SLOTTING FEES AND MERGER EFFICIENCIES: CAN FEWER COMPETITORS YIELD A LOWER PRICE?

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INTRODUCTION

In the market for grocery products, competition enables supermarkets to charge some manufacturers for scarce shelf space. Manufacturers, who depend on retailer shelf space for sales, pay for shelf space in many markets. These payments frequently come in the form of slotting fees, also known as slotting allowances and fixed trade spending. For the purpose of this Comment, I define slotting fees as fixed per-unit time payments from manufacturers to retailers in exchange for some allocation of shelf space. These are lump-sum payments distinguishable from variable payments, which are correlated with the quantity of goods sold (such as discounts). A recent Federal Trade Commission (“FTC”) study shows that manufacturers of goods for which shelf space is fixed for longer periods, such as refrigerated and frozen foods, incur higher slotting fees.1

Slotting fees are controversial. Critics claim they are anticompetitive, benefiting retailers, and possibly manufacturers, at the expense of consumers.2 Other commentators argue that slotting fees can serve valuable economic functions that benefit consumers, such as providing new products with a vehicle for market entry or creating a promotional mechanism for existing products.3

2 Id. at 50. Because increasing shelf space within a store’s refrigerated or frozen section requires major capital investment, this shelf space is fixed for longer periods.
This Comment will focus on slotting fees in the context of merger analysis. All else equal, more competitors mean supermarkets may charge more for shelf space, and fewer competitors means stores should charge less. Manufacturers may charge higher wholesale prices to compensate for this distribution cost, which may drive up retail prices. By reducing the number of competitors seeking shelf space, horizontal mergers may decrease the amount of slotting fees that a manufacturer pays to get its product on the shelf. These cost savings may reduce the price that consumers pay for the manufactured goods, creating an efficiency within that product market. Can fewer competitors yield a lower price? If so, will this lower price benefit consumers? How should merger analysis address this issue?

This Comment will suggest that the revenue generated by slotting fees benefits a wide range of consumers. Many of these customers fall outside the relevant product market. A merger that reduces slotting fees may create a benefit within the product market, in the form of lower prices. Such a merger, however, will create harms outside the market that outweigh these benefits.

This Comment will address how merger law should treat transactions that reduce the number of firms paying slotting fees. A good example of such a merger arose in *FTC v. Heinz*, where the D.C. Circuit granted a preliminary injunction enjoining Heinz, the number three maker of jarred baby food in the United States, from acquiring Beech-Nut, the number two maker.\(^5\) In the baby food industry, Gerber is sold at virtually all stores, and does not generally pay slotting fees, whereas only one of the two remaining competitors (Beech-Nut or Heinz) are sold as a second brand, and do pay slotting fees.\(^6\) The proposed merger probably would have driven down slotting fees, and any cost savings would have been passed on to the consumer, but the D.C. Circuit did not consider reduced slotting fees as a potential efficiency. Without addressing the effects of slotting fees on consumer welfare outside the market, the court determined that the potential anticompetitive harms outweighed these benefits.\(^7\)

This Comment will argue that the implications of slotting fees are worthy of investigation, and should be considered in merger analysis. Part I of this Comment examines slotting fees, how they work, and their implications for consumers, retailers and manufacturers. Part II discusses general merger doctrine in the United States, including the Clayton Act, the FTCA, and the Guidelines. Part III analyzes *FTC v. Heinz*, and the slotting issues

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\(^5\) *FTC v. H.J. Heinz, Co.*, 246 F.3d 708 (D.C. Cir. 2001) [hereinafter Heinz II].

\(^6\) *Id.* at 711-12.

\(^7\) *Id.* at 725.
involved in that case. Finally, Part IV analyzes U.S. merger doctrine and how merger law should treat transactions that reduce the number of manufacturers paying slotting fees.

I. SLOTTING FEES

This Comment defines slotting fees as fixed per-unit time payments from manufacturers to retailers in exchange for some allocation of shelf space. Slotting fees date back to at least the mid-1980s. Slotting fees have been the subject of Congressional hearings, an FTC workshop and follow-up study, and substantial scholarly literature. This literature includes several theories explaining both the existence and impact of slotting fees. Section A surveys the various theories. Section B analyzes the probable economic implications of slotting fees. Finally, Section C considers the effects of horizontal mergers on slotting fees.

A. The Economic Theories of Slotting Fees

There is no universally accepted theory as to the origin and function of slotting fees. Several competing theories offer insight into the purpose of slotting fees. These theories are limited by a general lack of empirical evidence on slotting fees. The FTC released the first major empirical study on slotting fees in 2003. The FTC Study produced empirical data on the instances of slotting fees among seven retailers for five product groups. The data in the reports did not sufficiently prove any individual theory, but

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8 Mary Sullivan, Slotting Allowances and the Market for New Products, 40 J. L. & ECON. 461, 461 (1997); but cf. Shaffer, supra note 3, at 121 (observing that payment of fees to retailers have been documented as far back as the 1930s).
9 Slotting Fee Hearing I, supra note 3; Slotting Fees: Effort to Study the Use of These Payments in the Grocery Industry, Hearing Before the Senate Comm. on Small Business, Subcomm. on Forests and Forest Health, 106th Cong. (2000) [hereinafter Slotting Fee Hearing II].
10 FTC STUDY, supra note 4.
11 Id. at 1.
12 There are several reasons data is scarce. First, many retailers claim they do not have detailed data on slotting fees, and the revenue they derive from such fees. Id. at 7. Retailers generally record this revenue as a reduction in the costs of good sold, rather than separately recorded as revenue. Id. at 17. Furthermore, even when retailers have data, they are reluctant to hand it over because public policy in this area is unsettled and retailers are concerned about sharing confidential information that could be used by competitors. Slotting Fee Hearing II, supra note 9 (testimony of Lawrence J. Dyckman, Director, General Accounting Office).
13 FTC STUDY, supra note 4, at 6.
provided valuable insight regarding slotting fees. The sub-sections below describe the various slotting theories.

1. Slotting as Compensation for New Product Costs

In the 2003 FTC Study on slotting practices, six of the seven retailers that provided information claimed that slotting fees charged for new products compensate for the time and financial burden these new products require.\textsuperscript{14} One manufacturer quantified its costs, explaining that a new product could cost $4 million in evaluation costs, a cost incurred even if the product is not selected. Thereafter, creating space in the warehouse (which could involve 30 to 40 other warehouse moves), storing and stocking the item, assigning shelf space, getting the product on the shelves, modifying the computer system and replacing the old product, may cost thousands of dollars and sacrifice immense time and effort.\textsuperscript{15} Retailers also want to be compensated for the risk of product failure.\textsuperscript{16} Many products that are on the market for the first time lack the recognition and reputation of more successful products, and pose a greater risk to the retailer that they will not be purchased (or at least not be purchased in a timely manner).\textsuperscript{17} Given a choice, most retailers would rather sell more established products. By paying a slotting fee, some manufacturers may be able to get reluctant retailers to sell their product, and gain otherwise impossible access to the market.\textsuperscript{18}

Mary Sullivan agrees that slotting fees compensate retailers for the costs associated with selling new products.\textsuperscript{19} Sullivan argues that the introduction of scanner technology, with the influx of marketing data that it provided manufacturers, dramatically decreased the costs of developing and supplying new products.\textsuperscript{20} As a result of decreased costs, manufacturers supplied more products to the market.\textsuperscript{21} Sullivan suggests a demand-supply hypothesis where the purpose of retailers is to provide multiple products in one store, thereby decreasing consumer search costs (e.g., the number of

\textsuperscript{14} Id. at 9. It is worth noting that retailers may have concerns over antitrust liability, and this justification is the least likely to raise anticompetitive concerns. Furthermore, retailers do not claim that they pass on slotting fees as a per service fee, rather, they have asserted that the revenue they draw from slotting fees compensate the costs they incur for the associated products (in an aggregate sense). Id.

\textsuperscript{15} Id. at 10.

\textsuperscript{16} FTC REPORT, supra note 1, at 14.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Sullivan, supra note 8.

\textsuperscript{20} Id. at 475. For a discussion on the divergence of retailer and manufacturer incentives regarding product decisions, see infra Part I.A.2.

\textsuperscript{21} Sullivan, supra note 8, at 479.
stores a consumer must visit). In equilibrium, manufacturers provide the number of products that satisfy retailer demand. Sullivan contends that brand line extensions caused supply to increase faster than demand, creating a need for manufacturers to compensate retailers for accepting products that consumers did not demand.\textsuperscript{22} Discounts were an insufficient form of compensation because they impose transaction costs when products fail, and because they distort quantity decisions of the retailer and manufacturer.\textsuperscript{23} Retailers could solve this problem by requiring per unit time payments, or slotting fees.\textsuperscript{24}

2. The Promotional Services Theory of Slotting

The Promotional Services Theory, proffered by Benjamin Klein and Joshua Wright, suggests that manufacturers pay for shelf space (in the form of slotting fees) as a form of promotional spending, much like advertising.\textsuperscript{25} It further suggests that the payments take the form of fixed per unit time payments rather than variable payments (e.g., discounts) because fixed payments allow retailers to apply the slotting revenue to those purposes that correlate with consumer demand.\textsuperscript{26}

Demand in the shelf space market comes from manufacturers attempting to increase sales by getting their products on the shelf, getting a favorable location on the shelf, or obtaining some other type of promotional gain. Slotting fees are most prevalent among those products that have the most to gain. The goods that most often incur slotting fees are new products,\textsuperscript{27} products with high profit margins\textsuperscript{28} and products with a greater likelihood of impulsive purchases.\textsuperscript{29} Accordingly, slotting fees are rare among those products that have less likelihood of impulse sales, such as bread.\textsuperscript{30}

Slotting fees arise where retailers need greater incentive either to stock a product at all or to accommodate the manufacturer’s specific shelf space demands. Some products are in such high demand that retailers have full incentive to stock these items without charging slotting fees. This is most

\textsuperscript{22} Id. at 480.
\textsuperscript{23} Id. at 482-83.
\textsuperscript{24} Id.
\textsuperscript{25} Benjamin Klein & Joshua Wright, The Economics of Slotting Contracts, 49 J.L. & ECON. (forthcoming 2006).
\textsuperscript{26} Id.
\textsuperscript{27} FTC STUDY, supra note 4, at 9.
\textsuperscript{28} See Klein & Wright, supra note 25.
\textsuperscript{29} See id. at 24. Among product types, slotting fees are more prevalent for ice cream than other frozen foods. FTC STUDY, supra note 4, at 53.
\textsuperscript{30} Id. at 54.
common among products that advertise very heavily. Proctor & Gamble and Gerber are two examples of companies that invest heavily in advertising and do not generally pay slotting fees.

Klein and Wright argue that because shelf space serves a promotional function, and slotting fees increase product demand, slotting fees benefit the manufacturer. In this sense, a manufacturer faces a trade off in which it could substitute higher slotting fees for lower advertising costs.

That shelf space serves a valuable function does not necessarily imply that manufacturers are willing to pay retailers for it. If retailers can earn enough of a margin on the product, it would seem that they will have full incentive to provide products promotional shelf space without being paid to do so. In some cases, however, a retailer has less incentive to sell or promote an item than the manufacturer. Manufacturers earn high margins on many products, which makes marginal sales more profitable, whereas retailers generally earn a lower profit margin on each sale. This means that the value of each additional sale may be higher for the manufacturers than the retailer, which creates a distortion in the profit-maximizing quantity of promotional shelf space for each. The solution is for manufacturers to pay retailers for a specific allotment of shelf space. This payment gives retailers the incentive to allocate shelf-space in a way that will maximize the joint profits of the retailer and manufacturer.

Klein and Wright’s promotional services theory also explains why the payments take the form of per unit time payments (rather than discounts) in some cases. First, while the manufacturer would rather charge a lower wholesale price, retail competition dictates that these payments get passed on to customers as lower prices, rather than applied to means that may yield greater consumer surplus. In addition, the costs faced by retailers in operating a store are primarily per unit time costs. In the end, the terms of the

31 Klein & Wright, supra note 25.
32 Heinz II, 246 F.3d at 712.
33 Klein & Wright, supra note 25.
34 Id.
35 Id.
36 Id.
37 Id.
38 This is much like any other type of contract, where two parties with divergent interests have reached a compromise where one party pays the other to give in to the other’s interest. The resulting distribution represents a Pareto improvement. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 15-17 (5th ed., W.W. Norton & Co. 1999).
39 See Klein & Wright, supra note 25.
40 Id.
41 Id.; see also infra Part II.B.2 (explaining why retailers often prefer per-unit time payments over wholesale price reductions).
42 Klein & Wright, supra note 25.
contract between the retailer and manufacturer will reflect a compromise between their respective conflicting interests.\textsuperscript{43}

3. The Anticompetitive Theories

a. Retail Market Power

Some theorists and industry observers believe that retail market power and anticompetitive practices drive slotting fees.\textsuperscript{44} Retail stores are merging and gaining enough market share that they can demand slotting fees from manufacturers. The retailers control so many stores that preclusion from the shelves of all their stores would be more costly to the manufacturer than paying high fees. Taking the fees solely based on market power, the retailers then pocket the fees as excess profits.\textsuperscript{45}

b. Retail Collusion

Greg Shaffer has claimed that slotting fees help retailers reduce competition at the retail level.\textsuperscript{46} According to Shaffer, scarce shelf space and retail market power have shifted the balance of power from manufacturers to retailers.\textsuperscript{47} To accommodate retailers, manufacturers raise the wholesale price to retailers, creating a wholesale price in excess of the marginal cost.\textsuperscript{48} In return, the retailer takes the excess revenue (from the increased wholesale price) in the form of slotting fees.\textsuperscript{49} The higher wholesale price reduces retail competition since all retailers face a higher price.\textsuperscript{50} This practice results in higher retail prices and yields higher profits to the retailers.\textsuperscript{51} Manu-

\textsuperscript{43} If retailers prefer per unit time payments and manufacturers prefer lower wholesale prices, it is probably the case that either party would be willing to offer concessions regarding the final fee in exchange for the form of payment they prefer. The end result should yield a compromise that maximizes the joint profits of each.

\textsuperscript{44} See Slotting Fee Hearing I, supra note 3 (testimony of “Witness B”), (testimony of Robert A. Skitol, American Antitrust Institute).

\textsuperscript{45} Such fees gained solely from market power are also referred to as economic profits. In economic terms, businesses should earn zero-profits in the long run after accounting for a reasonable rate of return, which incorporates reasonable accounting profits. See VARIAN, supra note 38, at 326-27, 335.

\textsuperscript{46} See Shaffer, supra note 3, at 122.

\textsuperscript{47} Id. at 120.

\textsuperscript{48} Id. at 122.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 121.

\textsuperscript{51} Shaffer, supra note 3, at 122.
facturers end up in a neutral or ambiguous position (greater sales revenue less the cost of slotting fees).

c. Raising Rivals’ Costs or Manufacturer Exclusion

At the 2001 FTC Workshop on slotting allowances, the central issue of concern was whether slotting fees serve as anticompetitive means for manufacturers. A manufacturer may purchase shelf space in order to exclude rivals’ products or raise rivals’ costs and prevent or deter them from competing. In *R.J. Reynolds Tobacco v. Phillip Morris*, the court initially enjoined Phillip Morris’s use of slotting fees on such grounds. The court found Phillip Morris made payments to retailers that assured prominent shelf space for their cigarettes and restricted the shelf space allocated to competing brands.

The Raising Rivals’ Costs theory of slotting raises some interesting issues, but evidence suggests that slotting fees will not drive competitors out of the market. First, retailers prefer to carry the products of several competing manufacturers, and would require significant incentive to go along with a manufacturer’s exclusivity plans. Also, most slotting fees are limited in duration to one year, which makes the likelihood of driving out competitors less plausible. Finally, Steven Salop suggests that a “market” for exclusive distribution should emerge if slotting fees are really tools of exclusion.

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52 See STEVEN C. SALOP, PRESENTATION TO THE FTC SLOTTING FEE WORKSHOP 6, (2000), http://www.ftc.gov/bc/slotting/presentations/slottingfee.pdf; see also FTC REPORT, supra note 1, at 35-41.

53 Id.; see also Thomas G. Krattenmaker & Stephen C. Salop, Anticompetitive Exclusion: Raising Rivals’ Costs To Achieve Power Over Price, 96 YALE L.J. 209 (1986) (explaining how firms may profit from raising competitors’ costs).

54 R.J. Reynolds Tobacco Co. v. Phillip Morris Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999), modified 199 F. Supp. 2d 362 (M.D.N.C. 2002) (granting summary judgment in favor of Phillip Morris Inc. because: (1) Phillip Morris lacked requisite market power; (2) the slotting fees were not an exclusive dealing arrangement; (3) the slotting fees did not foreclose competition; and (4) Phillip Morris lacked monopoly power), aff’d, 2003 WL 21456688 (4th Cir.).

55 Id. at 511-12 (though it should be noted that the payments from Phillip Morris consisted of both fixed and variable payments); see also Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 930 (7th Cir. 2000) (finding that slotting fees at Toy “R” Us posed a greater threat of anticompetitive harm because of the store’s essential role in the introduction of new products).

56 See FTC REPORT, supra note 1, at 40-41.

57 See id. at 40.

58 See id. at 41.

59 Salop, supra note 52, at 6; see generally Krattenmaker & Salop, supra note 53.
4. Summary

While this Comment does not adhere to any single theory as regards the purpose or origin of slotting fees, empirical evidence suggests that slotting fees do not generate excess retail profits and therefore do not yield anticompetitive gains for retailers. In the time slotting fees have been prevalent (and as slotting fees have increased as a share of retail revenue), retailers have seen no growth in profit margins, which have averaged about one percent of sales since 1980. From 2003 to 2004, net profits (after tax) in the retail supermarket industry averaged just 0.88 percent. Furthermore, as a matter of economic principle, retailers will not be able to earn excess profits where timely entry is feasible. This is the case in the retail grocery industry where entry is free and common.

B. The Implication of Slotting Fees

Assuming that slotting fees generally serve a pro-competitive purpose, this section outlines the probable implications of slotting fees. Without empirical evidence, the points laid out below cannot be known with certainty.

1. Slotting Fees on a Given Product are Not Usually Passed on to Customers as a Price Reduction on That Product

One unique feature of slotting fees for which the more plausible theories account is that these payments are per-unit time payments. In other words, slotting revenue is fixed and does not increase as the quantity of goods sold increases. Economics tells us that fixed and variable payments differ because retailers will not have incentive to pass on fixed payments from a particular product in the form of lower prices on that product,


---61 elitzak, supra note 60; sullivan, supra note 8, at 488.


---63 phillip areeda & lewis kaplow, antitrust analysis: problems, text and cases ¶ 114 (5th ed., aspen law & business 1997).

---64 while entry into the retail grocery industry does require a capital investment, there are no prohibitory factors such as licenses, unique resources, market foreclosure or other issues that prevent new stores from entering the market.
whereas, in the case of variable payments, supermarkets must pass on the
discount on that specific product (which increases the quantity sold) in or-
der to extract the value of the payments.  

Generally, manufacturers can align their interests with the retailer by
ty ing payments to the quantity of goods sold. For example, manufacturers
could increase the retail margin by reducing the wholesale price, in which
case the payment to the retailer would increase as the quantity of goods
sold increased, posing a greater benefit to manufacturers. Some of these
payments, however, take the form of slotting fees instead of price reduc-
tions.

Looking at the retailer’s incentives explains why a retailer is unlikely
to use the slotting revenue from a product to reduce the price of that prod-
uct. A retailer would only use the slotting revenue to reduce the price of
that product if it believed such a discount would increase profits. As men-
tioned above, the fact that the retailer collects a per-unit time payment in-
stead of a price reduction suggests the impacted product is not among the
class of products in which price discounts would maximize retail profits.

2. Slotting Fees Are, However, Passed on to Consumers Through
Generally Lower Prices and Non-Price Amenities at the Retail
Level

Assuming that slotting fees do not tend to lower the price on the prod-
ucts to which they are attached, they do benefit retail customers in other
ways. If slotting revenue does not tend to lower prices on the products
that yield the fees, and retailers are not generating excess profits, then two
possibilities remain: better service and amenities relative to price and lower
prices on other items. Because retailers have the freedom to choose how
slotting revenue is passed on to consumers, retailers serve their own inte-
rests by passing on slotting revenue in a way that maximizes consumer sur-
plus. By passing on the slotting revenue in this manner, slotting fees serve

65 See Salop, supra note 52, at 3 (explaining “[w]here payments are made on a lump sum basis
with no performance requirements, microeconomic theory would predict that they are not passed
through directly to consumers in the short run in the form of lower prices”).

66 See infra Part I.B.2.b.

67 See also Klein & Wright, supra note 25.

68 See Klein & Wright, supra note 25.
a pro-competitive function outside the product market that will exceed the added costs to consumers within the relevant product market.

a. Better Service and Non-Price Amenities

One use of slotting revenue could be investment in the retail outlet.69 The retail grocery industry today offers bigger and better stores than in the past. Stores rely on much more than price competition to lure consumers. Retail stores, especially supermarkets, often expend resources on many of the following: music that induces people to shop, good aromas that make customers hungry, bright lights, better technology, remodeling, cleaner stores, wider aisles, better parking lots, specialty sections (coffee bars, sushi stations, etc.), more baggers, and many other means that increase consumer welfare and enable stores to earn more revenue.70 Beyond price competition, retailers are spending a great deal to create a store that will appeal to customers, often subjectively.71

Industry data suggests that retail supermarkets are spending a greater percentage of sales revenues on labor and overhead than ten years ago.72 The proportion of revenue spent on payroll expenses and overall employment costs have increased over ten percent each.73 The proportion of revenue spent on supplies increased exactly ten percent, and utilities expenses increased eight percent.74 Even if these changes are attributable to disproportionate inflation among labor costs, supplies and utilities, consumers are still better off. If stores spend a greater percentage of revenue on operating expenses as a percentage of sales, then they are inherently providing lower prices and better service than they would if they raised prices or decreased services in response to increased expenses. Since these expenses are increasing as a percentage of sales, it is logical to conclude that the revenue supporting the increased expenditures is coming from the supermarkets’ other major revenue source: slotting fees.

69 See Salop, supra note 52, at 3.
71 Id. (explaining that stores use the smell of cinnamon buns to make customers hungry, and songs such as “Time is on My Side” to subliminally induce customers to slow down and buy items they had not planned on purchasing).
73 Id.
74 Id.
b. Lower Prices on Other Items

As discussed above, retailers may use slotting revenue to decrease retail prices of unrelated items when doing so will maximize profits.\textsuperscript{75} Certain discounts will generate profits regardless of the discounted product’s sales by generating profits on other non-discounted items. This could happen in a few ways. First, the discount could attract additional customers who might then purchase additional items. Second, the discount could draw a customer to a specific shelf or section of the store where the customer will purchase one or more additional items they otherwise would not have bought. Finally, by purchasing the discounted item, the customer may be induced to purchase complementary goods (discounted coffee selling coffee filters or discounted hot dogs selling buns). The types of products on which a retailer would be most likely to offer discounts include products with high price elasticity (very price sensitive), products that will generate profitable sales of complementary goods, products that will induce customers to buy more goods, and products that will drive customers to shop at the store rather than shopping at its retail competitors.

3. Slotting Fees Generally Lead to Higher Retail Prices on The Subjected Item

Holding constant other factors, slotting fees impact the cost of supplying goods to the market.\textsuperscript{76} Paying higher slotting fees for a specific allocation of shelf space will increase distribution costs, and paying lower slotting fees will decrease such costs. In this sense there is a direct relationship between slotting fees and the costs incurred by the manufacturer. Manufacturers pass on these costs to retailers in the form of higher wholesale prices. Mergers that decrease demand for shelf space may lower the cost for shelf space, yielding lower wholesale prices.

It is important to distinguish exogenous circumstances that affect slotting fees, such as mergers, from endogenous circumstances, such as a change in promotional strategy.\textsuperscript{77} To illustrate this, consider the following:

\textsuperscript{75} Where $Q_1$ represents the quantity sold with the discount, $Q_0$ represents the quantity sold if no discount is offered, $P$ represents the retail price, $d$ represents the discount, and $X$ represents any other additional profits generated by the discount, a profit-maximizing retailer should offer a discount where $Q_1(P - d) + X \geq PQ_0$ (assuming no marginal cost on the retailer).

\textsuperscript{76} FTC STUDY, supra note 4, at 62; see also Slotting Fee Hearing I, supra note 3 (testimony of Robert A. Skitol, American Antitrust Institute).

\textsuperscript{77} Slotting costs may change in relation to other promotional costs. For instance, in the tobacco industry, slotting fees and other in-store promotional spending, such as rebates, free products and display cases have become important tools for tobacco companies to promote their product, as marketing
A restaurant purchases the same ad space in the local newspaper every week. If the cost of its weekly ad space decreased relative to all other costs, the overall marketing cost for the restaurant will decrease, but the promotional benefit generated by that advertisement should not change. Similarly, extraneous factors that reduce the slotting fees that manufacturers pay for a specific allotment of shelf space would tend to lower the distribution cost of the manufactured goods, decreasing wholesale prices of those items.

Higher distribution costs that raise wholesale prices will likely lead to higher retail prices for consumers. Even if slotting fees are offset by a reduction in other costs or an increase in revenue, higher slotting fees will increase costs more than lower slotting fees. Consider an exogenous change that increases a manufacturer’s costs. For a specific level of product demand, the increased manufacturer cost will drive up the cost of supplying a given quantity of goods, shifting the supply curve inwards and upwards, and creating a new equilibrium at a higher wholesale price. This does not mean that slotting fees make prices higher per se. It merely suggests that the prices of some goods are higher than if there were no slotting fees or lower slotting fees. If manufacturers could get the same benefits for a lower cost, retail prices on that product would be cheaper. By lowering slotting fees, some horizontal mergers may be able to create such an effect.

4. The End Effect—Some Higher Prices, Some Lower Prices, and a Better Store

Slotting fees may cause higher prices to one group of consumers, lower prices to other consumers and other benefits for a broader group of consumers. Some consumers may gain and others may lose. The aggregate effect of slotting fees on overall customer welfare should be positive because the consumer loss of those who pay higher prices for the affected product is not substantial enough to offset lower prices to customers of other products and a better store for all consumers.  

78 Through media sources becomes more difficult and expensive. Paul N. Bloom, Role of Slotting Fees and Trade Promotions in Shaping How Tobacco is Marketed in Retail Stores, 10 TOBACCO CONTROL 340 (2001). The percentage of trade spending that tobacco companies pay for promotional allowances (including discounts) increased from just 9.4 percent of advertising and promotional expenditures in 1970 to 84 percent in 2003. FEDERAL TRADE COMMISSION, CIGARETTE REPORT FOR 2003 (August 2005) at Table 2, 2C, available at http://www.ftc.gov/reports/cigarette05/050809ciggrp.pdf.

78 To maximize revenue stores will apply slotting revenue in a way that maximizes consumer welfare. If consumers preferred the slotting revenue go towards the product that yields the slotting revenue, no transfer would occur. However, to the extent some transfer does occur, this has a beneficial impact on consumers as a whole.
C. Horizontal Mergers and Slotting Fees

1. Horizontal Mergers Reduce the Number of Competitors for Shelf Space

Horizontal mergers among manufacturers reduce the number of competitors bidding for shelf space within a given product market. Even if such mergers do not actually reduce the numbers of competing products, they should reduce the number of firms competing for scarce shelf space. Such mergers may pose a significant antitrust threat because industries with too few firms or too much concentration may yield firms with monopoly power and increase the risk of collusion. Despite the potential for anticompetitive harm, many horizontal mergers produce efficiencies that more than compensate for the anticompetitive risks. The next sub-section lays out the premise on which Part IV is based: horizontal mergers among product manufacturers could reduce the amount of slotting fees they pay.

2. A Reduction in the Number of Competitors May Reduce Slotting Fees

Slotting fees reflects equilibrium between manufacturers’ demand, and the retailers’ supply, of shelf space. This section will explain how a merger between competing manufacturers affects the market for shelf space. Essentially, a reduction in the number of competing manufacturers may reduce shelf space demand and create lower slotting fees.

Retailers are the suppliers of the shelf space market. In product categories where shelf space is scarcer, slotting fees are higher. Unless retailers foresee a horizontal merger changing the overall demand for one or more product groups, one would expect that a merger between competitors

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79 Sullivan explains that 89% of new products are brand-line extensions, rather than products of new competitors. Sullivan, supra note 8, at 479. Therefore, reducing the number of competitors may not reduce the number of competing products.

80 In some mergers, the merged entity may keep two separate brands. See United States Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 2.21 (rev’d 1997), available at http://www.ftc.gov/bc/docs/horizmer.htm [hereinafter MERGER GUIDELINES].

81 See discussion infra Part II.A.1.

82 While different theories explain why this is, none of the theories dispute that slotting fees represent a per unit time payment from manufacturers to retailers, in exchange for some allotment of shelf space.

83 For instance, slotting fees are more common for products in the frozen and refrigerated foods sections because shelf space is limited and cannot be easily increased. FTC Study, supra note 4, at 53.
within a specific product group would not affect the overall allocation of shelf space for that product. In other words, a merger between firms that manufacture competing products should not affect the supply of shelf space within that product market.

Manufacturers are the purchasers in the shelf space market. Within every product market, the aggregate demand for shelf space will be the sum of the demand curves for each competing manufacturer. As the number of competitors decrease, the aggregate demand for shelf space should decrease because there are less buyers seeking shelf space. Even if the number of competing brands does not decrease (because the post-merger entity maintains competing brands), that manufacturer will face less competition for shelf space because there will be fewer manufacturers bidding for shelf space. For instance, a post-merger entity that seeks to maintain the same allocation of shelf space for all products as existed before the merger should face a lower price because that firm can purchase one large block of space, and allocate that shelf space among its products as it desires rather than bid against the former competitor for shelf space.

Horizontal mergers that decrease the number of competitors may shift the demand curve for shelf space. Demand is driven by all of those competitors that seek shelf space, not just those that end up on the shelf. The Supreme Court has specifically acknowledged the relevance of competitors whose demand or bid impacts a transaction or market, even though they do not exchange goods or services in that transaction or market. As mentioned earlier, the supply curve for shelf space, in response to a horizontal merger, should not change. If demand decreases and supply stays constant, the equilibrium price of shelf space should decrease. According to this model, a horizontal merger between competitors for shelf space should decrease the cost manufacturers pay for shelf space and yield lower slotting fees.

Overall, there is no way to make a conclusive determination what impact a reduction in the number of competitors would have on slotting fees. There is still little empirical data on slotting fees, in addition to vast theoretical debate on the topic. However, the limited evidence that does exist, and the available theories suggest that fewer competing manufacturers within a specific product market may lower the cost of slotting fees that each manufacturer pays. This produces a unique benefit within the market,

84 Varian, supra note 38, at 262-63.
85 FTC Report, supra note 1, at 6; see also United States v. United Tote, Inc., 768 F. Supp. 1064, 1071 (D. Del. 1991); Heinz II, 246 F.3d at 717.
86 United States v. El Paso Natural Gas Co., 376 U.S. 651, 661 (1964) (“Unsuccessful bidders are no less competitors than the successful one.”); see also United Tote, 768 F. Supp. at 1071 (finding that United Tote’s unsuccessful bids led Autotote to lower its prices).
and a more substantial harm (in reduced slotting revenue) outside the market. There still remains the question of how merger law can and should deal with such mergers.

II. AMERICAN MERGER LAW

A. Section Seven of the Clayton Act

Section Seven of the Clayton Act is the principle statutory provision that determines the legality of mergers and acquisitions. Section Seven states, in the relevant portion:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly. 87

1. Purpose and Scope

There was little merger enforcement in the United States prior to 1890. 88 After the Industrial Revolution, society began to experience the harms of monopoly. Farmers and small businesses suffered in their dealings with large manufacturers, railroads and financiers, while those in the city dealt with issues such as excessive hours, child labor and slums. 89 Large business tycoons used coercion to acquire new businesses, quickly eating up competitors to create or maintain a monopoly. 90 Concentration, coercion and corruption dominated the business culture. Congress relied on laissez-faire policies, and trusted that market competition left free from government restraints would lead to a prosperous economy. Congress enacted the Sherman Act in 1890 to condemn combinations, monopolies, contract and

88 See AREEDA & KAPLOW, supra note 63, ¶¶ 128-133. Prior to the antitrust statutes, some state courts invalidated combinations formed for the purpose of restricting competition, but courts seldom applied this doctrine. Id. ¶ 128(e).
89 Id. ¶ 129(a).
90 Id. (explaining the predatory practices that dominated, including the tycoons who would threaten “sell or be ruined,” and businesses that would use local price cutting to drive out competitors).
conspiracies that imposed unreasonable restraints on trade.\textsuperscript{91} In 1914, President Wilson and Congress realized the need for a more detailed merger doctrine, as well as an administrative body to enforce the law and help businesses understand what practices they could and could not engage in.\textsuperscript{92} They responded by passing the Clayton Act, including Section Seven governing mergers\textsuperscript{93} (which was significantly tightened in 1950).\textsuperscript{94}

Section Seven’s purpose is to protect competition by prohibiting anticompetitive mergers. The test of Section Seven is whether the effect of a merger may be to lessen competition.\textsuperscript{95} Mergers that yield market power or tend to create a monopoly are likely to harm consumers.\textsuperscript{96} According to economic theory, markets that have only a few highly dominant firms are more likely to experience a coordinated or unilateral exercise of market power.\textsuperscript{97} Coordinated effects, where a group of firms within an industry collude to restrain output and raise prices, are more likely in highly concentrated markets (fewer firms with greater market power).\textsuperscript{98} Unilateral effects arise when a merging firm can profit by elevating the market price and suppressing output, regardless of their competitors’ actions.\textsuperscript{99}

2. Enforcement of Section Seven: The Federal Trade Commission Act

Both the Clayton Act and Section 13(b) of the Federal Trade Commission Act ("FTCA") authorize the FTC to enforce Section Seven.\textsuperscript{100} FTCA gives the FTC authority to seek an injunction preventing mergers before

\textsuperscript{91} Id. ¶ 129(b).
\textsuperscript{92} See id. ¶ 132.
\textsuperscript{93} Id. ¶ 133.
\textsuperscript{94} Areeda & Kaplow, supra note 63, ¶ 133
\textsuperscript{95} "Congress used the words 'may be substantially to lessen the competition' (emphasis supplied) to indicate that its concern was with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (alteration in original).
\textsuperscript{96} MERGER GUIDELINES, supra note 80, § 0.1.
\textsuperscript{97} See George J. Stigler, A Theory of Oligopoly, 72 J. POLITICAL ECON. 44 (1964).
\textsuperscript{98} There are two main reasons that higher concentration levels make collusion more likely. First, there is less communication required, which makes colluding more efficient and less likely to be detected. Second, there is a lower chance that any coordinating party will cheat, and better opportunities for detection and punishment if such cheating does occur. MERGER GUIDELINES, supra note 80, § 2.1.
\textsuperscript{99} Because the merged firm owns two competing products, the firm may be able to raise the price and restrict the output of one product, and, assuming the products of the merging parties are close substitutes, absorb a high proportion of the last sales to the other product, rather than to competing products. MERGER GUIDELINES, supra note 80, § 2.2; see also Jonathan B. Baker, Why Did the Antitrust Agencies Embrace Unilateral Effects, 12 GEO. MASON L. REV. 31, 34 (2003).
they occur. After the merging parties submit a premerger notification filing, pursuant to the Hart-Scott-Rodino Act, the FTC or the Department of Justice may issue a second request for documents and information or bring an action to permanently enjoin the merger. When the FTC decides to challenge a merger, the FTCA allows the agency to seek a preliminary injunction that enjoins the merger pending a full administrative trial. Although only “preliminary”, the time-sensitivity of merger agreements generally renders such an injunction permanent.

While prevailing in a 13(b) case may be just as effective for the FTC as full adjudication, the standard of adjudication is lower. In order to prevail in a motion for a preliminary injunction, the FTC must show it has reason to believe the proposed deal would violate Section Seven, that it is likely to succeed on the merits, and that such an injunction would be in the public interest, weighing the equities. The district court, when faced with such a motion, may not determine whether the deal in question would violate Section Seven, but instead, must inquire as to the FTC’s likelihood of success. Courts faced with 13(b) actions generally consider the likelihood of success on the merits first, and then consider a weighing of the equities.


In Philadelphia National Bank, the Supreme Court considered an attempted merger between the second and third largest commercial banks in the Philadelphia metropolitan area. The merged entity would have controlled over 30% of the relevant market. The merger would have also increased concentration by 33% in an already highly concentrated market. Considering the market realities, the court required no further evidence of anticompetitive harm. The court ruled that a merger that yields

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101 Id.
103 FTC v. Exxon, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (“[A]s result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated.”) (citations omitted).
105 FTC v. Food Town Stores, Inc. 539 F.2d 1339, 1342 (4th Cir. 1976) (explaining that determining whether the merger violates Section 7 is left to the FTC in the first instance).
106 See, e.g., Heinz II, 246 F.3d at 726; FTC v. PPG Indus., Inc., 798 F.2d 1500, 1507 (D.C. Cir. 1986); FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1081-83 (D.C. Cir. 1981); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1225 (11th Cir. 1991); Food Town Stores, 539 F.2d at 1346.
108 Id. at 331.
109 Id.
one firm controlling an undue share of the relevant market and results in a significant increase in concentration was so inherently likely to stifle competition that it must be enjoined absent evidence showing anticompetitive effects were unlikely.110 This test creates a rebuttable presumption against those mergers that pose the greatest threat to competition.

Philadelphia National Bank also established that efficiencies and anticompetitive effects outside the relevant market are not considered in merger analysis. The merging banks claimed to be creating an efficiency because the resulting bank would have been able to compete with large out-of-state banks in the market for very large loans.111 The court rejected this logic, noting that if all of the Philadelphia area banks merged into one entity, the merged entity would still be smaller than the largest New York bank, but that this was “not a case . . . where two small firms in a market propose to merge in order to compete more successfully with the leading firms in that market.”112 The court ruled that anticompetitive effects in one market could not be justified by procompetitive effects in another.113

The court specifically rejected this premise on the grounds that “every firm in the industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.”114 Some experts explain this rule on the grounds that merger analysis focuses on a specific set of affected consumers, and “[w]ithout economies in their market . . . those consumers cannot gain and may lose. Economies in another market do not benefit them. Thus to balance gains in one market against potential losses in another would necessarily favor one group of consumers of another.”115 This rule is significant when one considers the economic implications of slotting fees, described above.

B. The Horizontal Merger Guidelines

In recent years, the law respecting horizontal mergers has followed guidelines put out by the enforcement agencies. The Department of Justice and the Federal Trade Commission are the federal agencies that generally enforce merger law in the United States. Towards this end, the Department of Justice issued the Guidelines in 1968 to inform those contemplating mergers how the government would evaluate the market and the effects

110 Id. at 363.
111 Id. at 370.
112 Id.
114 Id.
relevant to a given transaction.\textsuperscript{116} The Department modified the Guidelines a few times before joint Guidelines were issued by the Department of Justice and FTC in 1992, and revised in 1997.\textsuperscript{117} The purpose of the Guidelines is to convey to market participants (and their legal counsel) the analytical framework the government applies in determining the likely effects of a merger on competition. The Guidelines’ “unifying theme” is that the government should prohibit mergers that contribute to market power or its exercise.\textsuperscript{118}

1. The Guidelines—Overview

The Guidelines start with a discussion of the purpose and policy assumptions underlying government enforcement decisions.\textsuperscript{119} Section One discusses market definition, measurement and concentration.\textsuperscript{120} This section introduces the Herfindahl-Hirschman Index (“HHI”),\textsuperscript{121} which is the primary measure of market concentration. The agencies use HHI to consider the overall concentration of the relevant market and the specific impact the merger in question will have on concentration.\textsuperscript{122} This section also discusses the product market and geographic market definition, and the respective “five percent test.”\textsuperscript{123} In defining both product market and geographic market, the agencies consider alternative products to be in the same respective market if customers would switch to that product in response to “a small but significant and nontransitory price increase;” usually five percent.\textsuperscript{124}
2006] SLOTTING FEES AND MERGER EFFICIENCIES 1293

Section Two of the Guidelines discusses the adverse affects the Guidelines seek to prevent: coordinated and anticompetitive effects. The agencies will consider the specific likelihood of these anticompetitive effects when deciding whether to challenge a merger. Section Three discusses the timely and effective entry of new competitors into the market. Section Four discusses efficiencies. Finally, Section Five considers special analysis that applies to the acquisition of failing and exiting assets.

2. Section Four—Efficiencies

Section Four is the section of the Guidelines most relevant to this analysis. Section Four discusses efficiencies, which are procompetitive benefits that may justify mergers. The recognition of efficiencies as a defense to otherwise anticompetitive mergers was not so widely accepted in the past. As recently as 1967, the Supreme Court ruled, “[p]ossible economies cannot be used as a defense to illegality under [Section Seven of the Clayton Act]. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.” More recently however, efficiencies have been understood as a defense to illegality.

The Guidelines acknowledge that mergers may enhance a firm’s ability and incentive to compete, and this may benefit consumers through better quality (and service), lower prices and innovation. For efficiencies to be considered under the Guidelines, they must be both merger-specific and verifiable. By merger-specific, the agencies mean those efficiencies that could not be realized absent the proposed merger. The government will not permit an efficiencies defense to negate anticompetitive effects if those

125 Id. § 2; see supra Part II.A.1.
126 Id.
127 Id. § 3.
128 Id. § 4; see infra Part II.B.2.
129 MERGER GUIDELINES, supra note 80, § 5.
130 Id. § 4. Efficiencies are sometimes referred to as "economies." FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).
131 Proctor & Gamble, 386 U.S. at 580.
132 See, e.g., Univ. Health, 938 F.2d at 1222 ("a defendant may rebut the government’s prima facie case with evidence showing the intended merger would create significant efficiencies in the relevant market."); United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); FTC v. Tenet Healthcare Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (district courts should consider “evidence of enhanced efficiency in the context of the competitive effects of the merger”).
133 MERGER GUIDELINES, supra note 80, § 4.
efficiencies could be attained through less restrictive means. The requirement of verifiable efficiencies reflects the fact that some efficiency claims are vague or speculative, and pose a higher risk of non-materialization. For instance, in *United States v. Oracle Corp.*,\(^{135}\) while finding for the defendants, the court rejected the defendants’ efficiency claims, finding “the potential cost-savings to Oracle are much too speculative to be afforded credibility.”\(^{136}\) In applying efficiencies analysis to mergers that impact slotting fees, the general analysis focuses on the specific implications on consumers within the relevant market, though the analysis in Part IV will also evaluate these potential efficiencies while also considering the effects on consumers outside the market.

3. *FTC v. Staples*

The Guidelines are not binding on the courts at any level. Despite their lack of authority, the Guidelines are heavily relied upon by the courts that adjudicate Section 7 and Section 13(b) claims.\(^{137}\) American merger doctrine, while based on the vague language of the Clayton Act, very much centers around the Horizontal Merger Guidelines. The two cases below illustrate American courts’ application of the Guidelines in merger actions.

In *FTC v. Staples*,\(^{138}\) the District Court for the District of Columbia granted the FTC’s request for a preliminary injunction to prevent Staples from acquiring Office Depot.\(^{139}\) Office Depot and Staples were the largest of only three chains of office supply superstores in the nation (Office Max being the third).\(^{140}\) The court’s competitive analysis included several references to the Guidelines. For instance, in defining the product market, the court analyzed the effects of a five percent increase in price, expressly stating, “[t]he Merger Guidelines use 5% as the usual approximation of a ‘small but significant and nontransitory price increase.’ For this reason, the court's analysis will often refer to this 5% number.”\(^{141}\) The court also applied the Guidelines presumptions regarding HHI calculations, stating that

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\(^{135}\) 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

\(^{136}\) Id. at 1175.


\(^{138}\) 970 F. Supp. 1066.

\(^{139}\) Id. at 1069.

\(^{140}\) Id.

\(^{141}\) Id. at 1076 n.8 (citation omitted).
the Guidelines, while not legally binding, “do provide ‘a useful illustration of the application of the HHI.’”\textsuperscript{142}

After using the Guidelines to analyze the relevant market and anticompetitive effects, the court applied Section Four of the Guidelines in analyzing the efficiencies claimed by the defendant companies.\textsuperscript{143} The court found that the defendants’ projected cost savings on account of economies of scale and distribution were overstated and lacked verification. The court also found that the defendants failed to exclude savings that were not merger specific.\textsuperscript{144} While the court would have reached the same outcome without the Guidelines, 	extit{FTC v. Staples} illustrates that courts take the Guidelines very seriously when conducting merger analysis.

III. \textit{FTC v. Heinz}

The baby food merger case challenged courts to deal with slotting fees within the Guidelines framework.\textsuperscript{145} Understanding the nature and purpose of slotting fees, much less the fees’ implications, when no legal precedent dealt with the issue, presented a unique challenge.

A. \textit{Background}

Three companies make and sell jarred baby food in the United States.\textsuperscript{146} Gerber is the dominant firm, with a 65\% market share.\textsuperscript{147} Next is Heinz with 17.4\%, and then Beech-Nut with 15.4\%.\textsuperscript{148} Despite three competitors in the market, retail stores only sell up to two brands of baby food, one of which is always Gerber.\textsuperscript{149} Gerber has significantly more brand recognition than the other brands and the greatest brand loyalty of any product sold in the United States.\textsuperscript{150} Gerber is generally recognized as the maverick in terms of pricing. Gerber is usually the first to raise prices, and its prices have constantly increased faster than inflation, with the other competitors following suit as their marketing strategy dictates.\textsuperscript{151}

\textsuperscript{142} \textit{Id.} at 1082 (quoting FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986)).
\textsuperscript{143} \textit{Staples}, 970 F. Supp. at 1088-90.
\textsuperscript{144} \textit{Id.} at 1089-90.
\textsuperscript{145} \textit{Heinz I}, 116 F. Supp. 2d 190; \textit{Heinz II}, 246 F.3d at 708.
\textsuperscript{146} \textit{Heinz II}, 246 F.3d at 711.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} The domestic manufacturers sell eighty million cases of jarred baby food per year in the United States, yielding up to one billion dollars in revenue. \textit{Id.}
\textsuperscript{149} \textit{Id.} at 711 n.2.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Heinz I}, 116 F. Supp. 2d at 193.
Beech-Nut and Heinz use different marketing approaches for their respective brands. Beech-Nut sells for about the same price as Gerber (about one penny less), but markets its product as a premium in brand, of equal quality to the Gerber product.\textsuperscript{152} Heinz, on the other hand, markets its product as a “value brand” competing on price. The Heinz product sells for several cents less than Gerber’s.\textsuperscript{153} Beech-Nut and Heinz do not compete against each other at the retail level. Though both firms sell their product nationally, they have very little regional overlap. Heinz’s sales are concentrated in northern New England, the South and the Midwest. Beech-Nut is concentrated in the mid-Atlantic region, California and Florida.\textsuperscript{154}

Beech-Nut and Heinz do compete at the wholesale level. Both pay slotting fees to obtain shelf space in retail supermarkets.\textsuperscript{155} According to the FTC, Heinz and Beech-Nut are locked in an intense battle at the wholesale level to gain the second position on retail shelves (where they compete with Gerber).\textsuperscript{156} In addition to slotting fees, the companies also use discounts and specific allowances to retailers to create retail price differentials with Gerber’s product.\textsuperscript{157} Gerber does not pay slotting fees to get its jarred baby food product on retail shelves,\textsuperscript{158} though they may incur other trade spending for premium placement, end displays and other promotional mechanisms.

With just a small share of the market, and baby food sales in decline, Heinz and Beech-Nut faced a pessimistic outlook in the late 1990s.\textsuperscript{159} From 1995 to 2000, domestic retail sales fell more than fifteen percent, despite a stable birth rate.\textsuperscript{160} Part of this decline has been attributed to a shift from jarred food to table food.\textsuperscript{161} With Beech-Nut’s sales flat or declining since the early 1990’s, Beech-Nut’s owner, Milnot Holding Company, reached an agreement with Heinz in which Heinz would acquire Beech-Nut for $185 million.\textsuperscript{162} On February 29, 2000, the companies filed a Premerger Notification and Report form with the FTC and the Department of Justice, pursuant to the Hart-Scott-Rodino Antitrust Improvement Act.\textsuperscript{163}

\textsuperscript{152} Heinz II, 246 F.3d at 712.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 711-12.
\textsuperscript{155} Id. at 712.
\textsuperscript{156} Id. at 712 n.3.
\textsuperscript{157} Id. at 712.
\textsuperscript{158} Heinz II, 246 F.3d at 712.
\textsuperscript{159} Heinz I, 116 F. Supp. 2d at 194.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.; 15 U.S.C. § 18a.
The FTC had jurisdiction over the matter, and authorized an action for a preliminary injunction under Section 13(b) of the FTCA. The FTC claimed the merger posed “serious and substantial risks to competition.”

Pointing to high concentration and low prospects of entry, the FTC argued, as one of its points, that merger would produce both unilateral and coordinated effects. It claimed that intense competition between Beech-Nut and Heinz caused the parties to spend millions of dollars in trade spending to win retail accounts, some of which went directly to customers and some of which got passed on to consumers indirectly. It claimed that the post-merger entity would not have the same incentive to offer concessions for the sake of winning shelf space. The Commission also claimed that competition between Beech-Nut and Heinz led both firms to improve product quality and safety. The FTC raised concerns that collusion would be likely because “[n]o environment could be more conducive to coordinated interaction than a duopoly.”

Heinz and Beech-Nut disputed the government’s presumption of anticompetitive effects, but also argued that any anticompetitive concerns raised by the merger would be offset by merger-specific efficiencies. They argued that despite the high concentration, the merger would enable the merged entity to produce a better product (in quality and taste) at a lower price than either competitor could have charged before the merger. For instance, Heinz’s new, more advanced Pittsburgh plant was only operating at a fraction of its capacity, and one expert testified that consolidating production in this plant could reduce the cost of processing the current Beech-Nut volume by 43 percent. They also argued that the merger was the only way to gain the innovative strength to introduce new products that could effectively compete against Gerber. The FTC argued that these efficiencies were not cognizable (because efficiencies would come at the cost of decreasing consumer choice) nor were they merger-specific (because each claimed efficiency could come about through other means).

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164 Heinz I, 116 F. Supp. 2d at 194.
165 Post Trial Memorandum in Support of the FTC’s Motion for Preliminary Injunction at 1, Heinz I, 116 F. Supp. 2d 190 (No. 1:00CV01688(JR)) [hereinafter FTC Memorandum].
166 Id. at 2-3.
167 Id. at 3.
168 Id. at 4.
169 Heinz I, 116 F. Supp. 2d at 199.
170 Id.
171 Id.
172 The FTC specifically attacked the merger specificity of three efficiencies. FTC Memorandum, supra note 165, at 39-40. First, it argued that Heinz could compete on a national scale through internal growth. Id. Second, it implied that Beech-Nut may be able to reduce variable costs through modernization. Id. at 40. Finally, it implied that other ownership changes for Beech-Nut could yield greater production efficiencies. Id.
B. District Court Decision

The FTC brought its 13(b) action in the United States District Court for the District of Columbia. The court held a five day evidentiary hearing in late August and early September 2000. On October 19, 2000, Judge Robertson issued an opinion denying the FTC motion. The court held that the FTC established a prima facie case of anticompetitive effects, but failed to adequately overcome the manufacturer’s rebuttable presumption that the merger would have a beneficial effect on post-merger competition.

The court first determined the applicable legal standard. Because this was a horizontal merger, Section Seven of the Clayton Act would determine the merger’s legality. The FTC was entitled to injunctive relief under Section 13(b) of the FTCA if it could show, weighing the equities, and considering the Commission’s ultimate likelihood of success, a reasonable probability that the merger would substantially impair competition. The FTC could establish a prima facie case by demonstrating that the merger would result in a firm that controls a substantial share of the relevant market and increase concentration within the market. Once a prima facie showing has been made, the burden of production would shift to the defendants (the manufacturers) to rebut that presumption by producing evidence that the merger would be unlikely to lessen competition. The burden of persuasion would remain with the FTC throughout.

The court next analyzed the relevant facts. First, the court said that the relevant product market was jarred baby food, and the geographic market was the United States. The court next considered market concentration. The pre-merger HHI was 4775 and would increase 510 points on account of the merger. It was undisputed that the merger would significantly increase market concentration in a highly concentrated market. The parties agreed, as did the court, that the cost of entry was significant and new entry would be improbable.

After considering the market, concentration and entry, the court looked at the competitive landscape of the baby food market. First, the court found that Beech-Nut and Heinz do not constrain each other’s retail
Significantly, the court found that the cross-elasticity of demand between the products, which measures how a price increase in one brand would affect the quantity sold of the other, was insignificant. 182

Regarding slotting fees, the FTC attempted to claim that this spending benefits consumers, but the court found “that attempt failed completely.” 183 The defense successfully argued that slotting fees do not reduce the shelf price, and the merger would therefore create an efficiency. 184 The court did acknowledge that variable trade spending (discounts, coupons, etc.) does lower prices for consumers, but found the merger would not change the need for such spending, since intense retail competition would still exist between the merged entity and Gerber. 185

Finally, the court concluded that the competition between Beech-Nut and Heinz did not yield innovation and product differentiation. To the contrary, the court agreed with the defense that neither competitor was strong enough to compete with new and differentiated products in the current market. 186 Having determined the present competition between Beech-Nut and Heinz did not benefit consumers, the court next considered the post-merger competitive landscape, concluding the merger would probably yield strong competition between the merged entity and Gerber. 187 The court also found that structural market barriers to collusion made coordinated effects unlikely. 188

The court next looked at the efficiencies defense put forth by the defendants. The court agreed that shifting production to the more modern, under-utilized Heinz facility would be the type of cognizable efficiency that the Guidelines recognize as pro-competitive. 189 The court also agreed with

181 Id.
182 Id.
183 Id. at 197.
184 That slotting fees to do not directly impact retail prices does not mean that a reduction in slotting fees caused by the merger would not reduce prices. Rather, the defense successfully argued that the revenue the retailers received in fixed trade spending did not lower the prices of Heinz and Beech-Nut’s products. See supra Part I.B.1 for an explanation as why slotting fees do not generally lower prices on the items for which they are incurred.
185 Heinz I, 116 F. Supp. 2d at 197. Variable trade spending tends to lower prices by either providing discounts or rebates directly to customers, or by providing incentives to retailers (through rebates or discounts that increase the profit margin on that product) to sell a greater quantity of that product.
186 Id. at 197-98 (noting a specific example where Heinz’s attempt to offer an organic variety was defeated when Gerber came out with its own organic variety, and offered incentives to retailers who agreed to discontinue the Heinz product).
187 Id. at 198.
188 Id.
189 Id. at 199.
the defendant’s expert that the merged entity would have the resources and means for successful innovation that both firms independently lacked.\footnote{\textit{Heinz I}, 116 F. Supp. 2d at 199-200.}

The district court concluded that the merger would increase competition in the jarred baby food market in the United States.\footnote{\textit{Id.} at 200.} In weighing the equities, the court noted that granting the preliminary injunction would effectively kill the merger and a denial of the injunction, upheld on appeal, would eliminate the possibility of preventing the merger (since the merger would consummate and Beech-Nut would close its facilities).\footnote{\textit{Id.} at 201.} The court acknowledged tipping the equities balance for the defense because appellate review was only available for a denial of the motion.\footnote{\textit{Id.}} The district court denied the preliminary injunction but stayed the merger pending appellate review.

\section*{C. Circuit Court Decision}

In a rare 13(b) appellate case,\footnote{Appeals in merger cases are rare. Before \textit{Heinz II}, the court of Appeals for D.C. Circuit had not decided a 13(b) appellate case since FTC v. PPG in 1984.} the D.C. Circuit reversed the district court and granted the preliminary injunction.\footnote{\textit{Heinz II}, 246 F.3d 708 (D.C. Cir. 2001).} The court first explained the standard of review, stating that it would only set aside factual findings it finds “clearly erroneous” (but stating it would examine the district court decision in light of the proper legal principles).\footnote{\textit{Id.} at 713.} The court then analyzed the market, entry and concentration, agreeing with the district court that the merger would increase concentration with little chance of entry. Unlike the district court, however, the D.C. Circuit was less willing to accept a rebuttable presumption, noting “no court has ever approved a merger to duopoly under similar circumstances.”\footnote{\textit{Id.} at 717.}

The D.C. Circuit disagreed with the district court’s analysis of the market landscape. The court found that Beech-Nut and Heinz price against each other, as well as Gerber, where all three products are sold in a given region.\footnote{\textit{Id.} at 718.} The court found the district court erred in finding that the two products do not compete against each other since they are both in the same relevant market.\footnote{\textit{Id.}} The court also found that the District court inadequately
considered the wholesale competition, including trade spending between Beech-Nut and Heinz. The court ruled that the plaintiff does not need to prove that wholesale competition impacts consumers for a reduction in such competition to be relevant.\textsuperscript{200} It also ruled that where the FTC does need to show impact, it does not need to prove impact with certainty.\textsuperscript{201}

The court also rejected the lower court’s finding regarding the threat of collusion.\textsuperscript{202} The court rebuffed the defendants’ argument because the district court made no finding that cartels are more difficult to form or operate in the baby food industry relative to other industries.\textsuperscript{203} The court ruled such a finding would be necessary to rebut the presumption that highly concentrated markets with high barriers to entry are likely targets for collusion.\textsuperscript{204}

The D.C. Circuit similarly disagreed that any anticompetitive effects would be offset by efficiencies, noting that high concentration levels present in this case would require proof of extraordinary efficiencies.\textsuperscript{205} The court noted errors in the calculations used at the district court level\textsuperscript{206} and also doubted that some of the efficiencies recognized by the district court were merger-specific. The court ruled that the district court “failed to make the kind of factual determinations necessary to render the [defendant’s] efficiency defense sufficiently concrete to offset the FTC’s prima facie showing.”\textsuperscript{207} The court also rejected the district court’s conclusion that the defendants’ innovation defense rebutted the FTC’s prima facie case. The court found no significant and reliable evidence that the merger would improve innovation.\textsuperscript{208}

The court did not regard a reduction in slotting fees as an efficiency, and did not apply the Guidelines’ analysis respecting slotting efficiencies. The court distinguished slotting fees (fixed trade spending) from discounts (variable trade spending),\textsuperscript{209} then claimed the merger would yield anticompetitive effects by reducing variable trade spending.\textsuperscript{210} The court never con-

\begin{itemize}
\item \textsuperscript{200} Heinz II, 246 F.3d at 719.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id. at 724-25
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 725.
\item \textsuperscript{205} Heinz II, 246 F.3d at 720.
\item \textsuperscript{206} For example, the 43 percent savings that could be realized by consolidating the production facilities would not represent 43 percent of the combined firms’ costs, but only of Beech-Nut’s costs. \textit{Id.} at 721.
\item \textsuperscript{207} Id. at 722.
\item \textsuperscript{208} Id. at 723.
\item \textsuperscript{209} Id. at 719 n.16.
\item \textsuperscript{210} Heinz II, 246 F.3d at 718-19.
\end{itemize}
siders what impact a reduction in slotting fees will have on the wholesale price of baby food.\textsuperscript{211}

On the merits, the court held that the FTC succeeded in raising questions on the merits of such a substantial nature for thorough investigation and determination by the FTC, as Section 13(b) of the FTCA requires for preliminary injunction. Weighing the equities, the court noted that denying the injunction would amount to final, irreversible approval of the merger, while disagreeing that an injunction would kill the merger.\textsuperscript{212} The court found equities favored the FTC.\textsuperscript{213} With the D.C. Circuit’s decision to grant a preliminary injunction, the parties to the merger ceased their efforts, killing the merger. The court did not thoroughly analyze the impact brought about by a reduction in slotting fees, but the section below will show why, in an aggregate sense, the slotting fees issue supported the D.C. Circuit decision.

IV. HOW MERGER LAW SHOULD TREAT SLOTTING FEES

As discussed earlier, slotting practices may impose costs on consumers within the product market, while providing benefits to consumers outside of the product market.\textsuperscript{214} A slotting fee reduction would likely have the opposite effect, providing an efficiency to consumers in the product market, while reducing benefits to consumers outside that market. While an individual customer may fall into both groups, the fact remains that those two groups of consumers fall into two different lines of commerce. Under Philadelphia National Bank, merger analysis cannot currently offset anticompetitive effects in one product market with efficiencies in another, an issue address in the second section below.\textsuperscript{215}

A. Analyzing the Manufacturers’ Cost Savings From Lower Slotting Fees Under the Horizontal Merger Guidelines

Slotting fees impact consumer prices in proportion to the number of competitors in a given product market.\textsuperscript{216} In applying economic analysis to

\textsuperscript{211} It is worth noting that the district court raised the issue of slotting fees to assert that a reduction in slotting fees would not harm consumers, but also did not consider slotting efficiencies. See Heinz I, 116 F. Supp. 2d. at 197.

\textsuperscript{212} Heinz II, 246 F.3d at 726-27.

\textsuperscript{213} Id.

\textsuperscript{214} See supra Part I.B.


\textsuperscript{216} See supra Part I.C.2. Under most of the theories for slotting fees, fees will be lower, all else
determine what is likely to happen when the number of competitors is reduced, both potential anticompetitive effects and efficiencies need to be considered. But does the Guidelines’ efficiencies analysis account for a reduction in slotting fees, brought on by a horizontal merger, which impacts consumer welfare?

If a horizontal merger between two manufacturers in the same product market reduces the number of competitors, then slotting fees (the price of shelf space) may decrease. As the price of shelf space decreases, the cost of supplying the product should also decrease, which will drive down the wholesale price of the product. In response, the retail price, which will probably not be directly impacted by a decrease in slotting revenue, should decrease in direct proportion to the wholesale price reduction. This will leave the consumers of the affected product better off, with a lower price. This efficiency should satisfy *Philadelphia National Bank* because it will benefit consumers within the product market affected by the merger. Lower slotting fees would tend to cause lower prices within the line of commerce, unlike the efficiency offered in *Philadelphia National Bank*, which would have benefited customers outside the relevant market.

Admittedly, consumers outside of the relevant market should face a decrease in consumer welfare. As prices of the affected product decrease, making consumers of the affected product better off, those customers who benefit from the retail application of slotting revenue will be worse off, since slotting revenue is decreasing. The expected harm to that larger group will produce outside market losses that exceed the inside market gain. However, merger analysis does not account for those consumers outside the relevant market who are worse off. The Clayton Act precludes a multimarket balancing approach to markets. Effects of a merger on consumers equal, where there are fewer competitors in a given product market.

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217 The emergence of the Guidelines and the efficiencies defense recognize this. See, e.g., FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991) (“a defendant may rebut the government’s prima facie case with evidence showing the intended merger would create significant efficiencies in the relevant market”); United States v. Baker Hughes, Inc., 908 F.2d 981, 985 (D.C. Cir. 1990); FTC v. Tenet Healthcare Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (holding that district courts should consider “evidence of enhanced efficiency in the context of the competitive effects of the merger”).

218 See supra Part I.C.2 (explaining why slotting fees should fall as the number of competitors in a product market decreases).


220 See id.; see also Salop, supra note 52, at 3.


222 See supra Part II.A.2.

223 See supra Part II.A.2.; see also AREEDA ET AL., supra note 115, ¶ 972a.
within other markets are not considered in deciding the merits of a merger.\textsuperscript{224}

This efficiency for consumers within the market presents the first of two interesting antitrust issues—the raised bar of the Horizontal Merger Guidelines. Mergers that lower slotting fees may have enough procompetitive justification to be legal under Section Seven of the Clayton Act and \textit{Philadelphia National Bank}, but this alone is not sufficient under the current doctrine. Efficiencies must meet the higher standard set out in Section Four of the Guidelines.

The first requirement for efficiencies considered under Section Four is that they be merger-specific.\textsuperscript{225} The Guidelines state:

\begin{quote}
The Agency will not deem efficiencies to be merger-specific if they could be preserved by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.\textsuperscript{226}
\end{quote}

A reduction in slotting fees brought about by a merger would satisfy the merger specific requirement. Because the reduction in slotting fees comes from a reduction of the number of firms seeking shelf space, this efficiency requires a reduction in the number of competitors. Legal alternatives cannot bring about such results.

The next requirement for efficiencies is that they be substantiated and verifiable.\textsuperscript{227} This is an evidentiary standard, and must be judged by the specific facts of a given merger. Nonetheless, this requirement should pose extreme difficulty in the case of slotting efficiencies. The defendants’ expert will carry the burden of persuading the court that costs will decrease in a calculated magnitude on account of lower slotting fees. Projected cost reductions brought upon by economies of scale and overhead cost savings are already the hardest to verify on account of their speculative nature and uncertainty.\textsuperscript{228}

With slotting efficiencies, not only do the figures fall into this speculative class, but accumulating the evidence needed to provide such verification poses a significant obstacle. First, obtaining the necessary data requires an unprecedented discovery from the retail industry.\textsuperscript{229} Furthermore, even

\textsuperscript{224} \textit{AREEDA ET AL.}, supra note 115, ¶ 972a. For further discussion and analysis of this distinction, see \textit{infra} Part IV.B.

\textsuperscript{225} \textit{MERGER GUIDELINES}, supra note 80, § 4.

\textsuperscript{226} \textit{Id.} at n.35.

\textsuperscript{227} \textit{Id.} § 4.


\textsuperscript{229} The Senate Committee on Small Business & Entrepreneurship asked the GAO to conduct a
with the data, separating out the slotting fees,\textsuperscript{230} determining how the store uses the revenue, measuring the in-store benefits, determining the pass-through effects and many other necessary inquiries carries significant burdens and requires a great deal of participation from retailers.

After explaining the requirement of verifiable and substantial efficiencies, Section Four reveals a strong preference for those efficiencies that reduce the marginal cost of production, as opposed to efficiencies that reduce fixed costs.\textsuperscript{231} Shifts in production that reduce marginal cost are most preferred, followed by efficiencies brought about by merging research and development operations, and lastly, those relating to procurement and capital costs are least preferred.\textsuperscript{232} Slotting fees are a fixed cost, so efficiencies resulting from a reduction in slotting fees join the lowest-ranking class, and face a difficult level of scrutiny. This is quite problematic, however, because the rationale for giving merit to efficiencies that reduce variable costs, but virtually disregarding fixed costs, lacks economic logic.\textsuperscript{233} Efficiencies that create a verifiable reduction in fixed costs should generate the same magnitude and likelihood of savings as those that reduce variable costs.\textsuperscript{234}

Finally, the Guidelines reject efficiencies that result from an anticompetitive reduction in output.\textsuperscript{235} Mergers that yield slotting efficiencies should reduce competition for shelf space, and reduce the cost that manu-

\textsuperscript{230} Retailers do not keep specific data on slotting fees, but rather include it in the cost of goods sold. FTC \textit{Study}, supra note 4, at 7-8.

\textsuperscript{231} \textit{MERGER GUIDELINES}, supra note 80, § 4. \textit{See also} \textit{UNITED STATES DEPARTMENT OF JUSTICE \\ FEDERAL TRADE COMMISSION, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES,} 57-58 (March 2006), \textit{available at}\textit{http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf} [hereinafter \textit{GUIDELINES COMMENTARY}].

\textsuperscript{232} \textit{MERGER GUIDELINES}, supra note 80, § 4.


\textsuperscript{234} Muris, supra note 233, at 751. Also of note, many costs that are fixed in the short-term are variable in the medium and long term (including slotting fees).

\textsuperscript{235} Id.
facturers pay for shelf space. Because this cost reduction bears no relationship to market output, there is no reason to expect that output will decrease as the cost for shelf space decreases. Under the Guidelines’ analysis, this lack of correlation between the cost savings and market output suggests that the efficiency does not result from an anticompetitive reduction in output.

It must be noted, however, that a reduction in the competition for shelf space does raise a competitive problem. The efficiency of lower slotting fees results from a decrease in competition that may decrease output and harm consumers outside the market. Because of the harm that reduced slotting fees may create outside the relevant product market, one could argue that the efficiency of lower slotting fees results from an anticompetitive reduction in output. However, it is unclear whether such implications outside the relevant product market would qualify as an anticompetitive reduction in output under the Guidelines analysis. The next section more thoroughly addresses this question.

Overall, it does not appear that the Guidelines could recognize the inside market efficiencies that may result when a horizontal merger reduces slotting fees. First, the cost savings that creates the efficiency results from a reduction in fixed costs, which the Guidelines disfavor. In addition, merging parties, in some cases, would not be able to verify and substantiate their costs savings. While there is no doubt that parties’ claiming slotting efficiencies would need to come forward with considerable evidence, there are things the agencies can do that would decrease the evidentiary burden for those claiming such efficiencies. First, the agencies could modify the Guidelines to ease the requirements regarding verifiable and substantial efficiencies. Second, the agencies could modify the Guidelines to recognize efficiencies that reduce fixed costs with the same vigor as those that reduce variable costs. These steps, even outside the realm of slotting, would yield an efficiencies analysis that better reflects mergers’ economic realities.

B. Evaluating the Foregone Benefits of Lost Slotting Revenue Outside the Market

Thus far this Comment has suggested that a more liberal, economics-oriented approach to efficiencies analysis could benefit direct consumers by sanctioning horizontal mergers that reduce slotting fees. To end there, however, would still subject merger analysis to an economic fiction. As discussed earlier, the procompetitive benefits of slotting revenue to retail customers as a whole probably outweigh the costs imposed on purchasers of the product subjected to slotting fees. In the merger context, this means

236 See supra Part I.B.2.
that a reduction in slotting fees will impose more overall harm than good. Just like merger law should waive rigid efficiencies standards to accept greater economics realities, it should also recognize that the consumers antitrust policy seeks to serve include those inside and outside the relevant product market.

The previous discussion of Philadelphia National Bank, noted the doctrine set out in that case that efficiencies and anticompetitive effects outside the relevant market are not considered in merger analysis. While this rule has been explained as avoiding disparity in the treatment of one group over another, a merger that removes a benefit to consumers outside the relevant market, to the benefit of those consumers within the market, will necessarily favor one group of consumers over the other. Treating all consumers equally—the notion of never favoring one group of consumers over another—is a fiction that will render it near impossible to maximize consumer welfare across the market. To some degree, the Guidelines and the agencies recognize that merger analysis cannot disregard merger implications outside the relevant market that are “inextricably linked” with the merger. However, outside market effects, both positive and negative, need to assume a larger role in merger analysis, particularly those mergers involving slotting issues.

Law that serves to benefit the ends of consumer welfare should not distinguish between consumers of one product on a supermarket shelf and the overall body of consumers who shop at that grocery store. The consumer welfare that the law attempts to maximize should consider the full universe of consumers. Rather than putting the interests of one group over another, the law should seek a solution with the most potential to maximize consumer welfare. Consumers benefit from slotting fees. Legal policies that rest on economic fiction, rather than reality, neither increase competition nor serve the ends of consumer welfare.

238 See Areeda et al., supra note 115, ¶ 972a.
239 See Rule, supra note 233, at 3 (“[T]here is no coherent a priori basis for believing that consumers in any given market are inherently more deserving of surplus than the producers in that market. The social value of the surplus is the same.”).
240 The Guidelines and the agencies’ 2006 Commentary explain that outside market effects may be considered where removing an anticompetitive effect in the relevant market would sacrifice an efficiency in another market. MERGER GUIDELINES, supra note 80, § 4 n.36; GUIDELINES COMMENTARY, supra note 231, at 56.
CONCLUSION

Slotting fees may significantly impact product markets. In light of the market factors that determine the amount and application of slotting fees, some mergers that reduce the number of competitors at the manufacturer level may reduce slotting fees, and ultimately cause the price of the impacted product to decrease, benefiting consumers of that product. At the same time, this same reduction in slotting fees may impose a greater cost on consumers outside the product market, which should not be ignored. Slotting fees may pose costs and benefits beyond the scope of traditional analysis, and the time is ripe for merger analysis to take a hard look at slotting fees and their impact on prospective mergers. Mergers that reduce the number of competitors for scarce shelf space may reduce slotting fees and yield a lower price, but in a larger sense, this reduction in slotting fees may actually harm consumer welfare.