EPIC FAIL: WHY IT IS BETTER TO FOCUS ON A COMPETITIVE EFFECTS ANALYSIS THAN THE FAILING FIRM DEFENSE

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The failing firm defense is the fortune cookie of merger analysis: prevalent in merging parties' advocacy, tantalizingly full of potential, but in the end, stale and unsatisfying. However, the failing firm defense is not the only way for merging parties to explain the context of their transaction to the Antitrust Division of the Department of Justice and the Federal Trade Commission (the "agencies") or to courts. Merging parties typically can achieve more favorable outcomes by presenting facts about firms' relative competitiveness and the competitive conditions facing the industry in the context of a competitive effects analysis rather than within the tight strictures of the failing firm defense. These compelling arguments are especially important as the failing firm defense has become top-of-mind as businesses grapple with the impact of COVID-19.[2]

I. THE FAILING FIRM DEFENSE HAS PROVED TO BE A HIGH HURDLE

A. The Failing Firm Defense Has Stringent Requirements

The Horizontal Merger Guidelines and case law both endorse a failing firm defense.[3] The defense is designed as a mechanism to preserve failing assets that otherwise would exit from a market. The prototypical example is a strong hospital acquiring a failing hospital, allowing both hospitals to keep operating and serving patients. The rationale for allowing the failing firm defense is that customers "are not worse off after the merger" than they would be but-for the merger.[4]

In practice, however, the defense "rarely succeeds."[5] The agencies also will not lower the requirements for a failing firm defense during economic downturns, including the current COVID-19 induced recession.[6] This position is consistent with past practice, most recently in the Great Recession. There, the agencies warned that they would not relax the way they applied the failing firm defense to account for poor economic conditions.[7] The agencies have been similarly resolute during the pandemic,

2 Ian Conner, On "Failing" Firms — and Miraculous Recoveries, FTC Blog (May 27, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

3 See Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (2010), § 11 ("Horizontal Merger Guidelines"); see also *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).

4 Horizontal Merger Guidelines § 11.

5 4A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 953 (4th ed. 2016) ("Antitrust Law").

6 See Ian Conner, On "Failing" Firms — and Miraculous Recoveries, FTC Blog (May 27, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

7 See Carl Shapiro, Competition Policy in Distressed Industries (May 13, 2009), https://www.justice.gov/atr/speech/competition-policy-distressed-industries; J. Thomas Rosch, Implications of the Financial Meltdown for the FTC (Jan. 29, 2009), at 10, https://www.ftc.gov/sites/default/files/documents/public_statements/implications-financial-meltdown-ftc/090129financialcrisisnybarspeech.pdf.

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explaining that it is no excuse for dampening enforcement.[8] The agencies' concern is easy to grasp: they fear that changing their enforcement standards to account for temporary (even if large) economic shocks will cause long-term harm when the shock subsides.

Under the 2010 Horizontal Merger Guidelines, to offer a successful failing firm defense, a company must meet three criteria. The company must demonstrate (i) that it is in imminent danger of financial failure, in other words that it cannot meet its financial obligations in the near future, (ii) that it could not successfully reorganize under Chapter 11 of the bankruptcy code, and (iii) that it has no reasonable alternative acquisition offer, despite good faith efforts, that would allow it to maintain its assets and would pose a less severe danger to competition than the proposed merger.[9] The Horizontal Merger Guidelines framework largely mirrors the failing firm criteria first enumerated in *Citizen Publishing Co. v. United States*.[10] Lower courts have followed similar criteria to the Horizontal Merger Guidelines.[11]

To meet the first prong, a firm must establish that there is "imminent danger" of financial failure, i.e. it will not meet its financial obligations in the near future. Whether a firm can meet its financial obligations in the near future is judged on a case-by-case basis, with the agencies considering factors including: sufficient cash flow,[12] whether total liabilities exceed total assets over time,[13] and whether a company's costs are greater than its revenues.[14] The agencies also consider the ability of a firm to obtain new revenues or new customers, whether its productivity is declining, whether its supply of key inputs is being exhausted, and whether it is simply being poorly run by current management.[15] Declining sales or negative current profits are not sufficient to show a firm will be unable to meet its future financial obligations.[16] This prong can create a self-fulfilling prophesy in the case of unconsummated mergers. The very fact that the merging parties are able to submit themselves to a lengthy antitrust investigation and (potentially) litigation may suggest in and of itself that the seller is not in imminent danger of financial failure.

The second prong requires that a firm be unable to reorganize under Chapter 11 of the bankruptcy code. The prospects of reorganization must be "dim" or "nonexistent."[17] The agencies will look at whether a company's financial situation can be resolved if its debt is eliminated in a bankruptcy proceeding. Reorganization is not possible if a company cannot meet its current and future operating expenses from expected revenues and has no more capital.[18] The agencies may go so far as to speak with a company's creditors to determine how willing they are to restructure the company's debts.[19]

Meeting the third prong — that there is no reasonable alternative acquisition offer — is difficult. The issue turns on the good faith effort of the seller to elicit a competing offer. For example, in *United States* v. *Energy Solutions*, two low-level radioactive waste disposal companies failed to show that the buyer was the "only available purchaser" of the purportedly failing seller.[20] The court explained that the merging parties must demonstrate that the seller made "good faith efforts to elicit reasonable alternative offers…that would both keep it in the market and pose a

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8 Joint Antitrust Statement Regarding COVID-19, DOJ (Mar. 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 ("Joint Antitrust Statement Regarding COVID-19").

9 Horizontal Merger Guidelines § 11.

10 394 U.S. 131 (1969).

11 See *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017) (applying a two-part test: "To successfully assert the defense, defendants have the burden of showing (1) that the resources of [the seller] were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, and (2) that there was no other prospective purchaser for it.") (internal citations omitted).

12 US Contribution to the Roundtable on Failing Firm Defence, Directorate for Financial and Enterprise Affairs Competition Committee (Oct. 6, 2009), at 4, https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/failingfirm.pdf ("US Contribution to the Roundtable on Failing Firm Defence").

13 See *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1134-35 (N.D. Cal. 2001).

14 US Contribution to the Roundtable on Failing Firm Defence, at 4.

15 *Id.*

16 *Id.*

17 *California v. Sutter Health Sys.*, 130 F. Supp. 2d at 1135.

18 US Contribution to the Roundtable on Failing Firm Defence, at 5.

19 *Id.*

20 *United States v. Energy Sols.*, 265 F. Supp. 3d at 445.

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less severe danger to competition."[21] The court found that the seller did not make good faith efforts to elicit reasonable alternative offers because it entered into "no-talk" and "no-shop" agreements with the buyer that hamstrung the seller's ability to solicit alternative buyers.[22] The agencies also have stated that sellers soliciting alternative offers must avoid discouraging any offer above liquidation value, meaning that they must not suggest that bids below a certain level will not be entertained.[23] This provision can be difficult to meet because it requires a firm that is in dire financial straits to undertake a time-consuming and costly wide-ranging search for buyers.

As the three-pronged test suggests, the agencies typically will not fast-track potentially anticompetitive mergers beyond the expedited timing requirements for bankruptcy mergers under the HSR Act even if a firm faces imminent liquidation.[24] For example, Dean Foods filed bankruptcy in November of 2019, and Dairy Farmers of America ("DFA"), a national cooperative, successfully bid to purchase most of Dean Foods' milk processing plants.[25] Following a five-month investigation, the Department of Justice ("DOJ") filed a consent decree that required DFA to divest three of Dean Foods' milk processing plants in the Midwest and New England.[26] In addition, DFA abandoned plans to acquire additional plants in the Upper Midwest in response to DOJ concerns.[27] DOJ permitted rival dairy Prairie Farms to acquire Dean Foods' plants in the South and Midwest after DOJ concluded that there were no alternative bidders and the plants would otherwise be shut down.[28] The Prairie Farms acquisitions appear to have surmounted the failing firm hurdle.

B. Merging Parties Claiming the Failing Firm Defense Often Fail

Because the failing firm defense functions as a shield from agency enforcement, it stands to reason that the requirements for success are lofty. There are few known examples of the agencies accepting a failing firm defense, though some non-public matters likely have been closed based on this basis.[29] In one of the few publicly-available examples, the FTC closed an investigation into Scott & White Healthcare's 2009 consummated acquisition of rival King's Daughters Hospital in Bell County, Texas. The FTC explained that it was not seeking to unwind the deal because the only alternative buyer declined to acquire the King's Daughters Hospital due to its poor financial condition.[30] Another example is a 2016 FTC matter clearing the merger of the two largest providers of certain types of physician services in St. Cloud, Minnesota after the buyer agreed to eliminate non-compete agreements and provide incentives for physicians to leave for other practice groups or to establish a new group.[31] The FTC recognized a failing firm defense when it stated that the seller was "a financially failing physician practice group that has been unable to

21 *Id.* (citing *Dr. Pepper/Seven–Up Co.* v. FTC, 991 F.2d 859, 865 (D.C. Cir. 1993)).

22 *Id.*

23 US Contribution to the Roundtable on Failing Firm Defence, at 6.

24 One exception is the 2010 *Tops Market/Penn Traffic* supermarket merger enforcement action. In this matter, where Penn Traffic had filed for Chapter 11 bankruptcy, the FTC stated: "Because a full FTC investigation before the deal was completed could have led the bankruptcy court to liquidate the Penn Traffic supermarket assets, the FTC staff reached an agreement with Tops that allowed the transaction to close immediately, while allowing staff to complete its review after the deal was completed. At the same time, Tops agreed to keep all the newly acquired Penn Traffic stores open and subsequently to sell any stores that posed competitive concerns for the FTC." Press Release, U.S. Federal Trade Commission, FTC Order Requires Tops Market to Sell Severn Penn Traffic Supermarkets," (Aug. 4, 2010), https://www.ftc.gov/news-events/press-releases/2010/08/ftc-order-requires-tops-markets-sell-seven-penn-traffic.

25 DOJ proposes DFA sell additional Dean Foods Assets, Food Business News (May 4, 2020), https://www.foodbusinessnews.net/articles/15962-doj-proposes-dfa-sell-additional-dean-foods-assets.

26 Press Release, Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy; Department Also Closes Investigation into Acquisition of Other Dean Plants by Prairie Farms (May 1, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa.

27 *Id.*

28 *Id.*

29 The FTC and DOJ typically do not disclose the rationale for why they closed an investigation.

30 See Statement of Bureau of Competition Director Richard Feinstein on the FTC's Closure of Its Investigation of Consummated Hospital Merger in Temple, Texas (Dec. 23, 2009), https://www.ftc.gov/sites/default/files/documents/closing_letters/scott-white-healthcare/kings-daughters-hospital/091223scottwhitestmt.pdf.

31 See Press Release, U.S. Federal Trade Commission, Healthcare Provider in St. Cloud, MN Settles FTC Charges That Its Acquisition of Rival Provider Would Likely Lessen Competition for Certain Physician Services (Oct. 6, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/healthcare-provider-st-cloud-mn-settles-ftc-charges-its (explaining that St. Cloud Medical Group "is failing financially, has lost its sole remaining line of credit, and appears unlikely to improve its financial condition. Also, a number of physicians have already left the practice and others are likely to depart – and may leave the St. Cloud area altogether – if the merger does not close.").

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find an alternative purchaser for the entire practice," even though another physician group agreed to acquire a subset of the practice group.[32] In a concurring statement, Commissioner Ohlhausen argued that the seller did not meet the "stringent failing firm criteria set forth in the Horizontal Merger Guidelines and case law."[33] Nevertheless, she accepted the consent agreement because of the seller's unique financial circumstances and certain physicians' plans to leave that would "diminish the competitive significance" of the combined entity.[34]

Courts similarly have been skeptical of failing firm arguments.[35] There are few examples of merging parties prevailing on this issue.[36] Most recently, in *United States v. Energy Solutions*, the Department of Justice challenged a proposed merger between two providers of low-level radioactive waste disposal services.[37] While the court recognized that some evidence supported a conclusion that the seller was at imminent risk of failing (the first and second prongs of the analysis[38]), the court found that the merging parties failed to show that Energy Solutions was the only available purchaser (the third prong).[39] The court explained that the seller did not make a good faith effort to identify other purchasers and that it sought "fair value" for the company as opposed to any offer above liquidation value.[40]

As one can see from its three elements, the failing firm defense focuses entirely on a company's financial viability, *not* its competitive viability. In other words, the failing firm defense does not address the underlying question of whether the merger likely will substantially lessen competition. Rather than jumping straight to a failing firm argument, merging parties can achieve a favorable outcome to their merger investigation or litigation by approaching this issue from the perspective of a competitive effects analysis. This allows merging parties to present facts and arguments about their relative competitiveness and industry conditions without confining them to the elements of a failing firm defense.

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32 Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of CentraCare HealthSystem* (Oct. 6, 2016), https://www.ftc.gov/enforcement/cases-proceedings/161-0096/centracare-health-system.

33 Concurring Statement of Maureen K. Ohlhauasen, *In the Matter of CentraCare Health System* (Oct. 6, 2016) (footnote omitted), https://www.ftc.gov/public-statements/2016/10/concurring-statement-maureen-k-ohlhausen-matter-centracare-health-system.

34 *Id.*

35 Antitrust Law ¶ 953; see *United States v. Energy Sols.*, 265 F. Supp. 3d at 445.

36 See *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109; *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192 (N.D. Cal. 2000); see also *United States v. Energy Sols.*, 265 F. Supp. 3d at 444 (agreeing that the defense "rarely succeeds").

37 *United States v. Energy Sols*, 265 F. Supp. 3d at 420.

38 The court set out a two-part test, in which the first prong appears to encompass both the first and second prongs of the Horizontal Merger Guidelines' three-part test. See *id.* at 444 ("To successfully assert the defense, defendants have the burden of showing (1) that the resources of [the seller] were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, and (2) that there was no other prospective purchaser for it.") (internal citations omitted).

39 *Id.* at 444-45.

40 *Id.*

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II. A FIRM'S COMPETITIVENESS (OR LACK THEREOF) IS BETTER EVALUATED THROUGH A COMPETITIVE EFFECTS LENS, NOT FAILING FIRM

Competitive effects analysis avoids the all-or-nothing framework of the failing firm defense and shifts the focus to where it ought to be – the merging parties' competitive positioning, the competitive conditions in the industry, and what those facts say about the likely competitive effects of the proposed merger.

In the seminal *United States v. General Dynamics* case, the Supreme Court established that Clayton Act Section 7 analysis is forward-looking, and requires that courts consider evidence of the merging parties' ability to compete in the future.[41] In this merger between competing coal producers, the defense demonstrated that although the seller was highly profitable and not at risk of failing, it lacked uncommitted coal resources which limited its future ability to compete.[42] In permitting the merger, the Court explained that "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete."[43] Later decisions reaffirmed the dynamic merger analysis established in *General Dynamics*.[44]

Logically, then, if merging parties can demonstrate that one party will be weak going forward, anticompetitive effects are unlikely to result from the merger.[45] While courts rely on market shares and concentration statistics as a proxy for post-merger market power, they also must consider whether it is appropriate to extrapolate those market shares and concentrations into the future: "[E]ven accepting the [market share] statistics as the primary index of market power, 'only a further examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anticompetitive effect of the merger.'"[46] In *FTC v. Arch Coal/Triton*, for example, the court declined to enjoin a merger between two competing coal suppliers in part because the seller was a "relatively weak competitor" with "no convincing prospects for improvement."[47] The court found that although the failing firm defense did not apply, the seller's high-cost position, low coal reserves, uncertain future competitive prospects, weak financial position, and no realistic prospects for alternative buyers remained "relevant to an examination of whether substantial anticompetitive effects are likely from the transaction."[48] This approach is consistent with the Horizontal Merger Guidelines, which explain that "recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."[49]

Some courts have skeptically addressed this analysis as a "flailing firm" or "weakened competitor" argument.[50] One court called it the "Hail-Mary pass of presumptively doomed mergers."[51] These cases generally focus on the weak company's financial position. For example, in *Kaiser Aluminum & Chemical v. FTC*, the Seventh Circuit wrote that "[f]inancial weakness, while perhaps relevant in some cases, is probably the

41 *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

42 *Id.* at 503.

43 *Id.* at 501.

44 See, e.g. *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979); *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 121 (1975).

45 *US v. Int'l Harvester Co.*, 564 F.2d 769, 773 (7th Cir. 1977) (relying on the "very precarious" financial situation of a seller to affirm a district court judgement that a merger was not anticompetitive).

46 *Id.* at 774 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38 (1962)).

47 *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 157 (D.D.C. 2004).

48 *Id.*

49 Horizontal Merger Guidelines § 5.2.

50 See, e.g. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir. 1991) (explaining that the court will credit the "weak competitor" defense "only in rare cases, when the defendant makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's prima facie case"); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 572 (6th Cir. 2014) (calling the "weakened competitor" argument "probably the weakest ground of all for justifying a merger"). We do not like these monikers because ultimately the argument is about competitive effects, not meeting specific elements of a defense.

51 *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d at 572.

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weakest ground of all for justifying a merger."[52] Other courts have blocked mergers on similar grounds.[53] While these courts were right to demand evidence that a purportedly weak competitor actually was weak, they inadvertently fell into the trap of focusing on the companies' financial condition while overlooking dynamic company- and industry-level factors that bear on the question of what the world will look like but-for the transaction.

Indeed, delving into the "why" behind a company's poor performance informs proper merger analysis because it places the emphasis on competitive effects. Companies may decline for any number of reasons other than financial reasons, such as: aggressive competition; oversupply or excess capacity in the market; declining or changing customer demand; failed business strategy; failure to keep pace with competing firms; product quality or brand issues; leadership problems; criminal or civil litigation; or any number of other reasons. These problems have different solutions and companies can recover from some more easily than others. Assessing the "why" behind a fledgling company allows the fact finder to determine the likelihood that those issues will change in the future, and consequently, what effect a merger actually will have on competition. This is not a defense for or justification of an otherwise anticompetitive merger,[54] but rather evidence establishing why a merger is not anticompetitive in the first place.

The merging parties deployed this argument in *T-Mobile/Sprint*, persuading the court that Sprint was a weak competitor that likely would decline further going forward. In 2019, a group of states led by New York challenged the proposed merger between wireless telecommunications providers T-Mobile and Sprint.[55] The defense argued that Sprint was declining in competitive significance, and would weaken further in the future.[56] The court agreed that "a variety of conditions … may render statistical market share evidence misleading, including a firm's lack of resources required to compete long-term, financial difficulties that constrain the firm from improving its competitive position, and poor brand image and sales performance."[57] The court then analyzed Sprint's competitive position in the market and found that it was in the midst of a downward spiral. Sprint made some strategic missteps in the past and consequently was falling farther and farther behind its rivals. As the court explained, "Sprint's network and product offerings have been distinguished for years for poor operational quality and negative customer perception … Sprint's financial difficulties hamper its ability to invest in its network, which in turn prolongs its poor network quality and hurts its ability to generate the revenues necessary to improve its financial condition."[58] Sprint did not qualify as a failing firm – indeed, the defense did not even argue the point – but its decline was a key factor in convincing the court that the merger would not lead to anticompetitive effects after the parties' consent agreement with the Department of Justice.

Another example is Boeing's proposed acquisition of McDonnell Douglas, a 3-to-2 merger with entry barriers that the FTC unconditionally cleared in 1997, despite the fact that Boeing's market share for large commercial aircraft was approximately 60%.[59] The Commission majority's closing statement issued after an "extensive and detailed investigation" states that "Our decision not to challenge the proposed merger does not reflect a conclusion that McDonnell Douglas is a failing company or that Douglas Aircraft is a failing division."[60] Instead, the majority found that "(1) McDonnell Douglas, looking to the future, no longer constitutes a competitive force in the commercial aircraft market and (2) there is no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern, that would

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52 *Kaiser Aluminum & Chemical v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981).

53 See *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1164-65 (9th Cir. 1984) (finding that "a company's stated intention to leave the market or its financial weakness does not in itself justify a merger"); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d at 572 (finding that the seller was not in "such dire straits before the merger that it 'was not a meaningful competitive constraint'").

54 See *FTC v. Univ. Health*, 938 F.2d at 1221 (explaining that an acquired firm's weakness is one of many factors that a defendant can introduce to rebut the government's prima facie case, but is not a defense).

55 *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434, Opinion and Order (S.D.N.Y. Feb. 11, 2020).

56 *Id.* at 84.

57 *Id.*

58 *Id.* at 86.

59 See Press Release, U.S. Federal Trade Commission, FTC Allows Merger of Boeing Company and McConnell Douglas Corporation (Jul. 1, 1997), https://www.ftc.gov/news-events/press-releases/1997/07/ftc-allows-merger-boeing-company-and-mcdonnell-douglas; see also Commentary on the Horizontal Merger Guidelines, Federal Trade Commission and Department of Justice, at 16 (2006) ("Although McDonnell Douglas was not a failing firm, staff determined that McDonnell Douglas' significance as an independent supplier of commercial aircraft had deteriorated to the point that it was no longer a competitive constraint on the pricing of Boeing and Airbus for large commercial aircraft").

60 Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (Jul. 1, 1997), https://www.ftc.gov/public-statements/1997/07/statement-chairman-robert-pitofsky-commissioners-janet-d-steiger-roscoe-b.

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change that grim prospect."[61] This closing statement also states that "the failing company defense comes into play only where the Commission first finds that the transaction is likely to be anticompetitive" but in this matter, "the absence of any prospect of significant commercial sales, combined with a dismal financial forecast, indicate that Douglas Aircraft is no longer an effective competitor, and there is no prospect that position could be reversed."[62]

The merging parties in the recent *FTC v. Peabody/Arch Coal* merger litigation also rely on this argument, explaining that a "dynamic and forward-looking assessment" of the merging companies' competitive and financial position is critical to an "overall assessment of the transaction's likely competitive effects."[63] The case is pending a decision in the Eastern District of Missouri.

The particular facts and circumstances of a transaction dictate whether merging parties can credibly make this competitive effects argument. The common theme among cases where the merging parties won antitrust approval, such as *T-Mobile/Sprint, Boeing/McDonnell Douglas*, and *Arch Coal/Triton*, is that the sellers were weak both in terms of their competitive position and their financial position. For example, Sprint and McDonnell Douglas had long histories of strategic missteps that caused them to lag farther and farther behind of their rivals. By comparison, arguments that focus on the seller's financial position alone have tended to fail. For example, in *ProMedica Health System v. FTC*, the Sixth Circuit was not persuaded that the acquired hospital's precarious financial situation inhibited its ability to compete effectively going forward.[64] The merging parties did not identify any qualitative reason why the merger would not harm competition (such as a structural decline in demand or persistent quality issues) and some of the merging parties' own documents contradicted their arguments.[65]

III. CONCLUSION

Merging parties may be more likely to prevail in front of the agencies and in court when they frame facts about a firm's weakness as a competitive effects inquiry rather than as a failing firm defense. Merging parties should craft a narrative grounded in the documents, testimony, and data that describes why one (or both) of the merging parties is declining, and what the effects will be going forward. Then, the merging parties can offer a convincing explanation as to why their merger is good for consumers.

61 *Id.*

62 *Id.* Commissioner Mary L. Azcuenaga, in a separate statement, observed that "One problem with accepting a 'flailing firm' or 'exiting assets' claim is that it creates an incentive for strategic action to avoid competitive overlaps and government challenge under Section 7 of the Clayton Act. This is a dangerous precedent when we move from the realm of finite reserves of natural resources [in General Dynamics] to the more indeterminate realm of managerial discretion, because of the susceptibility of the defense to self-serving statements, manipulation and strategic behavior." Statement of Commissioner Mary L. Azcuenaga in The Boeing Company (Jul. 1, 1997) (footnotes omitted), https://www.ftc.gov/public-statements/1997/07/statement-commissioner-mary-l-azcuenaga-boeing-company. We view this as an academic concern. It is unlikely that an executive who has significant financial incentive to turn the company around would instead choose to run it into the ground for the speculative and uncertain prospect of obtaining antitrust approval.

63 *FTC v. Peabody Energy Corp.*, No. 4:20-cv-00317, Defendants' Response to Plaintiff's Memorandum of Law Addressing Failing and Weakened Firm Arguments, at 1, 3 (Aug. 5, 2020).

64 *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d at 572.

65 *Id.*

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