The Effect of Financial Distress On Business Investment: Implications for Merger Reviews

BY RAMSEY SHEHADEH, JOSEPH LARSON, AND ILENE KNABLE GOTTS

OVER THE LAST TWO YEARS, the subprime mortgage crisis begat a mortgage crisis which begat a financial crisis.[1] As economist Brad DeLong noted, "Every time I remark to [macroeconomist] Barry Eichengreen about the disjunction between the intensity of the financial crisis and its limited transmission to the real economy, he says 'just wait.'"[2] The wait is over, and we now are observing the significant impact worldwide on the "real economy" of what first manifested as financial distress in a narrow class of securities in the United States.

This article reviews the role of company distress in merger considerations, illuminates the links between financial distress and operating distress in companies, and identifies the implications of these findings for antitrust merger enforcement in the current economic environment. We highlight the need for antitrust enforcers, particularly in times of economic distress, to account in merger review for (1) the effects of financial distress on ongoing business investment in productive assets, (2) the degradation of firms' productive capacity without ongoing investment, and (3) the implications of these considerations for the potential procompetitive effects of in-market acquisitions that maintain productive capacity in the relevant market at levels higher than would be achieved through available alternatives to merger. Unless these economic issues are taken into consideration, merger enforcement may decrease consumer welfare if firms facing economic distress are prevented from reorganizing efficiently to facilitate ongoing investment.[3] Consumer welfare benefits from a clear and consistent antitrust policy that recognizes the value of facilitating both efficient reorganization and firms' investments requiring multi-year returns, particularly in distressed periods when the outcomes from investment are especially volatile.

Analyses under the failing or flailing firm defenses historically have not acknowledged expressly a link between financial and real distress. Economic evidence has identified the link between a firm's financial cost of capital and its level of investment in productive assets, the link between its level of investment and its resulting cost of production, and the potential for more efficient use of investment capital by in-market acquirers. Taking account of a firm's financial distress in merger analysis would be consistent with the Guidelines' overall approach to evaluating competitive effects.[4] If, absent the merger, the target firm would be less efficient or competitive in the face of capital constraints, then a combination with an in-market competitor may be efficiency enhancing, even if the transaction would not satisfy the strict failing firm defense or a competitive effects analysis that ignores financial distress.

The benefits of a transaction with an in-market competitor are heightened during times of economic and financial distress when, as now, external sources of financing for investment are substantially constrained, costs of investment with external funds are substantially higher than the costs from internal cash flow, and financing constraints can shorten dramatically the time available to distressed companies to improve operations. In the current economic environment, cases involving companies in this situation likely will be more numerous, and, in light of the at times narrow window available prior to liquidation, it can be critically important to get the antitrust analysis right.

The Failing Firm Defense

The Guidelines identify four criteria for the failing firm defense:

> 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.[5]

The Welfare Effects of Mergers Under the Failing Firm Defense. While the failing firm defense first developed

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in the case law as an exception in which the "lesser of evils" could justify a merger because "there were no alternative purchasers available that would have been *less anticompetitive*,"[6] the four Guidelines criteria above provide structure to an analysis to assess the underlying antitrust question: Is the merger likely substantially to lessen competition, e.g., are prices likely to be higher with the merger than in its absence? Mergers that satisfy these criteria can be expected to enhance consumer welfare relative to the alternative of productive assets exiting the relevant market.[7] In other words, these conditions are sufficient for identifying mergers that enhance consumer welfare.[8]

Enforcement staffs at both agencies often have applied stringent interpretations of the criteria. For example, under the typical interpretation, a merger would satisfy criterion 4 only if the firm otherwise would face certain shutdown and complete liquidation with "run-off" of the business. One example in which a strict interpretation of these conditions was satisfied involved a shipyard in liquidation for which the two bidders were (1) a competing shipyard and (2) a real estate developer seeking to acquire waterfront property for condominium development. The setting left no doubt that in the absence of acquisition by the competitor, productive assets would leave the market.[9]

While the four conditions are sufficient for identifying welfare-enhancing mergers, they are not necessary, at least as the conditions appear to have been interpreted by the enforcement agencies. To assess whether the merger likely would substantially lessen competition relative to competitive conditions in the absence of the merger (which may be very different from competitive conditions existing before the merger), greater flexibility in balancing the criteria is required. Satisfaction of these criteria should be evaluated taking into account (1) the predictive nature of merger review, and (2) the recognition that even partial deterioration of productive assets can increase costs and have significantly negative implications for output and consumer welfare. Thus, the need to establish the absence of a viable alternative (as required by the agencies as part of the analysis today) can delay approval of a transaction and result in harm to both the company and competition.

Inference in the Face of Uncertainty to Assess the Failing Firm Defense. The Guidelines highlight the necessarily predictive nature of merger review: "Throughout the Guidelines, the analysis is focused on whether consumers or producers 'likely would' take certain actions."[10] Further, the Guidelines direct consideration of factors that can be expected to change competitive conditions in the future relative to the status quo ante:

> Recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. . . . The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.[11]

And such considerations arise in practice. For example, in the U.S. Department of Justice's recent decision to close its investigation of the proposed XM-Sirius merger, the DOJ explicitly considered the likely—but still uncertain—"technological change that is expected to make those alternatives [to satellite radio] increasingly attractive over time" to consumers in evaluating the likely competitive effects of the transaction.[12]

When reviewing transactions involving distressed firms, the agencies should consider (1) the possible paths of financial distress, (2) the likelihood of each path, and (3) the competitive implications of each path, rather than requiring that parties establish that no option other than the complete exit of productive assets from the relevant market is feasible (criterion 4).[13] Consumer welfare will be reduced if the Guidelines criteria must be met with certainty, rather than probabilistically, to satisfy enforcers.[14] Considerations of likely evolution in competitive conditions involving a firm with prospects that would diminish its competitive significance were identified in *United States v. General Dynamics Corp.*, in which the Supreme Court emphasized that the large market share resulting from the transaction did not accurately reflect the acquired company's likely future competitive position.[15]

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Likewise, in evaluating criterion 3 (alternatives to the proposed merger), antitrust authorities should recognize that efforts to elicit reasonable alternatives are costly for the firm because they direct firm resources toward search and away from other productive activities. Eliminating the possibility of an out-of-market acquirer as an alternative to the in-market acquirer can cause costly delay. Such delay may entail substantial costs in and of itself as the distressed firm's productive capacity (including goodwill with customers, suppliers, and employees with firm-specific human capital) erodes.[16] Instead, as in the case of the Competitor Collaboration Guidelines,[17] the authorities should not attempt to force the distressed firm to hunt for some theoretical "least restrictive alternative" transaction, but instead limit consideration to whether "practical, significantly less restrictive means were reasonably available" for restructuring without an in-market business combination.

The consideration of less restrictive alternatives in the failing firm context can be especially susceptible to rent-seeking behavior by competitors with interests that are not aligned with those of consumers. Competitors can indicate interest in assets with little cost and no commitment, even if the competitor has no interest or ability to act. Indeed, a third party with an interest in delaying the merger—and maybe even a hope to trigger the liquidation of the distressed target—need merely suggest it might make an offer to generate a long delay in merger review as time and effort are devoted to satisfying criterion 3.

The Real Effects on Output of Financial Distress

The Guidelines criteria taken together focus attention on the potential distinction between financial distress and real economic distress. If firms are readily able to restructure under the bankruptcy laws with ongoing access to capital and the ability to continue productive operations during a bankruptcy workout, financial distress may have few real effects on output. FTC and DOJ staffs frequently are skeptical of the real effects of financial distress and restructurings. Courts have been less clear than agency staff in drawing a distinction between financial distress and economic distress for identification of failing firms, with a variety of financial considerations playing a role, including solvency, profitability, access to financing and credit, cash flow, industry conditions, and output, among others.[18]

Alternatively, if financial distress constrains ongoing investment in maintenance of the productive capabilities of firms' assets, then productive assets will leave the relevant market through depreciation even if a firm can restructure financially in bankruptcy. If so, then in-market mergers may preserve consumer welfare even if the Guidelines failing firm criteria are not satisfied under the strict interpretation; the ability of the acquirer to maintain productive assets through investment (and thereby maintain higher market capacity relative to capacity under alternative asset dispositions) can offset the potential effects of changes in pricing incentives from the departure of a standalone firm. Indeed, even if production were to fall as a result of the transaction, the ability to allocate the reduction efficiently among productive assets may improve consumer welfare versus the "but for" world in which the distressed firm saw its capabilities deteriorate.

One historical justification offered for the skepticism of antitrust authorities toward the failing firm defense is the belief that financial distress, in and of itself, does not have real implications for the productive capacity of the firm. More precisely, it is the belief that capital is readily available to fund investments with positive net present value and that, therefore, profitable investment in productive capacity does not require merger, even if a company is in bankruptcy. This perspective stems from the "efficient capital market hypothesis," part of the foundation of modern financial economics. Under the efficient market hypothesis, capital markets function smoothly and costlessly, and a firm's financial structure, including its level of internal funds, should have no bearing on its investment behavior because external capital will be available to fund profitable investments.[19]

Research in financial economics has established that information on the profitability of investments frequently differs between the firm controlling "internal" funds and the markets through which a firm accesses "external" investment funds. This information asymmetry results in a wedge between the cost of funds from internal sources (cash flow) and external sources (the capital market).[20] When such a wedge exists, efficient investment in profitable opportunities may require funds from internal sources rather than reliance on funds from external capital markets because external funds are most expensive.[21] Thus, contrary to investment outcomes under the efficient capital market hypothesis, the productive assets of a bankrupt or financially distressed firm may depreciate—i.e., exit the market in part—due to constraints on funds for investment in maintenance and enhancement of those assets.

Financing constraints can have economically large effects on investment activity, as reflected in the sensitivity of investment to changes in cash from ongoing operations for investment.[22] Companies that are concentrated in related industries are more efficient at allocating scarce capital for investment to higher return opportunities, in part because owners of related businesses are better able to redeploy capital efficiently to higher return investment opportunities.[23] In the absence of investment, asset depreciation typically yields a less efficient capital stock over time, with rising marginal costs.[24]

The inability to fund profitable—and welfare-enhancing—investments can be exacerbated during times when even well-capitalized firms face substantial constraints in accessing capital markets, increasing the wedge between the internal and external cost of funds and, thus, the efficient investments that must be forgone in the absence of internal financing from cash flow.[25]

Forgone Investments Can Raise Costs, Reduce Output, and Raise Prices to Consumers. How are these financial constraints to ongoing investment manifest in product market competition? Two examples illustrate why prices might increase with higher costs of capital associated with financial distress. First, when investments in productive capacity decline as a result of the higher costs of capital to fund them, the marginal costs of production increase under standard depreciation models. Higher marginal costs for the firm decrease incentives to price aggressively to win new business and keep existing business.[26] Depending on competitive conditions, prices may rise overall as a result. Second, in many businesses prices themselves have an investment component: if customers form habits based on initial search and comparison among alternative suppliers—for example in choosing a preferred supermarket—then firms have the incentive to invest in sales growth by maintaining low prices in the short run in order to attract "searchers" who become regular consumers over the long run.[27] Firms using prices to invest in a customer base in this way may choose to forgo that investment in times of liquidity constraints associated with distress. In such cases, liquidity constraints can lead to higher prices.[28]

The implications of this research for antitrust enforcement are that (1) financial distress, including operations in bankruptcy, can affect real operations because of the resulting constraints imposed on ongoing investment that is required to maintain and expand productive capacity,[29] and (2) acquisition by in-market firms may lead to more efficient ongoing investment. In-market acquirers of firms facing economic distress are more likely to pursue profitable investments in the target's businesses post-acquisition than are purchasers in unrelated lines of business. Such investments would increase productive capacity relative to the alternatives to merger, and therefore, through lower marginal costs and expanded output, have the prospect of enhancing consumer welfare.

In economic times like the present, the very significant constraints on external capital imply that real costs—in terms of investment, output and, ultimately, prices to consumers—can be significant as productive assets depreciate in the absence of ongoing investment. For cases in which entire industries face substantial reductions in demand, such real costs can include less efficient operations if firms are prevented from efficiently reallocating investment to focus on the most efficient assets.

Recent Examples of the Real Costs of Constrained Financing

Among the wave of recent bankruptcies, many have led to liquidations, and some unexpectedly. Examples just from retailing include KB Toys, Linens 'n Things, Bombay Furniture, Mervyns, Value City Department Stores, Levitz Furniture, Sharper Image, and Circuit City. In a number of these cases, the retailers had hoped to reorganize rather than liquidate. For example, Frank's Nursery, Steve & Barry's, and Bally Health & Fitness each started out as a reorganization but ultimately needed to be liquidated, in some cases unexpectedly and on short notice as planned financing fell through.[30] While Chapter 11 offers protection from creditors, it may not offer protection without debtor-in-possession financing—which is often needed to operate within Chapter 11—or "exit" financing—which is often needed to emerge from Chapter 11. Both have proved difficult for distressed companies to find in the current environment. Potential buyers of bankrupt companies, including private equity firms and hedge funds, have similarly been unable to obtain financing for acquisitions. And financial and operating conditions can change quickly. Time may not be available for a Chapter 11 auction process subject to antitrust agencies' consideration of various potential alternative buyers.

Financial companies themselves have faced significant distress. The implications of higher capital costs and financial distress for firms in the financial industry are immediately obvious: when capital is the principal input, higher costs of capital can reduce the incentive and ability to provide financial products in the output market.

LandAmerica, a supplier of title insurance, faced financial distress and higher capital costs due to its position in the unrelated business for "exchange services" in connection with the purchase and sale of real estate.[31] LandAmerica's financial problems began when the auction-rate securities market, into which it had invested funds from its exchange services, froze in February 2008.[32] As a result of these problems, LandAmerica filed for a Chapter 11 reorganization on November 26, 2008.[33] While LandAmerica's title insurance business was not otherwise distressed, the title insurance business was imperiled because it requires a credible balance sheet to provide insurance services, and LandAmerica's cost of providing such a balance sheet had increased as a result of the financial problems in its exchange services business. Faced with bankruptcy, LandAmerica entered into an agreement under which Fidelity National Financial would purchase LandAmerica's title insurance underwriting subsidiaries, combining two of the largest title insurers in the United States.[34]

The FTC appeared and participated in the bankruptcy court's hearing on a sale motion and stated that it likely would issue a second request if alternative transactions to the Fidelity transaction were available to LandAmerica. In light of the FTC's statement, the bankruptcy court decided immediately to conduct a further inquiry into a competing offer that had been made by Stewart, a buyer the FTC favored over Fidelity. First, the court determined that the Nebraska Department of Insurance, which had approved both Fidelity and Stewart as acquirers of LandAmerica's title insurance business, did not consider whether the proposed Stewart transaction "was capable of being consummated."[35] Second, based on the testimony and cross examination of Stewart's CEO, the court found that the "transaction contemplated by the Draft Stewart SPA is not credible, not bona fide and is incapable of being closed . . . ."[36] Based on the representations and arguments of various parties at the hearing, the court concluded that if Stewart were not capable of consummating its offer, or it did "not represent a bona fide transaction," then the FTC likely would allow the Fidelity deal to proceed based on the failing firm defense, which is what happened.[37] Fidelity closed the transaction with LandAmerica underwriting companies on December 22, 2008, without a second request from the FTC.[38]

If, without the knowledge that the Stewart Title offer was not bona fide, the FTC had decided to issue a second request in order to compare the potential competitive effects from each potential merger, then the transaction likely would not have been consummated by December 22, 2008. According to testimony at the hearing, the Director of the Nebraska Department of Insurance would then have ordered the LandAmerica's underwriters to cease writing new insurance policies and have placed the underwriting companies into "run-off" and liquidation.[39] Such a result would have proven disastrous for the firm and would have reduced consumer welfare relative to the alternatives.

The LandAmerica experience highlights a number of ways in which financial distress can imperil the productive capacity of a firm and how the antitrust review process has the potential to exacerbate costs. It also highlights how the enforcement agencies can find themselves in an awkward situation in bankruptcy proceedings. First, the FTC's participation in the bankruptcy hearing raises questions as to whether the agency involved itself sufficiently to be subject to the jurisdiction of the bankruptcy court and to be precluded from initiating a separate proceeding or process that hinders the bankruptcy process. Second, the bankruptcy court conducted a full hearing with live witnesses regarding the viability of an alternative—and, from the FTC's perspective, preferable—offer. At no point did the FTC attempt to participate in that part of the hearing and, instead, remained an observer, deferring to the bankruptcy court. This resulted in the correct outcome given that the Stewart offer was not deemed a credible alternative. However, had the bankruptcy court not tested whether the Stewart proposal was a credible and viable offer by holding the inquiry, the FTC may have reached the wrong outcome as the FTC had stated it was prepared to issue a second request based on the existence of Stewart offer. In this example, the bankruptcy process showed the benefits of what may be lost in the context of a preliminary investigation due to the more limited tools available to the FTC or DOJ.

Conclusion

The Guidelines now embody a modern competitive effects analysis that is predictive and in which the competitive significance of the merging parties is assessed prospectively. Such analyses historically have not acknowledged in practice the link between financial and real distress. Instead, antitrust enforcement has previously attempted to draw a distinction between financial distress and real economic distress, being interested in the former only to the extent it was the result of the latter.

Economic research in corporate finance has established that it is frequently the case that (1) firms face a wedge between the internal cost of funds and external cost of funds and, as a result, the absence of internal funds may lead to less-than-efficient investment in productive capacity by financially distressed firms; (2) this decreased investment can raise prices in output markets as productive capacity declines; and (3) acquiring firms in the same industry are more efficient at identifying profitable investments and directing capital toward those investment opportunities. In the absence of consideration of these economic links, merger enforcement may reduce consumer welfare if firms facing economic distress are prevented from reorganizing efficiently to facilitate ongoing investment.

Thus, when reviewing transactions involving distressed firms, the agencies should consider (1) the possible paths of financial distress, (2) the likelihood of each path, and (3) the competitive implications of each path. If, in the absence of the merger, the target firm would be less efficient or competitive in the face of capital constraints, then a combination with an in-market competitor may be efficiency enhancing. The potential benefits of a transaction with an in-market competitor are heightened during times of financial distress when, as now, external sources of financing for investment are substantially constrained, costs of investment with external funds are substantially higher than the cost from internal cash flow, and financing constraints can shorten dramatically the time available to distressed companies to improve operations. ■

If, in the absence of the merger, the target firm would be less efficient or competitive in the face of capital constraints, then a combination with an in-market competitor may be efficiency enhancing.

[1] *See, e.g.*, IMF, World Economic Outlook xi (Apr. 2008), *available at* http://www.imf.org/external/pubs/ft/weo/2008/01/pdf/text.pdf ("The U.S. economy continues to be mired in financial problems that first emerged in subprime mortgage lending but which have now spread much more broadly.").

[2] *See* Brad DeLong, Comment on Glurk!!, Grasping Reality with Both Hands, posted Dec. 2008, *available at* http://delong.typepad.com/sdj/2008/12/glurk.html.

[3] We focus our discussion on consumer welfare. Consideration of acquisitions of distressed firms may be particularly affected by the use of a consumer-welfare, rather than a total-welfare, standard. *See, e.g.*, Dennis Carlton, *Does Antitrust Need to Be Modernized?* 21 J. Econ. Persp., Summer 2007, at 155.

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter Guidelines].

[5] *See id.* § 5.1. For a discussion of the procedural implications of bankruptcy of a target company or asset for merger review, see Ilene Knable Gotts & Nathaniel L. Asker, *Antitrust Aspects of Acquisitions of Financially Distressed Businesses*, LexisNexis Expert Commentary (June 2008), *available at* Lexis.com, Gotts & Asker on Distressed Entities and HSR, LEXSEE 2008 Emerging Issues 2377 (June 2008).

[6] Complaint Counsel's Pretrial Brief, Chicago Bridge & Iron Company N.V. et al., FTC Docket No. 9300 (Oct. 21, 2002) (emphasis added), *available at* http://www.ftc.gov/os/adjpro/d9300/021021vvptbpublic.pdf.

[7] The four criteria enumerated in the Guidelines are more extensive than those recognized in the case law. The consistent elements of the failing firm defense in case law are (i) that the firm is failing, and (ii) that there is no realistic alternative to the merger that would yield a more competitive outcome than the proposed merger. *See* Ilene Knable Gotts, William H. Rooney & Jonathan J. Konoff, *Transactions with Financially Distressed Entities*, Antitrust, Spring 2002, at 64.

[8] For discussions of the conditions under which the clearance of mergers through the application of the Guidelines failing firm defense criteria enhances consumer welfare, see, e.g., Thomas Campbell, *The Efficiency of the Failing Company Defense*, 63 Tex. L Rev. 251 (1984); Fred McChesney, *Defending the Failing-Firm Defense*, 65 Neb. L Rev. 1 (1986); Lars Persson,

The Failing Firm Defense, 53 J. INDUS. ECON. 175 (2005); William F. Shughart II & Robert D. Tollison, *The Welfare Basis for the "Failing Company" Doctrine*, 30 ANTITRUST BULL. 357–64 (1985).

[9] Similarly, in the acquisition by Winn-Dixie of the supermarket assets of Jitney Jungle, the bankruptcy court conducted separate auctions for each supermarket asset. As a result of competitive concerns, the FTC required that Winn-Dixie acquire only 68 of the 72 supermarkets for which its bid was the highest. In the 68 markets in which the transaction proceeded, the FTC concluded that the transaction would not lessen competition because, in the absence of the transaction, the assets likely otherwise would exit the relevant markets. *See* Winn-Dixie Stores, Inc., FTC File No. 011-0022, Analysis of the Complaint and Proposed Consent order to Aid Public Comment (Jan. 9, 2001), *available at* http://www.ftc.gov/os/2001/01/winndixieana.htm.

[10] Guidelines, *supra* note 4, § 0.1.

[11] *Id.* § 1.521.

[12] *See* Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

[13] A distressed firm faces the same probabilistic undertaking as a failing business considering its options: a comparison of the possible paths of financial distress against the alternatives, weighing each of its options using its best forecast of its likelihood, and deciding whether the best option is to sell to an in-market acquirer.

[14] Even idled productive capacity has an option value when there is uncertain market demand (which is the case today and in most periods of economic distress). *See, e.g.*, AVINASH DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY (1994). Idle capacity post-acquisition can be beneficial to expected consumer welfare if that capacity remains in the hands of a relatively more efficient firm. That firm can redeploy the capacity when demand improves, and in-market asset owners have a comparative advantage in deploying productive assets, such as identifying opportunities to bring capacity back online rapidly.

[15] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974). *See also* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004). Such considerations also have been recognized in merger enforcement, as in the FTC's consideration of the acquisition of McDonnell Douglas by Boeing. *See, e.g.*, Guidelines, *supra* note 4; William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001).

[16] The cost of investment delays has been recognized in the context of efficiencies. *See, e.g.*, Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195 (1992).

[17] U.S. Dep't of Justice & Fed Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors §§ 3.2, 3.36(b) (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[18] *See, e.g.*, Ilene Knable Gotts & Didier Théophile, *The Impact of Financial Distress on M&A Review: A Comparative Analysis*, 4 BUS. L. INT'L, May 2003, at 129; Gotts et al., *supra* note 10.

[19] RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 345–70 (7th ed. 2003).

[20] While the firm (and its managers) have better information about investment opportunities within the firm or a market, the capital markets typically will have better information about the breadth of investment opportunities across markets. For early discussions, see Armen Alchian, *Corporate Management and Property Rights*, in ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES (Henry Manne ed., 1969); OLIVER WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR (1970).

[21] Stewart Myers & Nicolas Majluf, *Corporate Financing and Investment Decisions When Firms Have Information that Investors Do Not Have*, 13 J. FIN. ECON. 187 (1984).

[22] *See, e.g.*, Steven M. Fazzarri, R. Glenn Hubbard & Bruce C. Petersen, *Financing Constraints and Corporate Investment*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 141 (1988).

[23] *See, e.g.*, Robert Gertner, Eric Powers & David Scharfstein, *Learning About Internal Capital Markets from Corporate Spinoffs*, 57 J. FIN. 2479 (2002); Robert H. Gertner, David S. Scharfstein & Jeremy C. Stein, *Internal Versus External Capital Markets,* 109 Q.J. ECON. 1211 (1994).

[24] *See, e.g.*, Barbara M. Fraumeni, *The Measurement of Depreciation in the U.S. National Income and Product Accounts*, Survey of Current Business (Department of Commerce Bureau of Economic Analysis 7–23, July 1997).

[25] In the same way that firms and managers have better information about the firm's investment prospects than the capital markets, firms and managers have better information about the firm's investment prospects than antitrust enforcers.

[26] Because the profit-maximizing firm will set prices such that marginal revenue is equal to marginal cost, higher marginal cost will increase the price the firm charges, holding all else equal.

[27] *See, e.g.*, Paul Klemperer, *Markets with Consumer Switching Costs*, 102 Q.J. ECON. 375 (1987); Paul Klemperer, *Competition When Consumers Have Switching Costs: An Overview of Applications to Industrial Organization, Macroeconomics, and International Trade*, 62 REV. ECON. STUDIES 515 (1995).

[28] *See, e.g.*, Judith A. Chevalier & David S. Scharfstein, *Capital-Market Imperfections and Countercyclical Markups: Theory and Evidence*, 86 AM. ECON. REV. 703 (1996); Judith A. Chevalier & David S. Scharfstein, *Liquidity Constraints and the Cyclical Behavior of Markups*, 85 AM. ECON. REV. 390 (1995); Judith A. Chevalier, *Do LBO Supermarkets Charge More? An Empirical Analysis of the Effects of LBOs on Supermarket Pricing*, 50 J. FIN. 1095 (1995).

[29] The FTC's divestiture policy recognizes such considerations. *See, e.g.*, STAFF, BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 35 (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf. For example, the FTC required divestiture of cash to a buyer of assets to ensure that an investment would be pursued by the divestiture buyer. *See* El Paso Energy Corp., FTC No. C-3996, Analysis (Jan. 29, 2001), *available at* http://www.ftc.gov/os/2001/01/elpasoana.pdf.

[30] Access to debtor-in-possession financing has been stifled by the current financial climate, removing what historically had been a primary source of financing to firms for ongoing operations and investments during bankruptcy reorganization. *See* Ben Levinsohn, *Fewer Lifelines for the Bankrupt*, BUS. WK., Jan. 19, 2009, at 22.

[31] Carol Hazard & Emily Dooley, *Filing Raises Fears About Tax Shelter/LandAmerica Unit's Bankruptcy Might Pose Risk to Real Estate Market*, RICHMOND TIMES-DISPATCH, Dec. 28, 2008, at A1.

[32] *Id.*

[33] Mark Basch, *Fidelity, Landamerica Back on; New Deal Lets FNF Buy the Operations Without Taking on Its Debt*, FLORIDA TIMES-UNION, Nov. 27, 2008, at B12.

[34] *Id.*

[35] LandAmerica Financial Group, Inc., No. 08-35994 (KRH) at RR (E.D. Va. Bankr. Ct. Dec. 17, 2009) (Order).

[36] *Id.* at SS.

[37] *Id.* at QQ.

[38] R.J. Lehmann, *Fidelity National Set to Close on LandAmerica Units After Antitrust Clearance*, BEST'S INSURANCE NEWS, Dec. 22, 2008.

[39] *LandAmerica Financial Group* Order, *supra* note 35, at TT.