COMPETITOR COMPLAINTS IN U.S. ANTITRUST INVESTIGATIONS AND LAWSUITS

By Michael H. Byowitz and Lori S. Sherman

This article addresses the role competitors play in antitrust litigations and investigations challenging mergers and single-firm conduct in the United States. As will be seen, U.S. antitrust law generally seeks to advance consumer welfare rather than producer welfare, resulting in a judicially imposed requirement that a complainant show the harm it seeks to redress in any private antitrust suit is the type of injury the antitrust laws were designed to protect against. Competitors have a difficult time meeting this antitrust injury requirement in lawsuits challenging mergers; while competitors frequently play an unofficial role in merger investigations by providing information and resources to the federal antitrust enforcement agencies, they sometimes work behind the scenes by seeking to attract others to be complainants. In single-firm-conduct cases, competitors play a more robust role in court and a less circumspect one before the agencies.

Historical Background

Through the Sherman Act, “Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.” As the U.S. Supreme Court has stated, the purpose of the antitrust laws is “the protection of competition, not competitors.” Although the law’s objectives thus have been articulated consistently, there has been no consensus on the means to achieve these objectives since the Sherman Act’s enactment in 1890.

The Sherman Act’s legislative history reveals disparate views in Congress, with some members believing it more important to protect the number of rivals competing in a market, while others defining the central role as protecting consumers even if there is harm to individual

---

1 Michael Byowitz is a partner and Lori Sherman an associate at Wachtell, Lipton, Rosen & Katz.
competitors. A seminal treatise suggests that, at the time the Sherman Act was drafted, the balance was slightly in favor of protecting competitors, although the “legislative history . . . does not point consistently in any signal direction.” By contrast, a leading academic and jurist argues that the legislative history confirms Congress was not in favor of protecting small firms. The debate notwithstanding, Supreme Court decisions interpreting the federal antitrust laws show that protecting small firms had won the day by the early 1960s. As the Supreme Court noted at that time:

we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

In the following decades, the pendulum swung in the opposite direction under of the so-called Chicago School of economics. The Chicago School generally advocated for economic goals over political and social concerns in interpreting and enforcing the antitrust laws. The focus on efficiency enhancement meant that keeping small, but less efficient, firms in business was not perceived as an antitrust objective. Instead, the overriding concern was avoiding injuries to consumers and customers and promoting economic efficiency. The approach to resolving anti-

4 The debate about the Sherman Act were framed in terms of the “populist” position, to protect small dealers against the threat of big corporations or trusts, and the “economic” position, to promote economic efficiency yielding benefits to consumers. See, e.g., Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, passim (Aspen Pubs. 3d ed. 2006); Richard A. Posner, Antitrust Law, An Economic Perspective (U. Chi. Press. 3d ed. 2006). For a general discussion of the legislative history of the Sherman Act and how it was applied during the first twenty years, see Albert H. Walker, History of the Sherman Law (Beard Books reprinted 2000, original printing 1911).

5 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, 41 -63 (Aspen Pubs. 3d ed. 2006).

6 Frank H. Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696, 1702-03 (1986) (“However, you slice the legislative history [of the Sherman Act], the dominant theme is the protection of consumers from overcharge.”).

7 Brown Shoe Co. v. United States, 370 U.S. at 344.

8 For a discussion of the founders of and the antitrust principles proffered by the Chicago School, see, e.g., Richard A. Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925 (1979). The principal rival to the Chicago School was the Harvard School. Judge Posner, one of the leading proponents of the Chicago School, argued, that the two schools have largely converged – of course with some important differences – into today’s mature body of economic principles underlying the antitrust laws. 127 U. Pa. L. Rev. 925 (1979).
trust concerns thus focused on ascertaining whether the action complained about increased or
decreased consumer welfare.

Judicial acceptance of the consumer welfare standard is evidenced by several decisions in
the late 1970s and early 1980s. For example, in *GTE Sylvania Inc. v. Continental TV, Inc.*, the
Supreme Court overruled prior precedent by holding that vertical non-price restrictions are not
*per se* illegal and instead are subject to a rule of reason analysis under which business justifica-
tions for the challenged conduct are considered.9 More recently, the Supreme Court in *Leegin
Creative Leather Products, Inc. v. PSKS, Inc.*, overturned long-standing precedent in ruling that
vertical minimum resale price maintenance agreements are not subject to *per se* treatment and
instead are to be analyzed under the “rule of reason.”10 In both cases, having a rule that allowed
considerations of efficiency enhancement outweighed concerns about protecting small retailers.

**Mergers**

Competitor complaints about mergers face difficulties under applicable case law and
have to be presented to the antitrust agencies with care.

**Judicial Challenges to Mergers**

Supreme Court decisions during and subsequent to the 1970s demonstrate acceptance of
Chicago school principles in defining whether competitors have standing to challenge a merger
under the antitrust laws. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,11 a number of local
bowling alley operators challenged the acquisition by Brunswick, a national bowling alley chain,
of a number of failing bowling alleys, alleging that, but for the acquisition, the bowling alleys
would have gone out of business. Significantly, plaintiffs claimed that their losses were due to

---

greater competition than would have existed had the acquisition never occurred. In rejecting the claim on “antitrust injury” grounds, the Court noted:

[T]he antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that, by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition, not competitors". It is inimical to the purposes of these laws to award damages for the type of injury claimed here.\footnote{12}{Id. at 489 (citation omitted) (emphasis added).}

In \textit{Cargill, Inc. v. Monfort of Colorado, Inc.},\footnote{13}{479 U.S. 104, 117 (1986).} the Supreme Court held the \textit{Brunswick} standard applicable to claims for injunctive relief. The case involved a challenge by a beef packer to a merger between two competing beef packers. The plaintiff alleged the merger would enable the parties to gain market share (combined to 20.4%), allowing the merged entity to charge lower, but not below cost, prices. The Court held:

\begin{quote}
The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.\footnote{14}{Id. at 116.}
\end{quote}

The Court concluded: “The antitrust laws require no such perverse result.”\footnote{15}{Id.}

Following \textit{Brunswick} and \textit{Monfort}, many lower federal courts have barred suits where the plaintiffs failed to allege competitive injury or where the claims of predatory conduct were deemed too speculative.\footnote{16}{See, e.g., \textit{OK Sand & Gravel, Inc. v. Martin Marietta}, 36 F.3d 565, 574-75 (7th Cir. 1994) (combined market share of 75% insufficient, where competitor failed to show other facts sufficient to constitute antitrust injury); \textit{Phototron Corp. v. Eastman Kodak Co.}, 842 F.2d 95 (5th Cir. 1988) (plaintiff failed to show substantial likelihood of injury through predation); \textit{U.S. Airways Group v. British Airways PLC}, 1998-1 Trade Cas. ¶ 72,037 (S.D.N.Y. 1997) (U.S. Airways failed to show that any alleged harm flowing from code-sharing agreement between American and British Airways constituted antitrust injury); \textit{Pearl Brewing Co. v. Miller Brewing Co.}, 1993-2 Trade Cas. P 70,370 (W.D.}}
injury requirement satisfied in competitor challenges to mergers under certain circumstances, such as:

- the combined share of the merged firm was high (84%) and market and entry conditions apparently made plausible a plaintiff’s allegations of potential injury from predatory conduct;\(^{17}\)

- the merger would create barriers to entry where the plaintiff was in fact seeking to enter the market;\(^ {18}\) and

- the challenge was to a vertical merger and the plaintiff allegedly suffered injury as a customer rather than a competitor.\(^ {19}\)

While *Brunswick* and *Monfort* both involved attempts by competitors to block mergers under Clayton Act Section 7, the antitrust injury requirement applies in non-merger challenges as well.\(^ {20}\) The “antitrust injury” standard requires courts to focus on injuries to the competitive process, which are remediable, while those to individual competitors are not unless shown to be the type that the antitrust laws protect against.

Since the 1990s, while many Chicago School orthodoxies have been challenged at the margin by economists and lawyers espousing so-called post-Chicago School economics,\(^ {21}\) the

\(^{17}\) *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989).

\(^{18}\) *Bon-Ton Stores v. May Department Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994) (Bon Ton, a disappointed suitor seeking to enter the department store business in Rochester, New York by purchasing the local department store chain that May Department Stores, which already had a large presence in the Rochester area, had contracted to acquire; Bon Ton’s claimed injury because the merger would create entry barriers for Bon Ton and other potential entrants; New York’s Attorney General was also a plaintiff in the case); *see also Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1254 (E.D. Pa. 1987) (antitrust injury supported by allegation of monopolization as merger of two parties with 70% market share in certain regions would increase barriers against plaintiff’s ability to sell products to supermarkets).

\(^{19}\) *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 576 (7th Cir. 1999) (Allied Signal properly alleged standing not as a competing seller of airplane wheels and brakes, but as a purchaser of landing gear).

\(^{20}\) *E.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (gasoline service station dealer suffered no antitrust injury as a result of a maximum resale price agreement that defendant imposed on rival dealers).

central role of consumer welfare and efficiency enhancement has continued to be followed by the courts and articulated by the antitrust enforcement agencies. We turn to consider the extent to which agency practice adheres to this standard in the merger context.

**FTC and DOJ Treatment Of Competitor Complaints in Mergers**

Disgruntled competitors are not limited to seeking to challenge mergers or single firm conduct (whether predatory or exclusionary) in court; they can and often do seek to encourage antitrust agencies to bring challenges in such matters. Acceptance of consumer welfare as the standard for assessing antitrust concerns in the courts and the academy has had an impact on agency receptivity to, and the extent to which reliance is placed on, competitor complaints in the merger context.

As with the courts, the attitudes of the federal antitrust agencies regarding competitor complaints in horizontal merger investigations has gone through a number of permutations in recent decades. After decades of receptivity to such complaints, the agency view changed during the Reagan Administration to one that involved a strong dose of skepticism. Indeed, during the Reagan Administration, the Antitrust Division of the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) argued in *amicus* briefs submitted in *Monfort* that competitors should not have standing to challenge mergers, because competitors were far more likely to challenge mergers that created more efficient combined firms than those that actually substantially reduce competition.\(^{22}\) The general view of senior officials at the agencies at the time with

---

regard to horizontal mergers (particularly at the DOJ) was that competitors tend to complain about procompetitive deals and not to complain about anticompetitive ones.23

Today, the federal antitrust agencies arguably take a more nuanced approach. Because the agencies are aware that competitor complaints can be pursued for ulterior motives, they tend not to accept them at face value. But, as noted by a former FTC Commissioner, “Competitor complaints (appropriately discounted for self interest) may convey some helpful insights about dynamic competition.”24 Competitor complaints thus are generally considered just another source of information as to the market in issue.

It can be particularly difficult for competitors complaining about horizontal mergers purportedly raising coordinated anticompetitive effects to assert a theory of harm consistent with antitrust doctrine. The problem for a would-be competitor complainant is that a merger allegedly producing coordinated effects, if anticompetitive, would result in higher prices that arguably would benefit both the merger parties and third-party competitors, leading to questions about the competitor’s motive for complaining.25 By contrast, horizontal mergers allegedly producing unilateral effects – involving high shares and entry barriers – are less likely to run into this problem, especially where market conditions are such that the complainant can plausibly claim the merger would make exclusionary or predatory conduct more likely to be both successful and anticompetitive.26

The agencies generally consider vertical mergers to be less likely to produce anticompetitive effects than horizontal mergers, since the procompetitive benefits of vertical mergers are

---

25 *Monfort* (discussed at pp. 4-5) is one such case.
26 *Bigelow Tea* (discussed in text accompanying n.16) is one such case.
more readily apparent while the theory of competitive harm is more difficult to articulate.  

At the same time, competitor complaints may be less likely to provoke a knee-jerk skeptical reaction as to ulterior motives because the complainant can often argue injury in its capacity as a customer or supplier rather than as a competitor. For example, competitors may complain about mergers upstream or downstream where the merger may increase their costs for, or constrain their access to, critical inputs.

A complaint sounding in injury to the complainant as a customer (rather than as a competitor) is advantageous because competitor complaints can be viewed with skepticism by the agencies, while complaints from customers frequently are given great weight. Indeed, many practitioners have from time to time voiced concern about purportedly uncritical acceptance of customer complaints by the agencies. Where customers overwhelmingly complain about a merger, senior officials at both agencies have long tended to view the very fact of the complaints as troubling. Where the customer reaction was mixed, the DOJ and FTC have challenged mergers even when similarly-situated customers had very different views of the merger, with the agencies arguably accepting at face value the complainers’ arguments while considering customers supporting the merger to be misguided. Significant government losses in the middle of the present decade in which agency requests for preliminary injunctions were denied in two merger cases heavily dependent on the testimony of complaining customers – the DOJ’s challenge to the Oracle/PeopleSoft merger and the FTC’s case in Arch Coal – has led to noticeably higher scrutiny of customer complaints in antitrust investigations, with customers often asked or even required to provide documents and submit to depositions to substantiate their voiced concerns.

Customer complaints nonetheless continue to be critical to agency merger challenges. Indeed, the absence of complaining customers is often a factor in agency decisions to refrain from challenging a merger.\(^{30}\)

**The Process by Which Competitors Complain in Merger Investigations**

Competitors have no official role in the agencies’ merger review process. Unofficially, competitors can and often do play an active role. While the agencies rely on formal investigative tools in merger investigations, such investigations are also conducted by less formal means such as conversations with counsel for complainants as well as telephone and in person interviews. This allows for participation in investigations by competitors in a wide range of roles. The role can be small, lasting as long as it takes for the reviewing agency to conduct a single telephone interview, or it can be substantial, lasting as long as the government’s investigation is pending. In investigations where competitive concerns persist and the agencies are seriously considering suing to block the transaction, competitors may be compelled through formal process to produce documents and make witnesses available for testimony under oath before the agency decides whether or not to challenge the merger.

Competitors who are serious about delaying or preventing mergers by their rivals often retain experienced antitrust counsel to assist and advise them how best to proceed. Such counsel needs to be sensitive to agency concerns about competitor complaints, and may chose not to run head on into the government’s potential skepticism about competitor complaints. Depending on the nature of the complaint, the first issue counsel may consider is whether the client’s interest is

---

\(^{30}\) See, e.g., the DOJ’s closing statement with regard to the Whirlpool/Maytag merger, U.S. Department of Justice, Press Release, March 29, 2006, available at http://www.justice.gov/atr/public/press_releases/2006/215326.htm. While the Closing Statement does not expressly point to the absence of customer support as the rationale for closing down the investigation, its language suggests that the DOJ communicated with customers and they voiced at the very least neutrality.
best served by being perceived by the agencies as a complainant or simply an information source. Counsel will also be aware that the agencies will ask for facts, not just opinion, and will want to know why the competitor feels aggrieved by the merger.

Early in a merger investigation, the antitrust agencies often call competitors along with other third parties deemed likely to have information relevant to assessing the competitive effects of the transaction. Competitors concerned about the merger may choose to wait for a call. That tactic may be optimal where the competitive concerns about the merger are readily ascertainable from public information, but becomes risky where there is uncertainty whether the agencies are likely to investigate. In the latter cases, competitors may opt for a more proactive approach by calling the agency (through antitrust counsel) either to complain about the merger or to offer assistance without necessarily taking a position on the transaction. However contacted, counsel for a challenging competitor may choose to articulate a theory of antitrust injury that sounds in consumer welfare and voluntarily provide documents and access to employees for interviews where doing so will help to substantiate the facts underlying the competitor’s theory. The agencies will test the theory and factual assertions with other sources including the merger parties.

Competitor complainants often seek and encourage complaints and other input from third parties (such as customers or suppliers) more likely to be perceived in a sympathetic light by the agencies. It is not uncommon for counsel to competitors to retain economists (behind-the-scenes) to help develop and support the theory of harm, and in some cases the economist may be “surfaced” with the investigating agency and made available to work directly at convincing the government’s economists.

Competitors may refrain from complaining about mergers for any number of reasons. In some cases, the competitor may deem the prospects of success for such a complaint too limited
to justify taking the time and not insubstantial expense of developing a compelling challenge. A would-be complainant may chose not to challenge due to concerns that the evidence it adduces may be used by the agencies if the competitor itself subsequently seeks to merge with another firm in the same industry. In the worst case, the competitor may be unsuccessful at challenging the present merger by others but find that the government is concerned when the former complainant seeks to acquire another industry participant.

Recent experience with Yahoo shows how a competitor can help to break up an attempted alliance between two competitors and then step in to form its own alliance with one of those two firms. Based on public information, it appears that Microsoft played an extensive role in opposing the proposed alliance between Google and Yahoo. Microsoft’s General Counsel testified before Congress, laying out theories of competitive harm and reasons why the alliance should not be permitted, including reduction of choice and innovation as well as higher pricing and reduced competition in searching.\(^{31}\) Shortly after Google and Yahoo abandoned their transaction in the face of DOJ’s decision to challenge it, Microsoft announced its own alliance with Yahoo, which was approved by the EU and found unobjectionable by the DOJ in February 2010.

**Complaints from Disappointed Merger Suitors and Potential Divestiture Buyers**

Some complaints are motivated by the fact that the complainant is a disappointed suitor for the acquired company hoping to acquire that firm if the merger is blocked at the behest of the government. In such cases, the competitor can anticipate the merger parties making that fact known to the investigating agency.

Third parties who wish to be divestiture buyers can act strategically in the merger review process to game the system in favor of their goal. The FTC and DOJ have unlimited discretion

---

\(^{31}\) Statement of Brad Smith, Senior Vice President and General Counsel, Microsoft, Before the Committee on Senate Judiciary and Subcommittee on Antitrust, Competition Policy and Consumer Rights, July 15, 2008.
in deciding not to accept a particular proposed divestiture buyer. Firms that are deemed to operate as a competitive constraint on the merged firm will not be considered acceptable buyers due to unease that such a divestiture might reduce competition. Fringe competitors and others not considered to offer close substitutes to the offerings of the merger parties may not run into the same problem and thus have been known to try to cause the divestiture of a product they wish to acquire.

Such would-be divestiture buyers will try to direct the reviewing agency’s attention to a particular product in the hope that the government will conclude that a divestiture of that product is necessary. Such potential divesture buyers may try to persuade the government to require a larger divestiture than the government otherwise would have required. If the potential divestiture buyer prefers the product sold by one of the merging parties, the would-be buyer may point out reasons why the agency should require divestiture of that product rather than giving the parties the choice among the party’s products. The potential divestiture buyer may also identify related and ancillary assets that are needed to provide a complete divestiture.

Complaints from Targets in Hostile Takeovers

Targets in hostile takeovers also have been known to raise antitrust defenses when the corporate raider is a competitor. Targets often refrain from launching their own court challenges to mergers as the case law in many (but not all) federal circuits is inhospitable.32 Instead, targets

may seek to convince the antitrust agencies to investigate the merger employing the various means that third-party competitor complainants employ. In any event, targets have a formal role to play in the agency review process because they are required to submit a Hart-Scott-Rodino form in response to the corporate raider’s filing within a specified period of time. Targets often exercise caution in considering whether to instigate a government investigation, as it is common for transactions that start off hostile to shift to a negotiated agreement if, as and when the price is raised sufficiently so that the target’s board of directors can recommend shareholders accept it.

### Single Firm Conduct

Concerns regarding competitor complaints are not limited to mergers, and also arise in the context of challenges to single firm conduct.

#### Judicial Challenges to Single Firm Conduct

Under U.S. antitrust law, acquisition or possession of monopoly power is not illegal without more; a competitor must also show monopoly power was acquired by exclusionary or other anticompetitive conduct. For much of the history of the Sherman Act, the courts have struggled with “the challenge [of] stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.” Concerns about safeguarding consumer welfare have led the courts to allow the acquisition of monopoly power through superior business acumen and to permit dominant firms to discount and expand their

---

33 In a cash tender offer, the target is required to file an HSR Form on the 10th day after the filing of the acquiring person’s HSR Form. The requirement for non-cash tender offers is 15 days.
36 See, e.g., *Verizon Communs., Inc. v. Trinko*, 540 U.S. 398 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”).
businesses so long as exclusionary conduct is not shown. As the Supreme Court has noted: “[t]he question of whether conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on” the plaintiff, since the appropriate focus is on whether competition is harmed, rather than any single competitor.

The Supreme Court’s 1993 decision in *Brooke Group v. Brown & Williamson Tobacco Corp.*, demonstrates the central role consumer welfare in U.S. antitrust challenges to single firm conduct. There, a cigarette manufacturer brought suit against a larger competitor, alleging that the defendant priced below cost in order to put the plaintiff out of business. The Court held selling at a low price – even at a price below an appropriate measure of cost – does not constitute monopolization, noting that great care must be exercised in assessing such antitrust challenges because below cost pricing, without more, benefits consumers. There must also be a dangerous probability that, once the plaintiff is driven out of business, prices are likely to rise sufficiently for the alleged predator to recoup the losses incurred from the below cost pricing. This is often difficult for a competitor to do.

**Agency Monopolization Cases**

---

37 See, e.g., *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.D.C. 2008) (finding that FTC failed to show that the conduct of Rambus – presumed to be a monopolist because of patents it held – was exclusionary under the antitrust laws).
40 The difficulty arises when barriers to entry by new companies into the market in question are not high. One case where this difficulty was overcome (at least in sufficiency of allegations) was Bigelow Tea’s 1989 challenge to Lipton Tea’s proposed acquisition of Celestial Seasonings. Bigelow alleged that Lipton combined with Celestial would have had a post-merger “herbal tea” share of 84%. While acknowledging that an 84% share was sufficient to raise a prima facie case of monopoly power, the district court found it insufficient to satisfy the antitrust injury standard. The U.S. Court of Appeals for the Second Circuit reversed, finding that the very large combined share was sufficient to distinguish the case from *Monfort* (where the combined share was only 20.4%), and sufficient to make out a “prima-facce case”. The decision can be explained on the ground that inability to obtain shelf space at supermarkets in view of the powerful array of brands offered by Lipton would have constituted a post-merger barrier to entry.
Unlike competitor complaints in merger cases, where successful challenges are often based on complaints by parties other than competitors, agency monopolization cases frequently arise from competitor complaints. Monopolization allegations by a competitor tend to resonate more with the antitrust law theories than in many mergers. The allegation of monopoly power carries with it strong concern of ultimate consumer harm, and the complaint often comes from a small competitor claiming exclusionary conduct by a dominant firm, which, if substantiated, can be seen to result in antitrust injury. In any event, complaints by customers may not be expected because monopolization cases often challenge conduct such as tying arrangements, bundled pricing and loyalty discounts that can be attractive to customers in the short term.\(^{41}\)

Serious allegations of monopolization, if supported by evidence provided by a competitor as well as that collected independently, has led to a number of court challenges by the agencies in the past 15 years.

Competitors were crucial to the government’s case against Microsoft. From the outset, Netscape, Sun Microsystems and others lobbied the Justice Department, state attorneys general, and Congress. Netscape reportedly provided substantial assistance to the DOJ, including assisting in developing the theory of the case via submission of unsolicited whitepapers, and Netscape and other rivals actively participated in the court proceedings including through the submission of *amicus* briefs.\(^{42}\) In DOJ’s lawsuit, the district court rejected Microsoft’s claim that its design of Windows to include Web browsing software (IE) and distribution arrangements with Internet

\(^{41}\) See ABA Section of Antitrust law, Antitrust Law Developments 251-56 (6th ed. 2007).

Service Providers and OEMs significantly benefitted customers and ultimate consumers. The court of appeals *en banc* affirmed the district court’s determination that Microsoft had unlawfully monopolized the market for “Intel-compatible operating systems” but vacated the remedial order. The parties ultimately settled the litigation.

The DOJ’s lawsuit against MasterCard and Visa provides another example of a successful competitor complaint in which the agencies relied on evidence of harm to the complaining firms. DOJ alleged that widespread “duality” of membership of banks in both Visa and MasterCard had effectively eliminated competition between the two with respect to network services and the creation of innovative network products, and that Visa and MasterCard by-laws prohibiting member banks from issuing cards of other competing networks (such as American Express and Discover) were anticompetitively “exclusionary.” After a non-jury trial, the district court held in favor of Visa and MasterCard on the duality claim, but ruled in the DOJ’s favor on the exclusivity claim. The Second Circuit affirmed.

Finally, the road to the FTC’s recently-filed administrative case against Intel was also smoothed by competitor assistance, notably from the principal complainant, AMD. The FTC’s administrative complaint filed in December 2009 alleges that Intel waged a systematic campaign to shut out rivals’ competing microchips by cutting off their access to the marketplace. In the process, Intel deprived consumers of choice and innovation in the microchips that comprise the computers’ central processing unit, or CPU.

---

In particular, the FTC alleges that various near exclusivity arrangements between Intel and OEMs, like Dell and Hewlitt Packard, whereby such OEMs would have to buy nearly all of their parts from Intel in exchange for preferential pricing and rebates, violated Section 2 of the Sherman Act. The result of Intel’s alleged predatory practices purportedly precluded widespread acceptance of AMD and Via products. Intel has responded that its conduct enhanced efficiency and benefited customers with lower prices. Unless settled, the issue will be adjudicated in court, and provide another example of the judicial struggle to identify the dividing line between aggressive lawful competition and exclusionary conduct on the part of an allegedly dominant firm.

**Conclusion**

As has been seen, competitor complaints play a role in merger and single firm conduct cases and investigations. The role can be substantial.

---

49 *Id.*