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The Supreme Court and Beer Mergers: From *Pabst/Blatz* to the DOJ–FTC Merger Guidelines

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Abstract. The beer industry in the U.S. has undergone significant structural change in the post-WWII period. The industry also was the object of prominent antitrust challenges to horizontal mergers proposed during this time frame. This paper documents the trend of increasing seller concentration in the brewing industry and assesses the role that mergers played in this structural transformation. We also analyze the change in merger policy that has taken place since the Supreme Court originally addressed mergers in the beer industry as compared to current antitrust enforcement under the DOJ–FTC Merger Guidelines and recent judicial decisions.

Key words: Antitrust, beer, mergers, Supreme Court.

I. Introduction

In Robert H. Bork's treatise on antitrust policy, he wrote:

> Though the goal of the antitrust statutes as they now stand should be constant, the economic rules that implement that goal should not. It has been understood from the beginning that the rules will and should alter as economic understanding progresses.[1]

The beer industry in the USA illustrates how the antimerger "rules" have altered "as economic understanding progresses." Few, if any, American industries have undergone such a remarkable structural shakeup in the post-World War II period. During this time frame, many mergers and acquisitions were consummated and, in the process of its structural transformation, the beer industry was the subject of several prominent antitrust decisions, including two Supreme Court opinions that interpreted the new antimerger law, the 1950 Celler-Kefauver amendment to Section 7 of

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[1] Bork (1993), at 430.

the Clayton Act. The beer industry not only illustrates how antitrust rules can and do change, but it also supports Bork's point: the rules should be altered "as economic understanding progresses."

The structural transformation of the beer industry was due to a combination of economic forces: economies of scale, superior skill, foresight and industry (on the part of some brewers), rising income supporting forms of product differentiation, and, to a lesser extent, mergers and acquisitions.[2] Running alongside the structural transformation of this prominent American industry has been the transformation of federal antimerger enforcement. Indeed, changes in the beer industry's structure provide a lens for understanding changes in federal antimerger enforcement. Changing enforcement principles have been the result of what Bork called progress in "economic understanding" and the implementation of these new principles through the Department of Justice ("DOJ")–Federal Trade Commission ("FTC") Horizontal Merger Guidelines.[3] As we shall argue, prominent Court opinions that were occasioned by beer mergers have been superceded by the Merger Guidelines and the exegesis of these Guidelines by the enforcement agencies.

After a review of the changing structure of the American beer market, we review the early Court opinions that fashioned amended Section 7 of the Clayton Act, explain the context of these opinions, and then show how antimerger enforcement adopted a more sophisticated analysis, reflecting progress in "economic understanding" as manifested in the Merger Guidelines. We then show, again through the lens of the beer industry, that notwithstanding the different paradigm of antimerger enforcement, the original merger doctrines had little effect on the current shape of the beer industry.

II. The Changing Structure of the U.S. Beer Market

During 1947–1995, the number of beer companies dropped over 90% (although beer sales doubled). Beer analyst Robert S. Weinberg counted 421 "traditional brewers" operating in 1947; by 2002, this number had fallen to only 22 firms. In 1947, the top five beer producers in the United States accounted for only 19% of the industry's barrelage; in 2001 their share was 87%. In 2003, three firms met over 80% of domestic demand: Anheuser-Busch (50.5%), Miller (18.9%), and Coors (11.0%). In 1947, the

[2] See Elzinga (2004). Portions of this article are drawn from this source. See also Tremblay (1985), Tremblay and Tremblay (1988), Lynk (1984), Ornstein (1981), and Greer (1998).

[3] The role of the Hart–Scott–Rodino pre-merger notification process also represents a fundamental change in merger analysis and enforcement. We do not discuss the impact of this legislation on mergers. See generally "Symposium" (1997).

Herfindahl-Hirschman Index ("HHI") for the U.S. beer industry was 140; in 2001, the HHI was over 2,900.[4]

Recently, due to the growth of the "craft" or "specialty" beer segment, there has been a noticeable increase in the number of new plants and independent companies – though these new entrants are at the small end of the industry size spectrum.[5] Even with the growth of the specialty segment, the decline in the number of major brewers has been dramatic. In recent years, beer drinkers also have chosen imported beers in increasing numbers. In 2003, imports held over 11% of the U.S. beer market; specialty brewers held just under 3%. Thus, while concentration has increased among the largest sellers, specialty brewing and imports have caused an explosion in new beer brands that offer consumers different taste signatures.

III. Mergers in the American Beer Industry

During the period 1950–1983, about 170 horizontal mergers were consummated in the beer industry. But the impact of mergers upon the growth of the three firms (Anheuser-Busch, Miller, and Coors) who drive much of the industry's volume, is, at best, indirect. If the antimerger law affected industry structure, it should be most manifest in the experience of these three firms.

The first antimerger action in the beer industry was taken by the Antitrust Division in 1958 against the industry's leading firm, Anheuser-Busch. Anheuser-Busch had purchased the Miami brewery of American Brewing Company. The government successfully argued that this merger would eliminate American Brewing as an independent brewer and end its rivalry with Anheuser-Busch in Florida. The impact of this early antimerger action was profound. Anheuser-Busch had to divest itself of this brewery and refrain from buying any others without court approval for a period of five years. As a result, Anheuser-Busch forsook horizontal mergers and instead began an extensive program of building large, efficient plants in Florida and at other locations around the United States. Anheuser-Busch deviated only once from its no-merger, internal growth policy in 1980 when it acquired the Baldwinsville, New York brewing plant of the Schlitz Brewing Company. Schlitz's sales had declined so much that it did not need

[4] The HHI for a given market is the sum of the squares of the market shares of the sellers in the market.

[5] The number of specialty brewers went from 1 in 1965 to over 1,400 in 2002, achieving a critical mass in 1995 by producing over 1 million barrels of beer. Some specialty brewers no longer can claim "micro" status since they now sell lots of beer (current examples would be Boston Brewing and Sierra Nevada). In 2002, specialty brewers numbered around 1,000 brewpubs (most of these produce less than 1,000 barrels of beer annually), more than 400 microbreweries (producing less than 15,000 barrels per year) and over 40 regional specialty brewers (with 15,000 + barrels capacity).

the brewery; the plant's capacity was so huge that only an industry leader could absorb its 5.4 million barrel capacity. Since 1958, the antimerger law thwarted Anheuser-Busch from making any major acquisitions, but this did not thwart the firm from retaining the market leader status it attained in 1957.

Miller Brewing Company, the second largest brewer, also grew primarily by internal expansion. In 1966, Miller purchased breweries in Texas and California but acquired no other breweries until 1987, when it acquired Leinenkugel, a small family-run brewery in Wisconsin. Miller Brewing Company itself was the subject of a conglomerate acquisition by Philip Morris in 1970. From that point, Miller, unlike Anheuser-Busch, had a large corporate parent.[6]

In 1972, just after being acquired by Philip Morris, Miller purchased three brand names from Meister Brau, a defunct Chicago brewing firm. The Meister Brau trademarks included one called Lite. Hardly anyone noticed at the time. But out of this acquisition came the low-calorie or "light beer" phenomenon.[7] In 1974, Miller bought the rights to brew and market Lowenbrau, a prominent German beer, in the United States. Miller was never able to develop this brand into an important U.S. product.[8] After this event, mergers played no role at Miller until 1993 when it acquired the marketing rights in the United States for the brands of Molson, a Canadian brewer. In 2001, Miller sold these rights back to Molson, which sold them to Coors.

In 1999, Miller, Stroh (then the #4 brewer) and Pabst (then #5) consummated a complex acquisition associated with Stroh's exit from the industry. Miller acquired four brands (Henry Weinhard, Mickey's, Hamm's and Olde English 800) and Pabst acquired all other Stroh brands

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[6] In 2002, Philip Morris sold Miller to South African Breweries, a London-based firm that is the second largest brewer in the world (behind Anheuser-Busch). SAB markets such brands as Pilsner Urquell and Castle Lager. The venerable Miller Brewing Company is now called SABMiller.

[7] Lite had been marketed locally by Meister Brau to weight-conscious consumers. The Miller management noticed that Lite had sold fairly well in Anderson, Indiana, a town with many blue-collar workers. In what became a marketing classic, Miller zeroed in on "real" beer drinkers, claiming that Lite's fewer calories allowed them to drink their beer with even less of a filled-up feeling. Lite became the most popular new product in the history of the beer industry. While Lite enjoyed great commercial success as the first mover in the light beer category, Miller has not been able to maintain Lite's leadership position in the low-calorie market segment the company first pioneered. In 2001, Bud Light became the leading U.S. brand of beer, outselling Budweiser. In 2002, Bud Light and Coors Light outsold Miller Lite. First mover advantages do not insure long-run leadership.

[8] Labatt, a Canadian brewer, currently is attempting to revive the Lowenbrau name in the U.S. beer market.

(including the former Schlitz and Heileman brands[9]). Miller also acquired Pabst's Tumwater, Washington brewery (which it closed in 2003) and Pabst acquired Stroh's Lehigh Valley, Pennsylvania brewery.[10] Miller has agreed to produce some of Pabst's beer on a contract-brewing basis. Most of the remaining Stroh breweries were to be sold as real estate for non-brewing purposes.[11] Despite the deal's magnitude in terms of brand ownership rearrangement, it resulted in only a small increase in industry concentration and had no antitrust consequence.

Third-ranked Coors has had a long-term policy to brew its Coors brand only in one location, Golden, Colorado. This policy itself restrained Coors' expansion by merger. Coors, more recently, began shipping beer in bulk to Elkton, Virginia, where it is bottled and canned for sale in the East. In 1990, Coors acquired the Memphis brewery of Stroh. There, as in Virginia, the company only *packages* the Coors brand (but brews the company's lower priced Keystone brand). One reason Coors is a high-cost producer relative to Anheuser-Busch is because its beer travels an average of 1000 miles; Anheuser-Busch, with its dispersed breweries, ships its beer an average of 200–250 miles.[12]

Stroh had been a prominent brewer since 1850 and was itself an acquirer until its demise. In 1980, when it was the seventh largest brewer in the country, Stroh acquired the F. M. Schaefer Brewing Company. In 1982, Stroh acquired the Joseph Schlitz Brewing Company, itself in a sales tailspin, but at the time the fourth largest brewer.[13] This acquisition catapulted Stroh to number three in the industry, but also shackled the firm with debt and set the stage for its demise. In 1996, Stroh made another sizable acquisition: the G. Heileman Brewing Company.[14] But its size did not insulate it from market competition. In 1999, then the fourth-ranking firm in the beer industry, Stroh exited the market.

[9] These would include, in addition to Stroh, Old Milwaukee, Schlitz, Schaefer, Old Style, Schmidt's, Lone Star, Special Export, Schlitz Malt Liquor, and Rainier.

[10] This facility was just acquired by Guinness-Bass Import Co. (GBIC), the U.S. branch of the British firm Diageo, in part to produce Smirnoff Ice, GBIC's best-selling flavored malt beverage.

[11] Yuengling acquired Stroh's 1.6 million barrel capacity Tampa brewery and will use it to meet current demand in the Northeast and for geographic expansion in the Southeast. Stroh's Portland, Oregon brewery (the former Blitz–Weinhard plant) has ceased operations.

[12] In 2002, Coors acquired Carling, Britain's best-selling brand, from Interbrew, marking Coors' first major acquisition outside North America. As of this writing, Coors has proposed merging with Molson, but the transaction has not yet been consummated.

[13] In 1950, Schlitz was the leading selling beer in the USA, with a 7% share of the market.

[14] Heileman had been the industry's fifth-ranking firm, itself the product of over a dozen acquisitions from 1960 on, notably Wiedemann, Associated Brewing, the Blatz brand, Rainier, Carling, and portions of Pabst.

Bottom line: mergers have not made much of an imprint on the structure of the brewing industry, and have not resulted in market power for merging partners. The most active merging firms, Stroh and Heileman, eventually failed. Much of the increase in concentration in the past three decades was due to the growth of Anheuser-Busch, Miller and Coors, whose expansion has been largely internal.

IV. *U.S. v. Pabst* and *U.S. v. Falstaff*

The Supreme Court issued its beer market decisions in *U.S. v. Pabst*[15] and *U.S. v. Falstaff*[16] during a period of aggressive antimerger enforcement. *Pabst* came shortly after the Court's 1962 decision in *Brown Shoe v. U.S.*[17] *Brown Shoe* was the Court's first treatment of Section 7 of the Clayton Act, as amended in 1950,[18] and established the principles of merger enforcement that would guide its future decisions. These principles, which would be further developed in cases like *Pabst* and *Falstaff*,[19] reflected a zealous approach to antimerger enforcement designed to protect small competitors and halt trends towards concentration in their "incipiency." As the Court stated,

[15] 384 U.S. 546 (1966).

[16] 410 U.S. 526 (1973). Other successful early challenges to beer mergers include: U.S. v. Lucky Lager, 1958 Trade Cas. (CCH) ¶69,100; U.S. v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd,* 385 U.S. 37 (1966). The DOJ's challenge in 1965 to the proposed merger of Pittsburgh Brewing Company and Duquesne Brewing Company and to the proposed merger of Molson Limited (of Canada) and Hamm Brewing Company led to these combinations being dropped. The DOJ was unsuccessful in thwarting Heileman from acquiring Associated Brewing Company in 1973. See U.S. v. G. Heileman Brewing Company, 345 F. Supp. 117 (E.D. Mich. 1972).

[17] 370 U.S. 294 (1962).

[18] *Id.* at 311. Section 7 of the Clayton Act is the principal U.S. statute governing the competitive aspects of mergers and acquisitions. Originally, as passed in 1914, Section 7 covered only acquisitions of the stock of one corporation by another corporation. *Id.* at 312. "The possibility of asset acquisition was discussed, but was not considered important to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitor's stock." *Id.* at 313–314. The 1950 amendments to Section 7 expanded its coverage to assets acquisitions as well as stock acquisitions. *Id.* at 314–315.

[19] See also, e.g., U.S. v. Von's Grocery Co., 384 U.S. 270, 278 (1966) ("[A] market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed."); U.S. v. Penn-Olin Chem. Co., 378 U.S. 158, 170–171 (1964) ("The grand design of the original § 7 ... was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach.").

> [I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.[20]

During this period the Court often declined to entertain elaborate economic reasoning, viewing virtually all concentration as potentially harmful to competition.[21] As it turned out, in the beer industry, Section 7 neither "protected" small competitors nor did it deter market concentration.

It was against this backdrop that in 1966 the Supreme Court decided *U.S. v. Pabst Brewing Co.*[22] *Pabst* involved the merger of Pabst Brewing Company and Blatz Brewing Company. Pabst, the nation's 10th largest brewer, acquired Blatz, the nation's 18th largest brewer, in 1958,[23] and the DOJ sued to challenge the merger in 1959.[24] The Antitrust Division alleged that "[t]he effect of this acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States and in various sections thereof, including the State of Wisconsin and the three state area encompassing Wisconsin, Illinois and Michigan…"[25]

The trial court in *Pabst* dismissed the matter after the DOJ had presented its case, finding that the government had failed to prove that the state of Wisconsin and the three-state area of Wisconsin, Illinois, and Michigan constituted relevant markets within which to evaluate the competitive effects of the merger. The trial court also found that as to the United States as a whole – the sole remaining relevant geographic market – the DOJ had failed to prove that the merger would tend substantially to reduce competition.[26] The Supreme Court reversed the district court on both holdings.

[20] 370 U.S. at 317–318.

[21] See, e.g., U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963) ("[The] intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.").

[22] 384 U.S. 546 (1966).

[23] *Id.* at 550.

[24] *Id.* at 547.

[25] *Id.* at 548.

[26] *Id.*

First addressing relevant geographic market, the Court found that the district court had held the government to too strict a standard, and laid out a rule that all but dismissed relevant geographic market definition as an element of a Clayton Act § 7 case:

> Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss a § 7 case. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States.[27]

Turning to the merger's competitive effects, the Court drew upon the same principles laid out in *Brown Shoe* to hold that the DOJ had properly shown that the merger violated § 7. The Court noted that the "merger took place in an industry marked by a steady trend toward economic concentration," and that "the leading brewers were increasing their shares of sales."[28] The Court expressed its concern that this trend toward concentration should be stopped before competition was diminished: "If not stopped, this decline in the number of separate competitors and the rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands."[29]

The Court concluded its analysis by noting that the government was under no duty to prove that the trend toward concentration in the beer industry was the result of mergers, as opposed to, for example, less

[27] *Id.* at 549–550.
[28] *Id.* at 550–551.
[29] *Id.* at 551. Commentators at the time recognized the Court's emphasis on halting a trend toward concentration as a significant development. See, e.g., Austin (1969), at 772 ("In his treatment of the merits of the case, Black avoided the problems of competitive effect analysis. Neither theory nor effort at effect ascertainment was employed to bridge the gap between facts and antitrust decisional principles. Primary statistical facts, reflecting a trend toward concentration, were extended into a proscriptive holding."); Agata (1996), at 638 ("*Von's Grocery* and other language in *Pabst* suggests that the Court will make no further inquiry concerning anticompetitive effects if the government can establish some trend toward concentration... In the light of *Von's Grocery*, a trend towards concentration may have become more than a 'highly relevant factor' and may now be a conclusive presumption of anticompetitive effect.").

efficient firms being unable to compete and exiting the market.[30] As the Court asserted: "Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, was concerned with arresting concentration in the American economy, *whatever its cause*, in its incipiency."[31]

Seven years following *Pabst* the Supreme Court again addressed a beer industry merger in *U.S. v. Falstaff Brewing Co.*[32] Falstaff, the fourth largest brewer in the United States at the time, acquired the Narragansett Brewing Co. in 1965.[33] Narragansett was a regional brewer selling approximately 20% of the beer in New England prior to the merger.[34] Without any economic analysis, the parties in *Falstaff* stipulated that the relevant geographic market for evaluating the competitive effects of the merger included six New England states.[35] The relevant product market, as in *Pabst*, was the production and sale of beer.[36] After a full trial on the merits the district court found that Falstaff did not compete in New England prior to the merger, and that it had no plans to enter the New England market except through an acquisition.[37] Accordingly, the trial court found that the DOJ had failed to prove the merger would substantially lessen competition for the production and sale of beer in New England.[38] To the district court, the merger simply swapped ownership of Narragansett to Falstaff with no consequent effect on market structure.

Since it did not sell in New England at the time, Falstaff saw the merger as an opportunity to expand into that part of the country.[39] The Court acknowledged that Falstaff had a compelling, pro-competitive story to tell in justification of the merger:

> Falstaff met increasingly strong competition in the 1960's from four brewers who sold in all of the significant markets. National brewers possess competitive advantages since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or

[30] *Pabst,* 384 U.S. at 552. The concentration the Court feared turned out to be inevitable, notwithstanding the *Pabst* decision. The Blatz brand was acquired by Heileman in 1969, and the Blatz brewery was closed.

[31] *Id.* (emphasis added).

[32] 410 U.S. 526 (1973).

[33] *Id.* at 526. Falstaff was a brewing pioneer in geographic market extension; it was the first American brewer to attach the same brand (Falstaff) to beer brewed at different locations. See McGahan (1991).

[34] 410 U.S. at 528.

[35] *Id.* at 527. The six states were Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island. *Id.* at 527 n.3.

[36] *Id.* at 527.

[37] *Id.* at 532.

[38] *Id.*

[39] *Id.* at 528.

> local beers, and they are less affected by the weather or labor problems in a particular region. Thus Falstaff concluded that it must convert from 'regional' to 'national' status, if it was to compete effectively with the national producers.[40] [Authors' note: the four national brewers at the time were Anheuser-Busch, Miller, Pabst, and Schlitz.]

Nonetheless, the Court reversed the trial court's ruling, finding that the lower court failed to give proper consideration to the effect on competition that Falstaff had from "the edge of the market."[41] Obviously, because Falstaff was not a competitor in New England, its acquisition of Narragansett did not increase concentration in that "market" at all. To stop the merger, the Supreme Court based its decision entirely on Falstaff's position as a potential entrant. The Court held that the district court should have "give[n] separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market."[42] The Court noted that Falstaff would have been a significant competitor in the New England market if it had chosen to enter the market *de novo.* The Court specifically noted that it did not address

> the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter de novo or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner.[43]

[40] *Id.* at 529.
[41] *Id.* at 532.
[42] *Id.* at 532–533. The Court relied heavily on its decision in FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) in which it found,

> [T]he acquiring company at the edge of the market exerted 'considerable influence' on the market because 'market behavior ... was influenced by each firm's predictions of the market behavior of its competitors, actual and potential'; because 'barriers to entry ... were not significant' as to the acquiring company; because 'the number of potential entrants was not so large that the elimination of one would be insignificant'; and because the acquiring firm was the most likely entrant.

Falstaff, 410 U.S. at 534 n.13 (quoting *Procter & Gamble,* 386 U.S. at 581). The Court's approach was criticized by commentators at the time as being superficial and not supported by the facts. See, e.g., Snider and Trier (1974), at 853 ("[The Court] was satisfied to consider only whether Falstaff was perceived as a potential entrant and would not go further to enquire whether its existence on the edge of the market actually had a beneficial influence.").
[43] *Falstaff*, 410 U.S. at 537.

V. Development of a More Sophisticated Analysis

The mid-1970s saw the beginnings of a radical shift in antimerger enforcement doctrine – a major change in what Bork called "the economic rules." In response to the work of Bork and others, the Chicago School of economics gained ground, and its focus on economic rigor in legal reasoning and an emphasis on consumer welfare as the goal of antitrust enforcement had a significant influence on antitrust law.[44] The emphasis shifted from the theme in *Brown Shoe*, *Pabst*, and *Falstaff* on the protection of small business and thwarting a trend to concentration. Market concentration still mattered, but only in the service of consumer welfare protection. Moreover, the Court began to engage in more sophisticated economic analyses when considering the competitive effects of mergers.[45]

VI. The DOJ–FTC Horizontal Merger Guidelines

As profound as any change in Supreme Court doctrine was the adoption, by the federal enforcement agencies, of the DOJ–FTC Horizontal Merger

[44] See, e.g., Bork (1978) and Elzinga (1977).

[45] For example, in 1974 the Supreme Court decided U.S. v. General Dynamics Corp., 415 U.S. 486 (1974), a case often heralded as ushering in a new era in merger analysis. See, e.g., U.S. v. Baker Hughes Inc., 908 F.2d 981, 990 (D.C. Cir. 1990) (Thomas, J.) ("*General Dynamics* began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence.").

As one commentator noted,

> Federal enforcement in the 1970s operated against a backdrop of a judicial loosening of restrictions on mergers. Key developments included the Supreme Court's decisions in cases such as *United States v. General Dynamics Corp.* and *United States v. Marine Bancorporation* and court of appeals decisions that emphasized the importance of supply substitution in defining relevant markets and measuring market power. In selecting cases in the 1970s, the federal agencies retreated from the more intervention-oriented approaches that had guided DOJ and FTC merger policy in the 1960s.

Kovacic (2003), at 434–435. See also Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.) ("The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act… Applied to cases brought under Section 7, this principle requires the district court … to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or further above the competitive level."), *cert. denied,* 481 U.S. 1038 (1987).

Guidelines.[46] "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time."[47] The Guidelines show how, in Bork's words, antimerger enforcement "should alter as economic understanding progresses" (even if the Court did not recant its approach to mergers in *Brown, Pabst*, and *Falstaff*).[48] In almost every way, the Guidelines would look at the prominent beer merger cases differently.

1. Elements of analysis under the merger guidelines

The Guidelines state "[a] merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured."[49] Thus, merger analysis under the Guidelines begins with a definition of the relevant product and geographic markets. The agencies look only at demand-side substitution – i.e., potential consumer responses to a price increase – to determine which products or services belong in the relevant geographic market and how large a geographic area comprises the relevant geographic market.[50]

After the agencies identify the relevant product and geographic markets, they attempt to identify the competitors in those markets and assign market shares.[51] Calculating market shares allows the agencies to measure concentration levels and determine whether the merger at issue will take place in a market that is unconcentrated, moderately concentrated, or highly concentrated.[52] Contrary to the precepts of *Pabst* and *Falstaff*, under the Guidelines, "[a]lthough large market shares and high concentration by themselves are an insufficient basis for challenging a merger, low

[46] The Merger Guidelines were first published in 1982 and revised in 1984. The 1992 Merger Guidelines explicitly mention the evolution in merger enforcement policy from 1968. The Merger Guidelines were last changed in 1997 when revisions were made to the section dealing with efficiencies. See 1992 Merger Guidelines.

[47] 1992 Merger Guidelines § 0.1.

[48] For discussions of the ways in which the Guidelines represent the progression of economic understanding, see generally Baker and Blumenthal (1983) and Werden (1983).

[49] 1992 Merger Guidelines § 1.0.

[50] *Id.* §§ 1.1 and 1.2.

[51] "The Agenc[ies] normally will calculate market shares for all firms (or plants) identified as market participants ... based on the total sales or capacity currently devoted to the relevant market together with that which likely would be devoted to the relevant market in response to a 'small but significant and nontransitory' price increase." *Id.* § 1.41.

[52] *Id.* § 1.5. The Guidelines use the HHI to measure concentration in a relevant market.

market shares and concentration are a sufficient basis for not challenging a merger."[53]

After the agencies have defined the size, scope, and concentration of the relevant markets involved, they generally will consider two broad categories of potential competitive effects: "coordinated effects" and "unilateral effects." A merger may potentially result in "coordinated effects" when it increases concentration in a market with a small number of relatively large players who may find it easier to coordinate their behavior – either explicitly or tacitly – after the merger.[54] "Unilateral effects" are those that occur when a merger results in a single firm that is large enough profitably to raise price on its own, regardless of the reaction of other firms in the market.[55]

If the agencies determine that a proposed merger likely will not result in significant anticompetitive effects, the analysis ends there. If a merger raises competitive concerns, however, the agencies will then consider other factors that may ameliorate those concerns. These other factors were absent in the antimerger calculus of the *Pabst* and *Falstaff* era. Specifically, the agencies now will consider potential entry, efficiencies, and the "failing firm" defense.

When evaluating entry, the agencies will consider whether entry by new competitors in the relevant market would be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern."[56] The consideration is more sophisticated than the premise in *Falstaff* that the acquiring firm might have entered New England *de novo* therefore the merger should be disallowed.

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[53] 2003 Merger Challenges Data.

[54] 1992 Merger Guidelines § 2.1 ("Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself."). Coordinated effects analysis has sometimes been explained through use of a "dinner party" analogy:

> [F]ewer firms make tacit collusion more likely or more effective for much the same reason that friends arranging a restaurant get-together will likely find it easier to coordinate the calendars of four people than five, and will more likely notice if one person accepts but does not show up. Under this view, coordination may technically not be inevitable when a market becomes highly concentrated, but the odds of success are high and those odds grow as concentration increases.

Baker (2002), at 139.

[55] 1992 Merger Guidelines § 2.2.

[56] 1992 Merger Guidelines § 3.0. Regarding entry, the Guidelines state "[a] merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels." *Id.*

As to efficiencies, the agencies will consider whether "cognizable efficiencies, (i.e., merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service), are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market."[57] At the time of *Pabst* and *Falstaff*, if anything, efficiencies from amalgamation were viewed negatively if accompanied by an increase in market concentration.

Finally, the agencies can consider whether the target of the proposed acquisition meets the "failing firm" defense. The Guidelines impose a high standard for the defense, requiring both that the firm be on the brink of failure, and that there be no less anticompetitive alternative available to it than the proposed acquisition.[58] By today's standards, *Pabst* and *Falstaff* would not have been decided differently because of the failing firm doctrine.

Two very recent merger decisions – one a unilateral effects case, the other a coordinated effects case – demonstrate the degree to which lower courts now apply economic analysis (not found in *Pabst* and *Falstaff*), and adhere to the structure of the Merger Guidelines, to determine whether proposed transactions violate § 7 of the Clayton Act. In *U.S. v. Oracle Corp.*,[59] the DOJ challenged the proposed merger of Oracle and PeopleSoft, two manufacturers of "enterprise application software" used by large organizations for such functions as human resource management and financial management systems. The DOJ argued that the relevant product market consisted of high function enterprise software used by large organizations, and that the relevant geographic market was limited to the United States.[60] The government argued that only three firms presently compete in the relevant market so defined (Oracle, PeopleSoft, and SAP), and that after the merger only two would remain.[61]

In an opinion that closely followed the structure of the Merger Guidelines, the district court refused to enjoin the transaction. First, the court rejected the government's proposed relevant product and geographic markets. The court found that "high function" software as a separate and distinct category was a fiction, and that other firms provide software that serves the same functions as the enterprise software produced by Oracle, PeopleSoft, and SAP.[62] The court found the relevant geographic market to

[57] 1992 Merger Guidelines § 4.

[58] *Id.* § 5.1.

[59] No. C 04–0807, 2004 WL 2006847 (N.D. Cal. Sept. 9, 2004). Elzinga was a testifying expert for the DOJ in this case.

[60] *Id.* at *2.

[61] *Id.* at *8.

[62] *Id.* at *59.

be global, rejecting the government's contention that the market was limited to the United States.[63]

The court noted that neither party had provided world-wide market share data, and so proceeded directly to an analysis of potential anticompetitive effects.[64] The court found that the government had not presented sufficient evidence of potential coordinated effects and considered coordinated action unlikely because enterprise application software is characterized by product differentiation and an absence of pricing transparency.[65] The court also rejected the DOJ's unilateral effects theory, finding that there was no group of customers for whom the products of Oracle and PeopleSoft were the next best substitutes.[66] Because it found no such group of customers, the court declined to consider whether the merged firm could profitably maintain a price increase post-merger.[67]

The *Oracle* decision followed the structure of the Merger Guidelines, but deviated from the Guidelines in terms of substantive analysis. Although the Guidelines reflect a reduced emphasis on market concentration relative to the early merger cases, they still provide that anticompetitive unilateral effects are likely where, *inter alia,* the post-merger HHI falls outside the Guidelines' safe harbors and "the merging firms have a combined market share of at least thirty-five percent . . ."[68] The *Oracle* court explicitly rejected the Guidelines' market share standard, however, implying that anything short of a merger to monopoly would not justify an inference of anticompetitive unilateral effects in a differentiated product market:

> A presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true. To prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position.[69]

In *FTC v. Arch Coal*,[70] the FTC challenged the proposed acquisition by Arch Coal of Triton Coal. The relevant market was coal produced from the Southern Powder River Basin ("SPRB") of Wyoming.[71] The court acknowledged that there were only five major suppliers of SPRB coal prior

[63] *Id.* at *66–67.
[64] *Id.* at *67.
[65] *Id.* at *68.
[66] *Id.* at *75.
[67] *Id.*
[68] 1992 Merger Guidelines § 2.211.
[69] *Oracle Corp.*, No. C 04–0807, 2004 WL 2006847, at *22.
[70] Nos. CIV.A.04–0534, CIV.A.9409535 (D.D.C. Aug. 16, 2004) (slip opinion).
[71] Slip op. at 17.

to the merger.[72] Nonetheless, applying a coordinated effects analysis, the court found that the FTC had failed to prove that the merger would increase the gains from coordination, eliminate a market "maverick," or otherwise make it easier for the merged firm and others in the industry to collude tacitly on price or output. Specifically, the court found no history of collusion in the industry, that SPRB coal production had increased steadily over the years, that pricing was not transparent (making it difficult to police "cheating" on a tacit agreement), and that there was no effective mechanism to punish cheaters.[73]

Both *Oracle* and *Arch Coal* highlight the degree to which current merger analysis differs from that of four decades ago. Both cases are notable for their use of economic analysis, which stands in stark contrast to the simplistic focus of the early cases on concentration trends. Moreover, *Oracle* and *Arch Coal* both involved markets in which there were only a handful of participants, yet both mergers survived challenge in the district court. By contrast, *Pabst* and *Falstaff* involved industries with literally dozens of competitors, and yet each was struck down. A court reviewing either *Oracle* or *Arch Coal* in the era of *Brown Shoe* and *Pabst* would have found it violative of § 7.

2. THE MERGER GUIDELINES AS APPLIED TO *PABST* AND *FALSTAFF*

The disconnect between the Court in *Pabst* and the economic analysis in the Merger Guidelines is illustrated by the following passage from *Pabst*:

> "Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, was concerned with arresting concentration in the American economy, whatever its cause, in its incipiency."[74]

By contrast, the Guidelines state:

> "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time."[75]

While the Court stressed a market structure objective, the spotlight of the Guidelines is on market power. The Court afforded the agencies enormous leeway in defining the relevant market whose deconcentration must be protected. The *Pabst* Court wrote:

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[72] *Id.* at 21.
[73] *Id.* at 85.
[74] *Pabst*, 384 U.S. at 552.
[75] 1992 Merger Guidelines § 0.1.

> "Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss a § 7 case."[76]

The Guidelines, on the other hand, put relevant market definition front and center:

> "A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured."[77]

Although the relevant product and geographic markets as defined in *Pabst* and *Falstaff* may not have been different under a Guidelines analysis, the Court's cavalier approach to relevant market analysis in those cases stands in marked contrast to the emphasis placed on market definition by the Guidelines and modern courts.[78]

The Guidelines approach to enforcement differs the most from *Pabst* and *Falstaff* in the area of market share and concentration analysis. In *Pabst,* the Court found that the merging firms had a combined market share of 23.95% in Wisconsin, 11.32% in the three-state area comprised of Wisconsin, Illinois and Michigan, and 4.49% nationwide. Each of these shares – even the nationwide 4.49% share – offended the Clayton Act in the Court's view.[79] In effect, the Court stated that no market share was too small to escape condemnation if it occurred in an industry marked by "a trend toward concentration."[80] Similarly, in *Falstaff,* the Court condemned the merger notwithstanding the fact that Falstaff had a 0% market share in the stipulated New England market, and thus that concentration did not increase at all as a result of the merger.[81]

The Guidelines approach to both mergers would differ substantially. In *Pabst*, even focusing on the market in which the parties had the high-

[76] *Pabst,* 384 U.S. at 549. One contemporaneous commentator observed that "*Pabst* is notable for its apparent relegation of proof of the relevant geographical market to inconsequential status." Austin (1969), at 772.

[77] 1992 Merger Guidelines § 1.0.

[78] See, e.g., FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1053 (8th Cir. 1999) ("Because we conclude that the FTC produced insufficient evidence of a well-defined relevant geographic market, we find that it did not show that the merged entity will possess … market power. The FTC's failure to prove its relevant geographic market is fatal to its motion for injunctive relief."); U.S. v. Engelhard Corp., 126 F.3d 1302, 1307–1308 (11th Cir. 1997) ("The Government's methodology for determining the relevant product market, as applied in this case, was flawed… After thoroughly reviewing the record, we cannot say the district court was clearly erroneous in holding that the Government failed to carry its burden of establishing the relevant product market.").

[79] *Pabst*, 384 U.S. at 551–552.

[80] *Id.* at 552–553.

[81] *Falstaff,* 410 U.S. at 532.

est combined market share (Wisconsin), a Guidelines analysis likely would not lead to a conclusion that the merger created market power. In 1957, the year prior to the merger, there were *70 sellers* of beer in Wisconsin, of which Blatz was the largest with a 12.81% share and Pabst was the fourth largest with a 11.14% share.[82] Based upon the market share data in the parties' joint trial exhibit, the pre-merger HHI for Wisconsin was approximately 695. The post-merger HHI was approximately 981, which would put it in the "unconcentrated" category of the Guidelines.[83] Under the Guidelines, mergers resulting in a post-merger HHI of less than 1,000 "are unlikely to have adverse competitive effects and ordinarily require no further analysis."[84]

Moreover, according to statistics published by the FTC and DOJ, from fiscal years 1999 through 2003, the agencies challenged 173 mergers in 1,263 relevant markets.[85] In none of these cases was the post-merger HHI in a relevant market below 1,400.[86] Thus, the modern-day antitrust enforcement agencies applying the Guidelines would be extremely unlikely to challenge the Pabst/Blatz merger that resulted in a post-merger HHI of less than 1,000. Unlike in *Pabst* where the trend toward concentration in the industry meant that virtually any merger would be condemned as anticompetitive, the federal agencies today take the view that "[a]lthough large market shares and high concentration by themselves are an insufficient basis for challenging a merger, low market shares and concentration are a sufficient basis for not challenging a merger."[87]

In *Falstaff*, prior to the merger, Narragansett had 20% of the New England market and Falstaff had zero, given that it did not compete in that market prior to the transaction.[88] Thus, the increase in the HHI as a result of the merger was zero. Under the Guidelines, even if New England were considered to be a "highly concentrated" market with a pre-merger HHI greater than 1,800, a merger that resulted in an increase of less than 50 points in the HHI would be "unlikely to have adverse competitive

[82] See "Sales of Beer in Wisconsin, 1957," Joint Exhibit 66, United States v. Pabst Brewing Co., et al., No. 59-C-215 (E.D. Wisc.). We use the year prior to the merger as the relevant date because we assume that a merger of the size of Pabst/Blatz would be reportable under the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a, and therefore that the agencies and the courts would review the merger prior to consummation.

[83] A market with an HHI under 1,000 is considered to be "unconcentrated" under the Guidelines. 1992 Merger Guidelines § 1.51(a).

[84] *Id.*

[85] 2003 Merger Challenges Data.

[86] *Id.*: Table 1.

[87] *Id.* at 2.

[88] *Falstaff,* 410 U.S. at 528.

consequences and ordinarily [would] require no further analysis."[89] The enforcement data published by the enforcement agencies strengthens this conclusion, reflecting that between fiscal years 1999 and 2003 the lowest increase in HHI that resulted in a challenge to a merger was approximately 85.[90]

Thus, under the HHI calculations employed by the modern Guidelines regime, neither the Pabst/Blatz nor the Falstaff/Narragansett transaction would likely be challenged by the federal enforcement agencies. Even if, however, the concentration levels did warrant additional investigation, the characteristics of the beer industry and the structure of the markets at issue suggest that neither transaction would present a competitive effects problem under contemporary merger analysis, either under a coordinated effects or a unilateral effects theory. Most significantly, the beer industry during the 1960s and 1970s was characterized by a large number of firms.[91] In an industry with so many sellers, no single firm would have the ability unilaterally to maintain a price increase, and the risk of so many firms organizing and abiding by a coordinated price increase is very low.

Other characteristics of the beer industry do not fit exclusively into either a coordinated effects or a unilateral effects paradigm and, in any event, would be overshadowed by the large number of players in the industry. For example, supporting a unilateral effects theory, beer is a differentiated product.[92] But product differentiation makes a coordinated effects theory more difficult to sustain. While pricing information is readily available through store price checking, such data may not mimic prices from the brewery. On the other hand, the industry is characterized by a large number of relatively small transactions, reducing the incentive of a colluding firm to cheat on an increased price.

[89] 1992 Merger Guidelines § 1.51(c).

[90] 2003 Merger Challenges Data: Table 1.

[91] There were still 150 independent brewing firms in 1963. By 1978, the number had dwindled to 44 (these numbers exclude microbreweries of less than 10,000 barrel capacity).

[92] However, undercutting unilateral effects theory would be the fact that Pabst and Blatz and Falstaff and Narragansett would not be considered "next best substitutes" for one another, and thus sales lost due to a price increase on one product would not necessarily flow to the other product. At the time of the merger Pabst was a premium brand that competed more directly with Miller, Schlitz and Budweiser. Blatz, by contrast, was a popular price beer. Similarly, Narragansett would have competed more closely with Rheingold and other Northeastern regional brands than with Falstaff and the large national brands. If these mergers took place today, their potential unilateral effects probably would be analyzed using, *inter alia,* a merger simulation model using scanner data from retail sales to measure the intensity of competition between the two merging brands and attempt to predict the incentive of the merged firm to raise prices.

Entry analysis presents another area in which a modern approach to merger enforcement diverges from the *Pabst* and *Falstaff* decisions. The Court in those cases gave no consideration to the possibility that new competitors might enter the market to discipline an attempted price increase. By contrast, the Guidelines recognize that entry that would be timely, likely, and sufficient to defeat an attempted price increase can "trump" potential anticompetitive effects that otherwise might derail a proposed merger.[93] Some lower court decisions have given even greater weight to the entry factor.[94]

VII. The Irrelevance of Early Antimerger Enforcement

Most of the mergers in the beer industry did not involve firms of significant stature. Generally, they represented the demise of an inefficient firm which salvaged some remainder of its worth by selling out to another brewer. The acquiring brewer gained no market power but might have benefited by securing the barrelage to bring one plant to full capacity or by gaining access to an improved distribution network or new territory. Mergers such as these are not the *cause* of structural change; they are the *effect*, as firms exit or rearrange their assets through the merger route. The trend to concentration in brewing would have occurred even if all mergers had been prohibited. In this regard, our analysis of the *Pabst* and *Falstaff* opinions, and their subservience to the Merger Guidelines, is in the grain of prior research on mergers and concentration in the U.S. brewing industry.[95]

[93] 1992 Merger Guidelines § 3.0. The Guidelines consider new entry to be timely if it could be accomplished within 2 years – "from initial planning to significant market impact." *Id.* § 3.2. Entry will be considered likely if a potential entrant would find entry "profitable at premerger prices." When considering likelihood, the agencies consider the minimum viable scale for a competing firm, and whether the increase in output resulting from the entering firm would depress prices below premerger levels. *Id.* § 3.3.

[94] For example, in U.S. v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990), the court noted that "[i]n the absence of significant barriers [to entry], a company probably cannot maintain supracompetitive pricing for any length of time." *Id.* at 987. Rejecting the government's proposed "quick and effective" entry standard as overly inflexible and burdensome, the court held that low barriers to entry can discipline a market merely by the threat of potential entry, "regardless of whether entry ever occurs." *Id.* at 987–988. *Baker Hughes* is all the more significant because the opinion was authored by now-Justice Clarence Thomas and joined by now-Justice Ruth Bader Ginsburg.

[95] See in particular Tremblay and Tremblay (1988), arguing that mergers had a negligible effect on market concentration in the 1970s, but a "larger positive impact on industry concentration" since 1972 but concluding that most mergers were "an efficient means of transferring assets from failing to successful firms." Hatten and Schendel (1977), at 108–109, concluded that the structure of the beer industry was determined by the inter-

The one constant in the market for beer has been Anheuser-Busch: number one since 1957. Even more remarkable than its hold on number one has been its relative growth. Throughout the 10-year period 1992–2002, Anheuser-Busch's market share has grown almost every year. Several factors contribute to Anheuser-Busch's strong leadership position. All of its breweries are large, low-cost facilities. Moreover, only two brands comprise much of the firm's output, and these are produced primarily in one package format (Budweiser and Bud Light in 12-oz cans). Because of its enormous volume, the company has per barrel advertising costs significantly below many of its rivals. Most of the firm's output is sold at premium and superpremium prices which generate higher margins. TV ads for Anheuser-Busch products are acclaimed for their positive recall.[96] Perhaps the most significant contribution of the antimerger law to the structure of the beer industry was to deter Anheuser-Busch from growth-by-merger and thereby to incline the firm to the growth strategies it has used with remarkable success.

VIII. Conclusion

Increases in concentration in brewing are neither the result nor the cause of market power. The reasons, rather, are benign: the exploitation of scale economies and the demise of suboptimal capacity; new or superior products; changes in packaging and marketing methods; poor management on the part of some firms; and the strategic use of product differentiation. As a consequence, Anheuser-Busch, Miller and Coors no longer face an array of robust domestic brewers. Brands like Schlitz, Pabst, Old Style, Stroh, Ballantine, Schaefer, Falstaff, Olympia, Rheingold, Ruppert, Blatz, Lucky Lager, Hamm's, and the firms that produced them, are gone or are shadows of what they once were. But the big three domestic brewers now face significant import competition, in some cases from large brewers with operations in many countries, and significant competition from specialty brewers.

Based on the experience of the late 1960s and early 1970s, two results might have been expected as a consequence of antimerger enforcement: market concentration in the brewing industry would not increase; smaller firms would be preserved. Neither turned out to be true. Indeed, the early stringent enforcement of the antimerger law was partly responsible for the emphasis on internal growth by the leading brewers. In the process, the

nal expansion of "larger and richer firms" while "weaker firms … took a cheaper 'plant acquisition' route …" Greer (1998), pp. 90–91, a critic of beer industry concentration levels, concluded that mergers "have not contributed substantially to present-day concentration… The firms that have grown most by merger have fallen the farthest since 1970."

[96] See, e.g., MacArthur (2002).

beer industry went from deconcentrated to concentrated. Because of the changes in antimerger doctrine and enforcement mechanics, later mergers in the beer industry went largely unchallenged by the antitrust authorities who recognized in the mid-1970s that beer mergers they once would have attacked did not merit challenge, even when the merger involved sizable regional sellers.

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