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Functional Discounts After Texaco v. Hasbrouck

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The fact that the *ARCO* conspiracy was vertical while the *Trial Lawyers* case involved a horizontal arrangement is insignificant. As Justice Stevens points out in his *ARCO* dissent, the result in *ARCO* should be the same if the conspiracy not to charge more than a specified maximum price were horizontal among all of the ARCO dealers and not vertically imposed by their common supplier.[105] In either case, the competitive injury, or absence thereof, would be the same, and thus they should receive the same treatment from the law. Indeed, Justice Brennan's argument that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition"[106] applies both to horizontal as well as vertical arrangements.

One cannot read *ARCO* without wondering whether the majority of the Justices really believe that, as a matter of substantive law, the per se rule ought to apply to a vertical maximum price-fixing scheme but are unwilling to come right out and say so by overruling *Albrecht*. More significantly, the case may signal acceptance by the Court's majority of an antitrust outlook that focuses on consumer welfare as the Alpha and Omega of Sherman-Act concern and permits restraints that are not likely to injure consumers somewhere down the road. There certainly is enough language in the *ARCO* opinion to support such a conclusion.

CONCLUSION

It might be good public policy to limit the ambit of per se antitrust doctrine to anticompetitive conduct that is highly likely to injure consumers. And it might be equally good policy to permit underpaid public defenders to use coercive pressure to persuade their governmental customers to raise their rates of pay—particularly when the D.C. Superior Court lawyers, had they been employees of the Legal Aid Society, could have gone on strike without any antitrust concern. In confronting these troubling policy issues, I fear that *Trial Lawyers* and *ARCO* have produced results that are difficult to rationalize. Whether that is because the Justices do not have small minds and consistency would have been foolish I leave to the reader.

FUNCTIONAL DISCOUNTS AFTER *TEXACO V. HASBROUCK*

by Richard M. Steuer[107]

IN *Texaco Inc. v. Hasbrouck*,[108] the much-maligned Robinson-Patman Act—that pariah of antitrust—came face to face with the Supreme

105. *See id.* at 1900 (Stevens, J., dissenting).
106. *Id.* at 1892.
107. Partner, Kaye, Scholer, Fierman, Hays & Handler, New York.
108. 110 S. Ct. 2535 (1990). The author's law firm represented Texaco before the Supreme Court.

Court for the first time in seven years. In years past, commentators have called for the abolition of this law, terming it, among other things, "obstructive,"[109] "pernicious"[110] and "perverse."[111] The Court's objective in *Hasbrouck*, however, was confined to correcting a renegade ruling by the Ninth Circuit that jeopardized the continued existence of wholesaling as we know it. To understand the Court's holding, it is essential to understand the import of the Ninth Circuit's later-reversed ruling.

Texaco sold gasoline at three price levels in the area of Spokane, Washington in the 1970s. First, it sold directly to independent retailers, including Mr. Hasbrouck, who operated service stations under the Texaco trademark. Second, it sold to Dompier Oil Company, which functioned originally as a wholesaler and later as both a wholesaler and a retailer. Dompier resold to independent retailers operating under the Texaco trademark, and later began reselling directly to the public through stations that it owned and that also were operated under the Texaco trademark. Texaco charged Dompier between 3.95 and 3.65 cents less than the price paid by Hasbrouck and the other independent retailers.[112] Although Dompier operated a small bulk storage facility, the Court found that it usually delivered gasoline directly from Texaco to the retail stations, for which Texaco paid it an additional hauling fee.[113] The third price level at which Texaco sold gasoline applied to another customer, Gull Oil Company. Gull sold directly to the public through retail service stations operated by third-party contractors under the "Gull" trademark.[114] Texaco charged Gull four to six cents less than the price Hasbrouck paid.[115]

The Texaco stations supplied by Dompier regularly sold Texaco brand gasoline to the public at lower prices than Hasbrouck and the other Texaco stations that were supplied directly by Texaco. This caught the attention of Mr. Hasbrouck and the other independent retailers, and ultimately that group filed suit. The case was tried before a jury.[116] The plaintiffs demonstrated that Texaco had granted wholesale discounts to

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109. Baxter, *Vertical Practices — Half Slave, Half Free*, 52 Antitrust L.J. 743, 754 (1983).

110. R. Bork, The Antitrust Paradox 382 (1978).

111. R. Posner, Antitrust Law 62 n.35 (1976). *See generally* ABA Antitrust Section Monograph No. 4, The Robinson-Patman Act: Policy and Law Volume I at 27-37 (1980) (critically examining the Robinson-Patman Act).

112. *See* Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2539 (1990).

113. *See id.* at 2540.

114. The stations were owned by third party operators, but Gull retained title to the gasoline until it was sold to the consumer. *See id.* at 2539.

115. *See id.*

116. The case actually was tried twice. The first jury found against Texaco, but the district court granted Texaco judgment notwithstanding the verdict on the ground that it was improper to award what amounted to "automatic" damages by simply calculating the amount of the "overcharge" to the dealers. Shortly thereafter, the Supreme Court confirmed the correctness of the district court's analysis in J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567-68 (1981). The Ninth Circuit overruled the district court's grant of judgment notwithstanding the verdict, but remanded for a new

Dompier and Gull, and asserted that as a consequence they had lost business to the retailers that Dompier and Gull supplied.[117] The jury agreed, and returned a verdict for the plaintiffs that was trebled to $1,349,700.[118]

The Ninth Circuit affirmed.[119] Because the plaintiffs had not drawn any distinction between the wholesale and retail functions of Dompier and Gull, the court focused exclusively on the wholesaling function performed by Dompier.[120] It was understood that if the plaintiffs could not prove a violation based on Dompier's activities as a wholesaler, before it also began to engage in retailing, their claim could not be sustained.[121]

The Ninth Circuit recognized that suppliers like Texaco "are permitted to use . . . functional discounts,"[122] charging wholesalers less than retailers, but then saddled Texaco with the unprecedented burden of proving what it called a "quantitative justification" for such a discount.[123] The court stated that the test for a wholesale discount should be whether it "compensate[s the] buyers for the distributional services they perform."[124] According to the Ninth Circuit, injury at the retail level is established if wholesalers receive "a functional discount in excess of the *value* of the services they perform, all or a portion of which they then *pass on* to the retailers they supply."[125] Thus, a violation of Section 2(a) "may occur if (1) the discount [Dompier] received was not cost-based and (2) all or a portion of it was passed on . . . to customers . . . who competed with Hasbrouck."[126]

In essence, the Ninth Circuit adopted a cost-justification test. But unlike the cost-justification defense under section 2(a) of the Robinson-Patman Act, which turns on the *seller's* costs (and derives from the text of the statute itself), this cost-justification test for wholesaler discounts hinged on the *buyer's* costs in providing the services performed.[127] It is notoriously difficult for sellers to calculate their *own* costs for providing

trial to conform with the analysis of *J. Truett Payne*. *See* Hasbrouck v. Texaco Inc., 663 F.2d 930, 932-33 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

117. *See* Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2540-41 (1990).

118. *See id.* at 2541.

119. *See* Hasbrouck v. Texaco Inc., 842 F.2d 1034, 1039-40 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990).

120. *See id.* at 1038-41.

121. Hasbrouck v. Texaco Inc., 634 F. Supp. 34, 36-37 (E.D. Wash. 1985), *aff'd*, 830 F.2d 1513 (9th Cir.), *superceded*, 842 F.2d 1034 (9th Cir. 1987).

122. *Hasbrouck*, 842 F.2d at 1038.

123. Hasbrouck v. Texaco Inc., 842 F.2d 1034, 1039 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990). The court pointed to evidence that Dompier had "passed on" part of the discount it had received from Texaco to the retailers it supplied. *See id.* It also accepted plaintiffs' proof that "in order to stay in business, gasoline retailers needed a profit margin in the neighborhood of ten cents per gallon; yet, service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two to three cents higher than the price that Hasbrouck paid to Texaco." *Id.*

124. *Id.* at 1038.

125. *Id.* at 1039 (emphasis added).

126. *Id.*

127. *See id.* at 1040-41.

distribution services. It would be nearly impossible for the seller to predict the buyer's costs of providing such services.

Texaco successfully petitioned for certiorari.[128] The Supreme Court affirmed the outcome of the case, but rejected the Ninth Circuit's formulation of the law, saying instead that "we agree with the basic thrust of *Texaco*'s argument."[129] Writing for a six-Justice majority, Justice Stevens modified the Ninth Circuit's cost-justification test, adopting a more flexible test of what the Court termed "reasonable reimbursement." This test is based on either the supplier's savings or the wholesaler's costs.[130] In essence, "[a] supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers."[131]

The Court began its analysis by rejecting Texaco's threshold argument that there had been no "discrimination" within the meaning of the Robinson-Patman Act because the sales in question had not been made to competing purchasers at the same level of trade. Reaffirming its previous holding in *FTC v. Anheuser-Bush, Inc.*,[132] the Court responded that "a price discrimination within the meaning of [section] 2(a) 'is merely a price difference.' "[133]

The Court then turned to Texaco's argument that the price differentials at issue had not injured competition. In the 1948 case *FTC v. Morton Salt Co.*,[134] the Supreme Court had held that injury to competition may be inferred simply from evidence that some purchasers had to pay their supplier substantially more than their competitors paid.[135] Texaco contended that this inference—the so-called *Morton Salt* inference—"should not apply to differentials between prices charged to wholesalers and [prices] charged to retailers."[136] Texaco argued vigorously that it would be inconsistent with antitrust policy to hold a manufacturer responsible for differentials between the prices it charges to retailers and the prices its *wholesalers* charge to retailers, because this would require a manufacturer to control its *customers'* resale prices.[137]

The Court agreed, quoting at length from the celebrated 1955 Report

128. *See* Texaco Inc. v. Hasbrouck, 109 S. Ct. 3154 (1989) (petition for certiorari granted). The United States filed a brief as amicus curiae on behalf of Texaco, and thirty five states filed a brief on behalf of the Hasbrouck group. *See* Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2538 (1990).

129. *Hasbrouck*, 110 S. Ct. at 2538 (emphasis added).

130. *See id.* at 2547.

131. *Id.* at 2545.

132. 363 U.S. 536 (1960).

133. Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2544 (1990) (quoting FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960)).

134. 334 U.S. 37 (1948).

135. *See id.* at 45.

136. *Hasbrouck*, 110 S. Ct. at 2544.

137. *See* Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2544 (1990).

of the Attorney General's National Committee to Study the Antitrust Laws (of which Justice Stevens was a member). That Report recommended

> that suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, 'the effect of' a differential that merely accords due recognition and reimbursement for actual marketing functions.[138]

The Court reasoned that, unlike the situation arising where a supplier discriminates between two competing retailers at the same level, anticompetitive effects upon the customers of wholesalers "may not be presumed automatically in every functional discount setting, and, indeed, one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition."[139]

Not all functional discounts, however, qualify as "legitimate." As the Court stated: "[a]t the least, a functional discount that constitutes a *reasonable reimbursement* for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate, the inference of injury to competition recognized in the *Morton Salt* case will simply not arise."[140] Thus, while the Court did not explicitly accept Texaco's argument[141] that the *Morton Salt* inference of competitive injury should never apply to functional discounts, it fashioned a rule under which injury to competition is established if there is proof that a functional discount does *not* constitute reasonable reimbursement. Arguably, there is no inference left to *Morton Salt*. All that remains is a matter of proof.

Having won the war with the Ninth Circuit and having persuaded the Supreme Court to adopt a more rational rule for functional discounts, Texaco lost this particular and unique battle with the Hasbrouck group—unique because the facts were driven largely by the presence of federal price controls.[142] The Supreme Court found "no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions."[143] Noting that "not every functional discount is entitled to a judgment of legitimacy," the Court reasoned that "it will sometimes be possible to produce evidence showing that a particular functional dis-

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138. *Id.* at 2545 (quoting Report of Attorney Generals' National Committee to Study the Antitrust Laws 208 (1955)). The Court generally agreed with this assessment, stating that a "supplier need not satisfy the rigorous requirements of the cost justification" test. *Id.*

139. *Id.* at 2550.

140. *Id.* (emphasis added).

141. This argument was also advanced by the Government as amicus. *See id.* at 2544.

142. *See* Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2540 nn.4, 5 (1990).

143. *Id.* at 2546.

count caused a price discrimination *of the sort the Act prohibits*."[144]

The Court held that the concept of "due recognition and reimbursement" for actual marketing functions "would not countenance a functional discount completely untethered to *either* the supplier's savings or the wholesaler's costs."[145] Stated positively, the Court suggests that a functional discount is legitimate if it provides reasonable reimbursement for *either* the supplier's savings *or* the wholesaler's costs—whichever can reasonably be estimated. In *Hasbrouck*, the Court held that there was proof of neither.

The Court noted that the evidence provided an illustration of the so-called "scrambled functions" performed by distributors that operate on both a wholesale and a retail level. The Court observed that instances of such a scrambled existence have "frequently signaled the illegitimacy . . . of what is alleged to be a permissible functional discount."[146] This is somewhat confusing because the narrow issue being addressed was the legality of the discount provided to Dompier at the time that it was functioning entirely as a wholesaler, that is, unscrambled. But the Court did not confine its observations to that aspect of the facts. Rather, it pointed out that "[b]oth Gull and Dompier received the full discount on all their purchases even though most of their volume was resold directly to consumers."[147] The Court inferred from this that "[t]he extra margin on those sales *obviously* enabled them to price aggressively in both their retail and their wholesale marketing."[148]

The ability of Dompier and Gull to pass on their discounts would not have been obvious, however, if there had been evidence that Gull and Dompier had shouldered significant costs normally attributed to wholesaling. The real key was not that Dompier and Gull were engaging in retailing, but that it appeared from the record that they never spent significant resources on wholesaling. The Court seems to have been persuaded by the findings that Gull's only expense relating to storage or transport was the operation of a couple of trucks,[149] and that all of Dompier's expenses for transport were separately compensated with an additional hauling allowance.[150]

Because Dompier's customers, and Dompier and Gull themselves, were competing with the Hasbrouck group's service stations, *and* were enjoying an "extra margin," the Court concluded that the "presumption of adverse effect on competition recognized in the *Morton Salt* case [was] appropriate."[151] Thus, "any presumption of legality that would other-

144. *Id.* at 2550-51 (emphasis added).
145. *Id.* at 2546 (emphasis added).
146. *Id.* at 2550.
147. *Id.*
148. *Id.* (emphasis added).
149. "Dompier was separately compensated for its hauling function, and neither Gull nor Dompier maintained any significant storage facilities." *Id.* at 2546.
150. *See id.* at 2550.
151. *Id.*

wise apply to their wholesale sales" was rebutted.[152] In other words, because the plaintiffs demonstrated that the functional discounts in this case did not constitute a reasonable reimbursement, injury to competition was established.

Having held against Texaco on liability, the Court was careful not to send the wrong signal on the rule it adopted. The Court explicitly cautioned that anticompetitive effects "surely *may not be presumed automatically* in every functional discount setting,"[153] and explained that a successful plaintiff must "produce evidence showing that a particular functional discount caused a price discrimination of the sort the Act prohibits."[154] Thus, a functional discount "that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate,"[155] the *Morton Salt* inference of injury to competition—to the extent it survives—will not arise.

Recall that where all customers are at the *same* level, *Morton Salt* simply requires evidence that some purchasers had to pay substantially more than their competitors over a significant period.[156] So who bears the burden of proof on the reasonableness of the reimbursement where functional discounts to customers at *different* levels are involved? The Court referred to a "presumption of *legality*" that normally applies to functional discounts, and held that "[w]hen . . . anticompetitive effects are *proved* . . . they are covered by the Act."[157] Consequently, the rule against presuming anticompetitive effects in functional discounts overrides the automatic triggering of the *Morton Salt* inference. Thus, where a functional discount is involved, a plaintiff must prove not only the existence of the price difference, but also the unreasonableness of the discount.

The question left open after *Hasbrouck*, however, is how to calculate what is and what is not a "reasonable" discount. *Hasbrouck* makes clear that if the plaintiff can establish that the favored customer was not performing any wholesaling functions, and was actually selling to consumers solely as a retailer, then providing a wholesaler's discount to that customer would not be reasonable and would create an illegal price discrimination. Most cases involving "scrambled" distributors, however, are not as simple as the Court found this one to be. Where a distributor provides legitimate wholesale services and also sells at retail, what would a plaintiff have to show in order to prove that a discount provided to that distributor did not represent "reasonable reimbursement" for the wholesale services?

152. *Id.*
153. *Id.* (emphasis added).
154. *Id.* at 2550-51.
155. *Id.* at 2550.
156. *See* FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948).
157. Texaco Inc. v. Hasbrouck, 110 S. Ct. 2535, 2551 (1990) (emphasis added).

The Court offers two yardsticks for measuring the reasonableness of the functional discount: the supplier's savings and the distributor's costs.[158] To satisfy its burden of proof, a plaintiff apparently must prove that the wholesaler discount did not provide reasonable reimbursement *either* for the seller's savings *or* for the buyer's costs. But does this mean that a plaintiff in each case needs to prove the amount of the wholesale discount, the amount of the seller's savings and the amount of the buyer's costs in order to establish a prima facie case? Or is it enough that a plaintiff prove the amount of the discount and *either* the amount of the seller's savings or the buyer's costs, and thereby shift the burden of proof to the other side?

The opinion leaves this and other questions unanswered. In discussing "reasonable reimbursement," the Court took pains to emphasize that it was not requiring mathematical "exactitude" or "rigorous accounting,"[159] but failed to explain exactly when and why a reimbursement becomes unreasonable. For example, is a discount that is twice as great as the seller's or the buyer's costs of providing the wholesale services unreasonable? Certainly a distributor is entitled to earn some margin of profit for wholesale services—why else would anyone become a wholesaler? The Court also failed to address the impact of a course of dealing between the supplier and the wholesaler. Should it make a difference whether the supplier has a historical basis for knowing the costs of wholesaling services with some certainty? Should there be more leeway in situations where suppliers have had little experience on which to base the amount of the discount?

When establishing or changing a functional discount, the prudent seller will estimate what the wholesaling services are worth to it—what it would have to pay an independent contractor to perform those services.

158. In the *Doubleday* case, the Federal Trade Commission held that there is no injury to competition where a buyer receives a discount that compensates it for the costs of additional services performed for the benefit of the seller. *See In re* Doubleday & Co., 52 F.T.C. 169, 209 (1955). In the *Mueller* case the Federal Trade Commission held that a discount is improper to the extent it compensates a particular buyer for services that benefit not only the seller, but the buyer as well. *See In re* Mueller Co., 60 F.T.C. 120, 127-28 (1962). In the *Boise Cascade* case the Commission embraced the *Mueller* rule, only to have its decision overturned by the Court of Appeals for the D.C. Circuit on the ground that competitive injury had not been proved. *See* Boise Cascade Corp. v. F.T.C., 107 F.T.C. 76 (1986), *vacated*, 837 F.2d 1127 (D.C. Cir. 1988).

In *Hasbrouck*, the Supreme Court did not need to resolve the *Doubleday-Mueller* struggle because the issue to be decided was limited to discounts provided to a buyer that sells at a different level than other buyers. *See* Texaco v. Hasbrouck, 110 S. Ct. 2535, 2547-48 (1990).

159. *Hasbrouck*, 110 S. Ct. at 2547 n.21. The *Hasbrouck* Court specifically rejected what it called "the requirement of exactitude which might be inferred from [the dictum of the Federal Trade Commission's 1955 decision in *In re* Doubleday & Co., 52 F.T.C. 169, 209 (1955),] that a functional discount offered to a buyer 'should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.' " *Id.* (quoting Doubleday & Co., 52 F.T.C. at 209). The Court explained that "a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense." *Id.*

Alternatively, the seller could estimate what costs its customers are incurring when they provide those services, including a reasonable return. If the amount of the functional discount bears a reasonable relationship to either of those estimates, this should satisfy the Supreme Court's standard. There is no one method for making these estimates, and the Court intentionally avoided limiting the calculation to any particular formula. It is also worth noting that in many industries wholesalers sell to any and all retailers, in which case no retailer stands to be injured from functional discounts and there can be no injury to competition.

Justice Scalia, joined by Justice Kennedy, filed a separate concurring opinion asserting that functional discounts are prohibited by the text of the Robinson-Patman Act regardless of whether they are "reasonable" under some judge-made standard.[160] Justice Scalia further stated that he did not believe that a functional discount could be "reasonable" unless it actually met the requirements of the cost-justification defense.[161]

Hasbrouck may not signal a resurgence of Robinson-Patman litigation, but it does serve as a reminder that the law cannot be ignored. The bottom line is that the Supreme Court checked what would have been a very disruptive ruling from the Ninth Circuit. Under the Supreme Court's framework, suppliers can sell to their wholesalers at lower prices than they sell to their retailers if the wholesalers are providing some genuine wholesaler services and the discount they enjoy is "reasonable." If companies designated as "wholesalers" are actually performing other functions, however, close scrutiny is advised. Likewise, if the amount of the discount appears unreasonably large, the supplier should investigate why it is being provided. Absent a legitimate reason for such a large discount, its effect on the market at the retail level may make it the target of litigation.

PRIVATE DIVESTITURE ACTIONS: *CALIFORNIA V. AMERICAN STORES CO.*

by Richard M. Steuer[162]

IN today's controversy over the direction of antitrust, nothing has been more hotly debated than the subject of merger control. For the most part, the Supreme Court has remained above the fray, taking only a single merger case during the entire Reagan Administration. In that case,

160. *See id.* at 2555.

161. He pointed out that the requirements of that defense "are not the rigors of mathematical precision, but the rigors of *proof* that the amount of the discount and the amount of the cost saving are close enough that the difference cannot produce any *substantial* lessening of competition." *Id.* (emphasis in original).

Justice White concurred in the result, asserting that this was not an appropriate case in which to make pronouncements on functional discounts because the discounts at issue would not qualify under any definition. *Id.* at 2553.

162. Partner, Kaye, Scholer, Fierman, Hays & Handler, New York.

the 1986 decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[163] the Court held that a company has no standing to challenge a merger between two of its competitors on the ground that it will face tougher competition if the merger takes place.[164]

In other quarters, of course, mergers became one of the liveliest topics of the 1980s. The arrival of the Reagan Administration in 1981 signalled a decidedly restrained approach to the enforcement of antitrust laws directed at mergers. The number and magnitude of mergers grew markedly, while the likelihood of a challenge from Washington diminished perceptibly.[165] This development prompted several state attorneys general to initiate their own merger investigations in instances where they were unsatisfied with federal antitrust enforcement, and the states began to challenge mergers in court. Some cases were filed in state court under state antitrust laws;[166] others were filed in federal court under the federal antitrust laws.[167] Acting through the National Association of Attorneys General, the states also adopted a premerger notification program similar to the federal program established by the Hart-Scott-Rodino Act in 1976, but on a voluntary rather than a mandatory basis.[168]

This grassroots approach drew criticism from those who believe that effective merger policy requires coordinated enforcement at the federal level, not a balkanized environment in which merging companies can face challenges from the federal government, the fifty states and the District of Columbia—all in just this one country.[169] The states, on the other hand, argued that they had to be free to proceed against consolida-

163. 479 U.S. 104 (1986).

164. *See id.* at 116. However, the Court declined an invitation from the Justice Department, appearing as amicus, to adopt a blanket rule denying companies standing to challenge any acquisitions by their competitors on the basis of anticipated price cutting by the merging companies. *Cargill* not only was the Court's only merger decision during the Reagan Administration; it was its only pronouncement on mergers since 1977, when in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Court held that a plaintiff in a merger case must prove "antitrust injury" in order to recover monetary damages. *See id.* at 489.

165. *See* Fox & Sullivan, *Antitrust - Retrospective and Prospective: Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 948-49 (1987); Handler, *Is Antitrust's Centennial A Time for Obsequies Or for Renewed Faith in Its National Policy?*, 10 Cardozo L. Rev. 1933, 1936 n.13 (1989).

166. *See, e.g.*, State v. Coca Cola Bottling Co., 697 S.W.2d 677, 678 (Tex. Ct. App. 1985) (state action to divest acquisition under state law counterpart to section 7 of the Clayton Act; no prior HSR review by federal agencies).

167. *See, e.g.*, Connecticut v. Wyco New Haven, Inc., 1990-1 Trade Cas. (CCH) ¶ 69,024 (D. Conn. 1990) (consent decree); Massachusetts v. Campeau Corp., 1988-1 Trade Cas. (CCH) ¶ 68,093 (D. Mass. 1988) (consent decree); City of Pittsburgh v. May Dep't Stores Co., 1986-2 Trade Cas. (CCH) ¶ 67,304 (W.D. Pa. 1986) (state and city action resulting in divestiture of local store following FTC no-action decision).

168. *See* National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact, 53 Antitrust & Trade Reg. Rep. (BNA) 943, 943-44 (1987).

169. *See* Crane, *The Future Direction of Antitrust*, 56 Antitrust L.J. 3, 9 (1987); Oliver, *The Role of the Federal Trade Commission in Formulating and Implementing Competition Policy*, 34 Fed. B. News & J. 200, 204 (June 1987).

tions that threatened their local economies, whether or not federal agencies saw fit to act.[170]

At the same time, private merger litigation began to command increasing attention. Notwithstanding *Cargill*, a number of plaintiffs succeeded in establishing standing to challenge acquisitions by their competitors. For example, in the 1987 case *Tasty Baking Co. v. Ralston Purina, Inc.*,[171] a snack cake manufacturer secured an injunction blocking the merger of two of its rivals on the ground that the combination would foreclose its own products from the limited space available on retailers' shelves.[172] In 1988, in *Phototron Corp. v. Eastman Kodak Co.*,[173] a photo processor obtained a preliminary injunction blocking the acquisition of a competing processor by Kodak,[174] although the court of appeals quickly reversed on the strength of *Cargill*, holding that the plaintiff was really complaining about the threat of greater competition.[175]

In 1989, in *R.C. Bigelow, Inc. v. Unilever N.V.*,[176] a manufacturer of herbal tea successfully obtained an injunction blocking the merger of its two major competitors. The Second Circuit held that a company should have standing to challenge a merger between its two competitors where market shares and other evidence suggested that the merging firms would be able to foreclose the company from access to its customers.[177] Finally, in *Consolidated Gold Fields PLC v. Minorco, S.A.*,[178] also decided in 1989, the Second Circuit held that a gold mining company was entitled to an injunction blocking the takeover of its major shareholder by another mining company that threatened to use its voting power to curtail the plaintiff's competing operations.[179]

Thus, by 1989, states and private parties had undertaken no small amount of merger enforcement of their own. Although many of these cases sought injunctions to block proposed mergers, others were brought too late for that, and consequently sought divestiture of completed mergers.[180] The law was split on the right of a private party—which for this

170. *See* Constantine, *Antitrust Federalism*, 29 Washburn L.J. 163, 179-81 (1990).

171. 653 F. Supp. 1250 (E.D. Pa. 1987).

172. *See id.* at 1273, 1277.

173. 687 F. Supp. 1061 (N.D. Tex.), *rev'd*, 842 F.2d 95 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988).

174. *See id.* at 1072.

175. *See* Phototron Corp. v. Eastman Kodak, 842 F.2d 95, 100-102 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988). *See generally* Note, *Competitor Standing to Challenge a Merger of Rivals*, 75 Cal. L. Rev. 2057, 2057 (1987) (arguing that *Cargill* does not preclude antitrust suits by competitors).

176. 867 F.2d 102 (2d Cir.), *cert. denied*, 110 S. Ct. 64 (1989).

177. *See id.* at 111.

178. 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

179. *See id.* at 254-58. The Supreme Court denied petitions for certiorari in both *Bigelow* and *Consolidated Gold Fields*, so it is impossible to know whether the Court would have agreed that *Cargill* was distinguishable in those two cases. *See* Thomas J. Lipton, Inc. v. R.C. Bigelow, Inc., 110 S. Ct. 64 (1989); Minorco v. Consolidated Gold Fields PLC, 110 S. Ct. 29 (1989).

180. See cases cited *supra* notes 166, 167.

purpose included a state—to seek divestiture, with the Ninth Circuit holding that there was no such right and the First Circuit holding that there was.[181]

It was against this backdrop of state and private litigation that the Supreme Court once again turned its attention to a merger suit in *California v. American Stores Co.*[182] In a 9-0 decision, the Court held that private parties have the right to seek divestiture as a form of relief under the federal antitrust laws.[183]

The history of the case is unusual. American Stores operated supermarkets in forty states, including California, where its Alpha Beta division was the fourth largest chain. In March 1988, it initiated a tender offer to acquire the stock of Lucky Stores, the largest chain in California, for $2.5 billion, and so notified the Federal Trade Commission ("FTC"). It provided information on the merger both to the FTC and to the state of California. The FTC conducted an investigation and entered into a consent agreement with American under which American agreed to divest thirty-seven of its California stores and to hold the Lucky assets and operations separate until the divestiture was complete.[184] With the FTC's approval, American then proceeded to acquire the stock of Lucky Stores. Complying with the consent agreement, however, it kept the business operations of the two companies separate. About three months later, after a public comment period, FTC approval of the acquisition became final; this occurred about five months after the original notifica-

181. The Sixth Circuit adopted the Ninth Circuit's position, while the First Circuit's holding found support in decisions of the Third Circuit and several district courts. *Compare* International Telephone and Telegraph v. General Telephone & Electronics Corp., 518 F.2d 913, 920 (9th Cir. 1975) (no divestiture remedy in private action under section 16 of Clayton Act); Calnetics Corp. v. Volkswagen of America, Inc. 532 F.2d 674, 692 (9th Cir. 1976) (same), *cert. denied*, 429 U.S. 940 (1976); Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 607 (9th Cir. 1977) (same) *and* Arthur S. Langenderfer Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1060 (6th Cir.) (following Ninth Circuit in denying divestiture remedy to private plaintiff), *cert. denied*, 469 U.S. 1036 (1984); *with* Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 414 (1st Cir. 1985) (concluding that section 16 of Clayton Act recognizes divestiture as remedy in private action); NBO Industries Treadway Companies, Inc. v. Brunswick Corp., 523 F.2d 262, 278-79 (3d Cir. 1975) (endorsing the Ninth Circuit's reasoning, but refusing to rule on the applicability of divestiture generally because, on the facts, less drastic relief was available), *rev'd on other grounds sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 640 (S.D.N.Y. 1975) ("divestiture is a potential remedy for private parties injured by violations of the Clayton Act"); Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F. Supp. 1016, 1025 (S.D.N.Y. 1979) (divestiture available for Clayton Act § 7 violation); Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 81-82 (N.D. Cal. 1972) (same); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 797 (S.D. Tex. 1971) (divestiture permitted to private parties under § 16, but should be avoided where other remedies are available), *aff'd*, 476 F.2d 989, 992 (5th Cir. 1973); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 126-27 (N.D. Cal. 1970) (same); Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 526 (S.D.N.Y. 1965) (same).

182. 110 S. Ct. 1853 (1990).

183. *See id.* at 1855, 1866-67.

184. *See id.* at 1856.

tion had been filed.[185] The very next day, the Attorney General of California, proceeding both on his own behalf and as parens patriae on behalf of California consumers, filed a suit in federal court in Los Angeles, complaining that the acquisition violated section 7 of the Clayton Act and section 1 of the Sherman Act.[186] The state sought a preliminary injunction requiring American to continue holding the Lucky assets separate pending a final adjudication, as well as a permanent injunction requiring divestiture under section 16 of the Clayton Act.[187]

The district court granted a preliminary injunction, finding that California had demonstrated a prima facie violation of section 7.[188] The Ninth Circuit Court of Appeals set the injunction aside, however, on the ground that it amounted to an impermissible divestiture.[189] The Ninth Circuit found that because the merger of American and Lucky had already taken place, notwithstanding the fact that the Lucky assets were being held separate under the FTC consent order, the district court's so-called "hold separate" order really amounted to an indirect form of divestiture. On the authority of its 1975 decision in *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corp.*,[190] the circuit court held that divestiture was not available as a remedy in a private action.[191] The state of California, suing on behalf of state consumers, was the equivalent of a private party under the federal antitrust laws, and thus subject to the same limitations.

California immediately applied to Justice O'Connor for a stay extending the district court's injunction, which was granted.[192] The Supreme Court then granted certiorari to resolve the conflict between the Ninth Circuit's ruling and the 1985 decision of the First Circuit in *Cia. Petrolera Caribe, Inc. v. ARCO Caribbean*.[193] In a unanimous decision, the Court reversed the Ninth Circuit and remanded for further proceedings.[194]

The Court's opinion, authored by Justice Stevens, parsed the language of section 16 of the Clayton Act, which authorizes private suits in equity.

185. California filed comments with the FTC arguing that the merger would be anticompetitive and urging the FTC to withdraw its consent. Brief for Petitioner at 33, California v. American Stores Co., 110 S. Ct. 1853 (1990). It also warned American Stores itself that if the FTC did not remedy the state's concerns, the state might bring an action under section 7 of the Clayton Act. *See id.* at 4.

186. *See id.* at 5.

187. *See id.*

188. *See* California v. American Stores Co., 697 F. Supp. 1125, 1135 (C.D. Cal. 1988).

189. *See* California v. American Stores Co., 872 F.2d 837, 845-46 (9th Cir. 1989), *rev'd in part*, 110 S. Ct. 1853 (1990).

190. 518 F.2d 913 (9th Cir. 1975).

191. *See id.* at 920.

192. 110 S. Ct. 1 (1989).

193. 754 F.2d 404 (1st Cir. 1985). *Caribe* pre-dated *Cargill*, and there is some question whether the underlying allegations in *Caribe*, brought by a competitor, would suffice under the *Cargill* rule.

194. California v. American Stores Co., 110 S. Ct. 1853, 1855, 1867 (1990).

First, the Court rejected American Stores' argument that because section 15 of the Clayton Act empowers the Government to "prevent and restrain . . . violations,' "[195] while section 16 simply authorizes private parties to obtain "injunctive relief . . . against threatened loss or damage,"[196] only section 15 permits divestiture. The Court refused to draw this distinction, and held that section 16 encompasses divestiture "just as plainly" as does section 15.[197] Indeed, the Court remarked that section 16 may actually be *more* expansive than section 15.[198]

The Court then went on to examine the legislative history of section 16, although it was careful to point out that it did not believe the statutory language to be ambiguous on its face.[199] American Stores argued that when Congress enacted the Clayton Act in 1914, it drew a distinction between relief directed at conduct and relief directed at structure.[200] American further argued that at that same time Congress specifically rejected dissolution and divestiture as available remedies for private parties.[201] The Supreme Court reviewed the legislative history itself, concluding that although there is evidence that Congress never intended to authorize outright dissolution as a private remedy, "divestiture," as that term was understood at the time, was a far less drastic measure than "dissolution."[202] The Court also rejected the notion that structural relief was not intended for private suits, observing that in a case of this kind "the distinction between conduct and structure . . . is illusory,"[203] because for all practical purposes a prohibitory injunction against the "conduct" of voting the stock of the acquired company would have exactly the same effect as a mandatory "structural" order of divestiture.[204] The Court concluded that section 16 "should be construed generously and flexibly pursuant to principles of equity."[205] It held that a district judge may "impose the most effective, usual and straightforward remedy to rescind an unlawful purchase of stock [or] assets,"[206] including divestiture.

The Court cautioned, however, that simply because private litigants may have the right to *seek* divestiture does not mean that divestiture should be ordered in every instance in which the federal government itself would be entitled to such relief.[207] "In a Government case the proof of the violation of law may itself establish sufficient public injury to war-

195. *Id.* at 1858 (quoting 15 U.S.C. § 25 (1988)).
196. *Id.* (quoting 15 U.S.C. § 26 (1988)).
197. *Id.* at 1859.
198. *Id.*
199. *See id.* at 1861-66.
200. *See id.* at 1863.
201. *See id.*
202. *See id.*
203. *Id.* at 1859-60.
204. *See id.*
205. *Id.* at 1866.
206. *Id.*
207. *See id.*

years. In return, the Attorney General permitted American to keep the rest of Lucky's 340 California stores, as well as 23 Alpha Beta stores in southern California.[215] The agreement did not restrict American Stores' freedom to acquire additional properties in California. In fact, the California Attorney General announced that he planned to recommend to the FTC that it dissolve its own consent decree, which continued to limit American's ability to make further acquisitions in the state.[216]

American Stores is important because it recognizes the right of states and private parties to seek divestiture to remedy a merger that violates the Clayton Act. If the Court had held otherwise, states would not be able to bring suit under federal antitrust law to break up completed mergers, even if they had no way of learning about a merger until after its consummation. Likewise, private parties would not be able to seek divestiture in federal court, even if they could establish standing to sue under section 7.

Such a result would have forced states and private litigants to turn to state courts and state antitrust law as an alternative.[217] This would have raised two possibilities: (i) the federal courts would have prohibited private divestiture suits under state law as well, or (ii) private divestiture remedies would have become available *only* under state law, thus making state merger law and state courts as important to shaping the nation's economy as federal merger law and the federal courts.

The Supreme Court has held in several cases that state antitrust laws are not preempted by federal antitrust laws,[218] and has permitted the application of state antitrust laws to interstate commerce notwithstanding the Commerce Clause.[219] But if the Supreme Court had held that Congress did not intend for anyone but the federal Government to have the right to seek divestiture, it would have opened the door to a preemption defense in cases seeking divestiture under state law.[220] Alterna-

215. *See* Zwiebach, *American Turns Attention Toward Reducing Its Debt*, Supermarket News, June 18, 1990, at 4.

216. *See* Zwiebach, *American Gives Up Fight; Will Sell 152 Alpha Betas*, Supermarket News, May 21, 1990, at 1.

217. Indeed, the states have already turned to their own antitrust laws on several occasions in efforts to obtain divestiture.

218. *See* California v. ARC America Corp., 109 S. Ct. 1661, 1665 (1989); Exxon Corp. v. Governor of Md., 437 U.S. 117, 133-34 (1978).

219. *See* ABA Antitrust Section, Monograph No. 15, Antitrust Federalism: The Role of State Law 10-11 (1988).

220. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 284-85 (1972) (commerce clause precludes use of state antitrust law in private action against organized baseball); California ex rel. Van de Kamp v. Texaco Inc., 219 Cal. Rptr. 824, 829 (Ct. App. 1985) (by virtue of FTC consent order, federal government occupied the field of a challenged acquisition, preempting state law), *aff'd on other grounds*, 46 Cal. 3d 1147, 1151, 252 Cal. Rptr. 221, 222, 762 P.2d 385, 386 (1988) (California Supreme Court held that California antitrust law did not reach mergers, so preemption issue need not be reached).

American argued that Congress intended the instrument of divestiture to be left exclusively in the hands of federal enforcement agencies, relying on Continental Securities Co. & Michigan Cent. R. Co., 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927);

rant relief."[208] A private litigant, on the other hand, must establish standing in every case. Moreover, a private litigant may face such equitable defenses as laches and unclean hands. The Court noted that these defenses "may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest."[209]

In a concurring opinion, Justice Kennedy confronted American's argument that permitting the filing of private suits for divestiture after the parties to the transaction have filed premerger notification reports under the Hart-Scott-Rodino Act,[210] and after they actually have entered into a consent agreement with the FTC approving the acquisition, would "reduce the Federal Government's negotiating strength and destroy the predictability that Congress sought to provide when it enacted [the Hart-Scott-Rodino Act]."[211] Justice Kennedy was sympathetic to this argument, but noted that there was nothing in the body of the Hart-Scott-Rodino Act to support it. He observed that "[a]lthough Congress might desire at some point to enact a strict rule prohibiting divestiture after a negotiated settlement with the FTC, it has not done so yet."[212] He went on to comment, however, that the Hart-Scott-Rodino Act nevertheless "may bear upon the issue of laches."[213] "By establishing a time period for review of merger proposals by the FTC," Justice Kennedy pointed out, the Act "may lend a degree of objectivity to the laches determination."[214]

Within three weeks after the Supreme Court's decision was announced, and before the Ninth Circuit could settle the laches issue on remand, however, American Stores entered into a consent agreement with the California Attorney General. Under the agreement, American agreed to divest 152 of its Alpha Beta stores in southern California, as well as some related facilities and nine Lucky stores over a period of five

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208. *See id.*

209. *Id.* at 1867.

210. 15 U.S.C. § 18a (1988).

211. California v. American Stores Co., 110 S. Ct. 1853, 1867 (1990) (Kennedy, J., concurring).

212. *Id.* at 1868. *But cf.* Lieberman v. FTC, 771 F.2d 32, 40 (2d Cir. 1985) ("We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance"); Mattox v. FTC, 752 F.2d 116, 122 (5th Cir. 1985) ("Because HSR only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department.").

213. *American Stores*, 110 S. Ct. at 1868.

214. *Id.* Justice Kennedy noted that the State of California received a copy of American Stores' premerger notification filing more than a month before the FTC concluded its settlement agreement. As Justice Kennedy put it, the State "elected not to act at that time, but now seeks a divestiture which, the facts suggest, would upset labor agreements and other matters influenced in important ways by the FTC proceeding." *Id.* "These considerations," Justice Kennedy remarked, "should bear upon the ultimate disposition of the case." *Id.*

tively, if courts were to hold that allowing private divestiture under state law would place too great a burden on interstate commerce, they could have applied the bar of the Commerce Clause to such suits.[221] In either case, no private divesture remedy would exist under federal *or* state law. This would leave structural merger enforcement—except in the case of purely intrastate matters—entirely in the hands of the Justice Department and the FTC. Traditionally, this is exactly where the power to seek divestiture has resided. After the experience of the Reagan Administration, however, states might have found such a situation difficult to accept and would have lobbied hard for change.

On the other hand, if the Supreme Court had prohibited a private right to seek divestiture under federal antitrust law, and such a right continued under state law, the result would have been equally unsettling. Private litigants would have been forced to bring divestiture actions only in state court under state laws, foreclosing the prospect of coordinated multi-district litigation in a single forum. Every time more than one state chose to challenge an acquisition, multiple litigations in multiple forums under multiple state laws would have resulted. Private challenges in multiple forums would have led to similarly inefficient litigation. This chaotic result would have created as much of a backlash as foreclosing private divestiture actions altogether. By allowing private parties to seek divestiture, the *American Stores* decision defused this potentially explosive situation.

While the decision was no bombshell, it was not without significance. The issue of laches represents the most interesting aspect of the case. American Stores relied heavily on the fact that California had launched

Graves v. Cambria Steel Co., 298 F. 761 (S.D.N.Y. 1924); Venner v. Pennsylvania Steel Co., 250 F. 292 (D.N.J. 1918).

It is true that in *ARC America*, the Supreme Court held that federal antitrust law does not necessarily preempt state antitrust remedies that are broader than federal remedies—but that was a different case. *See ARC America*, 109 S. Ct. at 1664-65. The *ARC America* Court held that states can provide standing to indirect purchasers even though federal courts do not provide such standing. *See id.* at 1667. The Court reasoned that state and federal remedies are not mutually exclusive where an inconsistent state rule would not undermine federal enforcement. But the Court emphasized that it would not be contrary to congressional purposes for states to allow indirect purchasers to recover under state antitrust laws. *See id.* at 1665-66.

In contrast, providing a private right to divestiture under state law where none exists under federal law would completely undermine congressional intent to have exclusive federal enforcement—assuming that the Court found this to have been the intent. Accordingly, had the Court been unprepared to allow a private right to divestiture under the federal antitrust laws, that ruling could have eliminated a private right of divestiture under state law as well.

221. *See* Edgar v. Mite Corp., 457 U.S. 624, 640 (1982); Flood v. Kuhn, 443 F.2d 264, 267-68 (2d Cir. 1971), *aff'd*, 407 U.S. 258, 285 (1972); Mechanical Rubber & Supply Co. v. American Saw and Mfg. Co., 747 F. Supp. 1292, 1296 (C.D. Ill. 1990); Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 385, 194 Cal. Rptr. 367, 372, 668 P.2d 674, 679 (1983), *cert. denied*, 466 U.S. 904 (1984); *see also In re* Wiring Device Antitrust Litigation, 498 F. Supp 79, 85 (E.D.N.Y. 1980) (state itself confirmed application of its antitrust laws to intrastate commerce).

its own investigation well before the FTC's approval of the acquisition became final, but failed to act until after the merger was effected.[222] In connection with the state's investigation, American voluntarily provided the California Attorney General with all of the California documents and information provided to the FTC. The Supreme Court did not ignore the significance of this, and remanded for further proceedings (which never actually took place). There is no doubt, however, that this kind of cooperation with state attorneys general would be pertinent to a laches defense. If a state has early access to the relevant information, should it not be required to act at the same time as the FTC and the Justice Department?

Laches is a peculiar doctrine in the field of mergers. The Supreme Court has not imposed strict time limits on merger challenges. For example, in *United States v. E.I. Du Pont de Nemours & Co.*,[223] the Supreme Court held that the Justice Department can seek divestiture as much as thirty years after an acquisition has taken place.[224] In *Copperweld Corp. v. Independence Tube Corp.*,[225] the Court suggested that a party can bring suit to challenge an acquisition any time after it takes place "when an original anticompetitive purpose [becomes] evident from the affiliated corporations' subsequent conduct."[226] Yet, given the enormous burden and expense associated with the premerger notification process, it makes considerable sense to require any party—federal, state or private—to challenge a merger as soon as it is reported, provided that a manifest threat to competition already exists. Section 7 of the Clayton Act provides that a court may strike down a merger on the ground that its effect "*may be* substantially to lessen competition, or to *tend* to create a monopoly."[227] More often than not, such a threat will be fully apparent even as the merger is taking place.

This raises the question of whether a company should undertake voluntary state-level premerger notification. American Stores provided premerger notification information to the state, only to be sued after the FTC gave the green light. It was largely because the tender offer was widely publicized, because the state was provided with ample information in advance, and because there was an FTC hold-separate agreement in effect that the state was able to obtain such effective relief. In a case

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222. *See* California v. American Stores Co., 110 S. Ct. 1853, 1867-68 (1990) (Kennedy, J., concurring).

223. 353 U.S. 586 (1957).

224. *See id.* at 597-98. The Court found that a suit could be brought at "any time when the acquisition threatens to ripen into a prohibited effect." *Id.* at 597. Thus, the Court held that the Government could proceed "at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." *Id.*

225. 467 U.S. 752 (1984).

226. *Id.* at 761. The Court stated that "[a] corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act." *Id.* at 777.

227. 15 U.S.C. § 18 (1988) (emphasis added).

where no hold-separate agreement exists, and the state first learns about an acquisition and has to subpoena documents after the FTC's approval becomes effective, the chances that the state could still obtain injunctive relief are significantly reduced.

On the other hand, the sooner states receive notice of a planned acquisition, the sooner they must act under the doctrine of laches. The *American Stores* decision will encourage judges to consider the degree and timing of cooperation with state premerger notification programs in deciding whether state enforcers have acted with sufficient speed. Thus, a party that has provided voluntary premerger notification to the state will have a stronger laches argument than one that has not.[228]

Of course, the prospect of federal, state and private challenges are only some of the obstacles to major mergers. Premerger notification does not stop in Washington and the state capitals. It often progresses through Canada, the European Community and other parts of the world.[229] Ironically, since the beginning of the Reagan Administration, the number of potential impediments to completing a major acquisition has mushroomed to the point that antitrust can easily eclipse all other issues once again, just as it did in years past. Although *American Stores* has prevented a major struggle between the state and federal governments, by keeping states in the divestiture business it has guaranteed that the process of completing a merger will be more tortured than ever.

Finally, the impact of the *American Stores* case has been lessened somewhat by the new atmosphere of cooperation that has been developing between the federal enforcement agencies and the states. The Justice Department and Federal Trade Commission have become appreciably more active in opposing mergers since the arrival of the Bush Administration, reducing the pressure for concurrent enforcement on the part of the states.[230] Also, state and federal enforcers have entered into their own informal division of efforts, whereby federal authorities are taking the lead on mergers while states are devoting greater attention to such

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228. It has been suggested that the Supreme Court's endorsement of a private right to divestiture will raise the settlement value of private merger litigation. A particularly difficult issue in this regard is how to settle a private suit that seeks divestiture, particularly one brought by a competitor. The Justice Department and Federal Trade Commission frequently negotiate settlements short of complete divestiture, but it hardly seems desirable for two competitors to negotiate over the breadth of a merger that one of them is entering into. Courts will need to pay particular attention to a proposed settlement of this kind, to prevent the settlement process from becoming more anticompetitive than the original merger itself. Enforcement agencies that decide not to challenge particular mergers may feel compelled to file amicus briefs commenting on private settlement proposals.

229. *See* Hawk, *European Economic Community Merger Regulation*, 59 Antitrust L.J. 457, 458 (1991); Goldman, *Bilateral Aspects of Canadian Competition Policy*, 57 Antitrust L.J. 401, 410 (1988).

230. *See* Pfunder, *Developments in Merger Law and Enforcement 1989-90*, 59 Antitrust L.J. 319 (1991).

areas as vertical restraints.[231] As long as this understanding continues, the right of the states to seek divestiture will have theoretical interest, but limited practical effect.

231. *See* Brockmeyer, *State Antitrust Enforcement Enters a New Decade—Its Directions and Challenges*, 59 Antitrust L.J. 26, 33 (1990).