was insufficient to estimate annual costs for rival distributors.[138] The circuit court found additional issues with the model, including that the model did not take into account long-term contracts which restricted Turner Broadcasting's ability to raise content prices for distributors at least until 2021, so the model was distorted and the price increases were overestimated.[139] The circuit court's decision to reject the model was further supported by the model's failure to consider the post-litigation offer of arbitration agreements, which prohibited certain blackouts and price increases.[140]

V. Analysis and Impact

In *United States v. AT&T, Inc.*, the United States Court of Appeals for the District of Columbia Circuit held that the merger between AT&T and Time Warner was not an antitrust violation under Section 7 of the Clayton Act because the merged entity would not have increased leverage to lessen industry competition.[141] The court held correctly that the merger would not significantly lessen industry competition because the merged entity was constrained in its future actions by behavioral remedies.[142] In addition, following the court's declaration that this respective industry was evolving with new market players, the merger may actually increase long-term market competition by enabling AT&T and Time Warner to leverage each other's capabilities and avoid individually being eliminated from the market.[143] Finally, while the merger did not lessen industry competition, the merger greatly impacted AT&T and Time Warner customers and prices, overall vertical mergers and acquisitions, and guidelines on vertical mergers, which were updated for the first time in decades after *United States v. AT&T, Inc.* was decided.[144]

137. Professor Shapiro calculated the $286 million net cost increase from a $587 million increase in annual fees for rival distributors to license Turner Broadcasting content minus the cost savings of $352 million for AT&T from the merger. *Id.* at 1046.

138. *Id.*

139. *Id.* The circuit court also noted that vertical mergers can create harms beyond just higher prices for consumers, including decreased product quality and reduced innovation, so quantitative evidence of a price increase was not required to prevail on a Section 7 challenge; however, the government did not argue any non-price related harms and instead only argued harm on the consumer price. *Id.* at 1045–46.

140. *Id.* at 1046.

141. *Id.* at 1031–32.

142. *See infra* Section IV.A.

143. *See infra* Section IV.B.

144. *See infra* Section IV.C.

A. The Court Correctly Held that the Merger Would Not Have Anticompetitive Effects Because the Merged Entity was Restrained by Historically Successful Behavioral Remedies

The circuit court was correct in noting that behavioral remedies,[145] such as irrevocable arbitration agreements and long-term contracts, would likely restrain Turner Broadcasting's bargaining leverage in affiliate negotiations because the federal government has previously accepted conduct remedies as a means to curtail anticompetitive action from mergers.[146] The Director of the FTC's Bureau of Competition, Bruce Hoffman, once stated that "in some cases [the FTC] believe[s] that a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration."[147] Mr. Hoffman further noted that in four examples of vertical mergers, behavioral remedies "succeeded in maintaining competition at premerger levels," suggesting that the FTC could structure remedies for vertical mergers that would restrain anticompetitive behavior.[148]

In the Comcast and NBCU merger, a merger in a similar industry, the government supported behavioral remedies imposed on the merger by the FCC.[149] Specifically for the Comcast-NBCU merger, a "baseball style" arbitration was embraced, which allowed distributors to retain access to NBC content during arbitration, mitigating concerns that the merger would withhold NBC programming to benefit Comcast's distribution subscriptions.[150] In *United States v. AT&T, Inc.*, Judge Rogers found that the irrevocable offers for no-blackout arbitration agreements were so effective that he was not swayed in favor of the government even when presented with a previous FCC statement made by AT&T during the Comcast-NBCU merger, where both AT&T and DirecTV stated that vertically integrated MVPDs are inclined to charge higher licensing fees for programming.[151]

In this case, Time Warner was not forced by the government to follow behavioral remedies but independently elected to extend the same "baseball style" arbitration that the government had embraced in the Comcast-NBCU merger to its distributors.[152] Following the reasoning of this circuit court, Turner Broadcasting competitors should not lose significant sales in the market for a certain amount of time, nor can Turner Broadcasting foreclose rivals due to the long-term contract and arbitration agreement conduct remedies, so the market would remain competitive post-merger.

145. *See supra* Section I.C (defining behavioral remedies).
146. *See supra* text accompanying notes 107–108, 123.
147. Hoffman, *supra* note 34, at 8.
148. *See id.*
149. United States v. AT&T, Inc., 916 F.3d 1029, 1035 (D.C. Cir. 2019).
150. Ford, *supra* note 108, at 4.
151. *AT&T*, 916 F.3d at 1036, 1041–42.
152. Ford, *supra* note 108, at 2.

Additionally, recall that the Supreme Court in *Brown Shoe Co.* held that the nature and purpose of the arrangement, present and future, were factors to consider when examining mergers for anticompetitive effects.[153] In *Brown Shoe Co.*, the acquirer was actively attempting to foreclose market competition by forcing the acquired to carry *only* the acquirer's products.[154] However, the AT&T and Time Warner merger was different. The purpose and nature of AT&T and Time Warner's arrangement was not to foreclose competitors from the market; the merger was an attempt to vertically integrate two company's complementary assets, respond to industry dynamics, and solve limitations within each company's respective business model.[155] For example, Time Warner lacked information about its viewers and thus their preferences, while AT&T lacked control over the video content it offered.[156] By acquiring Time Warner, AT&T would get immediate access to content and an extensive advertising inventory, and Time Warner would benefit from AT&T's consumer relationships and data capabilities.[157]

Notably, even if the nature or purpose of the merger was to foreclose industry competition, the merged entity of AT&T and Time Warner would not be able to take such anticompetitive actions for the present and foreseeable future because of its conduct-prohibitive arbitration agreements and long-term contracts.

B. The AT&T and Time Warner Merger May Increase Long-Term Competition by Preventing the Elimination of AT&T or Time Warner from the Market

The circuit court supported the merger, meaning that the court felt the merger would not lessen competition, as is required to succeed in a Section 7 Clayton Act action.[158] The court focused heavily on the impact of the merger on lessening industry competition, but only briefly noted that the industry was "changing and experiencing increasing competition" with emerging content distribution methods.[159] The court noted that SVODs, such as Netflix and Hulu, were emerging on the market.[160] Such SVODs, which are also vertically integrated, have led cable

153. Brown Shoe Co. v. United States, 370 U.S. 294, 329, 333 (1962).

154. *Id.* at 334.

155. United States v. AT&T Inc., 310 F. Supp. 3d 161, 181–82 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

156. *Id.* at 182. Because Time Warner lacked such consumer and preference information, it would be disadvantaged by SVODs, like Netflix, Hulu, and Amazon Prime, and web companies like Facebook and Google, which specialized in catering programming and advertisements to consumers. *Id.*

157. *Id.*

158. United States v. AT&T, Inc., 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

159. *Id.* at 1046.

160. *Id.* at 1042.

customers to "'cut[] the cord' and terminat[e] MVPD service altogether," threatening the long term success of AT&T MVPDs, like DirecTV and U-verse.[161]

AT&T and Time Warner needed to adapt to stay competitive in the evolving market.[162] "AT&T needed the deal . . . to evolve into a modern media company that could compete with companies such as Netflix, Amazon, Facebook, and Google."[163] Without the merger, it remained an open question whether AT&T or Time Warner could even exist with the threatening competition of Amazon and Netflix.[164] In considering the simple nature of competition, if AT&T or Time Warner ceased to exist, industry competition would naturally decrease from the elimination of one or two market share players.[165] As the United States Supreme Court held in *Ford Motor Co.*, Ford's acquisition of Electric Autolite Co. was found to have violated Section 7 because it would have lessened competition by eliminating one of two remaining market players and reducing future de-concentration in the market.[166] While the government focused on the potential anticompetitive effects of the AT&T and Time Warner merger, a lack of a merger could have led to the outcomes found in *Ford Motor Co.*[167] If AT&T and Time Warner did not merge, one or both may have been displaced from the market because of an inability to adapt to and compete in the evolving market. This could have lessened competition and concentrated the market across just a few key players, such as Hulu or Netflix, enabling future monopolies.

In judging the lawfulness of a merger under Section 7 of the Clayton Act, the court can consider a number of factors, including the market shares of the merging parties.[168] In 2019, Netflix led with 68% of the United States market share for SVODs, followed by Amazon Prime Video at 10%, Hulu at 9%, CBS All Access at 5%,

161. *Id.* at 1034.

162. Hadas Gold, *How Netflix and Amazon Helped Save the AT&T-Time Warner Deal*, CNN BUS. (Feb. 27, 2019, 4:40 PM), https://www.cnn.com/2019/02/27/business/netflix-amazon-streaming-att-doj/index.html.

163. Mike Snider, *Expect These Netflix Rivals Thanks to the AT&T-Time Warner Merger*, USA TODAY (June 18, 2018, 12:01 PM), https://www.usatoday.com/story/tech/news/2018/06/15/cord-cutters-can-expect-new-choices-wake-t-time-warner-merger/703850002/.

164. Hadas Gold & Brian Stelter, *Judge Approves $85 Billion AT&T-Time Warner Deal*, CNN BUS. (June 13, 2018, 8:11 AM), https://money.cnn.com/2018/06/12/media/att-time-warner-ruling/index.html; Cecilia Kang, *Time Warner C.E.O. Testifies That AT&T Merger is Needed to Battle Silicon Valley*, N.Y. TIMES (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/business/time-warner-att-merger.html.

165. *See* Ford Motor Co. v. United States, 405 U.S. 562, 566 (1972) (holding that the acquisition of one company's assets by another company was anticompetitive when the acquisition left only one independent player remaining in the replacement market).

166. 405 U.S. 562, 565–68 (1972).

167. *See supra* text accompanying notes 96–98.

168. 2 ANTITRUST LAWS & TRADE REGULATION § 30.03 (2d ed. 2020).

and others at 7%.[169] WarnerMedia, the revamped Time Warner, launched its SVOD service, HBO Max, in May 2020, to compete in the market already dominated by Netflix.[170] Like the *Hammerhill Paper Co.* case, the video programming and distribution industry does not have impenetrable barriers to entry.[171] Competition in the video programming and distribution industry has increased from new industry entrants in the past few years, with entrants including Walt Disney Company's Disney+, Amazon.com Inc.'s Prime Video, and Comcast's Peacock all threatening the dominant Netflix share.[172] Neither AT&T nor Time Warner individually had dominated the SVOD market, so their merger created a competitive market player, rather than a market monopoly.

In addition to low barriers to entry, similar to the distribution methods of Hammerhill, AT&T pre-merger did not solely sell Time Warner content to customers, and Time Warner, via Turner Broadcasting, did not solely license content to AT&T.[173] The circuit court, relying on the corporate-wide profit maximization theory, noted that post-merger, AT&T and Time Warner would not solely do business with each other because that would hinder corporate profit maximization by eliminating other distributors to license content to.[174] Combined with the arbitration agreements and long-term contracts, the merged entity of AT&T and Time Warner should not eliminate all other business partners from the programming and distribution chain because doing so would hurt overall corporate profit maximization.

The merged entity's emergence in the market that it, AT&T, or Time Warner did not already dominate, combined with the prevention of the elimination of either AT&T or Time Warner from a market they individually were unable to adapt to, serves to increase long-term market competition and de-concentrate the market.

C. Impact of the Decision

The *United States v. AT&T, Inc.* decision ultimately impacted the merged entity's prices, paved the way for additional vertical mergers, and highlighted the need for new vertical merger guidelines. Section IV.C.1 describes the resulting consumer

169. Dade Hayes, *Netflix has 71% of Global SVOD Market, But New Services Gain Grounds—Report*, DEADLINE (Apr. 1, 2019, 1:51 PM), https://deadline.com/2019/04/netflix-has-71-of-global-svod-market-but-new-services-gain-ground-report-1202586356/.

170. Kif Leswing, *HBO Max Online Service Just Launched in the U.S — Here's a First Look*, CNBC (May 27, 2020, 9:00 AM), https://www.cnbc.com/2020/05/27/hbo-max-new-hbo-streaming-video-service-launches.html.

171. The circuit court noted the rising presence of virtual MVPDs and SVODs, like Netflix and Hulu. United States v. AT&T, Inc., 916 F.3d 1029, 1042 (D.C. Cir. 2019).

172. Joe Flint, *Netflix Raises Prices as Competition Increases*, WALL ST. J. (Oct. 29, 2020, 4:31 PM), https://www.wsj.com/articles/netflix-raises-price-of-standard-premium-plans-11604000757.

173. *AT&T*, 916 F.3d at 1044.

174. *Id.*

price increase.[175] Section IV.C.2 identifies a number of vertical mergers following the *United States v. AT&T, Inc.* decision.[176] Section IV.C.3 introduces the new vertical merger guidelines that were released in 2020.[177] Finally, Section IV.C.4 highlights ongoing Big Tech antitrust litigation and considers how the *United States v. AT&T, Inc.* decision may affect the lawsuits.[178]

The Merger Created Price Increases for Customers Despite Proponents of the Merger Testifying That There Would Not be Price Increases

Both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia ruled in favor of AT&T, finding that evidence did not indicate that the merger would cause price increases for consumers.[179] At trial, Time Warner and AT&T witnesses testified that the merger would actually lower the price of video distributions to consumers.[180] The circuit court agreed with the district court that the evidence indicated that the merger "would [not] lead to *'any raised costs' for rival distributors or consumers*.'"[181] Despite these findings, following the district court's decision, AT&T immediately raised the base price of its DirecTV Now streaming service for new customers and certain existing customers.[182] By December 2019, DirecTV prices increased between 11% and 25%, depending on the offerings and contract longevity.[183] On November 19, 2020, AT&T announced another round of price increases for DirecTV Satellite and U-verse TV services.[184] AT&T attributed its latest round of price increases to "increased programming costs," stating, "[p]eriodically, TV network

175. *See infra* Section IV.C.1.

176. *See infra* Section IV.C.2.

177. *See infra* Section IV.C.3. The new 2020 Vertical Merger Guidelines were withdrawn in September 2021, but the FTC plans to work with the DOJ to update the vertical merger guidance. *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FTC (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

178. *See infra* Section IV.C.4.

179. *Id.* at 1038, 1046.

180. Testifying witnesses stated that the merger would create new advertising opportunities, which would increase advertising revenues, "alleviat[ing] pressure on the programming side and lower[ing] the price of video distribution to consumers." United States v. AT&T Inc., 310 F. Supp. 3d 161, 183 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

181. *AT&T*, 916 F.3d at 1038, 1046.

182. Jon Brodkin, *AT&T Promised Lower Prices After Time Warner Merger—it's Raising Them Instead*, ARS TECHNICA (July 2, 2018, 4:22 PM), https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/. Because the price increase occurred after the district court's decision, even on appeal at the circuit court, the government could not introduce the price increase as new evidence. FED. R. APP. P. 10(a); *see also* Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016 (2012).

183. Josh Kosman, *DirecTV Monthly Rates Spike After AT&T's Time Warner Buy*, N.Y. POST (Dec. 15, 2019, 10:51 PM), https://nypost.com/2019/12/15/directv-monthly-rates-spike-after-atts-time-warner-buy/.

184. Brodkin, *supra* note 182.

owners increase the fees they charge DirecTV for the right to broadcast their movies, shows, and sporting events."[185] AT&T should not pass off all of the blame onto other network owners for the price increase. AT&T itself is a television network owner, as it owns Time Warner, so AT&T also can determine certain programming prices.

It is more plausible that the latest price increase is to recover lost revenue from AT&T's dramatically declining customer base.[186] The district court found that the merger would increase AT&T's profits by reducing marginal costs, and with increased profits, AT&T would have the "incentive to get more customers" and "the DirecTV price [would] go down to consumers."[187] In early 2017, AT&T had over 25 million Premium TV customers, but as of December 2020, that number had dropped to 17.1 million.[188] Even if marginal costs were reduced by the merger, AT&T is not getting the additional customers it needs to lower DirecTV prices for consumers. Without the additional customers, prices will likely continue to increase to generate profits, pushing away even more customers.

The AT&T and Time Warner Merger Paved the Way for Additional Vertical Mergers

Since the AT&T and Time Warner merger was approved, the number of vertical mergers has been increasing.[189] On January 28, 2019, the FTC allowed a vertical merger between Staples, Inc. ("Staples") and Essendant, Inc. ("Essendant").[190] For this merger, the FTC accepted a settlement that required post-merger, behavioral remedies be enforced to limit the access Staples could gain to commercially sensitive business information of Essendant customers to raise its prices.[191] Two FTC Commissioners voted against the settlement and expressed concerns that this merger created a monopsony power by (1) Staples obtaining the ability to raise the price of Essendant products sold to other dealers who compete with Staples and (2) giving the merged entity increased market power on the buy side.[192] However, the

185. *Id.*

186. *Id.*

187. United States v. AT&T Inc., 310 F. Supp. 3d 161, 198 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

188. Brodkin, *supra* note 182.

189. Additional vertical mergers that occurred after the AT&T and Time Warner district court decision included the Cigna-Express Scripts merger and the CVS-Aetna merger. Armie Margaret Lee, *AT&T-Time Warner Ruling a Positive for Cigna-Express Scripts, CVS-Aetna Deals*, STREET (June 13, 2018, 10:24 AM), https://www.thestreet.com/markets/att-time-warner-ruling-positive-for-cigna-express-scripts-14620092.

190. Daniel E. Hemli & Jacqueline R. Java, *FTC Decision Highlights Growing Divide on Vertical Mergers*, NAT. L. REV. (Feb. 1, 2019), https://www.natlawreview.com/article/ftc-decision-highlights-growing-divide-vertical-mergers.

191. The settlement also required that a monitor be appointed for ten years to oversee the activity of Staples and Essendant. *Id.*

192. Then-FTC Commissioner Rohit Chopra, who voted against the merger, stressed the importance of considering the buyer's incentives and previous track record, noting that Sycamore, Staples' owner, had once

majority who approved the deal noted that if Essendant prices were raised for dealers, many of those dealers would cease doing business with Essendant and would switch to doing business with Essendant's largest wholesale competitor.[193] This theory is plausible using the AT&T and Time Warner post-merger price increases as a proxy.[194] Post-merger, when AT&T prices increased, the customer base dropped; presumably, consumers switched to lower-cost competitors.[195] In Essendant's case, dealers will likely act as AT&T customers did, and switch to a lower-cost alternative rather than be subjected to price increases.

Additionally, in February 2020, a federal judge approved a merger between T-Mobile and Sprint.[196] Prior to this merger reaching the court, the FCC and Department of Justice ("DOJ") approved the deal, which included structural and behavioral remedies.[197] However, several state Attorney Generals then sued to block it and protect their State's consumers.[198] Specifically, Brian E. Frosh, Maryland's Attorney General, joined nine other states in filing a lawsuit to halt the merger of these two telecom giants, alleging the merger would lessen competition and increase prices for cellphone services.[199] Frosh noted the dangers of merging two of the United States' largest cellphone carriers, and that "[r]educed competition in a market that only has four major competitors right now [would] result in higher prices and fewer options for Marylanders."[200] Similar to the outcome of *United States v. AT&T, Inc.*, Southern District of New York Judge Victor Marrero ultimately concluded that that the evidence did not indicate that the proposed merger of Sprint and T-Mobile would increase prices and "substantially lessen competition" in the market, thereby greenlighting the merger.[201]

It is possible that vertical mergers have been increasing following the AT&T and Time Warner merger because courts are becoming more comfortable in applying

acquired an asset and quickly resold it, indicative of the fact that Sycamore and thus Staples would be more concerned with increasing margins quickly rather than investing capital to grow Essendant's business. *Id.*

193. *Id.*

194. *See supra* Section IV.C.1.

195. *See supra* text accompanying notes 183–184, 188 (detailing the DirecTV price increase and corresponding customer base decline).

196. Makena Kelly, *T-Mobile and Sprint Win Lawsuit and Will be Allowed to Merge*, VERGE (Feb. 11, 2020, 8:30 AM), https://www.theverge.com/2020/2/11/21132924/tmobile-sprint-merger-approved-federal-court-antitrust-lawsuit.

197. *Id.*

198. *Id.*

199. Press Release, Brian E. Frosh, Md. Off. Att'y Gen., Att'y Gen. Frosh Joins Suit to Block T-Mobile and Sprint Megamerger (June 11, 2019) (on file with author).

200. An investigation led by the Attorneys General found the claimed benefits of the merger were generally unverifiable and would only be delivered years into the future, whereas if the merger happened, the combined entity could immediately raise prices and cut quality, meaning benefits from the merger would be outweighed by the immediate harm to competition and consumers. *Id.*

201. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 189 (S.D.N.Y. 2020).

remedies to constrain certain anticompetitive actions.[202] If there were not structural or behavioral remedies to impose, the court's other option would be to prevent the merger from occurring at all.[203]

D. The AT&T and Time Warner Merger Demonstrated the Need for New Vertical Merger Guidelines

For the first time since 1984, on June 30, 2020, the FTC and DOJ jointly released new antitrust guidelines for evaluating vertical mergers.[204] When the district court decided the AT&T merger case in 2018, it was clear that the 1984 Guidelines were outdated and did not reflect modern agency policy.[205] Antitrust commentators, prior to the release of the 2020 Vertical Merger Guidelines, often commented on how undeveloped vertical merger enforcement law had been for the past forty years.[206] For example, the Supreme Court last analyzed a vertical merger case brought by the FTC in 1979,[207] and between 1994 and 2016, only 52 mergers involving vertical integrations were challenged by U.S. agencies.[208] Irrespective of how outdated the 1984 Guidelines were, the district court judge, Judge Leon, repeatedly cited the 1984 version in his holding in favor of the merger.[209]

The 2020 Vertical Merger Guidelines, which describe how agencies analyze vertical mergers, were intended "to assist the business community and antitrust practitioners by increasing the transparency" of the vertical merger analytical process.[210] Importantly, the 2020 Guidelines were also updated to "*assist the courts* in developing an appropriate framework for interpreting and applying the antitrust

202. *See supra* Section IV.A (describing the remedies imposed on the AT&T and Time Warner and Comcast and NBCU mergers).

203. *See supra* text accompanying note 43.

204. *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers*, FED. TRADE COMM'N. (June 30, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

205. Jonathan M. Jacobson, *Vertical Mergers: Is it Time to Move the Ball?*, FED. TRADE COMM'N, Summer 2019, at 10.

206. Steve C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1964 (2018). Herbert Hovenkamp, an antitrust expert, stated that "during the 1980s there was a 'general hostility' towards vertical antitrust activity of all kinds and the government 'lost interest.'" *Is the AT&T-Time Warner Decision a Blow Against Antitrust*, KNOWLEDGE AT WHARTON (June 19, 2018), https://knowledge.wharton.upenn.edu/article/impact-att-time-warner-decision/.

207. Salop, *supra* note 206, at 1964 (citing Fruehauf Corp. v. F.T.C., 603 F.2d 345, 353, 355 (2d Cir. 1979) (holding that because a showing of some probable anticompetitive impacts from a merger was necessary to enjoin a merger, a Section 7 violation based on effects of a merger must be set aside if unsupported by substantial evidence)).

208. *Id.*

209. United States v. AT&T Inc., 310 F. Supp. 3d 161, 192–94 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

210. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 1 (2020).

laws to the types of transactions discussed [in the guidelines]."[211] It is plausible that the 2020 update to the Vertical Merger Guidelines was a response to the government's failed challenge to the AT&T and Time Warner merger, which was the first litigated challenge to a vertical transaction in almost 40 years.[212]

Despite this progress in releasing new guidelines, in September 2021 the FTC withdrew its approval of the 2020 Vertical Merger Guidelines and Commentary.[213] These guidance documents were found by the FTC to include "unsound economic theories that [were] unsupported by the law or market realities."[214] The FTC noted that the approval was withdrawn to "prevent industry or judicial reliance on a flawed approach."[215] The Guidelines still remain in effect at the DOJ, meaning that the DOJ and FTC may evaluate vertical mergers differently.[216] However, the FTC has indicated that they will continue to work with the DOJ to update vertical merger guidance.[217]

If the DOJ remains a contributor to Vertical Merger Guidelines, and the courts rely on such guidelines to analyze mergers that are challenged by the DOJ, courts should more often than not rule in favor of the DOJ, so long as the DOJ's claims are legitimate. For vertical merger cases that reach the court, the DOJ or another federal agency are often the party claiming an antitrust law violation.[218] The DOJ may be fighting against corporate monopolies, but by being both the enforcer of antitrust violations and the creator of the guidelines a court will use to analyze antitrust concerns, the DOJ has become a controlling decision maker in the judicial process and is better positioned to ensure it will not lose again when challenging a merger.

E. Big Tech Versus Antitrust Laws

Antitrust law has been in the public eye in the past year following allegations that some of the world's largest technology companies have "exercised and abused

211. *Id.* at 2 (emphasis added).

212. Mark McCareins, *AT&T-Time Warner Ruling a Milestone for Vertical Mergers*, HILL (June 14, 2018, 7:30 AM), https://thehill.com/opinion/finance/392158-att-time-warner-ruling-a-watershed-moment-for-vertical-mergers.

213. *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FTC (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

214. *Id.*

215. *Id.*

216. Joel Mitnick & Ngoc Pham Hulbig, *FTC Rescinds Vertical Merger Guidelines*, NAT'L L. REV. (Sept. 21, 2021), https://www.natlawreview.com/article/ftc-rescinds-vertical-merger-guidelines.

217. *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FTC (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

218. MERGER REMEDIES MANUAL, *supra* note 40.

their monopoly power."[219] House lawmakers investigated Amazon, Apple, Facebook, and Google over a 16-month period from 2019 to 2020, concluding that "the companies had abused their dominant positions, setting and often dictating prices and rules for commerce, search, advertising, social networking and publishing."[220]

On October 20, 2020, Google was sued by the Department of Justice and eleven Attorneys General under the Sherman Act[221] for "unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices."[222] The complaint alleged that Google entered into exclusionary agreements and engaged in anticompetitive conduct to "lock up distribution channels and block rivals."[223] Specifically, Google was charged with paying billions of dollars annually to distributors to prohibit Google's distributors from dealing with Google's competitors.[224] Among other complaints, these payments were alleged to also raise barriers to entry for rivals, especially for small search companies that could not afford to pay the billion dollar entry fee.[225]

Google's situation differs from the AT&T and Time Warner merger. First, there were lower barriers to entry in the video programming and distribution industry,[226] which worked in favor of the AT&T and Time Warner merger. On the other hand,

219. Cecilia Kang & David McCabe, *House Lawmakers Condemn Big Tech's 'Monopoly Power' and Urge Their Breakups*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/technology/congress-big-tech-monopoly-power.html.

220. *Id.* On May 25, 2021, the District of Columbia Attorney General sued Amazon for violations of the District of Columbia Antitrust Act, alleging Amazon suppressed competition on other online retail sales platforms by implementing anticompetitive restraints on its third-party sellers, thereby raising the prices of goods to consumers in the online retail sales market. Complaint at 1–2, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775 B (D.C. Super. Ct. May 25, 2021). As Hovenkamp notes, this lawsuit was filed in the D.C. Superior Court under D.C. antitrust laws, rather than under federal antitrust laws, limiting the scope of any resulting judgment to D.C. Cat Zakrzewski & Rachel Lerman, *D.C. Attorney General Brings Antitrust Lawsuit Against Amazon*, WASH. POST (May 25, 2021), https://www.washingtonpost.com/technology/2021/05/25/dc-ag-antitrust/.

221. *See supra* note 69 (introducing the Sherman Act).

222. Complaint at 2, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020). On December 17, 2020, Google was sued by a coalition of 38 states and territories for violating antitrust law by holding a general search monopoly. Richard Nieva, *Google Hit by Antitrust Lawsuit from Nearly 40 States Over Alleged Search Monopoly*, CNET (Dec. 17, 2020, 2:31 PM), https://www.cnet.com/news/google-hit-by-antitrust-lawsuit-from-nearly-40-states-over-alleged-search-monopoly/. The DOJ and state lawsuits were consolidated in January 2021. Amended Complaint, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021).

223. Complaint, *supra* note 222, at 3.

224. *Id.* at 3–4. Distributors are disincentivized to switch from Google to a Google competitor, even with restraints on distributor behaviors by Google because Google shares valuable advertising monopoly revenue with the distributors in return for the commitment to favor Google's search engine. *Id.* at 5.

225. *Id.* at 5.

226. *See supra* notes 171–172 and accompanying text.

Google's stronghold in the search engine market has created a billion dollar plus barrier to entry, which is greatly restrictive and thus anticompetitive.[227] Additionally, the circuit court held for the merger of AT&T and Time Warner because it noted that AT&T and Time Warner would not solely do business with each other after the merger because that would hinder corporate profit maximization.[228] Regarding the Google lawsuit and using *United States v. AT&T, Inc.* as the governing law, the court may be inclined to find that Google is engaging in anticompetitive conduct because, unlike AT&T and Time Warner, Google is shutting off distribution channels for competitors by demanding distributors only partner with Google.[229] Additionally, in further applying the holding of *United States v. AT&T, Inc.*, the Google court could find that Google has violated antitrust laws by its search business monopoly. The court may seek to cure Google's anticompetitive behavior in the present and future by imposing restrictive conduct remedies on the tech giant.[230] This case is ongoing, and a tentative trial start date has been set for 2023.[231]

Following the Google lawsuit, on December 9, 2020, the Federal Trade Commission and 46 states[232] sued Facebook, Inc. ("Facebook") for anticompetitive conduct and unfair methods of competition in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act").[233] The complaint alleged that Facebook bought companies Instagram and WhatsApp to eliminate threats to Facebook's dominant position.[234] Additionally, the complaint accused Facebook of enforcing anticompetitive conditions on access to its "valuable" platform interconnections.[235] Anticompetitive conditions included making application programming interfaces ("APIs") available to third-party apps *only* if third-parties refrained from providing the same core functions offered by Facebook and refrained from connecting with

227. Complaint, *supra* note 222, at 5.

228. *See supra* text accompanying notes 173–174.

229. Complaint, *supra* note 222, at 6.

230. *See supra* Section IV.A.

231. Lauren Feiner, *DOJ Case Against Google Likely Won't Go To Trial Until Late 2023, Judge Says*, CNBC (Dec. 18, 2020, 5:48 PM), https://www.cnbc.com/2020/12/18/doj-case-against-google-likely-wont-go-to-trial-until-late-2023-judge-says.html.

232. Maryland's Attorney General Brian E. Frosh joined the other state Attorneys General in suing Facebook and stated that the lawsuit would "bring the market back into balance, allow other businesses to compete, and will protect the privacy of millions of users." Mark Fowser, *Del., Md. Join Facebook Anti-Trust Lawsuit*, WGMD (Dec. 10, 2020), https://www.wgmd.com/del-md-join-facebook-anti-trust-lawsuit/.

233. Complaint for Injunctive and Other Equitable Relief at 1, Fed. Trade Comm'n v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020); 15 U.S.C. § 45(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

234. Facebook CEO Mark Zuckerberg wrote in a 2008 email "it is better to buy than compete." Complaint for Injunctive and Other Equitable Relief, *supra* note 233, at 2.

235. *Id.* at 7.

or promoting other social networks.[236] Such conduct was alleged to harm competition in multiple ways, including preventing third-party apps from (1) working in certain ways with firms that compete with Facebook and (2) evolving into competitors that could one day threaten Facebook's "personal social networking" monopoly.[237]

On June 29, 2021, federal Judge James Boasberg dismissed the Facebook lawsuit filed by the FTC and the states.[238] The Judge stated that the FTC's lawsuit was "legally insufficient" as it did not plead enough allegations to support the claim of monopolization.[239] On August 19, 2021, the FTC filed an amended complaint, again alleging anticompetitive conduct and unfair methods of competition by Facebook in violation of Section 5(a) of the FTC Act.[240] The anticompetitive conduct allegations are similar: first, that Facebook has a strategy to "buy or bury" threatening innovators to suppress competition, including acquiring and controlling Instagram and WhatsApp; and second, that Facebook requires conditional dealing policies in its agreements with firms that interoperate with its platform to limit third-party apps' abilities to engage with Facebook rivals or even become Facebook rivals themselves.[241]

Using *United States v. AT&T, Inc.* as the governing law, the Facebook court may be inclined to rule against Facebook. First, there are significant barriers to entry in the social networking market, including direct network effects and high switching costs.[242] A key reason the AT&T and Time Warner merger, as well as the Hammerhill merger, were allowed, was that there were not high barriers to entry in the industry.[243] On the other hand, a high barrier to entry, evidenced in *Ford Motor Co.*,

236. *Id.* at 7–8.

237. *Id.* at 8.

238. Brett Kendall, *Government Antitrust Lawsuits Against Facebook Thrown Out by Federal Judge*, WALL ST. J. (June 29, 2021), https://www.wsj.com/articles/federal-judge-dismisses-government-antitrust-lawsuits-against-facebook-11624907747.

239. *Id.*

240. First Amended Complaint for Injunctive and Other Equitable Relief at 1, Fed. Trade Comm'n v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021).

241. *Id.* at 25–26, 43.

242. Direct network effects "refer to user-to-user effects that make a personal social network more valuable as more users join the service." First Amended Complaint for Injunctive and Other Equitable Relief, *supra* note 240, at 70.

243. United States v. Hammerhill Paper Co., 429 F. Supp. 1271, 1285–86, 1293 (W.D. Pa. 1977) (finding the vertical merger to be lawful because industry barriers to entry were historically so low that if the merged entity attempted to foreclose competitors from distribution access, the foreclosed could just establish a new firm); United States v. AT&T, Inc., 916 F.3d 1029, 1042 (D.C. Cir. 2019) (noting that barriers to entry in the video programming and distribution industry were penetrable, meaning the merger of AT&T and Time Warner would not completely foreclose industry entrants).

was held to be anticompetitive.[244] Additionally, the conditions Facebook imposed on third-party apps had the potential to prevent these third-parties from working with other firms; this anticompetitive conduct differed from the predicted competitive conduct of AT&T and Time Warner where the judge found that AT&T would elect to do business with distributors in addition to Time Warner post-merger to maximize profit.[245] Lastly, AT&T and Time Warner sought to merge to benefit from each other's offerings, prevent individual dissolution, and engage in operating synergies.[246] On the other hand, Facebook acquired Instagram and WhatsApp solely to prevent market competition.[247] Similar to the predicted outcome of the Google lawsuit, applying the holding of *United States v. AT&T, Inc.*, the court could find that Facebook has violated antitrust laws by solely acting to suppress competition. While this lawsuit is ongoing, in October 2021 Facebook filed another motion to dismiss the FTC's lawsuit.[248]

V. Conclusion

In *United States v. AT&T, Inc.*, the United States Court of Appeals for the District of Columbia Circuit addressed whether the proposed merger between AT&T and Time Warner violated Section 7 of the Clayton Act.[249] Ultimately, the D.C. Circuit Court held that the merger did not have anticompetitive effects because the merger did not increase the merged entity's bargaining power, so the court denied a permanent injunction for the merger.[250] The court correctly found that the merger would not substantially impact industry competition because behavioral remedies imposed on the merger would curtail increased leverage against distributors and remedy a tendency towards anticompetitive arrangements.[251] The merger also has the potential to increase competition in the market by preventing the elimination of AT&T or Time Warner from an evolving market that the pre-merged companies struggled to stay relevant in.[252]

244. Ford Motor Co. v. United States, 405 U.S. 562, 566–68 (1972) (holding that the acquisition of one company's assets by another company was anticompetitive because it raised barriers to entry in the market by leaving only one independent player remaining in the replacement market).

245. *AT&T*, 916 F.3d at 1044.

246. United States v. AT&T Inc., 310 F. Supp. 3d 161, 181–82 (D.D.C. 2018), *aff'd* 916 F.3d 1029, 1031–32 (D.C. Cir. 2019).

247. First Amended Complaint for Injunctive and Other Equitable Relief, *supra* note 240, at 76–78.

248. Lauren Feiner, *Facebook Files Motion to Dismiss FTC Lawsuit Again, Says Chair Khan Should Have Recused Herself*, CNBC (Oct. 4, 2021, 2:35 PM), https://www.cnbc.com/2021/10/04/facebook-files-to-dismiss-ftc-lawsuit-again-says-khan-should-have-recused.html.

249. *AT&T*, 916 F.3d at 1031–32.

250. *Id.* at 1047.

251. *See supra* Section IV.A.

252. *See supra* Section IV.B.

In just a few years following the district and circuit courts' decisions, the merger has negatively impacted customers, forged an increase in vertical mergers, and led the government to attempt to regain control over the process by enacting new vertical merger guidelines.[253] With the lawsuits recently filed by U.S. agencies against Google and Facebook for violating antitrust laws[254] and further inquiries into the market powers of Amazon and Apple, potential changes and challenges to current antitrust law are on the horizon.[255]

253. *See supra* Section IV.C.

254. Anat Alon-Beck & Nizan Geslevich Packin, *Antitrust is Back: A Q&A with the Experts*, FORBES (Dec. 14, 2020, 1:18 PM), https://www.forbes.com/sites/anatalonbeck/2020/12/14/antitrust-is-back-a-qa-with-the-experts/?sh=1dffa072216d.

255. Ryan Tracy, *House Panel Says Big Tech Wields Monopoly Power*, WALL ST. J. (Oct. 6, 2020, 8:07 PM), https://www.wsj.com/articles/house-panel-calls-for-congress-to-break-up-tech-giants-11602016985.

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