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A Turning Point in Merger Enforcement: *Federal Trade Commission v. Staples*

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A TURNING POINT IN MERGER ENFORCEMENT: FEDERAL TRADE COMMISSION v. STAPLES

Jonathan B. Baker and Robert Pitofsky[1]

1. Opening Day

The first day of merger trials is usually a staid and dry affair. Not so with Staples-Office Depot. At the rear of the courtroom, counsel advocating the merger hung a large banner with the emphatic message "Save Even More." Defense counsel's opening statement was illustrated with a large number of exhibits and charts and with audio interludes. And every seat in the courtroom was taken - by lawyers, journalists, and stock market speculators (arbitrageurs) betting on who would win and who would lose the case.

The court proceeding was not an effort by the government to block the merger permanently. Rather its goal was to obtain a preliminary injunction preventing the merger from being consummated pending a full trial. Without that kind of injunction, the parties can often scramble the assets of the two firms with the result that a remedy is close to impossible. On the other hand, mergers are time sensitive: a long pending transaction held up by government review in a full trial can have an adverse effect on the morale of executives and staff, adversely affect stock market prices, and harm firm reputations (particularly of the acquired firm) in the marketplace. As a result, the award of a preliminary injunction usually means the end of the deal in practical terms.

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[1] Jonathan Baker is Professor of Law, Washington College of Law, American University; Robert Pitofsky is Joseph and Madeline Sheehy Professor of Antitrust Law, Georgetown University Law School. We are grateful to Bill Baer and George Cary for helpful discussions, and to Farrell Malone of Georgetown Law School and Ian Hoffman of William and Mary Law School, for their excellent assistance in preparing this paper; errors of course are ours.

The lead attorneys for the government and for the merging firms - George Cary for the government, and Donald Kempf for the merging parties - laid out the essentials of their case in opening statements to Judge Thomas Hogan. As is common in merger cases, there was no jury. Cary explained that the merger would have an effect on a market that he described as consumable office supplies - that is, pencils, pens, post-it notes, paper, even staples - the sort of product that people return again and again to purchase. It would not include furniture, business machines and computers. He described how the office supply superstore concept had only been initiated a dozen years earlier, with Staples in the lead, and at its maximum had more than twenty participants. By the time of the hearing, the industry had grown fantastically – Staples and Office Depot together accounted for more than $10 billion in annual sales – but there were only three office supply superstore chains left: the merging parties, Office Depot and Staples, and OfficeMax. He explained that the government case would be primarily a matter of documents and that the government intended to prove that in geographic areas where three office supply superstores were present and competed, prices were at their lowest; when two were present prices increased; and prices were at their highest when there was only one. He said the government would demonstrate that Office Depot generally had lower prices than Staples and was cutting into its profitability. Staples faced a stark decision: either meet Office Depot's lower prices in the marketplace and reduce its own profits or acquire Office Depot by merger. It chose the latter. He then stated what he thought was the heart of the government's case:

> "What will be the effect on prices? The key fact of this case, Your Honor, is that where Office Depot and Staples compete, their prices are five to ten to fifteen percent lower than where they don't compete. . . . All of the evidence directly answers the ultimate

> question . . . Will prices likely be higher after the merger than they would have been without the merger?"[2]

Don Kempf responded for the defendants in a variety of ways. He argued first that the government's description of the marketplace was wildly wrong. Rather than carve out the three office supply superstores as a separate competitive arena, he argued that mass merchandisers like WalMart and KMart, traditional small store retailers, direct mail and internet sales compete with superstores in the sale of office supplies and, therefore, those sellers should be included in the market. In a "properly defined" product market, the combined market share of Staples and Office Depot would be somewhere between and five and six percent, well below any sensible line where a merger should be challenged. He then noted that the whole history of the office supply superstore segment had been one of reducing prices to consumers, referring time and again to the "productivity loop." Under that theory, the large scale superstores can extract lower prices from stationery and other suppliers and then pass those lower prices along to consumers, as they had consistently done in the past, in order to increase market share. With larger market shares, the superstores could return to their suppliers and achieve even lower prices.

Kempf used the productivity loop to support his argument that high levels of concentration in this particular industry would not lead to higher prices. He emphasized that experience showed the opposite: as the industry consolidated, and the number of superstore chains declined over the previous decade from twenty to three, prices had continued to decline. The government's pricing evidence was simply "cherry picking" of unrepresentative examples and "nonsense correlations," according to Kempf. Finally, he said he was prepared to demonstrate that somewhere between \$5 and \$6 billion in savings could be achieved through

[2] Transcript (May 19, 1997) at 13-14.

improved efficiencies, and again that history showed that the office supply superstores passed along large portions of those efficiencies to consumers. He sidestepped the point that the government would constantly press: even conceding that prices had declined in the office supply superstore segment of the economy, the government contended they would have declined even more in the presence of vigorous competition.

2. The Players.

The government's challenge to the proposed merger of Staples and Office Depot was no small deal. Staples was the second largest office supply superstore chain in the United States with 550 stores and revenues of about $4 billion; Office Depot was the largest office supply superstore chain with more than 500 stores and revenues of a little over $6 billion. The only other substantial office supply superstore chain was OfficeMax, also with more than 500 stores.[3] All three chains were growing rapidly, each adding roughly one hundred stores per year nationwide and expanding into regions historically served by other chains.

As emphasized in the opening statements, one central question was whether office supply superstores were a separate product market in which adverse effects on competition could be measured. If the superstores were a market unto themselves, then the result of the merger would be to reduce the number of players from two to one in 15 cities and from three to two in 27 more cities – more than enough concentration to attract the most serious government attention.[4] Also, if the companies remained separate, it was predictable that each would invade the turf of the other over time, whereas the merger would eliminate that kind of future competition.[5]

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[3] *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1069 (D.D.C. 1997).

[4] *Id*. at 1081.

[5] *Id*. at 1082.

In the late 1990s the United States witnessed one of the most intense merger waves in the history of the country.[6] Robert Pitofsky, one of the authors of this chapter, took office as Chairman of the Federal Trade Commission (FTC) in 1995 pledging an activist antitrust agenda. One of his first moves was to appoint Jonathan Baker (the other author of this chapter) as head of the agency's Bureau of Economics. The Commission voted to challenge a few mergers in 1995 and 1996.[7] But the 1997 challenge to the Staples-Office Depot was far more important and controversial.

The effort to obtain a preliminary injunction, beginning May 19, 1997, lasted only five days but it was exceptionally spirited.[8] Each side was given only fifteen total hours of trial time, including cross-examination of witnesses, and a chess clock was used to keep track. Before the trial, the Commission had reviewed hundreds of boxes of documents and had taken 18

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[6] In 2000, the Federal Trade Commission (FTC) received a record high 4,926 merger filings, representing a 222.1% increase in the number of filings in 1991. FTC Bureau of Competition & DOJ Antitrust Division, Annual Report to Congress Fiscal Year 2000, 1, *available at* http://www.ftc.gov/os/2001/04/annualreport2000.pdf (last visited June 20, 2006).

[7] Rite Aid's proposed acquisition of Revco, a merger of two large pharmacy chains, was abandoned by the parties shortly after the FTC announced its intention to block the deal in court, in April 1996. Press Release, Federal Trade Commission, *Rite Aid Abandons Proposed Acquisition of Revco After FTC Sought To Block Transaction* (April 24, 1996), *available at* http://www.ftc.gov/opa/1996/04/ritenogo.htm (last visited June 21, 2006). A natural gas pipeline acquisition that the FTC concluded would raise prices to industrial customers around Salt Lake City was also abandoned after the FTC announced its challenge, in late 1995. Press Release, Federal Trade Commission, *FTC To Challenge Questar Acquisition of Kern River, Alleging Monopoly Over Natural Gas Transmission Into Salt Lake City Area* (Dec. 27, 1995), *available at* http://www.ftc.gov/opa/1995/12/questr.htm (last visited June 21, 2006). In early 1996, the FTC went to court to challenge a Grand Rapids, Michigan hospital merger. The district court concluded that certain conditions it placed on the merger would solve the competitive problem the FTC had identified without need to enjoin the transaction; that decision was on appeal during the *Staples* litigation. *FTC v. Butterworth Health Corp*., 946 F. Supp. 1285 (W.D. Mich. 1996), aff'd 121 F.3d 708, 1997 WL 420543 (6th Cir. 1997) (unpublished table opinion). As is usual in merger enforcement, the FTC resolved its competitive concerns in a number of other cases – such as Time Warner's acquisition of Turner Broadcasting in late 1996 – through consent settlement, without need to go to court. *See In the Matter of Time Warner, Inc*., 123 F.T.C. 171 (1997) (consent order).

[8] The hearing concluded with four hours of oral argument about two weeks later.

depositions; at trial, the defendants called eight live witnesses and introduced some 6,000 exhibits. After the trial, nine states filed amicus briefs supporting the Federal Trade Commission's case. On the other hand, stock market speculators and the national press were overwhelmingly of the view that the companies would prevail and the government would lose its first big merger case of the 1990s.

3. Merger Enforcement in the United States.

Merger policy issues have been central in the development of American antitrust policy since the enactment of a federal antitrust law in 1890. Difficult policy questions arise because the consequences of mergers can be good or bad or a little of both. Mergers can eliminate rivals and then the combined firm can raise prices to consumers. Mergers can also be a problem by reducing the number of firms in a market with the result that the remaining firms can coordinate sales policies and act like monopolists by coordinating their marketing efforts. There is also a general policy view that high levels of concentration undermine incentives to achieve efficiency and to innovate.[9] On the other hand, in most markets, mergers among relatively small companies pose no threat of monopoly or coordinated behavior and can lead to efficiencies. The combined firm may produce at a lower cost, engage in more aggressive research and development, or allow superior management to take over additional resources.

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[9] The most eloquent statement of that perspective - now a little out of date - was by Judge Learned Hand in 1945:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

United States v. *Aluminum Co.*, 148 F.2d 416, 427 (2d Cir. 1945).

Merger enforcement in the United States has been remarkably inconsistent over the years. For example, in the 1960s, the United States had a very aggressive merger policy - most people would now say overly aggressive - and successfully struck down mergers among very small firms in unconcentrated markets.[10] In the 1980s, during the second term of the Reagan administration, merger enforcement came close to disappearing.[11] The challenge in the 1990s, during the first Bush Administration and then the Clinton years, was to find a middle of the road merger policy that was active in protecting the welfare of consumers from merger-induced higher prices or reductions in quality, while at the same time being sensitive to protect incentives to improve efficiency and productivity and to achieve innovation. The FTC's challenge to the Staples-Office Depot proposed merger was regarded as a major test of its ability to restore effective and sensible merger enforcement – avoiding the undue activism of the 1960s and the extreme under-enforcement of the 1980s – while at the same time indicating the agency's willingness to litigate when the situation called for direct confrontation.

4. The FTC Decides to Challenge

[10] There are many cases that illustrate the point, but the most indefensible under current standards is *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 281 (1966) where a merger combining grocery firms in Los Angeles of 4.7% and 4.2%, respectively, was struck down even though the number of chains in Los Angeles was on the increase and there were few barriers to new firms entering the market. *See also United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1946) (combined market shares of 4.5% in one market where violation was found); *Brown Shoe Co.*, 370 U.S. 323, 347-48 (horizontal merger violations found in some markets with combined market shares of 5% and low entry barriers; violation in the vertical line - between a shoe manufacturer and shoe store outlets - in the 1% to 2% category).

[11] The rate of federal enforcement actions (challenges as a fraction of proposed mergers) during the second term of the Reagan administration was roughly half the typical rate before and after. Thomas B. Leary, The Essential Stability of Merger Policy in the United States, 70 Antitrust L,J. 105, 139 (2002); *see* Krattenmaker and Pitofsky, Antitrust Merger Policy in the Reagan Administration, 33 Antitrust Bull. 211, 213 (1988).

The "first blush or initial gut reaction of many people," Judge Hogan later wrote, is that with so many different types of retailers competing to sell office supplies, a merger of two office supply superstore chains would be unlikely to permit the merged firm to exercise market power.[12] If post-merger Staples "raised prices after the merger, or at least did not lower them as much as they would have as separate companies, . . . consumers, with such a plethora of options, would shop elsewhere."[13] Although every merger reported to the federal enforcement agencies receives some review, the FTC staff cannot practically give each a hard look, and indeed the vast majority are given early termination, – that is, they are allowed to proceed without a "second request" for additional information. Why did this transaction, seemingly unlikely on its face to raise an antitrust problem, receive close scrutiny from the FTC's merger enforcers?

Shortly after the merger was announced in September 1996, the FTC staff obtained a report from Prudential Securities, which followed the office superstores market for investors. Prudential Securities surveyed prices for a market basket of office supplies in Paramus, New Jersey, a town in which Staples and OfficeMax competed but not Office Depot, and compared them with the prices for the same market basket purchased in Totowa, New Jersey, twenty-five minutes away, where all three superstore chains competed. According to Prudential Securities, the additional competition from Office Depot led to five percent lower prices.[14] This report suggested to the FTC staff that the loss of competition among office superstore chains could affect prices, and was one reason the FTC decided to give the proposed merger a close look.

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[12] *Staples*, 970 F. Supp. at 1075.

[13] *Id*.

[14] Discussed and cited in Serdar Dalkir & Frederick R. Warren-Boulton, Prices, Market Definition, and the Effects of Merger: Staples-Office Depot, in The Antitrust Revolution: Economics, Competition, and Policy 143, 153 (John E. Kwoka, Jr. & Lawrence J. White eds., 3d ed. 1999).

During a typical merger investigation, the FTC staff reviews documents, testimony and data from the merging firms and their executives, and collects similar information from both rivals and customers. Many company documents treated the office supply superstore market as separate and distinct. Also, some unusual information came from consumers. For example, in March 1997, the FTC received a complaint from Thomas Russ of Leesburg, Florida, a "cost-conscious consumer" who owned a small real estate agency and shopped for office supplies "on a continuous basis."[15] The customer sent in two advertising circulars, one from a newspaper in Leesburg, Florida, where he lived and the other from a newspaper in nearby Orlando. (See Figure 1, p____.) Office Depot was the only superstore chain in Leesburg, but all three major chains competed in Orlando. The ads were identical except for the prices, which were systematically lower in Orlando. "I believe that the lack of competition in Leesburg explains the higher prices compared to the Office Depot stores in Orlando," the consumer later wrote in a declaration. "As a result of these price differences, I am very worried that Staples and Office Depot will be able to raise prices in markets where they directly compete, such as Orlando, Florida."[16]

5. Litigation Context

[15] Transcript (May 23, 1997) at 137. The FTC has published a study showing that strongly credible customer complaints and "hot" internal firm documents clearly predicting merger-related anticompetitive effects make an agency challenge more likely. Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996-2003 (available at <http://www.ftc.gov/opa/2004/02/horizmerger.htm>).

[16] Transcript (May 23, 1997) at 166. The FTC staff also was able to compare an ad for Staples stores in Charlottesville, Virginia, where Staples competes with Office Depot, and Fredericksburg Virginia, where it faces no superstore competition. The ads ran on the same day and involved the identical products and pictures; the only difference was that prices were lower in the city in which Staples and Office Depot competed head-to-head. Both sets of advertisements were included in the evidence the FTC later presented in the preliminary injunction hearing.

In April 1997, seven months after Staples' acquisition of Office Depot was announced, the FTC voted to seek a preliminary injunction in the Washington, D.C. federal district court.[17] The FTC had jurisdiction to review mergers since the agency was established in 1914. The "glory days" of the Warren Court extended roughly from 1962, when the first merger was challenged under revised Section 7 of the Clayton Act, until 1974 when the Supreme Court, in a five-four opinion, upheld a merger in the face of a government challenge. During that 12-year stretch, the government never lost a merger case in the Supreme Court.

During the following two decades, the Antitrust Division of the Department of Justice and the FTC brought few cases, in part because of the advent of pre-merger notification in 1976, requiring that mergers above a certain size be notified to the government, which permitted the enforcement agencies to resolve most competitive problems by negotiating a consent settlement. When the agencies did go to court, moreover, they no longer could count on winning. Accompanying the mediocre won-loss record were two common perceptions about the FTC in particular: first, that it would almost always settle with "half a loaf" in terms of remedy because it was afraid to go to court, and, second, in the rare instances when the agency did litigate it was out-lawyered both in numbers of opposing lawyers and their superior skill.[18] The common

[17] The merging firms had negotiated a possible settlement with the FTC staff that would have permitted the merger to go forward after sale of 63 stores to OfficeMax. Chairman Pitofsky and two other commissioners, a majority of the Commission, voted to reject the settlement and challenge the proposed merger in court; one voted instead to accept the proposed settlement as a solution to the competitive problem; and one did not believe the proposed merger would harm competition and thus that it needed no settlement. Press Release, FTC Rejects Proposed Settlement in Staples/Office Depot Merger (April 4, 1997) (available at <http://www.ftc.gov/opa/1997/04/stapdep.htm>).

[18] The *Staples* case was no exception in terms of numbers of legal staff. The FTC assigned perhaps five full-time lawyers to litigate the case, another ten back-ups. The FTC also assigned eight economists full-time to the investigation and litigation and made what is likely the most extensive commitment of resources to econometric analysis in any government antitrust case, before or since. By contrast, the merging firms reportedly fielded a team of 70, including 40

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perception was that the Staples/Office Depot challenge would be David versus Goliath and that David, seeking a market limited to office supply superstores, was pursuing an implausible theory. The press and most stock-market speculators thought the court would not enjoin the merger.

6. CEO Testimony

The compressed hearing schedule heightened the importance of every witness. One of the highlights was the testimony of Thomas Stemberg, the Chairman and CEO of Staples. Stemberg was called to the witness stand on the fourth day of the hearing. Through his testimony, which lasted more than four hours, both the merging firms and the FTC emphasized their main themes.

On direct, Stemberg explained how he had pioneered the office superstore business, opening the first Staples store in May 1986. From the start, Staples planned to attract customers by selling office supplies at a thirty to fifty percent discount compared to the prices charged by retail stationary stores. By 1992, he said, he had come to "embrace the productivity loop" strategy.[19] "The overwhelming reason people come to us is price," Stemberg stated. "[I]f we were ever to lose our low-price edge, … we would be in a lot of trouble."[20]

Stemberg further explained how the various other retailing channels for office supplies responded to Staples' growth and success: some traditional dealers formed buying cooperatives,

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lawyers, and spent $13 million in legal fees and related costs. Amy Singer, Staple Removers, American Lawyer 45 (Oct. 1997).

[19] Transcript (May 22, 1997) at 209. That strategy was described by an earlier defendant witness, a Wall Street retailing expert who helped invent the term, as a "virtuous circle" where lower costs are passed on to consumers in the form of lower prices or better service, and the resulting increase in sales leads to lower costs as a fraction of sales, allowing the firm to reduce costs and prices further.

[20] Transcript (May 22, 1997) at 209, 213-14.

mail order stationers lowered prices and reduced delivery times, and discount stores expanded assortments and cut prices. As a result, prices in office product retailing generally have been declining. "[E]verybody started pointing their guns at us" and became price competitive with the superstores, leading Stemberg to look for new ways to push the productivity loop. "I believe this merger will allow us to ratchet down our prices to a whole new level," he declared. [21]

Cross-examination centered on one of Staples' marketing documents, the firm's 1996 pricing strategy, which stated "Over time our goal is to be competitively priced on a market-by-market basis with other office superstores on all items." Stemberg acknowledged that the pricing document refers to office superstores as "primary competitors," and that it describes markets as "non-competitive" if Staples has no superstore rivals, regardless of the presence of other types of retailers.[22] In response to questioning, Stemberg agreed that Office Depot and OfficeMax have more impact on Staples' prices and margins than other retailers; that Staples creates new price zones with lower prices in response to entry by rival office superstore chains but not in response to entry by mass merchandisers like K-Mart and Wal-Mart; and that the price index Staples developed shows that its prices in every Office Depot pricing zone are lower than its prices in the non-competitive zone and its prices in Staples' warehouse club zones. (A Staples document showing how its price index varies by zone is reprinted as Figure 2, p_____.)[23]

7. Expert Testimony on Pricing

[21] Transcript (May 22, 1997) at 229-31.

[22] On redirect, Stemberg noted that the company's pricing manual also states, "Computer superstores, consumer electronics stores, and warehouse clubs are considered to be secondary competition. Although the office superstores are our primary competition, we will conduct price-checks at secondary competitor locations so that we can be sensitive to their pricing."

[23] On efficiencies, Stemberg acknowledged in cross-examination that if Staples had less competition in a market, it was not as necessary to pass on cost reductions as quickly as when it had competition, and that competition with Office Depot led Staples to reduce its costs.

The pricing evidence, around which the entire case pivoted, was the main subject of expert economic testimony on both sides. The experts had undertaken an extensive analysis of the pricing data using statistical tools. Although Judge Hogan later said he decided the case based on company documents rather than the econometrics,[24] the econometric back and forth shaped how the two sides framed the pricing evidence in examining all the witnesses.

The argument among experts was about why Staples prices are lower in markets where it faced superstore competition, as shown in the pricing documents emphasized by the government. The merging firms argued that the data were misleading. Prices were high in non-competitive markets, they contended, for the same reason that other superstores had not entered those markets: costs of doing business – for example, real estate rents – were high. If so, the loss of superstore competition would not lead to higher prices. Prices would stay low, near costs, in the merging firms' view because they were kept honest by competition from non-superstore retailers. To tell whether the merging firms were right when they contended that cross-city pricing comparisons were misleading, the economic experts for both sides looked at whether prices fell when Office Depot entered a market served by Staples, or vice versa.[25] But the experts did not agree on how the data on the price response to entry should be interpreted.[26]

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[24] Ken Auletta, World War 3.0: Microsoft and Its Enemies 221-22 (2001).

[25] The experts agreed that by focusing on price changes within metropolitan areas, where costs change slowly over time, they could largely avoid the possibility that price changes simply reflected cost changes.

[26] The debate is described from an FTC perspective in Jonathan B. Baker, Econometric Analysis in *FTC v. Staples*, 18 J. Pub. Pol'y & Marketing (1999). For further discussion of the economic evidence by the various experts who testified in the case, see generally Serdar Dalkir and Frederick R. Warren-Boulton, Prices, Market Definition and the Effects of Merger: Staples-Office Depot (1997) *in* John E. Kwoka & Lawrence J. White, eds., The Antitrust Revolution 143 (3d ed. 1999) (co-authored by the FTC's primary economic expert); Orley Ashenfelter, David Ashmore, Jonathan B. Baker, Suzanne Gleason, Daniel S. Hosken, Empirical Methods in Merger

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The econometric battle over how to interpret Staples' pricing data shaped the examination of fact witnesses. On direct examination, Thomas Stemberg cited cross-city differences in costs to explain why Staples prices were higher in a large metropolitan area served by multiple superstore chains, like Washington, D.C., than in a smaller city then served only by Staples, like Bangor. Maine. On cross-examination, the FTC responded by focusing on the price response to superstore entry. It sought to establish that a Staples store in Sumpter, South Carolina had been moved from a higher priced to a lower priced zone, reducing its prices, when it became evident that the store was in competition with Office Depot stores in Columbia and Florence, South Carolina.

Although Judge Hogan did not base his decision on the econometric testimony, he interpreted the documentary evidence on pricing using the approach the experts had suggested for the data: by analyzing how Staples altered its prices when Office Depot came into town, and not simply relying on price differences across cities in reaching his conclusions.

8. Efficiencies Witnesses

Just before Thomas Stemberg testified, Staples called to the stand the company's Senior Vice President of Integration to testify about the cost savings anticipated from the merger. She described her blue chip credentials: a college degree from Princeton, an M.B.A from MIT, a law degree from Harvard, work experience at Bain, a leading management consulting firm, and five years at Staples. The integration process she managed, from which the company's cost savings

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Analysis: Econometric Analysis of Pricing in *FTC v. Staples*, 13 Int'l J. Econ. Bus. 265 (2006) (co-authored by the FTC's primary econometric expert); Jerry A. Hausman and Gregory K. Leonard, Documents vs. Econometrics in *Staples* (Sept. 1, 1997) (available at http://www.nera.com/Publication.asp?p_ID=2744) (co-authored by the merging firms' economic expert).

projections were developed, involved fifteen task forces staffed by more than 200 executives from the two companies and supported by a host of highly-regarded management consulting firms, including the Boston Consulting Group, A. T. Kearney and Ernst & Young. After months of work, the witness testified, she and her team concluded that the acquisition would generate $5 billion or more in cost savings.[27]

The FTC's first rebuttal witness was David Painter, the Assistant Director for Accounting in the agency's Bureau of Competition. After thirty years at the agency, working his way up through the ranks, he was about to retire. Painter testified that in the three months before the hearing, he spent one thousand hours – averaging roughly seventy hours a week – reviewing the merging firms' efficiency analyses and preparing his report.

Painter testified that he was "astounded" to discover that the efficiency claims asserted by the companies were five times what the board of directors was told to expect when asked to approve the transaction. According to Painter, a substantial portion of the cost savings Staples claimed should not count because they could have been achieved by the merging firms on their own; in other cases the projected cost savings were based on assumptions inconsistent with the facts; and in still other instances, the estimation methodology employed by the Staples integration team was not documented adequately to permit him to evaluate their reliability. After detailed, painstaking analysis, Painter concluded that roughly 40% of the estimated cost savings were improperly attributed to the merger and another third were unsubstantiated.

[27] Cross examination focused on the extent to which the projected savings could have been obtained by Staples or Office Depot as stand alone firms, without need for merger. Other problems with the projections were described by the FTC's accounting expert. As will be discussed in section 9.b below, Judge Hogan had a number of reservations about the efficiency claims.

With time on the chess clock running short, the Staples side elected to respond to Painter's methodological arguments in their brief, and to focus the cross-examination on Painter's credibility. The Staples lawyer highlighted the resources and credentials of the Staples efficiency team. He asked about the large number of senior executives and top-flight management consulting firms involved in Staples' task forces. These consulting firms "all sound very impressive to me," Painter agreed. The cross-examination continued: "They get a lot of MBAs coming right out of the best schools, don't they, those firms?" Answer: "I think so."[28]

The cross-examining attorney drew the contrast with Painter's credentials: an accounting degree from a state university, three months in a management training program at a local department store, then three decades at the FTC. Painter had no prior experience in the office products business, was not a CPA, had not completed any post-graduate work, and had not published in a professional journal.

This cross-examination backfired. Judge Hogan did not question Painter's credibility. Instead, his opinion appears to go out of the way to affirm it. Judge Hogan described Painter's testimony as "compelling" and said he reached his conclusions as to efficiencies "based primarily on Mr. Painter's testimony."

9. Opinion of the Court

At an early point in his decision, Judge Hogan made remarks that would have given some degree of satisfaction to the defendants. As we noted earlier, the key introductory legal issue was to describe the area of competition where the proposed merger would have a competitive effect. In that connection, the Judge said the following:

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[28] Transcript (May 23, 1997) at 268.

> "The Court recognizes that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them and no one denies that many different types of retailers sell these products. After all, a combined Staples-Office Depot would only have a 5.5% share of the overall market in consumable office supplies."[29]

Then in the conclusion of his opinion, Judge Hogan praised Thomas Stemberg and his colleagues as pioneers in introducing the office supply superstore concept that revolutionized the office supply business, not just by introducing their own steep discounts, but by forcing many others in a broadly defined description of the industry to focus on cutting their prices, leading to a general decrease in price of office products across the board. As a result, manufacturers and suppliers were forced to implement efficiencies in their own businesses in order to compete in the sale of their products.[30]

But between those two instances of encouraging words for Staples, the FTC won just about every point.

a. Pricing Evidence and Market Definition. The heart of the FTC's case was the assertion that prices were higher in metropolitan areas where there was only one superstore and that the merger would exacerbate that situation. With only a little hyperbole, George Cary, the lead attorney for the FTC, has termed *Staples* a "one fact case."[31] Judge Hogan carefully

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[29] *Staples*, 970 F. Supp. at 1075.

[30] *Id*. at 1093.

[31] The one fact about prices was also the FTC's answer to Staples claim that easy entry would solve the competitive problem. If entry were so easy, the FTC asked rhetorically, why hadn't new superstore competition undermined the price premium in cities lacking superstore competition? In his opinion, Judge Hogan quickly disposed of defendants' ease of entry argument. He observed that the number of office supply superstores had dropped from 20 to 3 over the past several years, and that failed superstore entrants included large, well-known retail establishments such as K-Mart, Montgomery Ward, Ames and Zayres. Unless the new entrant

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examined the documents and the expert testimony on the pricing issue and concluded with respect to both Office Depot and Staples that their prices on average were more than 5% higher in cities where they faced no competition.[32] The court noted that the anticompetitive effect of the merger was not necessarily that prices would rise from present levels, but only that they would be higher after the merger than they would have been had there been no merger.[33]

The pricing evidence was ultimately the reason the FTC succeeded in court. There were two routes by which it could have been employed to decide the case for the government. The FTC, in litigating the case, and the court, in deciding it, framed the pricing evidence as a basis for defining a narrow product market, of consumable office supplies sold through superstores. The court noted that if the merger were to go through the combined firm would have a 100% market share in 15 metropolitan areas and a dominant market share in 42 other metropolitan areas across the country.[34] If a merger creates a monopoly, it is generally easy to conclude that competition will be harmed, with little need for detailed analysis of competitive effects.[35]

The court was encouraged to see the product market as narrow, confined to the superstore distribution channel, through a litigation tactic employed by the FTC lawyers. In a motion to the

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could open a large number of stores to achieve economies of scale equivalent to the three existing superstores, it could not be an effective competitor. The court concluded that even if some large chain stores could enter the market, there was simply no evidence in the record before him that they would in fact do so in the event of a post-merger price increase.

[32] *Staples*, 970 F. Supp. at 1076.

[33] *Id*. at 1092.

[34] *Id*. at 1081. Geographic market definition was not contested. Judge Hogan pointed out that just about the only thing the parties in the case did not disagree about was that metropolitan areas are the appropriate geographic markets. *Id*. at 1073.

[35] The government's Horizontal Merger Guidelines indicate that efficiencies are unlikely to carry the day in a merger to monopoly or near-monopoly.

court, they suggested that Judge Hogan get in his car and drive to Rockville, a northern suburb of Washington, DC, where he would find office supply superstores and all the other retail outlets defendants' claimed were in the market. It would have been awkward for defense counsel to resist the idea that the Judge should take a look at the stores for himself, and they did not oppose the suggestion. Judge Hogan accepted the invitation, and one weekend drove around visiting the various outlets, including Staples, Office Depot, CompUSA, Best Buy, CVS, K-Mart, Giant Food and Wal-Mart. Based on his observations he found in the superstores a unique combination of size, selection, depth, breadth of inventory and the type of customers they target and attract. His conclusion:

> "No one entering a Wal-Mart would mistake it for an office superstore. No one entering Staples or Office Depot would mistakenly think he or she was in Best Buy or CompUSA. You certainly know an office superstore when you see one."[36]

Judge Hogan noted that the products involved were the same no matter where they were purchased and therefore, in a sense, all sources could be regarded as a market. But he quickly added that there could be "well-defined submarkets" in which sellers could raise price without losing an unacceptable portion of their business, and noted that the submarket concept had been recognized by the Supreme Court and lower court cases many times in the past.[37]

The FTC and the court could instead have chosen to frame the pricing evidence another way: as direct evidence of anticompetitive effect within a broader office supplies product market, not limited to the superstore distribution channel, in which the merging firms' market shares were low. Under this alternative description of the evidence on prices, the merger would

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[36] *Staples*, 970 F. Supp. at 1079.

[37] *See id*. at 1075 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Rothery Storage & Van Co. v. Atlas Van Lines Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976).

represent an example of harmful unilateral competitive effects of a merger among sellers of differentiated products, reflecting a loss of localized competition within a broad market. This would have been a more difficult route for proving the case, however, because it would have required the court to conclude that the direct evidence from prices was more probative than the contrary implication of the market shares,[38] and because unilateral effects analysis, while well established at the antitrust enforcement agencies,[39] had only tentative acceptance in the courts.[40] An FTC victory on this basis, therefore, could have been more difficult to sustain on appeal than one based on a merger to monopoly within a narrow product market.

The FTC staff, comparing these alternatives, decided to challenge the merger within a narrow product market, rather than as leading to harmful unilateral effects within a broad product market. They argued the pricing evidence in terms of market definition, and prevailed on that basis. Some observers nevertheless view *Staples* as reflecting acceptance by the court of the unilateral competitive effects theory in the Horizontal Merger Guidelines. George Cary, the FTC's lead attorney, put it this way:

> "I do think of *Staples* as a unilateral effects case. … Ultimately. I think it has to be viewed as a unilateral effects case because the proof that was put forward in defining the product market was the closeness of competition between Staples and Office Depot and the

[38] In a broader market, market concentration and its increase would have been much lower, posssibly so low as to place the merger within the safe harbors for concentration set forth in the government's Horizontal Merger Guidelines. Although a number of economists have argued that this should not matter if unilateral effects of a merger among sellers of differentiated products can be established through direct evidence, the low Herfindahl-Hirschman Index (HHI) statistics resulting from defining a broad product market would have presented another litigation challenge for the government had the case been framed this way.

[39] This unilateral effects theory had been introduced into the government's Horizontal Merger Guidelines in 1992, and was routinely employed in the internal review of mergers by both the FTC and the Justice Department.

[40] In *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995), Judge Kimba Wood had accepted the theory "arguendo".

> effect of that competition on prices, without regard to competition from other firms."[41]

From this perspective, the narrow market definition adopted for the purpose of litigation operated as a vehicle for recognizing unilateral effects in an uncertain legal environment.[42]

b. Efficiencies. Defendants had submitted an "Efficiencies Analysis" predicting that the combined company would achieve savings of between 4.9 and 6.5 billion over the five years following the merger, and that two-thirds of those savings would be passed on to consumers. They claimed that these cost savings would outweigh any possible anticompetitive effect from merger.[43]

This claim drew the court into an exceptionally ambiguous area of antitrust. The Supreme Court in 1967 had announced that "[p]ossible economies cannot be used as a defense to illegality in Section 7 merger case."[44] On the other hand a significant number of lower courts had disregarded the Supreme Court directive and recognized the defense,[45] and the Department

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[41] Roundtable Discussion: Unilateral Effects Analysis After *Oracle*, 19 Antitrust 8, 9 (Spring 2005).

[42] *See generally*, Jonathan B. Baker, Stepping Out in an Old *Brown Shoe*: In Qualified Praise of Submarkets, 68 Antitrust L. J. 203, 209-17 (2000). Not every unilateral effects case will be amenable to reframing as alleging a merger to monopoly within a narrow product market, however, as some narrow markets look more gerrymandered than others. *See United States v. Oracle Corp.*, 331 F. 2d 1098 (N.D. Calif. 2004) (unilateral effects allegation was unsuccessful because the government did not prove a narrow product market within which the merger would create a near-monopoly).

[43] *Staples*, 970 F. Supp. at 1089-1090.

[44] *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 579 (1967).

[45] *See FTC v. University Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991) (acknowledging that claims of efficiency can rebut the government's prima facie case, but finding insufficient evidence in record); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 680 (D. Minn. 1990) (efficiency evidence relevant but not necessary because proposed transaction raised no anticompetitive threat); *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1289-91 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990) (efficiency evidence introduced, but violation nevertheless found because efficiencies may not have been

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of Justice-FTC Horizontal Merger Guidelines had been revised earlier in the year, just before the *Staples* case was argued, to incorporate an efficiency defense where the claimed efficiencies were significant, credible, verified and likely to outweigh any anticompetitive effect.[46] Judge Hogan acknowledged the uncertainty of the issue as a matter of law but was willing to assume efficiencies could be a viable defense. He concluded, however, that the defendants' efficiencies evidence was inadequate to sustain their position.[47]

As we noted earlier, Judge Hogan credited the testimony of Commission expert David Painter over the testimony of defendants' efficiency witnesses.[48] As to the claim of cost savings of $4.9 billion over five years, the court observed that this amount was five times greater than the figures presented to the two boards of directors of the merging companies when their boards approved the transaction. The claim was also far greater than the numbers submitted to the Securities and Exchange Commission. The court also noted that the savings were largely unverified and that much of the total could have been achieved by either company absent a merger. Finally, the court expressed extreme skepticism over the claim that two-thirds of the savings would be passed through to consumers in light of evidence that showed, historically, that Staples had passed through 15-17% in the past.[49] The bottom line for Judge Hogan was that the efficiency claims offered an inaccurate prediction of the proposed acquisitions' probable effect.

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unique to merger and in any event were not sufficiently substantial to overcome anticompetitive effects).

[46] 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 4 (Revised April 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm (last visited June 29, 2006).

[47] *Staples*, 970 F. Supp. at 1089-1090.

[48] *Id*. at 1089.

[49] *Id*. at 1089-1090.

Based on his review of the evidence, the Judge granted the Commission's request for a preliminary injunction and shortly thereafter Staples and Office Depot dropped the deal.[50]

10. Future Impact: Why the *Staples* Case was a Turning Point in Merger Enforcement

One significant impact of the FTC's victory in *Staples* was to demonstrate the agency's willingness to litigate with the necessary resources, even if it meant short-changing other portions of agency activity. A leading investment banker described the FTC's victory in *Staples* as "a particularly dramatic show-stopper, a sign of the [government's] new assertive posture and of the courts' willingness to block a deal."[51] In the years following the *Staples* decision, the FTC found itself in court several times advancing antitrust challenges to mergers: successfully blocking two simultaneous mergers among drug wholesalers that would have reduced the number of major firms from four to two;[52] stopping the merger of Beech-Nut and Heinz in the baby food market (a deal that would have reduced the number of baby food suppliers in the United States from three to two);[53] and challenging the proposed acquisition by British

[50] *See* Richard Tomkins, *US Court Upholds Ban On Staples Merger*, The Financial Times (London), July 1, 1997, at 32.

[51] Bruce Wasserstein, Big Deal: The Battle for Control of America's Leading Corporations, 148 (1998). Perhaps the arbitrageurs who spent unprecedented sums on the Staples case - first betting that the FTC would not bring the case and, second, that the agency would lose in court - will become more cautious in betting against the government. By one estimate, the "arbs" lost approximately $150 million by guessing wrong on both results. Wall Street Journal, C-2 (July 2, 1997).

[52] *FTC* v. *Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 68 (D.D.C. 1998).

[53] *FTC* v. *H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), *rev'g* 116 F. Supp. 2d 190 (D.D.C. 2000).. The present authors had different views on the wisdom of this case, Pitofsky as Chairman of the agency that successfully challenged the merger and Baker as economic expert for the merging firms. For two perspectives, see Thomas B. Leary, An Inside Look at the *Heinz* Case, 16 Antitrust, No. 2 at 32 (Spring 2002) (views of Commissioner Leary) and Jonathan B. Baker, Efficiencies and High Concentration: Heinz Proposes to Acquire Beech-Nut (2001), in John E. Kwoka, Jr. and Lawrence J. White, eds., The Antitrust Revolution 150 (4th ed. 2004).

Petroleum of ARCO which would have consolidated major oil-producing assets in Alaska. When BP agreed to divest the overlapping Alaskan assets, the rest of the deal was allowed to proceed.[54] The agency still allowed the vast majority (perhaps 97%) of mergers to go through without serious investigation, but clearly was ready to litigate if that was the right thing to do.

One result of energizing government enforcement of antitrust was that the agencies were taken more seriously as litigation opponents, and there was a recognition by the private bar that clients could expect extensive data requests and careful data analysis. Incidentally, the Department of Justice's Antitrust Division enjoyed a similar change in attitudes as a result of its successful challenge to business tactics by Microsoft, including respect for the quality of government litigation.

The *Staples* litigation also illustrated the increasing importance of economics to merger analysis since the Warren Court era, when the government seemingly needed only to show up in court to win. The Commission's case in Staples was based almost entirely on documents (it called only three fact witnesses) and focused on a single issue: the effect of the proposed merger on prices. The agency's economic presentation, primarily through the testimony of two economic experts and an accounting expert on the Commission's staff, was sophisticated and in the end persuasive.[55] Judge Richard Posner, one of the major figures in introducing economic

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[54] In the Matter of The British Petroleum Co. p.l.c., 127 F.T.C. 515 (1999) (consent order). Other Commission victories included *FTC v. Swedish* Match, 131 F. Supp. 2d 151 (D.D.C. 2000). While the Commission's winning record in antitrust challenges after *Staples* was impressive, the FTC did occasionally lose a case, and had particular difficulty in court prevailing in its efforts to block mergers of hospitals in local communities. For example, see *Federal Trade Commission v. Tenet Health Care*, 186 F.3d 1045 (8th Cir. 1999).

[55] Cooperation among lawyers and economists at the Commission had in the past been uneven and at times less than constructive. The *Staples* trial was a different matter. Leading figures in both the Bureau of Economics and Bureau of Competition strongly supported the case and the cooperation between the two groups of staff was as good as it is ever likely to be.

analysis into antitrust, and into law generally, stated at the conclusion of his review of the FTC's performance in *Staples* that "[e]conomic analysis of mergers had come of age."[56]

In addition, the *Staples* opinion solidified the view that antitrust theory grew primarily from initiatives of the enforcement agencies (guidelines and cases) and cases in the lower courts, largely because the Supreme Court had not reviewed a merger case on the merits since 1974.[57] Hopefully that will change in the next few years.

For most of its history, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties. It was often referred to as "The Little Old Lady of Pennsylvania Avenue." One courtroom victory does not justify the existence of an agency, but the staff's performance against outstanding and experienced antitrust lawyers in *Staples* was admirable.[58] In a subsequent case, the next major merger challenged in court by the FTC, Judge Stanley Sporkin, a prominent figure in the world of business and regulatory law, noted the fine performance of the FTC in court and described the agency as revitalized.[59]

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[56] Richard A. Posner, Antitrust Law 158 (2d ed. 2001).

[57] *United States v. General Dynamics*, 415 U.S. 486 (1974). Coincidentally, Donald Kempf, lead attorney for Staples, had represented General Dynamics in that case. The Supreme Court issued substantive antitrust merger decisions in three bank cases shortly after *General Dynamics*, but *General Dynamics* is generally considered the Court's most recent interpretation of Clayton Act §7.

[58] By one report, "most people who packed in to hear the case every day agreed that the government out-lawyered the defense in the courtroom …." Amy Singer, Staple Removers, American Lawyer 46 (Oct. 1997).

[59] *FTC* v. *Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 68 (D.D.C. 1998).

Comparison of Staples' Prices in Two Virginia Cities

Charlottesville, VA, *The Daily Progress* Feb. 1997 (Two Superstores)

Everyday Low Prices On All Filing Supplies!

- GLOBE-WEIS ⅓-CUT LETTER-SIZE MANILA — 2.99 100/BOX
- TRANSPARENT POLY STRING ENVELOPE — 1.39
- GLOBE-WEIS ⅓-TAB HANGING FILE FOLDERS — 3.50 25/BOX
- GLOBE-WEIS VERTICAL FILING JACKETS — 4.99 10/PACK
- GLOBE-WEIS LETTER-SIZE HANGING FILE POCKETS — 8.79 4/PACK

Over 7,000 Items In Stock Every Day!

- HIGHLAND 3" X 3" STICK-ON NOTES — 3.99 DOZEN
- BIENFANG WHITE PROJECT DISPLAY BOARD — 5.49
- BONUS 10/PACK OF PERMA STORAGE BOXES — 7.99 BONUS PACK

Avery Labels & Cards

- AVERY INKJET BUSINESS CARDS — 10.19 250/BOX
- AVERY LASER-PRINTER RECTANGULAR LABELS — 21.55 3,000 BOX

Huge Variety Of Inkjet & Laser Paper!

- XEROX HIGH-TECH INKJET PAPER — 5.99 500 SHEETS
- HAMMERMILL PREMIUM LASER PAPER — 6.99 500 SHEETS
- HAMMERMILL JET PRINT PREMIUM INKJET PAPER — 9.99 500 SHEETS

Fredericksburg, VA, *The Free Lance - Star* Feb. 1997 (One Superstore)

Everyday Low Prices On All Filing Supplies!

- GLOBE-WEIS ⅓-CUT LETTER-SIZE MANILA — 4.72 100/BOX
- TRANSPARENT POLY STRING ENVELOPE — 1.39
- GLOBE-WEIS ⅓-TAB HANGING FILE FOLDERS — 4.16 25/BOX
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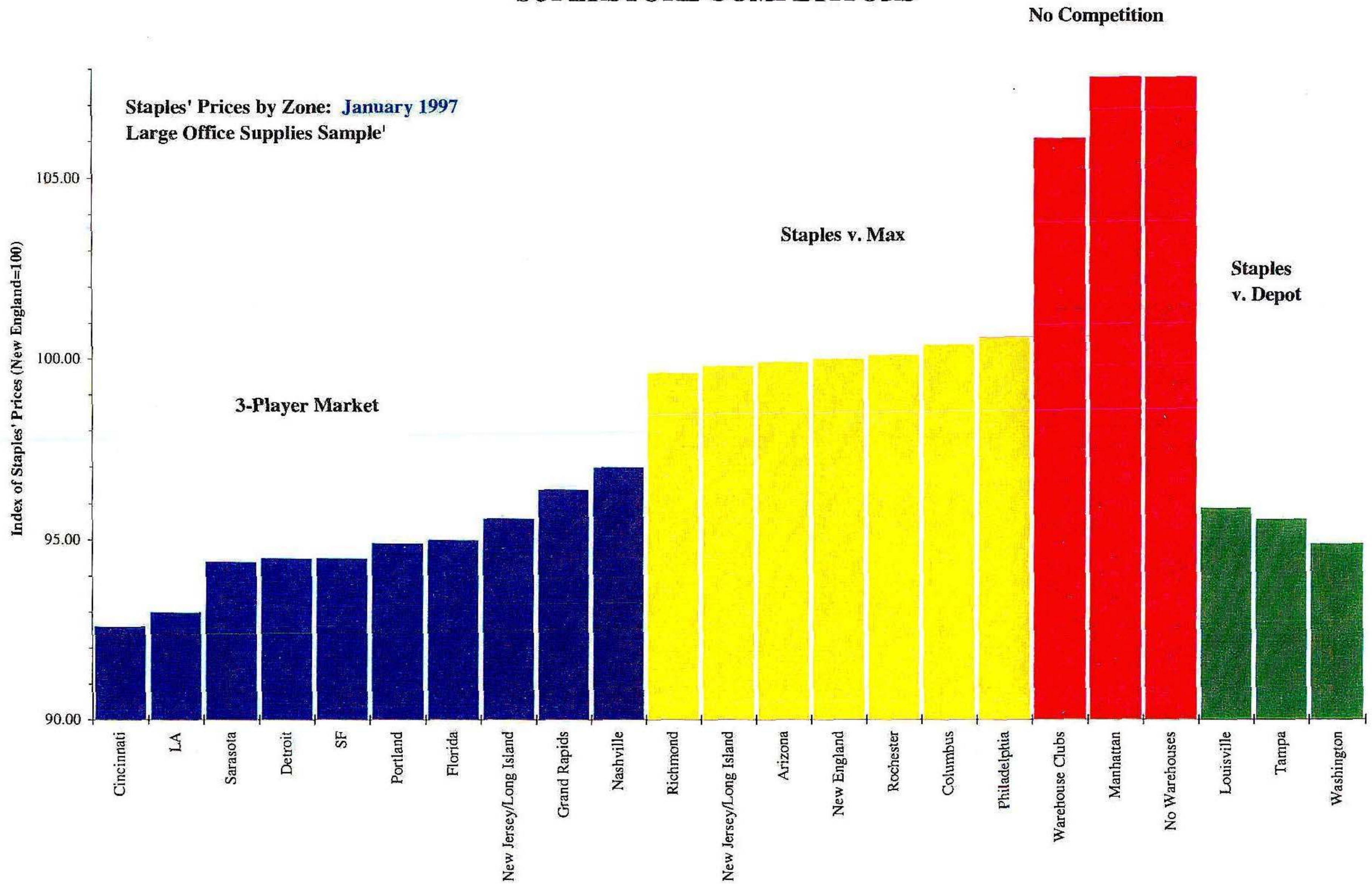

[1] Based on an office supply sample accounting for 90% of Staples' sales.