MERGER ANTITRUST LAW

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Class 23 (November 17): *AT&T/Time Warner*—Economic Evidence (Unit 12)

In Class 23, we turn to the parties' expert economists—Professor Carl Shapiro for the government and Professor Dennis Carlton for the defendants. We begin with Carlton's empirical analysis of what actually happened in prior vertical integrations in this industry and the corroborating executive testimony. We then turn to Shapiro's Nash bargaining model, which attempted to quantify predicted harm. Following the opinion's order, we will see why the court credited the prior-integration evidence but rejected Shapiro's predictions. The Unit 12 class notes supply the general RRC and EDM framework, but the detailed expert analysis is in the opinion. References below to the class notes identify version 03, dated November 2, 2026, and recall material introduced in Classes 21 and 22.

The central distinction is between the logic of an economic model and the evidence needed to apply it. A model can identify a coherent mechanism without establishing that the mechanism will produce a material effect in a particular market. Conversely, evidence that earlier mergers did not produce detectable price increases depends on the comparability of those transactions, the quality of the data, and the effects of any conditions imposed on them. Both predictive modeling and retrospective analysis require judgment about the appropriate counterfactual.

Evidence from prior vertical integrations. Carlton examined earlier transactions through a retrospective econometric study of earlier changes in vertical ownership. The relevant episodes were News Corp.'s acquisition and later divestiture of DirecTV, Time Warner's separation from Time Warner Cable, and Comcast's acquisition of NBCUniversal. Most of his estimates showed no statistically significant effect on programming prices, and some showed decreases. Such a study attempts to isolate the effect of ownership from other influences on price; its usefulness depends on the data and comparison, not simply on observing that prices rose or fell after a transaction. Begin with Section III.B.4 and read the introduction to the prior transactions and Carlton's study (pp. 250-53).

The DOJ and Shapiro challenged Carlton's data and the comparability of regional cable operations with DirecTV's national distribution business. Carlton relied on proprietary data as well as industry data and emphasized that the satellite distributors competed throughout the cable companies' territories. The court credited his analysis. A finding that a price effect is not statistically significant is not proof that the true effect is zero, and the opinion's abbreviated description does not independently establish the precision of every estimate. The court nevertheless treated the consistency of the results and the accompanying evidence as a substantial weakness in the government's case. Continue through the data and geographic-comparability discussion (pp. 253-55).

Conditions on the prior transactions. The government and Shapiro argued that the earlier transactions were subject to regulatory or court-ordered conditions that would not govern the

proposed merger. This objection matters because an absence of price increases after a merger subject to access protections does not, by itself, establish what would happen after an unrestricted merger. Carlton agreed that effective conditions could affect the interpretation of his results, but relied on Turner's arbitration offer to support the comparison with Comcast/NBCU. The court emphasized similarities between the two arbitration arrangements, including baseball-style arbitration, standstill provisions preventing blackouts during arbitration, a fair-market-value standard, and discovery procedures. It concluded that the Comcast/NBCU evidence could receive probative weight and credited Carlton's analysis. That was a judgment about the evidence in this case, not a finding that remedies never affect the interpretation of prior transactions. Read the remedies objection and the court's treatment of Turner's arbitration offer, including footnote 30 (pp. 255-56).

Evidence from actual negotiations. Executives from Comcast/NBCU and Time Warner testified that common ownership of programming and distribution had not affected their affiliate-fee negotiations. Their accounts supplied a different form of retrospective evidence from Carlton's statistical analysis. The government challenged the testimony on the grounds that conditions constrained Comcast/NBCU and that Time Warner's executives were interested witnesses. The court nevertheless credited the testimony because it concerned past experience rather than promises about future conduct, was consistent across the witnesses, and found support in Carlton's analysis. The court acknowledged that neither source provided perfect evidence of the proposed merger's effects, but found that together they weakened the government's increased-leverage case. Read the executive testimony and the court's concluding assessment through the end of Section III.B.4 (pp. 257-59).

The opinion next turns from this evidence of past experience to Shapiro's prediction of the proposed merger's effects. The two approaches address the same competitive mechanism from different directions: the retrospective evidence tests whether changes in vertical ownership affected prices or negotiations in comparable settings, while the model identifies how changed incentives could affect bargaining and estimates the resulting harm. Their persuasive force depends on the fit between the evidence, the assumptions, and this transaction.

The Shapiro Nash bargaining model. These pages contain the most technically demanding analysis in the opinion. Nash bargaining describes how two parties divide the gains from reaching an agreement rather than accepting their respective outcomes if bargaining fails. A party's "disagreement payoff" is its profit in that no-agreement outcome. If a merger improves one party's disagreement payoff, that party may obtain more favorable terms even when both sides still prefer agreement. This is why Shapiro's increased-leverage theory did not require a prediction that Turner would actually withhold its programming permanently. The dispute concerned whether the change in the consequences of disagreement would change the negotiated price. Read the introduction to Shapiro's testimony and the bargaining theory (pp. 260-63).

Before the merger, a blackout would cost Turner affiliate fees and advertising revenues. After the merger, the combined firm could offset part of that loss with distribution profits if subscribers left the affected rival for DirecTV or another AT&T service. That improvement in the combined firm's disagreement payoff was the source of the predicted increase in Turner's bargaining leverage. Shapiro treated the business as maximizing combined profits; the defendants offered evidence about actual negotiations and organizational practices to contest whether his prediction fit the industry. Read the application of the theory and the court's assessment (pp. 263-68). The Class 21 profit comparison isolates the same distinction between existing upstream profits and

newly internalized downstream profits (slides 13-15), although Shapiro applied that logic to negotiated programming fees rather than a specified unilateral wholesale price increase.

A simple example in this guidance illustrates the bargaining mechanism. Suppose a supplier and a distributor can earn $100 in combined profit by agreeing, and each would earn zero if bargaining failed. With equal bargaining weights, each receives $50. If a merger raises the supplier's disagreement payoff to $20 while leaving the distributor's disagreement payoff at zero and the $100 agreement payoff unchanged, the remaining surplus from agreement is $80. Each receives half of that surplus, so the supplier receives $60 and the distributor $40. Agreement remains preferable to a blackout, but the supplier obtains $10 more.

The model's critical inputs. The subscriber loss rate measures the proportion of customers a rival distributor would lose if Turner programming became permanently unavailable. The diversion ratio measures the fraction of those lost customers captured by AT&T. The contribution margin measures the incremental profit from those customers. Together with the rival distributor's subscriber base, these quantities help determine the improvement in the combined firm's disagreement payoff. A customer who leaves the rival but stops buying a traditional video bundle does not create the same recapture benefit as one who switches to DirecTV. Changes in any of these inputs therefore change the predicted increase in bargaining leverage. Read the model's setup and description of its inputs (pp. 269-70).

Shapiro then translated higher affiliate fees into predicted effects on distributor costs and consumer prices. He also incorporated the elimination of double marginalization within the merged firm, which could lower AT&T's prices. His conclusion was that the predicted harm exceeded those benefits. The court described approximately $350 million in annual consumer savings from EDM as conceded in this case (p. 260). That evidentiary concession did not establish that every vertical merger necessarily produces EDM or that the same amount of pass-through should be assumed in another transaction. Read the predicted net effects and the model's treatment of timing (pp. 270-71). The Class 21 example separates the upstream markup, the effective cost reduction after opportunity cost, retail pass-through, and the weighting of consumer price changes (slides 26-28). The bridge to Shapiro's analysis applies those distinctions to the evidentiary questions in this case (slide 54). The classroom figures illustrate the method; they do not establish the AT&T estimates.

The court's critique of the estimates. The subscriber loss rate was particularly important. Shapiro used 9 percent as his low-end estimate and relied on a distributor's valuation materials, experience with other programming blackouts, and a survey. The court found problems in the methods, the comparability of the blackouts, and the survey's translation of stated intentions into actual switching. It also examined revisions in the distributor's materials that changed an estimate for existing subscribers from 5 percent to 9 percent. The issue was not simply that one number was higher than another; it was whether the evidence reliably measured the response to a long-term loss of Turner content (pp. 271-88).

The court separately questioned the diversion calculation and the treatment of cord cutting, which affected how much of a rival's lost business AT&T would capture (pp. 288-92). It found that the margin estimates based on 2016 customer lifetime values were too high in light of later data. Lower margins reduced the predicted harm but did not, standing alone, eliminate it. The dispute also implicated the different values of newly acquired customers and customers AT&T

would retain. These are measurement questions that directly determine the size of the recapture benefit (pp. 292-96).

Existing long-term affiliate agreements raised a further issue of timing. Those contracts constrained fee increases until renewal, while EDM benefits could begin earlier. Shapiro sought to measure the longer-term effects of the new ownership structure; the court regarded the model's failure to reflect the phase-in of fee changes, particularly in a changing industry, as a serious weakness (pp. 297-99). The court ultimately found the predictions insufficiently reliable. Its conclusion rested on the record in this case, not a categorical rule against Nash bargaining models (p. 300). Read footnote 51 in full, including its continuation, for the court's additional discussion of the arbitration commitment and other evidence (pp. 300-301). Stop before the text of Part IV (p. 301).

Looking ahead. Class 24 begins with Part IV of the opinion (p. 301). We will finish the AT&T opinion and turn to *GE/Avio*, the remedies note, and the Tempur Sealy reply. The discussion of conditions on earlier transactions and Turner's arbitration offer in this class supplies a foundation for that broader treatment of vertical merger remedies.