GUILT BY (CLIMATE) ASSOCIATION: IMPRECISION MARS ANTITRUST CLAIMS AGAINST INSTITUTIONAL INVESTORS' EMISSIONS PLEDGES

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Antitrust enforcers in most advanced economies have sought to synthesize competition policy and climate policy, by endorsing some form of sustainability-minded cooperation between market competitors. U.S. enforcers have not followed suit. Perhaps for this reason, Judge Jeremy Kernodle's partial denial of the motion to dismiss in *Texas v. BlackRock* (E.D. Tex.) last fall received significant attention, as a legal flashpoint for colliding visions of what robust competition policy should look like in marketplaces grappling with climate risk. Most *BlackRock* commentary has focused on the complaint's novel antitrust challenge, under Section 7 of the Clayton Act, to "horizontal shareholding" scenarios, where an institutional investor holds significant shares in multiple firms across a single industry. Yet while broader investment-market implications of this novel Section 7 deployment have been explored elsewhere, less attention has been paid to the technical challenges of applying these novel antitrust claims to climate-alliance participation. We examine three of those challenges: how to establish that ostensible climate-mitigation measures amount to an anticompetitive output restriction, how to properly define the relevant market amid the transition to a green economy, and the appropriate standard of review for Section 7 solely-for-investment analysis.

I. INTRODUCTION

In *Texas v. BlackRock* (E.D. Tex.) ("*BlackRock*"), 13 state attorneys general claim that institutional-investor defendants BlackRock, Vanguard, and State Street unlawfully reduced output at coal companies they partially owned, via their participation in climate alliances.[2] The case raises classic antitrust concerns about checking corporate power and catalyzing nimble marketplaces. It also pushes the boundaries of enforcement into novel areas of climate collaborations and institutional investing.

Corporate coordination efforts to address the harms of climate change have raised challenging questions for competition policy in recent years. From a structural antitrust perspective, grounded in first principles of "fair competition, non-domination, and democratic control of the economy,"[3] climate alliances comprised of most of the world's largest asset managers, such as the alliances at issue in *BlackRock*, raise the specter of unaccountable "private governance."[4] Industry associations engaged in non-exclusionary standard-setting may avoid antitrust liability,[5] but competition principles caution against allocating a handful of firms the collective capacity to steer U.S. energy policy – say, through the imposition of clean-energy restraints on an entire sector, regardless of whether these firms pursue altruistic or self-serving goals.[6]

At the same time, from an econometric antitrust perspective, prioritizing market "efficiencies" that optimize consumer welfare, institutional investors seem to possess strong procompetitive rationales for mitigating climate risk. This is particularly apparent for a large asset manager with diversified investment portfolios, whose beneficiaries are acutely vulnerable to systemic risks. More broadly for an economy-wide clean-energy overhaul, given the capital-intensive burdens faced by first-movers in such a transition, climate alliances offer the promise of addressing negative externalities harmful to all, while enabling their members to thrive in a competitive marketplace.[7]

To varying degrees, antitrust enforcers in most advanced economies (including the EU, the U.K., Japan, South Korea, Australia, New Zealand, and Singapore) have sought to synthesize competition policy and climate policy, by endorsing sustainability-minded cooperation between market competitors.[8] U.S. enforcers have not followed suit.[9] Perhaps for this reason, Judge Jeremy Kernodle's partial denial of the *BlackRock* defendants' motion to dismiss last fall received significant attention, as a legal flashpoint for colliding visions of what robust competition policy should look like in marketplaces grappling with climate risk.

Most *BlackRock* commentary has focused on the complaint's novel antitrust challenge, under Section 7 of the Clayton Act, to "horizontal shareholding" scenarios, where an institutional investor holds significant shares in multiple firms across a single industry.[10] Yet while broader

2 As this article went to press, Texas Attorney General Ken Paxton announced that one of three defendants, Vanguard, had settled, pledging not to: "(a) direct its portfolio companies' business strategies, (b) threaten its portfolio companies that it will withdraw from its holdings unless they agree to act (or not act) in some manner, or (c) nominate directors…to its portfolio companies." As our article makes clear, these provisions largely duck the question of whether Vanguard's participation in climate alliances presented any meaningful grounds for claiming antitrust harm. Whether or not advocating for a portfolio company's greenhouse-gas emissions disclosures or reductions amounts to "direct[ing] its…business strategies" remains an open question. See Press Release, Tex. Off. Att'y Gen., Attorney General Paxton Secures Historic, Industry-Changing Agreement with Vanguard to Protect the Coal Industry and Empower Investors (Feb. 26, 2026), https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-secures-historic-industry-changing-agreement-vanguard-protect-coal-industry.

3 Daniel A. Hanley, *Antitrust Liability Obligates Structural Change*, The Sling (Aug. 17, 2025), https://www.thesling.org/antitrust-liability-obligates-structural-change/.

4 See e.g. Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 Tex. A&M L. Rev. 179, 182 (2018) ("Private governance occurs when…businesses, not-for-profit organizations, individuals, etc….pursue a goal traditionally associated with public governance, such as reducing greenhouse gas emissions, through actions that produce broad influence over others").

5 Denise Hearn, Cynthia Hanawalt & Lisa Sachs, *Antitrust and Sustainability: A Landscape Analysis*, Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law (July 2023), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/Antitrust-Sustainability-Landscape-Analysis.pdf.

6 See e.g. Lina Khan, *ESG Won't Stop the FTC*, Wall St. J., (Dec. 21, 2022); Editorial Board, *J.D. Vance, Lina Khan and the GOP's Economic Contradictions* (July 18, 2024).

7 Cynthia Hanawalt & Andy Fitch, *State AG Attacks on Climate Alliances Still Lack Coherent Antitrust Theories*, Sabin Center for Climate Change Law (Oct. 28, 2025) https://blogs.law.columbia.edu/climatechange/2025/10/28/state-ag-attacks-on-climate-alliances-still-lack-coherent-antitrust-theories/.

8 Maurits Dolmans, Wanjie Lin & Charity E. Lee, *Sustainable Antitrust Policy in the US—Hot Water or Hot Air?* (Mar. 11, 2025), A.B.A. INT'L L. SEC., https://www.americanbar.org/groups/international_law/resources/newsletters/sustainable-antitrust-policy-in-us/.

9 Cynthia Hanawalt, Denise Hearn, & Chloe Field, *Recommendations to Update the FTC & DOJ's Guidelines for Collaborations Among Competitors*, Sabin Center for Climate Change Law and Columbia Center on Sustainable Investment (May 2024), https://scholarship.law.columbia.edu/sabin_climate_change/224.

10 See e.g. John Crabb, *Texas vs. BlackRock Could Have Implications Beyond ESG*, Institutional investor (Aug. 26, 2025), https://www.institutionalinvestor.com/article/texas-vs-blackrock-could-have-implications-beyond-esg-0; Helena Grannis, Joseph Kay & Shuangjun Wang, *Shareholder Engagement Considerations in Light of Texas v. Blackrock*, Cleary Gottlieb (Aug. 6, 2025), https://www.clearyantitrustwatch.com/2025/08/shareholder-engagement-considerations-in-light-of-texas-v-blackrock/.

investment-market implications of this novel Section 7 deployment have been explored elsewhere,[11] less attention has been paid to the technical challenges of applying these novel antitrust claims to climate-alliance participation. We examine three of those challenges below: how to establish that ostensible climate-mitigation measures amount to an anticompetitive output restriction, how to properly define the relevant market amid the transition to a green economy, and the appropriate standard of review for Section 7 solely-for-investment analysis.

First, this article highlights *BlackRock* as a bellwether courtroom test for dubious antitrust arguments that conflate net-zero or emissions-reduction standards with unlawful output reductions. From there, it traces a pivotal connection between *BlackRock*'s lower-profile Sherman Act Section 1 unlawful coordination claims and its hot-button Section 7 analysis. Both counts allege climate agreements specific to the thermal-coal market, undermining the rationale for enhanced horizontal-shareholder enforcement. Advocates have long held that such enforcement should target concentrated markets, leaving competitive markets (like thermal coal) untouched. The article concludes with an important distinction for Section 7's relevant standard of review: unlike the incipiency standard for typical Section 7 merger cases, claims against Section 7's solely-for-investment exception must meet an evidentiary burden closer to Section 1's, raising legal complexities for the *BlackRock* court with significant policy implications.

II. EMISSIONS REDUCTIONS ARE NOT EQUIVALENT TO OUTPUT REDUCTIONS

An unlawful output reduction occurs when a monopolist or cartel reduces product supply in order to intensify demand, raise prices, and boost profit margins. Output-reduction analysis typically posits that a conspiracy among competitors only remains worthwhile if each participant is confident the others cannot cheat by elevating production levels and/or undercutting co-conspirators' inflated prices.

The *BlackRock* plaintiffs' theory of harm under Section 1 (and also under Section 7) centers on an output-reduction conspiracy, alleging that defendants coordinated reduced production at coal companies where they owned shares, through their participation in climate alliances.[12] But in its effort to allege such a conspiracy, the *BlackRock* complaint tenuously conflates net-zero[13] or low-emissions targets[14] with supposedly actionable signaling by each defendant about its future coal-output levels.

Net-zero pledges offer the weakest grounds for claims of an output-reduction conspiracy. By definition, net-zero metrics weigh a firm's greenhouse-gas ("GHG") emissions against its emissions-offset actions. In principle, a firm could realize net-zero goals entirely through offsets, while pursuing constant or even increased output levels. Commercial offsets' availability through an instantaneous transaction further precludes a Section 1 conspiracy from relying on net-zero pledges to reliably predict participants' near-term production plans.

BlackRock's antitrust allegations regarding emissions-reduction pledges present another false lead. This focus on emissions misapplies antitrust's output-reduction analysis to restraints on firms' negative externalities (here, GHG byproducts), rather than on their supply of economic goods (here, carbon-based energy sources). Veno et al. cite two of U.S. antitrust law's most prominent cases, *U.S. v. Microsoft* (D.C. Cir., 2001) and *U.S. v. E.I. du Pont de Nemours* (U.S., 1956), for the formulation that: "[a]n antitrust product market is defined as 'all products reasonably interchangeable *by consumers* for the same purposes.'"[15] With no such consumer market in the United States for GHG emissions (state-level cap-and-trade regimes do not factor into the *BlackRock* complaint), these emissions exemplify economic definitions of an externality as a commercial activity's "spillover cost or…spillover benefit on a bystander."[16]

California Dental Association v. F.T.C. (U.S., 1999) holds that defendants' coordinated restraint on an economic externality (information provided by dental-services marketing) did not amount to an unlawful output reduction, since "the relevant output for antitrust

11 See, e.g. Dolmans, *supra* note 8; Cynthia Hanawalt & Denise Hearn, *Texas v. BlackRock Puts the Common Ownership Theory on Trial, with Implications across the Financial Sector and Collaborative Sustainability Efforts,* Revue internationale des services financiers (2025, No. 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5284367.

12 *Texas v. BlackRock* (E.D. Tex.), Docket No. 145, at 40.

13 *Ibid.*

14 *Ibid.* at 41.

15 Nicole A. Veno, Jennifer E. Kelly, Kelly Capatosto & Geoffrey H. Kozen, *Climate and Antitrust*, 37 Geo. Envtl. L. Rev. 267, 287 (2025) [italics in original].

16 *Externalities: Key Terms*, Economics for Everyone, https://econ4everyone.uchicago.edu/resources/externalities-key-terms/. For a useful survey and critique of efforts to treat climate change and other environmental harms as economic externalities, see also Madison Condon, *Is Climate Change an Externality?*, LPE Project (Dec. 5, 2021), https://lpeproject.org/blog/is-climate-change-an-externality/.

purposes…is presumably not information or advertising, but dental services themselves."[17] This distinction between consumer-facing products and incidental byproducts only stands out more sharply in *BlackRock*. Advertising dental practices' treatment options offers an arguably procompetitive externality that enhances consumer decision-making, with no harmful effect on third parties. By contrast, GHG emissions epitomize a negative externality—compounding climate risk for all, and providing no discernable benefit to coal consumers or coal-market competition.

Perhaps sensing these obvious gaps in their antitrust analysis, the *BlackRock* plaintiffs seek to conflate emissions reductions and coal-output reduction, through the bald assertion that "there is no realistic path for a coal company to cut coal emissions other than by cutting production."[18] Climate advocates might endorse this logic, but a judicious antitrust analysis requires evidence. Yet plaintiffs provide no cited authorities for their sweeping proposition. They do not grapple with the viability of emissions-abating technologies for coal-fired power plants, nor do they offer an explanation of how their assertion might be reconciled with President Trump's questionable "BEAUTIFUL, CLEAN COAL" boosterism that attorneys general from 12 of 13 plaintiff states recently praised.[19] To date, Judge Kernodle has followed Federal Rules of Civil Procedure by taking as true plaintiffs' assertion, but his MTD dismissal made clear that such factual claims will face sustained scrutiny at subsequent stages of litigation.[20]

III. PROPONENTS OF SOLELY-FOR-INVESTMENT SCRUTINY FOCUS ON CONCENTRATED MARKETS, AN UNLIKELY FIT FOR BLACKROCK

Under the Clayton Act's Section 7, "[n]o person shall acquire…the whole or any part of [a corporation's] stock...where…the effect of such acquisition…may be substantially to lessen competition." However, a statutory safe-harbor provision continues that "This section shall not apply to persons purchasing such stock solely for investment and not using the same…to bring about, or…attempting to bring about, the substantial lessening of competition."

Institutional investors routinely rely on Section 7's "solely for investment" exception from antitrust enforcement, even though asset managers have accumulated powerful positions across the U.S. economy. The *BlackRock* defendants, often referred to simply as the "Big Three," have become the largest shareholder in 40% of U.S. public companies, and regularly acquire shares in firms competing against each other. Arguably, this horizontal-shareholding practice creates strong incentives for these asset managers to encourage industry-wide price increases (rather than price-cutting competition between firms).[21]

Yet even BlackRock, the largest defendant, only owns between 4% and 16% of any relevant coal company. The plaintiffs thus struggle to show anticompetitive harm stemming from one single defendant's unitary actions, necessitating their reliance on a broader conspiracy. Similarly, the MTD decision's three-pronged discussion of defendants' anticompetitive conduct under Section 7 persistently points to climate-alliance participation.[22] This reliance on climate-alliance conspiracy claims has pronounced implications for *BlackRock*'s novel Section 7 analysis, because it

17 *California Dental Association v. F.T.C.,* 526 U.S. 756, 776 (1999).

18 Docket No. 145, *supra* note 12, at 40.

19 John B. McCuskey et al., Letter to Doug Burgum, Secretary of Department of the Interior (March 20, 2025) [capitalization in original]. Yet see also Kelly Livingston, Daniel Peck, and Leah Sarnoff, *Trump Signs Executive Order to Expand "Clean" Coal, but There's No Such Thing*, ABC News (April 8, 2025).

20 See Docket No. 145, *supra* note 12, at 41-45. Plaintiffs at the pre-discovery stage often rely on some degree of atmospheric conjecture. The *BlackRock* plaintiffs appear to go further, systematically misrepresenting climate-alliance agreements. As one illustrative example, the complaint claims that Climate Action 100+ ("CA 100+") established "alignment metrics" that "require" reductions in thermal coal production. But a cursory skim of the glossary for the CA 100+ document cited by plaintiffs reveals that these specified alignment metrics do not "require" reductions, but instead cover two of eighteen factors comprising a composite scoring-system for assessing a firm's net-zero strategy. Where precisely the defendants committed to binding coal-output restraints, as alleged, is unclear. Similarly, the plaintiffs claim that defendants, as signatories to the Net Zero Asset Managers (NZAM) Alliance, pledged to "immediately ceas[e]…building new coal infrastructure." But the NZAM document does not require this particular climate-mitigation strategy; it is listed as one of five options for NZAM signatories to choose among (alternative options include a "phase out" of thermal-coal investments on an unspecified timeline, or "restricting financing for unabated coal power generation, i.e. without carbon capture and storage"). Discovery will reveal the evidentiary record, but on its face, the *BlackRock* complaint builds a flimsy guilt-by-climate-alliance-association theory of anticompetitive harm.

21 Benjamin Kessler, *The Power of Passive Investors Is a Double-Edged Sword*, Costello College of Business (Feb. 27, 2025), https://business.gmu.edu/news/2025-02/power-passive-investors-double-edged-sword.

22 See *Texas v. BlackRock* (E.D. Tex.), Docket No. 113, at 18 ("to summarize, Defendants publicly joined climate initiatives and pledged their assets to climate-based goals that necessarily result in the reduction of coal output, publicly proclaimed their intent to further these goals, and then used proxy votes or otherwise engaged with the Coal Companies in furtherance of those climate-based goals").

foregrounds a competitive "thermal coal" market that lies outside legal scholars' and antirust enforcers' preferred scope of solely-for-investment scrutiny.

Market definition is crucial to much antitrust analysis, including calls for expanding solely-for-investment enforcement. Horizontal ownership's academic critics have focused on "concentrated"[23] or "oligopoly"[24] markets. Advocates of tailoring enforcement this way, such as the Federal Trade Commission and the Department of Justice's Antitrust Division ("the Antitrust Agencies") in their *BlackRock* MTD Statement of Interest filing, likewise argue that it protects "the critical role of asset managers" in today's investment markets,[25] while also curtailing attempts "to mask…illegal, anticompetitive behavior behind the veil of passive investing and good governance principles."[26] But the *BlackRock* plaintiffs' claims challenge this broader policy, because their conspiracy allegations all tie back to thermal coal, which is clearly a competitive, not concentrated, market.

Judge Kernodle's MTD decision notes that the *BlackRock* defendants did not dispute "at this stage" plaintiffs' proposed focus on South Powder River Basin ("SPRB") coal, or alternatively on thermal coal.[27] The Antitrust Agencies further point to federal enforcers' recent success in *FTC v. Peabody Energy* (E.D. Mo., 2020) establishing the narrower SPRB market definition. But *Peabody*'s more familiar joint-venture scenario departs significantly from the *BlackRock* complaint. *BlackRock*'s novel challenge to Section 7 solely-for-investment exceptions, and convoluted claims of institutional investors pursuing a Section 1-style conspiracy via coal markets, complicate the legal analysis while raising the policy stakes.

The alleged climate-alliance agreements do not differentiate coal markets any further than the broader "thermal coal" category. Moreover, only three of this complaint's nine defendant-affiliated coal companies operate SPRB mines, and at least two of these companies also operate non-SPRB mines (further complicating any claim that information-sharing on thermal coal provides sufficiently granular data on SPRB-specific production). Simply put, for either Section 1 or Section 7 claims to stick, only the broader thermal-coal market appears viable.

But while SPRB coal fits prevailing conceptions of a concentrated market, thermal coal decidedly does not. The Antitrust Agencies' 2023 Merger Guidelines refer to markets with a Herfindahl-Hirschman Index (HHI) score between 1,000 and 1,800 as "moderately concentrated," and above 1,800 as "highly concentrated." The *BlackRock* complaint estimates an HHI of 2409 for SPRB coal, with defendant-affiliated coal companies possessing 63% share.[28] Yet the complaint estimates an HHI of only 522 for thermal coal, with defendant-affiliated coal companies possessing 46% market share.[29] Applying vigorous solely-for-investment enforcement in the competitive thermal-coal market may thus invite equivalent scrutiny across institutional investors' entire economy-wide portfolios, with destabilizing implications for tens of millions of clients.

By extension, the *BlackRock* plaintiffs' strikingly monolithic formulation that defendants have exercised control "more than sufficient… to set and enforce common policies that substantially reduce competition across the entire coal industry"[30] collapses any nuanced market defini-

23 Einer Elhauge, *Horizontal Shareholding* 129 Harv. L. Rev. 1267 (2016).

24 Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 Antitrust L.J. 669 (2017).

25 *Texas v. BlackRock* (E.D. Tex.), Docket No. 99, at 17.

26 *Ibid.* at 7.

27 Docket No. 113, *supra* note 22, at 6.

28 Docket No. 145, *supra* note 12, at 34.

29 *Ibid.* at 35. In seeking to recast the thermal-coal industry as problematically concentrated, the plaintiffs then apply a dubious hypothetical model for how horizontal ownership facilitates market coordination: "[w]ere the Coal Companies to merge or form a joint venture, the combined firm would yield an HHI for the thermal coal market of 2,116." Plaintiffs decline to articulate the practical relevance of this particular conjecture, which posits one defendant-dominated coal behemoth—whereas the real-world defendants collectively control roughly one-third of shares across a dispersed range of companies, and routinely conflict with each other in voting these shares. Legal scholars factoring horizontal shareholders into market-concentration calculations have developed a much more nuanced approach. See Thomas A. Lambert, *Lowering the Barriers to Entry to the Common Ownership Debate: A (Relatively) Non-Technical Explanation of MHHI Delta*, Truth on the Market (Aug. 16, 2018), https://truthonthemarket.com/2018/08/16/lowering-the-barriers-to-entry-to-the-common-ownership-debate-a-relatively-non-technical-explanation-of-mhhi-delta/. Again, our article does not allow for thorough explication of Modified HHI or Modified HHI Delta analysis, beyond noting with Lambert that the latter starts by considering "the *degree* to which the investors in one of the competitors would prefer that it not attempt to win business from the other" [italics added].

30 Docket No. 145, supra note 12, at 96.

tion. It also appears to implicate more than 600 active U.S. coal companies in its alleged conspiracy (even though *BlackRock* defendants do not own shares in hundreds of these companies).[31]

Given these disparities between scholars' and enforcers' targeted focus on concentrated sectors, and *BlackRock*'s sweeping claims of institutional investors' coercive power, advocates of using this case to expand solely-for-investment liability must decide whether they are calling for procompetitive tweaks to current institutional-investor practices, or for courts to fundamentally restructure investment markets. The Antitrust Agencies may wish to bridge these perspectives, again by claiming to only address "compelling evidence of the anticompetitive effects of common ownership by institutional investors in concentrated industries."[32] But the thermal-coal industry is not concentrated, and the Antitrust Agencies are underplaying this case's implications.

IV. SOLELY-FOR-INVESTMENT CHALLENGES UNDER SECTION 7 FACE GREATER EVIDENTIARY BURDENS THAN SECTION 7 MERGER CASES

Section 7's flexible, future-oriented statutory mandate prohibits stock acquisitions that "*may*…substantially…lessen competition" in "any line of commerce or…any activity affecting commerce in any section of the country" [italics added]. However, under Section 7's solely-for-investment exception, stock purchases can receive exemption from antitrust enforcement so long as purchasers do not "bring about, or attempt to bring about, the substantial lessening of competition."[33]

Note two distinct thresholds of antitrust liability: for acquisitions such as a merger, the prohibition is on those that "may…substantially…lessen competition" in "any activity affecting commerce." This is often referred to as Section 7's incipiency standard. Contrast that with stock purchases by an investor, which are prohibited only if "in fact used to cause a substantial lessening of competition."[34] These distinct thresholds of liability pose different evidentiary burdens on Section 7 plaintiffs — particularly on plaintiffs advancing novel arguments that institutional investors' broad ESG pledges equate to exertions of control over companies they partially own, or that emissions-reducing initiatives equate to output reductions.

Typical antitrust applications clarify the logic for these different standards. First, consider familiar Section 7 analysis of proposed mergers.[35] For these prospective combinations (where anticompetitive effects, even if predictable, might not have occurred yet), Section 7 plaintiffs face a comparatively low burden of proof. Antitrust law often justifies this expansive scope for prospective Section 7 liability through the quaint formulation that "it is easier to prevent eggs being broken than to unscramble an omelet."[36]

By contrast, partial acquisitions of stock may take significantly longer to trigger anticompetitive harms, and thus need not necessitate unscrambling the proverbial omelet. Section 7 remedies against a partial owner who had not previously exerted control (thus merely possessing a liquid investment asset) also pose fewer administrative complexities for courts, defendants, and markets. Incipiency analysis is not necessary.

Nonetheless, institutional investors' antitrust liability stemming from long-accepted business practices should be better clarified, particularly in this first-known case to test "whether horizontal shareholding can ever violate Section 7."[37] To date, both the *BlackRock* court and the

31 H. Yoo, *U.S. Coal Mining—Statistics & Facts*, Statista, (Dec. 17, 2025), https://www.statista.com/statistics/1312689/us-coal-mining-selected-figures/.

32 Docket No. 99, *supra* note 25, at 17.

33 Docket No. 113, *supra* note 22, at 11 [citing *E. I. du Pont*, 353 U.S. at 589]. See also Docket No. 99, *supra* note 25, at 13 ("plaintiffs state a Section 7 claim against…an initially passive investor when they plausibly allege that the investor ceased to operate passively and affirmatively used horizontal shareholdings to cause a substantial lessening of competition").

34 Docket No. 99 *Texas v. BlackRock*, *supra* note 25, at 19. Here the Antitrust Agencies' standard for challenging solely-for-investment status departs notably from their 2023 Merger Guidelines 4.1 standard for Section 7 liability in post-merger contexts: "A consummated merger, however, may substantially lessen competition even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and is therefore moderating its conduct."

35 See *Mergers*, Federal Trade Commission, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers: ("Merger law is generally forward-looking," allowing "antitrust agencies to examine the likely effects of proposed mergers before they take place").

36 George R. Hall, *Market Definition and Antitrust Policy*, 20 Wash. & Lee L. Rev., 47, 48 (1963).

37 Docket No. 113, *supra* note 22, at 28.

Antitrust Agencies have muddled this solely-for-investment analysis, with convoluted formulations that seem at first to require proof of anticompetitive effects, but then to suggest that the mere possibility of such harms could suffice:

> Although most Section 7 cases prospectively analyze…probable future effects…a claim focused on the use of stock examines what has occurred and should incorporate *evidence of post-acquisition behavior and effect*. The Supreme Court noted this distinction…recognizing… Section 7 is most often used prospectively, but also that a suit may be brought "at any time when a *threat* of the prohibited effects is evident."[38]

Here the Antitrust Agencies offer a more definitive take on the two distinct Section 7 standards of review than Judge Kernodle provided in his MTD dismissal. But precisely what role a "threat of prohibited effects" can play in establishing required "evidence of post-acquisition behavior and effect" remains unclear.

More broadly, given Section 7's default incipiency standard, articulating clear lines of antitrust analysis takes on added relevance in a case where the Section 7 and Section 1 claims both rely on the same purportedly anticompetitive conduct (horizontal shareholders' output agreement, facilitated through climate-alliance emissions pledges). Applying the appropriate antitrust framework to each claim has pivotal policy implications. Climate-alliance members who are not horizontal shareholders should only be assessed through the Sherman Act's "bring about, or attempt to bring about" standards of anticompetitive harm, necessitating plaintiffs' establishment of real-world effects.[39] Similarly, challenges under the Clayton Act to horizontal shareholders' solely-for-investment status should show "evidence of post-acquisition behavior and effect." The mere fact that plaintiffs have brought a Section 7 claim does not trigger an incipiency analysis. Should the *BlackRock* court choose to apply an overgeneralized incipiency standard, treating the defendants' emissions initiatives as an "activity affecting commerce" which "may" lessen competition, these attorney-general plaintiffs' antitrust shorthand of guilt-by-climate-association will only become more widespread, regrettably with the judiciary's imprimatur.

38 Docket No. 99, *supra* note 25, at 13 [citing *E. I. du Pont*, 353 U.S. at 597–98] [italics added].

39 For the *BlackRock* plaintiffs' efforts to establish anticompetitive effects, see Docket No. 145, *supra* note 12, at 83 (arguing that "divergent output trends at defendant-affiliated (public) and non-affiliated (private) coal companies "cannot be explained as a rational response to free-market forces because the price signals were to increase production"). This brusque claim overlooks public companies' greater susceptibility to reputational costs, shareholder campaigns, increased regulatory scrutiny, and related disclosure obligations.

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