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## ARTICLES

### “GIVE THE LADY WHAT SHE WANTS”—AS LONG AS IT IS MACY’S

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#### I. INTRODUCTION

Chicago burned to the ground in the Great Fire of 1871.<sup>1</sup> But, like a phoenix rising from the ashes, the city was quickly rebuilt, and rebuilt better than before.<sup>2</sup>

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1. LLOYD WENDT & HERMAN KOGAN, *GIVE THE LADY WHAT SHE WANTS* 101-09 (1952).

2. Encyclopedia of Chicago, *Fire of 1871*, <http://www.encyclopedia.chicagohistory.org/pages/1740.html> (last visited Aug. 1, 2008).

Marshall Field, the great merchant prince of Chicago,<sup>3</sup> began construction of a grand new department store just a few years after the fire.<sup>4</sup> His goal was to create a store that set a tone of “elaborate courtesy . . . where the customer was always right.”<sup>5</sup>

Soon after the first portion of the beautiful new store opened in 1892, while Chicago was hosting the World’s Fair and celebrating the city’s rise from the ashes, Field toured his store—as he did every morning to ensure that his business was operating properly.<sup>6</sup> He came to observe a manager in a heated discussion with a female customer.<sup>7</sup> Field asked the manager, “[w]hat are you doing here?”<sup>8</sup> The manager replied, “I am settling a complaint.”<sup>9</sup> “‘No you’re not!’ snapped Field. ‘Give the lady what she wants.’”<sup>10</sup>

This admonition to a manager became so strongly obeyed that the oft-repeated “Give The Lady What She Wants” became corporate policy and the store motto of Marshall Field & Co.<sup>11</sup> And it remained so—until September 9, 2006 when the name Marshall Field & Co. was banished to the dustbin of history<sup>12</sup> in favor of the name Macy’s in recognition of the store’s new corporate owner.<sup>13</sup>

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3. PBS, American Experience, *Chicago: City of the Century*, <http://www.pbs.org/wgbh/amex/chicago/filmmore/pt.html> (last visited Aug. 1, 2008).

4. The State Street store, which opened in 1892, includes a soaring five-story atrium designed by Louis Comfort Tiffany. See Chicago Architecture Info, The Buildings, [http://www.chicagoarchitecture.info/Building/1005/Macy%92s\\_On\\_State.php](http://www.chicagoarchitecture.info/Building/1005/Macy%92s_On_State.php) (last visited Aug. 1, 2008) (describing development of former Marshall Field Co. building); see also Emporis, Macy’s at State Street, <http://www.emporis.com/en/wm/bu/?id=marshallfieldcompanystore-chicago-il-usa> (last visited Aug. 1, 2008) (depicting and describing architecture of Macy’s building on State Street). The building itself was based on designs of the famous Chicago architect Daniel Burnham and is a National Historic Landmark. National Parks Service, Marshall Field Co. Building, <http://www.cr.nps.gov/nr/travel/chicago/c7.htm> (last visited Aug. 1, 2008). According to the *Wall Street Journal*, “[t]he building is a National Historic Landmark with massive granite columns (rivaled only by the Temple at Karnak) and a soaring Tiffany ceiling. It’s a veritable cathedral of commerce.” Gail Heriot, *Give the Lady What She Wants*, Wall St. J., June 17, 2006, at A10.

5. WENDT & KOGAN, *supra* note 1, at 222-23.

6. ROBERT HENDRICKSON, *THE GRAND EMPORIUMS* 84 (1979).

7. *Id.*

8. WENDT & KOGAN, *supra* note 1, at 223.

9. *Id.*

10. *Id.*; see AXEL MADSEN, *THE MARSHALL FIELDS* 304 (2002) (describing “give the lady what she wants” as one of Field’s aphorisms); THOMAS J. SCHLERETH, *VICTORIAN AMERICA* 141 (1991) (stating that Field insisted that employees “give the lady what she wants”).

11. HENDRICKSON, *supra* note 6, at 84; see also Heriot, *supra* note 4, at A10 (stating customer service set store apart and Field was fond of repeating motto); *Progress on State Street*, TIME, Sept. 14, 1953, at 25, 25 (repeating customer-first motto in context of community desire for Marshall Field’s to take steps toward integrated workforce); Ameet Sachdev & Lorene Yue, *Macy’s Clock? Loyal Shoppers Ticked off*, CHI. TRIB., Sept. 21, 2005, at Business 1 (discussing consumer reaction to news that Macy’s name would replace Field’s).

12. Susan Chandler, *Pain of a Name Change Cutting Deeper in Chicago*, CHI. TRIB., June 4, 2006, at Business 1.

13. Sandra Jones, *Field’s Green Fades to Red*, CHI. TRIB., Sept. 9, 2006, at Business 1. On February 27, 2007, Federated Department Stores (“FDS”), the owner of Macy’s, Bloomingdale’s, and

A change in ownership for Field's was not all that unusual. Since Marshall Field's descendants and other stockholders sold the department store in 1982, the chain was owned in turn by the U.S. subsidiary of British American Tobacco ("BATUS"),<sup>14</sup> Dayton Hudson/Target Corp.,<sup>15</sup> and May Department Stores ("May").<sup>16</sup> Each new successor to the Field's legacy made similar pledges that many Chicagoans considered critical:<sup>17</sup> Frango Mint chocolates, sold only at Field's, would still be featured in each store;<sup>18</sup> for a limited time, shoppers could, upon request, receive their purchases in Field's singular green shopping bag featuring a drawing of the big clock on the flagship downtown store;<sup>19</sup> and, of course, the name Marshall Field & Co. would live forever.<sup>20</sup> The federal antitrust authorities reviewed these, and indeed all large department store mergers, and pronounced each free of antitrust concern.<sup>21</sup>

the former May Department Stores, announced that it would seek shareholder approval to change its corporate name to Macy's Inc., recognizing that ninety percent of its sales come from Macy's (the other ten percent coming from its other department store chain, Bloomingdale's). Press Release, Macy's, Inc., Federated Plans Corporate Name Change (Feb. 27, 2007), <http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle&ID=967632&highlight>. That name change to Macy's, Inc. was approved by stockholders and became effective June 1, 2007. Sandra Jones, *Macy's: State St. Store 'Doing Badly,'* CHI. TRIB., May 19, 2007, at Business 1. The mixed lineage and nomenclature of the various entities discussed in this Article can be confusing because FDS and Macy's both had long, independent histories before finally merging in 1994. While many of the events discussed occurred while Macy's was part of FDS, this Article will only refer to FDS when necessary for historical clarity, particularly relating to the period prior to 1994 when FDS bought Macy's.

14. JEFFREY A. TRACHTENBERG, *THE RAIN ON MACY'S PARADE* 152 (1996). BATUS owned several other American department stores chains, including Gimbels, Kohl's, Ivey's, and Saks Fifth Avenue. Sachdev & Yue, *supra* note 11.

15. Chandler, *supra* note 12; *Remembering Marshall Field's*, CBS2CHICAGO.COM, Sept. 9, 2006, <http://cbs2chicago.com/vault/Marshall.Field.s.2.331984.html>; Sachdev & Yue, *supra* note 11. Dayton Hudson Corp. took the name of its two department store chains, Dayton's in Minneapolis and Hudson's in Detroit. Sachdev & Yue, *supra* note 11. The corporation was later renamed Target Corp., for its successful discount chain store. *Id.* In 2001, the Dayton and Hudson department stores were all renamed Marshall Field's. *Id.*

16. Dody Tsiantar, *Department-Store Superstar*, TIME.COM, Feb. 6, 2006, <http://www.time.com/time/printout/0,8816,1156587,00.html>.

17. See, e.g., Allyce Bess, *May Co. Will Buy Marshall Field's*, ST. LOUIS POST-DISPATCH, June 10, 2004, at A1 (reporting sale of Marshall Field's to May).

18. Gregory Meyer & Sandra Jones, *Federated to Roll Out Frango Mint Nationwide*, CHI. BUSINESS.COM, May 19, 2006, <http://chicagobusiness.com/cgi-bin/news.pl?id=20687>; see also *Remembering Marshall Field's*, *supra* note 15. Frango Mints are now sold in Macy's stores nationwide. Meyer & Jones, *supra*; see also Macy's, Frangos, <http://www1.macys.com/search/index.ognc?SearchTarget=&Keyword=frango> (last visited Aug. 1, 2008) (displaying Macy's inventory of Frango chocolates).

19. Chelsea Irving, *Last Day Comes for Marshall Field's*, CBS2CHICAGO.COM, Sept. 8, 2006, <http://cbs2chicago.com/topstories/Marshall.Field.s.2.332007.html>; see also Chris Serres, *Marshall Field's Name Fading*, STAR TRIB. (Minneapolis, Minn.), July 13, 2005, at 1D (commenting on Marshall Field's identifying green shopping bag).

20. See, e.g., William Sluis, *Marshall Field's: Name, Frangos Stay as Retailer Acquired by May*, CHI. TRIB., June 13, 2004, at Business 3 (asserting that Marshall Field's will retain historic identity).

21. See, e.g., Stephanie Strom, *F.T.C. Ends Inquiry into Macy Deal*, N.Y. TIMES, Aug. 20, 1994, § 1, at 37 (reporting FTC's conclusion that merger did not warrant further investigation); FTC Statement of the Commission Concerning Federated Department Stores, Inc./The May Department

This time, however, was different. Upon hearing of Macy's plan to change the name of downtown Chicago's iconic anchor to—of all things—a New York department store, hundreds of Chicagoans took to the streets in protest.<sup>22</sup> Film critic Roger Ebert told Macy's in a newspaper editorial “[d]on't mess with Chicago, and don't mess with the name Marshall Field's. You will generate rage beyond your wildest nightmares.”<sup>23</sup> Pulitzer Prize-winning author Studs Terkel considered the decision a big mistake.<sup>24</sup> But after its merger with May Department Stores, Macy's determined that one national department store name brand—Macy's—would be its best marketing tool and a better strategy than continuing the legacy of Marshall Field & Co. and the other regional department store names memorializing his merchant prince peers.<sup>25</sup>

Macy's began similarly to every other department store in the United States—as a single store in a single city—in Macy's case, New York City.<sup>26</sup> Despite a national reputation—due in no small part to an enormous and high profile flagship store in Manhattan's Herald Square and a nationally televised Thanksgiving Day parade—Macy's was a regional chain with stores in the New York City metropolitan area and a few other states.<sup>27</sup> Despite these modest beginnings, Macy's was so well known that it was featured (and immortalized) in the Academy Award-winning movie, *Miracle on 34th Street*.<sup>28</sup>

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Stores Company, FTC File No. 051-0111, at 3 (Aug. 30, 2005), <http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf> [hereinafter FTC Statement] (finding that FDS' acquisition of May entailed no strategic pricing and that conventional department stores are not distinct product). See generally FTC Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 73 Fed. Reg. 5191 (proposed Jan. 29, 2008) (providing revised jurisdictional threshold for premerger notification under Clayton Act); Federal Trade Commission, Pre-Merger/Hart-Scott Rodino Act Statute, Rules and Formal Interpretations, <http://www.ftc.gov/bc/hsr/hsrbook.shtm> (last visited Aug. 1, 2008) (providing guidance on premerger notification with FTC).

22. Rummana Hussain, *Protesters Wear Green, See Red: 200 Demonstrate on State as Field's Becomes Macy's*, CHI. SUN-TIMES, Sept. 10, 2006, at A9; see also Heriot, *supra* note 4 (describing petitions signed in protest of name change). Slogans on the protesters' signs included “Boycott Macy's, Field's is Chicago,” “Hell No, Not My Dough,” and, thinking along similar lines as this author with regard to the title of this Article, “Give the Lady What She Wants and She Wants Marshall Field's.” Hussain, *supra*. The *Chicago Tribune*, in an editorial, compared it to renaming Wrigley Field as Yankee Stadium. Editorial, *Farewell to Field's*, CHI. TRIB., Sept. 21, 2005, at 26.

23. Roger Ebert, *It's Time to Save Field's*, CHI. SUN-TIMES, Feb. 1, 2005, at 29.

24. *New Name for Signature Chicago Store*, ABC7CHICAGO.COM, Sept. 20, 2005 <http://abclocal.go.com/wls/story?section=news/local&id=3459232>.

25. See Press Release, Macy's, Inc., Federated Announces Strategic Decisions to Integrate May Company Acquisition (Sept. 20, 2005), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle\\_print&ID=758787&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle_print&ID=758787&highlight=) (describing Macy's, Inc.'s intention to increase synergy by focusing on national brands). Macy's also owns Bloomingdale's, an upscale department store, with forty stores in twelve states. Macy's Inc., Bloomingdale's, <http://www.macysinc.com/retail/blm/default.aspx> (last visited Aug. 1, 2008).

26. TRACHTENBERG, *supra* note 14, at 11.

27. ISADORE BARMASH, MACY'S FOR SALE 4, 21, 32 (1989) HENDRICKSON, *supra* note 6, at 69, 300-02.

28. See Stuart Elliot, *A New 'Miracle on 34th St.,' This Time Without Macy's*, N.Y. TIMES, Nov. 18, 1994, at D1 (discussing prominent role of Macy's in original Oscar-winning *Miracle on 34th Street*); Internet Movie Database, Awards for *Miracle on 34th Street*, <http://www.imdb.com/title/>

In 1994, Macy’s merged with Federated Department Stores (“FDS”), creating a national retail behemoth spanning the continent, although leaving an important coverage gap in America’s heartland.<sup>29</sup> Soon afterwards, Macy’s embarked on a new strategy of changing its historic regional brand names to its two marquee brand names: Macy’s and (for a select few upscale locations) Bloomingdale’s.<sup>30</sup> In 2005, Macy’s acquired May for \$17 billion, filling Macy’s Midwest gap and resulting in a nationwide chain of 1000 department stores, most now operating as Macy’s.<sup>31</sup>

Several states ordered Macy’s to divest a few stores to satisfy antitrust concerns.<sup>32</sup> But the Federal Trade Commission (“FTC”), which reviewed the transaction, took no action beyond its extensive investigation into the merger.<sup>33</sup>

Earlier mergers and name changes by Macy’s had eliminated Bullock’s in Los Angeles, Wanamaker’s in Philadelphia, Jordan Marsh in Boston, Rich’s in Atlanta, Burdines’s in Florida, A&S in Brooklyn, and Lazarus in Ohio, as well as many others, almost all rebranded as Macy’s.<sup>34</sup> Most of these famous names had been around for at least a century, the legacy of “immigrant entrepreneurs who moved to America and helped build the nation’s cities.”<sup>35</sup> In most instances, the founding families had sold out years earlier, but their names lived on, tightly intertwined with individual and family memories of wedding and Christmas gifts,

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tt0039628/awards (last visited Aug. 1, 2008) (listing Oscars awarded to *Miracle on 34th Street* in 1948: “Best Actor in a Supporting Role”; “Best Writing, Original Story”; and “Best Writing, Screenplay”). One of the most famous lines in *Miracle on 34th Street* was “does Macy’s tell Gimbels?” MIRACLE ON 34TH STREET (Twentieth Century Fox 1947). That line refers to the lack of cooperation between business competitors and how the two famous department stores actually did cooperate in the spirit of Christmas. David K. Randall, *Only the Store Is Gone*, N.Y. TIMES, Feb. 19, 2006, § 14, at 12. While it is unclear whether Macy’s ever actually did “tell” Gimbels very much, today Macy’s owns Gimbels, or at least some of its most important property. See, e.g., *11 Gimbels Stores Are Sold by BATUS*, N.Y. TIMES, June 18, 1986, at D4 (reporting sale by BATUS of nineteen Gimbels stores, four of which were sold to May Department Stores); Barry Adams, *End of an Era; Retail Icon Leaves Landscape for Good as Marshall Field’s Morphs into Macy’s*, WIS. ST. J. (MADISON), Aug. 27, 2006, at B1 (reporting FDS’ purchase of Marshall Field’s Madison store, formerly occupied by Gimbels); Terry Pristin, *Remaking the Manhattan Mall; Owner Sees Stern’s Departure as Chance to Freshen up*, N.Y. TIMES, Sept. 30, 2000, at B1 (reporting FDS’ purchase and subsequent sale of Gimbels former Thirty-Fourth Street store).

29. TRACHTENBERG, *supra* note 14, at 226-32; David Moin et al., *Macy’s Coast-to-Coast: Federated-May Deal Forges New Retail Giant*, WOMEN’S WEAR DAILY, Mar. 1, 2005, at 1.

30. Tracie Rozhon, *Dropping Hyphen, Some Great Old Stores Become Just Macy’s*, N.Y. TIMES, Sept. 14, 2004, at C1.

31. Brenon Daly, *Federated, May to Tie Knot*, THE DAILY DEAL, Mar. 1, 2005. Prior to the Macy’s-May merger, Macy’s operated 31 stores in the Midwestern and central states, and May operated 150 stores. Moin et al., *supra* note 29, at 1.

32. Assurance, *New York v. Federated Dep’t Stores, Inc.* (Aug. 30, 2005), available at [http://www.oag.state.ny.us/media\\_center/2005/aug/Federated%20Assurance.pdf](http://www.oag.state.ny.us/media_center/2005/aug/Federated%20Assurance.pdf).

33. FTC Statement, *supra* note 21, at 1.

34. Sandra Jones, *Hoarding Names No Game*, CHI. TRIB., July 23, 2006, at Business 1. A few stores were rebranded as Bloomingdale’s. Macy’s, Inc. History: 1990-1999, <http://www.macysinc.com/pressroom/History/1999.aspx> (last visited Aug. 1, 2008).

35. *Id.*

interview suits, and other memorable purchases.<sup>36</sup> While consumer reaction in Chicago was particularly intense, shoppers across the nation expressed reluctance to trade their local department store for Macy's, even if long divorced from its original founders.<sup>37</sup>

According to Chicago School antitrust dogma, none of this is particularly relevant. The Chicago School worldview, boiled down to its most simplistic description, would argue that "[a]ntitrust concern should kick in only when a firm had a dominant market share in a market protected by entry barriers, and entry itself could be relied upon to solve most competitive problems, except when government action protected incumbents."<sup>38</sup> Chicago School antitrust lawyers and economists—were they to consider this issue at all—would likely declare that department stores are a mere basket of goods, because department stores are essentially a collection of goods mostly available at other stores. And were a department store to impose anticompetitive price increases, shoppers should, at least according to Chicago School theory, make wise decisions for allocative efficiency and maximization of consumer welfare.<sup>39</sup> In this idealized perfect market, department store shoppers would then flock to the myriad stores that offer similar wares. Even if that were not to happen, the lack of entry barriers in something as simple as retail would invite a host of new competitive entrants to vie for the business of the incumbents.<sup>40</sup>

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36. *Id.* See generally Charles Stein, *A Loss of Identity*, BOSTON GLOBE, Mar. 2, 2005, at C1 (discussing history of department stores and reasons for attracting customers in past).

37. See, e.g., Jenn Abelson & Thomas C. Palmer, Jr., *It's Official: Filene's Brand Will Be Gone*, BOSTON GLOBE, July 29, 2005, at A1 (reporting shoppers lamenting loss of Filene's); Chandler, *supra* note 12 (discussing Chicago's ties to Marshall Field's name); Jim McKay, *All Kaufmann's Changing to Macy's*, PITTSBURGH POST-GAZETTE, July 29, 2005, at A-1 (discussing Pittsburgh's ties to Kaufmann name); Stein, *supra* note 36 (discussing consumer displeasure with loss of Filene's department store name).

38. Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 60, 66 (Antonio Cucinotta et al. eds., 2002). See *infra* Part II.A for further discussion of the Chicago School approach to antitrust law.

39. The term "consumer welfare" is confusing to some because it does not mean that the welfare of the majority of consumers is maximized. STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 3-4 (1993). Consumer welfare means maximization of societal wealth, not that of individuals, which can simply mean there is more wealth, but it is concentrated among the already wealthy. Similarly, "allocative efficiency" does not mean "competition." *Id.* at 4. The Chicago School usually focuses on short-term rather than long-term efficiencies. *Id.*

40. See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,560 (Sept. 10, 1992) (discussing entry analysis in context of mergers). The concept of a collection of goods taking on a characteristic separate and apart from the individual goods themselves has not received considerable attention from antitrust scholars. See generally Jonathan B. Baker, *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, 42 ANTITRUST BULL. 177 (1997) [hereinafter Baker, *Product Differentiation*] (examining antitrust problems with product differentiation across time and space); Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, ANTITRUST, Spring 1997, at 21 (reviewing rise of unilateral theories of adverse competitive effect in context of mergers); Jonathan B. Baker & Timothy F. Bresnahan, *The Gains from Merger or Collusion in Product-Differentiated Industries*, 33 J. INDUS. ECON. 427 (1985) (studying relationship between mergers and market power within product-differentiated industries); Craig M. Newmark, *Price Concentration Studies: There You Go Again* 12 n.10 (Feb. 14, 2004), available at

An incongruity therefore exists between the reaction of consumers to Macy’s absorption of the majority of department stores in the United States and the Chicago School’s belief in the irrelevance of that absorption.<sup>41</sup> Particularly in the city of Chicago, was it pure emotionalism, driven by fond memories of Marshall Field’s as an independent and elegant store? Or did Chicagoans—the real denizens, not those just attached to the University of Chicago and Chicago School thinking—have good reason to anticipate higher prices as well as reduced output in the form of less service and fewer choices?

Several noted antitrust scholars have suggested that the time is ripe for “merger retrospectives” . . . reviews of the actual competitive effects of mergers that were consummated despite having raised serious antitrust concerns.”<sup>42</sup> This Article will examine the antitrust ramifications of Macy’s growth and conclude that the real Chicagoans are in fact correct: Macy’s acquisition of May has led to market power, manifested by both an increase in prices and a reduction in output.<sup>43</sup>

Part II of this Article will provide the analytical framework for an antitrust analysis of department stores, including product market definition as well as submarkets, cluster markets, and price discrimination markets. This section will also analyze previous antitrust decisions concerning department stores. Part III

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<http://justice.gov/atr/public/workshops/docs/202603.pdf> (arguing that consumers compare prices on individual products but are actually interested in buying package of bundled services). The Supreme Court did, however, at least hint at this in one of the earliest merger cases. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356-57 (1963).

41. This incongruity highlights one of the major disputes between the Chicago School and the so-called Post-Chicago School. *See Baker, supra* note 38, at 69 (discussing new approaches to antitrust law based on non-Chicago School economic theory). Several post-Chicago School cases have considered the role of a nonmonopolistic yet dominant firm and its potentially exclusionary conduct. *Id.*; *see also Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (finding that dominant toy retailer’s vertical agreements with suppliers induced suppliers to collude rather than compete for shelf space).

42. Mark Whitener, *Editor’s Note: The Dismal Science*, ANTITRUST, Summer 2006, at 3, 6 (2006). Mark Whitener is Antitrust Counsel to the General Electric Company and has also served as the Deputy Director of the FTC’s Bureau of Competition. *See also Interview with William E. Kovacic*, THE ANTITRUST SOURCE, Jan. 2004, at 2-3, available at <http://www.abanet.org/antitrust/at-source/04/01/kovacic.pdf> (explaining FTC prioritization of nonlitigation activities such as issuing reports and undertaking studies to contribute to complete understanding of antitrust policy); William E. Kovacic, Gen. Counsel, Fed. Trade Comm’n, Remarks Before the Seoul Competition Forum 2004: Achieving Better Practices in the Design of Competition Policy Institutions (Apr. 20, 2004) (transcript available at <http://www.ftc.gov/speeches/other/040420compolicyinst.pdf>) (proposing that jurisdictions regularly perform basic evaluations of effectiveness of competition policy institutions). *See generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007) (calling for change in definition of markets in antitrust analysis).

43. *See Federated to Add More Macy’s Outlets*, CNNMONEY.COM, July 28, 2005, [http://money.cnn.com/2005/07/28/news/fortune500/federated\\_macys/index.htm](http://money.cnn.com/2005/07/28/news/fortune500/federated_macys/index.htm) (reporting planned store closures in sixty-eight duplicate locations as result of Federated-May merger); Press Release, Macy’s, Inc., Federated Announces Plan to Expand Macy’s Brand in 2006 (July 28, 2005), <http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle&ID=736315&highlight=> (announcing that Macy’s will operate in “virtually every major U.S. market” after converting stores from May merger (quoting Terry J. Lundgren, FDS’ chairman, president, and chief executive officer)).

of this Article will review the results of an empirical study designed to carefully examine some of the assumptions and conclusions made by the FTC. The study offers significant proof that Macy's has increased its prices since the merger, suggesting that the firm has market power. Part IV of this Article contains conclusions, appropriate remedies, and suggestions for additional research. Ultimately, this Article suggests that the FTC must use its power under § 46(b) of the FTC Act to review Macy's actions since acquiring May.<sup>44</sup> On further review, it may be necessary to order a dissolution of some or all of the merger.

## II. ANTITRUST FRAMEWORK AND ANALYSIS

### A. Background

For over a century, courts and commentators have stated that the purpose of the antitrust laws is to promote competition, or at least "to ensure that markets are competitive."<sup>45</sup> But according to Robert Bork, one of the leading lights of the law and economics movement (the more doctrinaire aspects of which are often referred to as the "Chicago School" of antitrust), while "preservation of competition was often cited as the aim of the law, there seemed no agreed definition of what, for the purposes of antitrust, competition is."<sup>46</sup>

The Chicago School of antitrust is named for its proponents' connection to the University of Chicago.<sup>47</sup> "The Chicago School offered an elegant, pro-market and largely anti-government vision of antitrust policy,"<sup>48</sup> firmly embedded in neoclassical price theory and based on an assumption of perfect competition.<sup>49</sup> The Chicago School assumes that, in the long run, most markets tend to correct their own imperfections, and, accordingly, to interject government interference will only prolong the distortion or create new imperfections.<sup>50</sup> Just three firms can make a market dynamically competitive; if that is insufficient, supracompetitive pricing will be undermined by new entrants into the market.<sup>51</sup>

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44. See 15 U.S.C. § 46 (2000) (empowering FTC to investigate and regulate companies to enforce antitrust laws).

45. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 3 (2d ed. 1999); see also *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (discussing purpose of antitrust laws).

46. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 427 (2d ed. 1993).

47. *Id.* at xi. According to Judge Bork, the books and articles that transformed and infused antitrust with economics began at the University of Chicago's Law School and, to a lesser extent, Department of Economics and Graduate School of Business. *Id.* But see Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 259 ("Contrary to a common perception, the Chicago School was hardly the first time that United States antitrust law confronted economic theory.").

48. Hovenkamp, *supra* note 47, at 266.

49. Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 859 (2004).

50. *Id.* at 860-61; Hovenkamp, *supra* note 47, at 269-70.

51. Hovenkamp, *supra* note 47, at 266.



And "court-ordered antitrust fixes actually make markets less rather than more competitive or injure consumers for the benefit of competitors."<sup>52</sup>

The question of whether a department store merger is anticompetitive is just one of many battlefronts in the war between the Chicago School and the so-called post-Chicago antitrust camps. Post-Chicago antitrust arose from a belief that markets were "somewhat messier" than the Chicago School claimed and that Chicago School economics were less robust in explaining all behavior that arose through competition, or lack thereof.<sup>53</sup>

Post-Chicago antitrust is "fearful of strategic anticompetitive behavior by dominant firms" and also believes that government intervention can be successful.<sup>54</sup> It is not that post-Chicago antitrust ignores or seeks to reverse the Chicago School; rather, post-Chicago antitrust seeks different explanations and solutions when a Chicago School answer is not enough alone.<sup>55</sup>

These two often-opposing views of antitrust conflict when scrutinizing Macy's acquisition of May. Although the Chicago School and post-Chicago antitrust agree on a great many things within this broad area of law, there are some very important and substantial differences.<sup>56</sup> One of those differences is whether competition is significantly diminished in oligopolistic markets.<sup>57</sup> Another difference is whether something like retail can have significant entry barriers.<sup>58</sup>

Macy's 2005 merger with May was specifically impacted by two separate antitrust laws, the Sherman and Clayton Acts.<sup>59</sup> Section 1 of the Sherman Act concerns price-fixing and other collusive activities.<sup>60</sup> Sections 7 and 7A of the Clayton Act, regulate large corporate mergers<sup>61</sup> and related government reporting requirements.<sup>62</sup> It was under sections 7 and 7A of the Clayton Act that the FTC came to review Macy's merger of May.

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52. *Id.* at 266-67; *see also* Greaney, *supra* note 49, at 861 (identifying skepticism of capacity of judiciary to resolve antitrust problems as principle of Chicago School adherents).

53. Hovenkamp, *supra* note 47, at 258.

54. *Id.* at 267.

55. ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE; CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 68 (2002); *see also* Hovenkamp, *supra* note 47, at 258-59 (discussing post-Chicago theory as departure from Chicago School).

56. *See* Hovenkamp, *supra* note 47, at 266-68 (outlining differences between Chicago and post-Chicago schools).

57. *See* Baker, *supra* note 38, at 69 (noting that recent post-Chicago appellate decisions take possibility of harm from vertical, exclusionary practices seriously).

58. *See* Hovenkamp, *supra* note 47, at 278-79 (noting that post-Chicago School economic theory recognizes that markets can be anticompetitive over variety of circumstances disallowed by Chicago School economists).

59. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.); Sherman Act, ch. 647, 25 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005)).

60. 15 U.S.C. § 1 (2000 & Supp. IV. 2004).

61. The term "merger" in antitrust means "the purchase by one firm of some or all of the assets of another firm." HOVENKAMP, *supra* note 45, at 491.

62. 15 U.S.C. §§ 18, 18a (2000).

Antitrust actions in the United States can be brought by the federal or state governments or by private parties acting as private attorneys general.<sup>63</sup> Federal antitrust enforcement is the rubric of the FTC and the U.S. Department of Justice (“DOJ”) Antitrust Division operating in an unusual situation in which each has sole jurisdiction over some matters and shared jurisdiction over others.<sup>64</sup> Generally speaking, the FTC is empowered to enforce the Clayton Act and the FTC Act; the DOJ enforces the Clayton Act and the Sherman Act.<sup>65</sup> Because the FTC Act outlaws “unfair methods of competition and unfair or deceptive acts or practices,”<sup>66</sup> the FTC may bring suits under the FTC Act that could otherwise be brought by the DOJ under the Sherman Act.<sup>67</sup>

*B. Section 1 of the Sherman Act*

Section 1 of the Sherman Act outlaws price-fixing and related offenses by two or more firms acting in concert.<sup>68</sup> Although this area is one of the chief disagreements between the Chicago School and post-Chicago thinking, both agree to some degree that, when there are fewer competitors, there is a greater chance of illegal price coordination and agreement between firms.

Price-fixing is one of the greatest harms antitrust laws seek to cure; one of the reasons the Sherman Act was passed in the first place was because of the proliferation of these types of agreements.<sup>69</sup> “[F]irms acting in concert can earn monopoly profits just as a single-firm monopolist.”<sup>70</sup> Even without an actual price-fixing agreement, when markets are highly concentrated oligopolies, “firm[s] cannot reasonably ignore the price and output decisions of competitors.”<sup>71</sup>

*C. Department Stores and Case Law Under Section 1 of the Sherman Act*

Whether department stores are easy targets for investigation because of their high profile, consumer-oriented operations, or because of an unusually high incidence of actual price-fixing, there have been a large number of price-fixing and other suits brought under section 1 of the Sherman Act, although most have

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63. HOVENKAMP, *supra* note 45, at 584, 590, 593-94.

64. *Id.* at 584.

65. *Id.*

66. 15 U.S.C. § 45.

67. HOVENKAMP, *supra* note 45, at 587.

68. 15 U.S.C. § 1 (2000 & Supp. V 2005). Price-fixing is a contract, combination, or conspiracy whereby competitors agree to charge identical prices. *See id.* (declaring such actions to be illegal). Other types of price-fixing agreements include bid rigging, customer or market allocations, and group boycotts. *See* HOVENKAMP, *supra* note 45, at 144, 218-19 (describing price-fixing and boycotts). Sherman Act section 2 deals with monopolization and attempted monopolization by a single firm. 15 U.S.C. § 2. This Article does not consider whether Macy’s is a monopoly or attempting to monopolize but only the lesser and related standard under section 7 of the Clayton Act of whether the merger substantially reduced competition.

69. ROSS, *supra* note 39, at 117.

70. HOVENKAMP, *supra* note 45, at 144.

71. *Id.* at 37.

been dismissed<sup>72</sup> or settled<sup>73</sup> without any clear disposition of the original claim.<sup>74</sup> The highly concentrated nature of the department store product market, however, suggests a continuing need for close scrutiny.

A class action lawsuit was filed by consumers against Nine West, a shoe manufacturer and retailer, and Macy’s, as well as several other traditional department store chains for price-fixing.<sup>75</sup> The class plaintiffs alleged that Nine West and the department stores met regularly at semiannual trade shows to set minimum retail prices and to determine which shoes would be discounted and on which dates the discounts would occur.<sup>76</sup> The FTC investigated the allegations as well.<sup>77</sup>

After surviving a motion to dismiss, counsel withdrew the class lawsuit and deferred to ongoing settlement negotiations between the defendants and the attorneys general of the fifty states, the District of Columbia, and the U.S. commonwealths and possessions.<sup>78</sup> The defendants agreed to pay \$34 million in damages.<sup>79</sup>

Macy’s and May were alleged to have conspired with one another to fix the price of fine tableware and to ensure that the manufacturers (Lenox and Waterford) boycotted Bed Bath & Beyond.<sup>80</sup> Macy’s, May, Lenox, and Waterford paid a combined \$2.9 million fine as a settlement.<sup>81</sup> The retired

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72. *See, e.g.*, Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923-25 (2d Cir. 1985) (concluding that buyer’s pressure on manufacturer to boycott off-price retailer did not violate section 1 of Sherman Act); Elder-Beerman Stores Corp. v. Federated Dep’t Stores, Inc., 459 F.2d 138, 141-47 (6th Cir. 1972) (finding exclusive arrangements between FDS and suppliers did not violate section 1 of Sherman Act); Toys “R” Us, Inc. v. R.H. Macy & Co., Inc., 728 F. Supp. 230, 234-36 (S.D.N.Y. 1990) (holding Macy’s and clothing manufacturer’s boycott of Toys “R” Us was not per se violation of section 1 of Sherman Act); Kender v. Federated Dep’t Stores, Inc., 88 F.R.D. 688, 696 (S.D.N.Y. 1981) (denying class certification in claim against FDS for price-fixing following FTC investigation).

73. *See, e.g.*, Kromer v. Saks & Co., No. 77 Civ. 2914, 1977 U.S. Dist. LEXIS 12504, at \*1 (S.D.N.Y. Dec. 8, 1977) (settling price-fixing class action against three department stores for approximately \$4 million); *see also* Isadore Barmash, *Credits Due 55,000 in Price-Fixing Case*, N.Y. TIMES, June 28, 1977, at 39 (reporting that aforementioned class action settled for more than \$4 million).

74. *See, e.g.*, Axelrod v. Saks & Co., 77 F.R.D. 441, 448 (E.D. Pa. 1978) (certifying class against several department stores accused of price-fixing).

75. *In re* Nine West Shoes Antitrust Litig., 80 F. Supp. 2d 181, 183-84 (S.D.N.Y. 2000). The ten department stores were FDS (since renamed Macy’s), Dayton Hudson (now part of Macy’s), Dillard’s, May (now part of Macy’s), Lord & Taylor (recently divested from Macy’s), Nordstrom, Macy’s East, Macy’s West, the Bon-Ton, and Bloomingdale’s (part of Macy’s). *Id.* at 183 n.1.

76. *Id.* at 184.

77. Jef Feeley, *Nine West to Pay \$34 Million to Settle FTC Claims*, L.A. TIMES, Mar. 7, 2000, at C1.

78. Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT. L. REV. 207, 229-30 (2003); *see also* Feeley, *supra* note 77 (discussing results of settlement negotiations).

79. Waller, *supra* note 78, at 229.

80. *In re* Tableware Antitrust Litig., 363 F. Supp. 2d 1203, 1204 (N.D. Cal. 2005).

81. Brooke A. Masters, *Perjury Charged in Antitrust Inquiry*, WASH. POST, Jan. 5, 2005, at E1; *see also* Assurance of Discontinuance Pursuant to Executive Law § 63(15), *In re* Tabletop Investigation (July 29, 2004), available at [http://www.oag.state.ny.us/media\\_center/2004/aug/aug10a\\_04\\_attach3.pdf](http://www.oag.state.ny.us/media_center/2004/aug/aug10a_04_attach3.pdf)

chairman and chief executive of Macy's was indicted for perjury in the tableware investigation, although that charge was later dismissed.<sup>82</sup>

I. Magnin, a Macy's-owned department store whose individual stores have since been converted to Macy's or Bloomingdale's, was alleged to have fixed the price of upscale women's clothing in Northern California with Saks Fifth Avenue.<sup>83</sup> Macy's paid a \$50,000 fine to the DOJ and, along with Bullocks, paid \$1.4 million to a certified class of customers.<sup>84</sup>

Broadway-Hale Stores, now owned by Macy's, entered into an agreement with suppliers of appliances to refuse to sell appliances to a local retailer or to do so only at unfavorable prices.<sup>85</sup> The Supreme Court held that this "[g]roup boycott[], or concerted refusal[] . . . to deal," was per se illegal.<sup>86</sup> Although the trial court characterized it as a "purely private quarrel,"<sup>87</sup> the Supreme Court held that such a boycott was unlawful as the first step toward a monopoly.<sup>88</sup>

### 1. Other Collusive Conduct

There are allegations of anticompetitive conduct in the department store arena that have never been litigated. For example, May maneuvered for years to keep Macy's from expanding in the Washington, D.C., area.<sup>89</sup> The result was that May operated twenty-nine department stores in the region while Macy's operated seven.<sup>90</sup>

May would "pressur[e] mall owners and scarf[] up empty space out of concern the competition would acquire it."<sup>91</sup> Macy's and Bloomingdale's first expanded to the Washington area in 1990; May demanded that, when new malls were developed, Macy's and Bloomingdale's stores would be kept out.<sup>92</sup> In 2001, after J.C. Penney left a Bethesda, Maryland, mall, May blocked Macy's from entering and the mall agreed to split the space—the lower level becoming an Old

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(delineating terms of settlement with respect to New York tableware investigation).

82. John Eckberg, *Federated Case Persists*, CINCINNATI ENQUIRER, Feb. 7, 2006, at 5C; Constance L. Hays, *Ex-Chief of Federated Stores Is Indicted on Charge of Perjury*, N.Y. TIMES, Jan. 5, 2005, at C2.

83. See *Hefty Shopper Refund*, CHRISTIAN SCI. MONITOR, Oct. 9, 1980, at 11 (reporting that Saks Fifth Avenue and I. Magnin had denied price-fixing allegations but agreed to settle); Jerry Knight, *I. Magnin: Even More Elitist than Its Cousin Bloomies*, WASH. POST, Aug. 13, 1978, at G1 (stating that I. Magnin paid \$50,000 fine as result of complaint that it was fixing prices of women's clothing).

84. *Hefty Shopper Refund*, *supra* note 83; Knight, *supra* note 83; see also *United States v. Federated Dep't Stores, Inc.*, Civ. No. 76-858 RHS, 1978 U.S. Dist. LEXIS 19098, at \*4 (N.D. Cal. Mar. 10, 1978) (providing terms of final judgment in price-fixing litigation).

85. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959).

86. *Id.* at 212.

87. *Id.* at 210 (internal quotation marks omitted).

88. *Id.* at 213.

89. Dana Hedgpeth & Michael Barbaro, *Shaking Up Regional Retail*, WASH. POST, Mar. 1, 2005, at E1.

90. *Id.* FDS operated five Macy's and two Bloomingdale's; May operated twenty-one Hecht's and eight Lord & Taylor stores. *Id.*

91. *Id.*

92. *Id.*

Navy and the upper level becoming an annex to Hecht's.<sup>93</sup> When hometown Washington, D.C., department store Woodward & Lothrop ceased operations in 1995, May and J.C. Penney formed a successful alliance to keep Macy's from acquiring any of the stores.<sup>94</sup>

The situation in the Washington, D.C., area may not be uncommon. According to an industry trade magazine, “[a]lternative anchors [such as Target] are certainly welcomed at malls by department stores that have survived industry consolidation and are loath to see direct competitors at the same center.”<sup>95</sup> Dillard's was “blackballed” by Macy's and May whenever it tried to expand into [any] Southern California mall.<sup>96</sup> Similarly, Von Maur, a small independent department store chain in the Midwest,<sup>97</sup> has been unsuccessful in its efforts to enter the Milwaukee market. Apparently the Bon-Ton, which is in every mall in the Milwaukee area, has “veto power on new anchor tenants at the malls” and it is using that veto power to “keep competition out.”<sup>98</sup>

Another example can be found at the Christiana Mall in Newark, Delaware, which prior to the Macy's-May merger was anchored by Macy's and two May brands: Hecht's and Lord & Taylor.<sup>99</sup> Two Macy's would be “overkill,” according to one retail expert, and Macy's preferred that the space be sold to a noncompetitor.<sup>100</sup> “Long-standing reciprocal easement agreements between the landlords and [Macy's] will also play a big part in how the stores are repositioned, because . . . [of] agreements that give anchors a lot of say in the matter.”<sup>101</sup> At the time this Article was written, both the former Hecht's and Lord & Taylor spaces at Christiana Mall are empty.<sup>102</sup>

## 2. Antitrust Violations and Recidivism

A concern in antitrust and, indeed, in all unlawful conduct, is recidivism. Repeated antitrust violations by a corporate entity may demonstrate that fines and even the possibility of prison sentences are considered good business risks

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93. Hedgpeth & Barbaro, *supra* note 89, at E1.

94. *Id.*

95. Debra Hazel, *Alternate Anchors: Owners Look Beyond Department Stores to Attract Shoppers to Malls*, SHOPPING CENTERS TODAY, June 2003, available at [www.icsc.org/srch/sct/sct0603/page13.php](http://www.icsc.org/srch/sct/sct0603/page13.php).

96. Leslie Earnest & Roger Vincent, *Retail Opportunity Seen in Federated-May Deal*, L.A. TIMES, Mar. 1, 2005, at C1.

97. Von Maur, About Us, <http://www.vonmaur.com/Default.aspx?PageId=2&nt=9> (last visited Aug. 1, 2008).

98. Doris Hajewski, *Von Maur Hopes Time Is Now: High-End Retailer Sees Chance to Crack Milwaukee Market*, MILWAUKEE J. SENTINEL, July 16, 2006, at A1.

99. Brannon Boswell, *Federated-May: Merger Good for Mall Industry, Landlords Say*, SHOPPING CENTERS TODAY, Apr. 2005, available at <http://icsc.org/srch/sct/sct0405/index.php>.

100. *Id.*

101. *Id.*

102. Christiana Mall, Store Directory, <http://www.shopchristianamall.com/html/storedirectory.asp> (last visited Aug. 1, 2008).

when compared with the possibility of high rewards.<sup>103</sup>

Macy's and its predecessor companies have been involved in a number of price-fixing cases.<sup>104</sup> The fewer the number of competitors, the easier it is to fix prices and the more likely it is that a corporation will do so.<sup>105</sup> In fact, fines may not be an effective deterrent to a profit-maximizing corporation; the decision to engage in such illegal conduct may simply be a logical conclusion to a cost-benefit analysis based on the possible profit versus the risk of prosecution, conviction, and fine. One Supreme Court Justice noted that fines were an ineffective deterrent to antitrust violators and that the impact has been negligible.<sup>106</sup> There may be reason for concern that, with fewer department stores, such behavior—and recidivism—will increase.

*D. Sections 7 and 7A of the Clayton Act*

It was never clear if—and to what extent—mergers were regulated by section 1 of the Sherman Act.<sup>107</sup> One of the earliest Supreme Court antitrust cases held, by a bare majority,<sup>108</sup> that section 1 applied to mergers, although it was disputed by four members of the Court in a strong dissent.<sup>109</sup> To shore up this and other weaknesses in the Sherman Act, the Clayton Act was enacted in 1914.<sup>110</sup>

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103. Congress has repeatedly amended the Sherman Act to increase fines to prevent repeated violations and recidivism. Fines were first increased from \$5,000 to \$50,000. Act of July 7, 1955, ch. 281, Pub. L. No. 84-135, 69 Stat 282 (1955) (codifying increase in maximum fine, which resulted in increase from \$5,000 to \$50,000); *see also* S. REP. NO. 618 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2322, 2324 (proposing increase of maximum fine to \$50,000). Congress later increased the maximum fine from \$50,000 to \$100,000 for individuals and noncorporate entities and to \$1,000,000 for corporations. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974) (codified at 15 U.S.C §§ 1-2 (1982)); *see also* H.R. REP. NO. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6540 (describing proposed fine increase).

104. *See supra* Part II.C for a discussion of Macy's price-fixing litigation.

105. *See* JAMES M. CLABAULT & MICHAEL K. BLOCK, SHERMAN ACT INDICTMENTS 1955-1980, at 901-11 (1981) (listing companies that have been charged with criminal antitrust conduct on four or more occasions); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 169 (2000) (noting that price-fixing becomes more difficult to coordinate as number of competitors increases); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 399 (1970) (noting that most conspiracy cases involved fewer than twenty conspirators).

106. *United States v. Se. Underwriters Ass'n.*, 322 U.S. 533, 590 n.11 (1944) (Jackson, J., dissenting).

107. ROSS, *supra* note 39, at 320. Section 1 of the Sherman Act would be the relevant law as it declares unlawful "contract, combination . . . or conspiracy" in restraint of trade, and a merger agreement could theoretically be considered such a contract, combination, or conspiracy. 15 U.S.C. § 1 (2000 & Supp. V 2005). Section 2 of the Sherman Act is not invoked unless the merging parties are monopolizing or attempting to monopolize. 15 U.S.C. § 2.

108. *Northern Secs. Co. v. United States*, 193 U.S. 197, 327-28 (1904).

109. *Id.* at 400 (Holmes, J., dissenting).

110. *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 53-55 (2003) (describing legislative history of Clayton Act).

The critical language in section 7 of the Clayton Act empowers the government<sup>111</sup> to block acquisitions the effect of which “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>112</sup> This language allows the government to challenge mergers before they are consummated and permitted to lead to actual anticompetitive effects, thereby “arresting mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency.”<sup>113</sup> Congress saw the process of concentration in American business as a dynamic force; it sought to assure the FTC and the courts the power to brake this force at its outset and before it gathered momentum.<sup>114</sup>

Section 7 of the Clayton Act “reflected a congressional intent” to use antitrust laws to “more aggressively” block anticompetitive mergers.<sup>115</sup> Section 7 of the Clayton Act was further strengthened in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, section 201,<sup>116</sup> which requires parties to certain large mergers to notify the DOJ and FTC prior to the merger and submit to a waiting period while the government collects information about the proposed transaction.<sup>117</sup>

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111. Private parties also may sue to enjoin a merger. 15 U.S.C. § 15 (2000). Private parties would, however, have a difficult time bringing a claim under section 7 of the Clayton Act before a merger, because only the government has access to confidential transaction materials and a waiting period prior to consummation of the merger. 15 U.S.C. § 18a. Retrospective merger reviews may present few choices for an appropriate remedy, because they would require a court to “unscramble integrated business assets and activities.” GAVIL ET AL., *supra* note 55, at 420; *see also* HOVENKAMP, *supra* note 45, at 492-93 (noting that government has had more success than private plaintiffs in bringing merger actions).

112. 15 U.S.C. § 18. As originally enacted, section 7 of the Clayton Act contained a significant weakness by not attempting to regulate asset acquisitions or mergers of firms that were not direct competitors. Clayton Act, ch. 323, § 7 38 Stat. 730, 731-32 (1914). In 1950, the Celler-Kefauver Act was passed to amend the Clayton Act and address these issues. Act of Dec. 29, 1950, ch. 1184, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (2000)).

113. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 317 (1962).

114. *Brown Shoe*, 370 U.S. at 317-18; *see also* GAVIL ET AL., *supra* note 55, at 419 (noting that, by amending Clayton Act, Congress made it clear that statute reached horizontal and vertical mergers as well as conglomerate mergers).

115. ROSS, *supra* note 39, at 324-25.

116. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390-94 (1976) (codified as amended at 15 U.S.C. § 18a (2000)).

117. HOVENKAMP, *supra* note 45, at 589; *see also* FED. TRADE COMM’N, HART-SCOTT-RODINO PREMERGER NOTIFICATION PROGRAM INTRODUCTORY GUIDE II, TO FILE OR NOT TO FILE, WHEN YOU MUST FILE A PREMERGER NOTIFICATION REPORT FORM (2005), *available at* <http://www.ftc.gov/bc/hsr/introguides/guide2.pdf> (providing requirements for Hart-Scott-Rodino reporting). The “size of person” and “size of transaction” tests were increased to higher dollar amounts effective February 21, 2007. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 72 Fed. Reg. 2692, 2692-93 (Jan. 22, 2007); *see also* 15 U.S.C. § 18a(a)(2) (providing old jurisdictional thresholds). The tests are quite complicated, but, generally speaking, they capture transactions in which one party has assets in excess of \$239.2 million or one party has assets in excess of \$119.6 million and the other party has assets in excess of \$12 million. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 72 Fed. Reg. at 2692-93.

E. *Market Definition Standards for Section 7 of the Clayton Act Review*<sup>118</sup>

A horizontal merger raises potential antitrust concerns when both the acquiring firm and the acquired firm produce the same product and both firms compete against one another in the same geographic market.<sup>119</sup> Federal enforcement has focused mostly on horizontal mergers, because it can be an obvious path to monopolization or at least oligopoly.<sup>120</sup> One of the most difficult components of antitrust analysis is determining the relevant product market.<sup>121</sup> “One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify—for working purposes—the very complex interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes.”<sup>122</sup>

1. Definition of Product Market and Recognizing Submarkets

Under section 7 of the Clayton Act, one must determine the relevant market to assess competitive harm. The relevant antitrust market is comprised of all the firms that participate and compete in the market and is broken down into a product market and a geographic market. An antitrust product market includes goods that buyers consider reasonable substitutes; buyers’ consideration of such goods as substitutes reflects cross-elasticity of demand. A geographic market is the trade area in which buyers might reasonably turn to purchase the relevant product or services. That analysis leads to estimates of market share for the competitors in the relevant market, which is then used to discern market power and potential anticompetitive effects.<sup>123</sup>

The first exposition of market definition came after Congress amended section 7 of the Clayton Act in 1950 in the Supreme Court’s decision in *Brown Shoe Co. v. United States*.<sup>124</sup> In *Brown Shoe*, the Supreme Court stated that “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”<sup>125</sup>

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118. For a general discussion of defining markets and the history of the relevant case law, see Baker, *supra* note 42, at 132-38, and Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 125-84 (1992).

119. HOVENKAMP, *supra* note 45, at 492; Baker, *supra* note 42, at 129-30.

120. SULLIVAN & GRIMES, *supra* note 105, at 575.

121. *Id.* at 575-76.

122. James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 703 (1995) (quoting *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993)); accord Dennis W. Carlton, *Market Definition: Use and Abuse*, COMPETITION POL’Y INT’L, Spring 2007, at 3, 3 (explaining methodology of market definition to be coherent but difficult to implement, because precise market definition requires extensive quantitative information often not available).

123. Carlton, *supra* note 122, at 4-5; Keyte, *supra* note 122, at 697-700.

124. 370 U.S. 294 (1962).

125. *Brown Shoe*, 370 U.S. at 325.



The Court also held that, within a broad product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."<sup>126</sup> Because Congress had created no single standard for defining a product market, the Court instructed that "practical indicia" be used, including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."<sup>127</sup> By these "practical indicia" in *Brown Shoe*, the Court found distinct submarkets for men's, women's, and children's shoes.<sup>128</sup> The practical indicia have often been used by courts erroneously, leading modern courts and commentators to be hostile to the concept of submarkets.<sup>129</sup>

Department stores may well be a submarket of a greater product market including sales of clothing and home goods. While most categories of products sold in department stores are sold elsewhere, many consumers indicate a clear preference to make their purchases in department stores, suggesting at least some inelasticity of demand substitution.<sup>130</sup> A number of cases have recognized antitrust product markets based on the distribution channel for the product.<sup>131</sup>

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126. *Id.* (citing *United States v. E.I. du Pont de Nemours & Co. (General Motors)*, 353 U.S. 586, 593-95 (1957) (as there are two du Pont antitrust cases in the mid-1950s, this case is usually referred to as "General Motors")).

127. *Id.*

128. *Id.* at 325-26.

129. Jonathan B. Baker, *Stepping out in an Old Brown Shoe: In Qualified Praise of Submarkets*, 68 ANTITRUST L.J., 203, 206 (2000). At least one court of appeals has asked litigants to avoid the term submarket because of its misuse and complexity. *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 355 n.5 (4th Cir. 1983).

130. *See Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 869-70 (W.D.N.Y. 1994) (finding department stores to offer distinct product choices that distinguish them from other retailers); David J. Dadoun & Diana L. Dietrich, *After Gillette: An Analysis of Premium Product Markets Under the 1992 Merger Guidelines*, 17 HARV. J.L. & PUB. POL'Y 567, 577 (1994) (finding factors such as prestige in product purchase to "drive low demand elasticity and warrant a premium market definition"); *see also* *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 996-97 (11th Cir. 1993) (holding that loyalty of consumers to prestigious product brands priced above competitive levels favors excluding that product from relevant market); *Vitale v. Marlborough Gallery*, No. 93 Civ. (PKL) 6276, 1994 WL 654494, at \*3-4 (S.D.N.Y. July 5, 1994) (finding paintings of Jackson Pollack to constitute submarket, as these distinctive works are not reasonably interchangeable with works of another artist); *Keyte*, *supra* note 122, at 709, 712 (finding cross-elasticity of demand often depends on product loyalty and presence of familiar brand names, rather than product similarity).

131. *See, e.g., California v. Am. Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) (agreeing with district court that supermarkets make up their own product market separate from all retailers of grocery products); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1342-43 (8th Cir. 1987) (holding that jury could find separate product market for route sales as subset of automotive battery sales); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 713-14 (7th Cir. 1979) (finding separate product market for drive-through film processors); *Bon-Ton*, 881 F. Supp. at 867-71 (finding separate product market for department stores).

## 2. Cluster Markets

One year after *Brown Shoe*, in *United States v. Philadelphia National Bank*,<sup>132</sup> the Supreme Court embraced the concept of cluster markets.<sup>133</sup> A cluster market is a cluster of services that could theoretically be purchased separately, but, for a variety of reasons, including convenience, consumers prefer to buy together.<sup>134</sup>

*Philadelphia National Bank* involved the proposed merger of two commercial banks, and the Court found that banks offered a “cluster of . . . services.”<sup>135</sup> Consumers purchased various banking services separately, or in packages, and it was theoretically possible to acquire most services separately through the cheapest or best provider of the service.<sup>136</sup> This was not, however, what happened in reality.

Although some banking services, such as checking accounts, were only offered by commercial banks, other banking services, including savings accounts, were offered by commercial banks and savings banks.<sup>137</sup> The Court, however, excluded savings banks from the relevant antitrust product market because it found that consumers chose to purchase a cluster of related banking services from one purveyor, despite superior interest rates on savings accounts from savings banks.<sup>138</sup> As an explanation, the Court quoted a trial witness who said:

There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3 1/2. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get 1/2 of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level.<sup>139</sup>

In other words, a “settled consumer preference” insulated individual commercial banking products from competition.<sup>140</sup> “The economic principle of complementarity . . . underlies the concept of cluster markets,” and lower courts have applied the concept to a variety of industries, including department stores.<sup>141</sup>

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132. 374 U.S. 321 (1963).

133. *Philadelphia Nat'l Bank*, 374 U.S. at 356.

134. SULLIVAN & GRIMES, *supra* note 105, at 579-80.

135. 374 U.S. at 356.

136. *See generally id.* at 326 n.5 (cataloguing bank “products” and alternative providers for these services).

137. *Id.* at 374 & n.4 (Harlan, J., dissenting).

138. *Id.* at 356-57 (majority opinion). When this case was decided, only commercial banks were permitted to offer checking accounts. *Id.* at 326-27.

139. *Philadelphia Nat'l Bank*, 374 U.S. at 357 n.34 (internal quotation marks omitted).

140. *Id.* at 357.

141. ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 61-62 (Robert S. Schlossberg ed., 2d ed. 2004). Cluster markets have also been

### 3. Merger Guideline Definitions and Price Discrimination Markets

In 1992, the DOJ and FTC jointly issued Horizontal Merger Guidelines (“Guidelines”) discussing and describing the two agencies’ policies toward enforcement of section 7 of the Clayton Act.<sup>142</sup> The Guidelines remain an administrative guidance document, and antitrust law is still governed by the Clayton Act itself as well as court decisions interpreting the Clayton Act.<sup>143</sup> But the Guidelines are influential to judges and are routinely cited by courts considering mergers.<sup>144</sup>

The Guidelines consider market-wide concentrations as a generally satisfactory proxy for market power; market power and anticompetitive effects can be presumed from high market shares.<sup>145</sup> After considering a relevant product and geographic market, the Guidelines hypothesize a small but significant and nontransitory increase in price (“SSNIP”) of five percent and then question whether consumers would switch to competing substitutes.<sup>146</sup> If sales remain constant or even grow after a SSNIP, then there is a possibility that the firm has market power.<sup>147</sup>

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used to challenge mergers involving supermarkets, beauty products, office supplies, ammunition, rotary drills, marine engines, industrial gasses, and a variety of medical services. *Id.* at 62 nn.83-84; *see also* Keyte, *supra* note 122, at 727 (noting that courts finding cluster markets of particular services); Werden, *supra* note 118, at 166 (observing that courts justify combining banking products and services because of complementarities). *But see generally* Baker, *supra* note 42, at 157-58 (“The cluster market approach is inappropriate for market definition because clusters include products and services that are not demand substitutes (or supply substitutes).”).

142. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992). The Guidelines were revised in 1997 to update the policies on efficiency. *See* Federal Trade Commission, 1992 Horizontal Merger Guidelines, with April 8, 1997, Revisions to Section 4 on Efficiencies, *available at* <http://www.ftc.gov/bc/docs/horizmer.htm> (containing more detailed section 4, including requirement that efficiencies be documented rather than speculative). Earlier versions of government merger guidelines were released by the DOJ in 1984 and the FTC in 1982. *See* 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41,553 n.4 (discussing history of merger guidelines).

143. HOVENKAMP, *supra* note 45, at 493.

144. *See, e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999) (pointing to defendant’s argument as stemming from Guidelines approach to ascertaining relevant geographic market); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997) (using Guidelines as basis for ascertaining product market definition); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1108 (N.D. Cal. 2004) (using Guidelines to direct analysis of parties’ differing product and geographic definitions); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 335-36 (S.D.N.Y. 2001) (finding expert testimony based on Guidelines to be persuasive); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998) (finding Guidelines, though not binding, to “constitute the agencies’ informed judgment on the area of their expertise”); GAVIL ET AL., *supra* note 55, at 455 (finding Guidelines to be influential tool for many courts); Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WISC. L. REV. 1035, 1080 n.353 (same). *But see* Ronald Katz, Janet Arnold Hart & Theodore R. Snyder, *Courts Adopt a Practical Approach: A Post-Kodak Working Guide to Market Definition*, ANTITRUST, Spring 1997, at 38, 38-39 (declaring that courts have shown only “mixed acceptance” of Guidelines).

145. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41,554-55.

146. *Id.*

147. *Id.* at 41,555.

Additionally, the Guidelines recognize the practice of price discrimination, whereby firms charge different prices to different buyers of the same product.<sup>148</sup> “The term price discrimination . . . is applied when [a seller can] raise price[s] profitably to a class of targeted buyers, notwithstanding the incentive of buyers to substitute to other products and more distant sellers . . . .”<sup>149</sup> One example of price discrimination is airline tickets, where different passengers—even adjacent seatmates—may pay enormously different prices to travel to the same destination, depending on when, and from which outlet, the ticket was purchased.<sup>150</sup>

Department store pricing strategies do not fit neatly into traditional and conventional definitions of price discrimination. But hypothetically, if there were only one middle-market department store in a mall, city, or other geographic market,<sup>151</sup> the department store could engage in price discrimination in situations that include the following: (1) pricing clothing directed at older, non-computer-using customers, at a supracompetitive level where the only significant competition is through the Internet; (2) pricing professional clothing aimed at those with little time to shop several specialty stores, as opposed to one department store, at higher margins; (3) pricing tailored clothing, particularly men’s and women’s business attire, at a higher margin than casual clothing in the same stores if there are few alternatives to that one department store in that geographic market; and (4) pricing items commonly listed in gift registries for babies and weddings at higher margins than other items in the store because the gift registrant needs to list items in a store accessible to friends and family across the nation, including noncomputer users.<sup>152</sup>

#### 4. Unilateral Effects

The Horizontal Merger Guidelines describe so-called “unilateral effects,” whereby a single merged firm may find it profitable to alter behavior unilaterally following a merger by elevating price and suppressing output.<sup>153</sup> The Guidelines

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148. Baker, *supra* note 42, at 151.

149. Baker, *supra* note 129, at 207-08.

150. *See id.* at 208 n.22 (cataloguing similar examples of price discrimination).

151. This hypothesis would also be appropriate if there were more than one middle-market department store and oligopolistic behavior, conscious parallelism, or collusion.

152. The challenge is charging a high price (and selling only to consumers who do not search other stores), versus charging a low price (and potentially also selling to consumers who bargain hunt). *See* Daniel Hosken & David Reiffen, *Pricing Behavior of Multiproduct Retailers*, B.E. J. THEORETICAL ECON., June 2007, at 6-9, available at <http://www.bepress.com/bejte/vol7/iss1/art39> (discussing market effect of consumers who are “store-loyal” versus those who compare prices of different stores).

153. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,560 (Sept. 10, 1992); Marc G. Schildkraut, *Oracle and the Future of Unilateral Effects*, ANTITRUST, Spring 2005, at 20, 21. The Guidelines also restrict unilateral effects analysis to situations in which the combined firm has over a thirty-five percent market share. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41,560; *see also* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1113 (N.D. Cal. 2004) (reviewing case law on unilateral effects merger analysis, and explaining that unilateral effects derive from higher prices due to elimination of competition between merging companies).

express particular concern if one party to the merger is a first choice for consumers and the other party is a second choice, and hence “a competitive constraint to the first choice.”<sup>154</sup> Once the second choice is eliminated by the merger, the competitive restraint is gone.

As an economic matter, unilateral effects do not turn on market definition. The economic analysis is the same regardless of whether the case is framed as a merger generating high concentration within a narrow market or as the loss of direct competition between the merging firms within a broader market where concentration is lower.<sup>155</sup>

As a hypothetical example, Macy’s and May could be compared to Mercedes and BMW.<sup>156</sup> If Mercedes and BMW were to merge, the change in concentration in a “new automobile[]” market would be insignificant, while the new concentration in a “luxury car market” would likely raise serious antitrust concerns.<sup>157</sup> At the same time, at least some reasonable arguments could be

Law and economics theory assumes that the retail sector is a “mere conduit [for] atomistic competition” and overlooks “the robust contribution that intertype competition has played in the development of the American economy.” Brief of Amicus Curiae Consumer Federation of America in Support of Respondent at 5, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480). Instead, law and economics focuses

on a short-term efficiency analysis predicted by a static microeconomic model that does not account for the significant benefits that intertype competition brings to consumers and the economy over the long run. Thus [law & economics] fail[s] to recognize that with supermarkets as much as with semiconductors, “competition’s role in spurring innovation—that is, in maintaining dynamic efficiency—has secured a central position in antitrust analysis, leading us to take a broader focus that incorporates issues of innovation and progress over time.”

*Id.* at 5-6 (quoting Deborah Platt Majoras, Chairman, FTC, The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers, Address to the Progress & Freedom Foundation’s Aspen Summit, at 19 (Aug. 21, 2006), <http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>).

154. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41,560.

155. Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, at 9 (Oct. 2007), available at <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>. Professors Baker and Shapiro critique the court’s decision in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), because the court suggested that a monopoly or a near monopoly would be necessary to prove unilateral effects; furthermore, the court discounted the relevance of customer complaints. *Oracle*, 331 F. Supp. 2d at 1131-32; Baker & Shapiro, *supra*, at 9-10; see also Robert H. Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other “Consumer Protection” Market Failures* 8-10 (Am. Antitrust Inst., Working Paper No. 07-06, 2007), available at [http://www.antitrustinstitute.org/archives/files/aa-20Lande,%20WP%2007-06,%20FTC%20Market%20Power%20Test\\_031420071657.pdf](http://www.antitrustinstitute.org/archives/files/aa-20Lande,%20WP%2007-06,%20FTC%20Market%20Power%20Test_031420071657.pdf) (arguing that Kodak had market power despite low market share in photocopier market). See generally *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 473 (1992) (noting that market power can arise through imperfect information to consumers).

156. With all due respect to Macy’s and May, a Honda Accord and Toyota Camry might be more appropriate comparisons, but Professors Lande and Langenfeld used Mercedes and BMW in their excellent example. Robert H. Lande & James Langenfeld, *The Evolution of Federal Merger Policy*, ANTITRUST, Spring 1997, at 5, 5.

157. *Id.* at 5 (internal quotation marks omitted); see also Jonathan B. Baker, *Mergers Among Sellers of Differentiated Products*, ANTITRUST, Spring 1997, at 23, 23 (using hypothetical merger

made that there is no such thing as a “luxury car market” for antitrust purposes, because at least some consumers would be dissuaded by a price increase and buy a nonluxury car.<sup>158</sup>

Merger analysis works best when dealing with fungible commodities; differentiated products with subtle variations complicate market definition, because even closely related products may be not be substitutes for all people at all times.<sup>159</sup> The critical question is whether the differentiated products “provide effective pricing constraints on one another.”<sup>160</sup> In other words, does Mercedes constrain price increases by BMW (or vice versa), or are both affected more by every other car seller, including sellers of subcompacts and trucks? Similarly, did Macy’s or May constrain the other’s prices before the merger for any customers in any geographic market? The FTC found no evidence that Macy’s and May priced their goods strategically to one another, although the results of the empirical study conducted for this Article suggest otherwise.<sup>161</sup>

#### F. Department Stores and Section 7 of the Clayton Act Before Bon-Ton

There have been a few merger cases involving department stores over the years. Most federal courts considering the matter have implicitly or explicitly recognized department stores as a distinct antitrust product market.<sup>162</sup>

In 1962, the DOJ brought an action under section 7 of the Clayton Act to enjoin Gimbels Department Store from purchasing Ed Schuster & Co. (“Schuster’s”), a Milwaukee department store chain. Citing affidavits that stated

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between “Crunchies” versus “Fruities” to illustrate localized competition theory). Similarly, three economists, one with the FTC, found that “merger effects are not well understood when firms compete in multiple dimensions, such as price, product, place and promotion.” Steven Tenn et al., *Mergers when Firms Compete by Choosing both Price and Promotion 1* (Vanderbilt L. Sch. Pub. L. & Leg. Theory, Working Paper No. 07-09, 2007), available at [http://ssrn.com/abstract\\_id=980941](http://ssrn.com/abstract_id=980941). Reviewing the effects of the 2003 merger between Häagen-Dazs and Dreyers, both superpremium ice creams, the economists found that a model that “ignores promotion under-predicts the price effects of a merger.” *Id.* at 2.

158. See generally Lande & Langenfeld, *supra* note 156, at 5, 7-8 (discussing effects of differentiated products compared to those that consumers perceive as differentiated).

159. See generally *id.* at 5 (observing that consumers can find enough differences in product to make two otherwise homogenous products differentiated).

160. Christopher A. Velturo, *Creating an Effective Diversion: Evaluating Mergers with Differentiated Products*, ANTITRUST, Spring 1997, at 16, 16. With an enormous amount of data and minions to perform the calculations, several models have been developed to analyze such markets, including the Residual Demand Elasticity Model (Jonathan Baker and Timothy F. Bresnahan), the Antitrust Logit Simulation Model (Gregory J. Werden and Luke M. Froeb), and the Almost Ideal Demand System (Jerry Hausman and others). *Id.*; see also Gregory J. Werden, *Simulating Unilateral Competitive Effects from Differentiated Products Mergers*, ANTITRUST, Spring 1997, at 27, 27 (recognizing Froeb’s and Hausman’s simulations to analyze mergers).

161. FTC Statement, *supra* note 21, at 3. See *infra* Part III for a discussion and presentation of the price data gathered for this Article.

162. See, e.g., *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 870 (W.D.N.Y. 1994) (reasoning that department stores have established dominance in key areas such as women’s apparel and cosmetics, thus creating niche that is appropriate submarket); see also FTC Statement, *supra* note 21, at 3 (concurring with *Bon-Ton* that department stores are distinct market).

that Schuster's business was in decline, that it had closed one of its stores, that some of its remaining stores were in declining neighborhoods, and that it had no downtown store to compete directly against Gimbels, the court found that the merger would not "substantially lessen competition in retail merchandising in Milwaukee County."<sup>163</sup>

In the late 1970s, shareholders of Marshall Field & Co. sued after Carter Hawley Hale ("CHH"), a nationwide department store holding company, made an unsuccessful takeover bid for Field's.<sup>164</sup> Marshall Field's maintained that rejecting a takeover by CHH was necessary because a merger between the two firms would violate the antitrust laws.<sup>165</sup> Although decided on securities law, the court held that such antitrust concerns were within the appropriate purview of directors deciding whether a merger was in the best interests of stockholders.<sup>166</sup>

In 1986, May acquired Associated Dry Goods, including its Joseph Horne Company department stores in Pittsburgh, Pennsylvania. The city of Pittsburgh sued to enjoin the merger, claiming that it would substantially lessen competition or tend to create a monopoly in violation of section 7 of the Clayton Act.<sup>167</sup> May already owned Horne's Pittsburgh competitor, Kaufmann's. The city of Pittsburgh and May stipulated to a court-ordered dismissal that required May to divest Horne's "as a viable competitive entity in the type of department store business operated by Horne's or Kaufmann's or Gimbel's [sic]."<sup>168</sup>

In 1984, CHH was the subject of a hostile takeover by the Limited, Inc.<sup>169</sup>

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163. *United States v. Gimbel Bros., Inc.*, 202 F. Supp. 779, 780 (E.D. Wis. 1962). Although the procedural posture of the case was the preliminary injunction stage, and no testimony of economists (or anyone other than the affiants) was heard, the court concluded that there were "literally hundreds of effective competitors of department stores." *Id.* The DOJ did not appeal the decision. The downtown Milwaukee Gimbels closed with the rest of the chain in 1986. The store was acquired by Marshall Field's, which then shuttered it in 1997. The store is now offices, apartments, and a Border's bookstore. Doris Hajewski, *Saying So Long; Signs Point to the End of Marshall Field's Local Run*, MILWAUKEE J. SENTINEL, July 31, 2006, at D1.

164. *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168, 1172, 1175 (N.D. Ill. 1980). CHH, the owner of Neiman Marcus, filed for bankruptcy in 1991 after taking on considerable debt to avoid several hostile takeover attempts. Richard W. Stevenson, *Chapter 11 for Carter Hawley*, N.Y. TIMES, Feb. 12, 1991, at D1. Neiman Marcus was spun off as a separate company in 1987, and most of the remaining department store chains were sold to FDS. EDNA BONACICH & RICHARD P. APPLEBAUM, *BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY* 86 (2000); Claudia H. Deutsch, *Neiman-Marcus Minds the Store*, N.Y. TIMES, Sept. 4, 1988, § 3, at 4.

165. *Panter*, 486 F. Supp. at 1180.

166. *Id.* at 1172, 1191.

167. *City of Pittsburgh v. May Dep't Stores Co.*, No. 86-1866, 1986 WL 12674, at \*1 (W.D. Pa. Sept. 24, 1986). Pittsburgh sued under section 16 of the Clayton Act, 15 U.S.C. § 26, which provided for injunctive relief for private parties under a cause of action permitted by other Clayton Act sections, including section 7.

168. *Id.* Horne's was eventually acquired by a local investor group, which attempted to sell the chain to Dillard's and real estate developer Edward J. DeBartolo Corp. After several years of litigation, Dillard's acquired the Ohio Horne's stores and FDS acquired the Pennsylvania stores. Cristina Rouvalis, *Goodbye Horne's, Hello Lazarus: Federated Buys Local Institution, Changes Vowed to Upgrade Stores*, PITTSBURGH POST-GAZETTE, Apr. 30, 1994, at A1.

169. *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246, 247-48 (C.D. Cal. 1984).

CHH argued that it had standing to sue the Limited under section 7 of the Clayton Act because the merger contemplated would substantially lessen competition in a department store product market under section 7.<sup>170</sup>

#### G. Bon-Ton

In 1994, a federal district court in New York held that traditional department stores were a distinct antitrust product market.<sup>171</sup> The case involved a section 7 challenge to May's proposed acquisition of the McCurdy department store chain in upstate New York, mostly in the Rochester metropolitan area.<sup>172</sup>

McCurdy's was founded in 1901 and was one of Rochester's premier department stores.<sup>173</sup> The company was closely held and elected to sell its assets in 1994.<sup>174</sup> The two most serious bidders were May and Bon-Ton.<sup>175</sup> McCurdy's accepted May's bid of \$17.75 million.<sup>176</sup> At the time, May's forty-unit Kaufmann's chain operated four stores in Rochester—at each of the four major shopping malls.<sup>177</sup> The Bon-Ton had no presence in Rochester but had recently acquired ten stores in Buffalo, New York, approximately seventy-five miles away.<sup>178</sup>

May planned to take over the McCurdy's space and operate two separate Kaufmann's stores at two of the Rochester malls (converting the former McCurdy's into a Kaufmann's but continuing to operate the existing Kaufmann's at the same mall—thus preventing the possibility of a new entrant).<sup>179</sup> At the third mall, Kaufmann's would take over McCurdy's store and convey the existing Kaufmann's store to the mall owner.<sup>180</sup> At the fourth mall, May planned to continue operating its existing Kaufmann's store and to convert the former McCurdy's store into another May chain, Lord & Taylor.<sup>181</sup>

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170. *Id.* at 248. The court held alternatively that a tender offer target did not have standing to challenge the acquisition under section 7 and that, *inter alia*, CHH's proffered relevant product market of "moderate-priced women's fashion apparel" and "special-sized women's apparel" did not withstand economic scrutiny. *Id.* at 252-53 (internal quotation marks omitted).

171. *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 867-75 (W.D.N.Y. 1994).

172. *Id.* at 862-63.

173. *Id.* at 863.

174. *Id.* at 863-64.

175. *Id.* at 864.

176. *Bon-Ton*, 881 F. Supp. at 864. May offered to buy eight of the twelve McCurdy's stores, six of which were in Rochester, one in Elmira, New York, and the other in Syracuse, New York. *Id.* The Elmira and Syracuse stores were not at issue in the antitrust case, and May had agreed to convey three of the six Rochester stores to a local real estate developer. *Id.*

177. *Id.* at 863.

178. *Id.*; Mapquest, <http://www.mapquest.com/directions> (enter "Rochester N.Y." in "Starting Location" field; then enter "Buffalo N.Y." in "Ending Locations" field; then follow "Get Directions" hyperlink) (last visited Sept. 1, 2008). Bon-Ton acquired Buffalo's Adam, Melsdrum & Anderson ("AM&A") department store in 1994. James T. Madore, *The Bon-Ton Wins Fight to Enter Rochester*, BUFFALO NEWS, Mar. 7, 1995, at B7.

179. *Bon-Ton*, 881 F. Supp. at 864, 876-77.

180. *Id.* at 864.

181. *Id.*



### 1. The Bon-Ton and the State of New York Sue May

The Bon-Ton and the state of New York sued May alleging that the acquisition would result in a monopoly "in the traditional department store market in the Rochester area, [thereby] violat[ing] federal and state antitrust laws."<sup>182</sup> If the transaction were to proceed as planned, May would have over a fifty percent market share for traditional department stores and would also have acquired all the available space for a department store in the four major regional malls in metropolitan Rochester.<sup>183</sup>

May made two critical arguments, both of which the court found unpersuasive.<sup>184</sup> The first was that the product market included all stores selling "general merchandise, apparel and furniture" ("GAF").<sup>185</sup> The second was that Bon-Ton could enter the Rochester market in numerous suitable sites outside the four regional malls: "other shopping malls, strip malls and 'stand-alone' locations where space is available for a department store."<sup>186</sup>

With regard to the proper definition of the product market, the court admitted considerable evidence from both sides, heard three days of testimony, and was "carpet bombed" with hundreds of pages of documents, exhibits, affidavits, declarations, and legal memoranda.<sup>187</sup> The court noted that the Supreme Court's seminal decision on product markets, *Brown Shoe*, was still controlling thirty years later and that product market was defined in terms of the "reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it."<sup>188</sup> The court also discussed *Brown Shoe's* admonition that "broad product market[s] may be subdivided into well-defined submarkets," and those "submarkets themselves constitute product markets for antitrust purposes."<sup>189</sup>

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182. *Id.* at 865.

183. *Id.* Plaintiffs disputed defendants' contention that J.C. Penney should be included in the product market, but May would have had over a fifty percent market share even with the inclusion of J.C. Penney. *Bon-Ton*, 881 F. Supp. at 865. Defendants disputed the existence of a traditional department store antitrust product market but argued that if one existed, it must include J.C. Penney. *See id.* (asserting that relevant product market includes all stores selling apparel, furniture, and general merchandise).

184. *Id.* at 875-77.

185. *Id.* at 865.

186. *Id.* May also argued that Bon-Ton had no standing because it had no recognized antitrust injury. *Bon-Ton*, 881 F. Supp. at 865. The court held that Bon-Ton did in fact have antitrust injury, and, regardless, the defendants conceded that the state of New York was a proper plaintiff. *Id.* at 878.

187. *Id.* at 863 (quoting *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr.*, 713 F. Supp. 1457, 1475 (S.D.N.Y. 1989)).

188. *Id.* at 868 (alteration in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

189. *Id.* (citing *Brown*, 370 U.S. at 325).

In what can be described as a post-Chicago analysis, the court stated that “[h]ypothetical formulas and paradigms are less important . . . than concrete economic realities. Thus, in defining the relevant product market, ‘the reality of the marketplace must serve as the lodestar,’”<sup>190</sup> and “‘actual market realities’ are of key significance.”<sup>191</sup> In plain terms, “[t]o paraphrase Justice Potter Stewart’s often-quoted comment made in another context; customers know a department store when they see it. Anyone who has ever shopped in a department store, specialty store or discounter certainly knows that there is a difference, and . . . that the difference is significant.”<sup>192</sup>

## 2. Expert Testimony to Define Product Market

The court reached this conclusion by relying on expert witnesses and May internal documents.<sup>193</sup> Robert Warner, president of Robert M. Warner Associates, had worked as an executive in several major retail concerns and had been employed by Macy’s for twenty-three years, during which time he served as general manager of Macy’s flagship store in Herald Square, Manhattan.<sup>194</sup> He testified that department stores were “a distinct type of retailer.”<sup>195</sup> The court considered his testimony to the effect that “[c]ustomers shop department stores . . . primarily to obtain upscale, brand name fashion merchandise, especially women’s fashion apparel. The department store is distinguished by its wide assortment of brands as well as the quantity and quality of merchandise in addition to its emphasis on cutting-edge fashion.”<sup>196</sup>

The court described the distinction Mr. Warner made between department stores and specialty and discount stores and noted his opinion that such stores were not primary competitors of department stores.<sup>197</sup> As the court noted,

Discount stores deal mostly in hard goods as opposed to the soft goods and fashion items sold by department stores. Specialty stores also provide a narrower focus and appeal to one or very few types of customers. They are much smaller, often deal with private brand labels and cannot compete with the upper-level brand names and high fashion items sold principally in department stores.<sup>198</sup>

Bernard Olsoff was another expert with over forty years of experience in the retail industry, including twelve years as president of May’s merchandising

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190. *Bon-Ton*, 881 F. Supp. at 869 (quoting *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987)).

191. *Id.* (quoting *Eastman Kodak Co. v. Image Technical Serv., Inc.* 504 U.S. 451, 466 (1992)).

192. *Id.* at 869-70 (footnote omitted). *But see* FTC Statement, *supra* note 21, at 1 (stating that department stores no longer occupy unique position they once had decades ago).

193. *Bon-Ton*, 881 F. Supp. at 870-75. The reported decision did not discuss any expert testimony that May may have proffered. *Id.*

194. *Id.* at 870.

195. *Id.*

196. *Id.*

197. *Bon-Ton*, 881 F. Supp. at 870.

198. *Id.* at 870.

division.<sup>199</sup> Mr. Olsoff stated that specialty shops and discount stores do not fill customer demand or sell the same product that department stores do.<sup>200</sup> The court noted that in Mr. Olsoff’s view, “[d]epartment stores are the primary and, in some instances, exclusive outlet for [Liz Claiborne, Polo, Nautica, and other well-known brand merchandise]” as well as “the principal source for higher priced, brand-name cosmetics such as Estee Lauder, Clinique, Lancome and Elizabeth Arden.”<sup>201</sup>

Mr. Olsoff also testified that “to protect their image, many manufacturers try to sell their merchandise exclusively to department stores.”<sup>202</sup> Selling exclusively to a department store allows manufacturers of brand-name items to “maintain the image of the brand name as being of high quality and at the cutting-edge of fashion.”<sup>203</sup> The “choice of a broad range of brand-name merchandise . . . is the distinctive feature of a department store[,]” particularly in women’s clothing and cosmetics.<sup>204</sup>

Frederick R. Warren-Boulton, a professor of economics at Washington University in St. Louis and the former chief economist for the Antitrust Division of the DOJ, submitted a declaration defining the relevant antitrust market as “all traditional department stores plus J.C. Penney.”<sup>205</sup> Professor Warren-Boulton predicted that prices would increase if May were permitted to purchase the McCurdy’s stores.<sup>206</sup> The court noted that toys, books, and most large appliances were no longer sold at most traditional department stores, but department stores still provided “a distinctive type of product to an identifiable type of consumer.”<sup>207</sup> The court summarized the testimony of Dr. Douglas F. Greer, an expert in industrial economics, to the effect that department stores have responded to marketplace changes by “concentrating on establishing their dominance in several key areas, particularly women’s apparel and cosmetics.”<sup>208</sup>

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199. *Id.*

200. *Id.* at 871.

201. *Id.* at 870.

202. *Bon-Ton*, 881 F. Supp. at 871.

203. *Id.* at 871.

204. *Id.*

205. *Id.* (quoting Declaration of Frederick R. Warren-Boulton at 42, *Bon-Ton*, 881 F. Supp. 860 (No. 94-CV-6454L)). Although the case as reported does not discuss Professor Warren-Boulton’s reasons for including J.C. Penney in the traditional department store market, it may be because of the chain’s decision to reposition itself as a purveyor of fashion. *See id.* at 875 (stating that J.C. Penney is repositioning itself as traditional department store). *See generally* Maria Halkias, *Dillard’s Plan Is a Puzzle*, DALLAS MORNING NEWS, May 30, 2005, at 1D [hereinafter Halkias, *Dillard’s Plan*] (mentioning that J.C. Penney has strong position in value and fashion); Maria Halkias, *Fashion Lines Lifting Penney*, DALLAS MORNING NEWS, Feb. 23, 2005, at 9D [hereinafter Halkias, *Fashion Lines*] (summarizing J.C. Penney’s efforts to revitalize its business); Andrea K. Walker, *A 3-Store Offensive*, BALT. SUN, Mar. 12, 2006, at 1C (noting that J.C. Penney created new image as affordable and fashionable store).

206. *Bon-Ton*, 881 F. Supp. at 871.

207. *Id.*

208. *Id.* at 868, 871.

Despite the fact that consumers can sometimes obtain some brand-name goods at other types of retail establishments, consumers recognize that these alternatives are not in the same product market, particularly for fashion-conscious consumers.<sup>209</sup> Furthermore, manufacturers of brand-name goods will distribute their products only to traditional department stores because it allows them to “maintain a certain aura of status and exclusivity” that they would lose if the products were sold at other stores.<sup>210</sup> While customers can obtain a “functionally similar product through some effort . . . a non-branded or private-label jacket may *not* be the equivalent of a designer jacket, regardless of whether its physical properties are the same.”<sup>211</sup> Thus for the core customer of department stores, shopping mostly for women’s clothing, there is no true substitute for a traditional department store.<sup>212</sup> Department store shoppers may also shop at a discount store, but there is a recognition that department stores have “peculiar characteristics and uses” and serve a function distinct from that of other types of stores.<sup>213</sup>

Expert testimony as well as May internal documents supported the view that department stores only look to other department stores as competition.<sup>214</sup> Mr. Olsoff testified to the effect that “other department stores located in shopping malls” were May’s competition, and it was “to those stores that May would adjust its prices.”<sup>215</sup> May’s documents cataloged the respective market shares of its competitors (including a postmerger analysis) but counted only traditional department stores.<sup>216</sup>

Other May internal documents showed a “preoccupation” with what would happen if Bon-Ton took over the McCurdy stores.<sup>217</sup> May did not believe it would experience any adverse effect in its existing Kaufmann’s stores if a

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209. *See id.* at 871-72 (reasoning that consumers are well aware that department stores are in submarket that is distinctively different from other retail establishments).

210. *Id.* at 872.

211. *Bon-Ton*, 881 F. Supp. at 872. Brand-name apparel sold by discount and outlet stores is priced lower because it reflects an older and less fashionable style. *Id.* at 874. “Unbranded and private-label goods may also be priced lower because . . . they lack the cachet of brand-name merchandise.” *Id.*

212. *See id.* (stating that department stores have customers that shop more at department stores for certain goods than at other kinds of retailers). It should be noted, however, that the court never considered whether the fact that the demand elasticity of noncore customers of department stores protected the core customers from price increases. This question could conceivably be answered through empirical pricing and marketing studies as well as econometric analysis.

213. *Id.* at 868, 873.

214. *Bon-Ton*, 881 F. Supp. at 873. *But see generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs Vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 652 (2005) (noting that existence of so-called “hot docs” is not dispositive in determining market power).

215. *Bon-Ton*, 881 F. Supp. at 873.

216. *Id.*; *cf.* *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076-77 (D.D.C. 1997) (noting that Staples, just like May stores, adjusted its price to remain competitive in markets where other office-supply superstores existed).

217. *Bon-Ton*, 881 F. Supp. at 873.

nondepartment store retailer took over the McCurdy’s stores, but May’s sales would drop five percent if Bon-Ton bought the McCurdy’s stores.<sup>218</sup> Even McCurdy’s own internal documents analyzing competitive dynamics stated that the company’s “primary competitors” were Kaufmann’s and J.C. Penney.<sup>219</sup> Both Kaufmann’s and McCurdy’s carefully monitored the prices and sales at the other department store; there was no monitoring of specialty stores and no price fluctuations based on their activities.<sup>220</sup>

The court held, therefore, that the relevant antitrust product market was “traditional department stores including J.C. Penney’s [sic].”<sup>221</sup> As such, the increase in the Herfindahl-Hirschman Index, a well-known measure of market concentration, was sixteen times higher than the threshold that indicates that the merging parties are likely to create or enhance market power.<sup>222</sup>

The court also held that the barriers to entry were significant and substantial with grave anticompetitive effects; even some of the defense witnesses agreed with that conclusion.<sup>223</sup> Regional malls were the only viable locations for department stores.<sup>224</sup> With just two locations, breaking into the Rochester market would be “very difficult” and locations in strip centers would undermine the image of upscale fashion.<sup>225</sup> The court noted that the “mere fact that May wants to expand into vacant McCurdy’s space at malls where May already has stores is an indication of the significance that May attaches to malls.”<sup>226</sup>

The court granted Bon-Ton and the state of New York an injunction against May and voided the asset purchase between May and McCurdy’s.<sup>227</sup> Bon-Ton now operates three department stores in the Rochester area; Macy’s continues to operate three stores (previously Kaufmann’s, now Macy’s) at the same four regional malls.<sup>228</sup>

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218. *Id.*

219. *Id.* at 874.

220. *Id.*; *cf. Staples*, 970 F. Supp. at 1076-77 (D.D.C. 1997) (observing that Staples, like May, closely monitored prices of its competitors).

221. *Bon-Ton*, 881 F. Supp. at 875 (internal quotation marks omitted).

222. *Id.* at 876. The Herfindahl-Hirschman Index is a measure of market concentration. *See* 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,557 (Sept. 10, 1992) (referencing Herfindahl-Hirschman Index as measure of market concentration).

223. *Bon-Ton*, 881 F. Supp. at 877.

224. *Id.* at 876.

225. *Id.* (quoting Robert Warner).

226. *Id.* at 877.

227. *Id.* at 878.

228. The Bon-Ton, Locations, <http://www.bonton.com> (follow “Find a Store” hyperlink; then select stores within “50 miles;” enter “Rochester;” and select “NY”) (last visited Sept. 1, 2008); Macy’s, Our Stores, <http://www1.macys.com/store/locator/index.ognc> (search by city “Rochester” and state “New York”) (last visited Sept. 1, 2008); *see also* James T. Madore, *The Bon-Ton Wins Fight to Enter Rochester*, BUFFALO NEWS, Mar. 7, 1995, at B7 (covering Bon-Ton’s presence in Rochester area after court enjoined May from expanding); *cf. Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, Civ. A. Nos. 94-6454L, 94-6479L, 1995 WL 215307 (W.D.N.Y. Mar. 6, 1995) (setting out settlement agreement, which includes transfer at one of regional malls of McCurdy’s store to May and former May store to

*H. Macy's Acquisition of May*

In 2005, Macy's announced it would acquire May for \$11 billion in cash and Macy's stock and the assumption of \$6 billion in May debt, for a total of \$17 billion.<sup>229</sup> Although the FTC took no action to enjoin or modify the merger, it conducted a lengthy investigation, resulting in a rare public statement explaining its rationale for permitting the merger to occur.<sup>230</sup>

The FTC's investigation considered Macy's and May's pricing strategies,<sup>231</sup> and the FTC "[s]taff found no evidence that Federated and May have priced their goods strategically in relationship to each other. The absence of such pricing patterns provides the most compelling, objective demonstration that these conventional department stores are not in a distinct product market."<sup>232</sup> The FTC further stated:

Equally compelling is the fact that Federated and May, like other department store chains, set prices that are uniform over very broad geographic areas – typically, multi-state regions. These firms do not appear to vary local prices based on the number or identity of conventional department stores in malls or metropolitan areas. This fact distinguishes the Federated/May acquisition from *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 (D.D.C. 1997), where a narrow "office superstore" market definition was buttressed by proof of differential prices, depending on the number of superstores in a particular city or [metropolitan area].<sup>233</sup>

The results of the empirical study in this Article, however, yielded very different conclusions.<sup>234</sup>

Several state attorneys general determined that the merger between Macy's and May would end competition and hurt consumers through diminished choices and higher prices.<sup>235</sup> The attorneys general of California, Maryland,

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Bon-Ton). Lord & Taylor, now owned by a private equity investment firm, still operates in one of the four Rochester-area regional malls. Lord & Taylor Store Locator, <http://www.lordandtaylor.com/eng/storelocator/> (search by city "Rochester," state "New York," and showing locations within fifty miles) (last visited Aug. 1, 2008); Press Release, NRDC, NRDC Completes Acquisition of Lord & Taylor (Oct. 3, 2006), available at [http://www.nrdcequity.com/pdf/pr/NRDcequity\\_LandTacquisition.pdf](http://www.nrdcequity.com/pdf/pr/NRDcequity_LandTacquisition.pdf).

229. Daly, *supra* note 31. See *supra* notes 29-31 and accompanying text for a discussion of Macy's acquisition of May and FDS.

230. FTC Statement, *supra* note 21, at 3. In high profile matters since 1997, the FTC has infrequently acknowledged the investigation of a particular merger under the Clayton Act, usually doing so when a party to the transaction had disclosed its existence in a press release or other public filing. Notice of Policy of Disclosing Investigations of Announced Mergers, 62 Fed. Reg. 18,630 (Apr. 16, 1997); Press Release, Federal Trade Commission, FTC: Merger Acknowledgement (Apr. 11, 1997), available at <http://www.ftc.gov/opa/1997/04/mergdisc.htm>.

231. It is unknown whether the FTC reviewed coupons or relied on other pricing data.

232. FTC Statement, *supra* note 21, at 3.

233. *Id.*

234. See *infra* Part III for an empirical study that shows Macy's-May in fact varies its prices based on the local area market.

235. See Assurance at 2-3, *New York v. Federated Dep't Stores, Inc.* (Aug. 30, 2005), available at

Massachusetts, New York, and Pennsylvania required Macy's to divest twenty-six duplicate stores in malls but required that the stores could only be sold to other traditional department stores.<sup>236</sup> The settlement required Macy's to sell the duplicate stores to other department stores as long as the offer was "commercially reasonable," even if Macy's received higher offers from other parties.<sup>237</sup>

New York's former Attorney General (and former Governor) Eliot Spitzer said that were it not for the divestiture agreement, Macy's acquisition of May would end department store competition for some consumers.<sup>238</sup> "With the divestitures, consumers will benefit from the lower prices, greater choice, and increased services that will result from the competition generated by placing the divested department stores under new ownership."<sup>239</sup> Reports noted that James Sluzewski, a spokesman for Macy's, considered "the agreement with state antitrust regulators [to be] expected, given the large number of Macy's and Bloomingdale's stores that overlap in malls with May stores."<sup>240</sup>

In addition to the stores ordered divested by the attorneys general of five states, Macy's divested an additional eighty stores, or in total twenty percent of the entire May purchase.<sup>241</sup> A number of stores were sold or swapped with other department stores, such as Boscov's and Belk.<sup>242</sup> A few were converted to Macy's upscale department store, Bloomingdale's.<sup>243</sup> But the majority of stores

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[http://www.oag.state.ny.us/media\\_center/2005/aug/Federated%20Assurance.pdf](http://www.oag.state.ny.us/media_center/2005/aug/Federated%20Assurance.pdf) (alleging anti-competitive effects of Federated's stores in several states); Terence O'Hara, *Federated Must Sell Stores to Rivals*, WASH. POST, Aug. 31, 2005, at D1 (describing mandated sale of four stores in Maryland); *California Requires Spinoffs to Clear Federated-May Merger*, ANTITRUST & TRADE REGULATION DAILY (BNA), Sept. 2, 2005, at ¶ 1 (describing similar sales of twenty-six stores in California); Press Release, N.Y. Att'y Gen., Department Store Chain to Divest Three NY Stores as Part of Acquisition (Aug. 30, 2005), available at [http://www.oag.state.ny.us/media\\_center/2005/aug/aug30b\\_05.html](http://www.oag.state.ny.us/media_center/2005/aug/aug30b_05.html) (informing New York public about sales in Albany and Long Island).

236. The traditional department stores acceptable to the attorneys general included Nordstrom, Dillard's, Gottschalk's, Neiman Marcus, Saks Fifth Avenue, Saks Department Store Group (which included Parisian), Bon-Ton, Elder-Beerman, Boscov's, Belk, and Von Maur. O'Hara, *supra* note 235.

237. William T. Lifland & Elai Katz, *Department Store Combination Scrutinized by States*, N.Y. L.J., Sept. 22, 2005, at 3. See *supra* note 32 and O'Hara, *supra* note 235, for a discussion of sales of Federated department stores. Another copy of the Assurance can be found at [http://ag.ca.gov/newsalerts/cms05/05-071\\_0a.pdf](http://ag.ca.gov/newsalerts/cms05/05-071_0a.pdf) (last visited Aug. 1, 2008).

238. Press Release, N.Y. Att'y Gen., *supra* note 235.

239. *Id.* (quoting then-Attorney General Spitzer).

240. O'Hara, *supra* note 235. While Mr. Sluzewski's perspective is interesting, it does not explain why the FTC reached such a different conclusion after its own investigation.

241. Press Release, Macy's, Inc., Federated Identifies Six Additional Stores for Divestiture (Oct. 24, 2005), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle&ID=771927&highlight=>.

242. *Federated to Exchange Stores with Belk*, BUSINESS WIRE, Nov. 9, 2006, <http://www.allbusiness.com/services/business-services/3918969-1.html>; Int'l Council of Shopping Ctrs., *Boscov's Buys 10 Federated Stores*, SHOPPING CENTER TODAY NEWSWIRE, Feb. 6, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2103&region=main>.

243. Int'l Council of Shopping Ctrs., *Federated to Close Six More Stores*, SHOPPING CENTER TODAY NEWSWIRE, Oct. 27, 2005, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2030&region=main>.

were sold to Target or back to the mall owners.<sup>244</sup> Without options for new department store entry, many of these former department store locations were turned into multitenant outlets, restaurants, food courts, movie theaters, or sporting goods stores, eliminating the possibility of department store entry and competition, perhaps forever.<sup>245</sup> Macy's also sold off the entire remainder of the Lord & Taylor chain to NRDC Equity Partners, a private equity group, for \$1.08 billion.<sup>246</sup>

### I. *The Department Store Product Market*

Market definitions, market shares, the Herfindahl-Hirschman Index, the Elzinga-Hogarty test,<sup>247</sup> the 1992 U.S. Government Horizontal Merger Guidelines, and other forms of market measurement and assessment<sup>248</sup> are all just proxies for market power or a means of assessing market power.<sup>249</sup> And

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244. Int'l Council of Shopping Ctrs., *Federated Sells 4 Mall Anchor Stores to Target*, SHOPPING CENTER TODAY NEWSWIRE, July 20, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2213&region=main>; Int'l Council of Shopping Ctrs., *Simon Buys Back Nine Federated Stores*, SHOPPING CENTER TODAY NEWSWIRE, May 2, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2164&region=main>; see also, e.g., Dana Hedgpeth & Michael Barbaro, *Shaking Up Regional Retail*, WASH. POST, Mar. 1, 2005, at E1 (noting extensive retail store reorganization affecting Washington, D.C., area). See generally Brannon Boswell, *Merger Good for Mall Industry, Landlords Say*, SHOPPING CENTERS TODAY, Apr. 2005, available at <http://www.icsc.org/srch/sct/sct0405/index.php> (describing advantages to mall owners resulting from retail industry consolidation); Andy Fixmer, *Mall Owners Won't Lament Federated-May Deal*, L.A. BUS. J., Mar. 7, 2005, available at <http://www.thefreelibrary.com/Mall+owners+won't+lament+federated-may+deal%3a+sales+rise+as+department...-a0130727901> (outlining developers' abandonment of traditional reliance on department stores); Michael Sasso, *Changes in Store for Malls*, TAMPA TRIB., May 24, 2006, at Moneysense 1 (illustrating experimental approaches to shopping center space); Debra Hazel, *Check-In Time*, SHOPPING CENTERS TODAY, Nov. 2003, available at <http://www.icsc.org/srch/sct/sct1103/page17.php> (discussing installation of hotel locations in shopping centers); Anne Watson, *Owners Finding New Uses for Old Centers*, SHOPPING CENTERS TODAY, May 2002, available at <http://icsc.org/srch/sct/sct0502/page82.php> (noting successful approaches to empty anchor store space in malls).

245. See *supra* note 244 and accompanying text for a description of strategies employed by developers in response to changes within the retail industry.

246. *Federated Finalizes Sale*, CHI. TRIB., Oct. 4, 2006, at Business 2; Press Release, NRDC Equity Partners, NRDC Completes Acquisition of Lord & Taylor (Oct. 3, 2006), available at [http://www.nrdequity.com/pdf/pr/NRDCequity\\_LandAcquisition.pdf](http://www.nrdequity.com/pdf/pr/NRDCequity_LandAcquisition.pdf); Press Release, NRDC Equity Partners, NRDC to Acquire Lord & Taylor (June 22, 2006), available at [http://www.nrdequity.com/pdf/pr/nrdc\\_acquiresLT\\_062206.pdf](http://www.nrdequity.com/pdf/pr/nrdc_acquiresLT_062206.pdf). The flagship Lord & Taylor store in Manhattan was alone valued for as much as \$384 million. Sharon Edelson, *With Federated-May Merger, Developers Eye L&T Flagship*, WOMEN'S WEAR DAILY, June 17, 2005, at 1. The same Wall Street analyst who valued Lord & Taylor's flagship at \$384 million said "[t]here is no way the FTC . . . will allow Federated to keep Macy's, Bloomingdale's and Lord & Taylor" because "Federated would become too dominant a presence." *Id.* (alteration in original).

247. Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45, 72-80 (1973) (assessing geographic market based on shipment data).

248. See, e.g., George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 557-62 (1985) (determining market based on price data).

249. See generally Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying*



without nearly impossible measurements of cross-elasticity of demand, the best way to assess market power is to apply one of these proxies or tests.<sup>250</sup> Any merger or market analysis is always going to include a certain amount of guesswork and common sense.

With regard to Macy’s, there are two diametrically opposite views proffered by two esteemed authorities. The first, offered by the U.S. District Court for the Western District of New York, is that traditional department stores are a distinct product market.<sup>251</sup> The second, offered ten years later by the FTC, is that “the product market must be defined to include, at the very least, all department stores and all specialty stores that collectively sell substantially similar products.”<sup>252</sup> To reconcile the two, the FTC seemed to suggest that the world had been turned upside down since the *Bon-Ton* decision, and that the case had no stare decisis value.<sup>253</sup>

Product market definitions, however, are most important for section 7A of the Clayton Act,<sup>254</sup> when the government is using Hart-Scott-Rodino reporting requirements to predict the future and determine whether a proposed transaction is likely to substantially lessen competition.<sup>255</sup> In a merger retrospective, it is critical only to assess whether the already-approved transaction has led to anticompetitive consequences; the product market may thus speak for itself. Just as the FTC suggested the world had changed drastically since *Bon-Ton*, it is also possible that the world has changed since its Macy’s-May decision or simply that despite a heroic investigation into the merger, the FTC’s Clayton section 7A crystal ball did not predict the future perfectly.

Antitrust scholar Jonathan Baker, noting that neither the Sherman Act nor the Clayton Act require market definition and market share proxies to measure competitive effects, wrote:

The possibility of observing and measuring market power more directly suggests a new notion for Clayton Act doctrine: the *res ipsa loquitur* market definition. When a piano crashes onto the sidewalk, the law does not ask whether someone was negligent; instead, it goes right to the question of who. This approach could translate to antitrust. Suppose that a merger or other practice can be shown, directly, to harm competition, for example by making an increase in price likely. But suppose also that it is hard to draw lines around a market, because the array of differentiated products is broad and seamless. If

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*and Measuring Market Power*, 61 ANTITRUST L.J. 3 (1992) (describing means of measuring effects of market forces on industries and resulting implications on antitrust analyses).

250. See generally Manne & Williamson, *supra* note 214, at 633 (noting that because of limits on ability to measure economic activity, proxies play role in such measurements).

251. *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 863 (W.D.N.Y. 1994).

252. FTC Statement, *supra* note 21, at 3.

253. *Id.* at 2.

254. Product market definitions are also important for the substantially identical analysis undertaken in a Sherman section 2 case.

255. See generally 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. §§ 15c-15h, 18a, 66 (2000)) (requiring notification of analysis by government in certain mergers).

competition will be harmed, some market must exist within which competition takes place. Just exactly where the market's boundaries are may not be very important, though. Nor may it matter much whether the market in which the harm occurs is large or small. All that should matter to the doctrine is that the "market" contain the products and locations that circumscribe the consumer injury.<sup>256</sup>

There is ample precedent for discounting the importance of precise product market definition in light of later developments. The Supreme Court held in *FTC v. Indiana Federation of Dentists*<sup>257</sup> that "[s]ince the purpose of . . . inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"<sup>258</sup> Indeed, the FTC said in a later case, "defin[ing] a relevant market, calculat[ing market] shares, and then draw[ing] inferences from these shares and from other industry characteristics . . . is not the most appropriate way to proceed in cases . . . where more direct evidence of competitive effects is available."<sup>259</sup>

*Indiana Federation of Dentists* was not the first time the Court suggested that market shares may be less relevant than other factors affecting a market. In *United States v. General Dynamics Corp.*,<sup>260</sup> one of the seminal Chicago School cases that altered antitrust theory's earlier reliance on structuralism,<sup>261</sup> the Supreme Court noted that market shares were merely a static snapshot of one aspect of market power and were not necessarily indicative of a company's future ability to compete.<sup>262</sup> Indeed, "[m]arket share is just a way of estimating market power, which is the ultimate consideration"; "[w]hen there are better ways to estimate market power, the court should use them."<sup>263</sup> Another court summarized that the "mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes."<sup>264</sup>

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256. Baker, *Product Differentiation*, *supra* note 40, at 185.

257. 476 U.S. 447 (1986).

258. *Ind. Fed'n of Dentists*, 476 U.S. at 460-61 (quoting 7 P. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)).

259. *In re Schering-Plough Corp.*, No. 9297, 2003 FTC Lexis 187, at \*24 (Dec. 8, 2003) (citing *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *PolyGram Holding, Inc.*, [2001-2005 Transfer Binder] 5 Trade Reg. Rep. (CCH) ¶ 15,453, at 22,453-58 (2003)).

260. 415 U.S. 486 (1974).

261. See Thomas C. Arthur, "Formalistic Line Drawing": *Exclusion of Unauthorized Servicers from Single Brand Aftermarkets Under Kodak and Sylvania*, 24 IOWA J. CORP. L. 603, 609 (1999) (discussing Supreme Court cases responding to Chicago School critiques and reducing antitrust liability).

262. *Gen. Dynamics Corp.*, 415 U.S. at 501.

263. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990) (quoting *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.* 784 F.2d 1325, 1336 (7th Cir. 1986)).

264. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997).

In another case where the FTC prevailed in an argument discounting the importance of a precise product market definition, the Seventh Circuit held:

[Toys “R” Us] seems to think that anticompetitive effects in a market cannot be shown unless the plaintiff, or here the [FTC], first proves that it has a large market share. This, however, has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration. The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant’s share exceeds whatever threshold is important for the practice in the case.<sup>265</sup>

The substantive question that must be answered about Macy’s is not the definition of the product market—we are long past that. The real question is whether harm has resulted to consumers since the merger between Macy’s and May and, indeed, whether even more harm is likely in the future.

### III. EMPIRICAL STUDY OF DEPARTMENT STORE DISCOUNT COUPONS<sup>266</sup>

#### A. *Basis for the Study*

Based on the products and quality of items sold, there does seem to be at least some overlap between middle-market department stores (e.g., Macy’s, Dillard’s, Boscov’s, Bon-Ton, Belk) and upscale department stores (e.g., Saks Fifth Avenue, Neiman Marcus, Nordstrom, Bloomingdale’s, Lord & Taylor), as well as with discount stores (e.g., Wal-Mart, Target, K-Mart) and chain stores (e.g., J.C. Penney, Sears, Kohl’s, Mervyn’s).<sup>267</sup> Indeed, on an item-by-item basis, there is also overlap between middle-market department stores and certain products sold at specialty stores (e.g., Bed Bath & Beyond, Limited, Gap, Ann Taylor, Best Buy).

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265. Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (citations omitted).

266. All raw data supporting this empirical study is on file with the author.

267. So-called “chain stores” have some attributes of middle-market department stores and some attributes of discount stores. They focus on clothing and household wares like the middle-market department stores (although Sears’s greatest success is in hard lines, like Kenmore major appliances and Craftsman tools) but generally have identical floor plans, formats, prices, and selection, like the discount stores, not varied by the demographics or tastes of the individual market. J.C. Penney has traditionally been considered a chain store but has repositioned itself in many ways over the past few years to be more like a middle-market department store. See generally Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005) (outlining popular resistance to chain stores during early twentieth century); Michael Barbaro, *Showing a New Style, Department Stores Surge*, N.Y. TIMES, Nov. 17, 2006, at A1 (noting growth in department store sales); Halkias, *Dillard’s Plan*, *supra* note 205 (depicting challenges of traditional family-run department store competing with larger chains); Halkias, *Fashion Lines*, *supra* note 205 (citing successful new J.C. Penney strategy for growth); Walker, *supra* note 205 (describing Boscov’s plans to move beyond its traditional market).

Middle-market department stores may, however, be a submarket or cluster market<sup>268</sup> based on consumer preference for this distribution channel.<sup>269</sup> In many respects, this analysis is very similar to that undertaken by the court in *FTC v. Staples, Inc.*<sup>270</sup>

In 1997, the Federal Trade Commission reviewed and blocked a merger between two of the three large office-supply “superstore” companies, Staples and Office Depot.<sup>271</sup> The FTC’s case was based in large part on data showing that, where Staples was the only office-supply superstore, its prices were higher than in markets where it competed against Office Depot or Office Max.<sup>272</sup> Specifically, prices in Staples-only markets were thirteen percent higher than in three-firm markets, and prices in Office Depot-only markets were five percent higher than in three-firm markets.<sup>273</sup> Documents obtained from both Staples and Office Depot established that the firms set prices according to the number of office supply superstores in the market.<sup>274</sup>

None of this would be surprising were it not for the fact that, at least at “first blush,” the concept of an office supply superstore made about as much sense as a middle-market department store market.<sup>275</sup> Substantially every item available at Staples, Office Depot, or Office Max is available at other chain stores, including Wal-Mart, Target, Best Buy, CompUSA, and Circuit City.<sup>276</sup> Many items are available at supermarkets and convenience stores, and every item can be purchased via the Internet.

Despite the plethora of buyers’ alternatives, Staples and Office Depot found it profitable to set prices only in relation to other office-supply

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268. It is possible that department stores are cluster markets because of the unique attributes created by the totality of the products sold under one roof. It is also possible that department stores are price-discrimination markets because certain demographic groups are likely to shop in them regardless of a significant but nontransitory price increase. Regardless, these classifications are helpful to deconstruct a market but are not germane to the final analysis.

269. See *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 869-70 (W.D.N.Y. 1994) (identifying traditional department stores as submarket within larger general merchandise, apparel, and furniture sales market). See generally *Staples*, 970 F. Supp. at 1075-76 (noting importance of submarket identification). Some products sold at department stores, such as tailored clothing, cosmetics, and bridal registry items, may have price discrimination aspects as well.

270. 970 F. Supp. 1066, 1075-77 (D.D.C. 1997) (analyzing to determine existence of office superstore submarket).

271. Press Release, FTC, *FTC Rejects Proposed Settlement in Staples/Office Depot Merger* (Apr. 4, 1997), available at <http://www.ftc.gov/opa/1997/04/stapdep.htm>. The third office-supply superstore is OfficeMax. *Id.*

272. *Staples*, 970 F. Supp. at 1075-76.

273. *Id.*

274. *Id.* at 1076.

275. Baker, *supra* note 129, at 207-08 (citing 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992)). “The trial judge recognized that his market definition had to ‘overcome’ a ‘first blush’ or ‘initial gut reaction’ that the product market must include all retailers of office supplies.” *Id.* at 211 (quoting *Staples*, 970 F. Supp. at 1075).

276. See generally *Staples*, 970 F. Supp. at 1073-74 (comparing price structure and customer base at Staples with those at stores such as CompUSA). Cf. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45-49 (D.D.C. 1998) (performing cluster-market analysis of pharmaceutical industry).

superstores.<sup>277</sup> Clearly customers chose these stores for their office supply needs based on convenience, comprehensiveness, variety, reputation, or some factor beyond, or in addition to, price. Customers may view middle-market department stores the same way and be less sensitive to price increases.

As in *Staples*, in *Bon-Ton Stores, Inc. v. May Department Stores, Co.*,<sup>278</sup> expert testimony as well as May internal documents stated that department stores only look to other department stores as competition.<sup>279</sup> May documents reviewing the Rochester, New York, geographic market cataloged the respective market shares of its competitors (including a postmerger analysis) but counted only traditional department stores.<sup>280</sup>

Other May internal documents showed a “preoccupation” with what would happen if Bon-Ton took over the McCurdy stores.<sup>281</sup> May did not believe it would experience any adverse effect in its existing Kaufmann’s stores if a nondepartment store retailer took over the McCurdy’s stores, but May predicted its sales would drop five percent if Bon-Ton bought the McCurdy’s stores.<sup>282</sup> Both Kaufmann’s and McCurdy’s carefully monitored the prices and sales at the other department store; there was no monitoring of specialty stores and no price fluctuations based on the activities of specialty stores.<sup>283</sup>

In *Staples*, in addition to presenting internal documents, the FTC conducted an empirical study capturing Staples’ prices for ninety percent of the items it sold and compared prices in markets where Staples faced no office superstore competition to markets where Staples faced competition from one or both of the other two office superstores.<sup>284</sup> Replicating the same type of empirical study for department stores proved challenging because department stores generally sell similar, but not identical, merchandise. The price of a legal pad at two different stores is easy to compare; two similar private-label women’s blouses at two different department stores may be as different as night and day for many purchasers.

Rather than create a sample basket of goods for price comparison, this empirical study looked at discount coupons in newspapers before and after Macy’s purchased May to determine whether Macy’s discounting behavior was affected by the existence of May and whether Macy’s changed its behavior after the acquisition. In theory, if there were no antitrust product market for middle-market department stores and Macy’s faced competition from upscale, discount,

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277. *Staples*, 970 F. Supp. at 1077-78; see also Orley Ashenfelter et al., *Econometric Methods in Staples 17* (Princeton Univ. Program in Law & Pub. Affairs, Working Paper No. 04-007, 2004), available at <http://ssrn.com/abstract=529144> (concluding that nonsuperstores failed to impact pricing of superstores).

278. 881 F. Supp. 860 (W.D.N.Y. 1994).

279. *Bon-Ton*, 881 F. Supp. at 872-73. But see FTC Statement, *supra* note 21, at 3 (finding that Federated and May department stores did not adjust prices in response to one another).

280. *Bon-Ton*, 881 F. Supp. at 873.

281. *Id.*

282. *Id.*

283. *Id.* at 874.

284. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075-76 (D.D.C. 1997).

and chain stores, as well as specialty stores, there should have been no significant difference in Macy's discounting policies before or after it acquired May. Indeed, both the number of coupons and the discount itself should have been substantially the same<sup>285</sup> in every city in the United States before and after the merger with May.

*B. Explanation of the Study*

The study collected coupons in newspapers for May and Macy's in thirteen cities from September 2004 through January 2005 (before the merger) and then again from September 2006 through January 2007 (after the merger).<sup>286</sup> The goal, with *Staples* as inspiration, was to measure Macy's and May's couponing policies in different geographic markets before the merger, and then to see how those policies may have changed after the merger. Several economists have used similar methodology to determine whether coupons drive store traffic in supermarkets.<sup>287</sup> For the 2004–2005 period, microfilm of each newspaper was reviewed; for the 2006–2007 period, subscriptions were purchased for each of the thirteen newspapers and they were reviewed on arrival.<sup>288</sup>

Newspaper research has become more challenging since the widespread use of the Internet. While newspaper content is available at the click of a mouse—and often at no charge—the banner and other advertisements that appear on Web pages are generally not the same advertisements that appear in actual print media. But because of the easy access to newspaper content online, few libraries continue to collect microfilm. Even major research libraries were found to be unlikely to purchase a newspaper of record on microfilm unless that newspaper was based in the same city. Ordinarily generous libraries were found to be very

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285. Minor variations from city to city in frequency and face value of coupons could be explained by overstocking items less popular in one city than another or a depressed economy in a particular city that lowered sales, necessitating promotional discounting. The differences found in this study, however, were not minor.

286. A study using somewhat similar methodology was conducted by Professor Margaret E. Slade, currently with the University of Warwick (U.K.). She examined saltine crackers at supermarkets to determine the relationship between price, advertising, and goodwill. Margaret E. Slade, *Product Rivalry with Multiple Strategic Weapons: An Analysis of Price and Advertising Competition*, 4 J. ECON. & MGMT. STRATEGY 445, 445-46 (1995). She concluded, inter alia, that at least for supermarkets, price (and its discount) is just one factor in competition, and that consumers make highly personal choices that include the location of a store, the proximity to home and work, the quality and ambience of the store, the breadth of product offerings, and the overall pricing policies of the store. *Id.* at 456-58. If Professor Slade's work is applicable to department stores, it would suggest that at least some consumers are demand inelastic and will continue to shop at Macy's regardless of a decrease in coupon discounts. *Cf.* Tenn et al., *supra* note 157, at 12-25 (studying impact of promotional activity and competition on predicted effects of merger of premium ice cream companies).

287. *See, e.g.*, David Besanko et al., *Logit Demand Estimation Under Competitive Pricing Behavior: An Equilibrium Framework*, 44 MGMT. SCI. 1533, 1545-46 (1998) (analyzing values of particular brands and their effects on sales promotions); Rockney G. Walters & Scott B. MacKenzie, *A Structural Equations Analysis of the Impact of Price Promotions on Store Performance*, 25 J. MKTG. RES. 51, 60-62 (1988) (describing empirical sales results of loss-leader promotions).

288. When the review was finished, the newspapers were placed in Stetson University College of Law recycling bins.

reluctant to part with these rare spools of microfilm through interlibrary loan.<sup>289</sup>

These challenges dictated both the total number of cities surveyed and the cities actually chosen; availability was a critical factor. Nonetheless, within each category, as the data below shows, the results were generally consistent, suggesting that the data would not have been substantially different had greater or fewer newspapers been surveyed. Furthermore, the cities chosen represent many of the largest metropolitan areas in the United States; ten cities chosen are in the top twenty and the remaining three are large metropolitan areas as well.<sup>290</sup>

The cities chosen for the study represent four different department store categories: (1) cities where Macy's was the only middle-market department store for the entire study period; (2) cities where Macy's faced May during the first half of the study period and owned the former May stores during the second half of the study period, but there were no other middle-market department stores; (3) cities where Macy's faced one or more middle-market department stores (e.g., Dillard's, but not May) during the entire study period;<sup>291</sup> and (4) cities where May faced an independent middle-market department store during the first half of the study period (but not Macy's) and was owned by Macy's during the second half of the study period. Table 1 lists the city, the category it falls into, and the newspaper surveyed.

The fact that middle-market competition exists in some form cannot be interpreted as a sweeping statement that the stores face each other head-on for all purposes. For example, in Indianapolis, Carson Pirie Scott (owned by Bon-Ton) has just one store, and many consumers may not consider it to be a viable option because of distance and convenience. In Chicago, Carson Pirie Scott operates twenty-five department and furniture stores throughout the metropolitan area, but some consumers may consider Carson's to be of lesser quality than Macy's.<sup>292</sup> Von Maur has only two stores in the Chicago suburbs and one store in a distant ex-burb and may not be considered a viable alternative for most consumers in the city, or even for those in most suburbs.<sup>293</sup> Macy's operates

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289. This study never could have been completed were it not for the fact that the Stetson University College of Law Library reference librarians, and its library director, Professor Rebecca Trammel, have many good friends throughout academia.

290. Denver is ranked twenty-second, Cleveland is ranked twenty-third, and Indianapolis is ranked thirty-fourth. By another measure of importance, all the cities chosen have National Football League football teams (except Los Angeles) and all have Major League Baseball baseball teams (except Indianapolis).

291. In only one city (Dallas) did Macy's face May and a second middle-market department store (Dillard's)—but the one or two Macy's in Dallas during the first half of the study period engaged in no newspaper advertising (no advertisements with or without coupons) in the *Dallas Morning News* at all.

292. See generally Sandra Jones, *Pleased with Growth, Carson's to Expand*, CHI. TRIB., Dec. 22, 2006, at C1 (noting expansion of Carson's chain in Chicago area); Mary Ellen Podmolik, *Chain Finds Might in Middle*, CHI. TRIB., Mar. 11, 2006, at C1 (describing strength and growth in middle-market department stores); Carson Pirie Scott, Store Locator, <http://www.carsons.com> (follow "Find a Store" hyperlink) (last visited Sept. 1, 2008) (depicting locations of Carson's chain stores).

293. It is not entirely clear whether Von Maur, a family-owned department store, is middle market or upscale. See generally Lorene Yue, *Low Key Opens Way to High Profits*, CHI. TRIB., Apr. 25, 2003, at C1 (noting high profits of so-called "anti-department store").

substantially more stores in both Indianapolis and Chicago.<sup>294</sup> Nonetheless, the study does not attempt to weigh any of these variables; if a middle-market department store is within a metropolitan area, then it is viewed as competition.

<b>City</b>	<b>Category</b> <sup>295</sup>	<b>Middle-Market Competition</b>	<b>Newspaper</b>
Atlanta	(3) Macy's & Independent	Dillard's, Parisian/Belk <sup>296</sup>	<i>Atlanta Journal-Constitution</i>
Boston	(2) Macy's & May	None	<i>Boston Globe</i>
Chicago	(4) May & Independent	Bon-Ton, <sup>297</sup> Von Maur	<i>Chicago Tribune</i>
Cleveland	(4) May & Independent	Dillard's	<i>Cleveland Plain Dealer</i>
Dallas	(2) Macy's <sup>298</sup> & May	Dillard's	<i>Dallas Morning News</i>
Denver	(4) May & Independent	Dillard's	<i>Denver Post</i>

294. Macy's operates at least four stores in metropolitan Indianapolis and at least fourteen stores in metropolitan Chicago, depending on the definition of the metropolitan area. See FEDERATED DEPARTMENT STORES, INC., CORPORATE FACT BOOK 81, 83 (2007), available at [http://www.macysinc.com/Investors/vote/2007\\_fact\\_book.pdf](http://www.macysinc.com/Investors/vote/2007_fact_book.pdf) (listing locations of Macy's stores).

295. See *supra* notes 290-92 and accompanying text for an explanation of the different patterns of department store competition that establish this study's relevant categories.

296. Belk, Inc. acquired two Parisian stores from Saks Fifth Avenue during the study period and converted them to Belk stores. Press Release, Belk, Inc., Belk, Inc. Completes Transaction with Saks Incorporated for Acquisition of Parisian Department Stores (Oct. 2, 2006), available at <http://carolinanewswire.com/news/News.cgi?database=topstories.db&command=viewone&id=4453&op=t>. Since then, one was sold to Bon-Ton and the other has been converted to a Nordstrom. *Bon-Ton to Acquire Parisian Store in Indianapolis*, INSIDE INDIANAPOLIS BUS., Oct. 26, 2006, <http://www.insideindianabusiness.com/newsitem.asp?ID=20235>; Press Release, Nordstrom, Nordstrom to Open at Simon's Fashion Mall at Keystone in Indianapolis (Nov. 29, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=93295&p=irol-newsArticle&ID=936912&highlight=>.

297. Bon-Ton acquired Younkers from Saks Fifth Avenue during the study period and converted the Chicago suburban stores to Carson Pirie Scott. *The Bon-Ton to Acquire 142 Stores from Saks Incorporated for \$1.1 Billion in Cash*, BUSINESS WIRE, Oct. 31, 2005.

298. Dallas and Indianapolis are enigmas because of the existence of only one or two Macy's stores in either city during the first half of the study period. The category of "Macy's and May" might be described as "Macy's, May, and Independent" in Dallas and Indianapolis. Dallas is unusual because there was at least one Macy's store during the first half of the study period but that store had no newspaper advertisements at all, with or without coupons. Indianapolis, however, had only one Macy's store during the first half of the study period, but that store heavily advertised. It is possible that because the Indianapolis Macy's had been converted from another FDS department store, Lazarus, Macy's maintained its predecessor's couponing and discount policies. Because of the incongruity, there was no reason to group these two cities together as fifth category. Regardless, the results of the study show that Macy's substantially changed its discounting policies after acquiring May, regardless of the continued existence of an independent store. The decision not to create a fifth category of cities does not change any of the conclusions.



<b>City</b>	<b>Category</b>	<b>Middle-Market Competition</b>	<b>Newspaper</b>
Indianapolis	(2) Macy's & May	Parisian/Belk, Bon-Ton <sup>299</sup>	<i>Indianapolis Star</i>
Los Angeles	(2) Macy's & May	None	<i>Los Angeles Times</i>
Miami	(3) Macy's & Independent	Dillard's	<i>Miami Herald</i>
Tampa/St. Petersburg	(3) Macy's & Independent	Dillard's	<i>St. Petersburg Times</i>
San Francisco	(1) Macy's alone	None	<i>San Francisco Chronicle</i>
Seattle	(1) Macy's alone	None	<i>Seattle Post-Intelligencer</i>
Washington, D.C.	(2) Macy's & May	None	<i>Washington Post</i>

Each newspaper is the leading newspaper of the city surveyed, having a higher circulation than any competitors. Each is a traditional newspaper format, except for the *San Francisco Chronicle*, which is a tabloid.<sup>300</sup>

Regardless of the number of coupons in any single day's newspaper, the study counted that as one coupon. While a single day's newspaper might contain several coupons, during the study period substantially all the coupons on a single day were for the same discount.<sup>301</sup> Furthermore, initial reviews showed that there were never coupons in a special sales insert unless there were also coupons in the first section of the newspaper, so only the first section of each newspaper was reviewed. In the case of the tabloid *San Francisco Chronicle*, the entire newspaper was reviewed for coupons.

The first half of the study period represents a time just after FDS had

299. Belk acquired two Parisian stores from Saks Fifth Avenue during the study period and began to convert them to Belk stores. Press Release, Belk, Inc., *supra* note 296. Before opening as Belk, however, the downtown store was sold to Bon-Ton and converted to Carson Pirie Scott, and the northern Indianapolis store was sold to Nordstrom. See Greg Andrews, *2nd Nordstrom an Obstacle for Fragile Downtown Mall*, INDIANAPOLIS BUS. J., Dec. 18, 2006, at 4 (describing evolution of downtown Indianapolis into retail center); Press Release, Bon-Ton Stores, Inc., Parisian in Downtown Indianapolis to Undergo Changes (Jan. 9, 2007), available at <http://www.insideindianabusiness.com/newsitem.asp?ID=21268> (announcing changes being implemented by Bon-Ton).

300. The *Chronicle's* competition in San Francisco, the *San Francisco Examiner*, also is a tabloid.

301. An exception—which happened only a few times during the study period, and in a small number of cities—was the appearance of one special coupon for a specific category of products, generally oriental rugs. On the same day, there would be one or more coupons with identical discounts for all merchandise or sales or clearance merchandise. Those special coupons were not counted in the survey.

changed the brand names of all its regional stores to Macy's. No newspaper advertisements reflected the former regional FDS name; it is possible, however, that some store signage still may have been changing during this period, and thus the former FDS regional name is provided in the following Table 2.

<b>City</b>	<b>2004–2005 FDS Store Name</b>	<b>Old FDS Regional Store Name</b>	<b>May Department Store Name</b>
Atlanta	Macy's	Rich's, Rich's-Macy's	—
Boston	Macy's	—	Filene's
Chicago	—	—	Marshall Field's
Cleveland	Macy's	—	Kaufmann's
Dallas	Macy's <sup>302</sup>	—	Foley's
Denver	—	—	Foley's
Indianapolis	Macy's	Lazarus, Lazarus-Macy's	L.S. Ayres
Los Angeles	Macy's	Bullock's, Macy's-Bullock's, Bullocks Wilshire, Broadway	Robinsons-May
Miami	Macy's	Burdine's, Burdine's-Macy's	—
Tampa/St. Petersburg	Macy's	Burdine's, Burdine's-Macy's	—
San Francisco	Macy's	—	—
Seattle	Macy's	Bon Marche or Bon-Macy's	—
Washington, D.C.	Macy's	—	Hecht's

302. Macy's operated one or two stores in Dallas starting in 1985. Macy's in Dallas placed no newspaper ads at all in the *Dallas Morning News* during the first half of the study in 2004–2005 and was not counted in the results. But Macy's in Indianapolis, which operated one store during the 2004–2005 study period, did place newspaper ads and issue coupons and was therefore counted in the results.

<b>TABLE 3: DATA DEFINITIONS</b>	
<b>Data Field</b>	<b>Definition</b>
Coupons	The number of days on which a coupon was found in the newspaper.
ATCD	<i>Average Total Coupon Days</i> : The average number of coupon days over the five-month period.
ACDM	<i>Average Coupon Days Per Month</i> : The average number of days per month in which there were coupons over the five-month period. <sup>303</sup>
AMD	<i>Average Monthly Discount</i> : The sum of all the discounts per month (including months with zero discounts) averaged by month.
AMFV	<i>Average Monthly Face Value</i> : The sum of the face values of all the coupons each month (not including any months with zero discounts) averaged by month.
AMMFV	<i>Average Monthly Median Face Value</i> : The median of the average monthly face value of all coupons (not including any months with zero discounts) averaged by month.

303. There were many days and even months, particularly during the second half of the study period in which there were no coupons at all.

## C. Data by City

<b>TABLE 4: ATLANTA<sup>304</sup></b>				
	<b>2004–2005 Macy's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	9	17.22%	11	10.91%
October	11	13.18%	10	12.00%
November	24	15.31%	15	15.67%
December	21	14.52%	21	14.52%
January	11	16.36%	6	10.00%
<b>Average Statistics</b>				
ATCD	76.00		63.00	
ACDM	15.20		12.60	
AMD		15.32%		12.62%
AMFV		15.32%		12.62%
AMMFV		15.31%		12.00%
<b>Change Statistics</b>				
<b>Macy's to Macy's</b>				
Δ ACDM	-17.11%			
Δ AMD	-17.61%			
Δ AMFV	-17.61%			
Δ AMMFV	-21.62%			

304. Missing newspapers: September 2, 2006; and September 4, 2006. Newspaper subscriptions present challenges as well. Several newspapers are not very interested in participating in the mail-order subscription business. Mailed newspapers are often sent by bulk mail, which often meant arrival months after the publication date, and a few papers just never arrived at all. While creating headaches and requiring many phone calls to customer service, in the end only thirty-four newspapers out of 3978 never arrived. This is less than one percent of the total and is unlikely to have changed any of the results.

<b>TABLE 5: BOSTON<sup>305</sup></b>						
	<b>2004–2005 Macy's</b>		<b>2004–2005 Filene's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	9	16.67%	23	16.09%	2	13.75%
October	11	16.82%	24	15.63%	5	15.00%
November	15	18.00%	21	15.95%	14	15.54%
December	30	19.83%	31	17.90%	21	16.90%
January	2	17.50%	15	17.00%	0	0.00%
<b>Average Statistics</b>						
ATCD	67.00		114.00		42.00	
ACDM	13.40		22.80		8.40	
AMD		17.76%		16.51%		12.24%
AMFV		17.76%		16.51%		15.30%
AMMFV		17.50%		16.09%		15.27%
<b>Change Statistics</b>						
	<b>Macy's to Macy's</b>		<b>Filene's to Macy's</b>			
Δ ACDM	-37.31%		-63.16%			
Δ AMD	-31.11%		-25.89%			
Δ AMFV	-13.87%		-7.34%			
Δ AMMFV	-12.74%		-5.10%			

305. Missing newspaper: November 17, 2006.

<b>TABLE 6: CHICAGO<sup>306</sup></b>				
	<b>2004–2005 Marshall Field's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	5	19.00%	2	15.00%
October	9	15.56%	0	0.00%
November	8	15.63%	5	15.00%
December	8	15.00%	10	14.50%
January	2	15.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	32.00		17.00	
ACDM	6.40		3.40	
AMD		16.04%		8.90%
AMFV		16.04%		14.83%
AMMFV		15.56%		15.00%
<b>Change Statistics</b>				
<b>Field's to Macy's</b>				
Δ ACDM	-46.88%			
Δ AMD	-44.51%			
Δ AMFV	-7.51%			
Δ AMMFV	-3.60%			

306. Missing newspapers: October 4, 2006; October 5, 2006; October 9, 2006; October 15, 2006; October 18, 2006; October 20, 2006; October 21, 2006; and November 20, 2006.

<b>TABLE 7: CLEVELAND<sup>307</sup></b>				
	<b>2004–2005 Kaufmann's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	21	16.90%	8	13.13%
October	21	16.19%	8	15.00%
November	22	16.59%	13	17.31%
December	32	18.13%	12	14.79%
January	15	17.00%	5	12.50%
<b>Average Statistics</b>				
ATCD	111.00		46.00	
ACDM	22.20		9.20	
AMD		16.96%		14.55%
AMFV		16.96%		14.55%
AMMFV		16.90%		14.79%
<b>Change Statistics</b>				
<b>Kaufmann's to Macy's</b>				
Δ ACDM	-58.56%			
Δ AMD	-14.24%			
Δ AMFV	-14.24%			
Δ AMMFV	-12.49%			

307. Missing newspapers: November 30, 2006; and December 26, 2006.

<b>TABLE 8: DALLAS<sup>308</sup></b>				
	<b>2004–2005 Foley's<sup>309</sup></b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	21	16.43%	10	14.50%
October	25	16.20%	10	15.00%
November	24	15.42%	13	17.69%
December	28	16.79%	21	15.24%
January	21	15.00%	7	12.50%
<b>Average Statistics</b>				
ATCD	119.00		61.00	
ACDM	23.80		12.20	
AMD		15.97%		14.99%
AMFV		15.97%		14.99%
AMMFV		16.20%		15.00%
<b>Change Statistics</b>				
<b>Foley's to Macy's</b>				
Δ ACDM				-48.74%
Δ AMD				-6.15%
Δ AMFV				-6.15%
Δ AMMFV				-7.41%

308. Missing newspapers: September 6, 2006; and November 26, 2006.

309. Because no coupons were issued by Macy's in Dallas during the first half of the study, comparisons to the second half of the study are not statistically relevant.



<b>TABLE 9: DENVER<sup>310</sup></b>				
	<b>2004–2005 Foley's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	21	16.42%	3	12.50%
October	25	16.20%	3	12.50%
November	26	15.38%	4	13.75%
December	29	17.41%	20	13.13%
January	19	15.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	120.00		30.00	
ACDM	24.00		6.00	
AMD		16.08%		10.38%
AMFV		16.08%		12.97%
AMMFV		16.20%		12.82%
<b>Change Statistics</b>				
<b>Foley's to Macy's</b>				
Δ ACDM	-75.00%			
Δ AMD	-35.48			
Δ AMFV	-19.35%			
Δ AMMFV	-20.90%			

310. Missing newspapers: September 9, 2006; October 7, 2006; January 2, 2007; and January 16, 2007.

<b>TABLE 10: INDIANAPOLIS<sup>311</sup></b>						
	<b>2004–2005 Macy's</b>		<b>2004–2005 L.S. Ayres</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	14	19.64%	9	16.11%	9	12.78%
October	11	13.64%	12	16.25%	8	15.00%
November	23	16.09%	19	15.79%	13	17.31%
December	19	15.23%	26	16.54%	13	15.19%
January	8	15.63%	13	15.00%	5	12.50%
<b>Average Statistics</b>						
ATCD	75.00		79.00		48.00	
ACDM	15.00		15.80		9.60	
AMD		16.05%		15.94%		14.56%
AMFV		16.05%		15.94%		14.56%
AMMFV		15.63%		16.11%		15.00%
<b>Change Statistics</b>						
	<b>Macy's to Macy's</b>		<b>L.S. Ayres to Macy's</b>			
Δ ACDM	-36.00%		-39.24%			
Δ AMD	-9.29%		-8.67%			
Δ AMFV	-9.29%		-8.67%			
Δ AMMFV	-4.03%		-6.89%			

311. Missing newspaper: January 18, 2007.

<b>TABLE 11: LOS ANGELES<sup>312</sup></b>						
	<b>2004–2005 Macy's</b>		<b>2004–2005 Robinsons-May</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	5	15.00%	33	16.82%	3	12.50%
October	2	15.00%	15	17.33%	0	0.00%
November	8	15.00%	25	16.40%	4	13.75%
December	14	11.96%	25	16.40%	20	13.13%
January	0	0.00%	20	16.25%	0	0.00%
<b>Average Statistics</b>						
ATCD	29.00		118.00		27.00	
ACDM	5.80		23.60		5.40	
AMD		11.39%		16.64%		7.88%
AMFV		14.24%		16.64%		13.13%
AMMFV		15.00%		16.40%		13.13%
<b>Change Statistics</b>						
	<b>Macy's to Macy's</b>		<b>Robinsons-May to Macy's</b>			
Δ ACDM	-6.90%		-77.12%			
Δ AMD	-30.86%		-52.67%			
Δ AMFV	-7.82%		-21.11%			
Δ AMMFV	-12.47%		-19.94%			

312. Missing newspaper: November 10, 2007.

<b>TABLE 12: MIAMI<sup>313</sup></b>				
	<b>2004–2005 Macy's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	0	0.00%	0	0.00%
October	5	15.00%	2	15.00%
November	8	15.00%	8	13.44%
December	15	15.00%	10	13.25%
January	5	15.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	33.00		20.00	
ACDM	6.60		4.00	
AMD		12.00%		8.34%
AMFV		15.00%		13.90%
AMMFV		15.00%		13.44%
<b>Change Statistics</b>				
<b>Macy's to Macy's</b>				
Δ ACDM	-39.39%			
Δ AMD	-30.52%			
Δ AMFV	-7.36%			
Δ AMMFV	-10.40%			

313. Missing newspapers: September 1, 2006; September 2, 2006; September 3, 2006; and January 30, 2007.

<b>TABLE 13: SAN FRANCISCO<sup>314</sup></b>				
	<b>2004–2005 Macy's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	0	0.00%	3	12.50%
October	9	13.89%	0	0.00%
November	7	14.29%	2	12.50%
December	13	12.12%	22	13.07%
January	0	0.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	29.00		27.00	
ACDM	5.80		5.40	
AMD		8.06%		7.61%
AMFV		13.43%		12.69%
AMMFV		13.89%		12.50%
<b>Change Statistics</b>				
<b>Macy's to Macy's</b>				
Δ ACDM	-6.90%			
Δ AMD	-5.53%			
Δ AMFV	-5.53%			
Δ AMMFV	-10.01%			

314. No newspapers were missing during the surveyed period.

<b>TABLE 14: SEATTLE<sup>315</sup></b>				
	<b>2004–2005 Macy's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	0	0.00%	0	0.00%
October	0	0.00%	0	0.00%
November	0	0.00%	7	12.14%
December	0	0.00%	2	20.00%
January	0	0.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	0.00		9.00	
ACDM	0.00		1.80	
AMD		0.00%		6.43%
AMFV		0.00%		16.07%
AMMFV		0.00%		16.07%

315. Missing newspaper: December 15, 2006. Because no coupons were issued in Seattle during the first half of the study, comparisons to the second half of the study are not statistically relevant and are omitted in Table 14.

<b>TABLE 15: TAMPA/ST. PETERSBURG<sup>316</sup></b>				
	<b>2004–2005 Macy's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	0	0.00%	0	0.00%
October	5	15.00%	2	15.00%
November	7	15.00%	8	13.13%
December	14	15.00%	9	13.06%
January	5	15.00%	0	0.00%
<b>Average Statistics</b>				
ATCD	31.00		19.00	
ACDM	6.20		3.80	
AMD		12.00%		8.24%
AMFV		15.00%		13.73%
AMMFV		15.00%		13.13%
<b>Change Statistics</b>				
<b>Macy's to Macy's</b>				
Δ ACDM	-38.71%			
Δ AMD	-31.35%			
Δ AMFV	-8.47%			
Δ AMMFV	-12.47%			

316. Missing newspapers: October 24, 2006; October 26, 2006; December 17, 2006; December 29, 2006; and January 8, 2007.

<b>TABLE 16: WASHINGTON, D.C.</b> <sup>317</sup>						
	<b>2004–2005 Macy's</b>		<b>2004–2005 Hecht's</b>		<b>2006–2007 Macy's</b>	
	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>	<b>Coupons</b>	<b>AMFV</b>
September	3	15.00%	21	16.43%	2	12.50%
October	4	17.50%	22	16.36%	5	15.00%
November	11	18.18%	22	16.02%	13	15.35%
December	11	20.00%	27	18.06%	20	16.88%
January	0	0.00%	15	16.33%	0	0.00%
<b>Average Statistics</b>						
ATCD	29.00		107.00		40.00	
ACDM	5.80		21.40		8.00	
AMD		14.14%		16.64%		11.95%
AMFV		17.67%		16.64%		14.93%
AMMFV		17.84%		16.36%		15.15%
<b>Change Statistics</b>						
	<b>Macy's to Macy's</b>		<b>Hecht's to Macy's</b>			
Δ ACDM	37.93%		-62.62%			
Δ AMD	-15.49%		-28.21%			
Δ AMFV	-15.49%		-10.26%			
Δ AMMFV	-14.94%		-7.24%			

#### D. Analysis

This study's conclusions are directly at odds with the FTC's conclusions.<sup>318</sup> Today, in cities where Macy's faces no middle-market competition,<sup>319</sup> coupons are issued on 31.03% fewer days than in cities where Macy's faces middle-market competition.<sup>320</sup> In all cities surveyed where Macy's acquired a May store,<sup>321</sup> the number of coupons issued by Macy's has declined by 62% and the average monthly face value of the coupons that Macy's does issue has decreased 13%.

317. Missing newspapers: September 9, 2006; October 12, 2006; and December 17, 2006.

318. FTC Statement, *supra* note 21, at 3.

319. Those cities are Boston, Los Angeles, San Francisco, Seattle, and Washington, D.C.

320. Macy's faces middle-market competition in Atlanta, Chicago, Cleveland, Dallas, Denver, Indianapolis, Miami, and Tampa/St. Petersburg. Interestingly, the average median face value is 2.82% higher in cities where Macy's faces no independent store middle-market department store, which suggests that Macy's may still be favoring customers used to a much higher level of coupons at both the Macy's and May stores when the two faced each other.

321. Those cities were Boston, Chicago, Cleveland, Dallas, Denver, Indianapolis, Los Angeles, and Washington, D.C.



Even before the merger, Macy's discounted at different levels and frequencies based on the middle-market department store competition present in those cities. In cities where Macy's faced May before the merger,<sup>322</sup> there were an average of 7.1 coupon days per month with a median face value discount of 16.43%. In cities where Macy's only faced Dillard's before the merger,<sup>323</sup> there were an average of 9.33 coupon days per month with a median face value discount of 15.11%. In the two cities where Macy's faced no middle-market department store competition before the May merger,<sup>324</sup> there were an average of 2.9 coupon days per month with a median face value discount of 6.72%.

At the time this Article was written, in cities where Macy's faced no middle-market competition,<sup>325</sup> there were an average of 5.8 coupon days per month with a median face value discount of 14.42%. In cities where Macy's faced another middle-market department store,<sup>326</sup> there were 7.6 coupon days per month with a median face value discount of 14.02%. Eliminating Chicago (where Macy's competes against Bon-Ton) and Indianapolis (where Macy's competes against Bon-Ton and Belk) and leaving the remaining cities in this group (where Macy's competes against Dillard's), there were 7.97 coupon days per month with a median face value discount of 13.79%.

#### 1. Coupons Generally, "Everyday Low Pricing," and Coupons to Cardholders

One obvious question that defies an easy answer is the value of coupons as a dispositive metric. One way to respond is by looking at it as *res ipsa loquitur*. Even with a sixty-two percent decline in the number of coupons Macy's prints in newspapers, Macy's still runs coupons on almost seven days of every month. The enormous cost of this advertising suggests that Macy's still benefits from these promotions in terms of attracting shoppers and assisting inventory control; it just appears that Macy's needs less of this advertising now in order to make the same or greater sales.

There are no publicly available figures on distribution and redemption of department store coupons nationwide. Coupon trade reports—which include all coupons, such as supermarkets and direct mail—state that “[o]verall distribution declined by 12% in 2006, with a corresponding 13% drop in redemption.”<sup>327</sup> Macy's sixty-two percent decrease is substantially greater than the national average.

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322. Those cities were Boston, Indianapolis, Los Angeles, and Washington, D.C.

323. Those cities were Atlanta, Miami, and Tampa/St. Petersburg.

324. Those cities were San Francisco and Seattle.

325. Those cities were Boston, Los Angeles, San Francisco, Seattle, and Washington, D.C.

326. Those cities were Atlanta, Chicago, Cleveland, Dallas, Denver, Indianapolis, Miami, and Tampa/St. Petersburg.

327. CMS, *CMS Reports Annual Coupon Distribution to 286 Billion*, Feb. 22, 2007, <http://www.cms.inmar.com/news022207.html>.

Macy's has not hidden its agenda of decreasing coupons and all promotions:<sup>328</sup> "Our first price simplification initiative is to reduce our level of public couponing. Coupons will not disappear from Macy's, but we are issuing fewer of them."<sup>329</sup> This "brings a measure of simplicity to pricing and reliability [by] assuring shoppers that what they can buy today will never be offered at a lower price," said Jim Sluzewski, FDS spokesman.<sup>330</sup> Macy's does, however, issue additional coupons to its credit card holders.<sup>331</sup>

Although Macy's income and stock price have steadily increased since the May merger, its sales growth has been uneven.<sup>332</sup> It is unclear whether these problems are related to the retiring of the historic department store names, a change in name brands and private labels, the remodeling of stores, a decrease in coupons—or some combination of all of these factors.<sup>333</sup> Over time, Macy's expects customers to simply get used to the fact that there are fewer coupons and fewer promotions.<sup>334</sup> For example, on New York's Long Island, Macy's has reduced coupons gradually since 2002, for a total drop of twenty-five percent.<sup>335</sup> Nationally, according to Macy's, promotions have been reduced by twenty percent<sup>336</sup>—a substantially lower number than the sixty-two percent found in this study.

Regardless, "[e]ven if Macy's sells a little less volume, but at a higher price, its stores will make more money," said Marshal Cohen, a financial analyst tracking department stores.<sup>337</sup> But a reduction in output—selling less but making more—is one example of market power. "A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output."<sup>338</sup> By eliminating May as a competitor, Macy's may have found it easier

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328. CORPORATE FACT BOOK, *supra* note 294, at 15; *see also* David Moin, *Terry Lundgren's Macro/Micro Game Plan for Federated*, WOMEN'S WEAR DAILY, Nov. 28, 2005, at 1 (noting ramifications of merger on Macy's business strategies).

329. CORPORATE FACT BOOK, *supra* note 294, at 15. Another price simplification announced by Macy's at the same time was to create "Everyday Value" for selected items from its private brands and market brands, although Macy's does not explain what the phrase means, what it covers, or how significant the everyday value is. *Id.*

330. Madhusmita Bora, *Macy's Cuts out Ayres Culture*, INDIANAPOLIS STAR, Feb. 8, 2006, at C1.

331. *Id.* Information about Macy's distribution of coupons to private-label credit card holders is not publicly available and was not included in this study.

332. *See, e.g.*, Teresa F. Lindeman, *Learning Curve: After a Year of Change, Shoppers Show Signs They're Starting to Accept Macy's*, PITTSBURGH POST-GAZETTE, Feb. 28, 2007, at E1 (noting that net income rose 5% in holiday quarter despite 4.3% sales dip).

333. *See id.* (discussing implications of new system).

334. *Id.* Query whether this suggests that Macy's has market power.

335. Keiko Morris, *Macy's Rethinks Cuts in Coupons*, NEWSDAY, May 21, 2007, at A41.

336. Melissa Levy, *Who Exactly Is Federated Department Stores, Inc.?*, STAR TRIB. (Minneapolis, Minn.), May 31, 2004, at 1D; Jayne O'Donnell, *Beloved Stores Get a Lot More than a New Name*, USA TODAY, June 8, 2006, at 1B.

337. Morris, *supra* note 335.

338. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,560 (Sept. 10, 1992); *see also*

to diminish promotions nationwide, and particularly in the cities where it formerly faced May.

## 2. The Anomalies of Dallas, Los Angeles, San Francisco, and Seattle

The cities of Dallas, Los Angeles, San Francisco, and Seattle are anomalies, at least as compared to the other nine cities surveyed. In Dallas, Macy's only had one or two stores in the first half of study period and faced Dillard's and Foley's. Macy's opened a store at the Galleria in Dallas in 1985. Foley's in Dallas had a complicated lineage; in 1987, FDS merged Dallas-based Sanger-Harris into the larger Houston-based Foley's.<sup>339</sup> In 1988, May acquired Foley's.<sup>340</sup> Perhaps because there was only one Macy's in Dallas during the first half of the study period, it chose to do no advertising.<sup>341</sup>

Macy's in San Francisco and Seattle had long been the lone middle-market department store.<sup>342</sup> In Los Angeles, Macy's faced middle-market department store Robinsons-May, owned by May. The number of coupons and discounts in all three cities in the first half of the study period were lower than any other city surveyed. Los Angeles and San Francisco both had 5.8 coupon days per month and Seattle had zero coupon days per month. In the second half of the study, Los Angeles and San Francisco had 5.4 coupon days per month and Seattle increased its coupon days to 1.8. The median face value of discounts decreased from 14.24% to 13.13% in Los Angeles, and 13.43% to 12.69% in San Francisco, which is lower than the national average of 14.17%.

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United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400, 404 (1956) (holding that no illegal monopoly existed because, even if DuPont controlled cellophane market, other substitutes existed). The phrase "*Cellophane Fallacy*" suggests that almost anything can be a substitute if the desired product's price grows high enough. But that fails to negate the existence of market power. See PHILIP NELSON, ECONOMISTS INC., MONOPOLY POWER, MARKET DEFINITION, AND THE *CELLOPHANE FALLACY* 6 (2008), [http://www.usdoj.gov/atr/public/hearings/single\\_firm/docs/222008.pdf](http://www.usdoj.gov/atr/public/hearings/single_firm/docs/222008.pdf), for a description of the "*Cellophane Fallacy*."

339. Department Store History, Foley's Chronology, [http://www.dshistory.com/stores/foleys\\_houston](http://www.dshistory.com/stores/foleys_houston) (last visited Sept. 1, 2008).

340. Heather Staible, *The Name Game: Under New Ownership, Foley's Will Become Macy's. But Will Shoppers Play Along?*, WOMEN'S WEAR DAILY, May 18, 2006, at 6S.

341. There were only two Macy's in Indianapolis during the first half of the study period, but both advertised heavily. It is possible that because both had just been converted from another FDS store, Lazarus, Macy's continued its predecessor's discount policy.

342. In San Francisco, several middle-market department stores competed, the last two of which were Macy's and Emporium. Emporium was acquired by FDS and converted to Macy's in 1996. Macy's, Inc., Macy's West, Our History, <http://www.fds.com/pressroom/macys/macyswest/about.asp?page=2> (last visited Sept. 1, 2008). In Seattle, Frederick & Nelson was a middle-market department store that competed against FDS' Bon Marche, which was renamed Macy's in 2003. Frederick & Nelson was founded in 1890 and acquired by Marshall Field's in 1929. Frederick & Nelson was the original owner of the famous Frango Chocolate recipe so closely identified with Marshall Field's today. Frederick & Nelson joined its parent company in 1982 when it was sold to BATUS. Local investors bought Frederick & Nelson in 1986, and it was liquidated in 1992. In 1998, Nordstrom abandoned its original store and moved its home store into the more beautiful former flagship of Frederick & Nelson. PdxHistory.com, Frederick & Nelson, [http://www.pdxhistory.com/html/frederick\\_\\_nelson.html](http://www.pdxhistory.com/html/frederick__nelson.html) (last visited Sept. 1, 2008).

While Dillard's has no stores in any of the three cities, Dillard's does have a store in Palmdale, California, sixty miles from downtown Los Angeles. Dillard's has been trying to enter the Los Angeles area market but has been thwarted by Macy's exclusive arrangements with local shopping malls.<sup>343</sup> The threat of entry of Dillard's into the Los Angeles market may explain the difference in discounting between Los Angeles and San Francisco. In Seattle, the home of upscale Nordstrom, it is possible that Macy's used the city—indeed, San Francisco and Los Angeles as well—as a laboratory for fewer coupons and lower discounts over the past few years.

#### IV. CONCLUSION

In 1994, when considering the antitrust ramifications of Macy's and Rich's merging in Atlanta, Alan Millstein,<sup>344</sup> retail consultant and former editor of the *Fashion Network Report*, observed the lack of precedent for separate chains of common ownership competing against each other in the same mall. As Millstein said, "[o]therwise, The Gap would open multiple stores in the same malls and compete against [itself], and you don't see [it] doing that."<sup>345</sup>

With all due respect to Mr. Millstein, his prediction proved to be very wrong. Department stores can and do operate multiple stores profitably in a single mall (either as separate brands, such as Macy's and Bloomingdale's, or by separating out a men's store or a furniture store), and Gap not only operates Gap, Banana Republic, and Old Navy in many malls, it also has been known to operate Gap, Baby Gap, Gap Kids, Gap Maternity, Gap Body, Banana Republic Men, and Banana Republic Women adjacent to one another.

Retail consultants, Wall Street analysts, and the FTC have much in common, including a desire to peer into the future; for consultants and analysts, they do so to make money, and the FTC uses its crystal ball as mandated by section 7 of the Clayton Act. But the most important thing they have in common is the fact that they can be wrong; no one can predict the future with any certainty.

Repeated claims that department stores are "dinosaurs" or "dying" should be taken with a grain of salt.<sup>346</sup> Department stores have been around for 150

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343. Leslie Earnest & Roger Vincent, *What's in Store for Malls?*, L.A. TIMES, Mar. 1, 2005, at C1; Norinne de Gal, *Dillard's Attempts to Expand in L.A. Being Thwarted*, L.A. BUS. J., Aug. 7, 2000, at 11.

344. Obituary, Alan G. Millstein, N.Y. TIMES, Jan. 26, 1998, at A17.

345. Susannah Vesey, *Waiting for a Sale: Macy's Left in Limbo*, ATLANTA J.-CONST., Aug. 28, 1994, at F1.

346. According to recent sales reports, department stores are alive and well and doing better than specialty stores. Michael Barbaro, *Showing a New Style, Department Stores Surge*, N.Y. TIMES, Nov. 17, 2006, at A1; Anne D'Innocenzio, *Retailers Post Weak April Sales*, ASSOCIATED PRESS, May 10, 2007; see also Sandra Jones, *Young Shoppers Buying into Department Store Makeovers*, CHI. TRIB., Oct. 17, 2006, at News 1 (noting that marketing toward young trendsetters is beginning to pay off for department stores). In fact, it is the specialty stores that may be the most endangered at this time. Rachel Dodes, *Liz Claiborne's Unexpected Stumble*, WALL ST. J., May 2, 2007, at B1; Jessica Dickler, *For Retailers, April Is Indeed Cruellest*, CNNMONEY.COM, May 10, 2007, <http://money.cnn.com/>

years and are too intricately connected to too many facets of our society to disappear anytime soon. A few years ago Wall Street seemed ready to write off department stores; since Macy's acquired May, its stock price increased forty-three percent at the time this Article was written.<sup>347</sup> Such an outcome in a large department store merger was in fact predicted by two FTC economists who studied May's earlier acquisition of Associated Dry Goods and found that May experienced "positive abnormal returns," suggesting the merger had lessened competition and led to higher prices for consumers.<sup>348</sup>

What is most important is not the opinion of experts, consultants, and analysts, but the opinion of consumers, many of whom remain loyal and continue to shop at department stores through bankruptcies, name changes, customer service debacles, and decreased selection.<sup>349</sup> These loyal customers continue to make department stores profitable and popular.<sup>350</sup> The mere fact that the stores generally have remained profitable despite frequent mergers and name changes is likely a testament to the overall strength of the institution.<sup>351</sup>

This Article reflects the tension between law and economics. If markets behaved as rationally as the Chicago School suggests, then Macy's acquisition of May would not have been problematic. But as the empirical study conducted for

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2007/05/10/news/economy/retail\_sales/index.htm?postversion=2007051013. Upscale department stores such as Nordstrom posted substantial gains over the past year. Emily Fredrix, *Kohl's, Penney, Nordstrom Profits Grow*, ASSOCIATED PRESS, May 18, 2007.

347. Robert Berner, *Is Federated as Flush as It Looks?*, BUSINESS WEEK, May 28, 2007, at 71. "The merger is not just going well," according to Terry Lundgren, Macy's chief executive, "It's going extremely well." *Id.*

348. JOHN DAVID SIMPSON & DAVID HOSKEN, ARE RETAILING MERGERS ANTICOMPETITIVE? 32 (1998), available at <http://www.ftc.gov/be/workpapers/wp216.pdf>.

349. See Julie Jette, *Tips to Reinvent the Department Store*, HARV. BUS. SCH. WORKING KNOWLEDGE, Apr. 18, 2005, <http://hbswk.hbs.edu/item/4758.html> (noting attempts by department stores to rebrand and offer consumers meaningful variety). "The great travesty of department stores is their lack of focus on shoppers . . . Even with Macy's, it's only the company's flagship store in New York that has the 'wow' factor with fantastic window displays and a food court. How many other Macy's stores look that great?" Parija Bhatnagar, *Macy's+Marshall: Better Prices in Store?*, CNNMONEY.COM, Jan. 20, 2005, [http://money.cnn.com/2005/01/20/news/fortune500/federated\\_may/index.htm](http://money.cnn.com/2005/01/20/news/fortune500/federated_may/index.htm) (quoting Candace Corlette, retail analyst and principal with retail consultancy WSL Strategic Retail).

350. See, e.g., Barbaro, *supra* note 346 (noting resurgence of department stores as compared to specialty clothing stores); Berner, *supra* note 347, at 71 (noting success of FDS' acquisition of May Department Stores); Jeremy MacNealy, *Will "M" Be a Moneymaker for Federated?*, THE MOTLEY FOOL, May 18, 2007, <http://www.fool.com/investing/general/2007/05/18/will-m-be-a-money-maker-for-federated.aspx> (noting Federated's increase in income as percentage of net revenues and gross margins).

351. See, e.g., Suzanne S. Brown, *Meet the New Department Store*, DENVER POST, Sept. 3, 2006, at L1 (noting department stores' attempts to reinvent themselves to get consumers' attention); Sandra Guy, *Changes Aim to Save Tradition*, CHI. SUN-TIMES, Sept. 8, 2006, at 55 (noting reversal of four years of declining same-store sales by Federated CEO Terry Lundgren); Sandra Jones, *May-Federated Merger Could Add to Overstock of Space*, CRAIN'S CHI. BUS., Mar. 7, 2005, at 2 (noting changing landscape in department store industry); Thomas Lee & Sara Glassman, *The Uncertain Future of the American Department Store*, STAR TRIB. (Minneapolis, Minn.), Sept. 3, 2006, at 1A (noting that Federated may be "knight in shining armor" that can revive department store industry).

this Article suggests, the market is not behaving rationally, or, at the very least, Macy's is exercising market power.<sup>352</sup> In the end, there are two basic questions: (1) what choices do consumers reasonably have as an alternative to Macy's,<sup>353</sup> and (2) how much would Macy's have to raise prices before consumers availed themselves of substitutes—even less desirable ones.<sup>354</sup>

Those two basic questions, however, have a plethora of subparts. For example, do certain demographic groups have alternatives to Macy's that others do not? Do consumers in some geographic areas have alternatives to Macy's that are not present in other areas? Will consumers choose stores other than Macy's for certain needs but return to Macy's for other reasons, regardless of the price? It is no wonder that in the end, the judge in *Bon-Ton Stores, Inc. v. May Department Stores, Co.*<sup>355</sup> said “[t]o paraphrase Justice Potter Stewart’s often-quoted comment made in another context; customers know a department store when they see it. Anyone who has ever shopped in a department store, specialty store or discounter certainly knows that there is a difference and . . . that . . . difference is significant.”<sup>356</sup>

Another way to look at this is to imagine making certain purchases. If one needs to buy a basic T-shirt, many choices exist for American consumers. A T-shirt from Macy's may be as acceptable as one from Gap, Target, or J.C. Penney—or even a plethora of Internet options, including eBay. But if one needs to buy a business suit for an interview for a new job for a professional position, the choices may be more limited.<sup>357</sup>

Many professionals undoubtedly would like to buy that suit at an upscale store like Nordstrom or Saks Fifth Avenue—and many certainly do. But those department stores are not present in most geographic markets,<sup>358</sup> and their prices may be higher than someone buying a business suit for an interview or a new job

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352. See generally NICHOLAS G. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 12-17 (2005) (positing that when formal logic fails, jurists must use informal normative reasoning). See *supra* Part III.C for a summary of this author's research into the effect of mergers on Macy's discounting.

353. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 404 (1956) (holding that no illegal monopoly existed where, although defendant might be assumed to control cellophane itself, there existed competition and interchangeability with other flexible wrappings). This case is usually referred to as “*Cellophane*”—a reference to its subject matter, as opposed to another du Pont antitrust case the following year.

354. See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,554 (Sept. 10, 1992) (referring to “small but significant and non-transitory” increase in price”).

355. 881 F. Supp. 860 (W.D.N.Y. 1994).

356. *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 869-70 (W.D.N.Y. 1994).

357. Certain groups, such as car-less city dwellers, the elderly, persons needing certain sizes, those without computers and the ability to make purchases on the Internet, or downtown workers without time on weekends to shop, for example, may be forced to shop in downtown department stores regardless of the price of goods. Similarly, if one seeks something stylish yet affordable, what options exist for most suburban Americans?

358. See, e.g., Nordstrom, About Nordstrom, <http://about.nordstrom.com/aboutus/?origin=footer> (last visited Sept. 1, 2008) (indicating that Nordstrom operates 169 stores in 28 states); Saks Fifth Avenue, About Us, <http://www.saksfifthavenue.com> (follow “About Us” hyperlink) (last visited Sept. 1, 2008) (indicating that Saks operates 53 stores in 25 states).

can afford. But at the same time, would this hypothetical fledgling professional be comfortable buying that same suit at Wal-Mart or Target?<sup>359</sup> Does the name Macy's allow the purchaser to feel more confident than he or she would in a specialty store, if there even is one that is convenient, in the right price range, and sells appropriate attire?<sup>360</sup> Will the service, security, and fashion safety that department stores are known for mandate that many consumers will continue to make at least some purchases in a department store, even if the price increases five percent or more?

Common sense suggests that after more than one hundred years of being "a part of [our] life," to paraphrase an old Macy's advertising campaign, Americans will continue to make purchases at department stores, even if prices go up.<sup>361</sup> The fact that Macy's has seen healthy increases in its sales and profits since the May merger, despite a reduction in both the number and value of coupons, supports this theory.<sup>362</sup>

It appears that consumers were injured when Macy's acquired May. The differentiated products sold by these two department store companies are hard to compare specifically, but they both sold similar men's and women's clothing, housewares, and bedding, in roughly the same price range, targeted at essentially the same demographic groups. And the empirical study in this Article shows that Macy's has definitively changed its couponing policies more than the company has acknowledged; the degree to which it has made changes in individual cities appears related to the competition from other middle-market department stores.<sup>363</sup>

Certainly more research is necessary. The empirical study could yield more dispositive results were it expanded to cover more cities or to cover greater time periods. A more inclusive study that examined coupons at more department stores, including Dillard's and Bon-Ton would provide greater context. And it is possible that another study including pricing data on popular items could be undertaken that would replicate that which the FTC undertook in *FTC v. Staples, Inc.*<sup>364</sup>

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359. In any case, Wal-Mart and Target do not currently sell tailored clothing.

360. Several cases state that brand recognition alone may be a barrier to entry sufficient to allow anticompetitive effects. *See, e.g.,* *United States v. Pabst Brewing Co.*, 384 U.S. 546, 559-60 (1966) (Harlan, J., concurring) (concluding that consumer preference based on brand recognition was barrier to entry); *S. Pac. Comm'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 1002 (D.C. Cir. 1984) (finding brand preference a barrier to entry); *A.G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585, 618, 620 (3d Cir. 1962) (noting reputation for quality was barrier to entry); *Ansell Inc. v. Schmid Labs., Inc.*, 757 F. Supp. 467, 474 (D.N.J. 1991) (considering brand name recognition barrier to entry); *Tasty Baking Co. v. Ralston Purina, Inc.* 653 F. Supp. 1250, 1263 (E.D. Pa. 1987) (same).

361. Marketing Shift, *Magic of Macy's Revealed in Word Association*, Oct. 22, 2008, <http://www.marketingshift.com/2008/10/macys-magic-revealed-through-word.cfm>.

362. *See supra* notes 328-31 and accompanying text for a discussion of Macy's reduction of its coupon promotions. *See supra* note 347 and accompanying text for a discussion of the success of the Federated-May merger.

363. *See supra* Parts III.C-D for a summary of this author's research into the effect of mergers on Macy's discounting.

364. 970 F. Supp. 1066 (D.D.C. 1997).

In the spring of 2007, Macy's announced that the former Marshall Field's stores were performing consistently with all the former May stores, with one exception: the former Marshall Field's flagship in downtown Chicago was doing "badly."<sup>365</sup> Long a tourist destination, the Macy's brand was not driving traffic to the store.<sup>366</sup> To compensate, Macy's advertised fifty percent discounts on clearance merchandise and total savings of sixty to ninety percent on spring fashions—but only at the downtown Chicago store.<sup>367</sup> In at least one situation, when Macy's found it did not have market power, it brought back promotions. No one's crystal ball is perfect. The FTC can and should review Macy's conduct since acquiring May and reassess whether the merger has led to an increase in prices and a reduction in output.<sup>368</sup>

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365. Jones, *supra* note 13.

366. *Id.*

367. *Id.*

368. The FTC has authorization to issue subpoenas to corporations whose business affects commerce. 15 U.S.C. § 46(b) (2000).