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The Jurisprudence of Antitrust Divestiture: The Path Less Traveled

E. Thomas Sullivan†

"Breaking up is hard to do."¹

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As this Article went to press, the Department of Justice and Microsoft proposed a consent decree. Nine states are opposing the consent decree, while nine have agreed. The proposed consent decree will be subject to public comment for sixty days after appropriate notice has been published, and then, pursuant to the Tunney Act, the district court will review the proposed consent decree along with the public comments. The court is not likely to act upon the proposed consent decree until the spring of 2002.

Preliminarily, the proposed consent decree incorporates many of the suggestions discussed in this Article, including (1) requiring Microsoft to share the inner workings of its Windows operating system with other software firms; (2) requiring Microsoft to permit other software products to be placed on Microsoft's Windows system by computer makers; (3) requiring Microsoft to provide software developers with interface necessities to inner-operate with Windows and to offer uniform licensing terms to key computer makers; (4) prohibiting Microsoft from entering into exclusive dealing arrangements that require exclusive support or development of Microsoft software; (5) prohibiting Microsoft from retaliating or punishing anyone in the sale or distribution of personal computers who makes or uses competing products; and (6) establishing a panel of computer experts to monitor the agreed upon terms.

While the proposed consent decree requires Microsoft to disclose technical data known as middleware to assist competitors making programs and gives manufacturers greater freedom to sell and lease machines with non-Microsoft middleware, while forcing Microsoft to establish standard royalties and licensing terms for the twenty largest computer makers (though volume discounts and other incentives may affect prices), the proposed consent decree does not require Microsoft to disclose code for its operating system, nor does it require Microsoft to unbundle its Internet Explorer browser from the operating system. The proposed consent decree also does not mention the legal consequences of the consent decree, once finalized, regarding the law of collateral estoppel, which implicates the other pending lawsuits.

¹. Neil Sedaka, Breaking Up is Hard to Do, on SINGS HIS GREATEST HITS (RCA 1962).
In its decision in United States v. Microsoft Corp.,\textsuperscript{2} the United States Court of Appeals for the District of Columbia broached, but did not answer, a question that has been the subject of much recent debate: "[W]hether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects."\textsuperscript{3} The court of appeals noted that Microsoft presented novel divestiture issues because it did not involve the traditional use of divestiture to remedy an illegal combination of stocks or assets.\textsuperscript{4} Although the technology sector has weakened in recent months, software and the new economy have continued to become more integral in everyday life and business. It is therefore instructive to consider when, or even if, divestiture could appropriately remedy a conduct violation in the new economy.

Though the Bush Administration has decided not to pursue divestiture as a remedy in the Microsoft case, Microsoft warrants continued discussion for two reasons. First, the case has brought the complexities of divestiture to the forefront of anti-trust law in the new economy. Before Microsoft, courts had not addressed the applicability of divestiture in technologically dynamic markets characterized by network effects. In fact, had the new administration not retreated from divestiture, Microsoft likely would have been only the third divestiture case in the last two decades to reach the Supreme Court.\textsuperscript{5} Second, despite the Bush Administration's decision to abandon the divestiture remedy, a number of state attorneys general prosecuting the case, or private parties, may still decide to pursue the remedy.\textsuperscript{6}

When the court of appeals vacated and remanded the decision ordering divestiture in Microsoft by Judge Thomas Penfield Jackson, divestiture remained a viable remedy because

\begin{itemize}
\item \textsuperscript{2} 253 F.3d 34 (D.C. Cir. 2001) (per curiam).
\item \textsuperscript{3} Id. at 50.
\item \textsuperscript{4} See id. at 105-06.
\item \textsuperscript{5} Recently, the Supreme Court denied certiorari to review the case. The Court may, however, accept the case once a final remedy is entered. Microsoft v. United States, 122 S.Ct. 350 (2001) (mem.) denying cert. to 253 F.3d 34 (2001). Therefore, California v. American Stores Co., 495 U.S. 271 (1990), and Maryland v. United States, 460 U.S. 1001 (1983), affg United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), stand as the only two divestiture cases to go before the Court in two decades.
\item \textsuperscript{6} See, e.g., Stephen Labaton, U.S. v. Microsoft: Going Back to Square One, N.Y. TIMES, Sept. 9, 2001, §4, at 3.
\end{itemize}
the alternative—a conduct-oriented remedy—had been tried in earlier litigation and led to the failed 1995 consent decree. Judge Kollar-Kotelly, the district court judge currently assigned to the case, still has discretion to consider the scope of possible remedies ranging from a structural breakup to behavior-oriented injunctive relief.

The district court must ultimately decide what effect any remedy will have on consumer welfare and competition in e-commerce. Surely, as one of the central questions, any court must ask whether the costs associated with the resulting remedy outweigh the public benefits. The historical record of court-ordered divestiture informs our understanding of its viable application both in the dynamic new economy, and perhaps in the Microsoft case itself.

Before the Department of Justice abandoned divestiture as the preferred remedy, the court of appeals had instructed the district court that divestiture remained a viable remedy. If the district court finds a "causal connection between Microsoft's exclusionary conduct and the company's position in the [operating systems] market," divestiture is still proper. The court of ap-


8. Microsoft, 253 F.3d at 45-47. Conduct-oriented orders might include injunctive relief to (1) forbid the restrictions placed on the licensing agreements with computer manufacturers and software companies; (2) license the Windows operating system code to other companies; (3) require prior approval by the court of any future bundling or tying of new products to the operating system; (4) require price publication for software licenses; and (5) offer an operating system with a variety of new applications or versions unbundled. See Proposed Final Judgment, United States v. Microsoft Corp., (D.D.C. filed Nov. 2, 2001); see also United States v. United Shoe Mach. Corp., 247 U.S. 32, 39-56 (1918). See generally United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954).

9. See supra note 5. Although the Department of Justice may not at the present be arguing in favor of divestiture, either the state attorneys general or private parties may. Id. The district court has the ultimate discretion to impose divestiture if conduct-oriented remedies prove to be ineffective as they have in the past due to Microsoft's recidivist conduct. Microsoft, 253 F.3d at 105-07.

10. Microsoft, 253 F.3d at 107. Moreover, the court observed that "divestiture is a common form of relief in successful antitrust prosecutions: it is indeed "the most important of antitrust remedies." Id. at 105 (citing United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961)).
peals cautioned, however, that “[d]ivestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain.”

A case like Microsoft particularly warrants judicial caution. Microsoft is the first case to reach the antitrust remedy stage in the new economy. Under the Government's analysis, accepted by the district and appellate courts, Microsoft maintained its monopoly under the system of network effects. Within this system, the value that a consumer derives from a good increases along with the number of consumers using the good. This provides incentives for third parties to develop a derivative support network for the good, which increases the appeal to the consumer, drives demand for the good, and creates a perpetuating cycle. As this Article discusses, this perpetuating cycle complicates the remedy analysis and makes an already complex decision more difficult. Indeed, the court of appeals admonished the district court that with respect to the tying violation, “[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations . . . .” The court recognized that Microsoft represented a novel and unprecedented case. This admonishment was equally instructive when considering divestiture as a remedy. At this point, Microsoft still provides useful insights to analyze divestiture in the context of a network market and the new economy.

The Supreme Court's history of divestiture provides some guidance. Historically, the Court has placed great weight on the remedy stage of antitrust litigation. From the Court's first divestiture case in 1911 to its most recent in 1990, the Supreme Court has decided at least fifty-two cases involving divestiture and allowed divestiture as a remedy in all but

11. Id. at 80.
12. Id. at 84 (quoting Broad. Music, Inc. v. CBS, 441 U.S. 1, 9 (1979)).
13. Id.

[The suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. “A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.”]

Id. (quoting Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947)).
New Jersey v. United States\textsuperscript{16} to correct the harm it believed injunctive relief would not. Over time, the Supreme Court has become more comfortable with the remedy. In the most recent Supreme Court case involving divestiture, California v. American Stores Co.,\textsuperscript{17} the Court reiterated that when a section 7 violation of the Clayton Act has occurred, divestiture should come to the “forefront” of the Court’s analysis.\textsuperscript{18} Over the span of the Supreme Court’s divestiture jurisprudence, the Court has analyzed the appropriateness of divestiture and the conditions that warrant the remedy.

This Article explores the connection between the history of the Supreme Court’s divestiture jurisprudence and the complex divestiture issues raised by the new economy, and specifically, by the suit pending against Microsoft. Part I examines the theories behind divestiture, how the Court’s theories have changed over time, and various possible forms of divestiture. Part II more closely examines specific instances where the Supreme Court considered divestiture. This Part first analyzes five cases that resulted in divestiture and the implications of the remedy. These cases also provide insight into the future of cases like Microsoft if divestiture remains an option in the new economy. Part II then analyzes five cases where the Supreme Court either rejected or did not consider divestiture, even if antitrust violations had occurred. Part II concludes by summarizing the insights provided in these cases to develop an analytical framework that can be applied to any divestiture analysis.

Part III briefly describes the software market in which Microsoft operates. Part IV applies the analytical framework derived in Part II to the unique aspects of the software and e-commerce markets described in Part III to determine whether divestiture can provide an appropriate remedy in the new economy. The Article concludes that divestiture may be an unwise remedy in Microsoft and other e-commerce litigation.

I. THE THEORY OF DIVESTITURE

A. THEORETICAL PREMISES

Since the announcement of the Standard Oil opinion in

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\textsuperscript{16} 221 U.S. 1 (1911).
\textsuperscript{17} 495 U.S. 271 (1990).
\textsuperscript{18} See id. at 281 (citing United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329-31 (1961)).
1911, protection of the public welfare has been the guiding principle of the Supreme Court's divestiture jurisprudence. In *Standard Oil*, the defendant had created a monopoly of oil distribution and sales by aggressively acquiring the stock of other companies. With the "conviction of a purpose and intent," Standard Oil allocated geographic markets to companies with no competition amongst them. Because Standard Oil's improper conduct contributed to the establishment of its monopoly, the Court recognized that injunctive relief would insufficiently protect the public interest. Thus, divestiture became a necessary remedy. In this respect, *Standard Oil* set the tone for the next century of divestiture cases. Where the defendant has engaged in improper conduct and an attempt to monopolize, but has not attained market power, the Court has favored injunctive relief. On the other hand, where the defendant has illegally attained market power, the Court has favored divestiture.

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19. [Injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 78 (1911).

20. *Id.* at 76-77.

21. *Id.* at 77.

22. [Ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. But in a case like this, where the condition . . . is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. *Id.* at 77 (citation omitted); cf. discussion of *United States Steel*, infra notes 194-202 and accompanying text.

23. Indeed, twenty-eight of the cases where divestiture was ordered were brought under section 1 or section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1994), for conduct violations, but only six were decided after 1960. Three of these cases were brought under section 7. In later cases, injunctive relief was the favored remedy. Divestiture was ordered, however, for various reasons including complexity of implementation and distrust of the defendants. *See supra* note 15.

24. Of the cases studied, twenty-eight of them were brought under section 7 of the Clayton Act, 15 U.S.C. § 18 (1994). Eighteen of the recent cases were brought due to a horizontal merger; five were brought due to a vertical merger; three due to a combination of the two; and only two involved a combination of structural and conduct violations. In this light, the direction provided by the Court in *American Stores* that, where a section 7 violation of the Clayton Act is found, divestiture should be in the "forefront" of the court's mind for a remedy, is understandable. *California v. Am. Stores Co.*, 495 U.S.
The theoretical premises underlying divestiture have varied since *Standard Oil*. Initially, the Court utilized divestiture for "trust busting." The theory supporting this application advanced that the likelihood of improper conduct increased with the firm's size. Bad conduct, coupled with size, warranted divestiture. If trusts like the Standard Oil Trust, or other large enterprises, engaged in improper conduct, and if their divestiture would not unduly injure the public, they should be dismantled.25

After the Great Depression in the 1930s, economists entered the discussion and began to analyze the relationship between structure and pricing. Economist Joe Bain and others opined that structure determined conduct.26 To be sure, the 1950 revision of section 7 of the Clayton Act underscored the important consequence of structure.27 Since then the Court has continued to become more sophisticated in its divestiture analysis, for example, by broadening the scope of economic substitutes it would consider,28 by considering even potential entrants to the market,29 and by shifting its analysis from market

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27. 15 U.S.C. § 18. The 1950 revision prohibited the acquisition in whole or part of the assets of another corporation when the effect could substantially lessen competition or tend toward a monopoly. Section 7 currently reads in pertinent part:

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 to tend to create a monopoly.

Id.

28. "Where the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made." United States v. Cont'l Can Co., 378 U.S. 441, 457 (1964).

29. See FTC v. Procter & Gamble Co., 386 U.S. 568, 570-75 (1967). Although Procter & Gamble had not, at the time of the merger, entered the market for liquid bleach (the relevant line of commerce) it produced complementary goods and acquired Clorox as an alternative to entering the market independently. See id.
share to market power.  

B. EXTRA-JUDICIAL EFFECTS ON DIVESTITURE

Despite the Court’s increasing sophistication, the number of divestiture cases that it regularly considers has decreased significantly. During the 1960s, the Court heard twenty-four divestiture cases. In contrast, since 1974 the Court has heard only four. Further, although the Supreme Court has ordered a total of forty-five divestitures since 1916, only two have occurred within the last two decades: United States v. American Telephone and Telegraph and American Stores.

One can attribute much of the recent decline in divestiture cases reaching the Supreme Court to increased activity in the Department of Justice Antitrust Division and the Federal Trade Commission. These agencies review mergers before they occur and often work out consent decrees before cases would otherwise go to trial. The pre-merger filings required

30. See, e.g., United States v. Gen. Dynamics Corp., 415 U.S. 486, 501-04 (1974) (holding that although the parties had substantial market share, the merger was not anticompetitive, as the parties lacked market power because 114 million of the 118 million tons of coal owned by United Electric were tied up in existing contracts); United States v. Gen. Dynamics Corp., 341 F. Supp. 534, 538 (D. Ill. 1972); see also Andrew Chin, Note, Antitrust by Chance: A Unified Theory of Horizontal Merger Doctrine, 106 YALE L.J. 1165, 1169-72 (1997) (discussing movement away from strict reliance on calculation of market share in antitrust analysis).

31. See supra note 15 for a list of cases illustrating the timeline of Supreme Court divestiture decisions.


34. During the period between 1981 and 1992, 18,337 potential mergers were reported under the Hart-Scott-Rodino Antitrust Improvement Act of 1976; 4.1% of these required Second Requests, and 1.3% were challenged. Similarly, during the period between 1993 and 1999, there were 21,702 mergers notified under the Act, 3.2% of which required Second Requests and 1.8% of which were challenged. Deborah A. Garza, Is the Past Prologue? A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come, 15 ANTITRUST 64, 66-67 (2001).

35. See E. Thomas Sullivan, The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition, 64 WASH. U. L.Q. 997, 1040-42 (1986) (examining the consent decree process). Indeed, the American Stores merger was approved by the FTC, and the State of California instituted the suit as a private litigant only after FTC approval. Assuming the courts made the correct determination that the merger was anticompetitive, the FTC approval should not have been given. Therefore, American Stores was, arguably,
by the Hart-Scott-Rodino Act\textsuperscript{36} allow these agencies to identify potential antitrust violations and work with the companies involved to avoid anticompetitive consequences \textit{ex ante}.\textsuperscript{37} In some instances, the companies themselves will abandon the merger if serious regulatory problems appear on the horizon.\textsuperscript{38} The cases now obviated by agency review—those involving horizontal and vertical mergers—previously appeared before the Supreme Court as likely candidates for divestiture.\textsuperscript{39}

C. THE EVOLVING DIVESTITURE JURISPRUDENCE

The increase in pre-merger participation by federal agencies may affect the future of the Supreme Court's divestiture jurisprudence. While the Supreme Court will likely continue to consider divestiture as a viable remedy, the Court may reserve the remedy for only the most exceptional and unique cases. \textit{Microsoft}, for example, may represent the last breed of divestiture cases that the Supreme Court will consider. In the absence of a large merger to remedy under section 7 of the Clayton Act, the Court will consider divestiture where a new paradigm in business structure or complex and burdensome behavioral relief renders injunctive relief inadequate.

D. FORMS OF DIVESTITURE

Divestiture may take various forms, ranging from total di-

\begin{itemize}
  \item an FTC "oversight," without which the Court's approval of the AT&T consent decree would have been the sole Supreme Court consideration of divestiture in the last two decades.
  \item \textsuperscript{36} 15 U.S.C. § 18a (1994).
  \item \textsuperscript{37} In fiscal year 1997, for example, the Antitrust Division opposed thirty-one merger transactions. A complaint was filed with a United States District Court in only fourteen of these. Of those fourteen, thirteen resulted in consent decrees. Only one case was actually litigated. In the remaining seventeen transactions, eight were restructured and nine potential transactions were abandoned. \textit{See} Robert Pitofsky & Joel Klein, \textit{Federal Trade Commission Bureau of Competition and Department of Justice Antitrust Division Annual Report to Congress: Fiscal Year 1997 Pursuant to Subsection (j) of Section 7A of the Clayton Act Hart-Scott-Rodino Antitrust Improvement Act of 1976} 5 (Aug. 8, 1998), available at http://www.ftc.gov/behsr97annrpt/ann972.htm.
  \item \textsuperscript{38} In these cases, two other factors for a diminishing number of divestiture cases, the increased time and resources necessary for a protracted litigation, certainly play a part. For example, United Airways and US Airways recently called off their proposed merger after an announcement by the Justice Department that it would institute a lawsuit to block it. Kenneth N. Gilpin, \textit{Antitrust Challenge Stops United Merger With US Airways}, \textit{N.Y. Times}, July 28, 2001, at C1.
  \item \textsuperscript{39} \textit{See} Appendix, \textit{infra}, at 614-23.
\end{itemize}
vestiture of newly purchased physical assets to partial divestiture of stock holdings.\textsuperscript{40} As in all remedy analyses, the fundamental question must be whether the "remedy shall be as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case."\textsuperscript{41} As the cases and anticompetitive harms have varied, so have the remedies.

In the past, when the antitrust violation damaged or threatened to damage the competitive system itself, the Court ordered the offending company to reestablish the newly acquired entity as an independent competitor.\textsuperscript{42} The Court employed this remedy, for example, in \textit{Utah Public Service Commission v. El Paso Natural Gas Co.}\textsuperscript{43} The defendant El Paso, the sole out-of-state supplier of natural gas for the State of California, supplied over fifty percent of the natural gas used in the state.\textsuperscript{44} Pacific Northwest, a nearby competitor, had attempted to enter the California natural gas market.\textsuperscript{45} Within a year after El Paso managed to kill a potential deal whereby Pacific Northwest would supply natural gas to Pacific Gas & Electric, El Paso acquired over ninety-nine percent of the outstanding stock of Pacific Northwest.\textsuperscript{46} The Court found that El Paso, in absorbing Pacific Northwest, had attempted to "paralyze competition."\textsuperscript{47} On remand, the district court carried out not the full divestiture mandated by the Court, but the "best that might be made without complete divestiture."\textsuperscript{48} The Court, reviewing the case after the district court's partial divestiture, reiterated the necessity of full divestiture to restore the competitive balance.\textsuperscript{49}

In other cases, where a company leveraged power in one branch of its business for the benefit of another, the Court has

\textsuperscript{40} For an example of total divestiture, see \textit{Continental Oil Co. v. United States}, 393 U.S. 79, 79 (1968) (per curiam). For an example of partial divestiture, see \textit{FTC v. Western Meat Co.}, 272 U.S. 554, 560-61 (1926).
\textsuperscript{41} \textit{United States v. Nat'l Lead Co.}, 332 U.S. 319, 335 (1947).
\textsuperscript{43} 395 U.S. at 471-72.
\textsuperscript{44} \textit{United States v. El Paso Natural Gas Co.}, 376 U.S. 651, 652 n.2 (1964).
\textsuperscript{45} \textit{Id.} at 654.
\textsuperscript{46} \textit{Id.} at 654-55.
\textsuperscript{47} \textit{Utah Pub. Serv. Comm'n}, 395 U.S. at 470.
\textsuperscript{48} \textit{Id.} at 471.
\textsuperscript{49} \textit{See id.} at 471-72.
ordered the company to divest itself of its own business units.\textsuperscript{50} In \textit{United States v. Pullman Co.}, for example, Pullman both manufactured and operated railroad sleeping cars.\textsuperscript{51} Pullman leveraged its monopoly in the operations market to protect its manufacturing position.\textsuperscript{52} By establishing itself as the only operations firm contracted to service the railroads, Pullman successfully erected barriers to entry in the manufacturing market.\textsuperscript{53} The Court ordered Pullman to divest itself either of its manufacturing business or its operations business, thereby simultaneously opening up the operations and manufacturing markets.\textsuperscript{54} Upon lifting the barriers to entry, the Court left it to the markets to determine whether a viable competitor would emerge.\textsuperscript{55}

In cases involving intellectual property, the Court has ordered mandatory licensing and the divestiture of stock but has ruled against divestiture of physical assets.\textsuperscript{56} For instance, in \textit{United States v. National Lead Co.}, the Court found a conspiracy between National Lead, its subsidiary Titan, and du Pont.\textsuperscript{57} In 1920, National Lead and Titan formed an international cartel, geographically dividing the markets for titanium pigments and compounds.\textsuperscript{58} In 1933, du Pont joined the conspiracy.\textsuperscript{59} The Court ordered National Lead and Titan to divest themselves of all their stock holdings in their foreign subsidiaries.\textsuperscript{60} In addition, the Court ordered National Lead and du Pont to grant nonexclusive licenses at reasonable royalties to third parties.\textsuperscript{61} Although the Government argued that the Court should force National Lead and du Pont to divest one of their two manufacturing plants, the Court found this remedy supported

\begin{itemize}
\item \textsuperscript{50} See, e.g., \textit{United States v. Pullman Co.}, 330 U.S. 806 (1947).
\item \textsuperscript{52} See id.
\item \textsuperscript{53} See id.
\item \textsuperscript{54} See \textit{United States v. Pullman Co.}, 53 F. Supp. 908, 908 (E.D. Pa. 1944).
\item \textsuperscript{55} Id.
\item \textsuperscript{56} See, e.g., \textit{United States v. Nat'l Lead Co.}, 332 U.S. 319 (1947).
\item \textsuperscript{57} See id. at 324-28.
\item \textsuperscript{58} Id. at 325.
\item \textsuperscript{59} Id. at 326-27.
\item \textsuperscript{60} See id. at 363.
\item \textsuperscript{61} See id. at 335-51.
\end{itemize}
by "neither precedent nor good reason." The primary violations were related to misuse of patents and exclusive agreements; any incidental violation occasioned by the physical plants did not warrant divestiture.

II. CASE STUDIES ON THE SUPREME COURT'S RECORD OF DIVESTITURE

To consider more closely the Supreme Court's treatment of divestiture and its ultimate efficacy, this Article turns to five instructive Supreme Court cases that resulted in divestiture. It then examines five cases where the Court either rejected or did not consider divestiture as a remedy. In general, the divestitures ordered by the Court have produced mixed success.

An examination of past Supreme Court cases resulting in divestiture can inform the modern assessment of whether divestiture provides an appropriate remedy for a conduct violation in the new economy. Each of the five cases discussed below provides a foundation on which to build an analysis. Standard Oil stressed the importance of bad conduct in ordering divestiture, even in a case of multiple acquisitions. The Court continued this emphasis on bad conduct in United States v. Paramount Pictures. The Court cautioned against relying only on injunctive relief when the defendant's past egregious conduct made future compliance with a behavioral remedy unlikely. This problem of enforcement surfaced again in the AT&T litigation. Although the consent decree did not contain allegations of AT&T's misconduct, its partial divestiture and partial injunctive relief consumed substantial judicial resources.

62. Id. at 351.
63. Id.
66. See Standard Oil, 221 U.S. at 76.
67. See 334 U.S. at 144.
68. See id. at 163-64.
in its implementation.69 These cases also provide guidance on the ultimate efficacy of any requested divestiture relief. Although criticized by some for not going far enough, many scholars argue that the Standard Oil divestiture achieved success by allowing the divested entities to function independently.70 In divestiture cases, such as Pullman,71 however, the Court expended significant judicial resources to achieve a result that in all likelihood would have been dictated by market forces.72 Under American Stores, even if the Government decides not to pursue divestiture, a private party can also seek divestiture if injured by the violation.73

A. CASES RESULTING IN DIVESTITURE

1. Standard Oil Co. of New Jersey v. United States

The Supreme Court first ordered divestiture in the Standard Oil decision.74 Standard Oil had acquired stock in other oil companies, creating a monopoly in petroleum distribution.75 Prior to the divestiture order, Standard Oil held shares of production, refining, transportation, and marketing firms in the oil industry.76 Production represented its weakest branch; in the three remaining areas it controlled more than eighty percent of national output.77

71. 330 U.S. at 806.
72. See infra notes 102-03 and accompanying text.
74. Standard Oil, 221 U.S. at 79.
75. See id. at 71. It has been argued that as refining had relatively low barriers to entry, it was Standard Oil's favored transportation agreements with the railroads and the railroads' collusion among themselves that allowed Standard Oil to retain its dominant position in the other business sectors. See Elizabeth Granitz & Benjamin Klein, Monopolization by "Raising Rivals' Costs": The Standard Oil Case, 39 J.L. & ECON. 1, 2, 43-45 (1996). This argument finds support in that, prior to divestiture, Standard Oil paid eighty cents per barrel to ship its product whereas its competitors were forced to pay a dollar forty for the same shipment. See GEORGE WARD STOCKING, THE OIL INDUSTRY AND THE COMPETITIVE SYSTEM 24 (1925).
76. Standard Oil, 221 U.S. at 32.
Standard Oil's tremendous size, standing alone, could not violate the Sherman Act. Instead, the Supreme Court condemned the company's actions in building its monopoly by transferring stock of many diverse corporations to the central company. These actions gave rise to a prima facie presumption of "intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination . . . with the purpose of excluding others from the trade." Although Standard Oil's dominance had waned by the time of the Supreme Court's opinion in 1911, the Court ordered the company to transfer the stock of the subsidiary corporations back to the stockholders who had owned the stock prior to the Standard Oil acquisition. In addition, the Court enjoined Standard Oil from voting or collecting dividends on any stock it retained.

Although a groundbreaking decision for the Supreme Court, the divestiture order merely transformed one nationwide monopoly into thirty-four regional monopolies, which divided the United States into eleven marketing territories. The decree's "fatal flaw," according to one scholar, was that it left "economic control over the successor companies with the same interests that had exercised control over the parent company." Standard Oil willingly complied with the dissolution.

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78. Standard Oil, 221 U.S. at 75.
79. Id.
80. Id.
81. See id. at 78-82.
82. ROSTOW, supra note 25, at 6.
83. See RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 558 (1999); see also BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY 180 (1979) (indicating that after the dissolution decree, the successor firms still respected the geographic monopolies and allowed no competition amongst each other). But cf. Hastings Wyman, Jr., The Standard Oil Breakup of 1911 and Its Relevance Today, in WITNESSES FOR OIL 63, 70-71 (1976) (arguing that although there may have been a "gentlemen's agreement" amongst the divested companies for some period of time, the tacit agreement did not last long and competition quickly ensued).
84. Walter Adams, Dissolution, Divorce, Divestiture: The Pyrrhic Victories of Antitrust, 27 IND. L.J. 1, 2 (1951). Under the terms of the divestiture, the owners of Standard Oil stock would become direct owners, instead of only secondary owners through their ownership of Standard Oil, of the divested companies. See STOCKING, supra note 75, at 54. Fourteen years after the divestiture, John D. Rockefeller or the Rockefeller Foundation continued to be the largest single shareholder in 26 of the companies from the "Standard Oil Group," holding, in a majority of the 26, more than a 20% share of the total stock. See id. at 57.
decreed because it failed to strip the most powerful owners of their power. One scholar, writing in 1940 about the Supreme Court’s divestiture record, opined that “[c]ommercial triumphs among the successor units are almost universal.” Further, uncertainty surrounded the assertion that divesting the companies into even smaller units would improve competition. Ironically, or perhaps tellingly, some of the same companies created by the 1911 divestiture recently have merged with one another, thus rebuilding part of the old Standard Oil empire.

2. United States v. Pullman Co.

In contrast to Standard Oil, the divestiture remedy ordered in Pullman rewarded, rather than punished, the antitrust violator by allowing it to divest itself of a declining business. Pullman, Inc., a holding company that controlled The Pullman Company, Pullman-Standard Car Manufacturing Company, and Pullman Car & Manufacturing Corporation of Alabama, had contracted with railroads for exclusive rights to operate and service sleeping cars. Pullman had maintained a monopoly in the sleeping car service industry since 1900. It had achieved its monopoly in part by buying out its competition

85. See Bringhurst, supra note 83, at 180.
86. Hale, supra note 77, at 623.
87. See id. Indeed, it has been argued that the success of the Standard Oil divestiture is due to the fact that it left many of the divested companies still large enough to have their own corporate identity separate from Standard Oil. See Kovacic, supra note 70, at 1301-02.
88. See, e.g., Bob Varvra, Rockefeller’s Power, Wealth Changed American Business, 92 Nat’l Petroleum News, at http://www.petroretail.net/npn/2000/1200/1200cnt.asp (Dec. 1, 2000) (discussing the merger of Exxon and Mobil, the proposed merger of Texaco and Chevron, and the merger of BP Amoco and Arco, all of which were pieces of the original Standard Oil Company of New Jersey). Interestingly, the reunification of these oil companies presents concerns about their size outside of an antitrust context. For example, some environmentalists are concerned that allowing these companies to merge will allow them to better work together against environmental protections such as ozone requirements. John Passacantando, the executive director of Ozone Action, said that “[p]utting Exxon and Mobil together creates the Death Star of global warming.” The Return of Big Oil, THE PROGRESSIVE, Jan. 1999, at 7.
90. Adams, supra note 84, at 25.
92. Id. at 125.
in the operation and servicing of sleeping cars.\textsuperscript{93} Pullman also maintained itself as the sole manufacturer of sleeping cars in the United States by refusing to operate cars manufactured by other companies.\textsuperscript{94}

Pullman used its monopoly position to exploit the railroads in numerous ways. In addition to demanding a minimum profit on every car, Pullman forced the railroads to bear all the risk of loss.\textsuperscript{95} Because Pullman also dominated the equipment market, it often operated outdated cars\textsuperscript{96} and denied consumers the benefits of advances in technology by keeping other manufacturers out of the market.\textsuperscript{97} The company reaped high monopoly profits from its position.\textsuperscript{98}

The lower court ordered Pullman to divest fully either the manufacturing division or the operating division, leaving the final decision to Pullman.\textsuperscript{99} A dissenting judge argued that Pullman should be forced to sell its manufacturing division because it was the more profitable and easier to sell.\textsuperscript{100} The judge argued that Pullman would not be able to find an independent buyer for the operating division, and would have to sell it to the railroads.\textsuperscript{101} Indeed, railroads controlling more than ninety-five percent of the passenger transportation in the United States later bought the operating division. Thus, these railroads acquired the monopoly formerly held by Pullman.

Divestiture did not have the intended effect. By the time the Court entered the decree, the sleeping-car industry had steeply declined. Pullman’s president embraced the decree because, instead of punishing the company, it allowed Pullman to sell off a dying part of its business and improve the company’s financial position.\textsuperscript{102} Hence, the changing structure of the industry transformed the remedy into an economically rewarding decree. The divestiture also failed to separate the financial control of the manufacturing and operating divisions, allowing

\textsuperscript{93} See id. at 126.
\textsuperscript{94} Id. at 128; Adams, supra note 84, at 25.
\textsuperscript{95} Adams, supra note 84, at 25.
\textsuperscript{96} See Pullman, 50 F. Supp. at 132. When Pullman did fix the cars, they charged the expense to the railroads. See id. at 25 n.11.
\textsuperscript{97} Id. at 133.
\textsuperscript{98} Adams, supra note 84, at 26.
\textsuperscript{100} See id. at 909-10 (Biggs, J., dissenting).
\textsuperscript{101} Id. at 910.
\textsuperscript{102} See POSNER, supra note 64, at 87.
Pullman and the railroads to maintain their overlapping directorships and common investors.\textsuperscript{103} The divestiture left the industry subject to monopoly control (by the large railroads instead of Pullman) and made Pullman a stronger, more financially viable company.

3. \textit{United States v. Paramount Pictures}

Whereas divestiture in \textit{Pullman} seemed at first reasonable but later proved unnecessary, divestiture in \textit{Paramount Pictures} seemed at first unreasonable but later proved necessary. The defendants, Paramount Pictures and four other firms, produced motion pictures, distributed the films, and owned theaters where they could be shown.\textsuperscript{104} These defendants discriminated against small, independent theaters in favor of larger, affiliated theaters.\textsuperscript{105} The larger theaters could transfer a film to another theater after the run expired, extend the run of any film, and receive unlimited playing time.\textsuperscript{106}

Before trial, the United States and the defendants entered into a consent decree.\textsuperscript{107} The decree provided that at the end of a three-year probationary period, the United States could seek the relief named in its amended complaint.\textsuperscript{108} The United States exercised this option after the three-year period expired, and the case proceeded to trial.\textsuperscript{109} At trial, the district court denied the Government's request to divest the distributors of all of their theater holdings.\textsuperscript{110} The trial court held that divestiture was unwarranted, provided too harsh a remedy, and would not best serve the public interest.\textsuperscript{111} Instead, the district court fashioned injunctive relief that provided for a mandatory

\textsuperscript{103} See Adams, supra note 84, at 30-31.

\textsuperscript{104} The four other firms were Loew's, Inc., Radio-Keith-Orpheum Corp., Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corp. Columbia Pictures Corp., Universal Corp., and United Artists Corp., who distributed films but did not own any theaters, were also named defendants in the suit. United States v. Paramount Pictures, 334 U.S. 131, 140 (1948).

\textsuperscript{105} See id. at 159-60.

\textsuperscript{106} See id.

\textsuperscript{107} See id. at 141 n.3.

\textsuperscript{108} See id.

\textsuperscript{109} Id. at 141 n.3.


\textsuperscript{111} See id. The court did order the defendants to divest the theaters which they owned jointly, but refused to order divestiture for theaters which were owned solely. See id. at 356.
bidding mechanism for theaters to acquire the rights to show a film.\textsuperscript{112} Because the film producers had an interest in showing their films in a proper venue, the district court allowed them to use subjective factors in addition to price and to select the best overall bid.\textsuperscript{113}

The Supreme Court, however, found the proposed bidding process unwieldy.\textsuperscript{114} Although noting that at first glance the bidding system seemed commendable, the Court examined the practical difficulties in instituting such a system.\textsuperscript{115} First, instituting the bidding system would force the judiciary into an inappropriate role of continual business management with only the crude mechanism of contempt to accomplish such a task.\textsuperscript{116} Second, delegating the management of such a subjective mechanism to the corporations who precipitated the antitrust violations in the first instance caused great concern.\textsuperscript{117} Therefore, the Court vacated the bidding system remedy and remanded to the district court to reconsider the appropriateness of divestiture.\textsuperscript{118} On remand, the district court ordered full divestiture as the only means to ensure the end of the conspiracy and the protection of consumer welfare.\textsuperscript{119}

Although the divestiture initially spurred competitive effects, some have questioned recently whether the remedy has overly hindered the defendants.\textsuperscript{120} Within ten years after the resolution of the case, the number of independent producers spiked from 70 to 170.\textsuperscript{121} More than fifty years after the case, 

\textsuperscript{112} See id. at 346.
\textsuperscript{113} See id.
\textsuperscript{114} See Paramount Pictures, 334 U.S. at 162-63.
\textsuperscript{115} The Court noted that as there were a variety of subjective criteria, the standards to use for the bidding process were "incapable of precise definition." Id. at 163.
\textsuperscript{116} See id.
\textsuperscript{117} Id. at 163-64.
\textsuperscript{118} See id. at 165-66.
\textsuperscript{120} See, e.g., Barry J. Brett & Michael D. Friedman, \textit{A Fresh Look at the Paramount Decrees}, ENT. & SPORTS LAW., Fall 1991, at 2.
\textsuperscript{121} See Kraig G. Fox, Note, Paramount \textit{Revisited: The Resurgence of Verti-
however, if the defendants wished to acquire a theatre, they still needed judicial approval. 122 Although industry changes had reduced substantially the defendants' market power, 123 the enforcement of the divestiture remedy continued and arguably restricted the defendants' trade unfairly. 124

4. American Telephone and Telegraph

The 1983 AT&T case 125 is an example of an effective use of the divestiture remedy, 126 but scholars continue to debate its success. 127 The complex integration between the local and long-distance telephone service markets complicated the divestiture process, mandated extensive post-divestiture monitoring, and may have ultimately limited the divestiture's competitive benefits. 128 In 1974, the United States Department of Justice filed suit against AT&T, alleging violations of section 2 of the Sherman Act. 129 At the time, AT&T was one of the largest

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122. See Barry J. Brett & Michael D. Friedman, A Fresh Look at the Paramount Decrees, 9 ENT. & SPORTS LAW. 1, 3 (1991).

123. At the time of the divestitures, the defendants produced approximately two-thirds of all the films released; currently, they produce approximately twenty-five to thirty percent. See id. at 4.

124. See id. at 23.


126. See, e.g., Kovacic, supra note 70, at 1302-03; Simran K. Kahai et al., Is the "Dominant Firm" Dominant? An Empirical Analysis of AT&T's Market Power, 39 J.L. & ECON. 499, 512-13 (1996) (finding that after the divestiture AT&T possessed little market power compared to other United States firms).

127. The measurement of the success of the divestiture decree is complicated by the fact that AT&T operated in a heavily regulated industry. It is not clear what would have happened absent this regulation, either before the divestiture or after it. See Enis & Sullivan, supra note 125, at 135. Compare Clement G. Krouse et al., The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies, 42 J.L. & ECON. 61, 64 (1999) (arguing that divestiture of AT&T created cost savings of 14.2% by 1993), with Geoffrey M. Peters, Is The Third Time the Charm? A Comparison of the Government's Major Antitrust Settlements with AT&T This Century, 15 SETON HALL L. REV. 252, 273 (1985) (predicting the only major change after the breakup will be the increase in local rates).

128. See Enis & Sullivan, supra note 69, at 133-35.

companies in the world and operated in local telephone service, long-distance service, equipment manufacture, and research.\textsuperscript{130} AT&T, through its Bell Operating Companies (BOCs) supplied local telephone service to more than eighty percent of U.S. subscribers.\textsuperscript{131} The Department of Justice broadly alleged that AT&T had used its monopoly in local exchange service to unlawfully leverage itself into dominant positions in the equipment manufacturing and long-distance markets.\textsuperscript{132} It also accused AT&T of predatory pricing\textsuperscript{133} and refusing to allow competitors access to equipment.\textsuperscript{134}

The Supreme Court summarily affirmed the consent decree\textsuperscript{135} entered into by the parties, which had been accepted by the district court after minor adjustments.\textsuperscript{136} In the consent decree, AT&T agreed to divest itself of local telephone service providers in an attempt to establish fair competition in the telecommunications market.\textsuperscript{137} The Court allowed AT&T to retain its equipment manufacturing, research, and long-distance divisions.\textsuperscript{138} The consent decree also led to the formation and

\textsuperscript{130} See Paul W. MacAvoy & Kenneth Robinson, \textit{Winning by Losing: The AT&T Settlement and Its Impact on Telecommunications}, 1 \textit{Yale J. on Reg.} 1, 3 (1983).


\textsuperscript{132} See id.

\textsuperscript{133} The accusation of predatory pricing is particularly interesting because AT&T was not free to set its own rates: It was heavily regulated and its rates were constrained by regulatory authorities. See MacAvoy & Robinson, supra note 130, at 27.

\textsuperscript{134} See id. at 14-15.

\textsuperscript{135} The parties had previously rejected two consent decrees, both proposing complex regulatory solutions, that came to be known as Quagmire I and Quagmire II. See Kearney, supra note 131, at 1410-11.

\textsuperscript{136} Judge Greene ordered four modifications before he would approve the decree: Greene allowed the BOCs to market and install telephone equipment (but not manufacture it) Greene forced AT&T to relinquish its profitable Yellow Pages business to the BOCs. Greene shifted about one-fourth of the revenues from long-distance provision from AT&T to the BOCs. Greene banned AT&T from participating in the "electronic publishing field" for seven years. Paul W. MacAvoy & Kenneth Robinson, \textit{Losing by Judicial Policymaking: The First Year of the AT&T Divestiture}, 2 \textit{Yale J. on Reg.} 225, 233-34 & n.51 (1985).

\textsuperscript{137} See Kearney, supra note 131, at 1412.

extensive regulation of the seven BOCs and heavily regulated each BOC. Because the Court feared that the BOCs would replicate AT&T's tactics by using their local exchange monopolies to leverage themselves unfairly into other markets, the decree required court approval for expansion of services beyond the local exchange.  

Although scholars debate whether the AT&T divestiture has resulted in lower costs for consumers, competition in the long-distance market has clearly increased. One need only consider the number of evening phone callers trying to convince the customer to change long-distance service providers to recognize the number of competitors in the market. Competition also has emerged in the local service markets. In some metropolitan areas, for example, consumers can choose between standard service from a BOC or digital telephone service. Whether AT&T's divestiture has stunted or advanced technological development, however, remains unresolved.

Despite the acknowledged benefits of the AT&T divestiture, the integrated nature of the local and long-distance telephone markets may have limited the divestiture's overall success. Although the Court initially attempted to completely sever the operations of AT&T and the BOCs, a relationship continued between the entities because of the market integration. In fact, the Court actually forced AT&T to continue to subsidize the BOCs long after the divestiture was supposedly complete. The Federal Communications Commission (FCC), aided by the courts, also permitted AT&T to maintain its original corporate structure, enabling AT&T to control a large part of the long-distance market. The Department of Justice itself reversed its prior hard-lined stance by reducing the amount of regulation imposed on the BOCs.

The middle ground taken in the AT&T divestiture may

139. Id.
140. It is clear that during the first year after divestiture, consumers experienced higher costs and service of lower quality. See MacAvoy & Robinson, supra note 136, at 235-43.
141. Ironically, in some areas this digital service is offered by none other than AT&T, in conjunction with its partners.
143. See Macavoy & Robinson, supra note 136, at 243.
145. See Kearney, supra note 121, at 1433-34.
have contributed to the need for intense regulatory oversight.\(^{146}\) Although the AT&T divestiture has led to the most dramatic and lasting changes of any industry affected by a major divestiture decree,\(^{147}\) the intense regulatory oversight required to accomplish the divestiture may have reduced its benefits. Perhaps the most important lessons to be drawn from the AT&T experience are the difficulties with the procedure itself. The case required tremendous oversight before and after issuing the decree. Judge Greene, for example, spent many years working on the AT&T case, first as the judge presiding over the litigation, then as the judge demanding modifications before he would accept the consent decree, and finally as the overseer of the divestiture itself.\(^{148}\) Judge Greene was particularly concerned that enforcing the antitrust laws would harm consumers in the form of higher telephone rates.\(^{149}\) Judge Greene issued decisions on more than 160 requests for waivers under the catch-all clause in the modified final judgment.\(^{150}\) He spent much of his time on the AT&T divestiture until the passage of the Telecommunications Act of 1996 removed his jurisdiction over the case.\(^{151}\)

\(^{146}\) One Antitrust Division economist drew a comparison between the AT&T divestiture and the Vietnam War. A common view of U.S. participation in the Vietnam War is that the country should have been fully committed to fighting the war and staying there as long as was necessary to win, or it should not have fought the war at all. The middle ground solution pursued by policymakers led to severe consequences. Similarly, the theory behind divestiture seems to suggest that there should be a complete severance or no severance at all. See Brennan, supra note 138, at 52-53.

\(^{147}\) On a related note, AT&T recently announced plans to restructure itself into four separately traded companies. See Deborah Solomon & Nikhil Degun, AT&T Board Approves Breakup Proposal, WALL ST. J., Oct. 25, 2000, at A3. This is the largest restructuring of the company since the divestiture decree; separation of AT&T into four distinct companies that perform different functions has the practical effect of a divestiture order.

\(^{148}\) Kearney, supra note 131, at 1406-11, 1416, 1461-63.

\(^{149}\) Fred W. Henck & Bernard Strassburg, A Slippery Slope: The Long Road to the Breakup of AT&T 241 (1988); see also discussion of United States Steel, infra Part II.B.2 (explaining the Court's conclusion that divestiture was not a proper remedy because consumer oppression did not result from the illegal acquisition).

\(^{150}\) See Kearney, supra note 131, at 1440, 1465. The catch-all clause essentially prohibited the BOCs from conducting business unrelated to the "common carriage of local telecommunications." Id. at 1401.

\(^{151}\) Id. at 1459.

The Supreme Court decided *American Stores*, its most recent divestiture case, in 1990. The decision permitted private litigants to request divestiture as a remedy for Clayton Act violations. The State of California brought an action against a supermarket chain that had acquired the stock of the largest chain of supermarkets in California. The Court considered California a private litigant in the action. The Supreme Court overturned a Ninth Circuit case by holding that a private litigant could request the divestiture remedy in appropriate antitrust actions. Because the Clayton Act authorized private litigants to bring such suits, it also authorized them to seek all remedies appropriate for such violations. A subsequent settlement allowed American Stores to retain some of the newly purchased supermarkets in return for selling off other stores in California.

Although *American Stores* paved the way for private litigants to request divestiture, few such cases have appeared in federal district courts. Perhaps this indicates the ineffectiveness of the divestiture remedy itself. Further, merely making the divestiture remedy available does not remove the private litigant's procedural hurdles to establishing standing or

152. *California v. Am. Stores Co.*, 495 U.S. 271, 271 (1990); see also Appendix, infra, at 615.
154. Id. at 275-76.
155. California was considered a private plaintiff just as if it had been an individual private party. See Wayne H. Elowe, Note, *Predictability in Merger Enforcement after California v. American Stores: Current Uncertainties and a Proposal for Change*, 42 CASE W. RES. L. REV. 599, 612 (1992). Prior to *American Stores*, it was unclear whether any party other than the United States government could bring a suit requesting divestiture. With its holding in *American Stores*, the Supreme Court allowed states to play a much greater role in enforcement of federal antitrust laws. See id. at 602-03, 612.
156. See *Am. Stores*, 495 U.S. at 278-83.
157. See id.
160. In cases brought by the United States government, simply proving the violation might demonstrate public injury sufficient to support a divestiture order. See *Am. Stores*, 495 U.S. at 295. Private litigants requesting the dives-
the economic challenge of financing such protracted litigation.

B. CASES THAT DID NOT RESULT IN DIVESTITURE

Instances where the Court did not order or consider divestiture can also inform the divestiture analysis in the new economy. The Court has held that divestiture should only be used where warranted. For example, although United States v. United States Steel Corp. involved a combination of companies similar to Standard Oil, the Court held that ordering divestiture would not serve the public interest. United States Steel exhibited none of the anticompetitive intent shown by Standard Oil, and ordering divestiture would expose the public to potential injury. Similarly, in United States v. United Shoe Machinery Co. of New Jersey, the Court avoided divestiture because it could potentially expose United Shoe to liability for the infringement of patents deemed necessary for its business.

The Court also has refused to order divestiture where other remedies would be more effective. In Timken Roller Bearing Co. v. United States, a majority of the Court did not believe divestiture would provide the most appropriate remedy for the antitrust violations. Because anticompetitive agreements had caused the harm, injunctive relief could adequately remedy the violation while avoiding the more draconian divestiture remedy. In United States v. General Dynamics Corp., the divestiture remedy, however, must still prove that they have standing to sue, just as in other private antitrust actions. Id. at 296. Additionally, the defendant is able to use traditional equitable defenses, such as laches or unclean hands, which would be unavailable in a suit brought by the government. See id. at 296.

163. U.S. Steel, 251 U.S. at 457.
164. Id. at 455-57.
166. See id. at 45-46 (questioning the possible consequences of divestiture).
167. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), overruled by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (overruling the invocation of the intra-enterprise conspiracy doctrine, but stating that the doctrine was not necessary to the result reached, thus endorsing the case's final adjudication).
168. Id. at 601.
169. Id. at 601, 603-05.
Court held that divestiture would not benefit competition.\textsuperscript{171} Although the acquisition at issue increased General Dynamics’s market share,\textsuperscript{172} pre-existing contracts bound much of the coal supply acquired by the acquisition.\textsuperscript{173} Thus, the acquisition did not put the competitive system at risk, making divestiture unnecessary and unwarranted.\textsuperscript{174}

1. \textit{United States v. United Shoe Machinery Co. of New Jersey}

In one of the most examined divestiture cases, \textit{United Shoe}, the Supreme Court refused to order divestiture because of overriding efficiencies.\textsuperscript{175} On February 7, 1899, seven shoe machinery companies merged into United Shoe Machinery Company of New Jersey (United Shoe).\textsuperscript{176} These seven business firms held patents in several countries and manufactured, sold, and leased shoe machinery.\textsuperscript{177} The United States accused United Shoe of acquiring competing companies and creating a monopoly on machinery for bottoming shoes.\textsuperscript{178}

The Government examined United Shoe’s purchase of Plant Company (Plant) for evidence of monopolistic behavior.\textsuperscript{179} Plant held an improvement patent for a shoe-bottoming machine.\textsuperscript{180} The patent covered improvements on United Shoe’s machine design that, when coupled with United Shoe’s own recent improvements, would be of “very great[] practical importance” to United Shoe.\textsuperscript{181} To avoid the risk of infringing Plant’s patents, United Shoe decided to buy Plant and thereby acquire

\textsuperscript{171} Id. at 511.
\textsuperscript{172} Id. at 494-96.
\textsuperscript{173} Id. at 499-500.
\textsuperscript{174} See id. at 503-04.
\textsuperscript{175} See United States v. United Shoe Mach. Co. of N. J., 247 U.S. 32, 66-67 (1918) ("It is impossible to believe . . . that the great business of [United Shoe] has been built up by . . . the exercise of power . . . . The installations could have had no other incentive than the excellence of the machines and the advantage of their use . . . ."). \textit{United Shoe} has been examined extensively for its nexus of the tensions created by the public protections of antitrust law and the private protections of intellectual property law. See, e.g., William H. Page, \textit{Ideological Conflict and the Origins of Antitrust Policy}, 66 Tul. L. Rev. 1, 60-62 (1991).
\textsuperscript{176} United Shoe, 247 U.S. at 38.
\textsuperscript{177} Id. at 39.
\textsuperscript{178} Id. at 38.
\textsuperscript{179} Id. at 47-49.
\textsuperscript{180} Id. at 47.
\textsuperscript{181} Id. at 51.
the improvements on its own machinery.\textsuperscript{182} Without this purchase, United Shoe may have been forced to halt further development on its shoe machinery design.\textsuperscript{183}

Despite the Court’s own admission that the acquisition removed some degree of competition, the Court refused to review all fifty-six of United Shoe’s transactions.\textsuperscript{184} Whether United Shoe purchased businesses because of machinery improvements, or to acquire patents or machinery it did not own, United Shoe gained efficiency through its acquisitions.\textsuperscript{185} Although the Court acknowledged the magnitude of United Shoe, efficiency dictated its size.\textsuperscript{186} Customers benefited from the improvements made by United Shoe and the cost savings it realized.\textsuperscript{187} United Shoe’s strategy kept it informed of the “mechanical march; to fall back would have been its destruction.”\textsuperscript{188}

2. \textit{United States v. United States Steel Corp.}

In \textit{United States Steel}, the Court concluded that the defendant’s illegal acquisition did not warrant divestiture because price-fixing and customer oppression did not follow the acquisition.\textsuperscript{189} The United States had charged United States Steel with violating the Sherman Act by purchasing the stock of several iron and steel companies with the purpose and effect of unduly restricting competition.\textsuperscript{190} Additionally, the Government argued that United States Steel’s role as a holding company unduly restricted competition by amalgamating the various corporations into one “super-combination of overwhelming

\begin{itemize}
\item[\textsuperscript{182}] United Shoe, 247 U.S. at 51. For a good discussion on the tying aspects of United Shoe, see Victor H. Kramer, \textit{The Supreme Court and Tying Arrangements: Antitrust as History}, 69 MINN. L. REV. 1013, 1026-30 (1985).
\item[\textsuperscript{183}] United Shoe, 247 U.S. at 51.
\item[\textsuperscript{184}] \textit{Id.} at 54. Notably, this is similar to the current Department of Justice and FTC merger guidelines, which consider the efficiency gains of the proposed merger. “M]erger-generated efficiencies may enhance competition by permitting two ineffective (e.g., high cost) competitors to become one effective (e.g., lower cost) competitor.” \textit{Antitrust Policies and Guidelines, U.S. Dep’t of Justice, Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20, 573-11 (Apr. 8, 1997).}
\item[\textsuperscript{185}] United Shoe, 247 U.S. at 54.
\item[\textsuperscript{186}] \textit{Id.} at 56.
\item[\textsuperscript{187}] \textit{Id.}
\item[\textsuperscript{188}] United Shoe, 247 U.S. at 55.
\item[\textsuperscript{189}] United States v. United States Steel Corp., 251 U.S. 417, 445-51 (1920).
\item[\textsuperscript{190}] \textit{Id.} at 436-37.
\end{itemize}
power." The size of the company had become "substantially dominant" in the industry through the "combination of powerful and able competitors." The Department of Justice argued that, while prices of some products fluctuated, the holding company increased prices in almost every instance.

The Court compared the United States Steel situation to Standard Oil and American Tobacco, two cases where the Supreme Court had ordered divestiture. The Court distinguished United States Steel from these cases based on the companies' intent in acquiring subsidiaries. The Court found that in buying subsidiary companies, Standard Oil intended to drive competitors out of the marketplace and prevent them from exercising their right to trade. In contrast to these "brutal" methods, the Court reiterated the lower court's description of United States Steel's behavior as "absolutely guiltless."

Although United States Steel grew to an impressive size, the company had not tried to fix or maintain prices, and it did not require customers to agree to limit purchases. Its competitors did not accuse it of aggression, nor did it attempt to oppress and destroy other companies.

Like Standard Oil, American Tobacco also exhibited similar brutal tactics. The combination in American Tobacco allowed the company to present its competitors with a choice between "submission or ruin." The company's modus operandi consisted of forming new companies and taking stock in them to veil the actual result; placing power in seemingly independent corporations to bar the entry of new competitors; and spending millions of dollars to acquire plants and close their

191. Id. at 419.
192. Id. at 442-43.
193. Id. at 420.
194. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); see discussion supra Parts I.A., II.A.1.
197. U. S. Steel, 251 U.S. at 455-57.
198. Id. at 455.
199. Id.
200. Id.
201. Id. at 440-42.
202. Id. at 441, 449, 451.
203. Id. at 456.
204. Id.
operations.\textsuperscript{205} In both \textit{Standard Oil} and \textit{American Tobacco}, the corporation systematically consolidated its market domination, but concealed its actions by controlling the stock of seemingly independent competitors.\textsuperscript{206} In these cases, dissolution became a "manifest instrumentality and inevitable."\textsuperscript{207} The Court distinguished \textit{United States Steel} from these two cases because acts conducted in violation of the Sherman Act were different from a condition that "is not only a continued attempt to monopolize, but also monopolization."\textsuperscript{208} Because of this distinction, the Court in \textit{United States Steel} determined that enforcement of the statute did not require the broad remedy of divestiture employed in \textit{Standard Oil} and \textit{American Tobacco}.\textsuperscript{209}

Although the Sherman Act clearly instructs courts to "prevent and restrain violations of" the Act, a court has discretion to choose remedies warranted by the particular situation.\textsuperscript{210} The Court held that the circumstances in \textit{United States Steel} did not warrant divestiture because of the ten-year delay in litigation, corporate development worth millions of dollars, and the public investment, including foreign trade, that had occurred.\textsuperscript{211} Given the circumstances, the Court determined that dissolution failed to serve the public interest and that divestiture would risk injury to the public interest, including the disruption of foreign trade.\textsuperscript{212}

3. \textit{Timken Roller Bearing Co. v. United States}

In \textit{Timken}, the Supreme Court determined divestiture unnecessary to restore competition to the affected market.\textsuperscript{213} The United States charged Timken Roller Bearing Company (Timken) with violating sections 1 and 3 of the Sherman Act by re-
straining interstate and foreign commerce. The district court found that Timken had business agreements with British Timken and Societe Anonyme Francaise Timken (French Timken) to allocate trade territories among themselves; fix prices on products sold in another's territory; protect their markets and eliminate outside competition; and participate in cartels to restrict imports and exports with the United States. While the district court enjoined the illegal conduct and ordered divestiture, a majority of the Supreme Court declined to uphold the divestiture.

Justice Reed’s concurring opinion reasoned that the statutory provisions did not specifically empower courts to apply divestiture to violations of the Sherman Act. Courts should order divestiture to restore competition, not to punish violators, and should use divestiture only when the circumstances render less severe remedies unavailable. Justice Reed also stated that courts should exercise judicial restraint before granting the remedy of divestiture. The circumstances in Timken made divestiture inappropriate because injunctive relief had already remedied the defendant's restraints of trade. Timken had violated the Sherman Act by entering into anticompetitive business agreements with British Timken and French Timken. Injunctive relief had already successfully dissolved the offending contracts, making divestiture inappropriate.

4. United States v. General Dynamics Corp.

The Court refused to employ divestiture as a remedy in General Dynamics because, although the acquisition increased

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215. Id. at 595-96. Timken and Mr. Dewar, an English businessman, purchased all of the stock of British Timken. See id. at 595. Although British Timken stock was later publicly sold, 30% and 24% of British Timken was still controlled by Timken and Dewar, respectively. See id. Timken and Dewar formed French Timken and continuously owned all of its stock. See id.
216. Id. at 600.
217. Id. at 600-01.
218. Id. at 602 (Reed, J., concurring).
219. Timkin Roller Bearing, 341 U.S. at 603 (Reed, J., concurring).
220. Id. (suggesting United States v. National Lead Co., 332 U.S. 319 (1941), as an appropriate guideline).
221. Id.
222. Id. at 603-04 (Reed, J., concurring).
223. Id.
market share, it did not affect market power.\textsuperscript{224} Between 1954 and 1959, Material Service Corporation acquired thirty-four percent of the stock of its competitor United Electric Coal Companies (United Electric).\textsuperscript{225} United Electric operated strip and open-pit mines.\textsuperscript{226} General Dynamics subsequently purchased Material Service and became the fifth-largest commercial coal producer in the United States.\textsuperscript{227} By 1966, General Dynamics owned all of United Electric's outstanding stock.\textsuperscript{228} The United States filed suit against General Dynamics, alleging Material Service's acquisition of United Electric violated section 7 of the Clayton Act by lessening competition in the production of coal.\textsuperscript{229}

The trial court addressed the probability of competition lessening within the market because of the acquisition of United Electric.\textsuperscript{230} Although the Government viewed the coal industry as a single-product market, the district court instead defined the relevant market as the “energy market,” which included coal, oil, natural gas, nuclear energy, and geothermal power.\textsuperscript{231} The district court also rejected the Government’s proposed geographic markets because the underlying statistics did not relate to coal consumption patterns.\textsuperscript{232} The Supreme Court agreed with the district court’s holding that “divestiture [would not] benefit competition even were this court to accept the Government’s unrealistic product and geographic market definitions.”\textsuperscript{233}

The Court considered not only the concentration of market share but also the resulting effect on market power. At trial the court found that General Dynamics acquired 118,000,000 tons of coal with the acquisition of United Electric.\textsuperscript{234} Although this acquisition increased General Dynamics’s market share, it

\begin{itemize}
\item \textsuperscript{225} Id. at 489; see supra note 30.
\item \textsuperscript{226} Id. at 489.
\item \textsuperscript{227} Id. at 489.
\item \textsuperscript{228} Id. at 490.
\item \textsuperscript{229} Id.; see 15 U.S.C. § 18 (1995).
\item \textsuperscript{230} Gen. Dynamics, 415 U.S. at 491.
\item \textsuperscript{231} Id. In addition to coal, “relevant” market fuels included “oil, natural gas, nuclear energy, and geothermal power.” Id.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id. at 494 (quoting United States v. Gen. Dynamic Corp., 341 F. Supp. 534, 560 (N.D. Ill. 1972), affd, 415 U.S. 486 (1974)).
\end{itemize}
did not necessarily increase its market power. Only 52,000,000 tons of the newly acquired coal were economically feasible to mine, and all but 4,000,000 tons had "been sold under long term contracts." Further, utilities consumed the majority of the coal and were "sophisticated, knowledgeable purchasers wielding great economic power." This left General Dynamics little freedom to exploit any power that it gained from the merger. Because the acquisition did not harm competition, it did not warrant divestiture.

5. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

Because the plaintiffs in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. had not suffered an "antitrust injury," the Court denied a remedy. Brunswick Corporation had become one of the two largest manufacturers of bowling equipment in the United States by the 1970s. The bowling industry experienced a boom in the 1950s and Brunswick's sales increased dramatically. Brunswick sold lanes, automatic pinsetters, and other equipment that required large expenditures. Brunswick financed these sales by extending credit to purchasers and taking a security interest in the goods. In the early 1960s, the bowling industry declined and Brunswick experienced difficulty in collecting its receivables. To overcome its financial difficulties, Brunswick acquired and operated defaulting bowling alleys. These acquisitions made Brunswick the largest operator of bowling alleys nationwide, even though it controlled only two percent of all bowling alleys.

The suit arose because operators of bowling alleys in certain geographic markets argued that Brunswick's acquisi-

235. Id.
236. Id. at 559.
237. See id.
238. Id. at 560.
240. Id. at 479.
241. Id.
242. Id. Brunswick sold a lane and pinsetter for $12,600 in the 1950s. Id.
243. Id.
244. Id.
245. Id. at 479-80. Brunswick bought 222 bowling alleys and closed or later divested 54 of them. Id. at 480.
246. Id.
247. The respondents were from markets in which Brunswick had acquired
tions lessened competition and created a monopoly in violation of section 7 of the Clayton Act. At trial, these plaintiffs tried to establish damages by arguing that if Brunswick had closed the acquired bowling alleys, the plaintiffs would have realized higher profits. The jury agreed with the plaintiffs and the court ordered Brunswick to divest the bowling alleys in these geographic areas. The case came before the United States Supreme Court to decide whether the plaintiffs could obtain antitrust damages when a competitor’s continued business operation prevented the plaintiffs from realizing an increase in their market share.

The plaintiffs claimed that they suffered an antitrust injury because Brunswick’s decision to operate bowling alleys in their cities placed them in a worse financial position than if Brunswick had allowed the alleys to close. The Court disagreed and held that plaintiffs must prove an “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” Plaintiffs’ injury did not meet this definition because they sought damages for profits they would have realized had competition been reduced by Brunswick not entering the market. Given the absence of antitrust injury, the Court did not need to address divestiture.

C. SYNTHESIS

A general framework for the divestiture analysis emerges from these ten cases. Although divestiture cases involving structural violations provide an easier analysis, as long as a party possesses market power, a court may order divestiture if it answers two questions in the affirmative. First, does divestiture provide the least restrictive alternative to remedy the al-

bowling alleys: Pueblo, Colorado; Poughkeepsie, New York; and Paramus, New Jersey. Id.
249. Id. at 481. Although the issue was not presented to the Court, Brunswick involved the question of a private litigant seeking divestiture under the federal antitrust laws which later was to be resolved in California v. American Stores Co., 495 U.S. 271 (1990). See supra note 152 and accompanying text.
250. Brunswick, 429 U.S. at 482.
251. See id. at 483.
252. Id. at 486.
253. Id. at 489.
254. Id. at 488.
leged harm? Second, will divestiture effectively remedy the violation?

The first consideration asks whether divestiture provides the least restrictive alternative. In a case involving a large merger, the Court has indicated that divestiture should be the first remedy considered. As seen in Standard Oil and Paramount Pictures, a court should order divestiture if the corporation has demonstrated a pattern of anticompetitive conduct that make its compliance with injunctive relief a dubious proposition. If, however, the corporation did not exploit any potential market power, as seen in United States Steel, the Court will feel free to impose less severe remedies. Although non-structural violations do not necessarily foreclose divestiture, the Court has indicated in cases such as United Shoe and Timken that these conditions favor injunctive relief.

If divestiture appears necessary, the second question asks whether divestiture can effectively remedy the violation. In answering this question, United States Steel, Pullman, and General Dynamics provide guidance. If the violation does not produce a net negative effect on competition, as in General Dynamics, divestiture is unwarranted. If divestiture accomplishes simply what the market would have Remedied in its natural course of operations, as in Pullman, then judicial intervention becomes unnecessary. Similarly, if divestiture of the corporation's assets will create a public risk, as in United States Steel, a court should not order divestiture. Where the divestiture will restore competition to the market, however, as in AT&T and Standard Oil, it should be considered.

This Article will next apply this analytical framework to determine whether divesture remains an appropriate remedy in the new economy. By using the facts presented in Microsoft to clarify the analysis, general conclusions should emerge that can be applied to any modern divestiture analysis. Before proceeding, the Article will first explain the distinct attributes of the software and e-commerce businesses and the unique issues they present for divestiture analysis in the new economy.

255. California v. Am. Stores Co., 495 U.S. 271, 281 (1990) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.").
III. THE SOFTWARE AND E-COMMERCE BUSINESS ENVIRONMENT

A. CREATION OF OPERATING SYSTEMS

IBM brought computer technology into homes by its broad commercial distribution of the personal computer (PC). PCs function because of operating systems that serve as platforms on which applications run. The operating systems schedule the execution of tasks and control the flow of information. Operating systems also provide an interface through which the user can operate the computer. Microsoft launched its first operating system, MS-DOS, in 1981. MS-DOS required users to enter precise commands to make the computer function. Microsoft later developed Windows, which allowed users to disregard precise verbal commands and operate the computer by clicking on icons. In 1990, Microsoft released Windows 3.1, and five years later it released Windows 95. Unlike earlier versions, Windows 95 combined the Windows and MS-DOS functions to create a single operating system.

B. RAPID TECHNOLOGICAL CHANGE

The computer industry theoretically can change overnight. Microprocessor capabilities are expected to double every eight-
As capabilities of microprocessors increase, prices decrease. This continual improvement in microprocessor capabilities makes the "computer industry inherently unpredictable."  

C. COMPETITION IN THE SOFTWARE MARKET

The software market is characterized by particularly fierce competition that stems from the nature of software itself. Software never wears out, and only new innovations render software obsolete. Software makers therefore continuously compete against their own products as well as against other software makers. If their software does not continually improve, consumers will not purchase new versions.

Software's potential is also linked to the microprocessors on which it runs. As microprocessor capability increases and prices decrease, affordable software can be created to take advantage of the increased capability and achieve previously unattainable goals. These swift technological advances quickly make products less valuable and even obsolete.

Once developed, software can be copied at virtually no cost. The primary expenditure goes to the research and development necessary to write the software in the first in-

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266. For example, a Zenith Z-station 425Sh sold for $3,083 in June 1992 but sold for $1,419 in May 1993, a price decrease of fifty-four percent in one year. William J. Cook et al., Computer Chaos, U.S. NEWS & WORLD REPT., July 26, 1993, at 47.

267. Brief for Defendant-Appellant, at 16, Microsoft (Nos. 00-5212, 00-5213). In fact, even Bill Gates was late in discerning the importance of the Internet. Microsoft contends that if it had misjudged the importance of the Internet, "it would be an anachronism today." Id. at 17.

268. Id. at 18.

269. Id.

270. Id.

271. Id.

272. Id.

273. Id.

274. Id.

275. See, e.g., Daniel J. Gifford, Microsoft Corporation, the Justice Department, and Antitrust Theory, 25 SW. U. L. REV. 621, 639 (1996) ("After the program is developed, output costs are essentially zero.").
276. See id.
277. See id.
278. See id. at 639-41.
279. See, e.g., Teague I. Donahey, Terminal Railroad Revisited: Using the Essential Facilities Doctrine to Ensure Accessibility to Internet Software Standards, 25 AIPLA Q.J. 277, 293-94 (1997) (explaining that the software market has “significant predatory pricing activity” where companies attempt to force other companies out by distributing free software).
280. Barriers to entry represent the hurdles a potential competitor must overcome in order to enter the market. For a classical study of the subject, see JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956). It has been argued that barriers to entry represent just normal market efficiencies that “properly dissuade entry” and so should be commended, “rather than condemned.” See David L. White, Shaping Antitrust Enforcement: Greater Emphasis on Barriers to Entry, 1989 BYU L. Rev. 823, 826-28 (1989). However, the Court has used barriers to entry as the basis for finding antitrust violations. See, e.g., FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967) (finding that the acquisition in question may raise the barriers to entry because a new contract would necessitate competing with a large company through advertising).
compatible with applications. The more applications that become available, the greater value the operating system has to the consumer. To make an application available to an operating system, however, it must be rewritten, or "ported," onto that platform, which involves significant time and resources. Although this structure does not necessitate a one-product market, a one-product market is not unlikely.

If a single product does becomes dominant, a potential entrant has to overcome the significant barrier of the "chicken-and-egg problem" to enter the market. The potential entrant must have a large application base to attract consumers. Because of the high cost of porting software, however, the entrant cannot develop the needed application base without an established, or securely predicted, consumer base. Although theoretically a software designer could design an operating system and port itself all of the desired software, the associated cost could prove to be prohibitive.

Network externalities are not limited to operating systems. Many software markets, from databases to word processing programs, also experience network effects. In the case of word processing programs, consumers desire to have a common platform to allow others to access their document. Although this creates a less burdensome hurdle than in operating systems, it still tends toward single-product domination. Therefore, the network model applies to other parts of the new economy beyond Microsoft and the operating systems market.

IV. LESSONS FOR MICROSOFT'S REMEDY

The unique aspects of the software and e-commerce business environment present several complications in the divestiture analysis. Because the Microsoft litigation has brought many of these unique aspects to the forefront, the case provides an excellent platform on which to discuss the implications for

282. Microsoft Findings of Fact No. 30, at 12, Microsoft (No. 98-1232).
283. Id. at 12
284. Id.
286. Findings of Fact No. 30, at 12, Microsoft (No. 98-1232).
287. Id.
288. See, e.g., Donahey, supra note 279, at 294-95.
289. See id.
290. Id.
divestiture in the new economy.

Despite the Bush administration's recapitulation on divestiture, the following analysis may also provide guidance in the Microsoft litigation itself. The case against Microsoft in favor of divestiture could go forward for at least two reasons. First, several state attorneys general have stated that they will continue to pursue litigation against Microsoft even if the federal government settles its case. Second, as discussed above, American Stores empowers private litigants to seek divestiture as a remedy for injuries caused by antitrust violations. Any number of litigants could continue to seek the divestiture of Microsoft.

A. ANALYZING SUCCESS OR FAILURE OF DIVESTITURE IS DIFFICULT

Even in traditional markets, analyzing the ultimate efficacy of divestiture poses no small amount of problems. The scarcity of compliance information makes it difficult to draw on the historical record of the Supreme Court's divestiture jurisprudence. The two major studies gathering compliance information—one by Richard Posner, and the other by Pfunder, Plaine, and Whittemore—were conducted in the 1970s and examined only select cases. This lack of comprehensive information partially stems from the absence of post-divestiture monitoring. Government employees, once the litigation phase has ended, tend not to monitor the companies ordered to divest as vigorously as they should. This is partially attributable to

291. As noted above, California and eight other states have expressed a willingness to continue to consider divestiture as a remedy even without the support of the Department of Justice. See supra note 6 and accompanying text.

292. See California v. Am. Stores Co., 495 U.S. 271, 278-85 (1990). And indeed, there are at this time a number of private antitrust actions against Microsoft where, although divestiture has not yet been sought, it may be later. See In re Microsoft Corp. Antitrust Litigation, 2001 WL 137255 at *2 (D. Md. Feb. 15, 2001).

293. POSNER, supra note 64, at 77-85. Some of the cases examined by Posner, such as Pullman, are discussed above. See supra text accompanying notes 82-91.

294. Malcolm R. Pfunder et al., Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained, 17 ANTITRUST BULL. 19, 139-78 (1972).

295. The Pfunder article examines both compliance with judicial orders in cases that have been fully litigated and compliance with consent decrees demanded by the FTC. Id.
under-budgeted, overworked government staffs. The shifting structure of industries subject to divestiture also contributes to the lack of compliance information. After market conditions have changed, it becomes difficult to determine whether the divestiture or the changing market caused the change in the divested entity.

B. DIVESTITURE LESSONS FROM MICROSOFT

The records from the trial and appellate courts in *Microsoft* remain relevant to analyze whether divestiture is appropriate for any new-economy market. Although *Microsoft* itself may no longer raise the divestiture issue, the records created by the trial court and the court of appeals provide a useful tool in examining the circumstances under which divestiture remains an appropriate remedy in the new-economy markets. The answer may depend on the characterization of the software industry and on the individual firm, in this case, Microsoft.296

1. Software as a Dynamic Market: “Take My Operating System... Please!”297

Under the characterization of software as a dynamic industry, divestiture could prove to be an empty gesture. If the changing market would force the firm to change its behavior or divest itself of the relevant assets, pursuing divestiture through litigation would waste both time and money. In *Pullman*,298 for example, the company's president welcomed the consent decree.299 Because of the changing nature of demand in the industry, the operations division no longer generated significant profit.300 The consent decree allowed, and even mandated, that Pullman divest itself of this failing operation, an action which Pullman would have taken even without judicial intervention.

Similarly, in *Microsoft*, Microsoft envisions eliminating its own need for the Windows operating system. Under a new plan called NET, still in its early planning stages, Microsoft would

296. Of course, the Court of Appeals did not overturn or vacate Judge Jackson's initial findings of fact. The judge on remand will have to accept these findings under the doctrine of the law of the case. See United States v. Microsoft, 253 F.3d 34, 116 (D.C. Cir. 2001).

297. Apologies to Rodney Dangerfield.


299. See POSNER, supra note 64, at 87.

300. See id.
create a platform to which customers would subscribe in order to access applications over the Internet. With such a platform, Microsoft could sell its applications effectively regardless of whether it still controls Windows.\footnote{See Microsoft's Cunning Plan, THE ECONOMIST, Jan. 6, 2001, at 53-54.}

Even without such a platform, the divestiture of Windows could still remain an empty gesture. A final judgment from the United States Supreme Court could take at least two years. In this time frame, the structure of the industry could change so much that Windows no longer dominates the market. Alternatively, Windows may become only one among several viable alternatives widely available and compatible with then-existing technology.

If Microsoft no longer requires Windows or Windows no longer dominates the market, divestiture could bring about two ill effects. First, a divestiture order at that point would possibly allow Microsoft to sell off a dying and unprofitable part of its company. Second, it would result in the expenditure of substantial judicial resources to remedy a violation that the market arguably has already remedied. Neither consequence supports divestiture.

Under the industry's dynamic market characterization, divestiture does not provide an appropriate remedy. Instead, the proper remedy has presented itself in National Lead.\footnote{United States v. Nat'1 Lead Co., 332 U.S. 319, 336-37 (1947). For further discussion, see supra note 56 and accompanying text.} National Lead involved the development of titanium pigments for paint manufacture—a new, explosive, and valuable market.\footnote{See Nat'l Lead, 332 U.S. at 338. Sales of titanium rose from 100 tons in 1920 to 133,000 tons in 1944. Sergei S. Zlinkoff & Robert C. Barnard, The Supreme Court and a Competitive Economy: 1946 Term, 47 COLUM. L. REV. 914, 934 (1947).} The defendants National Lead and Du Pont had entered into an agreement whereby they would cross license any present and future patents.\footnote{Under the agreements, National Lead was to be the exclusive supplier in North and South America; its subsidiary Titan Inc. was to be the exclusive supplier everywhere else in the world. See Nat'l Lead, 332 U.S. at 341-43. In 1933, du Pont joined the conspiracy. Id. at 326.} The district court characterized the multiplicity of patents as "instruments of domination of an entire industry."\footnote{United States v. National Lead Co., 63 F. Supp. 513, 532 (S.D.N.Y. 1945).} At the time of the suit, National Lead and du Pont together accounted for approximately ninety percent of...
the domestic production of pigments. The Government urged the Court to divest one of the manufacturing plants from both National Lead and du Pont. The Court noted, however, that the findings of fact showed the existence of "vigorous and effective competition" between National Lead and du Pont. Thus, the Court affirmed mandatory cross licensing of their patents to third parties at a reasonable royalty rather than granting the Government's request. This resolution respected the parties' property rights and allowed the market to develop in a competitive environment.

The issuance of a mandatory licensing or cross-licensing scheme would have similar benefits for a software violation. This would allow a firm to keep pace with the changing business environment and reap the rewards from its valuable intellectual property, while preventing the firm from wielding undue power derived from the intellectual property.

2. Software Must Keep Pace with Competitors: "Only the Paranoid Survive"

Divestiture could also present problems in the new economy by halting software developments and ultimately harming consumers. As in United Shoe and United States Steel, firms must keep in step with the "mechanical march." To order a divestiture could, at best, remove the efficiencies and cost-savings consumers gain from an integrated company. At worst, it could severely cripple the divested firm and produce two companies in constant fear of infringing each other's patents.

306. See id. at 347.
307. See id. at 351.
308. Id. at 350-53. However, National Lead and Titan Inc. were forced to divest themselves of all stock holdings in their foreign subsidiaries. See id. at 351-52. On the subject of mandatory or cross-licensing, now that Windows is a stable, standardized target for developers, it is important, arguably, to maintain the stability and coherence of the technology so that developers can rely on a uniform set of technological specifications when writing their applications. Mandatory licensing might fragment the standard and lead to confusion and new strategic behavior both on the operating system and developer level.

312. United Shoe, 247 U.S. at 55.
313. See supra note 182 and accompanying text.
In addition, divestiture poses a significant public risk. By most accounts, the technology sector drove the economic prosperity of the 1990s. It provided the foundation for the new economy. As the economy stagnates, a judge who orders divestiture must be mindful of the large repercussions that could resonate by shaking one of the keystones of the software industry. As the Court suggested in *United States Steel*, although a remedy should cure the desired ill, the ultimate goal is the safeguarding of the consumer interest through the promotion of competition.  

3. Software Dominated by a Few: *Use Your Illusion*  

If the district court accepts a more stagnant view of the industry, different implications arise for the remedy. Although the face of software can change overnight, certain "blue-chip" firms will likely remain in the market. One can argue that even though software products dynamically change in the markets, certain software corporations remain relatively stable. Even if these firms' products may eventually be replaced (very possibly by the firms themselves), the firms will continue to maintain market power with dominant platforms in their relevant markets. This viewpoint derives support from the advantages provided to software by the operation of network effects.  

Even under this market characterization, however, divestiture remains a questionable remedy. Analytically, the phenomenon of network monopolies has been compared to natural monopolies. The AT&T breakup has applied the corollary. As others have pointed out, however, a crucial distinction exists between the two: a network monopoly derives its power from the demand side, whereas a natural monopoly derives its power from the supply side. Because of the necessity for uniform standards, any new economy divestiture will not create competition amongst new equals. Instead, the divestiture will simply create a new leader possessing the same market power as its

314. See supra notes 211, 212 and accompanying text.  
317. See Joshua M. Greenbaum, *BabySofts, Anyone?*, SOFTWARE MAG., August 1998, at 10. Greenbaum, writing in 1998, proposed the division of Microsoft into six separate companies, calling these companies "BabySofts" in reference to the Babybells resulting from the AT&T breakup. See id.  
318. See, e.g., Donahey, supra note 279, at 285-88; McGowan, supra note 281, at 488-89.
pre-divestiture predecessor. Therefore, unless a court imposes strict conduct restraints on each of the newly formed companies, divestiture would not advance the public interest under the United States Steel analysis.

4. The Microsoft Case as a Consent Decree Failure: “Fool me Once, Shame on You. Fool me Twice, Shame on Me.”\footnote{Anonymous.}

Perhaps the strongest argument for divestiture in Microsoft derives not from an industry characterization but from a characterization of Microsoft’s specific case and conduct. Because of the previously unsuccessful attempt at injunctive relief, the courts could have no choice but to order divestiture, regardless of the market in which Microsoft operates.\footnote{Interestingly, in 1995, Judge Stanley Sporkin deemed that the consent decree entered into by the Department of Justice and Microsoft was unworkable and “that the U.S. government is either incapable or unwilling to deal effectively with a potential threat to this nation’s economic well-being.” Although Judge Sporkin’s subsequent removal from the case would likely chill Judge Kollar-Kotelly’s willingness to follow his example by issuing a remedy which the Department of Justice did not request, it is possible. See Labaton, supra note 6, at 3.}


The parties settled the dispute in 1995 by entering into a consent decree that prohibited various Microsoft practices.\footnote{See id.}

In 1997, the Department of Justice initiated a contempt proceeding, arguing that Microsoft’s bundling of Windows and Internet Explorer violated the earlier decree.\footnote{See United States v. Microsoft Corp., 147 F.3d 935, 952 (D.C. Cir. 1998).}

In 1998, the Court of Appeals for the District of Columbia held that Windows and Internet Explorer represented a genuine integration and did not violate the earlier decree.\footnote{See Complaint of United States at 53, United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000) (No. 98-1232), vacated, 253 F.3d 34 (D.C. Cir. 2001).}

In that same year, the Department of Justice also filed the current action.\footnote{See supra note 104 and accompanying text. As one commentator on}
Similar to objections raised to the proposed remedy in Paramount Pictures, injunctive relief in the Microsoft case would force the judiciary into an inappropriate and ongoing business management role and give too much discretion to an untrustworthy antitrust violator. The issues raised in prior Microsoft litigations, all centering around Microsoft's use and restrictions on the use of its operating system, support both propositions. Throughout the proceedings, Microsoft has questioned the judiciary's capabilities of understanding the highly technical issues. The announcement of a new Microsoft operating system followed shortly by the announcement of a possible government antitrust suit does not best serve the public interest. Further, despite its technical successes, Microsoft continues to have, at best, a strained relationship with the Justice Department.

Therefore, where the firm proves reticent and unwilling to change its behavior, divestiture should be the reluctant remedy. If the judiciary cannot continuously guard Microsoft's behavior and Microsoft cannot properly police itself, behavioral remedies will likely fail, leaving structural remedies as the last resort. Even under this analysis, however, courts should approach divestiture with caution. Although these factors simplify the analysis, they do not necessarily guard consumer welfare.

The courts should also bear in mind that any divestiture will still involve injunctive relief. The court must couple dives-

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consumer issues observed, "Microsoft has flaunted conduct remedies for years." Labaton, supra note 6, at 3 (quoting Mark N. Cooper, research director of the Consumer Federation of America).

327. See Kearney, supra note 131, at 1401-02. Judge Greene oversaw the administration of the consent decree (the Modification of Final Judgment, or MFJ) from the divestiture of AT&T in 1984 to the passage of the Telecommunications Act of 1996, at which time Greene terminated the MFJ. Id. at 1402. During this twelve-year period, Kearney argues, Greene upheld the purpose of the MFJ and administered the judgment efficiently. See id. Other scholars have been less approving of Greene's actions. See, e.g., PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOM (1997) (cited in Kearney, supra, at 1398 n. 8).

328. See supra note 117 and accompanying text.

329. See, e.g., Brief for Defendant-Appellant Microsoft Corp. at 73, United States v. Microsoft Corp., 253 F.3d 94 (D.C. Cir. 2001) (No. 00-5212).

330. In addition to challenging Windows 95 and Windows 98, as discussed above, the Justice Department also has announced it may consider an antitrust challenge to Microsoft's new operating system, Windows XP. See John R. Wilke, Microsoft Drafts Settlement Bid in Antitrust Suit, WALL ST. J., Sept. 10, 2001, at A3.
titure with injunctive relief to avoid the reconsolidation of power. As evidenced by Paramount Pictures331 and AT&T,332 these injunctive protections can cause problems later. Because of its use of partial divestiture, the AT&T enforcement consumed substantial judicial resources and required numerous modifications.333 Even in Paramount Pictures, where the court ordered a complete divestiture, the constraints on conduct lingered half a century after deciding the case, inhibiting competition rather than promoting it.334

C. ALTERNATIVE REMEDIES

Alternative remedies also should inform any divestiture consideration. Partial divestiture provides one such alternative.335 The court always can order a spin off of smaller chunks of the company, rather than dividing it into two larger pieces. This could encourage innovation and stimulate competition, by forcing the smaller companies (or the companies that bought certain pieces) to keep pace with the rapidly changing, highly competitive market. Certainly, the breakup of AT&T stimulated the development of Silicon Valley.

Permanent injunction provides a second alternative. Conduct relief can rapidly change the behavior of the company.336 A conduct-oriented injunction could forbid a firm from certain anticompetitive practices, such as purchasing or acquiring exclusive rights, ideas, or products from competitors. It could prohibit the firm from acquiring intellectual property rights from outsider firms and insure that it does not discriminate against its customers.337 For example, a court could require mandatory licensing of intellectual property or the publication of prices to inform customers of the terms given to their competitors. In a tying case, an injunction could also prohibit bundling of goods or require court approval to do so, thus hindering the firm from using its market power in one market to increase

331. See supra note 104 and accompanying text.
332. See supra note 125 and accompanying text.
333. See supra note 146 and accompanying text.
334. See supra note 121 and accompanying text.
335. See supra note 40 and accompanying text.
337. See id.
sales in another. \(^{338}\)

In addition, an injunction could set maximum prices that a firm would be allowed to charge. This option, however, seems particularly troubling in the new economy because of the very rapid change of the market and the regulatory oversight that might be required to monitor conduct. \(^{339}\) Imposing a fine creates a fourth option. \(^{340}\) When dealing with a firm such as Microsoft, however, a fine of any sum, other than the sum of total revenue, would probably not deter Microsoft from its obviously profitable behavior. Antitrust law is replete with repeat offenders, such as Eastman Kodak and du Pont. \(^{341}\)

**CONCLUSION**

Whatever the future holds for the *Microsoft* litigation, the lessons from the past are clear. Because fashioning a remedy is a fact-specific inquiry, the lines of precedent "cannot be much more than guides." \(^{342}\) By keeping the precedent firmly in mind, however, certain patterns emerge. These patterns find application in any divestiture analysis and, using the knowledge gained from *Microsoft*, apply to any new economy divestiture case.

First, the duty to enforce the antitrust laws requires that the remedy eliminate the prohibited evil; it must open to competition the formerly closed market. Otherwise, the litigation

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339. See supra note 321 and accompanying text.


has been an empty exercise. The method to open the market will vary from case to case. Some instances will warrant injunctive relief, while others will warrant full or partial divestiture. Just as market closure depends on the structure of the market itself, so will the opening of the market.

Second, the remedy, on the whole, must inure to the public benefit. The antitrust laws aim to prevent monopolies and protect the consumer welfare. From its earliest jurisprudence, the Supreme Court has weighed the benefits of the remedy against its potential harms. This practice has evolved with the reformulation of merger guidelines to include the consideration of efficiencies.

Third, courts should avoid expending their judicial resources to produce an outcome that will later prove unnecessary. If the market structure will correct the harm in its natural course or dynamic market changes will render the divestiture remedy moot, courts should not select divestiture. Instead, the judiciary should look to conduct-based remedies such as injunctions or mandatory licensing. If dominant firms emerge in the dynamic new economy because of the total economies of scale involved, equitable, rigorous conduct-driven remedies, when carefully monitored, should suffice to remedy any market failure.

Finally, the courts should be wary when brandishing the club of divestiture. Although divestiture can be the most effective remedy, it also is the most draconian. While courts can modify consent decrees or lift injunctions, they cannot retroactively change the consequences of divestitures without grave difficulty. This is particularly important when courts deal with markets and technologies with which they have little experience. If only long experience can warrant rulings on per se violations under Sherman Act section 1, then certainly divestiture deserves at least as strict a standard.

Divestiture jurisprudence will only become more difficult to predict. If the United States regulatory agencies continue to defuse potential divestiture cases before they reach a remedy stage, few divestiture cases will reach the Supreme Court. The cases that will arise, however, will not involve the traditional Clayton Act section 7 violations where the Government seeks to break up concentrations of power. Instead, courts will primarily consider conduct-oriented infractions, with the remedy being

343. See supra note 184.
much more difficult to fashion. In these infractions, when con-
duct-based injunctive relief proves inadequate, divestiture be-
comes appropriate.

Although the antitrust laws are flexible and robust enough
to handle questions involving e-commerce and the new econ-
omy, divestiture generally will not provide the best remedy.
The history of Supreme Court divestiture cases shows that di-
vestiture is inappropriate for markets characterized by dy-
namic forces or dominated by intellectual property protections.
It also should not be used in instances where the divestiture of
a company would put consumers at risk from increasedalloca-
tive inefficiency. Instead, courts should consider alternative,
conduct-based remedies that will both remedy the antitrust
harm and will promote the competitive process. Courts must
exercise care to ensure that the cost of correcting the market
failure does not exceed the anticompetitive injury visited on
consumers.
APPENDIX

These fifty-two cases based on federal antitrust law have been litigated through the courts to the Supreme Court with the exception of AT&T, which was broken up after a consent decree rather than full litigation. The following table compiles these cases and indicates for each the year of the Supreme Court opinion, the basis for the Court’s review, and the nature of the alleged antitrust violation. The final remedy in each case is summarized in the column entitled “Disposition.” The actions taken by the Court for each case are summarized in the column “Supreme Court Disposition.” Finally, in the column entitled “Supreme Court Disposition Category,” the Court’s actions are categorized by the directness of the Court’s ruling to the case’s issue of divestiture.

Legend:

D = Divestiture
No D = No Divestiture
CD = Consent Decree
Comp. Merger = Complimentary Merger
HM = Horizontal Merger
VM = Vertical Merger
Conduct = Conduct Violation

Category 1 = Cases where the Supreme Court ruled directly on divestiture as an appropriate antitrust remedy in the case.
Category 2 = Divestiture cases where the Supreme Court ruled on the substantive law of the case without a direct holding on the appropriateness of divestiture in the case.
Category 3 = Divestiture cases where the Supreme Court disposed of the case on grounds other than divestiture or substantive law.

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<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Final Disposition</th>
<th>Infraction</th>
<th>Supreme Court Disposition</th>
<th>S. Ct. Disposition Category</th>
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<tbody>
<tr>
<td>1990</td>
<td>California v. Am. Stores Co.</td>
<td>D</td>
<td>§7C</td>
<td>Affirmed</td>
<td>2</td>
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<tr>
<td>1983</td>
<td>Maryland v. United States</td>
<td>CD</td>
<td>§§ 1, 2, 3 S</td>
<td>Affirmed divestiture was in order divestiture in such a case; remanded.</td>
<td>1</td>
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<td>1977</td>
<td>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</td>
<td>No D</td>
<td>HM</td>
<td>Vacated on grounds of antitrust injury; remanded.</td>
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<td>1974</td>
<td>United States v. Gen. Dynamics Corp.</td>
<td>No D</td>
<td>HM</td>
<td>Affirmed dismissal on grounds of no competitive harm.</td>
<td>2</td>
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<tr>
<td>1972</td>
<td>Ford Motor Co. v. United States</td>
<td>D</td>
<td>§7C</td>
<td>Held divestiture was proper remedy.</td>
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<tr>
<td>Case</td>
<td>Year</td>
<td>Law</td>
<td>Referee</td>
<td>Result</td>
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<td>United States v. Greater Buffalo Press, Inc.</td>
<td>1971</td>
<td>§ 7 C</td>
<td>HM</td>
<td>Suggested divestiture was proper but did not reach the question as it was not addressed at the trial court.</td>
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<tr>
<td>Citizen Pub'g Co. v. United States</td>
<td>1969</td>
<td>§§ 1, 2 S; § 7 C</td>
<td>HM</td>
<td>Affirmed liability and divestiture as proper remedy.</td>
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<tr>
<td>Cont'l Oil Co. v. United States</td>
<td>1968</td>
<td>§ 7 C</td>
<td>VM</td>
<td>Affirmed liability and divestiture with no comment.</td>
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<td>Times Mirror Co. v. United States</td>
<td>1968</td>
<td>§ 1 S.; § 7 C</td>
<td>HM</td>
<td>Affirmed liability and divestiture with no comment.</td>
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<tr>
<td>Case</td>
<td>Year</td>
<td>Statute</td>
<td>Judge</td>
<td>Decision</td>
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<tr>
<td>United States v. Mercantile Trust Co. Nat'l Ass'n</td>
<td>1967</td>
<td>§ 1 S; § 7 C</td>
<td>HM</td>
<td>D</td>
<td>Reversed and reordered stays on merger until case could be fully heard.</td>
</tr>
<tr>
<td>Joseph Schlitz Brewing Co. v. United States</td>
<td>1966</td>
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<td>D</td>
<td>Affirmed liability and divestiture with no comment.</td>
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<td>FTC v. Dean Foods Co.</td>
<td>1966</td>
<td>§ 7 C</td>
<td>HM</td>
<td>D</td>
<td>Reversed, allowing preliminary injunction while merger was being reviewed.</td>
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<tr>
<td>Case</td>
<td>Year</td>
<td>Section</td>
<td>Judge</td>
<td>Result</td>
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<tr>
<td>United States v. Grinnell Corp.</td>
<td>1966</td>
<td>§§ 1, 2 S</td>
<td>HM</td>
<td>Upheld divestiture and remanded for further hearings.</td>
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<tr>
<td>United States v. Pabst Brewing Co.</td>
<td>1966</td>
<td>§ 7</td>
<td>HM</td>
<td>Reversed Rule 41(b) dismissal; remanded.</td>
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<td>United States v. Von's Grocery Co.</td>
<td>1966</td>
<td>§ 7 C</td>
<td>HM</td>
<td>Reversed dismissal with direction to order divestiture without delay.</td>
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<tr>
<td>Aluminum Co. of Am. v. United States (Cupps Mfg.)</td>
<td>1965</td>
<td>§ 7 C</td>
<td>VM</td>
<td>Affirmed liability and divestiture with no comment.</td>
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<tr>
<td>Kennecott Copper Corp. v. United States</td>
<td>1965</td>
<td>§ 7 C</td>
<td>HM, VM</td>
<td>Affirmed liability and divestiture with no comment.</td>
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<tr>
<td>FTC v. Consol. Foods Corp.</td>
<td>1965</td>
<td>§ 7 C</td>
<td>VM</td>
<td>Reversed reversal by Court of Appeals and reordered divestiture.</td>
<td></td>
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<tr>
<td>United States v. Cont'l Can Co.</td>
<td>1964</td>
<td>§ 7 C</td>
<td>D</td>
<td>Reversed dismissal; remanded.</td>
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<td>United States v. Aluminum Co. of Am. (Koppers Co. v. United States)</td>
<td>1962</td>
<td>§ 7 C</td>
<td>D</td>
<td>Reversed case and ordered divestiture.</td>
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<tr>
<td>Brown Shoe Co. v. United States</td>
<td>1962</td>
<td>§ 7 C</td>
<td>D</td>
<td>Affirmed divestiture.</td>
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<td>Case</td>
<td>1960</td>
<td>1959</td>
<td>1954</td>
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<td>Md. &amp; Va. Milk Producers Ass'n, Inc. v. United States</td>
<td>§2, 3 S.</td>
<td>§1, 2 S</td>
<td>Conduct</td>
<td>United States v. United Shoe Mach. Corp.</td>
<td>Timken Roller Bearing Co. v. United States</td>
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<tr>
<td>D</td>
<td>D</td>
<td>Conduct</td>
<td>No D</td>
<td>Conduct</td>
<td>Conduct</td>
</tr>
<tr>
<td>Affirmed liability and divestiture.</td>
<td>Affirmed liability and divestiture with no comment.</td>
<td>Affirmed liability but denied divestiture.</td>
<td>Three justices found liability and divestiture; two justices found no liability; two justices found no liability.</td>
<td>Vacated remedy and remanded to consider divestiture.</td>
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<tr>
<td>Schine Chain Theatres, Inc. v. United States</td>
<td>1948</td>
<td>§§ 1, 2 S</td>
<td>HM, Conduct</td>
<td>D</td>
<td>Vacated remedy and remanded to consider divestiture.</td>
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<tr>
<td>United States v. Nat'l Lead Co.</td>
<td>1947</td>
<td>§§ 1, 2 S</td>
<td>Conduct</td>
<td>D</td>
<td>Affirmed divestiture of stock; affirmed non-divestiture of plants.</td>
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<td>United States v. Pullman Co.</td>
<td>1947</td>
<td>§§ 1, 2 S, § 3 C</td>
<td>VM</td>
<td>D</td>
<td>Affirmed liability and divestiture.</td>
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<td>United States v. Crescent Amusement Co.</td>
<td>1944</td>
<td>§§ 1, 2 S</td>
<td>Conduct</td>
<td>D</td>
<td>Affirmed liability and divestiture.</td>
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<tr>
<td>Swift &amp; Co. v. United States</td>
<td>1928</td>
<td>S &amp; C</td>
<td>Conduct</td>
<td>D</td>
<td>Affirmed jurisdiction to enforce settlement agreement.</td>
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<td>United States v. Int'l Harvester Co.</td>
<td>1927</td>
<td>§§ 1, 2 S</td>
<td>HM</td>
<td>D</td>
<td>Affirmed no need for remedies beyond those entered into in consent decree.</td>
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<tr>
<td>FTC v. Eastman Kodak Co.</td>
<td>1927</td>
<td>FTC</td>
<td>Conduct</td>
<td>D</td>
<td>Affirmed FTC could not order divestiture of labs.</td>
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<td>FTC v. W. Meat Co.</td>
<td>1926</td>
<td>§ 7 C</td>
<td>HM</td>
<td>D</td>
<td>Affirmed FTC could order some divestiture.</td>
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<td>Eastman Kodak Co. v. United States</td>
<td>1921</td>
<td>S</td>
<td>HM</td>
<td>D</td>
<td>Dismissed on party motion.</td>
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<td>United States v. Lehigh Valley R.R. Co.</td>
<td>1920</td>
<td>S</td>
<td>VM</td>
<td>D</td>
<td>Ordered divestiture.</td>
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<td>United States v. Reading Co.</td>
<td>1920</td>
<td>§§ 1, 2 S</td>
<td>HM, VM</td>
<td>D</td>
<td>Ordered divestiture.</td>
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<tr>
<td>United States v. United States Steel Corp.</td>
<td>1920</td>
<td>S</td>
<td>VM</td>
<td>No D</td>
<td>Held divestiture was not in public interest.</td>
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<td>Case Title</td>
<td>Year</td>
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<td>Party</td>
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<td>Corn Products Ref. Co. v. United States</td>
<td>1919</td>
<td>S</td>
<td>Conduct</td>
<td>D</td>
<td>Dismissed on motion of appellants.</td>
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<td>Int'l Harvester Co. v. United States</td>
<td>1918</td>
<td>§§ 1, 2 S</td>
<td>HM</td>
<td>D</td>
<td>Dismissed on motion of appellants.</td>
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<td>United States v. United Shoe Mach. Co. of N.J.</td>
<td>1918</td>
<td>§§ 1, 2 S</td>
<td>HM</td>
<td>No D</td>
<td>Affirmed dismissal.</td>
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<td>United States v. Union Pac. R.R. Co.</td>
<td>1912</td>
<td>S</td>
<td>HM</td>
<td>D</td>
<td>Ordered divestiture.</td>
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<td>United States v. Terminal R.R. Ass'n of St. Louis</td>
<td>1912</td>
<td>S</td>
<td>HM</td>
<td>D</td>
<td>Ordered injunctive relief.</td>
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<tr>
<td>United States v. Am. Tobacco Co.</td>
<td>1911</td>
<td>§§ 1, 2 S</td>
<td>HM, Conduct</td>
<td>D</td>
<td>Ordered divestiture.</td>
</tr>
<tr>
<td>Standard Oil Co. of N.J. v. United States</td>
<td>1911</td>
<td>S</td>
<td>HM, VM, Conduct</td>
<td>D</td>
<td>Ordered divestiture.</td>
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