Bugs and Weeds—The Antitrust Division's Foray Into the Land of Cotton and Bioscience: The Monsanto/Delta & Pine Land Vertical and Horizontal Merger and Consent Decree [top]

David J. Saylor

Partner, Hogan & Hartson LLP

On May 31, 2007, the Antitrust Division of the Department of Justice ("DOJ") approved, subject to a consent decree, the acquisition of the largest (50%+ national share) U.S. cottonseed grower, Delta and Pine Land Company ("Delta"), by the leading U.S. supplier of cottonseed genetic modification biotechnology, Monsanto Company.[1] The settlement is not noteworthy for its routine horizontal features; in particular, requiring divestiture of Monsanto's own recently reacquired cottonseed-growing business (Stoneville) which Monsanto had offered up to the DOJ at the start of the nine-month-long investigation. Rather, the most important part of this settlement is its vertical features, namely: 1. divestiture to Stoneville's new owner (Bayer) of some of the acquired company's (i.e., Delta's) proprietary cottonseed "lines" as well as a license of Monsanto's present and future genetically engineered traits on terms as favorable as Delta had before the merger; 2. divestiture to Monsanto's rival Syngenta of Delta's cottonseed lines that contain Syngenta's proprietary insect-resistant traits; and 3. revision of Monsanto's current trait licenses with other cottonseed companies so as to allow combining or "stacking" of non-Monsanto and Monsanto traits in the same "line" (or variety of seed germplasm).

To some extent, this settlement affords a rare window into the current DOJ's thinking on vertical mergers. Even more than its recent predecessors, the Bush II DOJ tends to presume confidently that most vertical mergers are competitively benign and efficiency-enhancing,[2] but here the DOJ took a dramatically different course. The DOJ required partial divestitures of assets from the acquired company's business as well as licensing commitments and complete elimination of the

[1] United States v. Monsanto Co. and Delta & Pine Land Co., Civ. No.: 1:07-cv-00992 (D.D.C., complaint filed, May 31, 2007). The DOJ's complaint, competitive impact statement, proposed final judgment, and hold separate and preservation of assets stipulation and order, are available at http://www.usdoj.gov/atr/cases/monsanto.htm.

[2] See Antitrust Division Policy Guide to Merger Remedies, Oct. 2004, at 20-21 n.30, available at http://www.usdoj.gov/atr/public/guidelines/205108.htm . Suits to enjoin vertical mergers or consent settlements that require vertical restructuring of assets beyond what is necessary to eliminate a horizontal problem in a merger that is both horizontal and vertical are exceptionally rare. In the past 15 years or so, only the occasional DOJ consent decree in a vertical situation has included some stand-alone conduct relief, such as firewall, fair dealing, and/or transparency provisions. Id. at 20 n.21-25, 29.

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horizontal overlap via divestitures from the acquiring company. To be sure, the DOJ did not accept the entreaties of some who wanted the DOJ to prevent any vertical integration whatsoever between Delta and Monsanto. But, significantly, the DOJ sought to preserve the opportunity for successful entry/expansion by Monsanto's rival trait developers even though commercialization of many of their traits then in development was expected to be two years or more into the future.

Background

Modifying Seed Germplasm with Genetically Engineered Traits

From time immemorial, commercial seed growers have selectively bred crops like cotton to build characteristics into the seed germplasm which improve quality, disease-resistance, yield, and suitability for particular climate conditions. In the last century or so, chemical companies like Monsanto, DuPont, Bayer, and Dow developed insecticides, fungicides, and herbicides to increase the yield of cotton and other agricultural plants. More recently, advances in biotechnology have enabled companies like Monsanto, DuPont, Bayer, and Syngenta to engineer traits into seed germplasm that greatly improve crop yields. Not surprisingly, such genetically modified seeds are sold at a higher price than those without such characteristics.

In the meantime, other seed crops such as soybeans and corn (with its burgeoning energy uses) that generate far more U.S. revenues than cotton have undergone horizontal acquisitions and vertical mergers, making antitrust developments in the cotton seed context highly relevant to seed growers and genetically modified trait suppliers for those other agricultural products as well.

The First Monsanto/Delta Attempted Merger

In 1999, Monsanto sought to acquire Delta, which at that time had an even higher share than it does today (perhaps as much as 75%) of cottonseed sales to U.S. planters. Monsanto not only offered to sell off its own recently acquired cottonseed business (Stoneville, which was then number two) but it actually did dispose of that business while the DOJ antitrust investigation was pending. Although the details never became public, the Clinton Administration DOJ must have had substantial unresolved vertical concerns regarding the competitive effects of integrating Monsanto's upstream genetic trait business with Delta's dominant downstream cottonseed germplasm business.[3] The DOJ prepared to sue on the grounds that the transaction "would have significantly reduced competition in cottonseed biotechnology to the detriment of farmers."[4] Unable or unwilling to

[3] The DOJ's vertical concerns were foreshadowed by the previous year's Monsanto acquisition of DeKalb. The DOJ allowed the transaction subject to "fix-it-first" commitments in lieu of a consent decree. Monsanto divested DeKalb's intellectual property relating to a form of genetic trait technology that potentially competed with Monsanto's own trait technology to the University of California at Berkeley. Although Monsanto was allowed to add DeKalb's competing corn germplasm business to its Holden and Asgrow brand corn seed businesses, Monsanto committed to license its Holden elite germplasm to over 150 seed companies for them to work with Monsanto's rivals in the development of competing genetic trait technologies. "Justice Department Approves Monsanto's Acquisition of DeKalb Genetics Corporation," Nov. 10, 1998, available at http://www.usdoj.gov/atr/public/press_releases/1998/2103.htm.

[4] Statement of John M. Nannes, Dep. Asst AG, Antitrust Div., before Antitrust Subcomm., Senate Judiciary Comm., September 28, 2000, at 2, available at http://www.usdoj.gov/atr/public/testimony/6581.htm.

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address the DOJ's concerns, Monsanto abandoned the transaction, paid Delta a substantial breakup fee, and was later sued by Delta for not having tried hard enough to overcome antitrust objections.

Evolving Market Structure and Dynamics

Historically, Monsanto has been well ahead of its rivals in developing, obtaining regulatory approvals, and commercializing genetically traited cottonseed. According to the DOJ, over 96% of all U.S. traited cottonseed sales contain Monsanto traits.

As producer of the one-time-patented and widely-used glyphosate-based herbicide Roundup, Monsanto had a natural incentive to develop glyphosate-tolerant strains of corn, soybeans, and cotton. Monsanto worked closely for years with industry leader Delta (as well as Stoneville) in engineering that trait into cottonseeds. Cottonseeds containing Monsanto's first-generation herbicide-tolerant trait (Roundup Ready) were initially sold commercially in 1997; cottonseeds containing the second-generation trait permitting more delayed over-the-top applications (RoundUp Ready Flex) appeared commercially in 2006.

Monsanto was also a pioneer in using gene bioscience to develop, obtain regulatory clearances, and commercialize for cottonseeds certain insect resistance traits, namely its proprietary Bollgard and Bollgard II traits. The bioscience basically entails inserting into elite seed germplasm (such as Delta's) the ability for the plant to produce proteins that kill lepidoptera larvae, such as cotton bollworms, that try to eat plant parts, thereby reducing the need for insecticide spraying.[5]

Other cottonseed genetic traits developers were lagging behind Monsanto, although several such firms were working closely with Delta to develop new traits geared to its elite germplasm.[6]

The DOJ's Complaint

Relevant Product and Geographic Markets

The complaint defined the relevant product market as the development, commercialization, and sale of traited cottonseed, apparently drawing no distinction between herbicide tolerance and insect resistance given the increasing practice of stacking both such traits into the same cottonseed germplasm. Genetically engineered traits are not sold separately to the farmer but rather seed growers (or their distributors) typically charge a price per bag and also collect a separate technology license fee. Non-traited and non-cotton seeds were excluded from the relevant market.

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[5] For much of the foregoing history, see Competitive Impact Statement at 5-9, United States v. Monsanto, available at http://www.usdoj.gov/atr/cases/f223600/223682.htm.

[6] In 2006, genetic traits developer DuPont and Delta formed the DeltaMax Cotton joint venture to develop and commercialize sometime after 2009 DuPont's herbicide tolerant trait Optimum GAT. In 2004, genetic traits developer Syngenta and Delta began working to incorporate Syngenta's VipCot insect-resistant trait for commercialization by 2009. Neither DuPont nor Syngenta owned its own cottonseed germplasm. Another traits developer, Dow, incorporated its proprietary WideStrike insect resistance trait into its own Phytogen cottonseed germplasm, representing roughly two percent of the national market.

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Because cotton growing conditions vary among geographic regions depending on weather, soil, and demands for weed and insect control and because Monsanto prices traits by region, the DOJ identified as two relevant geographic markets for evaluating the merger's effects the MidSouth (Mississippi, Arkansas, Missouri, and Tennessee) and the Southeast (Alabama, Georgia, Florida, South and North Carolina, and Virginia). In the MidSouth, Delta's share is 79% of sales and Monsanto (including Stoneville) would add 17%. In the Southeast, Delta accounts for 87% of sales and Monsanto another 8%.[7]

Horizontal Effects

Given these market definitions and shares, the horizontal case (#1 buying #2) was pretty much a no-brainer. The combined company would have over 95% of sales in each relevant market. In the MidSouth, the HHI measure of concentration would increase 3310 points to 9110, and in the Southeast it would increase 1489 points to 9184. Barriers to entry would remain very high given the substantial time (8 to 12 years), assets, expertise, and money (approximately $40 million) that are needed to breed high-performing cottonseed varieties and develop or acquire by license the requisite biotech traits to insert into those varieties.[8] With the elimination of competition between the merging firms and enhanced unilateral market power held by the combined firm, plainly cotton farmers would face fewer (or effectively no) choices and higher prices.

Vertical Effects

Because Delta's trait licenses with Monsanto allowed Delta to stack other suppliers' traits in the same cottonseed germplasm with Monsanto traits, whereas Monsanto's licenses with most other cottonseed growers forbid that kind of stacking, and because Delta had developed so many high-quality lines or varieties of germplasm suitable for the relevant MidSouth and Southeast geographic markets, Delta was the best, if not the only, viable partner for doing trait development and commercialization work with Monsanto's bioscience rivals, targeted at those markets. Moreover, particularly since the 1999 Monsanto acquisition of Delta fell through, Delta had been working with all of Monsanto's major trait rivals, Syngenta, DuPont, Bayer, and Dow. In particular, cooperation between Syngenta and Delta had led to a 2004 agreement to market cottonseed containing Syngenta's VipCot insect resistance traits by as early as 2009. Due to that agreement's compensating Delta with 70% of the net trait technology fees (as opposed to only 30% under Delta's Monsanto agreement), Delta would have a strong financial incentive to maximize sales of VipCot traited cottonseeds.

The DOJ concluded that the acquisition of Delta by Monsanto would eliminate Delta as a partner for Syngenta and other trait developers and would delay or deter the development and commercialization of cottonseed traits to compete against Monsanto's. The loss of that important independent platform would result in cotton farmers facing reduced choices and higher prices.[9]

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[7] Complaint ¶¶ 23, 34-38.

[8] Id. ¶¶ 28, 39-40, 43-44.

[9] Id. ¶¶ 24-29, 42.

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Consent Decree

Horizontal Remedies

The Proposed Final Judgment ("PFJ")[10] addressed the loss of horizontal competition between Delta and Monsanto principally by requiring divestiture of all of Stoneville's business, including Stoneville's breeding facilities and germplasm development pipeline, to a DOJ-approved purchaser, Bayer CropScience ("Bayer"), a division of German chemical giant Bayer AG. Prior to the divestiture, Bayer was already the second largest cottonseed supplier to US farmers. This prominence was attributable to the rapid success of Bayer's FiberMax brand, which is well suited to the drier Southwest but not to the more humid MidSouth and Southeast, where Bayer's pre-divestiture market share was actually quite low. The PFJ also required Monsanto to license its current cottonseed traits for insect resistance (Roundup Ready and Roundup Ready Flex) and herbicide tolerance (Bollgard and Bollgard II) to Bayer. The license's provisions relating to stacking rights, revenue sharing, and options for licensing future traits must be at least as favorable to Bayer-owned Stoneville as the license terms that Monsanto previously had granted Delta.

Because the required divestiture and licensing would not fully restore the lost competition between Monsanto and Delta, the PFJ also required Monsanto to divest to Bayer additional cottonseed germplasm and technology that had been under development at Monsanto outside of Stoneville. First, Monsanto had to divest the exclusive right to commercialize certain "Advance Exotic Yield Lines," essentially cottonseed germplasm containing yield-increasing traits well suited for use as early as 2009 in the MidSouth and Southeast which had been developed through conventional cross-breeding rather than transgenic modification. Second, Monsanto was required to divest to Bayer specific cottonseed germplasm lines from Monsanto's "Marker Assisted Breeding" (MAB) program, which used molecular technology to aid selection of promising breeding lines and was expected to be the source of new marketable varieties for the Stoneville business as early as 2011. Third, the PFJ divested certain rights to Stoneville's new owner to use the output of Monsanto's Cotton States germplasm breeding program, for use in the MidSouth and Southeast.[11]

Vertical Remedies

Although the DOJ's Complaint, PFJ and Competitive Impact Statement ("CIS") do not use the word "vertical," it is clear that the remainder of the PFJ was designed not to rectify the lost horizontal competition between Monsanto and Delta but rather to address concerns about merger-caused vertical constraints upon the future development and commercialization of genetically engineered cottonseed traits. Basically the DOJ sought to ensure that: 1. there would be at least one "ef-

[10] The PFJ text is available at http://www.usdoj.gov/atr/cases/f223600/223679.htm.

[11] Under the Cotton States program, Monsanto was cross-breeding Stoneville germplasm with germplasm owned by small independent breeders. Monsanto also divested to Americot its NexGen cottonseed business, a brand suited to the Southwestern U.S. and not the relevant markets in this case. See Monsanto Press Release, "Monsanto Company Reaches Agreement with US Department of Justice on Elements of Consent Decree," May 31, 2007, available at http://monsanto.mediaroom.com/index.php?s=43&itm=493. When Monsanto repurchased the Stoneville brand through Emergent Genetics' US cotton business, it had obtained the NexGen brand as part of that transaction.

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fective and competitive [germplasm] platform for trait development,"[12] namely the buyer of the "Enhanced Stoneville Assets," and 2. that transgenic trait developer Syngenta's ongoing program to commercialize an insect resistance trait (VipCot) to compete against Monsanto's Bollgard trait would not be delayed or derailed by the Delta merger. Although the DOJ used the terms "platform" and "partner" to describe the cottonseed grower's germplasm business, it is not inappropriate to think of the grower as the downstream entity that sells the combined product on to the farmer and the genetically modified trait developer (i.e., Syngenta, DuPont, Dow, Bayer) as the upstream input supplier.

The DOJ did not consider Stoneville (even as enhanced by Monsanto's Advanced Exotic Yield Lines and MAB Lines and the Cotton States Licensed germplasm) to be a sufficient platform in terms of scale and scope to ensure adequate distribution of non-Monsanto transgenic traits. To remedy that concern, the PFJ required Monsanto to divest to the Stoneville buyer (Bayer) 20 of Delta's conventional lines of cottonseed germplasm suited to the MidSouth and Southeast, four of which (including the famous "Delta Pearl") are recurrent conventional parents for Delta's traited lines representing 55% of all cottonseed sold in the Southeast, four others of which are conventional lines also containing the pedigrees of Delta's popular MidSouth and Southeast varieties, and 12 more so highly ranked for yield, fiber, and disease resistance in the MidSouth and Southeast that they were selected for introgression with Monsanto's and Syngenta's traits.[13] Additionally, the PFJ required the combined company to divest to Bayer from Delta the conventional lines that Syngenta had sold to Delta a year earlier. Also, because many of the Advanced Exotic Yield Lines and MAB Lines to be divested by Monsanto to Bayer (the Stoneville buyer) were already introgressed with Monsanto traits, the PFJ required Monsanto to permit Bayer to breed out the Monsanto traits so as to create Null Lines and to provide Bayer any information necessary for Bayer to obtain regulatory approval for non-Monsanto traited varieties developed from those Null Lines.

Prior to the Monsanto takeover, Delta had functioned as a platform or partner, inter alia, for developing and inserting Syngenta's VipCot insect resistance trait into 43 elite Delta cottonseed germplasm varieties. Given that a Monsanto-owned Delta would have no incentive to foster competition against its parent Monsanto's Bollgard traits, the merger would have the vertical anticompetitive effect of blocking or at least delaying Syngenta's most promising route to market for its VipCot trait. Consequently, the PFJ obliged Monsanto to offer Syngenta, working alone or in conjunction with a partner of Syngenta's choice, the right to acquire and complete these 43 lines for commercialization, including stacking the VipCot trait and cross-breeding to develop additional lines, and to also offer Syngenta any necessary assets and licenses for the purpose of finishing the 43 lines for commercialization.

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[12] CIS at 16.

[13] The PFJ limits Bayer from triple-stacking for seven years in these 20 divested varieties a Monsanto glyphosate tolerance trait, a Monsanto insect resistance trait, and a glyphosate tolerant trait available at the time of the complaint. The PFJ permits Monsanto to obtain a license back from Bayer to exclusively sell varieties that contain only Monsanto's traits.

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Tunney Act Review

At this writing, the District Court's review of the decree under the Tunney Act[14] is in the very earliest stages. Statements by the National Black Farmer's Association,[15] the American Antitrust Institute,[16] the Center for Food Safety,[17] representatives of several state attorneys general,[18] and Monsanto's major traited seed competitor DuPont[19] in the days leading up to the settlement announcement tend to indicate that some critical comments are likely to be filed with the DOJ, requiring the DOJ to respond to them before Judge Urbina. Whether there will be any efforts to intervene in the Tunney Act proceeding remains to be seen. However, the possibility of a separate private Clayton Act suit to prevent or undo the merger—hotly rumored for weeks before the DOJ announcement—seems to have faded.

Post-settlement developments have raised a few questions as well. Although Syngenta is an intended beneficiary of certain provisions

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[14] Antitrust Procedures and Penalties Act of 1974, as amended, 15 U.S.C. § 16.

[15] Reuters, "US Allows Monsanto-Delta Deal with Conditions," May 31, 2007, ("John Boyd, president of the 80,000-member National Black Farmers Association, said he also was not satisfied by the requirements. 'This is a sad deal for us. We wanted the DOJ to step up to the plate,' said Boyd. 'Now we producers will be faced with astronomical prices on seeds with Monsanto taking control of the whole industry.' Boyd reiterated Thursday a threat to file a lawsuit to try to block the deal.").

[16] "AAI Calls DOJ's Consent Decree in Monsanto's Proposed Acquisition of Delta and Pine Land a 'Disappointing Development' in Merger Enforcement," June 5, 2007, available at http://www.antitrustinstitute.org/Archives/MonDPLpr.ashx.

[17] Bloomberg, "Monsanto Wins U.S. Approval to Buy Delta and Pine Land," May 31, 2007 ("'We are going to end up with two cottonseed firms controlling about 90 percent of the market, so we see even fewer choices and higher prices,' Bill Freese, a policy analyst with the Center for Food Safety, said from Washington. 'This merger should have been blocked.'").

[18] Reuters, "Opponents to Monsanto/Delta Deal Await DOJ Ruling," May 24, 2007 ("'Our concern is that this will allow Monsanto... to corner the market on certain biotechnology traits,' said the Arkansas chief deputy attorney general, Justin Allen... 'It will take DPL out of the market for working with other companies on new traits... and it will foreclose and shut down the market for competition on these traits,' Allen said. 'Monsanto will have the vast amount of control over genetically altered seeds. Monsanto... will be able to charge whatever it wants.'... Allen said Arkansas was not satisfied with the current [DOJ consent decree] proposal and was considering options, including submitting complaints to a federal judge who would review the Justice Department decision, or a lawsuit in conjunction with other states. A lawsuit, however, would be a "monumental task," he said.); Reuters, "US Allows Monsanto-Delta Deal with Conditions," May 31, 2007 ("Arkansas Attorney General Dustin McDaniel, whose office was part of a group of states investigating the transaction, said he has no plans to file a suit. 'We believe that the states' participation' in the review 'resulted in concessions by Monsanto that we hope will be beneficial to the market,' McDaniel said.) Attorneys general from as many as 15 states participated in joint meetings with the DOJ and the parties. See Defendant Monsanto's Description and Certification of Written or Oral Communications Concerning the Proposed Final Judgment, filed June 11, 2007.

[19] Reuters, "US Allows Monsanto-Delta Deal with Conditions," May 31, 2007 ("DuPont spokesman Doyle Karr said the Justice Department remedy fell short of protecting competition and the company was considering 'its options to block the acquisition in the courts.'"); "Foes of Monsanto Dig In," Wall St. J., Dec. 11, 2006, at C1 ("'The proposed Monsanto acquisition of Delta & Pine Land is clearly anticompetitive,' said Doyle Karr, a spokesman for DuPont Co., the Wilmington, Del., chemicals giant. 'We have serious concerns about the impact that it would have on farmers, the agriculture industry and ultimately consumers.'").

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in the proposed decree, Syngenta was surprisingly cautious in its public statements at the time the DOJ announced its settlement.[20] Moreover, to date it does not appear from any public disclosures that Syngenta has in fact acquired from the combined Monsanto-Delta the 43 lines of elite Delta germplasm introgressed with Syngenta's VipCot traits. Additionally, the proposed decree clearly contemplated that the buyer of the Enhanced Stoneville Assets, namely Bayer, would be a vigorous cottonseed rival to Monsanto-Delta and a platform/partner for Monsanto's various rivals in the development and commercialization of transgenic traits. However, three weeks after the DOJ announcement and one day after completing the Stoneville transaction, Bayer and Monsanto "entered into a series of long-term business and licensing agreements" sounding much like an alliance. Seeking to "expand the base for [Bayer's] Liberty herbicide business" and "broaden the availability of [Bayer's] LibertyLink [herbicide tolerance] technology outside [Bayer's] core cotton and canola seed business," Bayer granted Monsanto licenses to market corn and soybean seeds stacked with Bayer traits as well as Monsanto traits.[21] Without additional information, it is unclear whether these new arrangements will undercut the role that the DOJ envisioned for Bayer as a platform or partner for Monsanto's rivals in the traited cottonseed field.

Broader Significance of the DOJ's Vertical Concerns

The most significant aspect of this settlement is that the DOJ obviously is on the job, alert to the potentially anticompetitive effects of the vertical features of at least certain mergers. To some observers, this may be a surprise. A very high percentage of DOJ merger complaints in recent years, whether litigated or settled, have been strictly horizontal, the last notable vertical ones having been several years ago.[22] While the Horizontal Merger Guidelines have been expanded and refined several times since the combined 1984 Merger Guidelines, the non-horizontal features of those old Guidelines have languished without revision for more than two decades.[23]

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[20] Reuters, "US Allows Monsanto-Delta Deal with Conditions," May 31, 2007 ("Syngenta spokeswoman Anne Burt said Thursday that the company was still evaluating the Justice Department's remedy but was generally pleased. 'We need more details, but right now it is something that it looks to be in sync with what we are trying to do,' said Burt.").

[21] "Bayer CropScience and Monsanto Enter Long-Term Business and License Agreements for Key Enabling Technologies," June 20, 2007, available at http://www.bayercropscience.com/bayer/cropscience/cscms.nsf/id/20070620?Open&ccm=400&L=EN&markedcolor=.

[22] E.g., Complaints and Competitive Impact Statements, United States v. Northrup Grumman Corp., et al., Civ. No. 1:02CV02432 (D.D.C., 2002), available at http://www.usdoj.gov/atr/cases/northrop.htm; and United States v. Premdor, et al. Civ. No. 1:01CV01696 (D.D.C., 2001), available at http://www.usdoj.gov/atr/cases/indx327.htm. The DOJ investigated but did not find fault with vertical integration between movie studios and their online retailing joint venture. DOJ press release, "Justice Department Closes Antitrust Investigation into the Movielink Movies-on-Demand Joint Venture," June 3, 2004, available at http://www.usdoj.gov/atr/public/press_releases/2004/203932.htm.

[23] To be sure, the DOJ retains those non-horizontal guidelines on the Antitrust Division website at http://www.usdoj.gov/atr/public/guidelines/2614.htm. In contrast, the European Commission is actively engaged in an extensive public consultation to develop its own guidelines on non-horizontal mergers, including vertical ones. See Draft Commission Guidelines on the Assessment of Non-Horizontal Mergers, February 13,

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The foreclosure theory of seminal Supreme Court vertical merger cases reflected in the DOJ's 1968 Merger Guidelines was ridiculed as bad economics by the "Chicago School" and disappeared from the 1982 Merger Guidelines. Because there is normally only one monopoly profit to be taken in a vertically related marketplace and because suppliers and customers usually can realign relationships soon after their rivals' vertical integration, foreclosure arguably does not lead to anticompetitive results in the way the discarded theory presumed. In lieu of quantitative or qualitative foreclosure, the 1982 and 1984 Guidelines articulated two possible theories for challenging vertical mergers: 1. that such mergers may increase barriers to entry by requiring simultaneous entry at two levels, thereby enabling the incumbent firms at one or the other level to collude; or 2. that if the upstream business is rate base/rate of return or similarly regulated, costs wholly or partially attributable to the downstream business could be shifted anticompetitively to the upstream level. Subsequent economic writing and case law suggested that vertical mergers might be harmful if they: 1. raise rivals' costs, thereby enabling the vertically integrated firm to raise price above its own costs; 2. allow for exchange of non-public information among rivals that may lead to collusion; or 3. incentivize vertically integrated firms to discriminate in the price or provisioning of essential inputs required by unintegrated rivals.[24]

In the course of these developments in economic reasoning, the Clinton DOJ, despite requiring consent decrees in a handful of vertical mergers,[25] observed that "enforcement agencies need to exercise caution in taking actions against vertical transactions to avoid chilling efficiency-enhancing mergers" and noted "the lack of a robust theory of general applicability" to predict when vertical mergers cause harm.[26] The Bush II DOJ in turn made clear its view that most vertical transactions produce merger-specific efficiencies, "including elimination of the double-marginalization problem (i.e., the vertically integrated firm has an incentive to charge a lower price for the final good compared to the price that results from each of the merging firms setting prices independently), coordination of the design of intermediate and final products, and perhaps reduction or elimination of other types of transaction costs."[27]

2007, available at http://ec.europa.eu/comm/competition/mergers/legislation/non_horizontal_consultation.html.

[24] See ABA Antitrust Section, Mergers and Acquisitions: Understanding the Antitrust Issues, Second Edition (2004) at 347-366.

[25] E.g., Complaints and Competitive Impact Statements, United States v. MCI Communications Corp., et al., Civil Action No. 94-1317 (TFH) (D.D.C., 1993), available at http://www.usdoj.gov/atr/cases/mci0000.htm; United States v. Sprint Corp., et al., Civil Action No. (D.D.C. 1996), available at http://www.usdoj.gov/atr/cases/sprint1.htm; United States v. Tele-Communications, Inc., et al., Civil Action No. (D.D.C. 1996) available at http://www.usdoj.gov/atr/cases/f0200/0243.htm; and DOJ Press Release in United States v. AT&T Corp. and McCaw Cellular Communications Inc., July 15, 1994, available at http://www.usdoj.gov/atr/public/press_releases/1994/211893.htm.

[26] S. Sunshine, Dep. Asst AG, "Vertical Merger Enforcement Policy," April 5, 1995, at 4, available at http://www.usdoj.gov/atr/public/speeches/2215.htm. For the views of a Clinton-era FTC chairman, see Chairman Pitofsky, "Vertical Restraints and Vertical Aspects of Mergers–a U.S. Perspective," Oct. 16-17, 1997, available at http://www.ftc.gov/speeches/pitofsky/fordham7.shtm.

[27] Antitrust Division Policy Guide to Merger Remedies, Oct. 2004, at 20-21 n.30, available at

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In the quite recent past, there has been some suspicion (perhaps unfair or even flat wrong) that the DOJ staff will not even bring vertical concerns to the Front Office because those running the Antitrust Division almost irrefutably presume all vertical mergers are efficiency-enhancing. The staff's seeming indifference to vertical concerns involved in the reintegration of AT&T with local exchange bottlenecks two decades after the Antitrust Division forced the vertical breakup of the old Bell System has helped fuel that suspicion.[28] Nevertheless, the Monsanto-Delta consent decree demonstrates that in the right circumstances, and with key factual input from competitors, customers, and others, the DOJ will insist upon finely cut divestitures and detailed licensing requirements to prevent perceived vertical harm.

What is disappointing in the DOJ's published materials regarding the Monsanto-Delta settlement, however, is the absence of any DOJ explanation as to just what economic theory underlies its vertical enforcement stance. In its complaint, the DOJ said simply that the merger would "eliminate [Delta] as a partner independent of Monsanto for developers of traits that would compete against Monsanto" and that one of those independent trait developers (Syngenta) would be "delayed or prevented" in its ongoing trait developmental efforts with Delta.[29] In its CIS, the DOJ stressed the significance of losing Delta as an independent "platform." For a DOJ that has sought to obliterate the Aspen Skiing jilted co-venturer and MCI essential facility theories for Sherman Act Section 2 liability,[30] it may seem somewhat extraordinary to fashion a Clayton Act Section 7 theory of liability based on the loss by large sophisticated upstream suppliers like Syngenta, DuPont, Bayer, and Dow of a prospective or existing downstream partner like Delta. Nonetheless, the DOJ obviously concluded that post-merger, the non-Monsanto trait developers/suppliers could not simply realign with firms other than Delta or build/acquire their own downstream cottonseed germplasm business.

As the DOJ indicated without articulating an explicit vertical effects economic theory, the critical factors in this case were: 1. that Delta

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http://www.usdoj.gov/atr/public/guidelines/205108.htm
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[28] When the DOJ investigated the SBC acquisition of AT&T and the consequent reintegration of AT&T's leading long distance operations (for business and residential customers) with much of its former incumbent local exchange business in the Baby Bell territories of Southwestern Bell, PacTel, and Ameritech (as well as SNET), and later BellSouth, DOJ staff gave virtually no consideration to vertical merger issues, including inflation of rivals' costs through discriminatory pricing and provisioning – issues that were once at the heart of the DOJ suit to break up the company. The DOJ's SBC decree and its press release blessing the BellSouth deal focused entirely on atomistic horizontal overlap issues, namely whether AT&T and the local incumbent were the only two actual or likely providers of local private lines serving buildings housing business enterprises. Complaint, United States v. SBC Communications, Inc. et al., (D.D.C., Oct. 27, 2005), available at http://www.usdoj.gov/atr/cases/f212400/212421.htm and Competitive Impact Statement (Nov. 16, 2005), available at http://www.usdoj.gov/atr/cases/f213000/213026.htm;

"Statement of Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth," October 11, 2006, available at http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm.

[29] Complaint ¶ 42.

[30] Amicus Brief for the United States and FTC in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, U.S. Supreme Court, May 2003, available at http://www.usdoj.gov/atr/cases/f201000/201048.htm.

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owned the lion's share of elite cottonseed germplasm varieties suitable for the MidSouth and Southeast; and 2. that it would take a decade or more and many millions of dollars to develop comparable elite germplasm. This was not a situation where competitors could simply realign relationships in the wake of rivals' vertical integration. Moreover, the merger (unless regulated by the decree) would not simply foreclose traits companies from dealing with Delta, it would prevent traits developers from competing for end-users. At bottom, then, by focusing on the traits suppliers' merger-created inability to reach cotton growers with seeds containing their non-Monsanto traits and by mandating additional divestitures and mandatory licensing, the DOJ has breathed some new life into the venerable foreclosure theory for invalidating or conditioning certain vertical mergers.

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