

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Class 23 (November 13): Vertical Mergers (Unit 11)

In this final segment of the *AT&T/Time Warner* opinion, we shift our focus from the government's failed predictive model to the defendants' rebuttal evidence and the court's conclusion. After rejecting Shapiro's Nash bargaining analysis, Judge Leon turned to Professor Dennis Carlton's econometric study of prior vertical mergers and to corroborating testimony from industry executives. The class will trace how this evidence—together with the court's treatment of the DOJ's virtual-MVPD theory—led Judge Leon to hold that the government did not establish a prima facie case under *Baker Hughes* and why the D.C. Circuit ultimately affirmed that outcome.

Expert evidence: Professor Carlton's testimony (pp. 249-58). The defense's principal expert, Professor Carlton, offered an empirical critique of the government's theory and evidence. Rather than building a new structural model, Carlton conducted a retrospective econometric study of four prior vertical integrations in the same industry: News Corp.'s acquisition and later divestiture of DirecTV, Time Warner's separation from Time Warner Cable, and Comcast's acquisition of NBCUniversal. His analysis found no statistically significant evidence that these earlier vertical mergers led to higher programming prices and, in some cases, prices fell. The DOJ and Shapiro sought to discount this evidence on the ground that each transaction had been subject to behavioral conditions, but Carlton pointed out that AT&T and Time Warner had voluntarily committed to comply with the Comcast/NBCUniversal arbitration and non-retaliation provisions.¹

The court also examined testimony from executives at vertically integrated programmers and distributors, who stated that vertical integration did not affect affiliate-fee negotiations. Comcast/NBCUniversal witnesses described licensing decisions as independent of distribution ownership and reported no fee increases attributable to integration; Charter and Dish executives likewise testified that bargaining outcomes were not altered by counterparty integration. Judge Leon treated this testimony as corroborating Carlton's econometric findings and as further evidence against the DOJ's leverage theory.

¹ AT&T and Time Warner proposed a behavioral settlement to the Division, modeled on the Comcast/NBCUniversal consent decree, that featured a commitment to license Time Warner programming via binding final-offer ("baseball") arbitration and a no-blackout protection pending arbitration for rival distributors. The Division declined to settle and insisted on divestiture relief, departing from the prior practice of resolving vertical cases with conduct remedies. In response, Turner issued an irrevocable seven-year open offer to nearly 1,000 distributors, publicly committing to offer to license on the terms it had offered to the DOJ, with final-offer arbitration and no blackouts pending arbitration. This commitment was implemented as an enforceable open offer available to all relevant distributors, rather than by amending existing carriage contracts. In resolving the case, Judge Leon did not adjudicate the sufficiency of this "fix" because, even without considering the commitment, the government failed at Step 1 of *Baker Hughes* to make out its prima facie case.

Judge Leon credited Carlton’s analysis, describing it as definitive evidence that prior vertical integrations in the industry had not produced price increases. Neither the DOJ nor Professor Shapiro, he found, provided any basis to discredit Carlton’s econometric work or the supporting business testimony. This record reinforced the court’s rejection of the government’s predictive model and supported his conclusion that the DOJ failed to prove a likely postmerger price increase or any *prima facie* anticompetitive effect.

The DOJ’s remaining theory of harm (pp. 300-14). The DOJ advanced a second theory of harm focused on the growing market for virtual MVPDs—online distributors such as Sling, Hulu Live, and YouTube TV, which compete with traditional cable and satellite services. The government argued that, after the merger, AT&T could use its ownership of Time Warner’s “must have” Turner content to disadvantage these emerging rivals by raising licensing fees, delaying negotiations, or withholding programming. The court rejected this theory as speculative and unsupported by credible evidence. It credited testimony from AT&T and Turner executives that Time Warner had consistently sought broad distribution of its content and viewed online streaming platforms as an important growth channel. Judge Leon emphasized that AT&T’s incentives ran toward expanding rather than restricting access to Turner programming, and he found no instance in which Turner had ever withheld content from an online distributor. The DOJ therefore failed to prove that the merger would give AT&T either the incentive or the ability to harm virtual MVPDs.

The court’s conclusion (pp. 315-22). Judge Leon’s findings on both fronts—the insufficiency of the DOJ’s fact record (non-expert testimony and documents) and the failure of its expert proof (Shapiro’s model)—meant the government did not establish a *prima facie* case of likely anticompetitive effects at Step 1 of *Baker Hughes*. He therefore did not reach the defendants’ litigated “fix” or procompetitive justifications (Step 2) or engage in any balancing (Step 3). He also denied a stay pending appeal, effectively clearing the path to close unless the DOJ obtained emergency relief from the court of appeals.

The appeal. On appeal, the government faced the uphill task of overturning predominantly factual determinations, which are reviewed for clear error. There are no materials to read for this section. Signaling its skepticism, the court of appeals denied the DOJ’s emergency motion for an injunction pending appeal, and the parties closed their deal on June 14, 2018.² We will examine the DOJ’s arguments in class. Bottom line: the court rejected the DOJ’s arguments and affirmed Judge Leon’s judgment.

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

² AT&T, however, committed to (1) manage Time Warner as a separate business unit; (2) have no role in setting Time Warner’s prices; (3) leave unchanged Time Warner employee compensation and benefits, and (4) implement an information firewall between Turner and AT&T Communications to prevent the transmission of competitively sensitive information until the earlier of February 28, 2019, or the conclusion of the case. *See* Letter to DOJ from AT&T (June 14, 2018) (attached as an exhibit to the Joint Motion to Modify Case Management Order (June 14, 2018)).