

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 21 (November 6): Introduction to Vertical Mergers (Unit 11)

In Class 21, we turn to the first part of the *AT&T/Time Warner* opinion. This portion covers the government's case-in-chief at trial—its non-expert testimony, its internal document evidence, and Professor Shapiro's economic model—and ends just before the defense evidence begins. As you read these materials, keep in mind two questions: (1) How did the DOJ attempt to make out its prima facie case of a Section 7 violation through its non-expert evidence? (2) Why did the court find that the non-expert evidence, standing alone, failed to establish the prima facie case? There are no class notes for this class, so pay careful attention to the opinion.

Background: The industry, the parties, and the merger (pp. 151-90). These pages set the basic background. Your goal here is to understand the industry structure, not memorize details. Focus on three key relationships:

- (1) *MVPDs vs. OVDs*: Traditional cable/satellite distributors (like DirecTV) versus online streaming services (like Netflix)
- (2) *The vertical relationship*: Distributors buy programming from content owners to offer to subscribers
- (3) *"Must-have" content*: Why Time Warner's networks (especially Turner's sports and news) are considered essential for any viable distribution service.

Don't get bogged down in technical industry jargon—you need just enough to understand why combining a major distributor (AT&T/DirecTV) with a major content owner (Time Warner) raised concerns about foreclosure and raising rivals' costs.

Procedural history and governing law (pp. 190-209). These pages establish the legal standard that determines the outcome of the case. Pay special attention to how Judge Leon adapted the *Baker Hughes* burden-shifting framework to vertical mergers. In horizontal mergers, the government can rely on the *PNB* presumption to establish its prima facie case. But that presumption does not apply to non-horizontal mergers, so Judge Leon had to define what evidence the DOJ must present to meet its initial burden. The DOJ advanced three theories of competitive harm—raising rivals' costs, harm to OVD competition, and coordinated effects—but pursued only the first at trial. The court's explanation of what constitutes a "prima facie case" in a vertical merger becomes the measuring stick for evaluating all of the government's evidence in the pages that follow. Consider taking notes on these pages or re-reading them—you'll need this framework to understand the court's analysis.

Non-expert evidence (pp. 209-58). These pages examine the government's non-expert evidence: witness testimony from company executives, competitors, and other market participants, along with internal business documents and communications. The DOJ used this evidence to prove that

the merged firm would have both the ability and the incentive to raise licensing fees to rival distributors or withhold Turner programming entirely. Judge Leon found all of it insufficient. As you read, watch for three recurring problems the court identifies: (1) absence of empirical support: no data showing actual harm; (2) speculative testimony: witnesses describing what could happen rather than what likely would happen; and (3) lack of contemporaneous documents: no internal AT&T communications showing the company expected to gain competitive leverage from the acquisition. Try to identify specific examples of each problem as you read. This systematic critique shows why the factual case collapsed even before the court considered the economic model. The government needed the Shapiro model precisely because its factual evidence failed to establish the required anticompetitive effects.

Looking ahead: The reading for Class 21 ends with the court's analysis of the non-expert evidence. The government also presented expert testimony from Professor Carl Shapiro, who developed a Nash bargaining model to quantify predicted harm from the merger. We will examine the Shapiro model, the government's economic theory, and the court's critique in detail in Class 22. If time permits in Class 21, I may introduce the basic structure of the model to provide context for the next class. There is nothing for you to read on the Shapiro model for Class 21.

Enjoy the reading. As always, if you have any questions, please send me an email.