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An Oracle Without Foresight? Plaintiffs’ Arduous Burdens under *U.S. v. Oracle*

**AMANDA J. PARKISON HASSID***

**INTRODUCTION**

The decision in *United States v. Oracle Corporation* has the potential to obliterate the government’s ability to successfully block certain mergers. Because merger cases like *Oracle* rarely make it to trial, the extensive *Oracle* decision is likely to have great impact on future decisions. But ironically, at the same time that other courts may look to *Oracle* for guidance, the *Oracle* court itself largely disregards persuasive evidence. The unique set of circumstances in *Oracle* created little binding precedent on Judge Vaughn Walker, who did not shy away from using this freedom. The court set forth requirements for the government that differed drastically from those proposed in Horizontal Merger Guidelines (Guidelines) promulgated by the Federal Trade Commission (FTC) and the Department of Justice (DOJ)—requirements that effectively increased the burden of proof for the government. In addition, the *Oracle* court disregarded volumes of the government’s evidence, requesting instead evidence that would be nearly impossible for any litigant to offer.

The length and apparent thoroughness of the seventy-eight page decision in *Oracle* provides economists, lawyers, and students with enough material for volumes of commentary. The scope of this decision...

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* J.D. Candidate, University of California, Hastings College of the Law, 2007; B.A. Amherst College, 2003. I worked for a year as a paralegal on the *Oracle* matter at the Antitrust Division of the Department of Justice. While my work on that case piqued my interest in antitrust in general and *Oracle* in particular, I took pains to ensure that every fact and opinion in this Note is based only upon publicly available information. I would like to thank Pam Cole for her guidance as an attorney at the Antitrust Division during the *Oracle* matter, as my professor of antitrust at Hastings, and as my mentor for this Note. I would also like to thank Professors Jonathan Baker of American University and Andrew Gavil of Howard University School of Law for helping to clarify some antitrust concepts by e-mail. Last, thanks as always to Jonathan Hassid.


means that addressing all topics covered by the decision would be
difficult in a single note. Instead, this Note evaluates the impact two
aspects of the decision might have on the government’s ability to prove
future antitrust cases. First, the Oracle court’s requirements for proving a
unilateral effects case involving differentiated products dramatically
increase the onus on similarly situated antitrust plaintiffs. Second, the
court’s disparaging treatment of the government’s evidence further
increases the difficulty of the government’s task.

In sum, the reasoning behind the Oracle decision sets the bar so high
for the government that applying it to other cases would risk blessing
mergers that will result in a substantial lessening of competition in
violation of section 7 of the Clayton Act. For this reason, I argue that
despite the court’s extensive analysis and discussion of economics, other
courts should think carefully before giving the Oracle decision persuasive
force.

The beginning of this Note will provide the context needed to
understand the impact of the Oracle decision. Part I will describe what it
takes to prove a case under section 7 of the Clayton Act. Part II details
the specific facts of the Oracle case, and it contrasts the Guidelines’
standards of proof with those used in Oracle. In addition, Part II explains
how the Oracle court’s divergence from the Guidelines’ standards have
the practical effect of increasing the plaintiffs’ burden of proof. Part III
describes how the court’s minimization of the government’s evidence
greatly increased the difficulty of the government’s task. In particular,
this Part will look at the treatment of the testimony of customer
witnesses, at the testimony of expert witness Marco Iansiti, and at
internal business documents.

I. PROVING A CASE UNDER SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act forbids acquisitions where “the effect of
such [an] acquisition may be substantially to lessen competition, or to
tend to create a monopoly.” The legislative history of the Act suggests
that Congress intended to stop mergers before firms have the power to
profit from anticompetitive behavior. A Senate Report describing the
1950 amendments to the Clayton Act states that “[t]he intent [of the
Act] . . . is to cope with monopolistic tendencies in their incipiency and
well before they have attained such effects as would justify a Sherman
Act proceeding.” The Supreme Court interprets section 7 in accordance
with the legislative history, stating, for example, that “section 7 of the
Clayton Act was intended to arrest the anticompetitive effects of market

at 4–5 (1950)).
power in their incipiency. The core question is whether a merger may substantially lessen competition. The Guidelines, promulgated by antitrust enforcement agencies, provide an analytical framework for determining when a merger would violate section 7 of the Clayton Act. The DOJ and the FTC are bound by the Guidelines; in order to bring a case to block a merger, the government must first meet the criteria set forth therein. While the Guidelines do not bind courts, courts nonetheless frequently rely on them. The Guidelines are influential in part because they form a systematic approach to the analysis of mergers, and in part because the Supreme Court has not decided a merger case on its merits since the mid-1970s. I take no position on whether the Guidelines are the best method of evaluating anticompetitive effect. Instead, the Guidelines have been a persuasive force since their enactment, and any radical departure from them constitutes a major policy shift. Thus, courts should recognize that following the Oracle decision will result in furthering this policy change with the ultimate result of increasing the government's burden in such cases.

The Guidelines lay out a five-step process to determine when a merger is likely to be anticompetitive. Of particular importance here are the two steps that define the appropriate product market and that discern anticompetitive effects. In order to define the product market, the government begins by hypothesizing a narrow product market. It then asks what would happen if a hypothetical monopolist in that product market were to impose a small but significant and non-transitory increase in price (SSNIP). Often, the price increase posited is 5–10% above current prices. Next, the government asks whether a hypothetical price increase would drive so many customers to an alternative product as to render the price increase unprofitable. If the SSNIP would be unprofitable, the product market is too narrow. The government then hypothesizes a new product market, including within it the original products' next-best substitute. It repeats the process until a SSNIP

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6. Merger Guidelines, supra note 2, §§ 0.0, 0.1.
8. Id.
9. Id.
10. Merger Guidelines, supra note 2, § 0.2.
11. Id. § 1.21.
12. Id. § 1.1.
14. Merger Guidelines, supra note 2, § 1.11.
15. Id.
would be possible. Only when a hypothetical monopolist would have the market power to make a SSNIP is the market definition correct.

Another step of the Guidelines divides anticompetitive effects into two categories: unilateral and coordinated. Unilateral effects arise because merging firms find it profitable to unilaterally raise prices or suppress output following the merger. That is, the combined firm will have the ability to raise prices or suppress output on its own, without needing to coordinate with its competitors. In United States v. Oracle, the government only provided evidence of unilateral effects, omitting evidence of coordinated effects, which need not be addressed here. The Guidelines provide special instructions for certain types of unilateral effects cases, which will be described below.

While the Guidelines are an important tool, their purpose is to ensure that the government only blocks mergers that are likely to substantially lessen competition. The Guidelines do not require the government to present its case at trial using the Guidelines framework. For instance, the government could present its case during litigation without describing geographic and product markets, relying instead entirely on direct evidence that one or both of the merging firms currently exhibit monopolistic tendencies. So long as the government proves that the merger is likely to substantially lessen competition, it has met its burden.

II. STANDARD OF PROOF IN United States v. Oracle

A. PRODUCTS AND SERVICES INVOLVED IN United States v. Oracle

The government attempted to block the merger between Oracle and PeopleSoft for fear that it would substantially lessen competition in part of the market for enterprise resource planning (ERP) software. ERP suites manage a company's data across all or most of a company's activities. Vendors such as Oracle and PeopleSoft divide up the ERP software into "pillars" that focus on different parts of the enterprise's needs. For example, a customer can purchase human resources management (HRM), financial management systems (FMS), supply
chain management (SCM), and customer relations management (CRM) software from Oracle or PeopleSoft, or it could purchase only one or two of those pillars. A package of many pillars is called an ERP suite. The government challenged the merger for fear that it would substantially lessen competition in the markets for FMS and HRM software. In the government’s judgment, the merger did not present a substantial risk of weakened competition for the other pillars.

The government did not contend that all customers of FMS or HRM software would be harmed by the merger, however. Instead, it carved out a portion of the market, which it called “high function” software, whose customers it believed would be unreasonably harmed by the merger. It divided the market because not all companies need the same level of sophistication in their ERP suites. For instance, a company with five hundred employees in a single state will not need a payroll system as sophisticated as that used by a large, multinational corporation that must cut checks in accordance with multiple state and federal tax laws. Predictably, software targeted to clients with less sophisticated needs is simpler to build. As a result, more software vendors have successfully entered the market for these lower function software suites, so that a merger between Oracle and PeopleSoft would not likely harm competition for those customers. SAP, PeopleSoft, and Oracle call customers with less complex needs “mid-market” customers. The government called customers with more complex needs “large complex enterprises” (LCEs) and it calls the sophisticated software in question “high function software.” The government challenged the merger for fear that it would reduce competition in the high function software market. It did not contend that mid-market customers would be harmed.

According to the government, before the merger, only three vendors sold high function software that would be acceptable to LCEs: Oracle, PeopleSoft, and SAP. The merger, therefore, would lower the number of competitors from three to two. It asserted that among those three,
Oracle and PeopleSoft were particularly close competitors for LCEs.\textsuperscript{38} The Oracle court disagreed, however, ruling against most of the government's proposed findings. It found that the product market was not limited to Oracle, PeopleSoft, and SAP, but instead included mid-market vendors, outsourcers, and best of breed solutions.\textsuperscript{39} The court also found that the government had failed to prove that a significant number of customers regard Oracle and PeopleSoft as their first and second choices.\textsuperscript{40}

\textbf{B. The Guidelines on Differentiated Products and Unilateral Harm}

According to the Guidelines, products are differentiated if "products sold by different participants in the market are not perfect substitutes for one another."\textsuperscript{41} Products rolled out by Oracle, PeopleSoft, SAP, and other vendors are by no means identical.\textsuperscript{42} They each possess different qualities and emphasize different priorities. As a result, no product is a perfect substitute for any other.\textsuperscript{43} Also, installing a suite or pillar requires extensive customization because each customer has different functional needs with which the ERP product must be integrated. Therefore, no two installations will be identical. While two customers may choose to purchase and install Oracle's FMS solution, for instance, those two installations might look quite different.\textsuperscript{44} Because no ERP suite is a perfect substitute for another, the products are "differentiated," as the court determined them to be.\textsuperscript{45}

The Guidelines state that a merger involving differentiated products is likely to lead to anticompetitive effects when a significant number of customers perceive the merged firms' products as their first and second choices.\textsuperscript{46} When a significant number of customers view the merged firms' products as next-best substitutes, the combined firm is likely to be able to raise prices above competitive levels. If a firm were to raise by 5–10\% the price of a product which was the customer's first choice, the customer might normally purchase its second choice instead. If the merged company were to raise the prices of both products or to eliminate one product entirely, the customer would be more likely to absorb the price increase instead of turning to its third choice. The more strongly that customers prefer the two merged products as next-best substitutes,
the higher the price increase is likely to be.

However, the Guidelines do not prohibit every merger just because some customers might pay higher prices. The Guidelines would permit the merger if the benefits of merger-specific efficiencies outweigh the costs.47 Some efficiencies mentioned in the Guidelines are "lower prices, improved quality, enhanced service, or new products."48 If few customers are affected, the merger is more likely to go through. Also, the Guidelines provide that the merger is unlikely to lead to unilateral price increases if remaining competitors could reposition to replace any localized competition lost through the merger.49

The Guidelines identify three conditions before presuming that customers who regard the merging firms' products as first and second choices make up a significant share of the market.50 First, market concentration levels must reach a specified threshold. Second, each product's market share must reflect not only its relative appeal as a first choice, but also its appeal as a second choice.51 Last, the merging firms must have a combined market share of at least 35%.52 One logical reason for the last requirement is to ensure that the merger-specific efficiencies will not outweigh the competitive harm. If the merger will produce a combined market share of at least 35%, and the other Guidelines requirements are met, a sufficient number of customers are likely to be harmed to outweigh efficiencies in typical cases.53

C. The Oracle Court's Analysis of Unilateral Effects Requirements

Since the Oracle decision came out, many antitrust experts have suggested that the court's decision increases a plaintiff's burden of proving a differentiated products unilateral effects case, or even that the government could never succeed under its requirements.54 The purpose

47. Id. § 4.
48. Id.
49. Id. § 2.212.
50. Id. § 2.211.
51. Id.
52. Id.
53. See id.
54. See, e.g., Roundtable Discussion, Unilateral Effects Analysis After Oracle, Antitrust, Spring 2005, at 8, 11 (Jonathan Baker, moderator) (2005) [hereinafter Roundtable]. Professor Jonathan Baker moderated a discussion between four other lawyers and economists. See id. at 8. Carl Shapiro stated that the likely result will be "a huge hurdle for the government when it seeks to block mergers involving differentiated products based on a theory of unilateral effects." Id. at 10. George Cary agreed that Judge Walker has set up unilateral effects as something you can never prove, in which narrow markets have to be defined in theory but cannot be defined in practice. Id. at 11. Paul Yde defended parts of the Oracle opinion while recognizing that it seems to impose a higher standard of proof in a differentiated product setting. Id. at 9. For other commentary on the increased burden on the plaintiff, see Andrew Gavil et al., Teacher's Update, Summer 2006 to Accompany Antitrust
of this Note is not to rehash arguments that others have already articulated. However, a foundational understanding of the contrast between the court's requirements of proof in Oracle, as compared to the Guidelines requirements, is necessary before examining the types of proof that the court permitted.

The court eschewed the Guidelines and set forth its own requirements for the government to prove a differentiated products, unilateral effects claim. It listed four factors that the government must meet in order to satisfy its burden. While the court's first, second, and fourth factors reflect norms perpetuated by the Guidelines, its third factor might have the practical effect of making the government's success on any unilateral effects case prohibitively difficult. The court's first factor is that the products must be differentiated, and it defines "differentiated" in terms consistent with the Guidelines as described above. Second, the products produced by the merging firms must be close substitutes for a significant number of customers. Another factor, which the court lists fourth, is that repositioning by a third firm must be unlikely. The court lists the most troublesome factor third. It states, "Other products must be sufficiently different from the products controlled by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firms."

In this factor, the court effectively conflates two distinct steps in the Guidelines: the market definition analysis and the anticompetitive effects analysis. The Guidelines use the SSNIP test to define a product market. A hypothetical monopolist's ability to make a SSNIP suggests that the product market is properly drawn, but it has no bearing on whether the merger will lead to anticompetitive effects. The Guidelines ask in a separate step whether the merger is likely to lead to

56. Compare id. at 1117, with MERGER GUIDELINES, supra note 2, § 2.21.
57. Oracle, 331 F. Supp. 2d at 1117.
58. Id. at 1118.
59. Id. at 1117-18.
60. E-mail from Andrew Gavil, Professor, Howard University School of Law, to author (Feb. 16, 2006, 11:15:21 PST) (on file with author) [hereinafter Gavil Correspondence].
61. MERGER GUIDELINES, supra note 2, § 1.11; Gavil Correspondence, supra note 60.
anticompetitive effects. In a differentiated products case, for instance, the Guidelines provide that the merger is presumed to be anticompetitive if a significant number of customers view the merging products as their first and second choices. It is important to note that the Guidelines do not require that the merged firm be able to raise prices throughout the entire product market. Instead, the merger is presumed to be anticompetitive if a “significant share of sales in the market” is accounted for by customers who view the products as next-best substitutes. Some customers in the relevant market might view a third firm as a viable substitute for the merged products and thus be unaffected by the merger. Under the Guidelines approach, this does not mean that the merger is legal.

The court’s third requirement alters the SSNIP test radically. It uses the SSNIP test to measure anticompetitive effects rather than to define the market. In the process, it vastly increases the government’s burden of proof. This use of the SSNIP test goes beyond the Guidelines because it requires the merging firms alone to have the power to make a SSNIP. On the other hand, the Guidelines merely use the test to define the market by asking whether a hypothetical monopolist has the power to make a SSNIP. This makes a big difference in a case in which three or more firms compete in the relevant market, as the government alleged in Oracle.

For example, assuming that the government’s market definition was correct that Oracle, PeopleSoft, and SAP all competed in the relevant market, the court would require that a combined Oracle and PeopleSoft have the ability to profitably make a SSNIP in spite of the competition from SAP. The Guidelines, on the other hand, merely require that a hypothetical monopolist have the ability to make a SSNIP. By requiring the firms to have the ability to make a SSNIP across the market, the court requires the market to be defined more narrowly than do the Guidelines. Otherwise, any competition would likely prevent such a cross-market SSNIP from being profitable. This will become especially important because the court also makes it very difficult for plaintiffs to define a narrow market.

At first glance, it does not seem strange to require a merged firm to be able to profitably impose a SSNIP before an agency may consider the merger anticompetitive. However, the court’s analysis requires that the combined firms have the ability to raise prices throughout the entire

62. MERGER GUIDELINES, supra note 2, §§ 2.1, .2; Gavil Correspondence, supra note 60.
63. MERGER GUIDELINES, supra note 2, § 2.21.
64. The government argued that Oracle, PeopleSoft, and SAP competed in the relevant market. Oracle, 331 F. Supp. 2d at 1134–35.
65. See MERGER GUIDELINES, supra note 2, at 2. To reiterate, the Guidelines do not suggest this means the merger is anticompetitive, but merely that the market definition is properly drawn.
66. See infra Part III.
product market. Even if a significant number of customers will face a price increase as a result of the merger (presumably because the merging products are their top two choices), the court's analysis would require ruling against blocking the merger. The Guidelines, on the other hand, would probably require the agencies to try to stop the merger. The court explicitly requires that the firms have the ability to raise prices throughout the market later in its decision. In its section on unilateral effects, the court rejects as too low the Guidelines' requirement that the merging firms have a market share of at least 35%: "To prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position."^{67}

In essence, the court assumes that unilateral effects can flow only from a monopolist or near-monopolist, when in fact anticompetitive effects can arise anytime the merged firm exercises some degree of market power.^{68} In addition, longstanding economic theories of oligopoly and differentiated products contradict the court's assertion that only a firm with monopoly power has any power over price.^{69} The court also assumes that if the two competitors can raise prices but not to the level of a SSNIP, the merger should not be blocked. Last, because the court's third factor focuses entirely on the ability to raise prices, it might also fail to take into account other anticompetitive effects, such as diminution of innovation incentives.^{70}

III. SELECTED EVIDENCE BY THE GOVERNMENT IN U.S. v. ORACLE

Regardless of the correctness of the Oracle court's third factor (that the combined firms must have a monopoly or a dominant position), I propose that the court was also too selective in the types of evidence it deemed acceptable. By requiring the government to show a near-monopoly and then disregarding much of the proof that the government presented, the court made the government's case prohibitively difficult. The government was likely to lose regardless of whether the merger would have caused a significant number of customers to suffer higher prices.

A. CUSTOMER EVIDENCE

For instance, the court summarizes at some length the testimony of the government's customer witnesses.^{71} The court concedes that the ERP customers "represent a group of extremely sophisticated buyers and

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67. Oracle, 331 F. Supp. 2d at 1135.
68. Gavil Correspondence, supra note 60.
69. Roundtable, supra note 54, at 10.
70. Gavil Correspondence, supra note 60.
71. Oracle, 331 F. Supp. 2d at 1125–32.
users of information technology" with "decades of experience in negotiating in this field."\(^\text{72}\) Neither does the court "doubt the sincerity" of the witnesses.\(^\text{73}\) Nonetheless, the court found the testimony of customer witnesses "largely unhelpful" to the government's case,\(^\text{74}\) in part because they did not "provide the court with data from actual or probable ERP purchases and installations."\(^\text{75}\)

No one doubts the court must evaluate the credibility of witnesses. In the case of the government's customer witnesses, however, the court specifically states that it believes the customers mean what they say. It simply finds inadequate their methods of arriving at their conclusions that their companies would pay an extra 5–10% in a post-merger environment. I posit that in some instances, the court is too selective in the evidence it considers significant. This level of selectiveness is not the best means to achieve the statutory goal of determining whether the merger is likely to result in a price increase.

First, predictive customer testimony often has value.\(^\text{76}\) In particular, customers that recently procured ERP systems should be able to credibly state whether they would have purchased the same software in spite of a 5–10% price increase.\(^\text{77}\) After all, those are the customers who have already been through the months-long process of discerning their own functional needs and matching up those needs with the offerings of various ERP vendors. A customer's testimony that it did not consider any vendor other than Oracle, PeopleSoft, and SAP, and that it would not have changed its choices in the face of a 5–10% price increase, is the most similar evidence available to the specific data requested by the Oracle court. Similarly, "the fact that the knowledgeable, experienced, sophisticated, sincere customers that the Division put forward—and those are all Judge Walker's words—had not conducted extensive analyses of the costs of using Lawson or AMS, demonstrates something very important all by itself."\(^\text{78}\) Namely, it reflects that the other vendors

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\(^{72}\) Id. at 1131.

\(^{73}\) Id. at 1130.

\(^{74}\) Id.

\(^{75}\) Id. at 1131.

\(^{76}\) See, e.g., Thomas O. Barnett, Substantial Lessening of Competition—The Section 7 Standard, 2005 COLUM. BUS. L. REV. 293, 309 (arguing that while customers are sometimes biased, customer interests tend to be in line with the goals of the antitrust laws).

\(^{77}\) See, e.g., Oracle, 331 F. Supp. 2d at 1126 (noting evidence that CH2M Hill would have paid 10% more to acquire Oracle or PeopleSoft); id. (noting evidence that North Dakota would not have turned to options other than Oracle or PeopleSoft in the face of a 10% price increase); id. at 1129 (noting evidence that Neiman Marcus Group would not have considered any vendor other than Oracle and PeopleSoft for its FMS and HRM procurements even in the face of a 10–20% price increase); id. at 1130 (noting evidence that Verizon would have chosen PeopleSoft, Oracle, or SAP and no other vendor even if those three vendors increased prices by 10%); id. (noting evidence that Cox Communications would have chosen PeopleSoft or Oracle in the face of a 10% price increase).

\(^{78}\) Barnett, supra note 76, at 309.
likely could not have met the customers' functional needs and therefore
could not have constrained Oracle in a post-merger market.\textsuperscript{79}

Second, failing to consider evidence that lacks supporting "data from
actual or probable ERP purchases and installations"\textsuperscript{80} makes proving a
merger case unreasonably expensive for customer witnesses, the
government, or both. Evaluating ERP vendors sometimes takes over a
year, which makes it a substantial financial investment.\textsuperscript{81} Many
companies even pay outside consultants to help them through the
process.\textsuperscript{82} Surely, the government could not reasonably ask customers to
go through that time and expense out of a sense of civic duty. The \textit{Oracle}
court disregarded one feasible alternative when it dismissed the
testimony of an expert witness about which vendors could offer a viable
solution for particular customers. However, in \textit{Oracle}, the government
did present expert witness Professor Marco Iansiti. The government
hoped that Professor Iansiti's testimony would help sort out the
differences in functionality between mid-market and high function
solutions, and that he could testify generally as to which types of
customers need high function solutions.\textsuperscript{83} However, the court did not
apparently believe that Professor Iansiti's testimony bolstered the
customers' contentions that they would tolerate a SSNIP by a combined
Oracle and PeopleSoft.\textsuperscript{84} Realistically, neither the government nor the
customers will have the resources to mimic the actual process of
procuring an ERP solution. For that reason, it is unreasonable to
conclude that "the failure of these witnesses to present cost/benefit
analyses"\textsuperscript{85} reflects anything more than financial realities.

B. REQUIRING A BRIGHT LINE MARKET BOUNDARY: DISREGARDING
TESTIMONY OF EXPERT WITNESS MARCO IANSITI

The government put forth three expert witnesses: Professors
Kenneth Elzinga, Preston McAfee, and Marco Iansiti. The court focused

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Oracle}, 331 F. Supp. 2d at 1131.

\textsuperscript{81} \textit{See Lauren Hoyt, Grocer's ERP Selection Hinges On Milk, SEARCHSAP.COM, May 26, 2005,
http://searchsap.techtar\texttarget.com/originalContent/o.289142.sid21_gci1092250.00.html (noting that
Brookshire Grocery Co. selection process took one year); The ERP Selection Process, University of
(indicating that University of Illinois took six months to issue a request for information and nineteen
months to complete the selection process, including the signing of the contract with the vendor).

\textsuperscript{82} \textit{See, e.g., Oracle}, 331 F. Supp. 2d at 1127-28 (stating that Greyhound Lines hired CDG &
Associates and AIMCO hired Towers Perrin).

\textsuperscript{83} The specific types of evidence Professor Iansiti gave will be discussed below. \textit{See infra Part
III.B.}

\textsuperscript{84} \textit{Oracle}, 331 F. Supp. 2d at 1133-34. The court does not mention Professor Iansiti's testimony
during the discussion of customer testimony. \textit{Id. See infra Part III.B.} for analysis of the court's
treatment of Professor Iansiti's analysis.

\textsuperscript{85} \textit{Oracle}, 331 F. Supp. 2d at 1131.
more of its attention on the testimony of Professors Elzinga and McAfee, but Professor Iansiti’s testimony was also significant. Professor Iansiti testified as an industry expert. He attempted to show that for a significant group of customers, Oracle, PeopleSoft, and SAP were the only realistic options. However, the court did not credit Professor Iansiti’s testimony because he did not use economic analysis and failed to show a bright enough boundary around the government’s proposed product market.  

The court had room to require a clearly defined market boundary because little case law exists for merger cases in general, and for differentiated products cases in particular. However, I propose that a clearly demarcated market boundary is not the wisest requirement. By mandating a bright line, the court sets the bar yet higher for the government. The increased burden could permit mergers that have the effect of substantially lessening competition, which the Clayton Act forbids. In addition, economic analysis along with common sense bolsters the assertion that the court’s requirement of a bright line product market is not reasonable in differentiated products and unilateral effects cases.  

Professor Iansiti attempted to show that a significant group of customers existed for whom Oracle, PeopleSoft, and SAP were the only realistic options. He testified that in order for a large complex enterprise to process transactions and manage its information, the software must meet certain high function requirements. For instance, the software may need to be able to operate in multiple languages and currencies and across multiple jurisdictions in order to correctly reflect the actual structure and organization of the firm. For some customers, it must be highly configurable so that the user can mold the software to meet business needs without expensive software customization. Professor Iansiti also testified that many customers require vendors to demonstrate research and development investment and sufficient financial stability. Professor Iansiti reviewed 148 vendors, keeping these business requirements in mind, and determined that only Oracle, PeopleSoft, and SAP were able to satisfy those high function requirements.

86. Id. at 1133–34.
88. PFOF, supra note 33, ¶ 2.1.11.1.7.
89. Id. ¶ 2.1.11.1.10
90. Id. ¶ 2.2.2.
91. Id. ¶ 2.3.2.1.
92. Id. ¶ 2.3.1.2.
93. Id. ¶ 2.5.
The court, however, determined that Professor Iansiti's testimony failed to establish a product market. The court noted that Professor Iansiti had "conceded that there is not a 'clear line or demarcation' to distinguish" the high function market from the mid-market. It stated, "Because of his lack of economic analysis and his inability to identify articulable product market boundaries (a key issue in a horizontal merger case), the court finds that Iansiti failed to establish a clearly defined product market along the lines alleged by plaintiffs." In other words, the court wanted a thin black line around the product market. Because the plaintiffs could not pinpoint the exact boundary, the court found that the government had not fulfilled its burden of determining a "clearly defined product market."

One might argue, however, that at least in a differentiated products, unilateral effects case such as Oracle, a clear boundary around the defined product market is unnecessary. Decidedly, in the merger context, "[t]he purpose of market definitions is not to frustrate anti-trust plaintiffs by requiring the proof of bright lines which do not exist." In addition, economists support the notion that requiring a clear separation between the products in and out of the relevant market has much less utility in a unilateral effects case than in a coordinated effects case. For instance, Professor Jonathan Baker asserts that in differentiated products cases, "market definition is generally not very helpful as a first step in assessing the potential loss of localized competition" because "market shares . . . often reveal little about the competitive role played by individual firms." Marc Schildkraut illustrates this concept with an example of a series of evenly-spaced gasoline stations along a north-south highway. If one gas station acquires the two stations on either side of it, it may raise prices in its original station. The station operator may profitably raise prices at the middle station because it makes more money from those motorists who continue to stop at that station. However, he does not lose any revenue from the motorists who bypass the middle station because they will stop at the next one it owns either to the north or the south. Despite this obvious market power, under a conventional

95. Id. (quoting Transcript of Trial at 2088 l.7 to 2090 l.21).
96. Id. at 1134.
97. Id.
101. See Schildkraut, supra note 87, at 22.
102. Id.
103. Id.
104. See id.
market definition, the three gas stations fail to make up a market at all because there is no discontinuity.\textsuperscript{105}

Just as the gasoline stations lacked a bright line between the start and the end of the geographic market, the government in \textit{Oracle} did not argue that there was an industry-wide acceptance of its line between mid-market software and high function software.\textsuperscript{106} However, it contended that the distinction between mid-market and high function software was nonetheless meaningful,\textsuperscript{107} and that the merger would lead to increased prices for a significant number of customers.\textsuperscript{108} To bolster its argument, it pointed out that Oracle, PeopleSoft, and SAP have separate products and sales forces dedicated to selling mid-market products.\textsuperscript{109} Just because the government could not pinpoint precisely where the high function market begins and the mid-market ends does not mean that the merger will not harm competition.

C. \textsc{Internal Business Documents}

In addition to putting forth customer testimony and expert witnesses, the government put into evidence internal documents by Oracle, PeopleSoft, and SAP. One of the government’s purposes in presenting this evidence was to show that Oracle and PeopleSoft viewed one another as their top competitors.\textsuperscript{110} The government also intended to show that Oracle, PeopleSoft, and SAP viewed themselves as making up a separate market for high function software.\textsuperscript{111} I contend that these documents merit more attention than the \textit{Oracle} court gave them. I also note that the court’s theory of unilateral effects allowed the court to disregard some of this valuable evidence.

First, these documents are likely to reflect the knowledge of some of the most well-informed people about the competitive condition in that marketplace. The logic of the market dictates that companies have a strong incentive to learn about their competitors in an accurate and timely fashion. This is doubly true when, as here, competitors customize their prices for each individual customer. For instance, if a customer has

\begin{footnotesize}
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\item Id.
\item United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1103 (N.D. Cal. 2004) (Professor Lansiti acknowledging that different parties tend to define mid-market differently).
\item PPFO, supra note 33, ¶ 2.6.
\item Id. ¶ 3.1.1.1.
\item Id. ¶ 2.6.2.
\item Id. ¶ 7.1.1 (“Oracle’s Own Statements, Documents, and Actions Show That PeopleSoft Is its Most Significant Competitor in Applications Sales.”); id. ¶ 7.1.2 (“PeopleSoft’s Own Statements, Documents, and Actions Show That Oracle Is its Most Significant Competitor in Applications Sales.”).
\item E.g., id. ¶ 5.3 (“Oracle, Peoplesoft, and SAP Primarily View Each Other as Competitors for the Sale of High-function Software.”). The most significant impact of this evidence was described by Professor Kenneth Elzinga, who testified as an expert witness. \textit{Oracle}, 331 F. Supp. 2d at 1145. The court did not credit this testimony because it found that Professor Elzinga’s product market was unconvincing. Id. at 1145–48.
\end{enumerate}
\end{footnotesize}
ten other good options, the seller will likely wish to give that customer a lower price than if the customer had no other good options. However, before the seller can take advantage of its flexible pricing, it must know what the customers' needs are and what other solutions could fill those needs. In the context of ERP solutions, that means that vendors have a strong incentive to learn as much as possible about competitors' functionality and about buyers' needs. They are also likely to want to know which other solutions buyers tend to view as the most similar to their own products. Therefore, industry competitors are likely to be experts on the competitive condition in the marketplace.\(^{112}\)

Second, internal documents are likely to accurately reflect the competitors' opinions. While it is possible that companies would create misleading documents for the purpose of throwing off antitrust agencies, courts and agencies can reduce this danger by looking solely at documents created before company executives began considering the merger. It is unlikely that a company could efficiently create inaccurate documents for the purposes of slipping under the antitrust radar.\(^{113}\)

Perhaps for these reasons, both the courts and the Guidelines look to company documents to support assertions about competition in the marketplace. The Guidelines explicitly suggest that agencies should look to "normal course of business documents from industry participants" to help determine whether the merging firms are next-best substitutes.\(^{114}\) Courts, including the Ninth Circuit, credit evidence of competitors' opinions as well.\(^{115}\)

The *Oracle* court did not ignore internal documents altogether. In addition, it received volumes of documents into evidence, and should not be expected to respond to each document. However, the court should have considered two types of company documents differently in *Oracle*. First, some of the documents that the court discussed but decided were unimportant should have been given more weight. Second, some select

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113. For a discussion on why companies are unlikely to create misleading documentation, see Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 Wis. L. Rev. 1035, 1140-41.

114. *MERGER GUIDELINES*, supra note 2, § 2.211 n.22.

115. E.g., California v. Am. Stores, 872 F.2d 837, 841 (9th Cir. 1989) (concluding that "American Stores's own internal marketing documents indicating that American Stores considers other supermarkets to be its only competitors" supports the district court's judgment that supermarkets is the relevant product market); Greyhound Computer Corp. v. Int'l Bus. Mach. Corp., 559 F.2d 488, 494 (9th Cir. 1977) (concluding that evidence that leasing companies do not consider service bureaus or time-sharing arrangements to be competitors is part of "ample evidence" that service bureaus and time-sharing arrangements do not provide an acceptable alternative to those who might buy or lease computer systems).
internal business documents which were highlighted by the government’s Proposed Findings of Fact should have been given more consideration in the Oracle opinion.

In its section on plaintiffs’ evidence of unilateral effects, the court mentions Oracle’s quarterly “win/loss” documents. In Quarter Three of 2003, Oracle wrote that “PeopleSoft is our #1 competitor” and “SAP is our #2 competitor.” The government used this document to support its contention that Oracle and PeopleSoft were next-best substitutes for a significant number of customers. The court pointed out that the same document stated that Oracle lost to PeopleSoft 54% of the time, and it lost to SAP 53% of the time, a difference of only 1%. The Quarter Four win/loss document similarly stated that Oracle lost to PeopleSoft 59% of the time and to SAP 50% of the time. Accordingly, the court stated, it could “draw no conclusions from the conflicting data within the win/loss reports upon which plaintiffs focus. In fact, these documents arguably negate a showing of localization between Oracle and PeopleSoft more than they support such a finding.”

Under the court’s theory that two companies must have a near monopoly for a finding of unilateral effects to succeed, the fact that SAP and PeopleSoft both compete heavily with Oracle might harm the government’s case. However, under the Guidelines theory described above, the government does not need to prove that PeopleSoft is Oracle’s only serious competitor. The question is whether a significant number of customers would suffer a small but significant non-transitory increase in price if Oracle and PeopleSoft were to merge. The fact that PeopleSoft is Oracle’s biggest competitor is relevant to this question. If Oracle and PeopleSoft frequently compete head to head, it is likely that a significant number of customers see PeopleSoft and Oracle as their two best options. The court should be asking whether many of those customers who would choose PeopleSoft over Oracle (or Oracle over PeopleSoft) will have to pay a higher price because of the merger.

In addition, the court omitted any mention of the numerous documents that show that Oracle spends more resources monitoring and attacking PeopleSoft than other competitors. For instance, Oracle initiated a campaign called “Kill PeopleSoft” which involved heavy discounting to stop or slow PeopleSoft’s financial management licenses. PeopleSoft responded by discounting its price, driving for high customer

117. PFOF, supra note 33, ¶ 7.1.1.2; accord United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1166 (N.D. Cal. 2004).
118. Oracle, 331 F. Supp. 2d at 1166.
119. Id. at 1166–67.
120. See supra Part III.B.
121. PFOF, supra note 33, ¶ 7.1.1.5.1.3.
satisfaction, and investing in research and development to lower its total cost of ownership to customers. Oracle also had a “War Room” that generated weekly “War Room Reports” dedicated to monitoring its competition with PeopleSoft. Oracle had no similar war room dedicated to other competitors and did not generate similar weekly reports on other competitors. The government also introduced dozens of documents demonstrating that Oracle gave huge discounts to customers who were also considering PeopleSoft. In addition, the government produced many e-mails by top Oracle executives candidly explaining that PeopleSoft was a top competitor. For instance, in a 2003 e-mail, Oracle vice president Keith Block wrote to Oracle CEO Larry Ellison that with PeopleSoft, “[e]ach sales cycle is a street fight but my people expect this going in.”

These documents alone could not be the basis for finding that the proposed merger between Oracle and PeopleSoft would harm competition. However, if the goal is to discern whether a significant number of customers will pay higher prices as a result of the merger, the documents are relevant evidence. Evidence that fierce, ongoing price-cutting resulted from competition between Oracle and PeopleSoft lends credence to the proposition that PeopleSoft’s rivalry with Oracle kept prices lower. The fact that Oracle spent resources monitoring competition with PeopleSoft and attacking PeopleSoft in a manner unique to that vendor suggests that PeopleSoft was Oracle’s biggest threat.

CONCLUSION

The Oracle court is well-versed in antitrust law, and its decision is considered, extensive, and articulate. The court is not bound by the Guidelines, and may well be correct that they should be revised or altered. This Note’s intent is not to suggest that the Oracle court strayed beyond its precedent. Instead, the intent is to contrast the court’s imposed burden of proof and requirements of evidence with those of the Guidelines. Contrasting the Oracle decision with the Guidelines approach illustrates the extent to which the Oracle decision’s reasoning could preclude successful opposition to future mergers.

To follow the Oracle court’s reasoning would have the practical effect of de-emphasizing merger enforcement in cases similar to the

122. Id.
123. Id. ¶ 7.1.1.6.1.
124. Id.
125. See, e.g., id. ¶¶ 7.1.1.7.1 to .21, 7.3.2.2.3.
126. Id. ¶ 7.1.1.10.2.
127. See Roundtable, supra note 54, at 16 (Mr. Yde opining that “Judge Walker is known as a judge with antitrust experience and training”).
Oracle decision. In some cases, it might even thwart the Clayton Act's goal of preventing mergers that could result in a substantial lessening of competition. For this reason, judges and lawyers involved in future merger cases should look to the Oracle decision with full knowledge of its policy implications. Perhaps this oracle forecasts a future best prevented.
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