ALLOCATING THE BURDEN OF PERSUASION FOR ENTRY ISSUES IN THE GOVERNMENT'S HORIZONTAL MERGER CASES

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INTRODUCTION

In the not-too-hypothetical future, a judge is considering whether to grant the government's motion to enjoin a horizontal merger, a merger between two

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competitors in the same industry and geographic area. The suing governmental agency, either the Antitrust Division of the Department of Justice ("Antitrust Division") or the Federal Trade Commission ("Commission") (collectively "the Agencies"), has made its preliminary showing that the merger will result in a high market concentration. Still, proof that another company will enter the market and limit the post-merger company's market power could trump that showing of high concentration,[1] and the merging parties have offered evidence to show some chance of entry. However, the judge is not sure whether that entry will actually occur – the evidence on each side seems equally strong, and it is difficult to determine at this preliminary stage what a hypothetical third party will do in response to a merger that has not yet happened.

This is no simple case, and the consequences of the judge's decision are many. If the judge allows the merger to go through and entry does not occur, the judge will have just allowed two competitors to merge into a new company with a dominant market share. If this new company exercises its newfound power to raise prices, it will harm consumers. However, if the judge enjoins the merger based on a false determination that entry will not occur, the judge will have denied the economy a potentially beneficial merger, and future mergers may be chilled by this poor precedent. Consumers will again be harmed, as they will be denied the chance to reap the benefits of a new, possibly more efficient company.

Ordinarily, the burden of persuasion would provide our hypothetical judge with a clear way to rule when evidence appears tied on our hypothetical issue of entry.[2] The judge would simply rule against whichever party had the burden of persuasion.[3] Unfortunately, though, the courts have never articulated which party should have the burden of persuasion on entry issues.[4]

This Note examines that question and argues that the merging parties should carry that burden in horizontal merger cases brought by the government. Part I describes the basic structure of a horizontal merger case and the role that entry plays in it. Part II provides detail on how the Antitrust Division and Commission examine entry issues. It begins with a section on the basic economic debate behind defining entry barriers, explains which side the

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 3.0 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 Merger Guidelines].

[2] McCormick on Evidence § 336, at 562-63 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter McCormick]; 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 3:2, at 428 (3d ed. 2003).

[3] McCormick, *supra* note 2, § 336, at 563; 1 Mueller & Kirkpatrick, *supra* note 2, § 3:2, at 428.

[4] Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 Antitrust L.J. 189, 205-06 (2003) (describing how the guidelines do not provide assistance on the question of persuasion and courts have yet to provide clarification).

Agencies took in that debate, and then examines the Agencies' own documents to articulate their current policies. Part III briefly lays out the factors that determine how courts traditionally allocate the burden of persuasion. Finally, Part IV applies those factors to the issue at hand, concluding that the merging parties should have the burden of persuasion when the government sues to enjoin their horizontal merger.

I. ENTRY IN THE LARGER PUZZLE OF MERGER ENFORCEMENT LITIGATION

Courts have articulated a rough structure for evaluating merger enforcement prosecutions, placing entry analysis in an important role and allowing it to rebut the government's showing that a horizontal merger will result in a higher concentration. In the first step of merger enforcement cases, the prosecuting government agency must show that the "transaction will lead to undue concentration in the market for a particular product in a particular geographic area" and so establish a presumption that the transaction will "substantially lessen competition."[5] The burden then shifts to the defendant to produce evidence to rebut the government's prima facie case.[6] The court will enjoin the transaction unless the defendant can introduce evidence, such as demonstrating a sufficient likelihood of entry,[7] to show that the merger will not have the anticompetitive effects argued by the government.[8]

The government follows this same structure during its own investigations, concluding that if committed entry will be timely, likely, and sufficient, "the merger raises no antitrust concern and ordinarily requires no further analysis."[9] Thus, entry occupies an important role in merger enforcement investigations and judicial decisions. A finding of timely, likely, and sufficient entry allows mergers to proceed even if they will result in a higher concentration for the merged parties within a market.[10]

[5] United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); *see also* 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS ¶ 420b, at 75 (3d ed. 2006). This structure was first articulated in *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

[6] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974); *see also Baker Hughes*, 908 F.2d at 982; 2B AREEDA ET AL., *supra* note 5, ¶ 420b, at 75.

[7] *See, e.g.*, FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 34-38 (D.D.C. 1998) (discussing the Commission's Merger Guidelines that make ease of entry a defense to an anti-merger action).

[8] *Phila. Nat'l Bank*, 374 U.S. at 363 ("[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

[9] 1992 Merger Guidelines, *supra* note 1, § 3.0. For discussion of the definition of committed entry and tests used to evaluate it, see *infra* text accompanying notes 81-94.

[10] *See* Thomas A. Piraino, Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. REV. 785, 819 (2003) (reinforcing the importance of entry by arguing that once

II. THE APPROACH OF THE ANTITRUST DIVISION AND THE COMMISSION TO ENTRY ANALYSIS

The works of industrial organization economists Joe S. Bain and George Stigler dominated early economic research into entry barriers.[11] Bain envisioned a more interventionist merger enforcement approach to entry,[12] arguing that the government should be more focused on whether entry would cure the anticompetitive effects of a merger in the short-term rather than the long-term.[13] Stigler, in comparison, desired a much less hands-on enforcement approach and found sufficient entry in fewer situations.[14] The Agencies eventually sided with Bain,[15] and the 1992 Merger Guidelines, which outline how they will analyze a horizontal merger,[16] mostly represent a combination of Bain's philosophy and ideas gleaned from game theory analysis.[17]

A. *Bain vs. Stigler: The Early Economic Theories on Entry*

On one hand, Bain looked at the condition of entry in a primarily structural way.[18] He examined how "structural barriers created entry barriers, preventing new competition even when incumbents' pric[ing]" might otherwise be high enough to attract entry.[19] Bain considered certain structural factors as barriers to entry, including "(1) absolute cost advantages of established firms; (2) product differentiation advantages of established firms; and (3) significant economics of large-scale firms."[20] Bain wrote that "absolute cost advantages

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committed entry is proven, "the courts and agencies should approve a merger without further inquiry"). After the defendant makes a rebuttal argument in the judicial setting, the burden then shifts to the government to produce "additional evidence of anticompetitive effect." *Baker Hughes*, 908 F.2d at 983; *see also* 2B AREEDA, *supra* note 5, ¶ 420b, at 75. However, a court may not shift the burden back to the government if the government had already completely and successfully addressed the defendant's rebuttal in its prima facie case. Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 424 (5th Cir. 2008). Once the court has disposed of the defendant's rebuttal arguments and has given the government the chance to counter them, the defendant may then introduce affirmative defenses to the government's prima facie case. FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 48-49 (D.D.C. 2007); *see also* 1992 Merger Guidelines, *supra* note 1, §§ 4.0-5.0 (describing possible defenses, including arguments that one of the merging companies is a failing entity or that the merger will result in a more efficient use of resources).

[11] Baker, *supra* note 4, at 191 (discussing the seminal influence of Bain and Stigler).

[12] *See infra* text accompanying notes 29-32.

[13] *See infra* text accompanying note 25.

[14] *See infra* text accompanying notes 33-41.

[15] *See infra* Part II.B.

[16] *See* 1992 Merger Guidelines, *supra* note 1, § 0.

[17] *See infra* Part II.D.

[18] JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 17 (5th prtg. 1956).

[19] Baker, *supra* note 4, at 191.

[20] BAIN, *supra* note 18, at 14.

of established firms," come about when established firms are able to secure resources, including capital, at lower prices than entrants, or have access to more economical techniques than do the entrants.[21] His second category of entry barriers, "product differentiation advantages," occurs when buyers would prefer the established firm's products over any potential entrant's.[22] Lastly, Bain's third category of entry barriers, "significant economics of large-scale firms," is another way of referring to the benefits gained through economics of scale.[23] After research, Bain concluded that product differentiation is the most powerful barrier to entry.[24] He also considered the timeframe required to effectively enter as worthy of examination when determining if a barrier to entry exists in a specific industry.[25]

Bain evaluated entry by the "extent to which established firms, on the average over a long period, elevate price above a long-run competitive level while still forestalling entry."[26] Consistent with his structural analysis of entry barriers, he likewise considered entry itself to be a long-run structural determinant.[27] Bain also looked at entry impediments as a way of categorizing and determining how much market power companies can exercise before entry occurs.[28]

Bain recommended a series of ways for the government to deal with entry barriers. For example, the government could try to reduce entry barriers by reducing the benefits an acquirer enjoyed from economies of scale, but only if the government could do so without harming overall efficiency.[29] He also proposed policies that would focus on shortening entry lags, allowing entrants to move more quickly from deciding to enter an industry to becoming a ready competitor to established firms.[30] Bain's recommendations read as interventionist. He suggested that the government use governmental programs to supply capital to entrants in order to counter supposed imperfections in the capital markets, which would otherwise allow established firms easier access

[21] *Id.* at 14, 16.

[22] *Id.* at 14.

[23] *Id.* at 15 (characterizing the third factor as the advantage resulting from a company's "unit costs of production plus selling decline relative to price over some range of outputs").

[24] *Id.* at 216.

[25] *Id.* at 11 ("The effect of any given condition of entry on market behavior will therefore be likely to vary with the length of the entry lags which accompany it." (emphasis omitted)).

[26] *Id.* at 17.

[27] *Id.* at 18.

[28] *Id.* at 22. Companies can exercise market power, for example, by raising prices. *Id.* However, Bain did point out that this ability to exercise market power would be tempered by an established firm's desire not to raise prices too much, which would then make it easier for other companies to enter into the industry. *Id.* at 36.

[29] *Id.* at 207.

[30] *Id.* at 208; *see also id.* at 10-11 (discussing and defining "lags of entry" as the "time intervals consumed by entrants in making their entries effective").

to capital than worthy potential entrants.[31] He also listed ways for enforcement agencies to use the Sherman and Clayton Acts to counter entry barriers.[32]

Stigler's philosophies, on the other hand, are significantly less interventionist.[33] They derived from his standing as a member of the Chicago School of Economics, and reflected the Chicago School's idea that "many practices previously thought harmful to competition in fact reflected healthy competition."[34] These practices then simply reflect rewards given to the established firm that "had the foresight or luck to enter first."[35]

Stigler defined barriers to entry as the "cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[36] He rejected as barriers to entry some of the barriers that Bain had accepted. For example, Stigler did does not consider, as a general rule, that advantages due to economics of scale or product differentiation should be categorized as entry barriers.[37] He also did not agree with Bain's assessment that imperfections in the capital market would harm potential entrants.[38]

Thus, Stigler's theories on entry barriers "suggested a more permissible merger policy than did Bain's."[39] Stigler wrote that the government should use antitrust laws only against "activities which on their face have a general and important tendency to reduce competition."[40] These activities include the merger of business rivals or the cooperation of firms within an industry.[41]

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[31] *Id.* at 215-16. Bain, though, did caution that these plans should only be developed "on the basis of a careful preliminary study." *Id.* at 216.

[32] *Id.* at 218-19.

[33] Baker, *supra* note 4, at 192 ("[Stigler's] approach to the question could be read as resisting the interventionist implications of Bain's analysis into entry barriers.").

[34] *Id.*

[35] *Id.*

[36] GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY 67 (1968).

[37] *Id.* at 70; Baker, *supra* note 4, at 192-93. Stigler would have considered product differentiation to be a barrier to entry "only if the costs of differentiation . . . are higher for a new firm than an existing firm." STIGLER, *supra* note 36, at 70. He would not consider advantages due to economics of scale to be a barrier to entry "when entrants could, in principle, achieve comparably low costs through internal growth." Baker, *supra* note 4, at 192-93.

[38] STIGLER, *supra* note 36, at 113-22; *cf.* BAIN, *supra* note 18, at 15-16 (discussing how imperfections in capital markets could be a factor giving rise to absolute cost advantages of established firms, a Bainian entry barrier).

[39] Baker, *supra* note 4, at 193.

[40] STIGLER, *supra* note 36, at 297.

[41] *Id.* at 297-98; *cf.* BAIN, *supra* note 18, at 218-19 (arguing that the Sherman and Clayton Acts should be utilized against anticompetitive behavior in a proactive manner to, for example, counter patent systems that may exclude entry or cut down on the benefits given to firms that have achieved economies of scale).

B. *The Antitrust Division and Commission Side with Bain*

The Federal Trade Commission first chose between Bain's and Stigler's philosophies in *Echlin Manufacturing Co*.[42] At first glance, the Commission seemed to be adopting Stigler's definitions and positions. It described Stigler's definition of entry barriers as "widely accepted in the legal and economic communities" and generally appeared to agree with it.[43]

However, as the opinion developed, the Commission seemed to qualify its agreement with Stigler's theories by discussing how it must examine entry issues practically. It did so in part by agreeing with Bain that it was important to consider how long it would take for entry to develop, and that this practical consideration could outweigh Stigler's theoretic notion that absent permanent barriers to entry, entry would occur eventually.[44] The Commission also seemed to adopt a version of Bain's theories on the role of impediments to entry in merger analysis.[45] Using Bain's terms, the Commission defined impediments to entry as "any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim."[46]

The Antitrust Division of the Justice Department also rejected Stigler's philosophies, albeit in a more dramatic way. In a 1988 article, Judy Whalley, a Deputy Assistant Attorney General in the Antitrust Division, described the Justice Department's philosophy towards entry as it related to overall merger enforcement.[47] Whalley commented that the Department had rejected Stigler's writings because they "ignore . . . business and economic realities."[48] In

[42] 105 F.T.C. 410, 485-92 (1985).

[43] *Id.* at 485-86. Though the majority distanced itself from Stigler's philosophies later in the opinion, *see infra* text accompanying notes 42-43, the dissent was willing to go further and not even solely accept Stigler's definitions in even a theoretical sense. *Echlin Mfg. Co.*, 105 F.T.C. at 495 (Bailey, Comm'r, dissenting). The dissenter criticized the majority's acceptance of Stigler's basic theories and discussed Bain as an acceptable alternative. *Id.* at 495-501. Further, the dissent explained that "[t]he defect in the Stiglerian alternative is that it does not account for the time, scale and cost necessary for a successful entry that is a meaningful threat to incumbent firms." *Id.* at 496.

[44] *Id*. at 486 ("Unless there is barrier to entry, as defined above, market power cannot be exercised indefinitely. Sooner or later, new firms will enter the market and drive prices back down to competitive levels. From the standpoint of the public, however, it makes a great deal of difference whether this occurs sooner or later. There may be little practical difference between an absolute barrier to entry and conditions of entry that delay the restoration of competitive prices for decades.").

[45] *Id.*

[46] *Id.*; *see also* Baker, *supra* note 4, at 193 (describing the Commission's approach towards impediments to entry as "Bainian").

[47] Judy Whalley, *Department of Justice Merger Enforcement*, 57 ANTITRUST L.J. 109, 109 (1988). This article is a transcription of Whalley's comments to the 36th Annual Spring Meeting of the Antitrust Section of the American Bar Association. *Id.*

[48] *Id.* at 111-12.

language similar to the Commission's *Echlin* decision, Whalley agreed that "there are few true permanent barriers to entry," but asserted that merger enforcement should still act more proactively than Stigler would suggest because the economy can suffer if effective entry takes several years.[49] The Antitrust Division and its Merger Guidelines at that time focused not on the possibility of entry, but instead on "how long it will take an entrant to enter and become an effective competitor."[50] Whalley's article did not mention Bain by name, but the spirit of her comments clearly reflect his more proactive and interventionist policies.[51] Thus, even though both the Antitrust Division and Commission appeared at first to agree theoretically with Stigler's philosophies, both effectively adopted versions of Bain's teachings.[52]

C. *Game Theory Enters into Entry Philosophy – Strategic Entry Deterrence and the Role of Sunk Costs*

As the field of economics embraced game theory, economists began to examine entry deterrence in a more strategic way.[53] The game theory approach focused on the role that sunk costs play in a potential entrant's decision whether or not to enter an industry.[54] Sunk costs can arise when "entry requires investment in specialized assets" or "when the potential entrant may have to remain in the market for some time before it can reasonably assess its likelihood of long-run success," which would force it to incur operating losses.[55] Economists used contestable markets, a type of "idealized economic

[49] *Id.* at 112.

[50] *Id.* Though the Federal Trade Commission and Department of Justice later issued joint Merger Guidelines in 1992, *see infra* text accompanying note 72, at the time of Whalley's article, the Commission had its own distinctive merger enforcement policies and did not specifically endorse or follow the Merger Guidelines. *See* Jeffrey I. Zuckerman, *The FTC's Approach to Merger Enforcement: Is Anyone Out There Paying Attention?*, 57 ANTITRUST L.J. 115, 115 (1988).

[51] Whalley, *supra* note 47, at 111-12 (disagreeing with Stigler by name and advocating an alternative but unnamed philosophy). Whalley's article appears to agree with Bain's focus on the "lag of entry" and the Antitrust Division's focus on the "business and economic" reality that mergers can negatively affect economic conditions infers a more proactive merger enforcement policy. *Compare* Whalley, *supra* note 47, at 111-13, *with* BAIN, *supra* note 18, at 11, 207, 218-19 (discussing "lags of entry" and arguing for an interventionist merger enforcement policy).

[52] *See* Baker, *supra* note 4, at 193 (commenting that, though "Stigler won the definitional battle" in decisions like *Echlin*, "Bain won the war" to shape antitrust philosophy, which includes merger enforcement policies).

[53] *Id.* at 191, 194. *See generally* Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979) (discussing strategic entry deterrence in game theory terms).

[54] Baker, *supra* note 4, at 194.

[55] Janusz A. Ordover & Daniel M. Wall, *Proving Entry Barriers: A Practical Guide to the Economics of New Entry*, ANTITRUST, Winter 1988, at 12, 17.

market" with no entry barriers, to analyze entry in this new way.[56] In a contestable market, fixed costs of entry are recoupable upon exit, and thus not sunk.[57]

These theorists explained that, when the initial expenditures are not reversible, entry will only happen if the entrant can at least recover its sunk costs.[58] Thus, sunk costs may be thought of as a type of entry barrier that places an entrant and an established firm on an unequal footing. The incumbent has already spent the sunk costs, but the entrant must consider them when making its entry decision.[59] The effectiveness of sunk costs as an entry barrier depends on the established firm's actual or threatened responses to the potential entrant.[60] In a nod to Bain, the contestable market theories state that sunk costs can be a greater entry barrier if the incumbent firm can rely on advantages from economies of scale.[61]

Jonathan Baker describes the contestable market theories as a way of reimagining the "old debate" between Bain and Stigler.[62] Bain had earlier discussed the costs of "product design and advertising expenditures that often underlie product differentiation" as a factor contributing to entry barriers.[63] These costs are typically irreversible and would not simply transfer to another product if this entry failed.[64] These costs can thus be thought of as sunk costs that would act as entry barriers under the contestable market theories as they

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[56] *See* Elizabeth E. Bailey, *Foreword* to WILLIAM J. BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE, at xix-xx (1982).

[57] *Id.*; *see also* Baker, *supra* note 4, at 194. Research expenses are an example of a recoupable fixed cost of entry if they can be equally applied in a new market if entry into the first market proved unsuccessfully. *See id.*

[58] *See* BAUMOL ET AL., *supra* note 56, at 290-91 (stating that entry would only be profitable if "profits expected in the event of success outweigh the unrecoverable entry costs that will be lost in the case of failure").

[59] *Id.* at 290 ("The need to sink money into a new enterprise, whether into physical capital, advertising, or anything else, imposes a difference between the incremental cost and *incremental risk* that are faced by an entrant and an incumbent."). The expenditures needed to enter an industry would have more of an effect on a later entrant's decision to enter into the market than they did on the first entrant, who is now the established firm, because the first entrant did not initially have rivals to contend with and so failure was less likely. *Id.* at 291.

[60] *Id.* at 290. The role that sunk costs play as barriers to entry "depends on the risk to which they subject the entrant." *Id.* at 291. Entrants can reduce that risk by securing futures contracts before entering the industry, but these futures contracts can then create "a more formidable entry barrier" by further tying up resources that the entrant needs. *Id.*

[61] *See id.* at 292.

[62] Baker, *supra* note 4, at 194.

[63] *Id.* at 194-95.

[64] *Id.* at 195.

had in Bain's previous writings.[65] However, if these costs were not sunk, they would not function as entry barriers – as Stigler had argued.[66]

The new game theory approach also shifted the entry debate to one focused on the profitability of entry.[67] It allowed economists to base their entry models on the simple idea that "entry will occur if and only if the sum of entry period and future profits is greater than zero."[68] This view factors in both the variable costs incurred during operation and the possible fixed sunk costs incurred entering the industry.[69]

Further, the game theory approach had ramifications for merger enforcement policies. Antitrust analysis could distinguish between committed entrants, for whom entry required significant fixed costs, and uncommitted entrants, who were also termed "hit-and-run" entrants for their ability to enter into a market and then leave without significant exit costs.[70] The smaller the sunk costs required to enter an industry, the more able an enforcement agency would be to conclude that effective entry will occur at some point and counteract any anticompetitive effects from a merger in that industry.[71]

D. *Entry Under the 1992 Merger Guidelines*

1. How the 1992 Merger Guidelines Discuss Entry

The 1992 Horizontal Merger Guidelines ("Guidelines") represent the first merger guidelines issued jointly by the Commission and the Antitrust Division.[72] The Guidelines principally discuss how the Agencies interpret and analyze mergers under Section 1 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act.[73] The Guidelines feature a much lengthier section on, and better explanation of, entry issues than

[65] *Id.*

[66] *Id.*

[67] *Id.* at 194 (discussing the entry decision as a question of whether or not an entrant's "contribution margin (revenues less variable costs) [would be] adequate to cover its . . . sunk costs").

[68] BAUMOL ET AL., *supra* note 56, at 297.

[69] *Id.*

[70] Baker, *supra* note 4, at 194-96. See *infra* text accompanying notes 76-94 for further discussion on how the 1992 Horizontal Merger Guidelines deal with the issues of committed and uncommitted entry.

[71] Robert D. Willig et al., *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY. MICROECON. 281, 310-11.

[72] 1992 Merger Guidelines, *supra* note 1, § 0.

[73] *See id.* at Statement. The Antitrust Division enforces the Sherman Act and Clayton Act, and the Commission enforces the Federal Trade Commission Act. *See id.* § 0. The 1950 amendment to Section 7 of the Clayton Act considerably expanded its reach beyond that of the Sherman Act, and now the Antitrust Division mainly brings its anti-merger actions under that provision. *See* KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 318 (2003).

the Antitrust Division's 1984 Merger Guidelines.[74] This increased focus on entry in the Guidelines reflected the "growing significance and sophistication of entry analysis in judicial decisions and enforcement agency practice."[75]

The Guidelines reflected the economic theory of its day by incorporating ideas derived from game theory analysis and so distinguishing between committed and uncommitted entrants based on the sunk costs that they might incur.[76] The Guidelines describe uncommitted entry as that which would "occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase."[77] The position of the Antitrust Division and the Commission towards uncommitted entry, as well as their description of how it works, generally reflects the position advanced by game theory analysts.[78] As a general rule, the Guidelines conclude that sunk costs are insignificant, and a potential entrant is uncommitted, only if its sunk costs total less than five percent of the potential entrant's likely annual revenue in the industry.[79] In their merger analysis, the Agencies assign a market share to the uncommitted entrants and so consider their effects on industry concentration and analysis of their market conduct in the overall assessment of the likely competitive effects of an acquisition.[80]

The potential effects of committed entrants, on the other hand, are considered in a separate analysis since they are further from entering than uncommitted entrants.[81] The Guidelines define committed entry as requiring a "significant sunk cost" that "would not be recouped within one year of the commencement of the supply response, assuming a 'small but significant and nontransitory' price increase in the relevant market."[82] Committed entry can counteract an established firm's market power by preventing it from exercising

[74] Janusz A. Ordover & Jonathan B. Baker, *Entry Analysis Under the 1992 Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 139, 139 (1992) (describing how the 1984 Merger Guidelines discussed entry in only "two brief paragraphs" and relegated the economic analysis to two "dense" footnotes).

[75] *Id.*

[76] 1992 Merger Guidelines, *supra* note 1, §§ 1.32, 3.0 (discussing committed and uncommitted entry); *see also* Baker, *supra* note 4, at 195 (mentioning that the Merger Guidelines reflect "this new economic learning about entry").

[77] 1992 Merger Guidelines, *supra* note 1, § 1.32.

[78] *Compare id.* (defining uncommitted entry in the Guidelines), *with* BAUMOL ET AL., *supra* note 56, at 6-7 (stating that entry barriers do not exist when firms have the possibility of a costless exit from a market and so can obtain temporary profits and then leave if the incumbent firms react in such a way as to limit their profitability).

[79] Ordover & Baker, *supra* note 74, at 140 n.3.

[80] 1992 Merger Guidelines, *supra* note 1, § 2.0; *see also* Ordover & Baker, *supra* note 74, at 141.

[81] Ordover & Baker, *supra* note 74, at 139 (discussing how the Guidelines treat committed entrants differently because they are in the market for the "long haul").

[82] 1992 Merger Guidelines, *supra* note 1, § 1.32.

that power.[83] However, to have this effect, the Guidelines state that committed entry must be timely, likely, and sufficient.[84]

First, the Guidelines state that in order to be timely, committed entry must typically occur within a two-year window.[85] This time limit reflects the idea that a threat of distant entry is unlikely to prevent established firms from exercising their market power in the present.[86] The Guidelines consider entry sufficient when the entrant can affect enough of the market to ensure that "post-entry price does not rise above the premerger price."[87]

Second, the Guidelines follow the game theory analysts in determining that entry will be likely if it would be profitable in the post-merger environment.[88] The Agencies perform the profitability analysis at pre-merger prices because the potential entrant makes its decision whether or not to enter based on long-term post-merger prices, not short-term prices elevated by the merger.[89] Committed entry could be likely after a merger, even if it was not attractive pre-merger, because structural changes caused by the merger opened up new "sales opportunities."[90]

Lastly, the Agencies use a profitability test to determine likelihood of entry, comparing the minimum viable scale – "the minimum fraction of the market an entrant must receive to break even at premerger prices – with the sales opportunities available in the post-merger environment."[91] A potential entrant's minimum viable scale takes into account sunk costs and can be

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[83] *Id.* § 3.0.

[84] *Id.*

[85] *Id.* § 3.2.

[86] Ordover & Baker, *supra* note 74, at 142. The Guidelines only recognize one small exception to the two-year window:

> Where the relevant product is a durable good, consumers, in response to a significant commitment to entry, may defer purchases by making additional investments to extend the useful life of previously purchased goods and in this way deter or counteract for a time the competitive effects of concern. In these circumstances, if entry only can occur outside of the two year period, the Agency will consider entry to be timely so long as it would deter or counteract the competitive effects of concern within the two year period and subsequently.

1992 Merger Guidelines, *supra* note 1, § 3.2.

[87] Ordover & Baker, *supra* note 74, at 145 (discussing 1992 Merger Guidelines, *supra* note 1, § 3.4).

[88] 1992 Merger Guidelines, *supra* note 1, § 3.3. *Compare id.* (discussing the Guidelines' profitability test for likeliness of committed entry), *with* BAUMOL ET AL., *supra* note 56, at 297 (arguing that entry would occur "if and only if the sum of entry period and future profits is greater than zero").

[89] Ordover & Baker, *supra* note 74, at 142; *see also* 1992 Merger Guidelines, *supra* note 1, § 3.3 ("An entry alternative is likely if it would be profitable at premerger prices.").

[90] Ordover & Baker, *supra* note 74, at 143; *see also* 1992 Merger Guidelines, *supra* note 1, § 3.3.

[91] Ordover & Baker, *supra* note 74, at 144; *see also* 1992 Merger Guidelines, *supra* note 1, § 3.3.

determined by examining prior successful entries into the industry so long as those prior entrants used entry strategies that are still possible in the current market.[92] An entrant is likely to enter only if the sales opportunities available, the fraction of the market it would likely achieve, exceed the minimum viable scale, the share of the market it would need to be profitable in the industry.[93] The Guidelines do not require that companies or experts perform this analysis with mathematical care – it can be speculative and estimated by "knowledgeable industry experts."[94]

2. Entry Analysis as Performed Under the 1992 Merger Guidelines

The Antitrust Division and Commission receive notification of "most mergers that pose significant risk to competition" through the pre-merger reporting guidelines of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR").[95] The HSR requires that "parties to a transaction above a certain size notify the Agencies before consummation," and prohibits the transaction from going forward until the expiration of waiting periods designed to allow the Agencies time to review the transaction.[96] The Agencies conduct their investigations and then only pursue litigation if they find that the merger will have anticompetitive effects not counteracted by entry.[97] Reporting requirements under the HSR are discussed in more detail later in this Note.[98]

The Agencies' commentary to the Merger Guidelines outlines various factors that lead them either to bring an action against anticompetitive mergers, or allow mergers because entry will be timely, likely, and sufficient.[99] The Commentary dedicates four pages to discussing how sunk costs and the risks associated with entry can affect the likelihood of entry, and thus the Agencies' decision to bring, or not bring, an action.[100] During their analysis, the

[92] *See* Ordover & Baker, *supra* note 74, at 143-44; *see also* 1992 Merger Guidelines, *supra* note 1, § 3.1 ("Recent examples of entry, whether successful or unsuccessful, may provide a useful starting point for identifying the necessary actions, time requirements, and characteristics of possible entrant alternatives.").

[93] Ordover & Baker, *supra* note 74, at 144.

[94] *Id.* at 144-45.

[95] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 1 (2006), http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf [hereinafter COMMENTARY]. The Agencies will at times examine consummated mergers, "especially when evidence suggests that anticompetitive effects may have resulted from them." *Id.* at 2.

[96] *Id.* at 1.

[97] *See id.* at 2 (discussing how the Agencies analyze a proposed merger when making a determination of whether to challenge the merger). ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO U.S. AND FOREIGN MERGER REVIEW 254 (Ilene K. Gotts ed., 3d ed. 2006).

[98] *See infra* text accompanying notes 140-67.

[99] COMMENTARY, *supra* note 95, at 38-47.

[100] *Id.* at 38-42.

Agencies examine different types of sunk costs, varying by industry and context.[101] In the context of consumer product markets, the Commentary seems to agree with Bain by addressing how the risky, long-term advertising costs associated with entry into a market with high product differentiation can function as a sunk cost and thus an entry barrier.[102] Entry into these markets can also be unsuccessful when consumers do not have an incentive to embrace new brands.[103] In the context of industrial markets, the Commentary again agrees with Bain that the costs associated with breaking into a highly differentiated market can function as potentially unrecoverable sunk costs and thus create entry barriers.[104] However, these costs may be lower than in a consumer setting because industrial firms may not need to establish such powerful brands or reputations to be successful.[105] This may be especially true in the industrial commodities market where purchasers might be quite likely to switch brands.[106] The high costs associated with entry may also not prevent entry into industrial markets due to the high returns that entrants might expect to gain, but the Commentary does caution that entry into these markets requires significant fixed costs to build up infrastructure.[107]

The Commentary mentions other factors that the Agencies have deemed to be obstacles to successful entry. Regulation, for example, can prevent effective entry.[108] The Agencies, like Bain, also determined that intellectual property rights, including patents, can function as an entry barrier if entrants cannot easily license or invent around the required rights.[109] Though increased prices may, in most cases, naturally bring about committed entry, the Commentary states that increased prices may not bring entry if entry requires scarce natural resources that would be difficult for the entrant to acquire.[110] Entrants may also not enter if they cannot obtain other necessary resources for

[101] *Id.*

[102] *See id.* at 38-39. See also *supra* text accompanying notes 62-66 for discussion on how Bainian and Stiglerian economists would view the question of whether advertising costs in a highly differentiated market can function as sunk costs.

[103] COMMENTARY, *supra* note 95, at 39. This result can be attributed to the fact that retailer customers can either pass price increases onto their final customers, or push their own brands at now higher prices. *Id.*

[104] *Id.* at 40.

[105] *Id.* at 41.

[106] *Id.*

[107] *Id.* at 40.

[108] *Id.* at 42-43 (mentioning certificates of need, environmental regulations, zoning regulations, required Commission licensing, or approval from the Federal Drug Administration as examples of regulation that function as entry barriers).

[109] *Id.* at 43-44. See also BAIN, *supra* note 18, at 148, for a discussion of how "the control through patents of various production techniques by established firms" can produce barriers to entry.

[110] COMMENTARY, *supra* note 95, at 44.

entry, such as supplies for manufacture, labor, and "access to physical facilities built and owned by third parties."[111]

The Commentary also discusses factors that weigh on the Agencies' investigatory determinations of whether entry would be timely or sufficient. When determining if entry will occur within two years, and thus satisfy the Agencies' timeliness requirement, "the Agencies include the time to complete any necessary preliminary steps, such as establishing a reputation or the development of specialized inputs into the production of the product in question."[112] For the sufficiency requirement, the Commentary merely mentions that "[t]he Agencies' reasons for concluding that entry would not face significant obstacles also can be relevant to determining whether entry would be sufficient."[113]

III. METHODS FOR ALLOCATING THE BURDEN OF PERSUASION

The classic "burden of proof" encompasses both the burden of production and the burden of persuasion.[114] The burden of production dictates which party has the responsibility of producing evidence of "a particular fact in issue."[115] It may switch back and forth between the parties during the litigation.[116] The burden of persuasion, on the other hand, does not switch parties because it only comes into play when the trier of fact makes a final decision on an issue.[117] The burden of persuasion is significant when the "trier of fact is actually in doubt," because it instructs the trier of fact in how to determine the issue in question.[118] The party with the burden of persuasion

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[111] *Id.*

[112] *Id.* at 45-46. The Antitrust Division's March 24, 2008 approval of the merger between Sirius Satellite Radio and XM Satellite Radio initially looks likes a departure from this two-year requirement, as it first appears to focus on the entry of new technologies into the traditional radio market later than two years into the future. *See* U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), http://www.justice.gov/opa/pr/2008/March/08_at_226.html. The Antitrust Division's press release contemplates these new technologies entering the market in "several years." *Id.* The head of the Antitrust Division later said in an interview that the Department felt that the technologies would enter the market in approximately five years. *Conference Call Briefing with Assistant Attorney General Thomas Barnett, Antitrust Division*, FED. NEWS SERV., Mar. 24, 2008, *available at* http://www.fnsg.com. However, in that same interview, the official commented that the potential for entry was not a "core driver" behind the decision to approve the merger. *Id.*

[113] COMMENTARY, *supra* note 95, at 46-47.

[114] MCCORMICK, *supra* note 2, § 336, at 562-63; 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:2, at 428.

[115] MCCORMICK, *supra* note 2, § 336, at 562-63.

[116] *Id.*

[117] *Id.* § 336, at 563.

[118] *Id.*; *see also* 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:2, at 428.

must prove the issue to the trier of fact.[119] Thus, if the evidence does not clearly favor one party, the party with the burden of persuasion loses on the issue.[120] Ordinarily, the party that had the burden of production on an issue would also have the burden of persuasion on that issue.[121] And, as a general rule, the party who wants relief should have to carry the overall burden of proof.[122]

However, these general rules may give way to other considerations. First, special policy considerations may lead a court to allocate the burdens differently.[123] This may be done to make disfavored defenses or claims, like fraud, harder to utilize.[124] It may also be done "to serve substantive policy, [by] making it easier or harder for plaintiffs to recover or defendants to avoid liability."[125] Second, fairness may also lead a court to allocate the burdens in a more particularized way.[126] The court may assign the burdens of proof to a party relying on an exception to a legal doctrine.[127] The general rules may also give way when one party has the access to the required information,[128] as a court can allocate the burdens to the defendant out of fairness if he or she is "the party most likely to have access to the proof."[129] Third, convenience may also cause a court to vary from the general rules, such as in a case where the defendant relies on something that the court would naturally explore after the plaintiff, the party seeking relief, has rested.[130] Fourth, courts can decide on a more specific rule to resolve cases in which definitive proof is unavailable, as they do when creating a presumption of due care in suits brought against the estates of those killed in accidents.[131] And, finally, judicial estimation of the probabilities can also affect how courts allocate the burdens of proof.

[119] MCCORMICK, *supra* note 2, § 336, at 563.

[120] *Id.*; 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:2, at 428. Wigmore's term for the burden of persuasion, the "risk of non-persuasion," effectively captures the way the burden works at trial. 9 JOHN HENRY WIGMORE, EVIDENCE § 2485, at 271 (3d ed. 1940).

[121] MCCORMICK, *supra* note 2, § 337, at 564; 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 430.

[122] MCCORMICK, *supra* note 2, § 337, at 563.

[123] *Id.* § 337, at 564; 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 431.

[124] 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 431.

[125] *Id.*

[126] 9 WIGMORE, *supra* note 120, § 2486, at 278.

[127] MCCORMICK, *supra* note 2, § 337, at 565.

[128] *Id.* § 337, at 564; *see also* 9 WIGMORE, *supra* note 120, § 2486, at 275.

[129] 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 432. For example, courts may require "a debtor to prove payment of an obligation" rather than require the creditor to prove nonpayment on the assumption that the debtor would be more likely to have kept a record of the payment. *Id.*

[130] *Id.* § 3:3, at 430.

[131] *Id.* § 3:3, at 433.

Accordingly, "[t]he risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred."[132]

Justice Stevens's one-paragraph concurrence in *Schaffer v. Weast* also reflects a concern that could lead a court to differ from the general rules of burden allocation.[133] *Schaffer* dealt with the question of which party should have the burden of persuasion in a case where a parent challenges the appropriateness of an individual educational plan.[134] The Individuals with Disabilities Education Act requires school districts to design individual educational plans for disabled children.[135] The majority held that the parents, the party seeking relief against the school districts, should have the burden of persuasion,[136] and Justice Stevens concurred.[137] However, Justice Stevens concurred not out of devotion to the general rule of burden allocation, but instead because he believed "that we should presume that public school officials are properly performing their difficult responsibilities under this important statute."[138] Analogized to merger enforcement cases, a like-minded judge with faith that the Antitrust Division and Commission are accurately investigating entry in their pre-litigation investigations could then defer to the Agencies and place the burden of persuasion on the defendants to prove effective entry.

IV. APPLYING THE BURDEN ALLOCATION METHODS TO ENTRY

A. *Relative Knowledge*

Courts can place the burden of persuasion on one party if that party is more likely to have the relevant information than their opponent.[139] At first glance, this factor seems to obviously point toward placing the burden on the merging partners. After all, they function in their industry and geographic area, and have probably built up a large base of information. Moreover, who better to have information about the merger than those who have negotiated it and now wish to consummate it? However, the government has vast powers at its disposal to counter the information disparity early in the process, and so the question is not as obvious as it would first appear.

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[132] MCCORMICK, *supra* note 2, § 337, at 564; *see also* 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 433; V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817 (1961).

[133] Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring).

[134] *Id.* at 51 (majority opinion).

[135] *Id.*

[136] *Id.*

[137] *Id.* at 62-63 (Stevens, J., concurring).

[138] *Id.*

[139] 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 432.

The government mainly obtains pre-litigation information from merger partners through the Hart-Scott-Rodino Act.[140] The Act requires merging companies to submit reports to both the Commission and Antitrust Division when the merger meets statutorily provided size requirements.[141] This initial document requirement forces the merging companies to submit, among other items, "basic information about the parties and structure of the merger proposal," SEC filings, other relevant financial information about the merger partners, and information about the relevant geographic markets.[142] The merging companies must also submit Item 4(c) documents, which consist of "studies, surveys, analyses, and reports prepared by or for any officer or director in relation to the transaction."[143] The Agencies examine the Item 4(c) documents to see what the merging partners' management has said internally about the goals of the merger – namely, whether the partners intend for it to eliminate their competition.[144]

The HSR mandates a thirty-day stay while the Agencies review the initial documents.[145] Though the Agencies approve roughly ninety-five percent of mergers after initial review,[146] the unlucky few are then asked to submit additional documents as part of the "Request for Additional Information and Documentary Material," commonly referred to as the Second Request.[147]

The Second Request's scope of document production rivals that of discovery for "large scale civil litigation."[148] The Second Request varies for

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[140] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2006)).

[141] 15 U.S.C. § 18a(a). Merging partners must submit reports if the resulting company "would hold an aggregate total amount of the voting securities and assets" in excess of $200,000,000 as adjusted by the percentage change of the gross national product since 2003. *Id.* § 18a(a)(2). Alternatively, they must submit reports if the resulting company's aggregate total would be over $50,000,000 as similarly adjusted and each company meets statutorily provided annual net sales or total asset minimums that vary depending on the industry. *Id.* § 18a(a)(2)(B).

[142] Matthew S. Bailey, Note, *The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests*, 67 OHIO ST. L.J. 433, 442 (2006) (citing 16 C.F.R. § 803 app. (2003)).

[143] *Id.* (citing 16 C.F.R. § 803 app.). The Item 4(c) documents are so named because they respond to Item 4(c) of the initial Notification and Report Form required under the HSR. ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 9.

[144] John Harkrider, *Proving Anticompetitive Impact: Moving Past* Merger Guidelines *Presumptions*, 2005 COLUM. BUS. L. REV. 317, 337.

[145] 15 U.S.C. § 18a(b).

[146] COMMENTARY, *supra* note 95, at 1.

[147] Bailey, *supra* note 142, at 443.

[148] ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 180; *see, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997) (describing how merger partners Staples and Office Depot had to submit to the Commission "hundreds of boxes of documents" in response to a Second Request).

each transaction, but the parties may have to provide, for example, price lists and other information on the company itself, detailed information about the company's competitors and their products, and detailed information on many things that the Agencies would need to know to analyze ease of entry.[149] The stricter analysis conducted by the Agencies during this period mirrors the more onerous requirements on the merging partners. The Agencies may conduct natural experiments, which allow them "to perform an econometric analysis of prices, profits, or output, under circumstances that resemble the post-merger world."[150] For example, the Agencies may examine markets in which the acquirer currently operates and the acquired does not.[151] These experiments allow an estimation of the effects of the post-merger company's market power if that situation was replicated nationwide.[152] As compared to this more practical inquiry, the Agencies may also mathematically simulate the merger to determine how it would theoretically affect market prices.[153] The Agencies routinely ask merging companies to stage mock entries as part of the Second Request under the HSR.[154] They will also communicate with the merger partners' customers to obtain their thoughts on the likely effect of the merger.[155] The Commission seems to rely on these customer affidavits heavily – between 1996 and 2003 it brought cases in ninety-eight percent of the situations in which it received strong customer complaints.[156]

The onerous Second Request requirements, which allow the Agencies the time and resources to arguably examine the proposed merger too fully, have had their fair share of critics.[157] Upon issuance, the Second Request triggers a thirty-day automatic stay that lasts until the parties "substantially" comply with

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[149] ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 148 (providing a detailed list of the information that a Second Request will typically request).

[150] Harkrider, *supra* note 144, at 335.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 338-40.

[154] Ordover & Wall, *supra* note 55, at 14 ("As part of their Requests for Additional Information under Hart-Scott-Rodino, both agencies routinely propound interrogatories which, in essence, require the responding firm to stage a mock entry.").

[155] Harkrider, s*upra* note 144, at 340. The Agencies may also conduct some customer interviews during the investigation of the initial documents. ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 137-38.

[156] Harkrider, s*upra* note 144, at 340 (citing FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003, tbls. 7.1, 8.1 (as amended on Aug. 31, 2004), http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf).

[157] Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 881 (1997) (stating that the Commission and Antitrust Division have "essentially create[d] the automatic stay of a transaction that the 94th Congress explicitly refused to grant").

it.[158] However, the Agencies have interpreted this language as requiring complete compliance,[159] allowing them to maximize the time spent reviewing a rolling production's initial productions before the thirty-day automatic stay must end.[160] Some have called the automatic stay a de facto injunction that the Agencies have used in a manner contrary to the aims of the HSR's drafters.[161] Merging companies can try to get around this de facto injunction by filing their initial document requirement with a declaration that they will consummate the transaction imminently, forcing the Agencies to decide immediately whether to bring suit based on the information currently available.[162] However, such an end-around the stay subjects the merging companies to the possibility of large fines for violation of HSR procedure.[163]

The Agencies' ability to correct the knowledge disparity prior to litigation through the Second Request moots the argument that the defendants, initially more knowledgeable about the merger and the relevant industry, should then have the burden of persuasion on entry issues. Indeed, at least one commentator has argued that the information obtainable by the Agencies is so thorough and the time they have to review it is so great that, not only should the burden of persuasion on entry be on the government, but the entire standard of proof should be changed to require the government to prove its overall case by clear and convincing evidence.[164] Though a radical argument, it underscores the wealth of information available to the government prior to litigation.

The government might counter, though, that the information it obtains is not as reliable as it would like. Thus, even though the government receives a great quantity of information, the lack of quality still means that the merging partners would have more reliable information of the merger's possible effects and the potential for entry. Good corporate counsel can ensure that the government does not generate damaging Item 4(c) documents, or can perhaps spin documents already created.[165] Customers, on whom the Agencies' rely to determine if they would buy from potential new entrants, can behave

[158] 15 U.S.C. § 18a(e) (2006).

[159] Bailey, *supra* note 142, at 443 (citing FTC Statement of Basis and Purpose, 43 Fed. Reg. 33,508 (July 31, 1978)).

[160] ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 225.

[161] Sims & Herman, *supra* note 157, at 881.

[162] Bailey, *supra* note 142, at 458.

[163] *Id.* Penalties are as high as $11,000 per day. ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 13.

[164] Harkrider, *supra* note 144, at 324.

[165] ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 75, 116; Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 166. *But see* Harkrider, *supra* note 144, at 337 (arguing that a company's Sarbanes-Oxley Act requirements make it hard to manipulate Item 4(c) documents).

strategically and perhaps provide slanted information or try to avoid involvement that would upset the merging partners.[166]

Despite these legitimate concerns about the quality of the information provided to them, the Agencies would probably fail to convince a court that there is such a large information disparity that the burden of persuasion on entry should be placed on the defendants. The quantity of information provided to the Agencies, and the time they can spend reviewing the documents before deciding to file to enjoin the transaction, is simply too dramatic for the Agencies to have a compelling argument. And, of course, the courts have already given the merging parties the burden of production on entry at trial,[167] so any remaining information asymmetry may be accounted for then. If they want to convince a court to place the burden of persuasion for entry on the defendants, then, they will have to turn to other arguments.

B. *The* Schaffer *Argument*

As discussed earlier, a judge analogizing to Justice Stevens's concurrence in *Schaffer* could place the burden of persuasion for entry on the defendant if the judge believed that the Antitrust Division and Commission generally properly investigated and analyzed entry issues.[168] Though judges are not bound by the Merger Guidelines' approach to entry analysis,[169] deference would represent a judgment that the Agencies' investigations correctly determined whether entry will occur. However, in 1990 a suggestion of such judicial deference would have been almost laughable. Two separate Courts of Appeals' decisions handed down that year not only cast doubt on the Agencies' entry analysis, but roundly criticized the Agencies as being out of control in their merger enforcement priorities and for ignoring prior court precedent on this issue.[170] In *Syufy Enterprises*, as well as in *Baker Hughes*, the Agencies lost as the courts agreed with the defendants' rebuttal argument that entry would cure any anticompetitive effects.[171] However, these defeats for the Agencies were based

[166] Frankel, *supra* note 165, at 165.

[167] *E.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974); *see also* United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990); 2B AREEDA ET AL., *supra* note 5, ¶ 420b, at 75.

[168] *See supra* text accompanying notes 133-38.

[169] *E.g.*, Olin Corp. v. FTC, 986 F.2d 1295, 1300 (9th Cir. 1993) ("Certainly the Guidelines are not binding on the courts, or, for that matter, on the Commission."); *see also* 1992 Merger Guidelines, *supra* note 1, § 0.1 (claiming to set forth only how the Agencies analyze mergers internally and not to establish a legal framework or even exhaust the possibilities of what the Agencies can argue at trial).

[170] *Baker Hughes Inc.*, 908 F.2d at 983-84; United States v. Syufy Enters., 903 F.2d 659, at 663-64 (9th Cir 1990); *see also* Jonathan B. Baker, *The Problem with* Baker Hughes *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 ANTITRUST L.J. 353, 365-71 (1997); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 112 (1991).

[171] *See* Baker, *supra* note 170, at 365-71.

more on misunderstandings blown out of proportion than on actual disagreements with the courts.[172] Both courts mischaracterized the government's arguments about committed entry analysis as arguments about uncommitted entry analysis, causing them to believe that the Agencies were ignoring prior precedent on uncommitted entry analysis when they were in fact arguing different points.[173] However, since 1990, courts have begun to side more with the Agencies on entry issues, based in part on the clearer description of entry analysis in the 1992 Merger Guidelines.[174] The suggestion that courts agree with and support the Agencies' analysis of entry issues is no longer quite as laughable.

1. Precedent Before *Syufy* and *Baker Hughes*

Prior to the 1992 Guidelines, which incorporated the new thinking on how sunk costs can prevent entry into a market, and thus distinguished between uncommitted and committed entry,[175] most courts examining entry problems only spoke of what would now be considered uncommitted entry.[176] In *Waste Management*,[177] a decision that would later play a role in the *Syufy* and *Baker Hughes* disagreements, the court held that easy entry trumps concentration.[178] Though the decision itself concerned uncommitted entry,[179] disagreements and confusion emerged later when it appeared to the *Syufy* and *Baker Hughe*s courts that the government, which had tried to incorporate new economic theories and argue instead based on the separate notion of committed entry, was ignoring the holding of *Waste Management*.[180]

2. *Syufy* – The Agencies' Committed Entry Analysis Gets Off to a Rocky Start in the Courts

The *Syufy* decision represented the first sign that all would not be well between the Agencies and the courts. In that case, the Antitrust Division challenged Syufy Enterprises, a Las Vegas movie theater operator who had gradually bought out its rivals in the Las Vegas first-run film market.[181] The Antitrust Division conceded that Syufy had then used its market power only against its film distributor suppliers and not its customers, a position that the

[172] *Id.* at 366.

[173] *Id.*

[174] For further discussion, see *infra* text accompanying notes 214-35.

[175] *See supra* Part II.D.1.

[176] *See* Baker, supra note 170, at 359-62.

[177] United States v. Waste Mgmt., Inc., 743 F.2d 976 (2d Cir. 1984).

[178] *See id.* at 983.

[179] *Id.* (discussing entry prospects for those who could quickly and simply compete with the acquirer out of their homes, thus, without the large sunk costs that one would associate with committed entry).

[180] S*ee* Baker, *supra* note 170, at 365-71.

[181] United States v. Syufy Enters., 903 F.2d 659, 662 (9th Cir 1990).

court latched onto as it sided with Syufy and began to mock the Antitrust Division's case in the very first paragraph of the decision.[182] The lower court had approved Syufy's purchases, concluding that they did not injure competition because there were no barriers to entry – others "could" enter.[183] And, so, the appellate decision mainly focused on the issue of entry.

The government argued that entry would not be likely because entry at a scale large enough to achieve low costs could not be profitable due to "over-screening" in the industry.[184] Thus, any entrant that tried to enter in a scope large enough to receive the benefits of economies of scale would depress market prices in Las Vegas and simply not be able to make a profit.[185] The government's focus on profitability, arguing that an entrant *would* not enter because it could not compete with Syufy profitably rather than arguing that one *could* not enter, signaled a committed entry argument.[186] The court, though, misunderstood the argument.[187] The Antitrust Division's case revolved around "the scale necessary for an entrant to do business efficiently and whether committed entry at that scale would be profitable,"[188] but the court mischaracterized that argument as the "shopworn" claim that Syufy's own efficiency was a barrier to entry, and promptly rejected it.[189] The court and the government argued like two ships passing in the night. The court believed that the government was using the same old theories of solely uncommitted entry argued in cases like *Waste Management*, and claiming contrary to that case's holding that, even though entry *could* happen, the court should still block the transaction.[190] However, the government was actually arguing, based on the separate theory of committed entry, that due to the significant sunk costs involved with opening a movie theater, no one *would* want to enter the market, and thus entry would not solve the competitive problem.[191]

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[182] *Id.* at 661 (observing that though Las Vegas moviegoers suffered no direct injury as a result of the challenged transactions and there were no complaints from Syufy's bought out competitors, "[t]he Justice Department nevertheless remains intent on rescuing this platoon of Goliaths from a single David").

[183] *Id.*

[184] Brief for Appellant United States at 37-39, *Syufy*, 903 F.2d 659 (No. 89-1575).

[185] *Id.*

[186] *Compare Syufy*, 903 F.2d at 661 (stating that the lower court allowed the transactions because others "could" enter the market), *with* Brief for Appellant United States, *supra* note 184, at 37-39 (describing how depression of the market prices would render any entry on a sufficient enough scale to compete with Syufy unlikely because it would not be profitable).

[187] Baker, *supra* note 170, at 369-70.

[188] *Id.* at 370.

[189] *Syufy*, 903 F.2d at 667-69; *see also* Baker, *supra* note 170, at 369-70. The *Syufy* court also believed that the government was incorrect in its assessment of how many theaters the Las Vegas market would support. *Syufy*, 903 F.2d at 667 n.13.

[190] *See* Baker, *supra* note 170, at 370.

[191] *See id.*

Due to this misunderstanding, the *Syufy* court repeatedly mocked the government's case and what it believed to be the government's theory on entry analysis.[192] The court criticized the government for not applying its own merger guidelines to the case and said that the district court had been "rightly unimpressed" by the government's arguments.[193] More damaging, though, the Ninth Circuit Court of Appeals criticized the Antitrust Division's enforcement priorities and entry investigations. The court questioned whether pursuing the case "really serves the interest of free competition," calling Syufy a "paper tiger" that the Antitrust Division was expending "limited taxpayer resources" against.[194] The Court concluded its decision by characterizing government regulation as "some of the most insuperable barriers in the great race of competition," and stating that market decisions should not be made by "government bureaucrats pursuing their notions of how the market should behave."[195] *Syufy* represented the first precedent in a case based on committed entry theory,[196] and the precedent could not have damaged the Agencies' approach more.

3. *Baker Hughes* – The Agencies Suffer Another Terrible Committed Entry Precedent

The government next had to endure the *Baker Hughes* decision, which was as "equally unforgiving of the government's decision to prosecute."[197] And, perhaps most troubling in the years immediately following the decision, then-Circuit Court Judge Clarence Thomas wrote the scathing majority opinion and Judge Ruth Bader Ginsburg signed it.[198] The case concerned an Antitrust Division challenge of a merger between two corporations in the hardrock hydraulic underground rigs business.[199] The lower court denied the government's request for a permanent injunction, finding little evidence that the transaction would substantially lessen competition in the United States.[200]

As in *Syufy*, the government based its argument on committed entry theory.[201] The government viewed committed entry as the most plausible entry

[192] Kovacic, *supra* note 170, at 112 ("In style and content, Judge Alex Kozinski's opinion for the Ninth Circuit in *Syufy* dispatched the government's case in a torrent of ridicule.").

[193] *Syufy*, 903 F.2d at 666 n.11, 667 n.12.

[194] *Id.* at 672; *see also* Kovacic, *supra* note 170, at 112 ("[T]he *Syufy* majority opinion depicts the Justice Department's decision to prosecute as virtually irrational.").

[195] S*yufy*, 903 F.2d at 673.

[196] *See* Baker, *supra* note 170, at 361-62.

[197] Kovacic, *supra* note 170, at 112.

[198] United States v. Baker Hughes Inc., 908 F.2d 981, 981 (D.C. Cir. 1990).

[199] *Id.* at 982.

[200] United States v. Baker Hughes Inc., 731 F. Supp. 3, 11-12 (D.D.C. 1990).

[201] Baker, *supra* note 170, 367-68 (analyzing the government's brief and stating that "[t]he government almost surely considered *Baker Hughes* to be a committed entry case").

possibility because of strong customer loyalty in the industry, as well as other factors that could only be overcome by a firm entering the market to stay in it.[202] However, as in *Syufy*, the Court based its decision on the *Waste Management* holding, viewing the case instead through the separate lens of uncommitted entry.[203] As such, the decision "reads like an exasperated effort to rein in a runaway agency thought to have willfully ignored the teaching of *Waste Management*."[204]

Again, the court's misunderstanding led it to criticize roundly the government's analysis of the entry issues. The court rejected what it believed to be the government's first argument – that entry was the only way to rebut the government's prima facie case of concentration.[205] The court stated that Section 7 of the Clayton Act was a totality of the circumstances statute, and that it was "at a loss to understand on what basis the government has decided" to argue otherwise.[206]

The court then turned to the government's argument, based on committed entry theory, that entry would have to be quick and effective in order to lessen the anticompetitive effects of the merger.[207] It called the idea "novel and unduly onerous" and criticized the government for "the invention of a new standard."[208] This vitriol was likely fueled by the court's belief that the government's argument was based on similar theories as the one in *Waste Management*, and that the government had thus ignored *Waste Management*'s holding that easy, or uncommitted, entry would trump high concentration.[209] The court continued, saying that the Antitrust Division's pursuit of what the court believed to be a flagrant violation of *Waste Management* "only reaffirms our doubts . . . about the government's approach to section 7 analysis."[210] It finished, as *Syufy* did, by casting doubt on whether the Department of Justice was maximizing its resources by prosecuting the case.[211] Again, the government had argued based on the doctrine of committed entry, and again

[202] *Id.*

[203] *Id.*

[204] *Id.* at 368.

[205] United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

[206] *Id.* at 984, 986.

[207] *Id.* at 987.

[208] *Id.* at 987-88.

[209] *Id.* at 987 (saying it was "at a loss to understand how the government derived from *Waste Management*" the idea that entry needs to be quick and effective to trump a showing of high concentration).

[210] *Id.* at 988.

[211] *Id.* at 992 n.13 ("The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery."). The court then cited to *Syufy*'s description of the defendant as a "paper tiger." *Id.* (citing United States v. Syufy Enters., 903 F.2d 659, 672 (9th Cir. 1990)).

the court misunderstood this argument and cast doubt on the reliability of the government's merger enforcement investigations into entry issues.

4. The Courts Come Around to Trust the Agencies on Committed Entry Analysis and What That Means for Burden Allocation

As the *Baker Hughes* and *Syufy* cases pre-dated the 1992 Merger Guidelines, the use of language in those guidelines specifying that committed entry must be "timely, likely, and sufficient" to rebut a showing of high concentration could have been seen as a "direct challenge to judicial authority by unrepentant agencies."[212] After all, the language nearly echoes the "quick and effective" language that the court in *Baker Hughes* had rejected so completely.[213] However, due to the 1992 Guidelines' superior articulation of entry issues compared to past versions,[214] courts have begun to trust the Agencies' entry investigations. Thus, "the enforcement agencies no longer habitually lose merger challenges on grounds of ease of entry."[215]

Following the adoption of the 1992 Guidelines, the district courts of the D.C. Circuit became more trusting of the Antitrust Division and Commission's approach to entry analysis, even as they were formally bound by the *Baker Hughes* holding. In *FTC v. Staples*,[216] the court cited *Baker Hughes*, but did so to a section that allowed the court to consider whether "entry into the market *would* likely avert any anti-competitive effect."[217] The use of "would" rather than "could" perhaps signals the sort of profitability test discussed in the 1992 Merger Guidelines, and could be an attempt to harmonize *Baker Hughes* with the Agencies' current approach.[218] The Court eventually concluded that, based on the "extremely high" sunk costs, evidence of new entry into the market would not rebut the prima facie case of high concentration,[219] a sign of growing judicial acceptance of contestable market theories.

The trend continued in *FTC v. Cardinal Health, Inc.*,[220] in which the Court adopted the "timely, likely, and sufficient" test from the 1992 Merger

[212] Baker, *supra* note 170, at 373.

[213] *Id.*

[214] *See supra* text accompanying note 74.

[215] Baker, *supra* note 4, at 201.

[216] 970 F. Supp. 1066 (D.D.C. 1997).

[217] *Id.* at 1086 (quoting United States. v. Baker Hughes Inc., 908 F.2d 981, 989 (D.C. Cir. 1990)) (emphasis added).

[218] Baker, *supra* note 4, at 202. *See generally* PHILLIP AREEDA ET AL, ANTITRUST ANALYSIS: PROBLEMS, TEXTS, AND CASES ¶ 520, at 717 (6th ed. 2004) (introducing the *Staples* case by mentioning how the 1992 Merger Guidelines have "become the blueprint that courts use to decide whether a merger violates the antitrust laws" and flagging "how the judge in *Staples* walks through the steps in the Guidelines").

[219] *Staples*, 970 F. Supp. at 1087.

[220] 12 F. Supp. 2d 34 (D.D.C. 1998).

Guidelines.[221] *Cardinal Health* approvingly cited Sections 3.0, 3.2, and 3.3 of the Guidelines.[222] It thus directly followed the Guidelines' approach to committed entry analysis,[223] and sided with the government on the issue.[224] In *FTC v. Whole Foods Market, Inc.*,[225] which largely followed *Cardinal Health*'s approach to committed entry, the Court again sided with the government's analysis of new entry, though it did agree with the defendant's argument that a firm within the larger industry could enter by repositioning itself.[226] *Whole Foods* again used the "would" standard adopted in *Staples*.[227]

Courts in other circuits also began to adopt the Agencies' approach to entry analysis. In *United States v. United Tote, Inc.*,[228] a Delaware district court distinguished its case from *Syufy* and *Baker Hughes* by discussing the high sunk costs present.[229] The Fifth Circuit, in *Chicago Bridge & Iron Co. v. FTC*,[230] echoed Merger Guideline Section 3.2 by requiring that new entrants must be able to compete at a level that would constrain the acquirer's price increases in order to rebut a showing of concentration after a merger.[231] It further supported the Commission's approach to entry analysis by concluding that the Agency had used the correct legal standard in evaluating the sufficiency of entry.[232] Furthermore, rather than take the bait to follow *Baker Hughes* and attack the Agency for awkwardly phrasing the part of its brief discussing entry, the Court showed a willingness to trust the Commission and rejected the defendant's mischaracterization of the Commission's wording.[233]

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[221] *Id.* at 55; *see also* FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 42 (D.D.C. 2007) (stating that *Cardinal Health* adopted the "timely, likely, and sufficient" test), *rev'd on other grounds*, 548 F.3d 869 (D.C. Cir. 2008).

[222] *Cardinal Health*, 12 F. Supp. 2d. at 55, 58.

[223] Baker, *supra* note 4, at 202.

[224] *Cardinal Health*, 12 F. Supp. 2d at 58.

[225] 502 F. Supp. 2d at 1.

[226] *Id.* at 42-43.

[227] *Id.* at 42 ("To rebut the presumption of anticompetitive effects, the evidence must show that a firm would enter, and that 'entry into the market would likely avert the anticompetitive effects from the acquisition.'" (citing FTC v. Staples, Inc., 970 F. Supp. 1066, 1086 (D.D.C. 1997))).

[228] 768 F. Supp. 1064 (D. Del. 1991).

[229] *Id.* at 1081. *But see* Baker, *supra* note 170, at 372 (inferring that the reference showed that *Baker Hughes* and *Syufy* had proven influential in lower courts).

[230] 534 F.3d 410 (5th Cir. 2008).

[231] *Id.* at 429-30.

[232] *Id.*

[233] *Compare id.* (refusing to characterize the wording as putting forth a "novel and onerous" standard, as the defendant had asked the court to do), *with* United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) (misunderstanding the Antitrust Division's position and characterizing it as "novel and unduly onerous").

Even courts that have disagreed with the Agencies' ultimate position on entry have agreed with the standards they used to investigate it.[234]

As Justice Stevens discussed in *Schaffer v. Weast*, courts may place the burden of persuasion on one party when they feel that the other party, particularly a government body, has "properly perform[ed] their difficult responsibilities."[235] A court may thus place the burden of persuasion on the defendant to prove entry if it determines that the Commission and Antitrust Division correctly analyze entry issues. In this situation it would be more likely than not that, if the Agencies prosecuted a transaction, they had properly investigated the entry possibilities prior to litigation and had correctly determined that entry would not occur.

It seems clear from recent cases that the courts are willing to trust the Agencies' approach to analyzing entry issues. Courts have adeptly harmonized the harsh rulings of *Baker Hughes* and *Syufy*, seemingly determining that those decisions had mischaracterized the Agencies' positions and correcting the mistake by bringing their judicial analysis of entry more in line with the Agencies' analysis. Courts can continue this trend by placing the burden of persuasion for entry issues on the defendant, reflecting a judicial determination that the Antitrust Division and Commission have correctly analyzed possible entry during their investigations. Unlike the issue of who has superior knowledge of potential entry, judicial faith in the Agencies' investigations seems to cut clearly on the side of placing the burden of persuasion on the merging parties.

C. *The Judicial Estimation of the Probabilities*

As discussed earlier, the judicial estimation of the probabilities doctrine allows courts to place the burden of proof on the party who "contends that the more unusual event has occurred."[236] Essentially, courts decide that, in a litigation situation in which they cannot determine based on the facts presented whether the condition will occur, they will resolve the issue based on whether the condition is theoretically more likely than not to occur.[237] Thus, for the issue of entry, courts could place the burden of proving that entry will occur on the defendant if they decide that sufficient entry, however that is defined, is less likely to occur than not.

The old debate between Bain and Stigler illuminates this discussion. Though the Antitrust Division and Commission have sided for the most part with Bain, the judiciary is not bound by this determination and could side with

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234 *E.g.*, United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (evaluating entry by using the "timely, likely, and sufficient" standard from the Guidelines Section 3.0).

235 Schaffer v. Weast, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring).

236 MCCORMICK, *supra* note 2, § 337, at 564; *see also* 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 433; Ball, *supra* note 132, at 817.

237 Ball, *supra* note 132, at 817.

Stigler if it so desires.[238] Bain identified more barriers to entry than Stigler, so a judge viewing a merger through a Bainian lens could be less certain that entry would occur than a judge looking at it with Stigler's thinking in mind. For example, Bain would likely find barriers to entry in situations that Stigler would not when economies of scale,[239] capital requirements,[240] and production differentiation come into play.[241] And, while Bain focused on the period required for entry, so that late entry might be disregarded in merger analysis,[242] Stigler had primarily focused on the relatively rare permanent barriers to entry.[243]

Consider a hypothetical merger in which entry will not occur within a few years of the merger, but could potentially happen after a decade. A judge using Stigler's thinking would more likely determine that the required entry will occur than a judge who followed Bain's views and confined his or her search to entry that could occur within a limited time period following the merger. The probability of entry occurring in most situations is higher for the judge using Stigler's philosophy than the judge using Bain's philosophy, given the limited entry barriers in Stigler's philosophy and the few true permanent entry barriers. Therefore, a judge following Stigler might find reason to place the burden of persuasion on the government, the party advancing the idea that the required entry would not occur, or the more "unusual" event according to Stigler.[244]

Of course, the judiciary does not have to confine itself to the Antitrust Division and Commission's chosen brand of economics. It does not even have to confine itself to choosing between only Stigler and Bain. A particularly conservative judge could agree with economist Harold Demsetz, who had been even less likely to find entry barriers and thus more likely to find entry, than either Stigler or Bain.[245] A very conservative, or perhaps very stubborn, judge

[238] Olin Corp. v. FTC, 986 F.2d 1295, 1300 (9th Cir. 1993) ("It is important to note that the Guidelines are not binding on the courts or the agencies."); *see also* 1992 Merger Guidelines, *supra* note 1, § 0.1 (stating that the Guidelines do not purport to establish a legal framework or even exhaust the possibilities of what the Agencies themselves can argue at trial).

[239] *Compare* BAIN, *supra* note 18, at 16 (identifying economies of scale as a barrier to entry), *with* STIGLER, *supra* note 36, at 67 (looking at the same as not a barrier to entry).

[240] *Compare* BAIN, *supra* note 18, at 16 (identifying capital requirements as a barrier to entry), *with* STIGLER, *supra* note 36, at 70 (looking at the same as not a barrier to entry).

[241] *Compare* BAIN, *supra* note 18, at 216 (calling product differentiation perhaps the most important barrier to entry), *with* STIGLER, *supra* note 36, at 70 (identifying product differentiation as a barrier to entry in only some situations).

[242] *See* BAIN, *supra* note 18, at 11.

[243] Whalley, *supra* note 47, at 111-12.

[244] *See* MCCORMICK, *supra* note 2, § 337, at 564.

[245] Harold Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J.L. & ECON. 371, 382 (1976) (dismissing as "alleged barriers to entry" things like "advertising, vertical integration, and capital requirements"); *see also* HYLTON, *supra* note 73, at 16 (inferring that

could even throw all the economic thinking into the trash and decide that there are zero entry barriers and so entry would *always* occur. Though ridiculous, and probably one to be quickly criticized, that judge would be particularly willing to place the burden of persuasion for the entry issue on the government, who would in that judge's mind definitely be arguing for the occurrence of the more unusual event.[246]

But how likely are judges to actually side with the more conservative economic theory in this situation? Conservative judges would be more likely to require a stronger showing from the government. I have already commented on the dark days of the early 1990s, when the *Syufy* and *Baker Hughes* courts ridiculed the Antitrust Division's entry arguments.[247] Both Judge Kozinski, the author of the *Syufy* decision,[248] and then-Judge Thomas, the author of the *Baker Hughes* decision,[249] were appointed by Republican presidents.[250] The *Syufy* decision in particular hints at a more Stiglerian way of looking at entry. Judge Kozinski went out of his way to opine that "it is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation,"[251] essentially joining Stigler's Chicago School peers who had been greatly concerned "that government action could create barriers to entry."[252]

Indeed, the power to appoint like-minded judges may be one of the best ways for a president to make sure that his or her antitrust policies are implemented. Twenty of the last thirty years have seen Republican presidents, so currently the federal bench is comprised of many more Republican-appointed judges than Democrat-appointed. However, President Obama has indicated a commitment to bringing more merger enforcement cases.[253] It thus seems possible, and perhaps even likely, that this could mean the nomination and confirmation of judges who would have more liberal views on antitrust and merger enforcement issues. Those same judges would probably be more

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Demsetz would find that the only real entry barriers are created by the government, and characterizing Stigler's position as between Demsetz at one extreme and Bain at the other).

246 *See* MCCORMICK, *supra* note 2, § 337, at 564.

247 *See* United States v. Baker Hughes Inc., 908 F.2d 981, 987-88 (D.C. Cir. 1990); United States v. Syufy Enter., 903 F.2d 659, 672 (9th Cir 1990); *supra* text accompanying notes 181-206.

248 *Syufy*, 903 F.2d at 661.

249 *Baker Hughes*, 908 F.2d at 981.

250 Judge Kozinski was appointed by President Reagan and then-Judge Thomas was appointed to the D.C. Circuit by President George H.W. Bush. Kovacic, *supra* note 170, at 111.

251 *Syufy*, 903 F.2d at 673.

252 *See* Baker, *supra* note 4, at 192.

253 Senator Barack Obama, Statement for the America Antitrust Institute (Sept. 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

likely to agree with Bain's stricter view on whether entry will occur, and more likely to place the burden of persuasion for entry issues on the defendant.

Furthermore, despite the current conservative majority on the federal bench, the courts have resisted the urge to follow Judge Kozinski's and then-Judge Thomas's lead in criticizing the Agencies' analysis of entry issues in merger enforcement. Courts have become much more willing to trust the Agencies and the Guidelines upon which they base their analysis.[254] Additionally, as stated before, the Guidelines and the Agencies have mainly adopted a Bainian outlook to entry in their merger enforcement examinations.[255] Therefore, whether the federal judiciary knows the underlying economic theories or not, it has essentially adopted Bain's view of examining entry. Courts are unlikely to suddenly shift gears, disagree with the Agencies' underlying assumptions, and run to Stigler's or Demsetz's theories. The need to defer on the underlying economics, and the possible reluctance of courts to strike out on their own and ignore the Antitrust Division and Commission's chosen brand, is made more dramatic by the disparity of economic understanding between the Courts and the Agencies. The Agencies are staffed with individuals who deal with economics every day, while judges and their clerks are frequently relatively unschooled in the science.[256]

Moreover, recent economic research seems to, at least on the surface, side more with Bain than Stigler. Game theory analysts identify economics of scale as an entry barrier as Bain would have and Stigler would not have.[257] They also identify as entry barriers costs associated with product differentiation, like advertising, when those costs are not reversible upon entry.[258] Since these costs are typically not reversible, and would thus usually constitute entry barriers,[259] contestable market theory again seems to agree more with Bain's ideas than Stigler's. A federal bench might find reason to depart from Bain's philosophy if the more recent economic research regarded his theories as unsound, but the most recent school of thought on entry seems to support Bain, and at the very least does not discredit him.

Thus, given courts' general acceptance of the more Bain-based Guidelines, their lack of economic understanding relative to the Agencies that have sided with Bain, and the current picture of economic thinking on entry, judges pondering the issue of entry are more likely to look at it through a Bainian

[254] *See supra* Part IV.B.4.

[255] *See supra* Part II.B.

[256] Frankel, *supra* note 165, at 174; *see also* ABA SECTION OF ANTITRUST LAW, *supra* note 97, at 59 ("It has long been the practice at both the FTC and the Antitrust Division, from the onset of an investigation, to include on the staff at least one industrial organization economist to investigate a proposed transaction.").

[257] *See* BAUMOL ET AL., *supra* note 56, at 292; Richard Schmalensee, *Sunk Costs and Antitrust Barriers to Entry*, 94 AM. ECON. REV. 471, 471 (2004).

[258] Baker, *supra* note 4, at 194.

[259] *Id.*

lens. As stated before, they would then be more likely to conclude that the probabilities would not support entry occurring within the required two-year time period. Based on this judicial estimation of the probabilities, judges would place the burden of persuasion for the entry issue on the merging partners, as their argument that sufficient entry will occur is an argument for the occurrence of the more unusual event.

D. *Policy Considerations*

Finally, the government could turn to policy considerations, arguing that placing the burden of persuasion on the defendant would best "serve substantive policy."[260] Professor Areeda argues that, though the plaintiffs would ordinarily bear the burden, in merger enforcement cases the court should allocate the burden of persuasion to the merging partners on all areas arising once the government successfully shows that the merger will result in a high market concentration.[261] Since the court considers entry after the government proves market concentration, Professor Areeda's solution implies then that the defendant should bear the burden of persuasion on entry.[262] He argues that this structure best serves the overriding antitrust policy to "prevent mergers effecting undue further concentration," which the antitrust enforcement system may not be able to adequately control once the merger has been consummated.[263] Thus, the court best "carr[ies] out the prophylactic purpose of anti-merger law" by resolving issues of doubt in areas like entry against the defendant.[264]

It is useful to break down this argument into its two component parts. First, the Agencies describe the idea that merger enforcement efforts should mainly prevent mergers that lead to high market concentration as the "unifying theme" of the Guidelines.[265] They repeat this sentiment in the Commentary to the Guidelines.[266] Despite some predictable arguments that the Agencies may not

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[260] 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 431.

[261] 2B AREEDA ET AL., *supra* note 5, ¶ 420b, at 75-76.

[262] *See supra* Part I.

[263] 2B AREEDA ET AL., *supra* note 5, ¶ 420b, at 76.

[264] *Id.* The Areeda treatise distinguishes merger enforcement cases, in which it would be more willing to place the burden of persuasion on the defendant, with monopoly power cases, in which it would not. *Id.* In monopoly power cases, the government should have the burden of persuasion for entry due to the overall antitrust policy that "generally refrains from interfering with an individual firm's conduct in the absence of monopoly power." *Id.*; *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768-69 (1984) (interpreting congressional intent under the antitrust laws to direct courts to judge concerted action among many firms more strictly than one firm's unilateral actions).

[265] 1992 Merger Guidelines, *supra* note 1, § 0.1.

[266] COMMENTARY, *supra* note 95, at 2; *see also* 1992 Merger Guidelines, *supra* note 1, § 0.2.

go as far as they need to cut down on mergers of a high concentration,[267] it is true that at least the Agencies themselves believe that merger enforcement policy is mainly designed to limit mergers of a high concentration. Their belief is supported by case law and legislative history. The Supreme Court has called Section 7 of the Clayton Act, the relevant section for merger enforcement, "a prophylactic measure designed to prevent stock acquisitions which probably will have a deleterious effect on competition."[268] The Senate's legislative history reveals that Section 7's prophylactic nature was in part spurred by concern that the Sherman Act had not gone far enough to arrest monopolies "in their incipiency and before consummation,"[269] a clear indication of Congress's attitude towards merger enforcement's purpose.

Next, it is likely that the Agencies would have a difficult time policing consummated mergers that later exercise considerable market power. Prior to the passage of the HSR, which allows the Agencies the chance to review mergers before their consummation, the government had to seek remedies years after mergers were completed – a "hopeless" task "because the assets had been intermingled and the acquired firm typically dissolved."[270] Courts today still consider the difficulty of "unscrambling the egg" and untangling merger partners post-merger when considering whether to grant the Agencies' request for a preliminary injunction.[271] Finally, the Antitrust Division will frequently insist that, when negotiating a restructuring of merging partners to blunt the post-merger use of market power, the restructuring take place prior to the completion of the merger.[272] It does so because this "fix-it-first program . . . substantially lessens the need for post merger scrutiny," a sign of the Antitrust Division recognizing its weaknesses in this area.[273]

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[267] *See, e.g.*, Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 831-32 (1987).

[268] United States v. du Pont, 353 U.S. 586, 626 (1957).

[269] *Id.* at 597 (emphasis omitted) (internal quotations omitted) (quoting S. Rep. No. 698, at 1 (1914)).

[270] David Balto, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, 69 GEO. WASH. L. REV. 952, 958 (2001). *See generally* Kenneth G. Elzinga, *The Antimerger Laws – Pyrrhic Victories?*, 12 J.L. & ECON. 43, 43-78 (1969) (discussing the ineffectiveness, prior to HSR pre-merger review, of attempting to break apart a completed merger into its pre-merger entities).

[271] *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1091 (D.D.C. 1997). There may be another reason beyond the difficulty of achieving remedy post-merger why judges would be willing to defer to the Agencies during the preliminary injunction phase. By deferring to the government or private plaintiff and so enjoining the merger, the lower court judge avoids "the embarrassment" of being scolded by the appellate courts for not allowing for a final decision on the merits before the merger clutters the analysis. HYLTON, *supra* note 73 at 56.

[272] *See* Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 981 (2003).

[273] *Id.*

Now let us consider the consequences of placing the burden of persuasion for entry issues on the merging partners to see whether the harm of doing so counteracts the prophylactic benefits. A false negative in a merger enforcement case on the entry issue would be a judicial finding that entry would not occur in a "timely, likely, and sufficient manner" to counter high concentration when it in fact would.[274] Conversely, a false positive would be a finding that "timely, likely, and sufficient entry" would occur when it in fact would not.[275] Thus, a false negative would result in a court striking down a proposed merger that it should have actually allowed, while a false positive would instead see the court allowing a merger to occur when it in fact should not have. A false negative, though harmful of course to the merging parties and consumers in general, may not have a broadly harmful impact because the court's inquiry is so fact-specific that it would carry little precedential value and have little impact on other merger enforcement cases dealing with entry.[276] A false negative would do little to chill other companies from proceeding with their own mergers.[277] A false positive, though, would likely create a post-merger entity with a large enough market power to harm consumers broadly.[278] And, as previously discussed, the Agencies are relatively weak when constraining entities post-merger.[279]

Lawrence Frankel suggests, after examining the harm from false positives and false negatives in the context of the entire merger enforcement case, rather than just at the entry stage, that it would make sense to either eliminate the burden of proof or give it to the merging parties.[280] The former would provide no guidance for courts when the evidence appears roughly tied, while the latter would find opposition from courts that have consistently shown an unwillingness to place the ultimate burden of persuasion in merger enforcement cases on the defendants.[281] Frankel's more moderate solution – to allocate the burden of persuasion to the merging party for all issues following

[274] I borrow this reasoning, with modifications to make it applicable to the entry inquiry specifically, from Lawrence Frankel, who used it more broadly to look at the false positives and false negatives of merger enforcement decisions in their entirety. *See* Frankel, *supra* note 165, at 196-99.

[275] *Id.*

[276] *Id.* at 196.

[277] *Id.* at 197.

[278] *Id.* at 197-98.

[279] *See supra* text accompanying notes 270-73.

[280] Frankel, *supra* note 165, at 216-17.

[281] *See, e.g.*, Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 424-26 (5th Cir. 2008) (expressing hesitance over approving governmental suggestions that might even functionally switch the ultimate burden of persuasion onto the defendant); United States v. Baker Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990).

the government's showing of high concentration – echoes Professor Areeda's conclusion and would likewise give the defendant the burden on entry.[282]

Policy considerations, then, arguably support placing the burden of persuasion for entry issues on the defendant. Judges with little experience in the field of economics may be more likely to rule based the allocation of the burden of persuasion in antitrust cases, which rarely see courts, than they would in cases concerning subjects in which they have more experience.[283] The harm of resolving a close entry case in favor of the defendants would arguably be larger than resolving it in favor of the government for the reasons argued above. Furthermore, placing the burden of persuasion on defendants best serves the broader antitrust policies of interdicting competitive problems and preventing companies from obtaining a large market share. Indeed, placing the burden of persuasion on the government may lead to "systematic underenforcement" of the antitrust laws.[284] The courts would create too many false positives, thus harming consumers and frustrating the policies behind our antitrust laws.

CONCLUSION

Entry is one of the most important elements of a horizontal merger case, as proof of entry allows approval of a merger even when the evidence shows that it will result in a high concentration within the industry or geographic area. Thus, it is crucial that we provide the parties in these suits with some ability to predict how a court might rule on a close entry issue. Normally the burden of persuasion provides this foresight, but courts have thus far not discussed burden allocation for entry issues. This allocation, then, remains one of the last unresolved issues in entry analysis.[285]

A future court could clarify the issue by determining that the defendants should carry the burden of persuasion on entry. Three of the four most relevant burden allocation factors in this context point towards giving the merging parties the burden of persuasion when the government sues to enjoin a

[282] *See* 2B AREEDA ET AL., *supra* note 5, ¶ 420b, at 76; Frankel, *supra* note 165, at 217-18.

[283] *See* Frankel, *supra* note 165, at 179-80.

[284] *See id.* at 179-81 ("Placing the burden of proof on the plaintiff in an area of inherent uncertainty, and having review conducted under a nondeferential standard by an entity with less expertise, information, and resources than the initial decision maker will substantially enhance the number of false positives corrected by the court, but will also inevitably lead to true positives being converted into false negatives. And similarly, the fact that agency positives are subject to judicial review, but agency negatives are not will further skew the error mix towards more false negatives than false positives. The net result is systematic underenforcement.").

[285] Baker, *supra* note 4, at 205-06.

horizontal merger.[286] Courts' new-found trust in the Agencies' investigation of entry issues, the judicial estimate of the probabilities, and policy considerations all favor placing the burden of persuasion on the merging parties. Despite the Agencies' ability to rectify the initial knowledge disparity between themselves and the merging parties, courts could best serve antitrust law by requiring the defendants carry the burden of persuasion on entry.[287]

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[286] I earlier introduced more than four factors that weigh on the burden allocation decision, but I focused on the above four because they are the most relevant to this issue. Courts also can allocate based on convenience – for example, giving the burden to the defendant on an issue that must be raised after the plaintiff rests his or her case. 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 430. Entry is usually thought of as a rebuttal argument brought by the defendant. United States v. Marine Bancorp., Inc., 418 U.S. 602, 631 (1974); United States v. Baker Hughes Inc., 908 F.2d 981, 981 (D.C. Cir. 1990); 2B AREEDA ET AL, *supra* note 5, ¶ 420b, at 75. This factor, then, could also point toward placing the burden of persuasion on the merging parties. Finally, courts can also allocate the burden of persuasion based on specific rules when evidence on the issue would be impossible to obtain. 1 MUELLER & KIRKPATRICK, *supra* note 2, § 3:3, at 433. The parties may lack definitive knowledge during litigation on whether entry would occur, but the factor is likely irrelevant in this situation because the parties have more knowledge than they would in situations that invoke this factor. *See id.* (discussing that this factor is used, for example, when courts create a presumption of due care when suits are brought against the estates of individuals killed in accidents).

[287] In this Note, I limited the analysis to which parties should have the burden when the government sues to enjoin. I have not discussed the allocation when private parties sue merging companies. Private parties do not have the benefit of the HSR, so the knowledge disparity will be wider, but at the same time, the *Schaffer* argument would not be relevant to them. The conclusion could very well go the other way and support placing the burden on the private plaintiffs.