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AMENDED SECTION 7 OF THE CLAYTON ACT:

MERGERS AND ACQUISITIONS

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INTRODUCTION

This research paper is an evaluation of the effectiveness and the implications of amended Section 7 of the Clayton Act. The evaluation considers the following points: (1) A brief background of events leading to the 1950 amendment to the Clayton Act. (2) Initial application of amended Section 7 by the Federal Trade Commission and the Antitrust Division of the Department of Justice. (3) Complexities and problems in the application of the law. (4) Public reaction through Congress as debated in congressional hearings. (5) Problems with appropriations as experienced by the Federal Trade Commission as opposed to the Department of Justice. (6) The gradual emergence of Section 7 law during the period 1956-1960. (7) The gradual assumption of more Section 7 responsibilities by the Department of Justice and a concurrent decline in such actions initiated by the Federal Trade Commission during 1961-1965. (8) The emergence of a definitive body of anti-merger law. (9) Views of that body of law by scholars and others. (10) A brief summary and conclusions.

The evidence used in supporting or negating the present anti-merger policy, or parts thereof, is derived from an examination of 50 Section 7 case actions which were prosecuted by either the Federal Trade Commission or the Department of Justice during the period 1921-1965 with emphasis on the period 1956-1965. Court decisions subsequent to 1965 also are analyzed if the complaints were filed in the period under examination.

Congressional hearings on the efficacy of Section 7 as an anti-merger weapon are discussed. The majority and minority views of congressional leaders and others are outlined.

Published texts and articles by persons considered expert in the field of anti-merger work were examined and several are used as source materials for the observations made.

Unpublished dissertations relating to previous studies of Section 7 matters were examined and considered in this writing. One major conclusion was common, i. e., that Section 7 actions had no appreciable effect upon the number of mergers consummated.

Two Commerce Clearing House publications--Trade Cases and Trade Regulation Reporter--were used extensively. Legal files in six cases discussed in this paper were examined. Information in the two source publications were either in the form of a verbatim transcript of a hearing, or in the form of a summarization of the significant representations.

AMENDED SECTION 7 OF THE CLAYTON ACT: MERGERS AND ACQUISITIONS

CHAPTER I

BACKGROUND FOR THE CLAYTON ACT

Public sentiment against trusts and monopolies crystallized in the 1880's. In 1888, the four leading parties in the presidential campaign had specific planks in their platforms which related to monopoly, combinations, and trusts. Several bills were introduced into both houses of Congress in 1888 and 1889, and the most lucid was presented by Senator John Sherman of Ohio. The bill was entitled "A Bill to Declare Unlawful, Trusts and Combinations in Restraint of Trade and Production." After extensive debate, a revised substitute emerged which was signed into law by President Harrison on July 2, 1890. The law has since been known as the Sherman Antitrust Act.[1]

Administration of the law from the time of enactment until 1914 was sporadic and it did not have

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[1]Dudley F. Pegrum, Public Regulation of Business, rev. ed. (Homewood, Ill.: Richard D. Irwin, Inc., 1965), pp. 78-80.

the effect of curbing big business as the framers of the law had apparently intended. A Senate Committee on Interstate Commerce was appointed in 1911 to make inquiries into the subject of business concentration that had been "sweeping the country for two decades." The most significant recommendation was that the Committee was "unwilling to repose in any court the vast undefined power that the court must administer, and under a rule which the court promulgated."[2]

Professor Pegrum in his book pointed out three fundamental difficulties in the administration of the Sherman Act. First, an inadequacy of an enforcement procedure which relied solely on the courts who placed emphasis on punitive rather than preventive measures was apparent. Second, a difficulty in securing reasonable consistency in policy regarding restraint of trade and monopoly was evident since there had been varying degrees of enthusiasm for the objectives in the different administrations. Third, the successful prosecution of some practices led to the use of others which proved less vulnerable under the law.[3]

On January 20, 1914, President Wilson addressed a joint session of Congress and requested new antitrust

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[2] H. R. Seager and C. A. Gulick, Jr., Trust and Corporation Problems (New York: Harper & Bros., 1929), p. 59.

[3] Pegrum, p. 286.

legislation in accord with his campaign promises. His recommendations were placed in two bills--the Trade Commission Bill and Clayton Bill. Congressman Clayton, for whom the latter bill was named, was Chairman of the Judiciary Committee; his committee considered substantive changes in the antitrust laws. Four sections of the bill as reported by the House Judiciary Committee proposed substantive changes in the antitrust laws, and several sections dealt with the administration of the proposed law. The four sections proposed certain circumstances under which price discriminations, exclusive dealing and tying contracts, holding companies, and interlocking directorates would be illegal. The holding company section was to eventually become Section 7 of the Clayton Act.[4] It is that section with which this paper is concerned.

An acceptable bill was enacted after some eight months of hearings. The first two paragraphs of Section 7 of the Clayton Act--the most pertinent for this writing--state:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce

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[4]David D. Martin, Mergers and the Clayton Act (Berkeley: University of California Press, 1959), pp. 29-31.

> in any section of the community, or tend to create a monopoly in any line of commerce.
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> No corporation shall acquire, directly or indirectly, the whole or any part or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.[5]

During the debates on the Clayton Act, Senator Walsh of Montana made one of the more lucid statements concerning the purposes of the Act. The Senator described the purpose of the legislation as preserving competition where it existed and restoring competition where it had been destroyed.[6]

Professor Martin in discussing the lack of agreement in Congress about the Act ascribes some of the difficulties to the political environment in which the bill was passed. Each party had a common objective but with different approaches and different degrees of emphasis. In addition, Martin pointed out the inherent difficulties in trying to assess the effect upon the welfare of the public, especially with the analytical tools available at the time. He was of the opinion that the legislation was tailored to satisfy the demands of

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[5]U.S. Statutes at Large, v. 33, Public Law No. 212 (1914).

[6]U.S. Congressional Record, October 5, 1914, v. 51, p. 16, 145.

the major political parties.[7] With reference to the latter, Allyn Young said:

> . . . For many members of Congress the casting of a favorable vote was a matter of political exigency. Administrative pressure, party discipline, the political power of organized labor, the undoubted fact that a majority of the voters at home would interpret a Congressman's vote against an antitrust statute as a vote for monopoly were the dominant factors in the situation. . . .[8]

Professor Narver described the Clayton Act as the new anti-merger act that established a basic though incomplete philosophy regarding the consolidation of economic power. He explained that because corporate acquisitions were typically in the form of stock acquisitions, little need was necessary in 1914 for Section 7 to deal with asset acquisitions. He pointed out however that the matter had been debated in Congress and was generally agreed that the Sherman Act was adequate to meet any problems that would arise in connection with asset acquisitions. Accordingly, Section 7 was designed to prevent the acquisitions of one corporation of the stock of a competing corporation where the result would be to substantially lessen competition.[9]

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[7]Martin, pp. 48-49.

[8]Allyn A. Young, "The Sherman Act and the New Anti-trust Legislation," Journal of Political Economy, Part II (April 1915), p. 326.

[9]John C. Narver, Conglomerate Mergers and Market Competition (Berkeley: University of California Press, 1967), pp. 28-37.

Section 11 of the Clayton Act gave the Federal Trade Commission the authority to enforce Sections 2, 3, 7, and 8 of the Act, except that the Interstate Commerce Commission would use the same authority in the event of violations by a common carrier. The Federal Reserve Board would also exercise the same authority in the event of a violation by a member institution. Section 15 of the Act gave jurisdiction of Clayton Act violations to the Department of Justice, concurrently with the Federal Trade Commission. The Department of Justice was likewise empowered to institute suits in equity to prevent and restrain violations, but that power was not given the Commission.[10] The concurrent jurisdiction in the handling of Section 7 violations remains in effect, and Supreme Court decisions in which each agency has represented the government will be discussed in subsequent chapters.

The formation of the Federal Trade Commission was accomplished with less debate than the companion Clayton Act. The agency was formed about a month before the Clayton Act which it was to administer had been enacted. Creation of the agency is contained in Public Law No. 203, 63d Congress, September 26, 1914. Pertinent portions are Sections 1, 3, 5, and 11. Section 1 created

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[10]U.S. Statutes at Large.

the agency. Section 3 made the agency the successor to the Bureau of Corporations. Section 5 designated the Commission as the agency to deal with unfair business practices. Section 11 stated briefly that nothing in the act would be construed to prevent or interfere with the enforcement of the antitrust acts, or the acts to regulate commerce. Section 11 also contained a statement that nothing in the act would be construed as a modification or repeal of the antitrust acts.[11]

The Federal Trade Commission (FTC) was established as an independent agency and removed from the direct control of the Executive Department. The independency was important since the commission was supposedly freed from political influence. The agency was permitted to employ attorneys, examiners, and economists to assist in the conduct of authorized powers. The Commission was operational on March 16, 1915.[12]

Of specific note, there was no bar against mergers resulting from acquisition of assets. This loophole presented a major stumbling block to the FTC in its attempts to successfully apply Section 7 criteria in

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[11]Federal Trade Commission, Acts from which the Commission Derives Its Powers (Washington: U.S. Government Printing Office, 1922).

[12]Narver, p. 58.

its proceedings.[13]

Administration of Section 7, Clayton Act

A particularly significant decision concerning merger by acquisition occurred in the 1920 case U.S. v. United States Steel Corporation (251 US 417). Briefly, the Court pointed out that the Corporation, though large, had not engaged in predatory practices associated with an attempt to monopolize and restrain competition and was therefore a reasonable combination which should not be dissolved. The majority opinion stated that mere size, especially if size resulted from growth, was no offense; and neither was the existence of unused power a violation since overt acts were required.[14]

The FTC issued the first cease and desist order to include divestiture, against the Aluminum Company of America in 1921. The Commission ordered the firm to divest itself of the acquired capital stock of the Aluminum Rolling Mills Company. The order was upheld in District Court; however in 1924 the Court of Appeals permitted the Aluminum Company of America to purchase the physical properties of the rolling mill at a sheriff's

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[13]Asher Isaacs and Reuben Slesinger, Business, Government, and Public Policy (Princeton, N.J.: Van Nostrand Company, Inc., 1964), p. 141.

[14]Ibid., p. 123.

sale. (Aluminum Company of America v. FTC (299 Fed Rep 361.)[15]

In 1926, another FTC order directing the divestiture of stock was upheld in the case Federal Trade Commission v. Western Meat Company (272 US 554). Western Meat had acquired all the stock of the Nevada Packing Company, a competitor, but none of the physical assets. Divestment of stock was proper according to the Court which also ruled that the FTC had the power to prevent Western from using control of the stock to dissolve the packing company and acquire its assets.

Possibilities for evasion of the law were brought out clearly in two other 1926 cases ruled upon concurrently with the Western case. The additional cases were FTC v. Thatcher Manufacturing Company and FTC v. Swift Packing Company. Each of the two firms had acquired a controlling interest in a competitor. Each allegedly used that control to obtain the properties and assets of the respective competitors and dissolved the subsidiaries before the Commission instituted proceedings. In the latter two cases, the Supreme Court ruled that Thatcher and Swift were within their rights and the Commission had no authority to order divestiture of assets even though the assets had been obtained through an initial control of stock illegally obtained (272 US 554).

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[15]Pegrum, p. 353.

Thus in the first twelve years after enactment of the Clayton Act, four of the Commission's decisions had been subjected to Supreme Court interpretation, and three had been unfavorable to the government. The feeling was fairly general that Section 7 of the Clayton Act was ineffective.[16]

After three unfavorable decisions in the 1920's, the FTC suffered another reversal of a different nature. In the case of International Shoe Company v. FTC (280 US 291) the Supreme Court in 1930 set aside an order of the Commission requiring International to divest itself of the stock of the McElwain Company. First, the Court ruled that there had been no substantial competition between the two in some 95 per cent of the shoe business since they manufactured different grades of shoes and sold in different markets. The Court also concluded that McElwain probably would have disappeared since it had been in dire financial straits at the time International acquired its stock. The FTC later asserted that the Gourt had interpreted the phrase "substantially lessen competition" so narrowly as to practically limit its application to pure competition. The decision also opened another avenue for evasion of the law by introducing the "failing business" doctrine.[17]

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[16] Ibid., pp. 353-354. [17] Ibid.

Professor Martin has dwelt at length on the International Shoe decision and considers the Court's decision as having had more implications than even the inability of Section 7 to cope with asset acquisitions. He said:

> The opinion of the Supreme Court said, in effect, that, if two firms have previously achieved sufficient monopoly power by a location advantage or by differentiation of product, then substantial competition did not exist between them and therefore cannot be substantially lessened, nor can commerce be restrained in the sections in which they operate. If the two firms had been selling the bulk of their products in the same geographical areas and if their products were homogeneous, then the test becomes that of whether the acquisition has had the effect of injuring the public--that is, by unreasonable restraint of trade. The Sherman Act test would thus be applied. If many other firms sell a considerable proportion of the same homogeneous product, then the acquisitions would be deemed not to injure the public, even though competition between the firms would have been established as having existed prior to the acquisition and would have been completely eliminated.
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> With this interpretation of the standard of illegality, the only condemned acquisition would be an acquisition by a relatively large firm where there were few other firms in the industry and where the firms sold completely homogeneous products in the same geographical areas to the same customers. If such an acquisition were to take place, however, the test applied under Section 7 of the Clayton Act would be the same as that applied if a violation of the Sherman Act had been charged.[18]

If any effectiveness remained in Section 7, the final emasculation occurred in the Supreme Court's 1934 decision in the case Arrow-Hart and Hegeman Electric Company v. FTC (291 US 597). In that instance, a holding

[18] Martin, p. 135.

company had been formed to acquire the stocks of two competing firms. After the FTC had instituted proceedings, the holding company was dissolved and the assets of the competitors were merged into a new firm. The FTC ordered dissolution of the new firm. The Supreme Court held that the physical assets merger was not within the purview of the Clayton Act, and further that the Commission did not have the authority to include the newly formed firm in its complaint since it was the result of a merger.[19]

A Need to Amend Section 7, Clayton Act

The FTC was powerless to enforce Section 7 where the acquisitions of assets were involved. Martin and others are strongly of the opinion that the standard of illegality as interpreted by the Courts, i.e., the Sherman Act standard, did more to remove the effectiveness than did the limitations imposed by any failure to uphold the divestment of assets.[20]

In support of his contention that the assets loophole may have been overemphasized, Martin determined that between 1927 and 1950, the FTC issued only 31 complaints, and 27 of those were later dismissed. Twelve were dismissed on the grounds that the testimony would not support a finding that the effect of the acquisitions

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[19]Isaacs and Slesinger, p. 141.

[20]Martin, p. 141.

might be to substantially lessen competition, restrain commerce, or tend to create a monopoly within the meaning of the Court's interpretation in the International Shoe decision. Three were dismissed on the grounds that the acquisition of assets had nullified the jurisdiction of the Commission. The other twelve were dismissed with no reason given.[21] Surely had the jurisdiction of the FTC been nullified because of asset acquisitions in those latter instances, the number would have been included in that category of dismissals. Of the initial twelve dismissals, all were based on the International Shoe case. It was that reasoning that tended to crystallize Martin's opinion that "standards of illegality rather than assets acquisitions" appeared to have been a major factor in the lack of success in administering Section 7.

Regardless of the reasoning, statistics from Annual Reports of the FTC reflect that from 1929 to 1935, over 500 inquiries were instituted, but only 15 complaints were forthcoming, and only four cases resulted in the issuance of cease and desist orders. From 1935 to 1941, only 137 inquiries were instituted, and only 8 complaints were filed with no cease and desist orders having been issued.[22] The latter period is noteworthy, being subsequent

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[21] Ibid., pp. 158-159.

[22] Federal Trade Commission, Annual Reports, 1929-1940.

to the Arrow-Hart case which involved asset acquisitions.

In an effort to better define the policies of the FTC and to evaluate the adequacy of the statute, Martin examined the available facts concerning 121 dismissals after preliminary investigations during the period 1932 to 1938. He concluded from this review that the FTC accepted the interpretation given the law in the International Show case. According to Martin, such interpretation of the law regarding the standard of illegality precluded the FTC from preventing acquisitions even if it had had the power to order a divestment of assets.[23] A report made by the Temporary National Economic Committee noted that 57 of the dismissals were due to a "purchase of assets."[24]

The Federal Trade Commission first expressed an interest in having Section 7 amended to include asset acquisitions as early as 1921. The FTC stressed the omission in its annual report and reported that the matter had been brought to the attention of Congress.[25]

After the Arrow-Hart decision in 1934, the FTC began determined efforts to "plug" the assets loophole,

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[23]Martin, pp. 163-179.

[24]Federal Trade Commission Report on Monopolistic Practices in Industries, 1939, Temporary National Economic Committee, Hearings, Part 5-A, p. 2377.

[25]Federal Trade Commission, Annual Report, 1921, p. 6.

and mention was made in one form or another in over three-fourths of the succeeding annual reports. In a 1937 report to Congress, the FTC recommended amendment to Section 7 which would remove the necessity of ascertaining the effects of an acquisition. The agency further suggested that the criterion should be the percentage of total assets in an industry controlled by a firm after the acquisition. The FTC further suggested that Congress specify the percentage. The 1937 Annual Report included a recommendation for changing the illegality criterion but added that the chief concern was to have "assets" included in the list of prohibitions.[26]

The Temporary National Economic Committee (TNEC) in its preliminary report to Congress in 1939 recommended the asset amendment but did not recommend any change in the wording of the standard of illegality.[27]

In its final report to Congress in 1941, the Temporary National Economic Committee renewed the asset recommendation. TNEC additionally recommended a provision which would require that advance notification of mergers be made to the FTC, and that prior approval by that agency would be a prerequisite to final merger.[28]

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[26] Ibid., 1937, p. 15.

[27] U.S. Congress, Preliminary Report of the Temporary National Economic Committee, 1939, Senate Document 95, 76th Cong., 1st Sess., pp. 21-32.

[28] Ibid., Senate Document No. 35, 77th Cong., 1st Sess., 1941, pp. 38-39.

The Commission was primarily interested in having the law amended to care for asset acquisitions, and while some mention was made of the standard of illegality in a few annual reports, very little attention was focused on the damage which was caused by the court interpretations of "illegality" in the International Shoe case. A strong possibility existed that Professor Martin was correct in his assertion that the problem of asset acquisitions had been overemphasized. Certainly some action to correct the standard of illegality as interpreted by the Court in the International Shoe case should have received more specific attention. If the legality of a merger were to continue with Sherman Act guide lines as in that case, then Section 7 of the Clayton Act demanded some revision.

Section 7 activity by the FTC was dormant during the war years. From 1941 to 1946, only 7 preliminary inquiries were instituted. Only one complaint was filed and no orders of divestiture were issued. Annual reports made by the Commission during those years merely concurred in the recommendations of the Temporary National Economic Committee, one being that asset acquisitions be included in the prohibitions of Section 7.[29]

In outlining the legal history of the ineffectiveness

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[29]Federal Trade Commission, Annual Reports, 1941-1946.

of Section 7, the FTC in its 1948 report on the merger movement again pointed out the travesty on justice in the Arrow-Hart case. The majority opinion in that case conceded that the stock had been acquired in violation of the act, but that the stock at the time of the Commission's order was no longer owned by the defendant firm. The FTC in the 1948 report reiterated that it had called attention to the ruling; had characterized it as a virtual nullity of Section 7 as early as 1934; and had pointed out that by the ruling it was a simple matter for corporations to avoid the intent of the law.[30]

In the same report, the Commission stated that time and time again in cases involving the acquisition of stock, the defendant had quickly purchased the assets. The Commission pointed out a 1945 procedure against P. Ballantine and Sons as one example. Ballantine had acquired the stock of a competitor and during the hearing, the counsel for the firm announced that the assets of the acquired firm had been purchased. The Commission then dismissed the complaint. Another case in point concerned the Consolidated Grocers Corporation, which as a result of a series of stock acquisitions had become the largest wholesale grocer in the nation. While the case was being tried, Consolidated took title to the

[30]Federal Trade Commission, Report on the Merger Movement: A Summary Report, 1948, p. 5.

assets of the acquired firms and dissolved the subsidiaries. The Commission dismissed the complaint in 1947. In the two cases cited, the Commission was convinced that if the stock first, assets later, were to be declared illegal, firms would merely substitute an initial purchase of assets which would be legal at the time. The Commission speculated that possibly 90 per cent of all acquisitions could be handled in that manner.[31]

The report also emphasizes that the supposed strength of the Clayton Act had been affected by judicial interpretation of the tests of competition. The courts had not accepted the Section 7 connotation that the test of competition should be between the acquiring and the acquired; but the judicial bodies had utilized the Sherman Act connotation in which the legality depended upon the effect on competition generally. Small individual accretions of power, according to the FTC, made it difficult to use Sherman Act standards even though there would be a steady increase in concentration of power. According to the agency's interpretation, the Clayton Act was designed to check these minute accretions which would likely lessen competition.[32]

To stress the trend of the merger movement, the Commission reported that more than 2450 formerly independent manufacturing and mining companies had disappeared

[31] _Ibid._, pp. 5-6. [32] _Ibid._, pp. 6-7.

as a result of mergers and acquisitions during the period 1940-1947. In appraising the overall effects of mergers on economic concentration, the Commission said that over time, each year's mergers had been superimposed upon a structure of economic concentration which had been built up over the years. For example, more than 7,000 independent firms disappeared from mining and manufacturing competition in the period 1919-1929; over 2,000 during the depressed 1930's; and 2450 in the 1940-1947 period. Even in 1939 the Temporary National Economic Committee reported that one-third of the total value of all manufactured goods was produced under conditions where the four leading producers of each individual product turned out from 75 to 100 per cent of the value of the product; and about 57 per cent of the value of the product was produced under conditions where the largest four producers of each product turned out more than half the total. Concentration ratios at the time were even higher in terms of number of products than in terms of value. In three-fourths of the total number of products, concentration ratios exceeded 50 per cent. In other words, four manufacturers produced at least half of the total output of a particular product.[33]

In lobbying for legislation to "plug" the assets loophole, the Commission claimed that such action was in

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[33] Ibid., pp. 17-19.

the public interest. The agency further stated that under our theory of free, competitive capitalism, it was assumed the public was protected by the force of competition. In actuality however free enterprise had resulted in a growth in concentration. As a consequence much of the total production was controlled by a few firms, and vigorous price competition was a rarity. The Commission also argued that the need to find some effective means of preventing giant corporations from steadily increasing their economic power at the expense of small business was a crucial issue.[34]

The Commission further stated that it had urged Congress for 22 years to amend Section 7 in order to prevent corporations from buying the assets of competing firms. By the purchase of assets, huge corporations evaded the original intent of the Act--to arrest the creation of monopolies in their incipiency. A portion of the foreword to the 1948 Commission report outlines the legislative attempts to amend Section 7:

> Since 1945 companion bills designed to remedy this outstanding defect in the law have regularly been introduced in the Senate and House of Representatives by Senator Joseph C. O'Mahoney and Representative Estes Kefauver; twice, that is, in both the Seventy-ninth (Democratic) and the Eightieth (Republican) Congresses, the House bill has received the approval of a subcommittee of the House Judiciary Committee; and twice it has failed to emerge from the House Rules Committee. In the Eightieth Congress the Senate Bill was approved on May 17, 1948, by a

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[34] *Ibid.*, pp. 66-69.

> subcommittee of the Senate Judiciary Committee, headed by Senator William Langer. But like the House Bill, the Senate Bill has never reached the floor for debate.

The Commission recognized that the Courts were interpreting the effects of competition by Sherman Act standards yet that feature received only cursory comments by the agency. Emphasis was placed on the assets problem, and the Commission expressed confidence in its ability to arrest economic concentration in its incipiency if this loop hole were "plugged."

The Federal Trade Commission was not alone in its failure to arrest monopoly and concentration. In the case of the Commission it was before the fact, and after the fact in the case of the Antitrust Division of the Department of Justice. The failure of the Justice Department to win the case U.S. v Columbia Steel Corporation, et al (334 US 495) was of paramount importance in convincing Congress that something should be done about the problem of economic concentration. This case probably did more to trigger legislation to strengthen the antitrust laws than a quarter century of recommendations by the Federal Trade Commission. These recommendations did not reach a point of insistency until after the Arrow-Hart case in 1934.

Under the Sherman Act, the Department of Justice had been unable to obtain an injunction against Columbia Steel, a subsidiary of the United States Steel Corporation. In that instance, Columbia had acquired the assets of

Consolidated Steel Corporation, its largest independent competitor on the Pacific coast. In the 1948 decision, the majority of the Court concluded that the acquisition did not constitute an unreasonable restraint of trade--the competition between Consolidated and the United States Steel subsidiaries in the relevant market had not been substantial. The Supreme Court also agreed with the lower court that a purchase agreement had been entered into for sound business reasons with no intent to monopolize the production and sale of fabricated steel products. The Court also stated that in its evaluation of a possible violation of the Sherman Act, it had looked at the following points: (1) the percentage of business controlled; (2) the strength of the remaining competition; (3) whether the action sprang from business requirements; (4) the probable development of the industry; (5) consumer demands; and (6) other characteristics of the market. Pegrum says it was clearly implied that there was no directive in public policy at the time that forbade, per se, an expansion to meet new markets whatever the area. Suit under the Clayton Act as it was worded was not possible since Columbia Steel had acquired the assets of Consolidated but had left the corporate structure of the acquired company intact.[35]

It was mentioned earlier that Congressman Estes

[35]Pegrum, pp. 342-343.

Kefauver had sponsored a bill in the 80th Congress to strengthen the Clayton Act. The bill received the approval of the Subcommittee of the House Judiciary but failed to emerge from the House Rules Committee. The impact of the hearings, however, had an effect on the 81st Congress when three similar bills were introduced. House Bill 2734 sponsored by Congressman Emanuel Celler was the bill accepted and the one on which hearings were held. Congressman Kefauver at the opening of the hearings said:

> . . . if our democracy is going to survive in this country, we must keep competition and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business. . . . When people lose their economic freedom they lose their political freedom. I do want to urge while there is still time to save our free economy, before we reach the point of concentration where we are going to have a demand for state control of these basic industries in order to preserve our free enterprise system where every person and small corporation can have an opportunity of competing, that this committee exercise its good judgment and plug this loop hole in Section 7 of the Clayton Act and carry out the intent of Congress when it passed the Act in 1914. . . . Actually this is protection for the very big business as well because if we do not have this, big businesses are not going to be privately owned in the years to come.[36]

Opponents of the previous bills introduced in Congress had successfully based their position on the argument that the Sherman Act was adequate to handle asset acquisitions. It was recognized that such action

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[36]U.S. House of Representatives, Subcommittee of the Judiciary, Hearings on HR 2734, A Bill to Amend the Clayton Act, 81st Cong., 1st Sess., 1949, pp. 1-11.

would be after the fact, and not before, as was argued by the proponents for an amendment to Section 7 of the Clayton Act.

Even though opponents to any change in antitrust laws were still present, the Celler bill was reported favorably by the House Committee on the Judiciary in August of 1949. An interesting aspect of the favorable report is that five of the nine members who supported the bill had submitted a strong minority dissent on a similar bill two years earlier.[37] The Columbia Steel case had been decided by the Supreme Court in the meantime, and may have caused this reversal of opinion.

Congressman Celler led the floor debate in the House which lasted only one day, August 15, 1949. Celler pointed out that of the 3 million business units in the United States, 51 per cent of all gross assets were concentrated in 445 corporations. He asked for support of an amendment to Section 7 of the Clayton Act. Celler said that because of the asset loop hole, over 2500 independent businesses had disappeared through mergers during the period 1940-1947. In furtherance of this argument, Celler stated that four firms handled 64 per cent of all steel production; four firms accounted for 82 per cent of all copper sales; and two firms accounted for 90 per cent

[37]Martin, p. 250.

of the aluminum production.[38] The House Judiciary Committee had made it clear that it intended to reach acquisitions that could not be touched by the Sherman Act and rejected all arguments that the Sherman Act was adequate to prevent mergers considered to be contrary to public interest.[39] With a minimum of opposition, the House passed the bill 223 to 92.[40]

A bill, identical to the Celler bill, was introduced in the Senate by Senators Kefauver and O'Mahoney; however, hearings were not held on that bill in order that the House approved bill could be considered. The hearings on the latter bill were held in September 1949 and February 1950.[41]

On June 2, 1950, the Senate Committee on the Judiciary reported the bill favorably and Senator Donnell reported the minority views. Donnell argued that Section 2 of the Sherman Act was adequate to prevent mergers which would substantially lessen competition. He also argued that the Columbia Steel case clearly indicated that asset acquisitions would be considered as a contract in restraint of trade. As such, according to Donnell, a

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[38]Narver, pp. 50-51. [39]Martin, p. 251.

[40]Narver, p. 51.

[41]U.S. Senate, Subcommittee of the Committee on the Judiciary, Hearings on HR 2734, A Bill to Amend the Clayton Act, 81st Cong., 1st and 2d Sessions (1949-1950).

violation of Section 1 of the Sherman Act could be charged if an unreasonable lessening of competition could be proved.[42] Only minor changes were recommended by the Senate Committee and the bill was passed on December 13, 1950 by a 55 to 22 vote.[43] The amendment to Section 7 of the Clayton Act, now familiarly known as the Celler-Kefauver bill, was signed by President Truman on December 29, 1950.[44]

The 1950 amendment was the last in a series of bills which had been considered by Congress subsequent to the recommendations made by the Temporary National Economic Committee. The bill as finally adopted not only covered asset acquisitions but also clarified the standard of illegality.[45] The Federal Trade Commission after nearly 25 years of frustration had succeeded in having the assets loop hole plugged and with the standards of illegality having been changed, the enforcement problems should have been easier.

An examination of amended Section 7, as well as some of the procedural changes in the Clayton Act are important in light of developments and problems in administration during the ensuing years.

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[42] Martin, p. 251.

[43] Congressional Record, v. 96, p. 16,573.

[44] Ibid., p. 17,138. [45] Martin, p. 252.

1950 Amendment to the Clayton Act

The most important changes made in the wording of Section 7 occurred in the first two paragraphs which follow:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stock or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition or to tend to create a monopoly.[46]

A new paragraph was added to amended Section 7 which stated that the bill would not apply to corporations coming under the jurisdiction of the Interstate Commerce Commission, Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Securities and Exchange Commission, United States Maritime Commission, or Secretary of Agriculture.[47] Martin's comment was that he believed the Department of Justice could take necessary

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[46] U.S. Statutes at Large (1950), p. 1125.

[47] Ibid., pp. 1125-1127.

action in these areas in the event of a violation of the Clayton Act.[48]

In that regard, Section 11 of the Act was amended to require that any complaint issued by an administrative agency under Sections 2, 3, 7, or 8 of the Clayton Act would be acted upon by the Attorney General. Better coordination between the enforcement agencies and the administrative bodies was the intent. Section 11 was further amended to authorize the Federal Trade Commission to order divestment of assets, as well as stock which had been acquired in violation of Section 7.[49]

Comments on the new statutory standards of the amended Act were set forth by the Federal Trade Commission in its Report on Corporate Mergers and Acquisitions. The FTC compared amended Section 7 and original Section 7. The comparisons were: (1) acquisitions of assets as well as stocks were covered; (2) lessening of competition between the acquiring and acquired corporation was no longer necessary in finding a violation; (3) the elimination of the test of effect on competition between the acquiring and the acquired firm, made it clear that the 1950 legislation was not intended to prohibit all acquisitions among competitors; (4) the new bill made it clear that it applied to all types of mergers and acquisitions

[48]Martin, pp. 255-256. [49]Statutes at Large.

which indicated the specified effect; (5) the law applied in any section of the country rather than in any section or community; and (6) the 1950 Act applied uniformly, in any line of commerce in any section of the country where there "may be a substantial lessening of competition." In the report, the Commission stated that the intent of the 1950 amendment was to cope with monopolistic tendencies well before they reached a stage for Sherman Act proceedings. The report also explained that the Commission could intercede in the cumulative accretions of small firms by larger firms which reduced the vigor of competition; however, its efforts would not be as far reaching as Sherman Act prohibitions such as a monopoly in restraint of trade.[50]

In the report, the Commission stressed its observations and interpretations of the term "relevant markets." They were: (1) Since the 1950 Act applied to acquisitions where in any line of commerce in any section of the country--it would appear not to be limited to any specific set of product relations between the acquiring and the acquired companies, to any particular set of suppliers or competitors of either company, or to any geographic area in which they may trade. (2) Scrutiny of the competitive effects is not confined to product lines which

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[50]Federal Trade Commission, <u>Report on Corporate Mergers and Acquisitions</u> (Washington: U.S. Government Printing Office, 1955), pp. 150-170.

constitute a major portion of the business of either the acquiring or the acquired company. The Commission concluded that the foregoing would mean that market facts define the meaning of the relevant line of commerce and section of the country; and that the actual and potential competitive consequences are to be tested in (a) any product line, in (b) any geographic area, and (c) at whatever market levels they may occur. The Commission also said that a corporation in a failing or bankrupt condition would not be precluded from merging; and neither would the merger of small companies be prohibited since generally a merger of that nature would be incapable of producing the proscribed effects.[51]

Since amended Section 7 would be concerned with a prevention of a substantial lessening of competition, and in its incipiency, Martin commented that the "new" section would be interested in both economic issues and market consequences. He said that the proof would necessarily be in the domain of legal evidence; however, the facts which would be considered would be both economic and statistical, and that would obligate the economist to analyze the data in a form that would meet legal standards.[52]

When the original Section 7 was enacted, the Congressional intent was to supplement the Sherman Act to

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[51] Ibid.

[52] Martin, p. 143.

allow it to cope with the "evils" of intercorporate stockholding. The 1950 amendment marked a major change in antitrust policy on mergers and acquisitions of all kinds. It was in effect an amendment to both the Clayton and the Sherman Acts since the latter had been the policy statute regarding asset acquisitions which was now covered in the new Act. Martin has summarized the intent as follows:

> . . . The legislative history of the 1950 amendment indicates that Congress intended to change the law on corporate acquisitions of all types so as to make illegal all acquisitions manifesting a reasonable probability of the effect of a substantial lessening of competition or a tendency toward the creation of a monopoly in the market for any commodity irrespective of the existence of a conspiracy or of an intent to monopolize or restrain trade.[53]

On first examination the amendment conformed to the desires of the Federal Trade Commission. The next chapter will be focused on the interpretation given the amendment and specific handlings of proceedings initiated by the Federal Trade Commission.

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[53] Ibid., p. 267.

CHAPTER II

EFFECT OF AMENDED SECTION 7, CLAYTON ACT ON MERGERS AND ACQUISITIONS, 1951-1955

In the 10 year period prior to the enactment of the Celler-Kefauver amendment, mergers and acquisitions averaged about 300 annually according to records of the Federal Trade Commission, and about 80 per cent occurred in the mining-manufacturing segment of the economy. In the immediate 5 year period preceding the amendment, mergers and acquisitions totaled about 1,130, or an average of approximately 225 annually. In 1951, the first year amended Section 7 was operative, about 290 mergers-acquisitions were reported. In 1952, about the same number were recorded, but in 1953 the recorded number rose to about 385. There were about 700 in 1954 and about the same number in 1955. In summary, during the first five year period after the amendment the number of mergers-acquisitions rose to about 2,400, or more than double the number in the five year period preceding the Celler-Kefauver amendment.[1] If only a number comparison was used, the strengthened statute had a reverse effect from that which was intended.

For example, less than one per cent of all mergers and acquisitions were challenged, which will be discussed later. Briefly, of the 2,400 mergers between 1951-1956, only 24 were challenged and less than that number resulted in the issuance of a complaint. In 1951, the first year that amended Section 7 of the Clayton Act was in effect, there were no formal complaints issued. In 1952, one formal complaint was issued against Pillsbury Mills. Ironically, that case was still in litigation as of late 1966, and some of the problems in that case will be discussed later in this chapter. There were no complaints issued in 1953, and only two in 1954. The case against Crown Zellerbach initiated in 1954 will also be discussed in this chapter. Eight complaints were filed in 1955. Thus during the first five years after enactment of the Celler-Kefauver amendment to Section 7 of the Clayton Act, only 11 cases were initiated by the enforcement agencies.[2]

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[1]Federal Trade Commission, Annual Report, Fiscal Year 1966 (Washington: United States Government Printing Office, 1966), pp. 38-39. Above information partially extrapolated from Chart 1, Chapter VIII.

[2]Betty Bock, Mergers and Markets: An Economic Analysis of the First 15 Years under the Merger Act of 1950, The Conference Board Studies in Business Economics, No. 93 (New York: National Industrial Conference Board, Inc., 1966), 3-9.

Several reasons can be given for the paucity of challenges to mergers and acquisitions initiated by the Federal Trade Commission. First, there was, and still is no legal requirement that an enforcement agency be furnished advance information on business planning and expectations. To obtain a list of mergers-acquisitions, the FTC and the Department of Justice compile such data from news media and other sources such as Moody's Investor's Service and the Standard Corporation Report. That is the list of mergers and acquisitions which was, and is still used by the enforcement agencies.

Second, a review of such sources would be tedious and time consuming. The selection of a merger or acquisition for a detailed inquiry could be a decision that would not be welcomed by an agency that had been on the losing side for years.

Third, because of limited personnel and funds, it would have been impossible to give detailed attention to more than a select few mergers and acquisitions. Those would have normally been confined to a per se violation, or to a corporation which had been under suspicion at an earlier date.

Fourth, the Commission was attempting to enforce amended Section 7 without established guide lines, and none that could be attributed to judicial review. The act itself was allegedly ambiguous and that would lead to a cautious approach.

Fifth, during the 1951-1956 period, a national administration traditionally business oriented could have influenced the cautious approach. The Commission could have rationalized that any efforts by a regulatory body which would disturb the status quo of the economy, regardless of its objective, would have been viewed with disfavor.

The Federal Trade Commission initiated its first formal proceeding under the new anti-merger statute on June 16, 1952. Despite its apparent reluctance, a complaint was issued against Pillsbury Mills, Inc., the nation's second largest flour milling company. The FTC charged that Pillsbury acquired the assets of two important competitors in the southeastern area of the United States. Ballard and Ballard, producers of flour, flour base mixes, and animal feeds, was acquired on June 12, 1951; and the Duff Baking Mix division of American Home Foods, Inc., was acquired on March 10, 1952. The complaint alleged that prior to the acquisitions, the three firms were each engaged in the sale of family flour, bakery flour, prepared flour mixes, and other flour products. During the 12 month period prior to 1950, it was alleged that eight firms including Pillsbury were responsible for about 70 per cent of the national sales of flour base mixes. Pillsbury ranked as the nation's second largest seller of flour base mixes with about 16 per cent of total sales, and Duff ranked fourth with about 6 per cent of total sales.

In the southeastern market, it was alleged that Pillsbury had ranked first in sales of prepared mixes, Ballard ranked third, and Duff ranked fifth. According to the complaint, it was estimated that after the acquisitions, and using the 1949 market shares as the measure, the combined companies sold nearly 45 per cent of all prepared flour base mixes in the southeast.

The complaint also charged that the acquisitions were but a part of general tendency toward concentration of control in the flour milling industry. Statistics were cited which reflected an increased share of the market over a period of time for the nine leading companies.[3]

As in all complaints, the Commission charged the acquisitions were substantial factors in the industry and their effect would be to substantially lessen competition. The Commission's attorneys emphasized in the hearings that a distinction should be made between the Sherman Act test for illegality of mergers and the new Clayton Act test. The attorneys explained that Congress had declared that amended Section 7 of the Clayton Act was to bar piecemeal acquisitions not forbidden by the Sherman Act. That statute had been the basis for tests previously adopted by

[3]In the Matter of Pillsbury Mills, Inc., <u>Federal Trade Commission Decisions</u>, Docket 6000, v. 57, 1274-1415.

the courts. The Hearing Examiner gave an initial decision on April 22, 1953 in which he dismissed the complaint. It was stated that the Federal Trade Commission did not prove a substantial lessening of competition in the total market for flour.[4] (Underlining mine) The hearing examiner interpreted the language of Section 7 "substantially to lessen competition" to mean the acquisition of an overwhelming control of the total market. By that construction, he interpreted Section 7 with a Sherman Act connotation--"to prohibit only unreasonable restraints of trade."[5]

The maiden effort by the Commission into the anti-merger field had been rebuffed by its own family who had presumably seen no change in the merger law as it had been interpreted in the courts the previous 20 years. The dismissal order was appealed to the Federal Trade Commission. In supporting their appeal, the attorneys argued that the "substantiality test" should be used in deciding whether or not the effect of a given acquisition may be substantially to lessen competition. (Underlining mine) It was also argued that where a leading firm in an industry in a particular market in a section of the country acquires another firm in the same line of commerce in the same section of the country as Pillsbury did in its acquisition

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[4] *Ibid.*, p. 1277.

[5] Vernon A. Mund, *Government and Business*, 4th ed. (New York: Harper & Row, Publishers, 1965), p. 151.

of Ballard, then there should be a reasonable basis for the Commission to find that such an acquisition "may be substantially to lessen competition."[6] In ruling on the appeal, the Commission pointed out that the appellant had established a prima facie case to further show (1) the relevant products involved were competitive; (2) a relevant market had been delineated; (3) Pillsbury had a substantial share of the market and was one of the leading factors in that market; and (4) Ballard and Duff had had a substantial amount of business and were important factors in the relevant market. On December 23, 1953, the Federal Trade Commission vacated the dismissal order and remanded the matter of the Hearing Examiner for further consideration.[7]

Some of the points brought out by the Commission in its deliberations prior to sending the case back for further consideration are interesting, especially in attempting to delineate between Sherman Act and Clayton Act standards of illegality. While the Commission declined to utilize a quantitative substantiality test as proposed by the appellant, the reasoning did not mean a return to the Sherman Act test of illegality. The standard of illegality as expressed by the Commission was:

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[6] Ibid.

[7] Federal Trade Commission Decisions, p. 1278.

> As we see it, amended Section 7 sought to reach mergers embraced within its sphere in their incipiency, and to determine their illegality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of per se violations. Somewhere in between is Section 7, which prohibits acts that 'may' happen in a particular market, that looks to a 'reasonable probability,' to 'substantial' economic consequences, to acts that 'tend' to a result. Over all it is the broad purpose to supplement the Sherman Act and reach incipient restraints.
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> While these are far from specific standards--specificity would in any event be inconsistent with the 'convenient vagueness' of antitrust prohibitions--they can, we believe, be applied on a case-by-case basis. We think the present case is the type that Congress had in mind--one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless established, prima facie, a violation of Section 7 of the Clayton Act.[8]

The Federal Trade Commission, at least, believed that its attorneys had made a case against Pillsbury; however litigation was to continue for years. In the rehearings, an interesting point was brought out by the Commission in its Findings. Pillsbury utilized the services of an economist, Mr. Wroe Alderson, who testified as to the type of structural tests which should be constructed in arriving at the competitive effects of the acquisitions. The Commission disregarded the testimony, and preferred to accept the theory of another economist used by the prosecution--one who was widely recognized as an expert on competition from an economic standpoint and an authority on antitrust matters. (Actually the differences were the standards

[8] Ibid.

of measurement and the Commission chose to accept those of the more widely known authority.) An order of divestiture was issued on December 16, 1960, in which the Commission agreed with the findings in the rehearing commenced several years before.[9]

The Pillsbury case was not ended since the Federal Trade Commission order was appealed to the Circuit Court of Appeals, and on January 7, 1966 that body ordered the divestiture vacated and again remanded the case to the Federal Trade Commission.[10] The Court in its remand suggested that the Commission as "now constituted" should, in view of the lapse of time, reevaluate the case in light of the present state of case law applying to Section 7. (The implication would seem to be that the membership of the Commission had changed subsequent to most of the hearings, and the new members might not be as dogmatic in their opposition to the merger.)

During the years of litigation, the business operations of Ballard and Duff were completely merged with Pillsbury. Even if divestiture is finally ordered, the restoration of Ballard and Duff as separate entities may be difficult. Even if an order of divestiture were again issued by the Commission, the case could well go to the

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[9]Trade Regulation Reports, Transfer Binder, FTC, Complaints, Orders, Stipulations, 1959-1960, par. 27,845.

[10]Trade Cases, 1966, par. 71,646.

Supreme Court along with more years of litigation.

Other points of interest in the appeal by Pillsbury to the Circuit Court were that theoretically "pure and perfect competition" existed in the sale of flour in the southeastern market. It was also claimed that the acquisitions made Pillsbury more able to compete with General Mills, their primary competitor in the relevant market. It was also stressed that the acquisition of Ballard did not violate Section 7 since Ballard was a failing firm. (The latter point had been totally rejected by the Commission.) In the brief filed by the Federal Trade Commission, it was contended that the acquisitions had the effect of substantially increasing concentration in the relevant market with a probable detrimental effect on competition.[11]

What initially appeared to be an excellent test of the effectiveness of amended Section 7 may still be an excellent test, but if so, the Commission's success in that pilot case (Pillsbury) has not been noteworthy. Problems can be foreseen in any divestiture at this late date. After nearly 20 years, Ballard and Duff have lost their identity in the southeastern market and it may well be economically unfeasible to attempt to reestablish them as competitive firms in any market. The mere renaming of

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[11] Ibid.

the former physical assets of Ballard and Duff would not suffice in an area where the image of Pillsbury is so prominent--there could well be two "failing firms" in the area, rather than only Ballard as contended by Pillsbury.

The Commission was also of the opinion that further litigation would be unproductive. On March 28, 1966, the Federal Trade Commission issued a final order of dismissal in the Pillsbury case. That final order stated briefly that it would not be in the public interest to proceed further in its case against Pillsbury Mills.[12]

Of the 6 complaints filed by the Commission in the 1951-1956 period, all did not meet with the same opposition as in Pillsbury. On February 15, 1954, the Commission issued a complaint against Crown Zellerbach Corporation of San Francisco charging that its acquisition of the assets of St. Helen's Pulp and Paper Company violated Section 7 of the Clayton Act. Both corporations were fully integrated concerns engaged in the manufacture and sale of paper and paper products throughout much of the western part of the United States. The complaint further alleged that the sale of such products by the two firms accounted for 85 per cent of the sales in western states; and the effect of the acquisition might be to create a monopoly in

[12]Trade Regulation Reporter, Transfer Binder, Federal Trade Commission Complaints, Orders, 1967, par. 17,484.

pulp wood sales. The complaint also alleged that the acquisition would increase the market dominance of Crown, and would eliminate the opportunity for independent market behavior by converters of paper products, and jobbers. The complaint also stated that Crown was the largest seller of pulp and paper in the west, and was a price leader in that market; and that St. Helen's was one of the three major suppliers of paper and paper products in the Pacific Coast states. Both the hearing examiner and the Commission found that the acquisition had the effect of substantially lessening competition and a final order of divestiture was issued on December 26, 1957.[13]

Crown did not accept that order and appealed to the Court of Appeals. On June 5, 1961, the Court sustained the order of the Commission. The Court held that the results of the merger were (1) to remove as a supplier, an important fully integrated competitor, and (2) to significantly increase the size of Crown Zellerbach in the relevant classes of goods in which it already had a commanding lead.[14] Crown appealed the case to the Supreme Court but on December 22, 1961, that body declined to review the case.[15]

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[13]In the Matter of Crown Zellerbach Corporation, Federal Trade Commission Decisions, Docket 6180, v. 54, pp. 769-797.

[14]Trade Cases, 1961, par. 70,038.

[15]Ibid., par. 70,178.

To illustrate some of the difficulties that arose in the administration of the statute in that particular case, the Commission shortly after issuing the initial complaint against Crown Zellerbach, authorized its Bureau of Economics to collect market data from customers of St. Helen's. The results were presented in evidence but the respondent objected on the grounds that mail questionnaires were hearsay evidence. On appeal from the examiner's ruling, the Commission decided that the evidence would be admitted but that the respondent should have ample opportunity to examine the basic materials if that could be done without disclosing information about specific firms.[16] Accordingly the Commission not only had to satisfy a sound economic conclusion, but its presentations had to be legally admissable as evidence in a court of law.

Several important factors were proclaimed in the Crown case that were to be utilized in future proceedings--but unfortunately no such guide lines were available during the 1956-1960 period. For example, the Court of Appeals accepted the Commission's finding that Crown and St. Helen's both produced and sold the broad category of coarse paper as distinguished from fine papers and newsprint, shipping paper and others. Thus the relevant "line of commerce" was pronounced. The Court accepted the Commission's

[16] Trade Regulation Reporter, Transfer Binder, FTC Complaints, Orders, Stipulations, 1954-1955, par. 25,458.

findings that in 1953, in the 11 western states, Crown produced 51.5 per cent of the coarse paper, and St. Helen's, 11 per cent, and that the two would account for 62.5 per cent of total production. Thus a relevant "product market" was pronounced.[17]

Other important factors which could be used as guide lines were also enunciated by the Court. That body concurred in the Commission's delineation of the relevant geographic market by agreeing that in the states of California, Oregon, and Washington was where the most active competition occurred and the area most subject to common economic forces. The Commission was also upheld in its allegation that the acquisition of a rival firm by a larger one would result in an increased concentration of power by the acquiring concern. The reasoning was that the pre-merger dominance of the acquiring firm would be aggravated which would substantially lessen competition, or tend to create a monopoly. The respondent's defense that the merger would result in economies of scale which would permit lower prices for its products was rejected. The Court pointed out that the legislative history of the Act did not appear to concern itself with economic efficiency. Congress, according to the Court, was concerned with small businesses that would be absorbed by its larger competitors; and about those other competitors whose opportunities

[17] Trade Cases, 1961, par. 70,038.

to compete might be diminished by a merger which increased the concentration of power in the larger corporation.[18]

Even though the Federal Trade Commission was eventually successful in the Crown Zellerbach case, there was over 7 years of litigation before a final order of divestiture was approved. Much like the Pillsbury case, if the acquiring-acquired firms had fully integrated during that period, the re-establishment of St. Helen's with its previous market share would have presented an unenviable problem for both firms.

While the Pillsbury and Crown cases were the most notable of the Commission's attempts to enforce amended Section 7 of the Clayton Act during the first five years after enactment, some minor success was achieved without the legal delays. The Commission filed a complaint on June 30, 1955 alleging that Farm Journal, Inc., had acquired <u>Better Farming</u>, formerly <u>Country Gentleman</u> from the Curtis Publishing Co., and had thereby violated the law by eliminating one of the two large nation-wide farm magazines. Farm Journal was ordered to divest itself of the names <u>Better Farming</u> and <u>Country Gentleman</u> and of the lists of subscribers and advertisers. The Commission was unable to establish the two magazines as competitors to Farm Journal. The order of limited divestiture was issued only

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[18] <u>Trade Cases</u>, 1961, par. 70,038.

one year after the initial complaint.[19]

Of the six cases filed by the Commission in the 1951-1956 period, only the Crown Zellerbach case was given a court interpretation, and that about seven years after the initial complaint. The Pillsbury case was in litigation for 14 years. A 1954 action was filed in the case Federal Trade Commission v Luria Bros., Inc., FTC Docket No. 6156, in which the responder was charged with a violation of Section 7. Litigation also lasted 14 years, but the Supreme Court upheld a divestment order in 1968. In a 1955 complaint against A. G. Spalding and Bros. Co., FTC Docket No. 6478, an order of divestiture was upheld by the Court of Appeals in 1962 (A. G. Spalding and Bros. Co., v Federal Trade Commission). In a sixth complaint filed on June 30, 1955, Federal Trade Commission v Union Bag and Paper Corp., FTC Docket No. 6381, a consent decree was issued in 1956 in which the respondent agreed to limit its future acquisitions. Of the six cases filed by the Commission, only one consent order was issued. Of the five cases filed by the Department of Justice charging violation of Section 7, four were settled by consent decrees normally within 18 months. That agency sought a divestiture order in the Brown Shoe Case which was eventually

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[19]<u>Trade Regulation Reporter</u>, Transfer Binder, Federal Trade Commission Complaints, Orders, Stipulations, 1956-1957, par. 26,127.

upheld by the Supreme Court in 1962. The Brown case is considered a landmark case and will receive comment later in this paper.

The Federal Trade Commission attempted to completely dissolve the mergers against which it filed complaints with the exception of the Union Bag case in which a consent decree was obtained. Contrariwise, the Department of Justice used the consent decree in four of its five cases. From the time elements involved it is readily apparent that while a consent decree would not normally recreate a competitive entity, as many interpreted as the congressional intent, it does at the very least estop further concentration in a particular area, market, or industry. A consent decree, while not always reestablishing a competitive entity, will comply with the halting in its "incipiency," of a tendency toward greater concentration and eventual monopoly. The consent decree is also advantageous in that costly litigation and time consuming proceedings are eliminated and that will permit the enforcement agencies to devote more of their limited personnel and funds to broader areas in the anti-merger field. From the standpoint of the respondent, the acquiring company is normally left with at least a part of its property acquired prior to the date of the complaint. A saving is effected in that regard as well as a saving in time and money associated with a complex litigation.

The reactions of Congress and the business community regarding the administration and effectiveness of amended Section 7 after the first five years of its existence will be examined through the medium of Congressional hearings. The hearings commenced in 1956 and have continued through the intervening years. A discussion of the hearings is in the next chapter.

CHAPTER III

BUSINESS AND POLITICAL THINKING ON ANTI-MERGER LAW, 1956-1965

For the first five years after the enactment of amended Section 7 of the Clayton Act, there was very little concern in legislative circles about the effectiveness of the law, or the needs of the enforcement agencies in the administration of the statute. The lack of concern is supported by the minimal number of complaints filed in that period, and the relative insignificance of the actions. It was not until 1955, that Congress evinced concern with the enforcement of the new anti-merger law. Subcommittees of the Judiciary in both the House and the Senate were appointed to examine an alleged trend toward concentration in industry which reportedly was anti-competitive and proscribed by the Clayton and Sherman Acts.[1]

During that period the Federal Trade Commission had been lobbying, albeit unsuccessfully, to obtain further enabling legislation. The FTC had recommended that there

[1]U.S. Senate, Report No. 1028, 88th Cong., 2nd Sess., 1964.

should be a required pre-merger notification which should be made on all corporate mergers-acquisitions over a certain asset size. In that manner, time would be saved by the enforcement agencies which were compelled to laboriously compile merger information from a variety of public sources. That information according to the Commission was frequently incomplete and inaccurate.

The FTC strongly supported legislation to amend the Clayton Act that would provide the FTC injunctive powers in Section 7 cases. The agency contended that the inability to restrain the consummation of a merger made Section 7 proceedings extremely difficult. It was explained that if the Commission moved, and if its time-consuming hearings eventually resulted in an order of divestiture, the assets of the merged firm would have been so integrated, that an unscrambling process would be next to impossible.

A third measure strongly supported by the FTC consisted of a desired amendment to the Clayton Act to provide that the agency's cease and desist orders should be final, unless appealed within a specified time limit. The FTC contended that at the time, only orders issued under the unfair practices portion of the Federal Trade Commission Act (Section 5) had the finality desired.

It was against that background that congressional notice was taken of the problems surrounding the agencies designated to enforce the anti-merger law. Subsequently hearings were to be held which brought out the allegation that business concentration had been increasing at a rate which threatened the competitive system. The proponents of the FTC proposals strongly supported the thesis that industrial concentration was the forerunner of monopoly. On that presumption, the subject of concentration was either in the fore or the background of all debates which were to follow in the extended hearings on anti-trust and anti-monopoly.

At first glance one might have thought that a pre-merger notification bill would have been the easiest to enact, and possibly less offensive to bi-partisan thinking. Either the injunctive or restraint order proposal, or the legal finality of cease and desist order proposal would, at least on the surface, have possibly posed a more ominous threat to one's constitutional rights. In the first instance, notice of an intended merger would eventually be published in any event; while the latter two proposals, if enacted, could conceivably result in adverse business publicity.

By 1956, both houses of Congress had bills before them. Each bill embodied the Commission's desires in one form or another.

Congressional Hearings, 1956-1965

Congressman Emmanuel Celler, Chairman of the Antitrust Subcommittee held hearings in January 1956. In his opening remarks, Celler pointed out the increasing concern over the flood of mergers which had reduced competition and contributed to a rising tide of the concentration of economic power. The pattern, according to Celler, underscored the necessity for vigorous enforcement of the anti-monopoly laws by the Federal Trade Commission and the Department of Justice. Both agencies, according to Celler, were hampered by a lack of enabling legislation, along with insufficient funds with which to operate. Celler concluded that the committee would intercede with "appropriations" to secure additional funds to be allotted specifically to anti-merger work.[2]

Congressman Wright Patman remarked that the utter failure of the anti-merger law to that date was not due to the law's inadequacies, but that the enforcement agencies had made but token gestures in their enforcement activities. Patman suggested that a change in the basic tax structure would be necessary since at the time, big corporations were being given favored treatment.[3] Despite

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[2]U.S. House of Representatives, Antitrust Subcommittee of the Committee on the Judiciary, Hearings, 84th Cong., 2d Sess., January 1956.

[3]*Ibid.*, pp. 7-15.

his expressed dissatisfaction with the efforts of the anti-merger agencies, and his feeling that the laws were adequate, Patman sponsored a pre-merger notification bill. He explained that the existent procedures of compiling merger statistics were complex, cumbersome and ineffective. Patman stressed that the procedure was costly and that it "diluted the effectiveness of the enforcement dollar." He further stated that the delays attendant to the archaic procedure of compiling merger information caused the public interest to suffer.

Patman also supported an amendment to the Clayton Act which would permit the FTC to seek a restraining order to prevent a merger prior to its consummation. In explanation of his support of amendment to make FTC cease and desist orders issued in Section 7 cases final, Patman said that under the procedures in effect at the time, the agency had to prove its case twice. He explained that an order to cease and desist would not be final until affirmed by the Court of Appeals. Also that the recipient upon receiving such an order could choose to ignore it at which time the FTC would have to appeal to the Court for affirmation. During the appeal, the FTC would again have to prove a violation, and quite frequently that a violation had occurred since the issuance of the order.

Patman observed that the FTC had been trying to obtain finality for its Section 7 cease and desist orders for some time. Patman concluded that such an order of finality issued under Section 7 would be the same as the power already possessed by the FTC when it issued a cease and desist order for violation of the unfair practices portion of the Federal Trade Commission Act (Section 5).[4]

Senator John Sparkman, Chairman of the Senate Committee on Small Business, appearing as a witness before the Subcommittee observed that the tide of mergers had resulted in increased concentration which caused a lessening of competition. Sparkman asserted that he had received numbers of complaints from small business which reflected the broad anti-competitive effects of most mergers. Sparkman added that he too was sponsoring a bill in the Senate which would provide the necessary relief for the enforcement agencies in their Section 7 work. The senator said that his bill also included a proviso that bank mergers be specifically proscribed by Section 7.[5]

Senator Joseph C. O'Mahoney appeared before the Subcommittee and said that the people had seen the economic control pass away from them, and that their representatives in Congress had not been permitted by circumstances to come face-to-face with the effect of the concentration of economic power. The Senator used General Motors as a most significant example of economic concentration. He pointed out that its 50 largest share holders owned 32 per cent of

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[4]Ibid.

[5]Ibid., pp. 39-51.

the corporation. He added that it was common knowledge that anyone who controlled 30 per cent of the outstanding stock ownership, controlled the corporation. In his conclusion, O'Mahoney pointed out General Motors' revenue the preceding year (1955) was $9.8 billion, three times that of the City of New York and nearly equal to the total farm income of about $10 billion.[6]

A cross section of business and government officials' testimony before the Subcommittee is summarized:

(1) The president of a diversified manufacturing concern said that it was less expensive to buy a small company than build. The executive did not believe that he had lessened competition by pursuing that course, but if size were to be a criteria of economic power, an arbitrary limit could be established by use of a graduated corporate income tax.

(2) Two union officials testified in support of implementing existent anti-merger legislation.

(3) The Assistant Attorney General in Charge of Antitrust, Department of Justice, outlined the complex and time consuming procedure by which it was necessary to select cases for Section 7 action. That official strongly supported pre-merger notification legislation. The official also requested Committee support in his requested 25 per cent increase in funds for his agency.

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[6] Ibid., pp. 79-96.

(4) A law professor and an official of the American Bar Association supported proposed legislation which would provide the FTC with injunctive powers--if it were based on a reasonable probability that the merger might lessen competition. The professor rejected the proposed pre-merger notification bill on the basis that it would "make a mandate out of reporting to the government, a purely private business decision."

(5) The United States Chamber of Commerce submitted a letter to the Subcommittee in which it objected to a pre-merger notification which it characterized as an unwarranted form of government regulation under the guise of antitrust enforcement.

(6) The American Federation of Labor supported all extensions of anti-merger legislation.

(7) The New York State Bar Association supported pre-merger notification with a different approach.

(8) The National Association of Manufacturers in a letter to the Subcommittee observed that all additional anti-merger legislation was premature since there had been no court interpretation of Section 7.[7]

The House reported favorably on the proposals for strengthening amended Section 7.[8]

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[7] *Ibid.*, pp. 96-209.

[8] U.S. House of Representatives, *Report No. 1889*, 84th Cong., 2d. Session, 1956.

The Senate Subcommittee on Antitrust and Antimonopoly not only considered its own versions of supplementary legislation to strengthen Section 7, but also the House version. A cross section of business and government leaders' testimony is summarized:

(1) An official of the Independent Bankers Association testified in favor of the proposed legislation to amend Section 7. He believed that it would protect small independent bankers.

(2) The Assistant General Counsel for the National Association of Manufacturers opposed the proposed legislation in its entirety. He pointed out the proposals were premature since Section 7 had not had the benefit of court interpretation.

(3) An official of the American Mining Congress supported the legislation as did an official of the Life Insurance Association of America.

(4) An official of the American Paper and Pulp Association suggested amendments to the proposals other than the injunctive power bills which he rejected entirely.

(5) The Chamber of Commerce of the United States opposed the legislation on the grounds of an unwarranted intervention into private affairs.

(6) An official of the National Coal Association opposed the legislation and pointed that the proponents

for pre-merger notification had not justified their case.[9]

A report of the Senate made in the following session of Congress contained information on Corporate Mergers and Acquisitions.[10] The Chairman of the Federal Trade Commission outlined the status of the agency's 1956 Section 7 complaints which had been filed, and submitted them as representative of an increasing economic concentration. The report contained the testimony of several well known economists, and a summary of their comments was:

(1) M. A. Adelman hoped that the courts and the FTC would begin a tougher anti-merger policy.

(2) Clare Griffin observed that growth by merger had a different economic significance than internal growth. He was pleased with the distinction which was made between the two in Section 7. He deemed that most mergers had been managerial rather than financial.

(3) Jesse W. Markham expressed confidence that the statutes had been effective since they had probably prevented some undesirable mergers. Markham urged that Congress increase the appropriations of the agencies

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[9] U.S. Senate, Subcommittee on Antitrust and Antimonopoly of the Committee on the Judiciary, Hearings, 84th Cong., 2d Sess., May-June 1956.

[10] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, A Staff Study: Report on Corporate Mergers and Acquisitions, Report No. 132, 85th Cong., 1st Session, 1957, pp. 1-26.

charged with the enforcement of Section 7.

(4) J. Fred Weston stated that despite a large number of mergers, there had been no clear case of undesirable consequences. To the contrary according to Professor Weston, there was evidence of desirable consequences.

(5) Corwin D. Edwards said that the effectiveness of Section 7 had been disappointing. He suggested shifting the burden of proof in certain cases. Professor Edwards commented that while the presumption was strong that a merger would have an adverse effect on competition, there should be a rebuttable presumption in law for certain classes of mergers. The presumption, according to Edwards, would permit the enforcement agencies to move faster.[11] The report concluded with the statement that the Senate had adjourned prior to acting upon the proposed legislation. The staff however, recommended that a selected advance notification of mergers be made. The staff concluded that there was a serious lack of data concerning the concentration effects of "recent mergers."[12]

Since no action had been taken on the proposed Clayton Act amendments, hearings before the House Antitrust Subcommittee resumed in the following session of Congress. Chairman Celler opened the hearings with a recital of the increasing merger trends. He pointed out

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[11] _Ibid._, pp. 15-26. [12] _Ibid._

that of 4,686 mergers recorded between 1951 and 1956, over 2,000 had been in the mining-manufacturing sector of the economy, and added that over 1,000 banks had disappeared by merger during that period. Celler observed that the bills under consideration would combine substantially the same provisions as those which had been discussed in the previous session. One bill provided for Federal enforcement agencies to have the same authority to move against bank mergers accomplished by an asset acquisition preceded by a stock acquisition, as with the stock acquisition alone. Another bill provided that the parties of a proposed merger, where the capital exceeded $10 million, would be required to notify the Attorney General and the Federal Trade Commission in advance. A third bill spelled out that the authority of the Federal Trade Commission would be made similar to that of the Department of Justice in the seeking of court orders to prevent consummation of a merger pending the issuance of a complaint and the completion of FTC proceedings. Celler concluded his opening remarks by stating that President Eisenhower had recommended legislation embodying those features in his Economic Reports of 1956 and 1957.[13]

Attorney General Herbert Brownell testified before

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[13]U.S. House of Representatives, Antitrust Committee, Subcommittee No. 5, of the Committee on the Judiciary, Hearings to Amend the Clayton Act as Amended, 85th Cong., 1st Sess., March 1957, pp. 4-6.

the Subcommittee and strongly recommended favorable action on the pending legislation. Brownell recommended that the subject of bank mergers be either included as an amendment to Section 7 of the Clayton Act or as an addition to existent banking legislation.[14]

A cross section of government and private industrial leaders were questioned. The uncertainty concerning the inclusion of bank mergers, as an amendment to Section 7 of the Clayton Act, was answered. The consensus of government monetary officials--and others--was that bank mergers-acquisitions could be better handled as an amendment to the Financial Institutions Act of 1957.[15]

Among those who opposed the pre-merger notification bill and the injunctive power bill were: representatives of the National Association of Manufacturers; the National Coal Association; the United States Chamber of Commerce; the American Mining Congress; and the Independent Petroleum Association of America. The character of opposition ranged from "no demonstrated need" to an "unwarranted governmental invasion into the day to day affairs of business." Other than the governmental agencies that supported the bills in one form or another, the proponents in private industry were confined to small businessmen's organizations such as the National Association of Retail Grocers and the National Federation of

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[14] Ibid., pp. 9-49. [15] Ibid., pp. 120-242.

Independent Businesses. Letters concerning the bills were in the same category--the opposition in general was confined to big business, and the proponents in general, small business.[16]

The House reported favorably on the pre-merger and injunctive powers portions of the bills, and recommended that the bill "do pass."[17]

The Senate Subcommittee on Antitrust and Antimonopoly considered four bills in the second session of the 85th Congress. Three related either to a pre-merger notification amendment or an authority for the Federal Trade Commission to issue preliminary injunctions in its enforcement of Section 7 proceedings. The fourth related primarily to the inclusion of bank mergers as an amendment to Section 7 of the Clayton Act. Senator Estes Kefauver, Chairman, opened the hearings. He observed that there was a Big Four or Big Eight in most of the basic industries. Most of the concentration, according to the Senator, was due to mergers. He said that as concentration grew, it had been next to impossible for small business ventures to enter many of the concentrated fields. Kefauver concluded that as concentration had risen, so had the number of

[16] Ibid., pp. 263-404.

[17] U.S. House of Representatives, Report No. 486, 85th Cong., 1st Sess., May 28, 1957, p. 1.

business failures.[18]

Senator John Sparkman, Chairman of the Senate Small Business Committee, presented his particular version of a bill to amend the Clayton Act. It included not only the pre-merger notification requirement and the granting of injunctive powers to the FTC, but also an amendment to Section 7 which would apply to bank mergers. Sparkman concluded that "small business" was satisfied with anyone's version, as long as the bill was all encompassing.[19]

John W. Gwynne, Chairman of the Federal Trade Commission presented his views on all the pending legislation. He emphasized the virtues of pre-merger notification as well as the advantages of legislation which would empower the FTC to seek restraining orders prior to the consummation of a merger. Gwynne also supported a bill then in the Senate, which had to do with the finality of Clayton Act FTC orders under Section 11 of the Act. He explained that it provided for the finality of FTC's Section 7 orders just as its orders were final under the unfair business practices portion of Section 5 of the Federal Trade Commission Act. The Subcommittee counsel, Paul Rand Dixon (later to become Chairman of the FTC) pointed out that

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[18] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Hearings on legislation affecting Sections 7, 11, and 15 of the Clayton Act, 85th Cong., 2d Sess., April-May 1958, p. 1.

[19] Ibid., pp. 16-20.

under Section 13 of the Clayton Act, the FTC could ask the Department of Justice to seek a restraining order in Section 7 cases. Gwynne objected to that possibility on the grounds that the Commission would lose jurisdiction to an agency which had accomplished none of the "spade work."[20]

As in previous hearings before the House, the support for amendatory legislation was drawn from government officials and small business. The opposition was generally from big business. The extractive industries strenuously objected to the pre-merger notification bill on the grounds that frequently one of its merger-acquisitions would involve undeveloped mineral properties that in their opinion could not be classified as anti-competitive. A member of the legal profession testified specifically in favor of the Senate bill which provided for the finality of FTC cease and desist orders for violation of amended Section 7 of the Clayton Act. The attorney explained that finality should be given to Clayton Act orders just as the Wheeler-Lea amendment in 1938 gave finality to orders issued under Section 5 of the Federal Trade Commission Act unless appealed before a specified date.[21]

George D. Hagedorn, National Association of Manufacturers, added to objections outlined in the previous House hearings. Hagedorn said the association supported

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[20]<u>Ibid</u>., pp. 31-74. [21]<u>Ibid</u>., pp. 134-144.

antitrust policies in general, but vigorously opposed the pre-merger notification amendment because pre-merger notification was but an extension of the police powers of the state and delays pending a decision after such a notification would likely "kill" any prospect of a merger. Hagedorn also stated that a pre-merger notification would result in the reporting of highly confidential information.

The counsel for the Subcommittee responded to the second objection by stating that the FTC was then empowered under Section 6 of the Clayton Act to obtain "intra-state transaction information," therefore the proposed bill added little to existing authority. Hagedorn did not agree and said that it was an unwarranted invasion in the business fields.[22]

Robert A. Bicks, First Assistant to the Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, testified in support of the pending legislation. Bicks said the Department's support was based on (1) enforcement effectiveness; and (2) the consideration of a basic equity and fairness to the business community. As to enforcement effectiveness, Bicks explained that a pre-merger notification would enable the Department to sue before an illegal merger had occurred provided the waiting period were at least 60 days prior

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[22] *Ibid.*, pp. 134-144.

to consummation. In regard to the fairness to the business community, Bicks related that most respondents in a suit would argue that if they had possessed knowledge a merger would be challenged, a suit could have been averted. Bicks also stated that the Department of Justice strongly supported the injunctive proposal amendment which would be beneficial to the Federal Trade Commission. Bicks was just as strong in his support of additional Section 7 legislation to make FTC cease and desist orders final unless appealed.[23]

The Senate prepared a report to accompany its version of an amendment to Section 11 of the Clayton Act that would provide for finalization of Section 7 orders, just as other orders were final under Section 5 of the Federal Trade Commission Act. The Senate said that the effectiveness of the Clayton Act had been handicapped by the absence of adequate enforcement provisions. The report explained that under the procedures then in effect, the FTC would first investigate, and after the filing of a complaint, it would have to prove on the record that a violation existed before a cease and desist order could be issued. The report continued that in order to obtain a court order commanding obedience to the previously issued order, the FTC would be compelled to make another investigation to prove that a violation had occurred

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[23] *Ibid.*, pp. 161-190.

subsequent to the issuance of the initial order. Then, according to the report, if the respondent violated that order, the FTC would have to make a third investigation and furnish evidence to the Court at which time the respondent would be subject to a penalty. The Senate said that the need for corrective legislation was imperative, and cited the case FTC v. Ruberoid (343 US 470). In that 1952 decision the Supreme Court held that a court was without authority to issue an order commanding obedience to an FTC order under the Clayton Act until the agency had established a violation of its order. The Senate report concluded that the legislation favorably acted upon by that body would eliminate triple proof, and put "teeth" into the Clayton Act.[24]

The Senate reported on March 5, 1959 that its Subcommittee on Antitrust and Monopoly had commenced a study based on the economic importance of highly concentrated industries. In the industry by industry phase, the Subcommittee had concluded that there were high levels of concentration; that there was a prevalent price leadership; that industries' prices were insensitive to changes in the market; and that concentration had an inflationary effect

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[24]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, <u>Report on Finalization of Clayton Act Orders</u>, Report No. 1808, 85th Cong., 2d Sess., July 7, 1958.

on the economy.[25]

In a review of the work accomplished in the preceding session of Congress, the Subcommittee report concluded that all legislation regarding the amendments to the Clayton Act should have been passed; however, Congress had adjourned before action was taken.[26]

In a report submitted on the same date, the Senate Committee on the Judiciary again reported favorably on the bill to give finality to FTC orders of cease and desist issued under the Clayton Act.[27] In a report submitted by the House, the Senate bill was reported on favorably and it was recommended that the bill "do pass."[28]

There were further inconsistencies in the antimerger processes as they existed between 1950 and 1960. Section 6 of the Clayton Act empowered the FTC to subpoena information needed in Section 7 cases. There was no provision for such demand for documentary evidence to be honored when requested by the Department of Justice.

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[25]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Report on Activities of the Subcommittee on Antitrust and Monopoly, 1958, Report No. 77, 88th Cong., 1st Sess., March 5, 1959.

[26]Ibid.

[27]Ibid., Report No. 83, March 5, 1959.

[28]U.S. House of Representatives, Committee of the Whole House on the State of the Union, Report on Finality of Clayton Act Orders, Report No. 580, 86th Cong., 1st Sess., June 26, 1959.

Hearings were held on legislation to correct that inequity of the law.[29] No action was taken at the time.

The foregoing inequity was reminiscent of the exchange between the FTC and a subcommittee counsel in a discussion concerning the necessity for the FTC to have injunctive powers in Section 7 cases. In that situation, it was the Department of Justice that had the authority to obtain an injunction, but had the FTC called upon that agency to effect that action, the Department of Justice would have assumed jurisdiction of the case. In a like manner, the Department of Justice could have called upon the FTC to subpoena evidence, but it too would have lost jurisdiction. Jurisdictional jealousies were quite apparent.

The House again commenced hearings on bills to amend Section 11 of the Clayton Act which would provide for a more expeditious enforcement of cease and desist orders issued by the Federal Trade Commission in Section 7 proceedings. Three House bills and one Senate bill, each with the same general provisions, were considered.[30]

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[29] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Hearings on bills to authorize the Attorney General to make demand for evidence in civil antitrust investigations, 86th Cong., 1st Sess., March 3, 1959.

[30] U.S. House of Representatives, Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, Hearings: Finality on Clayton Act Orders, 86th Cong., 1st Sess., May 27-28, 1959.

Support for the bills came generally from the same sources previously, government officials and small business executives. Opponents as in the earlier hearings were generally classified as big business, or affiliated with it in some form.

The General Counsel for the National Association of Retail Grocers in support of the amendment, presented the results of a four year study of the grocery industry. The study disclosed that 2,657 local food stores with an estimated sales volume of over $2.8 billion had been "swallowed" by chain stores. Each of the chain stores had annual sales ranging from $400 million to $1 billion. The counsel contended that the serious concentration in the grocery industry created a pyramiding effect not conducive to a stable internal development. As an example of internal stability, the counsel pointed out that farmers' markets were fewer since their choices of outlets for farm products had declined.[31]

In late 1959, hearings were held before the Joint Economic Committee. Fourteen prominent economists and the Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice were heard. The subject of the hearings concerned the effects of monopolistic and quasi-monopolistic practices on employment,

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[31] Ibid., pp. 47-83.

growth, and price levels. The Committee Chairman was Senator Paul Douglas of Illinois, also an economist of national repute; and the Vice-Chairman was Congressman Wright Patman of Texas.[32]

Howard Hines, Iowa State University economist, said that entry into many markets required large capital outlays which would automatically eliminate many small firms. He believed, however, that the results would still be competitive since firms in the market tended to over-estimate the number of potential entries and that fact alone made them behave competitively. Hines said that the public relied upon new entries to perpetuate competition; therefore, the entry of well established firms was publicly undesirable. Hines concluded that bigness and concentration are vague concepts but they are socially significant and, since the antitrust laws are historically social and political, the economic results are secondary.[33]

William H. Martin, Penn State University economist, concluded that the spread of concentration was not alarming but that complacency was not acceptable. Martin pointed out that there are many variables in the measurement of concentration but that a measurement was at least a

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[32]U.S. Congress, Joint Economic Committee, Hearings on the Effects of Monopolistic and Quasi-monopolistic Practices, 86th Cong., 1st Sess., September 1959.

[33]Ibid., pp. 1977-1999.

starting point in making a determination as to the monopolistic effects.[34]

Senator Douglas, speaking as an economist, explained to the non-economic members of the Committee that under imperfect competition which was prevalent in a monopolistic situation, common in highly concentrated industries, it was not possible to have a maximum employment of labor and capital. In such a condition Douglas explained, labor not employed in monopolistic industries or other imperfectly competitive industries would be shunted into the competitive industries. That, according to Douglas, would inevitably result in a lowering of prices and marginal productivity in those industries. During the ensuing discussion, Douglas explained that since entry is blocked from monopolistic industries, resources do not respond to demand preferences, and thusly, total social product would be reduced. The Senator said that he believed that exhaustive industry by industry research would be necessary before any answer could be given about the effects of concentration. On the basis of his discussion, Douglas asked the witnesses whether or not a vigorous antitrust policy should be pursued. The two previous witnesses, Hines and Martin, answered in the affirmative.[35]

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[34] _Ibid._, pp. 2000-2005.

[35] _Ibid._, pp. 2008-2018.

Robert A. Bicks, Antitrust Division, Department of Justice, testified that a vigorous enforcement of Section 7 in those areas with the greatest growth potential, could shape the ultimate competitive structure of those sectors. By enforcement in those areas, Bicks explained, those sectors would avoid the loss of competitive vigor through an excess of concentration. Bicks explained the manner that the Antitrust Division selected cases for Section 7 action. Briefly, according to Bicks, the legal criteria would be the volume of interstate commerce affected; legal remedies necessary; and the state of the court's interpretation of the principles of law involved. Bicks said that he also relied heavily on economic data such as market, financial, and geographic concentration information in the selection of a case for investigation. Lastly, Bicks related, there were certain administrative limitations. He explained that the previous commitments of his staff and the condition of the court's calendar together with budget considerations were all considered in case selection.[36]

Jesse W. Markham, Princeton University economist, said that it was generally agreed that prices tend to be higher and less flexible, and output lower under imperfect competition. With the higher prices, according to Markham,

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[36] _Ibid._, pp. 2018-2105.

consumption is reduced and that would call for a reduced investment with a concurrent reduction in national income. Markham explained that since monopoly prices tend toward inflexibility, they are less sensitive to consumer demand and that aggravates unemployment. Markham asserted that a monopolist felt no compulsion to innovate and that caused a lag in autonomous investment which could cause a reduced economic growth. Markham concluded that the antitrust laws had been ineffective where applied and said that Congress should re-examine the statutes and also provide a realistic budget for the enforcement agencies.[37]

John P. Miller, Yale University economist, observed that the antitrust laws served to keep the channels to trade open and that tended to channel entrepreneurial talents into competitive efforts rather than into conspiracies designed to reduce risk.[38]

Robert J. Lanzillotti, Washington State University economist, said that the inflationary tendencies of the mid-1950's were due to a higher level of concentration which had tended to perpetuate itself. He explained that the type of pricing in effect in the concentrated industries was an administered price which was set by management, usually a year in advance. The price was based upon a

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[37] Ibid., pp. 2119-2123.

[38] Ibid., pp. 2123-2154.

pre-determined rate of return on investment, and according to Lanzillotti, the prices were inflexible and disregarded any change in consumer demand. He said that his study revealed that the preset prices were higher because they were frequently based on an overliberal estimate of costs. He believed that concentration should be reduced through the antitrust laws with action being taken against price leaders. Lanzillotti proposed that some industries should be re-structured with government assistance, and that some industries could be placed in a quasi-public category.[39]

Abba P. Lerner, Michigan State University economist, supported a more active anti-monopoly program. He proposed that restrictions be removed from foreign competition and that other devices should be designed which would promote competition. In a round table discussion preceding the appearance of the next witness, Lerner commented that he believed that prices could be lower under monopoly because of increased efficiencies.[40]

Richard Ruggles, Yale University economist, explained to the Committee the normal behavior of horizontally and vertically integrated industries. In posing a question whether a given product should be produced by a single producer or many producers, Ruggles explained that the answer would depend upon the demand and cost conditions

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[39] *Ibid.*, pp. 2257-2262. [40] *Ibid.*, p. 2265.

prevalent in the particular case. Ruggles in discussing vertical integration said that under similar demand and cost conditions, a vertically integrated industry would never arrive at higher prices and lower output than an unintegrated industry. Ruggles explained that whenever plants which have a vertical relationship are not selling at their marginal costs of production, vertical integration would yield lower prices and greater output than under conditions of decentralization.[41]

J. Fred Weston, University of California at Los Angeles economist, said that he did not believe that a policy against concentration would have much effect on price behavior. Weston cited the textile industry where concentration had increased but prices had declined. He observed that given the existence of highly concentrated industries with price policies, and if there were an incipient decline in demand, it would be irrational to lower prices if price elasticity were low and income sensitivity were high.[42]

James L. Dusenberry, Harvard University economist, said that competition offered the greater incentives to invest, but conversely the larger (concentrated) firm was better able to finance research and innovation. Dusenberry observed that in a concentrated industry, when

[41] Ibid., pp. 2265-2294.

[42] Ibid., pp. 2294-2324.

demand declines, management tends to avoid price cutting, or conversely if demand increases, management tends to avoid increasing prices. According to Dusenberry, if demand increased and prices remained stable, the union would probably attempt to secure a larger share--and wage increases could be granted by concentrated industries with less fear of loss since they could pass on the additional costs through higher prices. The latter condition according to Dusenberry, was an "ally of inflation."[43] The hearings closed with similar testimony from other economists, but whether the information would result in any change in public policy was a matter for speculation.

In early 1960, the Senate reported that the House had acted favorably upon legislation which provided for the finality of Clayton Act orders. The result was that the legislation became Public Law 86-107 which was briefly discussed in a preceding chapter. The law was the first concrete result of years of recommendations made by the Federal Trade Commission. At the time, there still remained the pre-merger notification bill and the injunctive powers bill, both of which had received several years attention, but the support had been varied. The Department of Justice was deeply interested in pending legislation that would empower the agency to make subpoena demands

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[43] *Ibid.*, pp. 2324-2333.

for evidentiary information necessary in Section 7 investigations.[44]

Hearings on pre-merger notification were resumed in the next session of Congress in 1960. Four bills, all embodying a pre-merger notification in one form or another were discussed. Chairman Celler in his opening remarks emphasized the increase in industrial concentration due to mergers and acquisitions. Celler cited statistics which showed that the 150 largest manufacturing corporations controlled over half of the total manufacturing assets. The data further indicated that the 500 largest manufacturing firms also controlled about 2/3 of the nation's productive capacity; and that about one-tenth of one per cent of all corporations owned over 53 per cent of all corporate assets. Celler related that from 1951 to 1961, over 8,000 formerly independent concerns had disappeared through mergers and acquisitions, with over half of them being in the manufacturing sector. According to Celler, many of the mergers had anti-competitive effects which had mushroomed.

Celler said it was in that setting that the President had recommended changes in the anti-merger law based

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[44]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Report on Clayton Act Legislation Passed, and to Consider-Amendments to Sections 7 and 15 of the Clayton Act, 86th Cong., 2d Sess., March 15, 1960.

on FTC and Attorney General experiences in administering Section 7. The Chairman related that those changes were embodied in bills relating to pre-merger notification and injunctive powers, both of which had been discussed in previous congressional sessions.[45]

Assistant Attorney General Lee Loevinger, Antitrust Division, Department of Justice, stressed the desirability of the legislation for both his department and the FTC. Congressman William McCullough, a committee member, questioned Loevinger at length to assure himself that information furnished in a pre-merger notification would remain confidential. McCullough said that the idea of advance notification had been operational in the Securities and Exchange Commission since 1933, and quite likely the information could be made available to the antitrust enforcement agencies. Loevinger later advised the Committee that the type of information received by the Securities and Exchange Commission would not be applicable to mergers and acquisitions. He cited that of 81 memos received from that source in 1960, only 9 pertained to mergers and in each instance the Department of Justice

[45]U.S. House of Representatives, Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, <u>Hearings on Bills to Amend the Clayton Act as Amended, to Require Prior Notification of Mergers, and for Other Purposes</u>, 87th Cong., 1st Session, April-May 1961.

already had the information.[46]

FTC Chairman Paul R. Dixon, formerly counsel for the Subcommittee, presented his arguments for pre-merger notification, and for the grant of injunctive powers to the Commission. In commenting about the latter proposal, Dixon said that the FTC had been refused injunctive powers in a Section 7 proceeding in 1956. The Court of Appeals had declined to issue a restraint in FTC v. International Paper Company (Docket No. 6676). Other than some suggested changes in phraseology, Dixon's presentation was substantially the same as in previous hearings. Dixon's response to a question from the minority counsel for the Subcommittee advised that of 125 mergers-acquisitions investigated in 1960, about two-thirds had been consummated before they came to the Commission's attention.[47]

In supporting the injunctive powers bill, Dixon described the FTC as an agency composed of experts in the anti-merger field, and with that quality it could "do a better job with its knowledge of that area." The implication was apparent that Dixon believed the anti-merger experts were in better position to determine whether a restraint should be ordered than a federal court with only limited knowledge. The fear was expressed by some of the Committee members that a grant of injunctive powers to the

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[46] _Ibid._, pp. 50-84. [47] _Ibid._, pp. 84-97.

FTC would result in two protracted hearings which would be but a further delay in litigation. The Committee argued that there would be one hearing to secure a temporary injunction, and then a second to determine whether a cease and desist order should be issued. Dixon contended that the delay would be no more than if the Commission had to go to Federal Court to obtain the necessary relief. Several of the Committee were quite reluctant to repose all the powers in the FTC, and suggested that an amendment should be made to apply to the FTC, only if proper court channels were utilized. Congressman McCullough, half apologetically, said that the lengthy questioning was necessary since a majority of the Subcommittee remained to be convinced, especially on the injunctive powers portion of the bill.[48]

The United States Chamber of Commerce, an opponent of both the pre-merger notification and the injunctive portions of the bills, was represented by Richard Wagner, the president-elect and an official of the Champlin Oil and Refining Company. Statistically, Wagner pointed out that the rate of new business starts in the period 1950-1959 exceeded the rate of business discontinuances. In further support of his contention that concentration had had no significant effect on the economy in general, Wagner cited

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[48] Ibid.

a 1959 issue of the Survey of Current Business. Statistics in that issue reflected that in 1959 the number of firms that employed fewer than 100 persons had increased since 1945. On that basis Wagner deduced that concentration had actually decreased. It was further contended that if less than 3 per cent of all mergers-acquisitions required enforcement attention, then the proposed legislation was based on a fear of concentration that was groundless. Too, according to Wagner, less than one per cent of all mergers had been declared illegal. Wagner observed that Federal policy failed to take into account that mergers-acquisitions were a normal and necessary part of any competitive system, and if the proposed legislation were enacted, it would be conceivable that all mergers would be illegal. It would be ironic, Wagner pointed out, that if in their vigorous efforts to protect competition by preventing mergers, it were to stifle the very thing they were protecting.

Wagner summarized his testimony by stating that the competitive system was not endangered by excessive concentration because: (1) the rate at which new firms were being formed had increased; (2) the number of firms operating at any point in time was rising at least as fast as the working population; (3) the size distribution of firms was not being altered in the direction of more powerful aggregates; and (4) the rate at which "small" firms were being formed was increasing. Wagner concluded that if there were a forced reduction in the number of mergers there would be real danger of increased business failures and bankruptcies.[49] (Wagner based the latter on the significant number of financially insecure firms which had been acquired as a result of mergers.)

Opposition to pre-merger notification and the granting of injunctive powers to the FTC, as in previous hearings, came from the same sources, big business and some of the legal fraternity. Proponents were the same, i.e., government officials and small business.[50]

In its annual report for 1960, the majority views of the Senate Subcommittee on Antitrust and Monopoly described in glowing terms the accomplishments in the anti-merger field. The majority report was specifically focused on the hearings which resulted in proposed legislative measures. Senators Everett Dirksen and Roman Hruska submitted minority views which were quite contradictory.[51]

The minority questioned the necessity and the propriety of lengthy interrogatories which occurred in the 1960 hearings, especially those that occurred in the drug industry. It was pointed out that the FTC had covered the same ground two years earlier. The minority disputed the

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[49] Ibid., pp. 117-145. [50] Ibid., pp. 154-260.

[51] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, Report on Antitrust and Monopoly Activities, 1960, Report No. 167, 87th Cong., 1st Sess., April 14, 1961.

threat of concentration and explained that the alleged threat was based on an FTC report which could not be supported statistically. The idea of concentration, according to Dirksen and Hruska, originated in 1930 and was based largely on a book by Gardiner Means and Adolph Berle. Berle in 1954, according to the senators, repudiated his earlier ideas, and agreed that while concentration was then at its highest level in history, it was a static condition which had varied very little if at all. The minority senators also pointed out that even though concentration might be considered high in the United States, it was not as high as in Britain and Canada.

The minority did not believe that a sweeping denunciation of administered prices in concentrated industries was in keeping with the facts. They observed that statistics indicated that the Consumer Price Index had risen less than personal care items, and that the latter prices could not be construed as "administered" by a concentrated industry. The minority senators also said that the rise in the Wholesale Price Index (since 1949) had mostly occurred prior to 1952, and increases since that time had been insignificant. The senators quoted various economists (Means, Norse, and Galbraith) who had appeared in Subcommittee hearings. All had agreed that administered prices were an inevitable consequence of our industrial set up. Dirksen and Hruska concluded that the majority report was not based on all the facts. They believed that industrial concentration, administered prices, et cetera, were not nearly so significant in the economy of the country as the majority report would indicate. The two senators defended conglomerate mergers on the grounds that in the long run, the public would benefit through technologies developed which would be made applicable in other fields.[52]

In 1963, the Senate Subcommittee on Antitrust and Monopoly held hearings on administered prices during which eminent economists presented their views. Walter Adams and Robert Lanzillotti concluded that the crux of the problem was concentration and that administered prices were no more than a symptom.[53]

Jules Backman, an economist, presented a paper before the Subcommittee and advised that he had studied the price behavior of products from five industries for the period 1955-1957 and there were price increases where concentration was low as well as where it was high. Backman asserted that there had been no statistical evidence to prove that a high concentration ratio was responsible for inflationary price increases, or that oligopolistic companies maintained prices without regard to

[52] _Ibid._, pp. 43-76.

[53] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, _Administered Prices: A Compendium on Public Policy_, 88th Cong., 1st Session, 1963, pp. 5-16.

economic forces. Backman referred to studies which had been made by Economists Ruggles, Richard Selden, and Horace dePadwin, each of whose studies covered years up to 1959, and each reached the same conclusion as Backman. Backman concluded that it would be ill advised to enact legislation to correct an alleged abuse on so tenuous a foundation.[54]

Irston R. Barnes, Columbia University political economist, said that there were several conditions conducive to administered pricing in concentrated industries. Some were: (1) fewness of competitors; (2) disparate size; (3) price leadership; (4) product characteristics; and (5) increasing rigidities of costs. Barnes contended that unwanted consequences would be: (1) inflation since the prices would not be truly competitive; (2) excesses of non-price competition; (3) loss of compulsion to cut costs; and (4) wage responses to non-competitive administered prices. Barnes proposed an industry by industry approach to the restoration of more effective competition. He believed strongly that a strict application of Section 7 would have the effect of shifting concentration.[55]

John M. Clark, Professor Emeritus, Columbia University, said that there was a prevalent underlying misconception that American public policy was unequivocally devoted to promoting and maintaining competition. Clark

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[54] *Ibid.*, pp. 25-43.

[55] *Ibid.*, pp. 44-85.

cited three exceptions: (1) farm support program; (2) public utilities; and (3) antitrust exemption of unions in their bargaining. Clark observed that unused capacity had often been regarded as a consequence or symptom of monopolistic control because of a restriction of output. But according to Clark, if a firm is driving to increase sales, it must have that "unused" capacity to care for the hoped for increase in volume.[56]

Joel B. Dirlam, Michigan State University economist, presented a paper entitled "The Celler-Kefauver Act: A Review of Enforcement Policy." Dirlam pointed out that due to theoretical limitations, Stigler, Kaysen, Turner, and Bok had all proposed that mergers be declared illegal if the market share exceeded a certain percentage. Dirlam favored a related approach but instead of arbitrary percentages, he initially suggested that reliance be placed on structural tests.[57] In commenting on the administration of Section 7, Dirlam said that enforcement had not dampened the merger trend; that large companies had been more active in making acquisitions; and that had resulted in the enforcement agencies allocating most of their scarce resources to proceeding against the large firms. Dirlam was critical of the haphazard manner of case selection by both agencies. He suggested that cases with more economic connotation be channeled to the FTC; and the cases with

[56] _Ibid._, pp. 86-96. [57] _Ibid._, pp. 99-104.

more legal complications be channeled to the Department of Justice.[58]

Dirlam surveyed the handling accorded a number of cases by the FTC between 1952 and 1962. It appeared, according to Dirlam, that from the complaints some courts had difficulty in distinguishing between Sherman Act standards and a mere lessening of competition. In carrying his discussion through the 1963 Philadelphia Bank decision (to be discussed later), Dirlam concluded that there had been little to show that either the courts or the FTC had been close to making a merger a per se violation.[59]

According to Dirlam, data concerning economic consequences of a merger were very limited, especially as it related to economies of scale and efficiencies. Census data on the distribution of employees, and value of shipments, and size of firm were of limited value according to Dirlam since it confined itself to four digit industries. In commenting upon economic consequences of a merger, Dirlam observed that the failure to approve the Bethlehem merger in 1956 did not dampen the investment of either firm; and neither was there any indication that interest costs would have risen in the Philadelphia Bank case.[60]

Dirlam questioned the economics of a divestiture,

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[58]Ibid., pp. 107-110. [59]Ibid., pp. 110-121.

[60]Ibid., p. 122.

especially where a firm had been fully integrated. That feature according to Dirlam, emphasized the advantage of a pre-merger notification as well as the advantage of empowering the FTC with injunctive authority. He also observed that both the courts and the FTC had recently been properly putting major emphasis on the acquisitions effect on market structure as measured by rank of the absorbing firm, relative size, market share, and importance of the absorbed firm. Nevertheless Dirlam concluded that if Congress desired further statutory revisions aimed at concentration, it would have to break sharply with Sherman Act policy and specify the percentage or absolute limits that existing concentration would be tolerated.[61]

Horace Gray, University of Illinois economist, said that the objectives of antitrust must be supported by a vigorous attack upon all public policies that would tend to promote monopoly. Gray suggested that foreign trade barriers be removed as a means to promote competition along with the removal of subsidies, and a plugging of the tax loophole.[62]

Earl Kintner, former Chairman of the Federal Trade Commission, commented upon administered prices in an oligopolistic and/or monopolistic market. If there were collusion in such pricing, Kintner said the laws in

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[61] _Ibid._, pp. 130-131. [62] _Ibid._, pp. 140-151.

existence would be effective. He continued, however, that there was no certainty as to the extent of such a pricing system, or whether such a system even existed. On that basis, Kintner said that the enactment of legislation that would limit or regulate industry pricing policies would be unwise.[63]

Gardiner Means, Vienna, Virginia economist, who brought the idea of administered prices before the public in the early 1930's maintained that such pricing policies were still in conflict with the public interest. Means explained that administered prices were based on a target rate of return for capital, with all operational and production costs considered. Means contended that if the predetermined rate cannot be met, then growth would be slowed or a new innovation could be delayed. The target rate of return as pointed out by Means would prevent a proper allocation of resources since an industry would naturally emphasize a sector of its production where the return would harmonize with the target. Means argued that the use of administered prices in monopolistic and oligopolistic industries would distort the distribution of income since there would be higher rates of return than from competitive endeavors. Means proposed a complex system which he termed "Economic Performance Act" which was based on a restructuring of the tax system. The "act" would establish a

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[63] Ibid., pp. 175-181.

new legal category which would include only those industries whose pricing power was vested with public interest. Means contended that the provision for a legalized tax shelter could result in a voluntary breakup of concentrated industries as each would strive to become eligible.[64]

George Stigler, University of Chicago economist, criticized Means' theory of administered prices. Stigler described the fallacies in the Bureau of Labor statistics which were relied upon by Means to provide concentration ratios for industry. Stigler said that the wholesale price index as an example, contained about 1900 prices, but that over 500 of those prices had been obtained from only 1 or 2 sellers. Stigler contended that if administered prices are prices taken from only one or two sellers, rather than from a number of buyers, it would be very flimsy evidence to classify prices as either administered, or market determined.[65]

On January 14, 1964, Senator Philip A. Hart, Chairman of the Subcommittee, addressed a letter to Senator James O. Eastland, Chairman of the Committee on the Judiciary. Hart pointed out that as a result of the compendium, it had stressed, among other areas, that informed opinion seriously questioned the effectiveness of antitrust laws that were 50 and 74 years old. A reassessment of those

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[64] Ibid., pp. 213-239. [65] Ibid., pp. 275-276.

laws was suggested. Hart also emphasized the importance of the problem of concentration of economic power which could reach a point where the market place was no longer competitive.[66]

Later in 1964, the Senate commenced detailed hearings on the problems attendant to economic concentration with emphasis on the overall and conglomerate aspects. Testimony was taken from 10 economists, seven from outside the government. Senator Hart opened the hearings by stating that the economic system was threatened by an ever increasing rate of industrial concentration.[67]

Senator Hruska, the ranking minority member of the committee, characterized concentration as a phantom danger that could not be supported by fact. He interpreted the statistics as reflecting a decrease rather than an increase. Hruska explained that generally the term "concentration ratio" was defined as the share of output in a particular market accounted for by the four largest firms. Then, according to Hruska, if the four firms accounted for 40 per cent of the entire output, the concentration ratio

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[66]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Report on Investigation of Antitrust and Monopoly, Report No. 845, 88th Cong., 2d Sess., Jan. 30, 1964.

[67]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Hearings on Economic Concentration: Overall and Conglomerate Aspects, 88th Cong., 2d Sess., July and September 1964, pp. 1-2.

would be 40 per cent whether figured in sales or employment of assets. Hruska said that his set of statistics showed the number of firms with concentration ratios exceeding 75 per cent had decreased from 40 in 1947 to 34 in 1958. Further, that those with ratios in excess of 50 per cent were fairly stable but actually decreased from 114 in 1947 to 113 in 1958. Hruska also asserted that the share of industry shipments had decreased. He referred to his records which reflected that for the period 1954-1958, shipments of 210 industries had decreased and 182 showed increases. Of the decreases, Hruska said that 84 of the 210 showed declines of over 5 per cent. On the other hand, only 60 of the 182 whose shipments had increased, showed increases over 5 per cent. The Senator concluded that measurements of concentration by employment instead of value of shipments, showed about the same relationship.[68]

Gardiner Means testified that the body of economic theory which had once provided a reasoned basis for public policy was no longer applicable. It was designed for small scale enterprise according to Means, at least to the extent that the policies rested upon the assumption of a price-wage flexibility that was no longer in existence. Means contradicted the statistics presented by Senator Hruska, and claimed that the statistics actually reflected

[68] *Ibid.*, pp. 2-8.

an increase in the concentration of net assets. Means considered that area to be a most significant measure since it was concentration of assets that contributed to economic power. Means argued that where there was a large body of administered price and wage rates, the automatic corrective mechanism of supply and demand was not and could not be operable. Means also said that the federal authorities presently employed monetary and fiscal tools to maintain aggregate demand and full employment. With that policy in effect, Means doubted that there would ever be a return to a policy that relied on short run changes in the price-wage level to maintain equilibrium. Means contended that the policy change in the application of economics was the first indication that concentration would be a subject in the consideration of public policy.[69]

The second implication that concentration should be a subject for economic policy making had occurred in the 1950's when, according to Means, there had been inflation without an excess of demand. Means argued that the concentration in industry had generated a power on the part of labor which if arbitrarily used, could have pushed up wage rates faster than any increase in productivity could have justified. Thus, Means contended, there were

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[69] Ibid., pp. 16-22.

justifiable price increases even though there had been no increase in demand. Means classified that type of inflation as "administrative inflation" which resulted from the concentration of market power in the hands of labor--and conversely, the same situation would be applicable to management's policy of administrative pricing.[70]

In an exchange between Means and Senator Hruska, Means agreed with the senator that a certain amount of concentration was necessary. Means agreed that the existent high standard of living was due largely to big business. In regard to the senator's hypothesis that possibly big business should be broken into smaller parts, Means responded that he did not think such an approach would solve the problem. He explained that the crux of the matter was whether there was enough competition in a four firm dominated industry to give the consumer anything that resembled a classical competitive price. Means concluded that an arbitrary break up of big business would have to be at the cost of giving up efficiencies. It would actually mean, according to Means, of returning to "making sheets in the home and pegging shoes in the back room as Senator Hruska had previously mentioned."[71]

Corwin Edwards, former Chief Economist, FTC, testified that the wave of conglomerate mergers was his

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[70]Ibid., pp. 22-23. [71]Ibid., pp. 26-36.

primary concern. He believed that the antitrust laws should be applicable to all types of mergers, or to the concentration of economic power. The aspects of conglomerate mergers as explained by Edwards were subsidization, reciprocity, full line selling, and ability to sustain initial losses in a new market. In an exchange with Senator Hruska, Edwards explained that when one looked at a conglomerate, if there were a reasonable probability that competition would be lessened, the merger should be prevented.[72]

John Blair, Chief Economist for the Subcommittee, observed that concentration ratios for the nation as a whole were not entirely satisfactory because the ratios for individual industries would show a substantial difference. (Blair was refuting the statistics referred to by Senator Hruska which reflected a decrease in industrial concentration from 1901 to 1947, and a lesser decrease after 1947.) Blair said that he had used a "value added" approach in arriving at his concentration ratios, which was different than the methodology of Dr. Means; however, the results were about the same, i.e., an increase in concentration in certain markets.[73]

Willard F. Mueller, Bureau of Economics, Federal Trade Commission, said that his concentration ratios compared very favorably with those of Blair and Means. In a

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[72]Ibid., pp. 36-56. [73]Ibid., pp. 95-97.

discussion after his testimony, Mueller agreed that about 84 per cent of asset growth attributed to the 200 largest corporations had been due to internal growth, and not mergers.[74]

J. Fred Weston testified that there were many sides to the "concentration ratio" controversy with different interpretations and different yard sticks used, which tended to leave the issue beclouded. Weston strongly opposed the protection of inefficient industries as a means of policy. He pointed out that large firms should grow faster than their smaller counterparts since they were financially able to procure the best talent available. Weston recommended an elimination of all tariffs which would expose all industries of both high and low concentration to the rigors of world competition which would permit a survival of the fittest.[75]

Erwin Stelzer, President, National Research Association, New York, in discussing diversification by way of conglomerate mergers concluded that there was a danger that the conglomerate would progress far outside the range of the Clayton Act. The concentration of economic control, according to Stelzer, could result in a control of decision making processes which could be inconsistent with the broad social objectives of antitrust.[76]

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[74] *Ibid.*, pp. 112-138. [75] *Ibid.*, pp. 138-146.

[76] *Ibid.*, pp. 181-200.

Senator Hruska had a statement inserted in the records of the Subcommittee. It was pointed out that the greatest concentration of economic control was in the federal government. Hruska cited that revenues of the government in 1940 had been less than corporate profits, but in 1963 the corporate profits of $27 billion totaled but one-third the government revenue.[77]

M. E. Adelman, Massachusetts Institute of Technology economist, said that the concentration figures cited by Mueller, i.e., 84 per cent of corporate growth was due to internal expansion, did not give the whole picture. Adelman said that those figures did not take into account that some acquisitions were made by cash purchases. Adelman believed that internal growth was responsible for nearer 90 per cent of the expansion (concentration). The economist for the minority pointed out that Adelman had departed from the central theme--danger in concentration. Adelman replied that over the "long pull" concentration had not increased noticeably.[78]

Additional Senate hearings on economic concentration were conducted in the following session of Congress.[79] Senator Hruska took issue with Senator Hart, the

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[77]Ibid., pp. 221-222. [78]Ibid., p. 246.

[79]U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Hearings, Hearings: Mergers and other Factors Affecting Industry Concentration, 89th Cong., 1st Sess., March-April 1965.

Subcommittee Chairman, on Hart's continued usage of the phrase that "our economy is becoming increasingly concentrated." Hart had claimed that overall concentration had increased since 1947. Hruska contended that the term "overall concentration" was a term without meaning in the application of the antitrust laws, except as it could be applied in a specific industry or market. Hruska also argued that in the use of the year 1947 as a base year, possibly some increase in concentration could be shown, but the year 1947 was a very "low year" for mergers. To show an increase in concentration of any significant nature, according to Hruska, the proponents of that thesis had to be quite selective in the years to be compared. The Senator suggested that the year 1931 be used as an acceptable base year, since that was the first year that the Internal Revenue Service started to publish corporate balance sheets by asset size classes. In support of his view that there had been no significant trend toward concentration, Hruska said that if the year 1931 were used as a base year, and then compare it with 1960, there was no discernible trend, actually a slight decrease.[80]

Willard F. Mueller testified that the rate of merger activity appeared to be closely associated with business cycles which had been borne out by a study of merger activity since the 1920's. Mueller described the declines

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[80] _Ibid._, p. 505.

in mergers during depressed periods, and a rapid rise during boom periods. Mueller observed that there had been a sharp decline in the number of horizontal mergers between 1948 and 1964, and the decline was possibly due to anti-merger enforcement activities. By the same token, Mueller's records reflected a corresponding increase in the number of product extension, or conglomerate mergers in the same period. In the exchange which followed Mueller's testimony, Senator Hiram Fong, a Subcommittee member, elicited Mueller's admission that the FTC had been unable to measure the precise effect of mergers on industrial performance. Subcommittee Attorney Cohen observed that despite "recent sympathetic court treatments" in Section 7 cases, there had been no lessening of the merger trend. Mueller stated that possibly there had been some restriction of concentration as a result of FTC activities, notably in the dairy industry where a number of complaints had been filed. Minority Attorney Chumbris cited the oil and steel industries, both heavily concentrated, in which sharp competition continued to exist.[81]

Carl Kaysen, Harvard University economist, made the distinction between overall concentration and concentration in particular industries. The first concept, according to Kaysen, is the one most easily understood and therefore had a wider appeal. The second concept concerns

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[81] _Ibid._, pp. 505-533.

a statistic such as that in "M" industries in manufacturing, the largest four produce 50 per cent of total value of output. That is the concept, according to Kaysen, with which enforcement agencies have had to concern themselves. He explained that the agencies would then attempt to show the extent to which the degree of concentration would function in a more or less competitive manner. Briefly, according to Kaysen, one could state that concentration measures in particular markets would merely serve as an indicator where significantly non-competitive markets could exist. "It would be the dominant firm in a particular market to which economic power could be imputed." Kaysen concluded that recent Supreme Court decisions in horizontal merger cases had moved toward establishing a presumption of illegality when the acquiring-acquired firms had market shares of 20 per cent or more. Kaysen said such a rule would be economically defensible, in properly defined markets, and in the absence of substantial economies of scale not achievable by any other means.[82]

Jules Backman asserted that price competition had been particularly vigorous in many concentrated industries such as chemicals, aluminum products, and electrical equipment. Backman said that concentration ratios in these industries meant very little, and he claimed that the power

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[82] Ibid., pp. 533-554.

claimed for any "big four" was exaggerated. Backman also argued that in the industries which he mentioned, oligopolistic theory would not be applicable. In support of that statement, Backman said that there had been no concerted reactions of competitors to the actions of another. Backman claimed that entry of new competitors had not been barred, and there was a growing reluctance of firms to follow arbitrary price increases announced by a competitor. Backman cited 42 instances of price increases announced by a recognized price leader between 1961-1965 which had not been followed. Backman contended that a price leader would announce an increase because of increased costs, possibly created by inflationary pressures, and would merely act as a barometer for other firms as to when the increase should be announced. It would be only then, according to Backman, that a price leader would have its followers. Backman agreed with Weston in proposing that all trade barriers should be removed which could permit overall competition to increase (despite concentration) rather than diminish.[83]

One of the last witnesses called in the hearings was William H. Orrick, Jr., Antitrust Division, Department of Justice. Orrick observed that Section 7 as then constituted was adequate to deal with the problem of merger created concentration in particular markets where one or

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[83] Ibid., pp. 561-579.

the other of the merging firms happened to be a major factor in the market.[84]

After a four month pause, the hearings on economic concentration reconvened. John M. Blair, Subcommittee Economist, presented the majority views on "Concentration and Efficiency."[85]

Blair prefaced his testimony with the remark that for the majority of concentrated industries, the efficiency rationale would have to rest on multi-plant economies. Blair referred to a 1954 study completed by Professor Joe Bain which covered economies of scale and conditions of entry in 20 manufacturing industries. In that study, Blair stated that the conclusions were that overall, there was insufficient support for either the thesis that production or distribution economies seriously encouraged concentration or discouraged entry. Blair said that a cloud had been further cast over existence of multi-plant economies when one looked at the absence of rising profit rates along with increasing size of the plant. Actually, according to Blair, when one looked at the so-called multi-plant operation, it would be observed that frequently firms of lesser size earned a higher rate of return.

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[84] Ibid., pp. 809-830.

[85] U.S. Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Hearings on Economic Concentration: Concentration and Efficiency, 89th Cong., 1st Sess., Aug-Sept 1965.

After a lengthy presentation of economies of scale versus diseconomies of scale, Senator Hruska interrupted the discourse to remark that he failed to see the legislative relevance to all the testimony which had been given. Hruska questioned Blair as follows:

> I should like to ask your ideas as what relevance the type of testimony you gave here today has, conjectural as it is, indefinite as it is, suppositional as it is, predicated upon many assumptions, and those assumptions predicated on certain other assumptions. Could you enlighten me a little in that direction?[86]

Blair responded that the type of the discussion happened to be in the program for the year. Hruska wanted to know "but what can we get hold of and say this is it." Blair said the subject was so complex that it did not lend itself to any finally determining test, but that he believed the information was sufficient to form a basis for the generalizations that he had given. Blair tended to accept Bain's conclusion that concentration had not been significantly identified with economies of scale or conditions of entry and concluded that:

> . . . with the continued rise in the merger movement, and with law journals filled with articles speculating on the conflict between competition and economies of scale, the dilemma has become a matter of growing concern. Since presumably no one is opposed to progress, the public policy of promoting competition may have to give way to the realities of modern science and technology.[87]

During the hearings there was quite an amount of discussion about large corporations being able to use

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[86] *Ibid.*, p. 1557. [87] *Ibid.*, pp. 1555-1571.

computers as an economy not available to the smaller operator. Two witnesses testified as to the availability and growing use of computer services that were then being utilized by smaller businesses.[88]

Joel Dean, Columbia University economist, described six economic fallacies which had served to perpetuate the traditional prejudices against big business. The fallacies, according to Dean, are: (1) Competition is declining and is an untrustworthy control device. Dean contended that it was competition that produced cost saving usually as a result of technology or the development of radically different substitutes. (2) Competition becomes cut-throat unless curbed by government. Dean said that competition, if it was to be efficient in serving the consumer, must injure an individual competitor and even kill some. (3) Profits are at the expense of the consumer. Dean contended that the consumer really pays less because losses that are not "book kept" are not deducted from the profits. Profits paid for the use of equity capital are not deducted since accounting views equity capital as a free good. (4) Advertising makes the consumer captive and is an economic waste. Dean said that advertising enables a customer to pre-shop which economizes his leisure--if that meant anything. (5) The best way to care for the incompetent is to make competition soft. Dean observed that most

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[88] *Ibid.*, pp. 1575-1603.

of our anti-trust legislation is directed toward care of the incompetent but questioned that such a policy could slow down economic growth. (6) Job security for the individual is best attained by slowing down economic progress. Dean contended that no road block should be placed in the path for an individual's short run benefit. He should be re-educated to take advantage of technological progress. Dean concluded that after 25 years as a college professor and an economic consultant, by far the toughest competition occurred where the number of firms were the fewest.[89]

Senator Hart closed the hearings upon a note of optimism and said that he believed the Subcommittee hearings had accomplished the purpose of clarifying "economic concentration." Senator Hruska disagreed and termed the hearings little more than a "symposium of abstract economic inquiries into areas quite remote from any conceivable legislative purpose."[90]

During the conduct of the congressional hearings over the approximate 1955-1965 period, the House published a report on mergers and concentrations for the period 1952-1962. Some of the more significant observations in the report were: (1) Total number of businesses increased at a rate of 1.5 per cent per annum but the Gross National Product had increased at a rate of 3.1 per cent per annum. (2) Acquisitions tended to be viable businesses or a

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[89]*Ibid.*, pp. 1687-1691. [90]*Ibid.*, pp. 1714-1715.

valued asset to the acquiring firm. (3) New entrants were usually small, marginal firms with the chances of survival not good. Most discontinued businesses were in that category. (4) Percentages of value added by the 200 largest manufacturing firms decreased one percentage point from a 1954 peak of 37 per cent. The share of the 50 largest remained at 23 per cent. (5) Mere numbers of acquisitions challenged or cases concluded were not indicative of the effectiveness of antitrust enforcement. Many were undoubtedly deterred by a threat of action. (6) Most merger prone industry during the period was the dairy industry. The mergers adversely affected small business. Paper and chemical industries were the next most merger prone.[91] By the use of statistics which related to the number of acquisitions in each industry during the period 1951-1961, it was concluded that there was a trend toward superconcentration.[92]

The thinking on the efficacies of anti-merger activities or a need for additional legislation to supplement Section 7 of the Clayton Act was diverse to say the least. The proponents advanced their arguments directed toward a more effective enforcement policy. The opposition,

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[91] U.S. House of Representatives, Report on Mergers and Superconcentration, Staff Report, Select Committee on Small Business, 87th Cong., 2d Sess., Nov. 8, 1962.

[92] Ibid., pp. 39-45.

for the most part, tended to minimize the concern over an alleged phantom danger called concentration.

Comments on the anti-merger subject however were not confined to congressional hearings. Some of the more significant pronouncements on the subject will be examined in a later chapter.

During the congressional hearings concerning merger policy as it was or was not intended in amended Section 7, the two enforcement agencies were annually defending their budget requests.* The views brought out in the appropriations hearings will be discussed in the next chapter.

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*The budget defenses offer an insight into problems of securing additional funds from a Congress that has never been convinced whether there should be more or less enforcement.

CHAPTER IV

APPROPRIATIONS FOR ANTI-MONOPOLY ENFORCEMENT, 1955-1965

Federal Trade Commission Appropriations

Money appropriated for the FTC increased steadily from 1956 to 1966. The appropriation in 1956 was $4,262,500, and by 1965 that figure had been increased to $12,875,000.[1] Appropriations were increased rather gradually, averaging about $.5 million yearly from 1956 through 1961. During that period total personnel increased from 639 to 838. The gradual increases were based on an expanding work load, and the announced acceleration of investigations and trials of anti-monopoly matters. Only in 1957 was there specific mention made that an increase of funds was necessary to provide an expanded anti-merger program. In that year, an increase of $1.3 million was appropriated which was the only year during that 1956-1961

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[1]U.S. The Budget, Independent Offices Appropriations, 1956-1966. Though the budget is set up on a fiscal year basis, July 1 through June 30, references are made as if they are calendar years, except as otherwise noted. Amounts reflect the actual appropriations, not necessarily the amount in the budget request for any year.

period when more than a $1 million increase was provided.[2]

President Eisenhower in his last budget message to Congress in 1961, recommended that additional funds be appropriated to finance a 40 per cent staff increase for the regulatory agencies. The recommendation was based on the "increased complexity of the problems involved." The President recommended that the antitrust laws be strengthened, which he had also recommended in his message the preceding year. The appropriations for the Federal Trade Commission in fiscal year 1962 were increased nearly $3 million to a total of $10.3 million.[3]

Funds for the following year were increased nearly $1 million based primarily on the receipt of 56 cases for investigation from the Attorney General. Under Section 6c of the Federal Trade Commission Act, the FTC was charged with determining whether there had been a compliance with court decrees issued in antitrust cases. In this instance, the period of the request spanned 20 years.[4]

The appropriations for the next two years were increased about $1 million annually, and an additional $.6 million was added for fiscal year 1966 (July 1, 1965-June 30, 1966). The lesser amount was due primarily to a reduction in the funds needed to complete the balance of the Attorney General investigations which had taken nearly

[2] _Ibid._, 1956-1962.

[3] _Ibid._, 1961-1962.

[4] _Ibid._, 1964.

three years to complete. The appropriation increases for the period 1962-1965 reflect a steady increase in the Commission's earmarked funds for the investigation and litigation of cases in the anti-monopoly field. Funds alloted in that particular area increased from $3.9 million in 1962 to $6.5 million in 1965. The primary supporting data included in the respective budgets to justify its increased appropriations was to "expedite trial and litigation of anti-monopoly and deceptive practices cases," and "to expand 'our' industry guidance program." There was no specific mention made of any expansion in the anti-merger program as had been done in 1957. Funds alloted to the "expanded industry guidance program" amounted to less than 10 per cent of the requested increases in the anti-monopoly area and accounted for only 1 to 2 per cent of the total appropriations for the years 1962-1965. Industry guidance funds appropriated during the periods were in the $100-$200 thousand range each year.[5]

In each of the budgets submitted by the Federal Trade Commission for fiscal years 1956-1966, funds actually appropriated were invariably less than requested, and with one exception, substantially less. The thoughts of the Congress resulting in steady increases, though much less than the requests, will be examined.

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[5] *Ibid.*, 1962-1966.

Independent Offices Appropriations, Hearings before the Subcommittee of the Committee on Appropriations, 1955-1966

Table 1 contains data which reflects the amounts requested by the Federal Trade Commission, and the amounts actually appropriated for the agency's yearly activities. The appropriations for the 10 year period range from $75,000 less than requested in 1958 to $2.1 million less than requested in 1961. Even though an average does obscure variations, the average annual amount trimmed from requests for the 10 year period amounted to about $1.2 million.

A feature which is interesting but probably not too significant concerns the periods 1956-1960 and 1961-1965. The earlier period was during an alleged pro-business administration, and the economy was undergoing some recessionary pains. Appropriations during that period were about $.75 million less per year than the Commission requested. By contrast, the period 1961-1965 was dominated by an alleged anti-business administration and the economy was on a rebound from the recession of the late 1950's, yet the appropriations averaged about $1.5 million per year less than the Commission requested.

Yet in both periods, the Commission received appropriations in excess of the previous year, ranging from 25 thousand to $2.8 million. During the 1956-1960 period, annual increases averaged $.34 million, and in the

TABLE I

APPROPRIATIONS, FEDERAL TRADE COMMISSION, 1956-1966*

Year	Amount Requested	Amount Appropriated	Less than Amount Requested	Increase over Preceding Year
1956	$ 5,500,000	$ 4,262,500	$1,237,500	$ 217,500
1957	6,250,000	5,550,000	700,000	287,500
1958	6,025,000	5,950,000	75,000	400,000
1959	6,975,000	5,975,000	1,000,000	25,000
1960	7,600,000	6,840,000	760,000	865,000
1961	9,640,000	7,507,500	2,132,500	667,500
1962	11,845,000	10,345,000	1,500,000	2,837,500
1963	13,028,000	11,282,500	1,745,000	937,500
1964	13,270,000	12,214,750	1,055,250	932,250
1965	13,776,000	12,875,000	901,000	660,250

*U.S. The Budget, Independent Offices Appropriations, 1956-1966.

1961-1965 period, the annual increases were about $1.2 million. The most significant increase occurred in 1961. In reviewing the hearings, it is indicated that the increase was due to President Eisenhower's influence as expressed in his budget message to Congress.

The Chairman of the House Subcommittee of the Committee on Appropriations was Congressman Albert Thomas, a Texas Democrat, and by and large, the committee members remained about the same during the 10 year period of this discussion. The bi-partisan Federal Trade Commission had a Republican Chairman from 1956 to early 1961.[6] Conservatism was not apparent in the Commission's annual requests for increased appropriations, so it is apparent that party affiliations had no significant part in the overall makeup of budgets for the years in question. See Table 1.

In each of the hearings during the 10 year span, the Chairman of the FTC would first describe the need for additional funds based on an expanding work load.

In 1956, John Gwynne, Chairman, pointed out an increasing number of mergers and acquisitions, and additional funds were needed to employ more people in the anti-merger field. Congressman Thomas was quite critical of the 2 1/2 to 3 year time lag in the Commission's cases

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[6] U.S. House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, Independent Office Appropriations, 89th Cong., 1st Sess., 1965, p. 402.

then in process of litigation. The Executive Director of the FTC assured the Subcommittee that the "situation was improving." Congressman Yates (R.-Ill.) expressed curiosity as to the area in which the Bureau of the Budget had cut the FTC request for funds. Gwynne responded that the reduction had been in the anti-merger area, but that he could operate very well with the reduction. Even though the Budget Bureau had cut the original request, the amount suggested was still in excess over appropriations the preceding year. Thomas wanted to know exactly where FTC proposed to use the additional funds, if appropriated. Gwynne said that they would be used in the anti-merger area.[7] Table 1 will reflect the increase over the preceding year that was actually appropriated.

Hearings during the following session (1957) produced little of particular note from either the FTC or the congressional members of the Subcommittee. The Commission did point out that the increased appropriation requested was, in part, due to a pay raise recently enacted by Congress.[8]

Hearings in the following year (1958) produced substantial criticism. In his examination of the work load statistics presented by FTC Chairman Gwynne, Congressman Thomas emphasized that too much of the Commission's

[7]Ibid., 84th Cong., 2d Sess., 1956.

[8]Ibid., 85th Cong., 1st Sess., 1957.

resources had been allocated to inconsequentials with a notable lack of Section 7 proceedings. Congressman Evins (D-Tenn.) stressed that the Commission had issued only nine Section 7 complaints the preceding year, yet its appropriations had been increased more than $1 million over the preceding year. Evins was adamant in his observations to Chairman Gwynne that more emphasis should be given to anti-merger work. Evins supported that view when he pointed out that the major portions of the Commission's budgets had been allocated to the field of "false advertising," with more important anti-merger work having been relegated to a secondary position. During the exchange of views between the FTC and the committee, it was revealed that the appropriations for the Antitrust Division of the Department of Justice were roughly comparable to those allocated to the FTC for the same work (discussed later). Some brief attention was given to the FTC recommendations to Congress that a pre-merger notification proposal should be enacted into law; that a law should be enacted authorizing the finality of FTC Clayton Act orders; and that a law should be enacted which would authorize the FTC to seek preliminary injunctions.[9]

In hearings conducted in the first session of Congress (1960), the Commission asked for additional funds

[9] Ibid., 85th Cong., 2d Sess., 1958.

to meet an increasing work load due to an expanding economy; and to administer new laws enacted by Congress (Packers and Stockyards Act, Wool Act, and Fibers and Textile Act). Congressman Boland (R-Mass.) remarked that despite annual increases in appropriations, the Commission had been remiss in its allotments to anti-merger work; yet had substantially increased its personnel. Congressman Jonas (D-NC.) raised a question about the FTC and the Department of Justice possibly duplicating efforts in the anti-monopoly field. The Commission Chairman assured the Committee that such was not the case because of excellent liaison.[10]

The Commission in defending its budget before the second session of Congress (1960), based an increased appropriation request as usual, on an increased work load plus the initiation of a 3 year program to build up its staff. The Commission pointed out that since the "payola scandal" (rigged TV give away shows) that it had commenced to receive about 1,000 complaints monthly (primarily false advertising and deceptive practices). The Commission said that its work in deceptive practices far exceeded anti-monopoly work. It was explained that the cases were easier to handle, were less time consuming, and were normally settled by a consent order. Congressmen Thomas and Evins were critical of the time devoted to "penny ante" affairs, and stressed that time and money should have been devoted

[10] _Ibid_., 86th Cong., 1st Sess., 1960.

to the larger things such as price fixing and mergers. The FTC assured the committee that historically 60 per cent of the budget had been devoted to anti-monopoly work, but the results were slower due to the complexities. Thomas questioned the necessity of annual budget increases and pointed out that questionable competition would normally be expected to occur in times of stress. But, he continued, 'times' had been reasonably good for several years, yet the FTC, year by year, invariably pointed out that the work was increasing. Congressmen Yates and Jonas were concerned with the lengthy FTC litigations in the "few cases they had filed." Yates remarked that each year the previous Chairman (Gwynne had been succeeded by Earl Kintner) would state that FTC operations would continue on whatever appropriations were granted, yet the work backlog had continued to increase. Chairman Kintner stated that he could reduce the backlog if the increased funds were appropriated. Evins expressed his continued and repeated concern over the FTC's devotion to "penny ante" problems--and he hoped that funds were not being diverted from anti-monopoly work. Thomas observed that the Department of Justice could possibly handle all litigated cases; however Kintner replied that such work in the FTC was handled in its office of the General Counsel, and "no increase was requested in that area." Jonas pointed out that the federal courts completed their cases much sooner than the FTC, and it had occurred to him that possibly the FTC Hearing Examiners had been too lenient with the respondents.[11]

In hearings the following year (1961), the Commission again stressed its increased work load in support of its annual request for additional funds. According to the Commission, the recently enacted legislation which would make Clayton Act orders final (PL 86-107) would generate more work due to more extended pre-merger conferences. The Commission also pointed out that the budget request would also cover increased funds for a 'stepped up anti-merger program.' Congressman Thomas remarked that of the personnel increase of some 208 people that had been requested, all appeared to have been programmed as 'chiefs.' Thomas also expressed his concern with the work back log of the Hearing Examiners. The Commission Chairman explained that new procedures had been adopted whereby the examiner would no longer be charged with the handling of consent order cases, about 70 per cent of the load, since it had been transferred to another division within the Commission. Thomas again emphasized that the FTC appeared to continue "chasing the rabbit and letting the fox escape." (Reference to the lack of positive results in the anti-merger area.) The Commission countered by

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[11] *Ibid.*, 86th Cong., 2d Sess., 1960.

stating that excellent results had been obtained in its drug industry inquiries since the consumer had been saved about $16 million yearly due to a decline in drug prices of about 15 per cent. (Combined anti-monopoly Section 2, Clayton Act and unfair practices, Section 5, FTC Act proceedings.)[12]

The Commission described a new problem area that had arisen and the problem would require a later supplemental appropriation. It was explained that under Section 6c of the Federal Trade Commission Act, the FTC was charged with the responsibility of assuring that court decrees in antitrust cases had been complied with. The Commission explained that the Department of Justice had requested a number of cases (56) be investigated, and that the Commission had no alternative but to fulfill the request. It was explained that the law then in existence did not permit the Department of Justice to obtain the desired information, but that Civil Investigative Demand legislation, then being considered by the Congress, would correct the situation. Congressmen Evins and Thomas observed that if Section 6 of the FTC Act had been in effect for 50 years, why would it "just now be invoked." It was implied that it was a new antitrust policy initiated by the new (Kennedy) administration. Evins questioned

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[12] *Ibid.*, 87th Cong., 1st Sess., 1961.

the propriety of the new Commissioner (Paul R. Dixon succeeded Kintner in March 1961) in increasing his predecessor's estimate nearly $3 million. Dixon replied, "We need it to get the job done."[13]

The House Subcommittee reduced the Commission's request by some $700,000, and the Commission appeared before the Senate Appropriations Committee with a request for restoration of the cut. The Senate questioned FTC Chairman Dixon as to the consequences if the cut were allowed to stand. Dixon responded that it would force him to eliminate 54 people from regular programs, and 22 from those assigned to the "Attorney General" program. In an effort to arrive at the individual attorney's work accomplishments, Dixon stated that one attorney could handle about 12 deceptive practices cases per year as opposed to about 3 or less in the anti-monopoly field. The Senate restored one-half the cut.[14]

The House hearings the following session (1962) were in the same vein. The FTC again requested a substantial increase in funds. Congressman Thomas in particular was critical in his remarks to FTC Chairman Dixon. Thomas contended that the written presentation prepared by the Commission reflected that Dixon had not filled all the

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[13] Ibid.

[14] U.S. Senate, Subcommittee of the Committee on Appropriations, Hearings, Independent Offices Appropriations, 87th Cong., 1st Sess., 1961.

approximately 70 additional positions programmed in the preceding year's budget. Thomas speculated as to what use had been made of the approximately $2.5 million increase that had eventually been granted because the FTC had not substantially reduced the work back log. Thomas questioned the usefulness of Dixon's "reorganization" announced by the FTC the preceding year since the work load situation had not been bettered. Dixon said that the Attorney General investigations had consumed more time than was originally thought, even though 35-40 attorneys had been assigned to that project. Dixon explained that the reason that the 70 additional attorneys had not been hired was due to a shortage of physical space. Dixon maintained that he needed the additional funds "to get the job done."[15]

The requested appropriations were again cut sharply by the House. The Commission again appealed to the Senate Committee on Appropriations. Dixon pointed out that the FTC could not operate its new division of Advisory Opinions, which had been created as a result of urgings by Congress that the Commission "develop new programs to protect the consumer." No new programs could be initiated on the funds appropriated by the House according to Dixon, and the House cuts amounted to the loss of about 150 people. The Committee questioned Dixon about the appropriations, some

[15] U.S. House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, Independent Offices Appropriations, 87th Cong., 2d Sess., 1962.

of which appeared to be allocated toward "doing the Attorney General's job." Dixon explained the provisions of Section 6c of the Federal Trade Commission Act. The Senate restored about half of the House cut in appropriations.[16]

In the budget presentation the following year (1963), Dixon explained his agency's renewed emphasis on industry guidance in anti-monopoly matters, and a faster handling of complaints; but admitted the FTC still had a 2 year backlog of work. In his plea for additional funds, Dixon maintained that the industry guidance-advisory opinion programs had been highly successful, but that neither could be operated without additional funds. Dixon described a new study that was then being initiated. He explained that the FTC would collect financial and product information from 1,000 manufacturing-mining firms for use in the agency's anti-merger program. Congressman Thomas questioned the propriety of such a project; however Dixon read Section 6c of the FTC Act which authorized such a procedure. Congressman Rhodes (R-Ariz.) remarked that the questionnaire to be utilized in that project was oppressive, and an unwarranted invasion of private property. Thomas described the annual increases in FTC personnel over a several year period; but the anti-monopoly case

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[16]U.S. Senate, Subcommittee on Appropriations, Hearings, Independent Offices Appropriations, 87th Cong., 2d Sess., 1962.

load had not been reduced to where it had been over four years ago. Thomas also remarked that over $1 million had been spent in a 2 year period on the Attorney General cases, yet the initial assignment of the 56 cases had not been completed at that time. Evins critically remarked to Dixon that if the 70 attorneys previously alloted to the Attorney General work had been utilized, the work would have been completed, instead of only half done. Jonas pointed out that the Hearing Examiner case load had not been reduced as Dixon had announced. Dixon responded to Jonas, that the case load reflected "old work" still under the old procedure, which had progressed too far for him to feasibly reassign cases to a new division. Dixon maintained that the new reassignment procedure would begin to show its effects in a short time.[17]

Commission Chairman Dixon presented his annual request for an increased appropriation the following year (1964). He explained that while the increase amounted to nearly $1 million, about three-fourths was due to a pay increase which had been enacted by Congress. The Subcommittee vigorously attacked the propriety of the business questionnaire (mentioned in the hearings of the preceding year). Dixon responded by again quoting from Section 6c

[17]U.S. House of Representatives, Subcommittee of the Committee on Appropriations, Hearings, Independent Offices Appropriations, 88th Cong., 1st Sess., 1963.

of the FTC Act. Dixon again emphasized FTC's increased emphasis on industry guidance, and deceptive advertising--both very favorably received by the business community and the public.[18]

In the following year (1965) Chairman Dixon presented the FTC budget with the announcement that it reflected a long overdue emphasis by the Commission to obtain compliance with the trade laws. Congressman Thomas remarked to Dixon that "you have been flirting with that concept for 8 or 9 years, and there is no reason to think it will work at this time." Dixon explained that he was taking positive action, and not just giving lip service to the concept. Dixon emphasized that the new procedures he had initiated were becoming effective since the Commission was beginning to have fewer complaints and fewer orders to cease and desist. (Reference was made to the renewed emphasis on industry guidance and advisory opinions previously mentioned by Dixon in other hearings.)[19]

Congressman Evins questioned Dixon about the status of the 56 Attorney General cases which had been received two or three years before. Dixon reported that 55 had been completed, and the last was then in the process of being closed. Dixon added that about 12 of the 56 indicated

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[18] Ibid., 88th Cong., 2d Sess., 1964.

[19] Ibid., 89th Cong., 1st Sess., 1965.

violations of previously issued court decrees.[20]

Congressman Jonas queried Dixon as to why the FTC had been able to loan three Hearing Examiners to the National Labor Relations Board despite an increased work load. (Described in the FTC written presentation.) Dixon said that the budget had already been prepared, and it had been too late to "turn the positions back."[21]

Congressman Evins remarked that a news report reflected that mergers and acquisitions had continued to increase, but he had noted no particular step up in the Commission's activities. Dixon said that he was unable to further emphasize anti-merger work with the existing staff of attorneys. Evins described a recently publicized merger of two tire companies in which the news article had stated that 200 tire manufacturers had existed in 1920, but only 12 were manufacturing tires at that time (1965). That type of situation, according to Evins, was of increasing concern to the Subcommittee, and such instances should have the increased attention of the anti-merger agencies. Dixon said that the Commission had issued six Section 7 complaints, and had issued six Section 7 orders to cease and desist in 1964. Evins again evinced his concern over the possibility of a duplication of effort in the anti-merger area by the FTC and the Department of Justice.

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[20] <u>Ibid</u>.

[21] <u>Ibid</u>.

Dixon explained that "if we see something, we notify them, and if they don't object within 24 hours, we proceed." If there were to be an objection, Dixon explained, the agencies would then agree as which had the expertise, then the selected agency would proceed. Dixon did say that if during an FTC investigation, evidence of a criminal violation were developed, the case would then be transferred to the Department of Justice for grand jury action.[22]

The Commission has obtained an increase of funds yearly, but not without thorough and penetrating questioning by congressional members of appropriations committees. The House Subcommittee members in particular have not been convinced that the Federal Trade Commission has always operated in consonance with the laws or within the framework of good management principles. During the 10 year period examined, the principal areas of criticism and concern were: (1) Length of litigations; (2) Too much time devoted to work other than anti-merger; and (3) Failure to reduce the backlog of work despite annual increases in personnel and funds. (The number of personnel increased progressively from 639 in 1956 to 1175 in 1965.)[23]

Criticism of the Commission was not confined to minority members of the committees; on the contrary, the Democratic Chairman of the House Subcommittee on Appropriations was the most persistent of all members in the

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[22]*Ibid.* [23]*Ibid.*

penetrating questioning. In perusing the hearings in detail, it was not surprising that the appropriations were always less than requested. First, there is a strong implication that at least congressional members of various committees were not convinced that the FTC was accomplishing its mission. And second, it has been traditional for government budgets to reflect a request for more funds than were actually needed. That fact was brought out in two of the hearings during the period 1956-1965.

The appropriations to the FTC compared to those granted the Department of Justice are interesting.

Antitrust Division, Department of Justice, Appropriations

The most significant fact appearing in Table 2 is that Congress appropriated the amount requested by the Department of Justice in each year except 1957. Even in that year, the amount appropriated was nearly one-half million more than in the preceding year. By contrast, the FTC appropriations were substantially reduced each year from the amount requested. A possible explanation could be that the Department of Justice has traditionally been in the public favor, primarily because of the well publicized Federal Bureau of Investigation. With public favoritism, there would be an obvious reluctance to reduce any request made by the Department.

Chairman Dixon of the FTC testified during an

TABLE 2

APPROPRIATIONS, ANTITRUST DIVISION DEPARTMENT OF JUSTICE, 1956-1965*

Year	Amount Requested	Amount Appropriated	Less than Amount Requested	Increase over Preceding Year
1956	$3,100,000	$3,100,000	$ ----	$ ----
1957	4,265,000	3,568,650	696,350	468,650
1958	3,785,000	3,785,000	same	116,350
1959	3,800,000	3,800,000	same	15,000
1960	4,500,000	4,500,000	same	1,300,000
1961	4,760,000	4,760,000	same	260,000
1962	5,873,000	5,873,000	same	1,113,000
1963	6,218,000	6,218,000	same	345,000
1964	6,600,000	6,600,000	same	382,000
1965	6,854,000	6,854,000	same	254,000

*U.S. The Budget (Department of Justice Appropriation), Fiscal Years 1956-1966. The foregoing table compiled in same manner as FTC appropriations in Table 1.

appropriations hearing that his agency traditionally alloted 60 per cent of its total funds to anti-monopoly work. Even though anti-monopoly work as characterized by the FTC covers enforcement of sections other than Section 7 of the Clayton Act, 60 per cent of the annual FTC appropriations would closely approximate Justice's funds.

If the same 60 per cent criteria is used in regard to personnel, the same close approximation will result. Personnel assigned to anti-monopoly work in the FTC would have increased from 383 in 1956 to 705 in 1965. Personnel in the Antitrust Division of the Justice Department increased from 451 in 1956 to 614 in 1965.[24]

A comparison of the number of Section 7 proceedings initiated by each agency will be discussed in other parts of this writing. However for the period being emphasized, i.e., 1956-1965, the total number of actions have been about equal despite annual variations.

In light of the foregoing observations, the enforcement of Section 7 during the period 1956-1960 will be discussed in the next chapter.

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[24] The Budget (Fiscal Years 1956-1966).

CHAPTER V

EFFECTS OF AMENDED SECTION 7, CLAYTON ACT ON MERGERS AND ACQUISITIONS, 1956-1960

Mund says that the very small impact of amended Section 7 on mergers during the first five years was the result in part by the apathetic attitude taken by the anti-trust agencies. He says it was not until the second five year period, after years of prodding by congressional committees that the agencies decided to step up their enforcement activities.[1] In support of Mund's contention, there were 18 enforcement agency complaints in 1956, nearly twice the number initiated in the preceding five year period. A total of 69 complaints were filed in the period 1956-1960, or over six times the number initiated in the preceding five year period.[2]

It was additionally pointed out by Mund that:

> The number of merger complaints filed by the anti-trust agencies touches only a very small percentage of the actual mergers--only about one per cent of the mergers and acquisitions actually being consummated. In selecting the cases filed, the antitrust agencies are influenced by complaints received on particular mergers, by their judgment of the public

[1] Mund, p. 157. [2] Bock, No. 99, p. 3.

interest involved, by the impact of the merger on concentration, by the available staff and funds, and in some instances by the personal opinions and ambitions of the persons charged with enforcement of the law.

In studying the cases brought, it is difficult to understand why some cases have been brought and some actual mergers not attacked. The facts are that the antitrust agencies do not scrutinize all acquisitions in terms of their probable impact on competition. Rather their method is the hit-or-miss method of reading newspapers and trade periodicals. Upon learning that certain mergers have been effected, they select some for prosecution, depending upon the factors mentioned above. The remedy for this haphazard procedure is the adoption of a pre-merger notification law requiring that all acquisitions of a certain size must first be cleared with the Department of Justice and the Federal Trade Commission.[3]

In the 1956-1960 period, the Federal Trade Commission recorded about 3,900 mergers in the mining-manufacturing segment of the economy.[4] It has been mentioned that about 2,400 mergers occurred in the same segment in the 1951-1955 period. The annual average increased from about 480 in the earlier period to about 790 in the latter. This comparison would further support a statement made in Chapter II that amended Section 7 had had no effect on the merger trend.

Mention has been made that less than 1 per cent of the merger activity is challenged by the antitrust agencies. Records of the Federal Trade Commission reflect

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[3]Mund, p. 157.

[4]Federal Trade Commission, Annual Report, Fiscal Year 1966, p. 39.

that about 650 mergers-acquisitions occurred in calendar year 1956,[5] and in its 1956 Annual Report, the agency showed that 65 inquiries had been conducted, but only 12 were of the Section 7 type investigations.[6] Challenges to mergers-acquisitions for that isolated year will exceed the "less than 1 percent" but over the years, that figure will hold reasonably well. For the period 1956-1960 it is nearer to 2 per cent.

In Chapter II several reasons were given to explain the apparent lack of initiative by the Federal Trade Commission in challenging mergers and acquisitions that could have been proscribed by Section 7. An examination of each reason would add little at this late date, but to further pursue those obvious shortcomings, the personnel staffing of the FTC might bear a closer scrutiny.

The Federal Trade Commission has jurisdiction over all alleged violations of Sections 2, 3, 7 and 8 of the Clayton Act. Notable exceptions are violations committed by businesses which are under the jurisdiction of other regulatory agencies such as the Federal Communications Commission, the Civil Aeronautics Board, et al. In addition the Federal Trade Commission has jurisdiction over alleged violations of the unfair practices portion of Section 5 of the Federal Trade Commission Act.

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[5] *Ibid.*, Extrapolation from Chart 1, p. 39.

[6] Bock, pp. 232-243.

In 1956, the Bureau of Investigation of the Federal Trade Commission, conducted all the investigations of alleged violations of the statutes administered by the Commission. During that fiscal year, the Bureau of Investigations was assigned the full responsibility for examining all reported corporate mergers and acquisitions, and to identify those which would appear to have economic significance. The latter would be subjected to a more complete investigation by the legal staff to determine whether there could be a contravention of Section 7 of the Clayton Act.[7] The personnel strength of the Bureau of Investigations in 1956 was 3 investigative supervisors and 9 investigators.[8] Thus 9 investigators had to review the approximately 650 mergers and acquisitions in that year. In addition to preparing the initial listing for review, the one division had other duties connected with other sections of the Clayton and Federal Trade Commission Acts. Because of inadequate staffing only a cursory examination of a corporate merger or acquisition could be made. Mund said it would be quite probable that unless a per se violation or some other significant feature were noted, some violations could have been passed over.

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[7]Federal Trade Commission, Annual Report, 1956, pp. 20-22.

[8]Appendix: The Budget of the United States Government for the Fiscal Year ending June 30, 1958 (Washington: U.S. Government Printing Office, 1957), p. 36.

After the investigative division had prepared an initial information sheet on a probable violation, legal investigative work would then have been conducted under guidance of a chief project attorney out of a staff of 28 project attorneys. The initial information sheet could be assigned to any attorney on the staff, who after consultation with economists, statisticians, and other experts in the antitrust area, would make a decision as to whether the merger or acquisition would likely have adverse effects as proscribed by the statute. If it were decided that there would be proscribed effects, a more time consuming investigation would be conducted in which both economic and marketing research would be employed.[9] Sixty-five complete investigations were undertaken in 1956 despite a shortage of personnel.

It must be recognized that all of the 65 inquiries did not involve Section 7 violations even though 12 such complaints were filed. Some of the inquiries made by the legal staff were based on information sheets from the investigative division relating to specific violations of other applicable antimonopoly sections of the Clayton Act. In fact of the 42 cases filed, 30 were complaints of violations of sections other than Section 7.[10]

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[9]Federal Trade Commission, Annual Report, 1956, pp. 20-22.

[10]*Ibid.*, p. 29.

That being the case, the Federal Trade Commission did a commendable job in the 1954-1956 period with the personnel available. Management principles would dictate that the 28 man legal staff would have included at least five supervisors.[11] The effective number of attorneys available for investigations and litigation would have been further reduced when earned annual and sick leave for those Civil Service employees is considered--probably a loss of three to four men annually or the full time use of about 19 attorneys who made 65 complete investigations, and filed 42 complaints of which 12 were the very complex Section 7 type cases. Necessary appearances in court and at hearings would have further reduced their time for legal investigations. In retrospect, it is no mystery as to why more new complaint type cases were not filed.

Analysis of Section 7 Type Cases Filed by the Federal Trade Commission, 1956-1960

An examination of the 37 Section 7 type cases filed by the Federal Trade Commission in the second five year period after enactment of the Celler-Kefauver amendment, shows more of an industry wide approach to violations as opposed to the isolated or random approach "emphasized" in the first five year period. For example, of the 37

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[11]Michael J. Jucius, Personnel Management, rev. ed. (Homewood, Ill.: Richard D. Irwin, Inc., 1953); and course in Personnel Management, USAF, Tinker AFB, Oklahoma, 1946.

cases filed, 4 were in the dairy industry; and 4 were filed in the paper (pulp-timber-paper products) industry.[12]

Another feature of significance is a change from a total dissolution policy which characterized the earlier five year period. The Commission made a more frequent use of the consent decree which was used freely by the Department of Justice in their 1951-1955 cases. For example, 17 of the 37 cases were settled by consent decrees ranging from partial to total divestiture. Of the remaining 20 cases, 5 were dismissed by the Commission; 6 were either pending in the Commission, or the Courts; and 9 were either appealed to the Commission, or to the Courts, where initial orders of divestiture were upheld.[13]

Two of the above cases reached the Supreme Court and each resulted in a decision favorable to the Commission. They will be discussed since each of the decisions have furnished definitive guide lines for future action.

On December 18, 1957, the Commission filed a complaint against Consolidated Foods Corporation of Chicago, Illinois, one of the nation's larger integrated processors and distributors of a broad line of food products. The complaint alleged that the acquisition of Gentry, Incorporated, a Los Angeles, California, manufacturer and distributor of onion and garlic dehydrated seasoning, in

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[12] Bock, Mergers and Markets, No. 93, pp. 231-243.

[13] Ibid.

April 1951 caused a lessening of horizontal competition; and secondly, because of Consolidated's buying power, it was in a position to coerce its suppliers to purchase from Gentry. The complaint further cited that net sales of Consolidated increased from $174 million in 1951 to over $268 million in 1956; and that assets of the Gentry Division of Consolidated had increased from $60 million to $99 million in the same period. It was further stated that Gentry had been in a position of dominance in a small, four firm industry, and its sales had increased from about $2.6 million to over $5 million in the same period of time, or the position which Consolidated then occupied.[14]

The Hearing Examiner recommended an order of divestiture on December 29, 1961. He explained his order by saying that there was no question but that the line of commerce was dried food seasoning. The acquisition was designated a conglomerate which implied the absence of pre-merger competition or supply relationships between the acquiring and the acquired. Although the record showed that Gentry had supplied some of the Consolidated affiliates, there was insufficient evidence to designate the merger as vertical. The examiner however emphasized that Section 7 of the Clayton Act as amended applied to conglomerate mergers as well as horizontal and vertical; and

[14] Federal Trade Commission Decisions, In the Matter of Consolidated Foods Corp., v. 62, Docket No. 7000, pp. 929-931.

the evidence was clear that the conglomerate had lessened competition. The examiner also said the evidence indicated Consolidated had placed pressure upon its suppliers to purchase from Gentry, or that reciprocal dealings were practiced. He added that the joining of Consolidated by Gentry had placed Consolidated in a better overall competitive position to the detriment of competition. The examiner concluded that overall, the acquisition of Gentry by Consolidated had the effect of substantially lessening competition as proscribed by Section 7.[15]

During the litigation in the Consolidated case, a significant legislative change was made which would give finality to Federal Trade Commission orders. Public Law 86-107, enacted on July 23, 1959, was an amendment to Section 11 of the Clayton Act. The intent was to provide a more expeditious enforcement of the cease and desist orders issued under that section. Briefly it stated that if no petition for review had been filed with the Commission within the allotted time of 60 days, the initial order would become final. If a petition were filed, the court would have jurisdiction.[16]

Consolidated Foods did appeal the initial examiner's finding, and on November 15, 1962, an order of divestiture

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[15] Ibid., pp. 931-945.

[16] U.S. Statutes at Large, v. 73, 86th Cong., 1st Sess., 1960, pp. 243-245.

accompanied by a modified order was issued by the Commission. The resultant final order was then issued on March 22, 1963. The opinion in the final order contained several interesting points, all in agreement with, and supporting the initial findings. After considering both the affirmative and negative arguments concerning reciprocity, the Commission ruled that the acquisition did permit reciprocal powers in violation of Section 5 of the Federal Trade Commission Act (unfair practices), but the case had been filed only as a violation of Section 7, as amended, of the Clayton Act. In rationalizing the situation it was brought out that a cease and desist order would eliminate an overt reliance on reciprocity by Consolidated, but it would do nothing to eliminate the anti-competitive effect inherent in the corporate structure created by the merger. Therefore the question resolved itself into whether the anti-competitive effects of a merger in which reciprocity had attained a foothold were sufficient to constitute a violation of amended Section 7. In ruling affirmatively, the Commission brought out several points which are summarized:

(1) In both the onion and garlic product line about one-fourth of the market stood to be influenced by the possibility that Consolidated would withdraw patronage unless Gentry were patronized.

(2) The area of prospective foreclosure was great,

and potential foreclosures always weigh strongly in testing the lawfulness.

(3) Historically, the respondent had been active in a trend toward concentration. In an industry where two firms had 85 per cent of the market there was no room for a trend.

(4) It was desirable to prevent a trend toward further oligopoly in the onion-garlic seasoning market.

It was therefore concluded that the merger-acquisition had conferred upon Consolidated, the power to foreclose a major share of the market for dehydrated onion and garlic seasoning. And with that ability, the competitive opportunities of its small, relatively undiversified competitors had been jeopardized, thereby "tending to lend further rigidity to an already heavily concentrated industry . . . without producing any countervailing competitive, economic or social advantages."[17]

Another segment of anti-merger law had been pronounced--that the possibilities for reciprocal dealing in a conglomerate setting would, under certain circumstances, possibly tend to lessen competition which was proscribed by amended Section 7 of the Clayton Act.

Consolidated appealed the Commission's decision to the Court of Appeals. In setting aside the Commission's order, the Court said that the Commission failed to

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[17]Ibid., pp. 946-968.

consider post-acquisition evidence. That evidence, according to the Court, reflected that the onion-garlic producer's share increased only 7 per cent over a 10 year period in an onion market that had been described as "burgeoning." The share of the garlic market had declined 12 per cent during that period. The Court concluded that the Commission mistakenly rejected what the record demonstrated as to the past in favor of a future possibility based on conjecture and speculation. The order setting aside the Commission's decision was dated March 24, 1964.[18]

The Federal Trade Commission appealed to the United States Supreme Court. That body reversed the Court of Appeals in a 1965 decision and some of the reasoning is interesting:

> The mixed threat and lure of reciprocal buying is one of the anti-competitive practices at which the anti-trust laws are aimed, and an acquisition which makes reciprocity in trading possible, violates Section 7 of the Clayton Act . . . if the possibility of a lessening of competition is shown . . . however not all acquisitions, no matter how small, violate Section 7 just because there is a possibility of reciprocity. . . .
>
> An FTC ruling that the acquisition violated Section 7 since it put the wholesaler and retailer in a position to exercise reciprocal power . . . was supported by evidence that reciprocity was tried over and over again and it sometimes worked . . . and despite an inferior product and a rapidly expanding market, it was able to increase its share of the onion market by 7 per cent and held its losses in garlic to 12 per cent.

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[18] Trade Cases, 1964, par. 71,054.

> Post acquisition evidence should be considered but it should not override all probabilities since the force of Section 7 is still on probabilities, not in what later transpires.
>
> Post acquisition conduct may violate Section 7 even though there is no evidence to establish probability at the time of the merger, but a limitation on the weight to be given such evidence is necessary since, once the two companies have united, no one knows what the fate of the acquired company would have been but for the merger.
>
> No group acquiring a company with reciprocal buying opportunities is entitled to a "free trial." To do such would distort the scheme of Section 7.[19]

A case of a little different nature which not only involved the term "conglomerate merger" but a new term, "product extension," is also considered a landmark case in the annals of the Federal Trade Commission, since it too, resulted in a favorable Supreme Court ruling. The Procter and Gamble Company, the nation's leading producer of household cleansing agents, acquired the Clorox Co., the nation's leading producer of household bleach, on August 1, 1957. On September 30, 1957, the Commission filed a complaint against Procter and Gamble alleging that the acquisition "may" substantially lessen competition or tend to a monopoly in the household liquid bleach industry.[20]

Briefly the complaint alleged that:

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[19] Trade Cases, 1965, par. 71,432 (85 US 1220).

[20] Trade Regulation Reporter, Transfer Binder, Federal Trade Commission Complaints, Orders, Stipulations, 1957-1959, In the Matter of Procter and Gamble Co., FTC Docket 6901, par. 26,737.

At the time of the acquisition, Procter and Gamble was one of the 50 largest industries with sales in excess of $ one billion annually.

At the time of the acquisition, liquid bleach was basically a small firm industry.

At the time of the acquisition, Clorox' sales were 50 per cent of the national market with Purex, the chief competitor accounting for only 15 per cent.

At the time of the acquisition, there was a crucial fight for store shelf space and Procter and Gamble could obtain advantages not available to a single unit producer.

Despite Clorox' growth in the industry, it had always been competitive, and substitution of Procter and Gamble for Clorox would lead to further rigidities in an oligopolistic market which could eliminate the remaining competition.

The entry of one of the largest firms into a relatively small market could inhibit entry. The public being more accustomed to Procter's brands would probably prefer it over others.

Procter and Gamble would be in a position to strengthen its aggregate market position such as using Clorox products as a loss leader in promoting its other products.[21]

During the hearing, the Commission described the merger as a "product extension." Household cleaning agents produced and marketed by Procter and Gamble, particularly their packaged detergents, were used along with Clorox' liquid household bleach. Since both were related in the consumer's mind, the term "product extension" was coined. The two products were also related by the manner of marketing, which was usually through grocery stores and accompanied by mass advertising. Because of this

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[21] *Ibid.*

relationship there were significant possibilities for marketing and distribution integration.[22] An initial recommendation of divestiture accompanied by a consent decree was furnished the Commission by the Hearing Examiner on June 30, 1960.[23] The Commission ruled that the evidence was not sufficient to render an informed decision and remanded the case to hearing examiner for additional evidence. A second recommendation of the same magnitude was made by the Hearing Examiner on June 11, 1962. On July 11, 1962, in the midst of a new appeal to the Commission, a question was brought up as to whether all evidence should be considered, or just that part developed in the subsequent re-hearing. On November 30, 1962, the Commission ruled that in the public interest all should be heard.[24] During the travesty of errors and indecision, Procter and Gamble-Clorox continued to operate as one firm.

In the 1963 re-hearing it was ruled that post-acquisition data should not have been accepted unless it indicated that the market share had dwindled to insignificance. In rejecting the argument of "efficiencies" or economies of scale, the Commission said that the only

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[22] Ibid., 1963-1965, par. 16,673.

[23] Federal Trade Commission Decisions, FTC Docket 6901, v. 56, July 1, 1959 to June 30, 1960, pp. 1623-1626.

[24] Trade Regulation Reporter, Transfer Binder, Federal Trade Commission Complaints, Orders, Deputations, 1963-1965, par. 16,673.

economy was a saving in the cost of sales promotion which did not contribute a social benefit. The Commission issued its final order of divestiture on December 15, 1963 with only a slight modification of the divestiture order recommended in the second instance by the hearing examiner.[25]

Over seven years had elapsed since the initial complaint but the Commission's order was appealed and the Circuit Court of Appeals vacated the order of the Commission in 1966.[26]

The Federal Trade Commission appealed to the Supreme Court and on April 11, 1967 that body reversed and remanded the case to the Circuit Court of Appeals with instructions to affirm and enforce Federal Trade Commission order in Docket No. 6901. The Court said:

> A product-extension acquisition of the nation's leading manufacturer of household bleach, nearly 50 per cent of the industry, by a large ($1 billion sales) diversified manufacturer of low cost, high turnover household products sold through grocery, drug, and department stores violated the Clayton Act since it had the following anticompetitive effects: the substitution of the powerful acquiring firm for the smaller but already dominant firm may substantially reduce the competitive structure of the household bleach industry by raising entry barriers and by dissuading small firms from aggressively competing; and second, the acquisition eliminates the potential competition of the acquiring firm.[27]

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[25] Ibid.

[26] Trade Cases, 1966, par. 71,713.

[27] Trade Cases, 1967, par. 72,061 (386 US 568, 87 SCt 1244).

The Court further reasoned that the liquid bleach industry was oligopolistic before the acquisition and it was probable that the acquirer would become a price leader causing the oligopoly to become more rigid. The Court also said that Procter with its much larger advertising budget and its ability to divert funds to meet short term competitive threats would discourage new entrants. In concluding the Court explained that Procter had been the most likely entrant into the liquid bleach market, and that its existence on the fringe of the bleach industry had exerted considerable influence on the market.[28]

The Consolidated Foods and the Procter cases are representative of the complexities involved in the application of the Celler-Kefauver amendment to Section 7 of the Clayton Act.

Even though the Federal Trade Commission has the primary responsibility for enforcing Section 7, the Department of Justice has concurrent authority under Section 15 of the Clayton Act. The Justice Department has one weapon with which the Federal Trade Commission does not possess. The Department has the authority under Section 15 of the Clayton Act to request a District Court to enjoin merger negotiations pending presentation of evidence to the Court. The efforts of the Federal Trade Commission to

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[28] Ibid.

secure injunctive authority comparable to the Justice Department will be discussed later.

Section 7 Cases Filed by the Department of Justice, 1956-1960

A total of 32 Section 7 complaints were filed in 1956-1960 by the Justice Department, and of these 15 were settled by consent decrees, while six cases were dismissed in district court proceedings, and 3 are pending in 1968. Nine cases were decided in favor of the government, and 7 of these 9 reached the Supreme Court.[29] Two of the latter will be discussed; however, one case not brought under the Celler-Kefauver amendment will be mentioned as background.

In a case brought against duPont in 1949, the Department of Justice charged the company with violations of Section 1 and 2 of the Sherman Act in acquiring 23 per cent of the shares of General Motors (US v. E. I. duPont de Nemours, et al., 353 US 586). The primary issue was whether through ownership of the shares, duPont had secured control of General Motors and whether it had used that control to insure a protected market for its automobile finishes, and other products. Even though the lower court found that no such control existed, the Supreme Court reversed the decision in 1957 and unexpectedly relied on Section 7 of the Clayton Act as it existed prior to 1950.

[29] Bock, pp. 230-243.

That reliance was based on the reasonable probability that the acquisition of the stock would likely result in the proscribed restraints. The Court also narrowed the product line to be considered as the "relevant market" in a Section 7 case. The Court held that automobile finishes and fabrics had enough peculiar characteristics to make them a line of commerce within the meaning of the Clayton Act. The Court also ruled that the legality of the stock acquisition would be tested "at a time whenever the reasonable likelihood appeared that the acquisition will result in a restraint, or the creation of a monopoly on any kind of commerce."[30] The latter concept meant that Section 7 of the Clayton Act could be used against previously accomplished mergers, even back to 1914, as well as against current mergers.

In 1956, the Department of Justice brought its first major case under the Celler-Kefauver amendment to Section 7 (US v. Bethlehem Steel Corp.). The Bethlehem Steel Corporation had entered into an agreement with the Youngstown Sheet and Tube Company under which Bethlehem would acquire all the assets of Youngstown. At the time, Bethlehem was the second largest steel producer in the nation and Youngstown the sixth. The government sought to enjoin the proposed merger as a violation of Section 7,

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[30] Trade Cases, 1957, par. 68,723 (353 US 586).

but the Court denied the request. The ruling was based upon the size of the industry and the effect an injunction could have had on the economy as a whole. The presiding judge also reasoned in his January 13, 1958 denial that pre-trial conferences would hasten a decision in a trial to commence on April 7, 1958.[31]

On November 20, 1958, the District Court held that the proposed merger would violate Section 7. The opinion stated that there would be a reasonable probability that the merger would substantially lessen competition; and the proposed merger would eliminate Youngstown as a substantial buyer of certain steel products from other suppliers.

The defendant first argued that the merger would permit a more vigorous competition with the largest steel producer. The Court answered by asserting that if a merger offended the statute in any relevant market, good motives or even demonstrable effects would be irrelevant, and no defense. The lower court also stated that the merger presented an incipient threat that could provoke a chain reaction of mergers among the other 12 major steel producers. Second, the defendant argued that a broad definition of the relevant market should be accepted as in the duPont-Cellophane case[32]--which would tend to show that

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[31] Trade Cases, 1958, par. 68,914 (157 Fed Supp 877).

[32] Trade Cases, 1956, par. 68,369 (351 US 377). The court broadened the definition of product, or "line of commerce" by separating cellophane from other wrapping material.

the total market for steel products would not be adversely effected. The Court rejected that contention when it indicated its preference for the narrower definition of "line of commerce," or product as set forth in the duPont-General Motors case. The Court also ruled that the "section of the country" phrase in Section 7, or the geographic market in this particular case would be nationwide. The "section of the country," according to the Court, would also include that section of the northeastern United States where Youngstown primarily operated. The Court explained that under the Clayton Act the government's burden was met if it established a reasonable probability that competition would be substantially lessened. The opinion also said that a requirement of certainty and actuality of injury to competition would be incompatible with Section 7's purpose of supplementing the Sherman Act by reaching incipient restraints.[33]

On October 16, 1958, the Department of Justice filed a complaint in which it alleged that the Maryland and Virginia Milk Producers Association, an agricultural cooperative, had violated both the Sherman and Clayton Acts. This case was the first test of the exemptions to antitrust as spelled out in Section 6 of the Clayton Act. The complaint alleged that the agricultural cooperative had:

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[33]<u>Trade Cases</u>, 1958, par. 69,189 (168 Fed Supp 576).

Attempted to monopolize interstate trading in the supply of milk in the District of Columbia and areas of Maryland and Virginia in violation of Section 2 of the Sherman Act.

Created a combination which had conspired to eliminate competition in the metropolitan Washington area by making and carrying out a contract for the transfer of substantially all of the assets of Embassy Dairy, a retail outlet in Washington, in violation of Section 3 of the Sherman Act.

On July 26, 1954 purchased and acquired substantially all the assets of Embassy, and that the effects had been to substantially lessen competition or to tend to create a monopoly in the production and sale of milk in the Washington metropolitan area; and on December 6, 1957 had purchased and acquired all the outstanding stock of Richfield Dairy Corporation and Simpson Brothers, Inc., both acquisitions being in violation of Section 7 of the Clayton Act.[34]

The agricultural cooperative pleaded an exemption from antitrust actions under Section 6 of the Clayton Act which placed it under the jurisdiction of the Secretary of Agriculture. The Court did not accept that plea. The Court ruled that when a firm subject to one of those agencies listed in Section 6 transgressed and conspired with persons who were not in the agricultural pursuits, its actions were subject to both the Sherman and Clayton Acts. The Court explained that under the permissive portion of Section 6 as it pertained to agricultural cooperatives--the Capper-Volstead Act--the cooperative could monopolize food production and restrain commerce to the detriment of the public. On that basis, the Court dismissed the charge

[34]Trade Cases, 1958, par. 69,161 (167 Fed Supp 45).

of monopoly as specified in Section 2 of the Sherman Act. The case was then tried on the conspiracy charge, Section 3 of the Sherman Act, and Section 7 of the Clayton Act.[35]

The government argued that the acquisition of Embassy, a "cut rate" dairy concern, by the cooperative was primarily for economic gain. The cooperative acquired Embassy's nearly $1 million government market. The government's case was that (1) the acquisition eliminated a "cut rate" competitor; (2) the acquisition diminished competition since it eliminated a significant competitor; (3) it reduced competition for the government market; and (4) the acquisition increased concentration of the milk market in the Washington metropolitan area. The defendant contended that it did not achieve complete control of the market since a few strong independents remained in competition; that prices had not risen; and that the cooperative should be exempted from prosecution under Section 7 of the Clayton Act. The Court did not accept the defense argument, and ordered a dissolution on November 21, 1958.[36] The Court had previously ruled that the Section 3, Sherman Act violation would be tried concurrently but separately. There the Court found that the transaction was entered

[35] Ibid.

[36] Trade Cases, 1958, par. 69,197 (167 Fed Supp 799).

into with the intent and purpose of restraining trade.[37]

The government appealed the case to the Supreme Court alleging that Section 2 of the Sherman Act, the monopoly allegation, should not have been dismissed by the lower court. The government also claimed that the dissolution order should have been more stringent. The defendant appealed for a review of the dissolution order. On May 2, 1960, the Supreme Court upheld the lower court in its decision on Section 3, Sherman Act; the violation of Section 7, Clayton Act; and it also upheld the dissolution order. The decision reversed the lower court on its dismissal of the Section 2, monopoly violation, and remanded that portion of the case to the lower court for retrial.[38]

In summary, the period 1956-1960 saw the courts giving broader dimensions to antitrust law, but all of the contributions came from Department of Justice cases. The significant cases of the Federal Trade Commission were still in the process of litigation.

The duPont-General Motors case, even though not filed as a violation of Section 7 of the Clayton Act, was significant. The decision illustrated that any stock acquisition which occurred after the 1914 enactment of the original law--if there were a reasonable probability that competition would be lessened--would be in

[37] Ibid., par. 69,245.

[38] Trade Cases, 1960, par. 69,694 (360 US 927).

contravention of the statute. The same case narrowed the definition of line of commerce in a relevant market. In the Bethlehem case, the claim that a merger would make a firm better able to compete with its larger rivals was held invalid. In the same case it was held that a geographic market or section of the country could be considered as nationwide, regional, or both. The Court also held that the elimination of a significant competitor in both the buying and selling markets would be weighed heavily. In the Maryland-Virginia case, the Court held that Section 6 of the Clayton Act did not grant absolute immunity to concerns under jurisdiction of the Secretary of Agriculture. There could be antitrust action if there were a reasonable possibility that anticompetitive effects would result from a merger.

The application of the limited guide lines during the period 1961-1965 will be discussed in the next chapter.

CHAPTER VI

EFFECTS OF AMENDED SECTION 7, CLAYTON ACT ON MERGERS AND ACQUISITIONS, 1961-1965

During the period 1961-1965, the Federal Trade Commission reported that over 4,500 mergers-acquisitions occurred in the manufacturing-mining sector of the economy, with over 1,000 occurring in 1965.[1] The annual average of more than 900 as compared to less than 800 annually the preceding five year period would lend further support to a previous statement--the threat of Section 7 action had had no significant effect even when there was a more vigorous enforcement by the responsible agencies. A total of 90 Section 7 complaints were filed by the two enforcement agencies in the period 1961-1965 as compared to 69 the preceding five year period.[2] There were some landmark court decisions which will be discussed later, but even with the emergence of some anti-merger guide lines, the pace of mergers and acquisitions continued unabated.

Of the 90 Section 7 complaints, the Federal Trade

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[1]Federal Trade Commission, Annual Report, 1966, p. 58.

[2]Bock, pp. 230-243.

Commission filed only 22, as compared to 37 the preceding five year period.[3] The Commission continued its industry wide approach to the problem. Four complaints were filed against the cement industry; four against the grocery industry, and two were filed against department store chains. The increased use of consent decrees rather than court litigation continued as the operational procedure. Of the 22 cases filed, 13 were settled by consent, 6 cases filed in 1964 and 1965 were still pending, and divestiture was ordered by the Commission in two. In one case, divestiture was delayed but an order of the Supreme Court enjoined the co-mingling of assets.[4] The record would indicate that the Commission had been more selective in its choice of cases since of the 13 consent decrees, nine were effected the same year the complaint was filed. Contrary to the previous five year period, the Commission had no cases in the federal court as a result of complaints filed in the 1961-1965 period.[5]

An explanation of the decrease in the number of complaints filed for Section 7 violations can be found in the new procedures adopted by the Commission during the period. The increasing emphasis on the industry wide approach adopted in the preceding five year period would of itself result in a decline in numbers. In addition two

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[3] _Ibid._ [4] _Ibid._ [5] _Ibid._

new procedures were adopted in 1962 which were designed to forestall illegal business practices. One was the issuance of Trade Regulation Rules which spelled out clearly what the Commission believed would be illegal about a particular business practice. The second was for the Commission itself to give businessmen advisory opinions whenever requested as to whether a proposed merger would likely be challenged.[6] Briefly, the latter course was adopted wherein the agency would accept a mere assurance of business that a particular practice would be discontinued. That too, had its part in the declining number of formal complaints. The Commission cited statistics showing that in 1964, 416 assurances of discontinuance had been accepted compared with 239 in 1963. (The majority were of Section 2 or price discrimination type complaints.) In any event the "assurance of discontinuance," though initially provided some 50 years before had never been used to any extent. The Commission adopted that approach four times more frequently in the period 1961-1965 than it did in the preceding five year period.[7]

In its 1965 report, the Commission emphasized that its policy of helping business comply with the law was much less costly and a happier alternative than filing a

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[6]Federal Trade Commission, Annual Report, 1962, p. 1.

[7]Ibid., Annual Report, 1964, pp. 1-2.

complaint. According to the agency, mere statistics would not truly reflect the accomplishments, and the number of cases filed should be discounted. The FTC said the effect of Trade Regulation Rules and the advisory approach was manifested by a record of a declining number of case investigations, and a declining number of cases in litigation.[8] If the foregoing is a plausible explanation for the declining number of formal complaints, there is a suggestion of an increased though unpublicized effectiveness of the Federal Trade Commission.

A further explanation of the decrease in number of complaints filed during the 1961-1965 period could be attributed to increased work placed on the Commission. The work load received no more than passing mention in the FTC Annual Report for 1962, but the increased work was the result of an entirely new approach by the Department of Justice to the anti-merger problem. Soon after the new national administration took office in 1961, Attorney General Robert F. Kennedy evidenced an interest in the progress of anti-merger work. He resorted to the seldom used Section 6(c) of the Clayton Act which provided that the Attorney General could call upon the Federal Trade Commission to investigate the degree of compliance with Department of Justice judgments and decrees obtained in

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[8] _Ibid._, _Annual Report_, 1966, pp. 1-5.

district and higher courts.[9]

The complexities incident to complying with the request necessitated additional manpower and funds for the Federal Trade Commission and a supplemental appropriation was granted.[10] Unquestionably the voluminous amount of paper work and research attendant to each case added to the load of an already overburdened staff. The additional investigative work could have resulted in the Commission unconsciously de-emphasizing the importance of its own anti-merger work--the investigations consumed the better part of three years. Congressional observations and criticisms of the "Attorney General work burden" have been described in Chapter IV.

To sum up, there were three reasons for the declining number of Section 7 complaints. First, the industry wide approach would tend to eliminate filing of isolated complaints unless related to an industry; second, the use of Trade Regulation Rules and the business Advisory Conferences; and third, the additional burden of work imposed by the Department of Justice request may have resulted in a de-emphasizing of Section 7 inquiries.

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[9] U.S. House of Representatives, Committee on Appropriations, Hearings, 87th Cong., 1st Sess., April 20, 1961, pp. 313-316.

[10] U.S. The Budget, Fiscal Year Ending June 30, 1963. Appendix, p. 814 explains the situation including the supplemental appropriation.

The period 1961-1965 was significant in the number of Section 7 cases decided by the Supreme Court. Most of the cases will be discussed later since the majority were filed prior to 1961, and this immediate section deals with the filing of cases in the 1961-1965 period.

Four Section 7 Cases, 1961-1965

Two representative cases filed by the Federal Trade Commission during that period will be discussed. One against a cement company is unique because of a jurisdictional dispute. The second represents the Commission's drive against concentration in the food industry, and brings out both conglomerate and product extension aspects. Two cases filed by the Department of Justice during that period will also be discussed. One concerns the applicability of Section 7 to joint ventures, and one concerns the applicability of Section 7 to bank mergers.

On July 15, 1963, the Federal Trade Commission filed a complaint against the Lone Star Cement Corporation, New York, charging a violation of Section 7 of the Clayton Act.[11] It was alleged that Lone Star's acquisitions of Pioneer Sand and Gravel Co., Seattle, Washington and Southern Materials Co., Inc., of Norfolk, Virginia, "may substantially lessen competition or tend to create a

[11] Trade Regulation Reporter, Transfer Binder, Federal Trade Commission Complaints, Orders, Stipulations, 1963-1965, FTC Docket 8585, par. 16,490.

monopoly" in the manufacture and sale of either portland cement or ready mix concrete; or, in both "lines of commerce" in the relevant "section of the country." Specifically it was charged that:

> Lone Star was one of the three largest producers of portland cement, an essential ingredient in the manufacture of ready mix concrete.
>
> Pioneer was the largest supplier of ready mix concrete and one of the larger consumers of portland cement in the Seattle area. Lone Star was the principal supplier.
>
> Lone Star acquired Pioneer December 1, 1959 by purchasing all of the capital stock of the Seattle concern for $3.9 million.
>
> Southern Materials was the largest supplier of ready mix concrete and the largest purchaser of portland cement in the Norfolk-Richmond, Virginia area; and the area of Jacksonville, Florida. Lone Star was the largest supplier of portland cement in Virginia and sold in Florida.
>
> Lone Star acquired Southern August 15, 1962 by exchanging about 750,000 shares of its stock valued at $14 million for all Southern's assets.
>
> Southern also manufactured concrete products and both Southern and Pioneer produced sand and gravel for their own use and for outside sale.[12]

During the initial phases of the hearing, the Federal Trade Commission listed specific adverse effects of the acquisitions:

> Lone Star's present and future competitors have been and may be precluded from selling portland cement to a substantial consumer.
>
> Lone Star's competitors have been or may be foreclosed from a substantial share of the market for

[12] *Ibid.*

> portland cement; and Lone Star may be assured of a substantial share of that market.
>
> Entry of new sellers of portland cement, ready mix concrete or concrete products may be inhibited or prevented.
>
> Further integration of suppliers and consumers of portland cement may result.
>
> As an integrated manufacturer and seller of portland cement, ready mix concrete, and concrete products, Lone Star has achieved or may achieve a decisive competitive advantage over non-integrated competition.
>
> Prior to its acquisition of Pioneer and Southern Materials, Lone Star had, it now has, and after the divestiture sought in this proceeding, it will continue to have, such a significant position in the sale of portland cement in the four areas in question, and in every other section where it sells that any acquisition of it of a corporate seller of ready mix concrete or concrete products in any of these sections may result in a substantial lessening of competition or tendency toward monopoly.[13]

After limited pre-trial proceedings, the respondent moved for a dismissal of that portion regarding the Seattle area. Lone Star argued that business in that area was strictly local and therefore not subject to Federal Trade Commission jurisdiction under Section 7 of the Clayton Act. The Hearing Examiner denied the motion for dismissal. The examiner observed that since the proceedings were incomplete, there was no evidence upon which to judge the intra or interstate character of the acquisition.[14]

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[13] Ibid.

[14] Trade Cases, 1964, par. 71,322. History of initial hearing taken from case record of the Court of Appeals, 9th Circuit.

In the course of further pre-trial procedures, the Commission on January 24, 1964 authorized the taking of testimony from witnesses in Seattle. A list of those witnesses, all in the concrete and cement business, was furnished the respondent. It was explained that the witnesses would furnish information showing that the acquisition of the Virginia firm (Pioneer) would have the proscribed anti-competitive effects. On February 7, 1964, the Commission upheld the Hearing Examiner's denial to dismiss the Seattle acquisition from the complaint on the basis that the hearing had not been completed.

Even though the Commission's announced intent was to have Seattle expert witnesses testify only on the probable anticompetitive effect of the Virginia acquisition, Lone Star speculated that testimony in the Seattle issue would be taken concurrently. Lone Star therefore assumed that the Commission would then base its final action on both aspects. Lone Star appealed to the proper federal court for injunctive relief.[15]

Lone Star pleaded for injunctive relief on the ground that the Federal Trade Commission had exceeded its jurisdiction as provided by Section 7 of the Clayton Act. The respondent again contended that the Act embraced only interstate transactions. Lone Star also pleaded that

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[15] _Ibid._

irreparable injury would be caused by the proceeding. The latter plea was based on injury to its reputation among its customers, and that preparation for defense against an allegation without foundation would be costly and time consuming.[16]

The District Court denied the relief sought. The denial of the jurisdictional matter was on the same basis used by the Commission--that facts as developed in the hearing did not enable anyone to decide on a determination of jurisdiction. The Court explained it could set aside a determination made by an administrative agency, but in the case at hand, the case had not been tried by the administrative agency as provided by statute. The Court relied on the earlier Brown Shoe decision in specifying that under Section 7 of the Clayton Act, an inquiry could be made into a local matter where the acquisition of such a local firm by an interstate firm could lessen competition. In overruling Lone Star's allegation that it would suffer irreparable injury because of the proceeding, the Court stated that burden and inconvenience of preparing for a Commission hearing was not in itself enough to show a necessity for invoking the equity powers of the Court. The Court added that the respondent always had the right to appeal any final Federal Trade Commission order to a

[16] Trade Cases, 1964, par. 71,158. District Court proceedings.

higher court in an effort to secure relief. The Commission moved for dismissal of the matter which the Court granted. Lone Star filed a cross motion for a summary judgment which was denied on June 17, 1964.[17]

Lone Star appealed the decision of the lower court. On December 8, 1964, the Circuit Court of Appeals affirmed the decision of the lower court. The Court specified that the Federal Trade Commission had not had the opportunity to develop facts on which to base jurisdictional findings. The Court also indicated there was no evidence reflecting on the competency of the Commission to make a factual jurisdictional decision. Concerning the allegation of irreparable injury, the Court ruled that neither inconvenience nor the burden of preparation would be the types of injury which would be protected by an injunction.[18]

The foregoing demonstrates some of the complexities, pitfalls, and delaying tactics possible in antimerger litigation. The Federal Court's injection into a matter which by statute was still under the jurisdiction of the Federal Trade Commission further confused the issue and prevented an earlier decision.

A consent order to cease and desist was approved by the Commission on January 13, 1965. Lone Star was

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[17] Ibid.

[18] Trade Cases, 1964, par. 71,322.

ordered to divest itself of 25 of 31 ready mix concrete plants in Virginia, Florida, and in Seattle, Washington.[19] The Federal Trade Commission won its jurisdictional battle along with further support--mergers with vertical aspects and acquisitions of purely local concerns by an interstate firm could be a violation of Section 7 as amended.

Another case of interest was filed by the Federal Trade Commission during the 1961-1965 period. It was against General Foods Corporation (GF) of White Plains, New York, one of the largest manufacturers and distributors of packaged grocery products. The complaint issued on September 30, 1963 alleged that the acquisition of the S.O.S. Company (SOS), Chicago, Illinois, a dominant producer of household steel wool, by General Foods was in violation of Section 7 of the Clayton Act.[20]

The complaint set forth that the acquisition "may lessen competition or tend to create a monopoly" in the manufacture, distribution, and sale of household steel wool products in the following ways:

> Other producers as well as potential producers have been or may be precluded from competing with GF due to one or more of these factors:
>
> GF's dominant market position.
> GF's financial resources.
> GF's economic power.

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[19] Trade Regulation Reporter, Transfer Binder, Federal Trade Commission Complaints, Orders, Stipulations, 1963-1965, par. 17,183.

[20] Ibid., par. 16,612.

> GF's advertising abilities and experience in marketing.
> GF's merchandising and promotional abilities.
> GF's comprehensive line of packaged grocery products.
> GF's ability to command consumer acceptance, and its ability to command prime grocery shelf space.
> GF's ability to concentrate on one of its products, or one selected section of the country, the full impact of its advertising, promotional, and merchandising experience.
>
> The already high concentration in the industry has been or may be further increased.
>
> Entry in the household steel wool industry has been or may be discouraged and inhibited.
>
> A dominant producer of household steel wool has been absorbed into, and combined with one of the nation's largest producers and marketers of packaged grocery products which is also one of the nation's largest advertisers.[21]

The complaint further alleged that GF acquired all the assets of SOS plus a subsidiary on December 1, 1957 for about $17.5 million of GF common stock. At the time SOS was the largest marketer of household steel wool (soap pads) accounting for 51 per cent of the national market with only one major competitor (Brillo) accounting for 46.7 per cent. There were two smaller firms accounting for about 1 per cent each in the national market.

The Commission explained that GF had entered a market in which it was not a customer, supplier, or competitor and replaced the largest producer in that market. General Foods, according to the Commission, had sales in

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[21] Ibid.

excess of $1 billion annually, and GF had entered into an industry having only four small firms, none of whom had sales in excess of $17 million annually. The Commission claimed that the acquisition had upset and realigned the basic competitive structure in the household steel wool industry--SOS's share of the national market increased from 51 per cent to 57 per cent in four years. The Commission further charged that the SOS brand on household steel wool when backed by GF, the nation's third largest advertiser, received substantial advertising discounts. Finally, the FTC claimed that SOS, through its affiliation with GF, was able to acquire valuable grocery store shelf space to the disadvantage of other marketers--other household steel wool producers did not have the expansive line of packaged grocery products marketed by General Foods.[22]

During the extensive pre-trial hearings common to such a complaint, General Foods on March 31, 1964 filed a motion with the Commission requesting that the trial attorneys supply GF with an identification of all documentary evidence upon which official notice would probably be taken. The respondent also asked that the Commission enter an order directing that official notice not be taken of such documentary evidence until GF had had the opportunity to present rebuttal through oral argument. In denying the motion on April 3, 1964, the Commission explained that

[22] Ibid.

under the Federal Administrative Procedure Act, no such order would be necessary, and quoted:

> . . . where any agency decision rests on official notice of a material fact not appearing in the evidence on record, any party on timely request shall be afforded an opportunity to show the contrary. . . .

The Act, according to the Commission, did not preclude administrative agencies from relying upon pertinent reference material in their file to the same extent as the Supreme Court and other federal tribunals.[23] The case, U.S. v. Philadelphia National Bank, to be discussed later, was cited as the authority.

In the hearings which lasted nine months, an initial recommendation for divestiture, and cease and desist was made by the Hearing Examiner on December 30, 1964.[24] The Hearing Examiner in his findings stated that Commission attorneys had presented evidentiary support for all the allegations. The findings also emphasized that Brillo, the second largest producer of household steel wool at the time of the acquisition, had been gradually losing its market share since GF had entered.

As a result of that declining market share, according to the evidence as outlined by the Hearing Examiner, Brillo had been forced into a 1963 merger with Purex, a much larger firm. In ruling that household steel wool (soap pads) was a separate "line of commerce" from other

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[23]Ibid., par. 16,482. [24]Ibid., par. 17,161.

type soap pads sold by GF and others, the market was defined as one of "product extension." The finding concluded that the merger fell within the proscription of Section 7 of the Clayton Act. The Hearing Examiner cited as his authority, the favorable court decision in another "product extension" case, that of Procter and Gamble.[25] (Procter and Gamble discussed in Chapter V.) The Federal Trade Commission upheld the findings of the Hearing Examiner.

General Foods petitioned the Federal Court to review and set aside the order of the Commission. On November 9, 1967, the U.S. Circuit Court of Appeals, 3rd Circuit, affirmed the order of the Commission.[26]

In its findings the Court pointed out several factors:

> The fact that the Commission did not make a special finding with regard to whether a product was sold by special vendors, or to special customers did not indicate that the relevant market had been incorrectly determined. There was no requirement that each of seven criteria for determining relevant markets enumerated in Brown Shoe must be present in each merger case.
>
> There was evidence to support an industry recognition of the household steel wool submarket as a separate economic entity in the household soap pad business.
>
> There was evidence to support the contention of the Commission that household steel wool soap pads sold at distinct prices when compared to other soap pads.

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[25] Ibid.

[26] Trade Cases, 1967, par. 72,269. CA3 (386 F. 2d. 936).

> The Commission correctly determined that steel wool required unique production facilities, comparatively large and expensive machinery not available on the open market, and that it cannot be used for other than steel wool production.
>
> The Commission correctly determined that the acquisition raised already high entry barriers.
>
> The Commission correctly determined that through extensive advertising and promotional ventures, GF was able to induce potential customers to buy soap pads at a discount based on pooled purchases from other GF divisions.
>
> That concentration, by eliminating competition, disturbed the previous balance between the dominant firms. While not the aim of antitrust policy merely to preserve competitive balance it assuredly is the aim of such policy to preserve whatever competition exists even though it is of an oligopolistic nature.[27]

The Court recognized that General Foods was not a potential competitor in the household steel wool soap pad market. Further the Court said it was not necessary to show that the acquisition of one of two dominant firms was unlawful because the Supreme Court had already declared that a "product extension" merger was illegal in the Procter and Gamble case.[28]

The Penn-Olin and Philadelphia National Bank cases were as significant as any of the 68 Section 7 cases filed by the Department of Justice during 1961-1965. Both can be considered landmark cases in the development of anti-merger law as decided by the Supreme Court.

The status of joint ventures was the issue in the

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[27] Ibid.

[28] Ibid.

1961 case U.S. v. Penn-Olin Chemical Company.[29] The Pennsalt Chemicals Company, and the Olin-Mathieson Chemical Company, a multi million dollar firm, jointly formed the Penn-Olin Chemical Company to produce and sell sodium chlorate in the southeastern market of the United States. Each was to own 50 per cent of the stock and a plant was to be built in Kentucky to supply the intended market. Sodium chlorate was used in the pulp and paper industry in a relatively new process. Although the market was burgeoning, Olin-Mathieson had never produced and marketed the chemical in any area. Pennsalt had an insignificant sodium chlorate market in the southeast because of the location of its plant in western United States. Olin-Mathieson and Pennsalt had an agreement, which had been in existence for several years whereby Olin-Mathieson would sell Pennsalt's production of sodium chlorate in the southeastern market. This arrangement was superseded by the joint venture. The government charged that the joint venture firm, Penn-Olin Chemical Company, would substantially lessen competition in both the sodium chlorate market and non-chlorate market in violation of Section 7. In an amended complaint the government also charged that the sales and production agreements previously entered into by the two firms were in contravention to Section 1

[29] Trade Cases, 1963, par. 70,762 (217 Fed. Supp. 110).

of the Sherman Act.[30]

During the trial it was disclosed that prior to the joint venture arrangement, two firms, Hooker Chemical Company and the American Potash Company, both multimillion dollar concerns, were dominant in the southeastern market and had supplied 91.3 per cent of that market. The government centered its attack upon the various aspects of potential competition which the joint venture would negate. The government argued that either or both firms could have individually entered the market. Only passive attention was given to the adverse effects of the joint venture on existent competition. The plaintiff also argued that the financial resources of the joint venture would, in time, make it dominant in the sodium chlorate market. The government seemingly discounted the resources of Hooker and American. The government maintained that entry into the market would be foreclosed after Penn-Olin reached peak operation despite the fact that the Pittsburgh Plate Glass Corporation had entered that market after Penn-Olin came into being in 1960. The government insisted that there was a reasonable probability that both Olin-Mathieson and Pennsalt would build plants in the southeast, but the Court rejected this assumption since neither firm had built in that area at the time of the suit. The Court

[30] Ibid.

observed that since Penn-Olin had entered the southeastern market both the dominant firms, Hooker and American Potash, had made very substantial efforts to hold their customers, and some of the two firms' efforts had even preceded the actual operational status of the joint venture. That evidence, according to the Court, would indicate an even more vigorous competition in the relevant market. The Court concluded that all combinations were not per se anticompetitive--some could even stimulate competition, and Penn-Olin could be such a combination. On May 1, 1963, the case was dismissed as not being violative of the proscribing statutes.[31]

The government appealed to the Supreme Court and on June 22, 1964 the Court remanded the proceedings to the District Court for further considerations.[32] The Court took the position that if the parent companies were in competition, or might have competed without the joint venture, it would be assumed that neither parent would compete with its "progeny" in its line of commerce. The Court added that basically the same consideration should apply to a joint venture as would be applicable to a merger. According to the Court, the joint venture ended any threat of one or the other firm being on the outer limits of the market and continually threatening to enter.

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[31] Ibid.

[32] Trade Cases, 1964, par. 71,147 (375 US 938).

The Court differed substantially with the lower court's negative assessment of a lessening of competition. In its remand, several suggestions were made in that area which were:

> Number and power of competitors in the relevant market.
>
> The background of growth, and the power of joint ventures.
>
> The relationship of their lines of commerce.
>
> The competition existing between them and the power of each in dealing with the competitors of the other.
>
> The setting in which the joint venture was created.
>
> The reasons and necessities for its existence.
>
> The joint venture's line of commerce and relationship thereof to that of its parents.
>
> The adaptability of its line of commerce to non-competitive practices.
>
> The potential power of the joint venture in the relevant market.
>
> An appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin.
>
> The effect in the event of that occurrence of the other joint venturer's potential competition.
>
> Any other factors that might indicate potential risk to competition in the relevant market.[33]

In its remand, the Court also reminded the lower court that the mandate of Congress was in terms of a probable lessening of competition as distinguished from a "present restraint." Mr. Justice Douglas dissented

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[33]*Ibid.*

stating that the agreement between competitors was a per se violation of Section 1 of the Sherman Act and that such an agreement would have the effect of lessening competition. On that basis, Justice Douglas favored a reversal rather than the remand for additional consideration. Mr. Justice Harlan dissented. He said that the decision of the lower court should have been affirmed, and in his opinion the remand was merely giving the government an opportunity to retrieve a lost antitrust case.[34]

The District Court dismissed the suit on October 12, 1965.[35] In its comments on the independent entry hypothesis the Court reasoned that the government had been unable to establish a preponderance of evidence that either party individually would have entered the relevant market without the joint venture. That reasoning was based on the evidence of probable unprofitability of an independent operation as presented by Penn-Olin. The Court for the most part repeated its reasons for dismissal as set forth originally such as:

> It was impossible to conclude as a matter of reasonable probability that each of the parties would have built chlorate plants.
>
> It was reasonable to assume that Penn-Olin would be a more effective competitor than either

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[34] Ibid.

[35] Trade Cases, 1965, par. 71,571 (246 Fed. Supp. 917).

> Olin-Mathieson or Pennsalt individually, if one had built in the southeast.
>
> Even assuming either Pennsalt or Olin-Mathieson would have entered absent the joint venture, the government had been unable to prove that the effect might be to substantially lessen competition.[36]

The Court concluded that it had given both parties an opportunity to submit additional evidence. The government had not seen fit to add additional facts, and the decision to dismiss had been based upon the remand evidence plus the evidence presented in the first trial.[37]

Justice Harlan's dissent may have ended with a proper conclusion--the government had a chance to retrieve a lost cause. The dissent is further borne out in the District Court's findings in the remand which were the same as in the initial dismissal. As Pegrum stated,

> . . . the prolonging of litigation in this fashion would seem to call for either a clarification of the respective roles of the trial courts and the Supreme Court or a more definitive statement of the tests of law that can be understood by both.[38]

A 1961 case, U.S. v. Philadelphia National Bank and Girard Corn Exchange Bank involved the first test of the Bank Merger Act of 1960.[39] The Department of Justice filed a complaint on February 25, 1961 charging the banks with violation of Section 1 of the Sherman Act

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[36] Ibid.

[37] Ibid.

[38] Pegrum, p. 365.

[39] Trade Cases, 1962, par. 70,197 (201 Fed. Supp. 721).

and Section 7 of the Clayton Act. The complaint alleged that the merger would:

> Increase concentration unreasonably in the Philadelphia area thereby lessening competition, since commercial banking with its integral parts fulfilled a unique role unduplicated by other services.
>
> Destroy the foundation of the banking system which rested upon a number of independently owned banks.
>
> Increase costs and interest rates to depositors and borrowers due to the undue concentration.[40]

During the trial, the respondents challenged the applicability of either the Sherman or Clayton Acts. The banks maintained that the Bank Merger Act of 1960 exempted them from antitrust actions since the merger had been approved by the Comptroller of Currency. The approval, according to the banks, had been received the day before the Department of Justice filed its action.[41]

The question of jurisdiction was likewise involved in the Maryland-Virginia Milk Producers case, previously discussed. In that action the respondents plead that the Clayton Act itself exempted the firm since they were under the jurisdiction of the Secretary of Agriculture. The Court however rejected that plea. The respondents in the Philadelphia Bank case conjectured that the Bank Merger Act of 1960 had been conceived in a different setting so the banks surmised that the antitrust statutes were not applicable.

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[40] Ibid.

[41] Ibid.

Both parties to the action had a history of previous acquisitions and both had been extensively engaged in the "unique" commercial banking business in the Philadelphia area. Each bank had assets in the $ one billion range, and each bank had loans of about $.5 billion of which about half were in the commercial and industrial category.[42]

It was stipulated early in the trial that the Comptroller of Currency had approved the merger despite the admonitions of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General. Each commented that the merger could possibly violate Section 7 of the Clayton Act since the merged firm would control about half the deposits in the Philadelphia area. Early testimony indicated that the Comptroller of Currency had tested the validity of the merger by use of a "public interest" yard stick rather than the broader anti-trust or anti-monopoly standards. The Court stated that it could find statements in the legislative history of the Bank Merger Act which indicated an intention to preclude anti-trust application. On the other hand the Court observed, there were specific references in both Senate and House debates on the bank bill which stated unequivocally that the act would not circumvent the applicability of either the Clayton or the Sherman Acts.[43]

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[42] Ibid. [43] Ibid.

On January 15, 1962 the Court entered judgment in favor of the defendants. The Court reasoned about as follows:

> The approval of the merger by the Comptroller of Currency did not preclude Department of Justice challenge.
>
> But amended Section 7 of the Clayton Act applied to only an illegal acquisition of stock or assets by a corporation under the jurisdiction of the Federal Trade Commission. The bank merger was not in that category. The banks merged to form a new association with each contributing all their assets. The fact that certificates representing shares of stock were exchanged for new ones was only incidental to the transaction.
>
> Interchangeability and "peculiar characteristics" have the same rule for testing except in a different language.
>
> The relevant market is commercial banking in general rather than specific services.
>
> The conglomeration of services offered by a bank sets it off from other financial institutions.
>
> Commercial banking viewed collectively had sufficient peculiar characteristics which negated reasonable interchangeability.
>
> The relevant geographic market for testing the competitive effects of the merger was a greater part of the northeastern United States and not the four county area defined by the government. (The court considered the origin of the bank's business and also alternatives available to customers, and found neither were limited to political boundaries. The banks competed in international, national, regional, and local markets dependent upon the particular service and the customer involved.)
>
> The qualitative substantiality test was distinguished from quantitative substantiality was rejected on the basis that all relevant factors should be approached, not merely the probable market share.[44]

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[44] Ibid.

The Court made further observations as a result of its interpretation of other evidence offered during the trial. Some of the more significant postulations were:

> The proposed merger would not even violate the proscribing statutes if only the four county area were considered. Concentration in commercial banking would increase but the new bank would not have the power to control the price and supply of credit. A substantial competitor would be eliminated however competition would be more vigorous.
>
> Though entry in the banking field in the area would be difficult it would be only conjecture that a new firm would not enter.
>
> The history of mergers-acquisitions in which the two banks had engaged reflected only valid business reasons.
>
> Anti-competitive effects in the area would be minimal and the merged banks could better compete with other cities that had been draining the area of banking business.
>
> There was no reasonable probability that the merger would create a monopoly, and there would be no unreasonable restraint of trade even in the four county area.
>
> Since it had been found that the merger was reasonable under the law and not in violation of Section 7 of the Clayton Act, therefore it could not have violated the more stringent standards of the Sherman Act.[45]

The government had won only one point--an action under the Bank Merger Act of 1960 could be challenged by the Department of Justice.

The Department of Justice appealed the case to the Supreme Court. On June 17, 1963 that body reversed the decision of the lower court and remanded the case

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[45] Ibid.

for appropriate disposition.[46] The Court reasoned that amended Section 7 of the Clayton Act was applicable to bank mergers by explaining that:

> Section 7 applied to bank mergers through an exchange of stock even though the proposed merger is neither an acquisition of corporate stock or an acquisition of corporate assets by a corporation subject to the jurisdiction of the Federal Trade Commission.
>
> The proposed merger was neither a pure assets acquisition nor an acquisition of pure stock but something in between. Prior to 1950 it had been held that Section 7 of the Clayton Act did not apply to mergers which did not involve a stock purchase. Then that assets loophole was closed to include assets as well as a reenactment of the stock proviso. On that basis it must be deemed to have been expanded to include at the very least all acquisitions by merger of consolidation which involved a transfer of stock of the parties.
>
> Congress' objective in including the language "corporations subject to the jurisdiction of the Federal Trade Commission" in Section 7 was not to limit the scope but to counteract adverse court decisions which had limited the Commission's divestiture power.[47]

In its comment on the applicability of the Bank Merger Act of 1960, the Court held:

> The Act of 1960 which directed banking agencies to consider anti-competitive effects did not immunize approved bank mergers from an anti-trust challenge. The Comptroller of Currency is not required to give any considerable weight to such effects, to hold hearings, or to provide for judicial review. The House and Senate both have stated that the Act would not affect the applicability to the antitrust laws.[48]

The Court held that the relevant line of commerce for purposes of testing the legality of the Clayton Act

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[46] _Trade Cases, 1963_, par. 70,812 (369 US 883).

[47] _Ibid_.

[48] _Ibid_.

were products and services. Products were found to be the various kinds of credit made available by the bank. Services were found to be checking accounts, and administration of trusts, and the like. The Court rejected the lower court's definition of the relevant geographic area as being the entire northeastern tier of states. The Court held that the relevant area would be the four county area as argued by the government since it was in that area that the majority of the merged bank's business originated.[49]

In outlining the effects on competition as a result of the merger, the Court held that:

> The merger would result in a single bank controlling 30 per cent of the commercial banking business in the relevant four county area. It would result in the merged bank plus one other controlling 50 per cent of all commercial banking in the area, and that would substantially lessen competition.
>
> The fact that dissatisfied customers had 40 other banks in the area, other than the merged bank, with which to transact business did not offset the demonstrated anti-competitive effects. The Clayton Act was designed to arrest the trend toward concentration before consumer alternatives disappeared through merger.[50]

In rejecting the lower court's assumption that the merged bank would be better able to compete with out of state banks, the Court referred to countervailing powers as "defense," reasoning that:

> The fact that the merged bank could better compete with New York banks for very large loans would not

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[49] *Ibid.* [50] *Ibid.*

> justify the merger. If anti-competitive effects in one market could be justified by pro-competitive effects in another, then every firm in the industry could, without violating the Clayton Act, embark on a series of mergers that would make it as large as the industry leader.[51]

It had been argued in the lower court that as a result of the merger, social and economic benefits would accrue to the community. The Court rejected that argument by stating that:

> The fact that an otherwise illegal merger of two banks might give such benefits to the community in which the banks were located such as a stimulation to the area's social and economic development could not save the merger. Not only is a value choice beyond the limits of the judicial competence, but Congress had made the choice by choosing to presume a competitive economy.[52]

With the exception of the Penn-Olin case, the litigations described have been favorable to the government. For the first time since the enactment of the Celler-Kefauver Act (Amended Section 7 of the Clayton Act) there were some definitive Court interpretations upon which to base future procedures in anti-merger litigation. By the same token, those same decisions could act as guides to business when it considered external expansion.

Several other cases considered to be landmark in the anti-merger field have also been decided in the 1960's. With one exception however, all were initiated in the 1950's. Because of their added significance in

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[51] Ibid.　　[52] Ibid.

the emergence of anti-merger guide lines, they will be discussed in the next chapter.

CHAPTER VIII

EMERGING GUIDE LINES FROM OTHER SUPREME COURT INTERPRETATIONS OF AMENDED SECTION 7

The Brown Shoe case decided in 1962 is probably the best known of all the anti-merger cases decided by the Supreme Court.[1] It is considered a landmark case since it was the first higher court determinative interpretation of amended Section 7 of the Clayton Act. Section 7 had been utilized in the Bethlehem case though not in the detail as in the Brown case.

The application of Section 7 to vertical and horizontal aspects was clarified as well as the meaning of "line of commerce" and "any section of the country." Martin said that the policy pronounced in this case would have prevented the development of the oligopoly structure in American industry had it been adopted in 1895 when the problem of regulating corporate mergers was temporarily relegated to the states in the E. C. Knight case.[2]

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[1]Trade Cases, 1962, par. 70,366. (370 US 294)

[2]David D. Martin, "The Brown Shoe Case and the New Anti-Merger Policy," American Economic Review (June 1963), pp. 340-358.

On July 25, 1955, the directors of the Brown Shoe Company, predominantly a shoe manufacturer, and the G. R. Kinney Company, predominantly a shoe retailer, voted to submit a stock exchange plan to their stockholders. If adopted, it would have resulted in Brown acquiring control of Kinney by placing the combined assets in a separate subsidiary corporation. On November 28, 1955, the Department of Justice charged that the proposed merger was in violation of Section 7 of the Clayton Act, and the department moved for injunctive relief under Section 15 of that Act. A temporary restraining order was granted by the District Court without argument. Ironically, the Department of Justice made its move just 2 days before the stockholders of Brown and Kinney were to vote on the proposed merger.[3]

On January 13, 1956, the Court dissolved the temporary restraining order based upon the equities of the case. (Both firms suffered under the restraint.) As an alternative the Court ordered the issuance of a temporary conditional injunction which would not prevent the consummation of the merger. The conditions were that title to all assets would be held by the subsidiary corporation which was to operate independently of Brown or Kinney directors, and that the subsidiary would retain all

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[3] Trade Cases, 1956, par. 68,244.

earnings as a completely independent operation.[4]

During the hearing, the government described a trend toward concentration in the shoe business. It was explained that Brown, primarily a manufacturer of shoes since its incorporation in 1913, had sold men's, women's, and children's shoes under a number of brands. There was trend, according to the government, toward favoring chain store retailing, and with a sharp decline in the number of independents to whom Brown sold. Brown had entered retailing in a substantial way as did other manufacturers. Brown's number of franchised dealers, according to the government, had increased from 449 in 1950 to 587 by 1955. The government was further stated in the support of the "trend" argument that Brown had acquired Wohl Shoe Company, in 1951 which had 250 retail outlets in 125 store locations, and that this number had increased to 350 outlets in 193 locations by 1955. Further, in 1954, Brown acquired the Regal Shoe Company with 110 retail outlets and that this number had decreased to 98 by 1955. The government asserted that the two acquisitions, and Brown's originally franchised dealers each handled Brown manufactured shoes. Wohl and Regal, however, were allowed the handling of other brands as well. Testimony was to the effect that Brown was responsible for more than 4 per cent of all national shoe production in 1954, and ranked

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[4]<u>Ibid</u>.

third in the industry. Evidence also showed that Brown, plus each of its acquisitions, controlled less than 1 per cent of all retail outlets.

Kinney, according to the government, was primarily a retailer and wholesaler of men's, women's, and children's shoes and sold about one half of one per cent of the national shoe production through 360 retail outlets in 325 cities, towns, and shopping centers in 44 states.[5] The shoe industry, both manufacturing and retail, was manifestly a fragmented industry and the government sought to prove that acquisitions in such a market condition would tend to lessen competition.

In support of its fragmentation theory, the government cited Bureau of Census reports which reported that the estimated total shoe production for the four largest firms which included Brown amounted to 23 per cent in 1939 and only a little more than 22 per cent in 1954. The largest eight companies produced 28 per cent of total production in both 1939 and 1954, and the largest 50 shoe manufacturers produced about 51 per cent of the total in 1939 but that percentage had declined to 46 per cent by 1954.[6]

Brown contended that the merger with Kinney would give Kinney financial resources for plant improvement;

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[5]*Ibid.* [6]*Ibid.*

that it would permit Kinney to handle a more complete line of shoes with the addition of the Brown line and thereby keep pace with changing conditions; and lastly, the merger would make Kinney more competitive.[7]

In the description of the subsequent proceedings, it should be explained that the judge to whom the Brown case was initially assigned, died in July 1956, and no further action was taken until August 1957. Because of the lengthy pre-trial conferences, it was not until the following August that the case was finally called for trial. After testimony was completed in January 1959, the matter was set aside for the filing of briefs and the case was not taken under advisement until August 1, 1959. The final decision was handed down by the District Court on December 14, 1959. The decision declared that the Brown-Kinney merger was in violation of Section 7 of the Clayton Act.[8]

The case had been in litigation over four years. Some of the delay could be explained by the death of the judge. Additional delay could conceivably be attributed to a very cautious approach by the District Court. The Court had no higher court precedent or guideline as to what would constitute a "substantial lessening of

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[7] Ibid.

[8] Trade Cases, 1959, par. 69,532. (179 Fed. Supp. 721).

competition" as proscribed by the amended Section 7 of the Clayton Act.

The Court selected three issues for determination: (1) the effect of the merger on competition; (2) the relevant "line of commerce;" and (3) the relevant market, or "section of the country." In its decision that the merger violated Section 7, the Court reasoned that the effect on competition would be:

> Concentration in the shoe industry would be increased in both manufacturing and retailing. The combination would be the largest retailer in the nation with a market share of 5.7 per cent.
>
> Other manufacturers would be affected since the acquired chain (Kinney) would be a smaller market for their products.
>
> Other retailers would be adversely affected since advantages would inure to the chain from its affinity with the manufacturer.
>
> In the retailing field, the chain (Kinney) would be eliminated as a substantial competitor of Brown.[9]

The Court said that the relevant "line of commerce" was men's, women's, and children's shoes, each considered separately. Each had its peculiar characteristics to make it distinguishable from all other products. The Court's rationale was that men's, women's and children's shoes were manufactured separately, and were different in style, quality and price. The classification, according to the Court, was recognized by the industry and

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[9] Ibid.

by the public.[10] The Court held that the relevant market (section of the country) was the whole nation as far as manufacturing was concerned since both Brown and Kinney had operated nationwide.

The retail market conversely would be a city of a population of 10,000 and over, and its immediate surrounding area in which both firms had stores. The government had contended that the retail market should be nationwide just as the manufacturing market. The respondent contended that the retail market should be a standard metropolitan area which it defined as an economic unit normally the result of a consolidation of political units delineated by the flow of commerce. The Court reasoned that the 10,000 population figure was proper because:

> Kinney, a family type store, operated primarily in cities of that size or larger. Brown had stores, and leased stores in such size cities. There were 141 such cities in which both firms had stores, and their competition was the dealer in the "downtown area."[11]

The Court withheld its divestiture order explaining that the disposition of stock and assets of the acquired firms could have had a far reaching economic effect.[12]

The respondent appealed the case to the Supreme Court and in June 1962, the decision of the District Court was affirmed.[13] The Supreme Court first discussed the

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[10]*Ibid.* [11]*Ibid.* [12]*Ibid.*

[13]*Trade Cases, 1962*, par. 70,366. (370 US 294)

legislative history of Section 7 of the Clayton Act and concluded that the intent of Congress was to arrest undue concentration in its incipiency. The Court listed eight factors which would be considered in its evaluation of the validity of a merger, and they were:

> Congress intended to "plug the loophole" and to include the acquisition of assets no less than the acquisition of stocks.
>
> Section 7 applied not only to mergers between actual competitors but also to vertical and conglomerate mergers whose actual effect "may be to lessen competition in any line of commerce in any section of the country."
>
> A keystone in the erection of a barrier to the rising tide of concentration was the provision for arresting mergers at a time when the trend to a lessening of competition in any line of commerce was still in its incipiency.
>
> Congress rejected as inappropriate the application to Section 7 cases, the standards for judging the legality of business combinations adopted by the courts in cases arising under the Sherman Act.
>
> While Congress sought to create an effective tool for preventing all mergers having demonstrable anti-competitive effects it did not intend to impede a merger between two companies which would enable the combination to compete more effectively with larger corporations dominating a relevant market. It did not intend to prevent a merger between a corporation that is financially healthy and a "failing one." The purpose was to protect competition, not competitors.
>
> Congress neither adopted nor rejected specifically any particular tests for measuring the relevant market, nor did it adopt a definition of the word "substantially."
>
> Congress provided no definite quantitative or qualitative tests, but it indicated plainly that a merger was to be functionally viewed in the context of a particular industry.

> Congress used the words "may be substantially to lessen competition" to indicate that its concern was with probabilities, not certainties.[14]

The Court then dealt separately with the horizontal and vertical aspects of the merger in terms of the product market, the geographic market, and the probable competitive effect of the merger. The Court accepted the lower court's definition of "line of commerce" as being men's, women's, and children's shoes. The Court found that in owning Kinney, Brown could force its shoes into Kinney's retail outlets. A vertical restraint would have operated throughout the Kinney chain, so the Court held that the relevant geographic market for manufactured shoes would have been the entire nation. The Court construed that a vertical acquisition operated just as a tying contract, proscribed by Section 3 of the Clayton Act. In the case at bar, the Court explained that Kinney would be required to buy Brown shoes usually to the exclusion of other manufacturers. Even though the vertical foreclosure amounted to only 2 per cent of the retail market, the Court said that there was a tendency for acquiring manufacturers to become increasingly important sources of supply for their acquired outlets. The Court found that the trend in the shoe industry was toward further oligopoly, and that such a trend would adversely affect local control of business which would lessen competition.[15]

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[14] _Ibid._ [15] _Ibid._

The District Court had held that the merger had resulted in horizontal restraints at the manufacturing and retail levels. According to that Court, the merger of the Brown and Kinney manufacturing facilities did not involve a significant restraint, but the rivalry of sellers that took place at the retail level was where competition could be substantially lessened. The Supreme Court accepted that conclusion. The relevant retail market as outlined by the District Court--cities of 10,000 or more where both Brown and Kinney had outlets--was likewise accepted by the higher court. It was explained by the Supreme Court that the absence of future competition between the two firms in those areas constituted a horizontal restraint on competition.[16]

To determine the impact of the acquisition on competition, the Court relied on concentration statistics. The Court concluded that as a result of the merger, combined sales in 118 cities were over 5 per cent of the total market. The rationale was that if such a merger were approved, it could trigger similar actions in the shoe industry which would further the oligopolistic trend which Congress had sought to avoid.

The Court looked particularly long at features of the market structure. The Kinney acquisition, according to the Court, had reshaped the structure from one of

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[16] Ibid.

fragmentation toward one of concentration which could have an adverse effect on competition.

The Court also commented on the social benefits of an internal expansion as opposed to an expansion by merger. Internal expansion, reasoned the Court, would more nearly reflect consumer demand which would result in increased investment, more jobs, and greater output.

The Court in concluding its affirmation of the District Court's order of divestiture said that the appellant had presented no mitigating factors such as an imminent business failure or inadequate resources which would have made one or the other less competitive.[17]

The first definitive interpretation of amended Section 7 of the Clayton Act was made nearly 12 years after the late 1950 enactment. Although guide lines had been established in this case it was not likely that the reasoning could or would apply to all mergers.

On July 22, 1957, the Department of Justice filed a suit in the District Court of Utah (US v El Paso Gas Company, 370 US 651). The complaint alleged that El Paso Natural Gas Company had acquird the stock of Pacific Northwest Pipe Line Company, in violation of amended Section 7 of the Clayton Act. The respondent filed a motion in the District Court to dismiss the action since the gas company

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[17]<u>Ibid</u>.

was under the primary jurisdiction of the Federal Power Commission. As an alternative, the respondent requested the Court to stay the procedures until the Federal Power Commission (FPC) made a final determination on the respondent's merger application. The Court ruled that the application had been made after the Section 7 action had been filed. The Court further held that the FPC did not have jurisdiction to pass upon a stock acquisition, therefore the plea of primary jurisdiction was inapplicable. The Court explained that the filing of the application with the FPC did not divest the Court of jurisdiction to hear the Clayton Act proceeding. The petition for dismissal was denied on October 21, 1957.[18] The District Court was notified on a later date that the respondent had made an application to the Supreme Court in which it requested that body to order the file for review. The application was denied on March 3, 1958.[19]

El Paso Natural Gas Company was a one billion dollar corporation, and a major supplier of natural gas in several western states; however, the firm had experienced difficulty in maintaining the gas reserves required by the FPC. Pacific Northwest with relatively limited financial resources, was another supplier of natural gas in northwestern United States. It had ample gas reserves

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[18] Trade Cases, 1957, par. 68,772.

[19] Ibid.

and had sold large quantities of gas to El Paso but despite that source of revenue it had been unable to fully develop its own leases. Pacific Northwest (PN) had made several unsuccessful efforts to enter the rapidly expanding natural gas market in California. El Paso on the other hand had been the only successful out of state bidder in the California market and was furnishing 50 per cent of California's requirements.

El Paso had been interested in purchasing PN for several years, presumably to obtain and develop PN's reserves. By May 1957, El Paso had acquired 99.8 per cent of PN's stock, and shortly thereafter the Department of Justice filed suit. The District Court dismissed the suit on November 20, 1962. The Court concluded that:

> El Paso's acquisition of, and efforts to obtain reserves and supplies of natural gas did not result in substantial competition with Pacific Northwest. The two firms had operated in different areas and 95 per cent of the supplies acquired by each for distribution was without competition. Too, the Federal Power Commission had regulated sales and approved all prices.
>
> El Paso did not violate Section 7 since it had no reasonable probability of substantially lessening competition or tend to a monopoly in the sale and transportation of natural gas for distribution or use. Both El Paso and Pacific Northwest were under long term supply contracts authorized by the Federal Power Commission, and there was little likelihood there would ever be competition between them.
>
> The multi-state area served by the two firms did not constitute a relevant geographic market since there was no section or area in those states where the two firms competed.

> Natural gas was accepted as the product in the "line of commerce" but so was electricity and fuel oil with the latter a particularly vigorous competitor.[20]

The Court prepared no detailed opinion as was customary but merely enumerated its findings of fact and its conclusions of law.[21]

The Department of Justice appealed the case to the Supreme Court. On April 6, 1964, the Court reversed the decision of the District Court and remanded the case for the issue of an order of divestiture.[22]

The primary issue according to the Supreme Court revolved around a question as to whether the acquisition substantially lessened competition in the sale of natural gas in the state of California. The Court asserted that because of Federal Power Commission regulations, FPC's grant of a supply authorization to a particular firm would withdraw that particular market from the area of competition. Therefore reasoned the Court, competition for new increments of demand caused by an expanding population would be all that remained. In that instance rationalized the Court, California was a booming market, and merely because PN had been an unsuccessful bidder, in the past it was still no less a competitor than successful El Paso. Accordingly, ruled the Court, the acquisition had the

[20] Trade Cases, 1962, par. 70,571.

[21] Ibid.

[22] Trade Cases, 1964, par. 71,073. (373 US 930)

effect of substantially lessening competition.[23]

The Supreme Court also noted that in 1962 it had set aside the FPC order approving the El Paso-PN merger holding that the agency should have not acted until the District Court had passed on the Clayton Act issues.

In the reversal, the Supreme Court directed the District Court to proceed with an order of divestiture without delay. The Court explained that if El Paso could absorb Pacific Northwest without violating Section 7, then the statute had no meaning in the natural gas field. It was pronounced that even though PN had no pipe line in California, it had been young and vigorous, and had the only interstate pipe line west of the Rocky Mountains. The Court reiterated its belief that the expanding California market offered an opportunity for entry, and that PN could have eventually entered that market. Mr. Justice Harlan dissented only in the matter of "ordering divestiture." He stated that that was the job of the lower court.[24]

Some side issues were involved in the El Paso case. On January 22, 1965, the District Court in Utah dismissed a suit in which the public utility commissioners of seven states, the State of California, and twelve natural gas distributors had petitioned to intervene in

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[23] _Ibid._

[24] _Ibid._

the fashioning of a divestiture decree. The Court ruled that the public convenience and necessities of gas consumers could not prevail over the anti-trust requirements of the suit. The Court said that there was no reason to believe that the interests of all parties would not be adequately represented, and further, that the distribution of the effected property would be subject to the control of the Court.[25]

A consent decree which required that El Paso divest itself of all properties acquired in violation of Section 7 of the Clayton Act was entered on June 24, 1965.[26]

Although the guide lines of the Brown Shoe case were not particularly important in the foregoing case, they did have applicability in the next case to be discussed. In the 1965 case, United States v. Aluminum Company of America and Rome Cable Corporation another significant ruling occurred. A brief history will provide a setting for the events to follow.

In early 1959, it was announced in the press that the Aluminum Company of America (Alcoa) would purchase the assets of the Rome Cable Corporation (Rome). Shortly after the announcement, the Department of Justice addressed inquiries to both firms; however, the merger

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[25] Trade Cases, 1965, par. 71,362

[26] Ibid., par. 71,453 (37 FRD 330).

was consummated on March 31, 1959, and the Rome assets were transferred to a wholly owned subsidiary of Alcoa. It was one year later, April 1, 1960, that the Department of Justice filed an application for injunctive relief. Alcoa was described as the largest producer of aluminum and aluminum products, and was referred to as an integrated producer--a self sufficiency in both production and distribution was implied. Rome was described as a manufacturer of electric wire and cable although the company's principal raw materials use was copper, it had recently used some aluminum conduit.[27]

The District Court denied the application on May 31, 1960 in which the government had charged that the merger violated Section 7 of the Clayton Act. The government pleaded for injunctive restraint speculating that unless Alcoa was restrained until time of the trial, the large firm might feel constrained to strip Rome of its personnel which would leave Rome with only a shell of its former self. The shell, according to the government, would be incapable of competing even if divestiture and restoration of the firm were ordered. The Court in rejecting the application stated that no such stripping had occurred, and further that Alcoa had assured the Court that no such stripping would occur. The Court also surmised that the action could probably

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[27]Trade Cases, 1960, par. 69,227.

be heard in three or four months, but in the meantime temporarily enjoined Alcoa from encumbering any of the Rome stock.[28]

The case had the usual pre-trial complexities. Alcoa forwarded the government a number of interrogatories. The questionnaires were designed to obtain information about the details of production and distribution of the products which the government would claim as the "line of commerce." The government objected, but on November 8, 1960, the Court ruled that the respondent was entitled to test the validity of the majority of the information which would be presented.[29] In a further hearing on November 17, 1960, the Court ruled specifically on the privileged nature of a portion of the information requested by Alcoa. There was little change from the Court's ruling the week before--merely a clarification and expansion of its explanation on "privileged communications."[30]

It was over two years before the case came before the Court. On January 28, 1963, the District Court said that the acquisition would not substantially lessen competition. The Court held that the competitive impact of an integrated aluminum company's acquisition of a

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[28]Ibid.

[29]Trade Cases, 1961, par. 69,910.

[30]Trade Cases, 1961, par. 69,911.

copper wire and cable manufacturer could not be properly measured by comparing the relevant market shares held by an aluminum producer and fabricators of aluminum wire and cable while ignoring the competition between integrated producers. The Court recalled that previous government actions against the acquiring integrated producer had been designed to facilitate the entry of competitors into the industry. According to the Court the existence of completely integrated producers could not be overlooked or distorted in the appraisal of the competitive market in the acquisition. The Court also said the evidence established that some non-integrated producers had either held or increased their market share since the challenged acquisition. The Court concluded that the combined market share of the merger had decreased, and that fact with testimony by wire and cable purchasers that the Alcoa acquisition had not adversely affected their businesses, precluded a finding of a substantial lessening of competition.[31]

The Court in defining the relevant market in the aluminum industry as to "line of commerce" decided that aluminum wire and cable was not a "line of commerce" distinct from copper wire and cable within the meaning of Section 7. Also that aluminum wire and cable was deemed

[31] Trade Cases, 1963, par. 70,563. (214 Fed Supp 501)

interchangeable with copper wire and cable since it had no distinct purchasers by specialized vendors--and there was a cross elasticity of demand for the two types of wire and cable. The Court accordingly concluded that the "line of commerce" was the combination of aluminum wire and cable and copper wire and cable.[32]

The Court ruled that the relevant geographic market was the United States as a whole rather than an 11 state area where most of the products of the merger were sold, as contended by the government. The Court reasoned that the larger area was proper since there had been substantial evidence presented in that respect. Favorable freight rates, and commercial realities, according to the Court, enabled purchasers even though located in the narrower area to buy from anywhere in the United States. In its ruling concerning market shares, the Court reasoned that:

> The comparatively small percentage of the aluminum wire and cable market held by a company primarily in copper wire and cable would not by itself condemn an acquisition of that competitor by an integrated aluminum company.
>
> The copper wire and cable company held .3 percent (Alcoa held 32.5 per cent) of the market in aluminum conductor reinforced steel cable and competed with the aluminum company in smaller sized cable.
>
> The combined market share for their production decreased from 32.7 per cent to 26.1 per cent after the acquisition.

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[32]<u>Ibid</u>.

> The evidence pointed out that the acquisition was an effort by Alcoa to overcome a market disadvantage (lack of know how in manufacturing insulated aluminum cable) rather than to obtain a captive market (.3 per cent) or eliminate a competitor.[33]

The Court used the Brown Shoe case freely in considering factors such as ease of entry (there had been five entries since World War II), anti-competitive effects, and factual results of a declining market share.[34]

The District Court may have tried to interpret the Brown Shoe guidelines too freely. The government appealed to the Supreme Court, and that body on June 1, 1964, reversed the lower court and remanded the case for divestiture.[35]

The Supreme Court held that the "line of commerce" should not have been the combined copper-aluminum conductor market as held in the lower court. Even though the lower court had used Brown Shoe in its reasoning the Supreme Court interpreted it differently. The "new" interpretation explained that the degree of competition did not preclude a market division into separate sub-markets for purposes of Section 7 procedures, just as the existence of broad product markets in Brown Shoe did not preclude lesser sub-markets.[36] The Court further reasoned that aluminum conductor and copper conductor for

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[33] Ibid. [34] Ibid.

[35] Trade Cases, 1964, par. 71,116 (375 US 808).

[36] Ibid.

the purpose of analyzing the competitive effects of a merger were separate, and on that basis aluminum conductors were declared a sub-market for purposes of the Section 7 concept of a "line of commerce." Since it was a "line of commerce" in that setting, the Court concluded that the merger violated Section 7.[37]

The lower court had said that the "ease of entry" criteria had been met since there had been five new entries into the particular market since World War II. The Supreme Court observed that all five had been due to government intervention and not to normal competitive decentralization.[38]

The Court in its explanation asserted that the objective of Section 7 was to prevent small accretions of power which were individually so minute as to make the Sherman Act ineffective. The Court reasoned that although the acquisition of Rome added only 1.3 per cent to Alcoa's control of the aluminum conductor market--in Section 7 terms, it was likely that there would be a lessening of competition. The Court stated that it was a basic premise of Section 7 that competition would be most vigorous where there were many sellers, with none having a significant market share. The Court observed that the aluminum industry could well be more oligopolistic, and as that phase developed, the greater the likelihood

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[37] *Ibid.* [38] *Ibid.*

that more parallel policies of mutual oligopolistic advantage would emerge. Such a tendency, according to the Court, could possibly be thwarted by the pressures of a small but significant competitor, and "Rome might be the prototype that Congress had in mind." Justices Goldberg, Harlan, and Stewart dissented. They believed that the application of the Brown Shoe guide lines by the District Court had been proper.[39]

With the Supreme Court disagreeing as to its own Brown Shoe guide lines in Section 7 cases, one last significant proceeding will be examined in an effort to determine a significant guide for business and the lower courts.

On September 13, 1956, the Continental Can Company, the second largest producer of metal containers in the nation, acquired all of the assets of Hazel-Atlas Glass Co., the third largest producer of glass containers in the United States. The government applied for a temporary restraining order. The request was denied on September 13, 1956 on the ground that the complaint did not show by specific facts that immediate and irreparable injury would be suffered if the temporary restraint was not invoked.[40] A previous effort to block the acquisition

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[39]Ibid.

[40]Trade Cases, 1956, US v. Continental Can Co., and Hazel-Atlas Glass Co., par. 68,806.

had been made by invoking the terms of a consent decree which had been entered against Continental in 1950 in an anti-trust suit under Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. On August 31, 1956, a District Court in California held that the consent decree was not applicable to the 1956 acquisition.[41]

The next court appearance, nearly a year later, concerned the propriety of certain interrogatories served by the government upon Continental. The government asked that answers be given, as of the date of the interrogatory --while the respondent based its objection on a decision in U.S. v. duPont (353 US 586). In that case, the Court said that the test of a Section 7 violation was whether at the "time of the suit" there was a reasonable probability that the acquisition would likely result in the condemned restraints. On August 21, 1957, the Court held that the "time of the suit" was not restricted to the time of the commencement of the suit.[42]

About a year after the 1957 ruling, the government objected to interrogatories received from Continental and claimed that the answers would involve privileged information. On July 14, 1958, the Court held that since most of the information would necessarily be disclosed

[41] Ibid., par. 68,476.

[42] Trade Cases, 1957, par. 68,806.

during pre-trial examinations, there would be no necessity to withhold the answers. The Court did authorize the government to withhold answers to interrogatories if the answers would amount to an actual presentation of the case in advance of trial.[43]

The preceding background has been outlined to again emphasize the complexities and the pre-trial delays attendant to Section 7 proceedings. Further pre-trial proceedings and many pages of testimony required an additional five years. On April 15, 1963, nearly seven years after the initial proceedings had begun, the District Court rendered a decision adverse to the government.[44]

The District Court established three products--metal containers, glass containers, and part metal-glass containers. The issue was whether the admitted competition between metal and glass containers, for use other than packaging beer, was of the type and quality which would serve as the basis for defining the relevant market. The Court reasoned that the entire packaging industry was not a relevant market in which to test the legality of the acquisition of a glass container manufacturer by a manufacturer of metal cans. The reasoning was based on:

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[43] Trade Cases, 1958, par. 69,082 (22 FRD 235).

[44] Trade Cases, 1963, par. 70,759 (217 Fed Supp 761).

The broadest application of the product market test of reasonable interchangeability of use or cross elasticity of demand could not encompass the wide diversity of products used in packaging.

No evidence concerning industry or public recognition of the market, peculiar characteristics and uses of the products involved. No evidence of unique production facilities, distinct customers, distinct prices, sensitivity to price changes, specialized vendors, or any other practical indicia by which the product market could be determined.

Metal closures for glass and metal containers, containers for the soft drink industry, containers for the canning industry, containers for toiletries and cosmetics, and containers for medicine and for the household and chemical industries were not relevant markets.

Metal cans and glass containers used in the beer industry were relevant markets to test the legality of the merger.[45]

The Court held that the acquisition of a glass container manufacturer by a manufacturer of metal cans did not violate Section 7 of the Clayton Act because:

It was not shown that the acquisition would be to substantially lessen competition in the metal can or glass container industries, or in the beer container industry.

It was not shown that the can manufacturer obtained an advantage over its competitors because of its ability, after the acquisition, to offer glass containers to its customers.

Allegations that the acquisition made new entry into the industry more difficult or reduced the possibility of new entry were not substantiated. Charges that the can manufacturer would be likely to lose incentive to push can sales at the expense of glass, or vice versa; or that the acquisition would aggrevate a general oligopolistic trend in the industry were not substantiated.

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[45] Ibid.

> It was not shown that the acquisition would effect competition in the beer container industry.
>
> The glass manufacturer's share of the beer market was only .8 per cent before the acquisition, and only 1.1 per cent afterward. The manufacturer's share of the total container market, including metal cans, was 41/100 ths of one per cent before the acquisition, and 17/100 ths of one percent afterward.
>
> The potential of the glass manufacturer to become a competitor in the beer container field did not make the acquisition illegal since there was no showing of a reasonable probability that the glass manufacturer would become a significant producer of beer bottles.[46]

In the Court's conclusions, it was specified the failure to the government's case would be observed when a comparison was made with the Brown Shoe findings. In that case, according to the Court, both horizontal and vertical aspects were present in a single well recognized separate industry. In the Continental case, the Court believed that the merging companies were in different industries, and termed it more of a conglomerate type merger. The Court admitted that the proof presented in Brown Shoe which caused the Supreme Court to strike down that merger went far beyond the proof developed in the Continental Can case. In the case at bar, according to the Court, the government attempted to artificially contrive ten "lines of commerce" (Brown Shoe) which were not generally recognized by industry, and neither did those "lines" conform to market reality.[47]

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[46] Ibid.

[47] Ibid.

The government appealed the adverse decision to the Supreme Court, and on June 22, 1964, that body reversed the dismissal. The Supreme Court said that metal and glass containers competed over a broad range. The Court explained that:

> Interchangeability of use and cross elasticity of demand should not be used to obscure competition, but to recognize competition where in fact competition exists.
>
> Even though the interchangeability of use may not be so complete, and the cross elasticity of demand so immediate as in most intraindustry mergers, there would be over the long run, the kind of customer response to innovation and other competitive stimuli that brought competition between the glass and metal container industries within Section 7's competition preserving proscriptions.
>
> Inter-industry competition between the two industries was sufficient to warrant treating the combined metal-glass container industry as being competitive since they competed in the end use of their products.
>
> Complete inter-industry competitive overlap need not be shown. The existence of noncompetitive segments within a proposed market area would not preclude that market area from being treated as a "line of commerce."[48]

In considering the competitive effects of the merger as measured by market shares, the Court reasoned that:

> Even though the market shares are the primary indicia of market power, a judgment under Section 7 should not be made by any single qualitative or quantitative test.
>
> The merger must be viewed in the context of the particular market involved. That would be its structure, its history, and its probable future.

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[48] Trade Cases, 1964, par. 71,146 (375 US 893).

> Where a merger is of such size as to be inherently suspect, elaborate proof of market structure, market behavior, and the probable anti-competitive effects may (could) be dispensed with in view of Section 7's design to prevent undue concentration.[49]

In its comment that the size of a resulting firm may be presumed to be unlawful, the Court explained that a merger between two of the six dominant firms in the combined glass-metal container industry was unlawful under Section 7. It was specified that the acquiring company had not only increased its share of the combined market from 21.9 per cent to 25 per cent, but that the merger had also reduced from five to four, the most significant competitors who might have threatened its dominant position. The Court also said that the resulting market share of the combined firm approached that held presumably unlawful in U.S. v. Philadelphia Bank which was 30 per cent.[50]

Justices Harlan and Stewart dissented strongly. They contended that the Court majority had substituted a meaningless figure, i.e. the merged company's share of a non-existent market, for the sound and factual findings of the District Court. Justice Harlan argued that in effect the Court had declared a per se rule which would hold that mergers between two large companies in related industries are presumed unlawful under Section 7.[51]

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[49] Ibid.

[50] Ibid.

[51] Ibid.

A meaningful body of anti-merger law has emerged during the 1960's. The issues or guide lines enunciated in the eight significant Supreme Court decisions will be discussed in the next chapter.

The emergence of the guide lines however has brought forth varied reactions. The first of the diverse opinions were described in the Congressional hearings. The opinions of academician and business men some of which were given minus any of their inhibitions prevalent in official hearings are interesting.

Other Voices on Anti-Merger

Professor Derek C. Bok, a law professor, commented upon the contribution of economic theory to the world of mergers. Bok freely used the writings of economists Bain, Martin, Ruggles, and Weston in describing the theoretical shortcomings of trying to forecast the economic effects of a merger. He agreed with Weston that the writings on the issue had been primarily descriptive and that very little progress had been made toward finding answers to the basic theoretical issues. Bok added that studies of monopoly and oligopoly as well as pure competition had all been helpful but all had dealt with changes in magnitude which he believed were rarely present in merger cases. He quoted from Bain when he said that at best, the economist might conclude, long after the fact, that competitive behavior in an industry had deteriorated substantially. Bok said that such a late determination would preclude the relief intended by Section 7.[52]

Bok also agreed with Bain that any decision as to whether the vigor of competition had been or would be significantly reduced would depend upon a weighing process based upon a value judgment. Bok suggested that it would appear appropriate, and in the public interest, to frame a rule which would prohibit any acquisition which would appreciably enhance the acquirer's marginal market position over that which he had enjoyed prior to the merger. Bok concluded however that there was a general unwillingness to recognize the limits of our understanding, hence there was a hardened resistance to simple rules. Such resistance according to Bok was based upon a false hope that more information could somehow dispel any doubts about the consequences of a disputed merger. "In striving to be flexible, we may be obscure; in seeming up to date, we will be merely indiscriminate; in seeking expertness, we may end only in extravagance."[53]

Adelman, in a 1961 article on anti-merger, briefly examined several Federal Trade Commission decisions. Even though concentration ratios were not to be equated with

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[52]Derek C. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," Harvard Law Review, v. 74 (December 1960), pp. 226-355.

[53]Ibid., p. 349.

monopoly according to Adelman, inquiries into that area had been accorded heavy weight. The character of competition in the market involved had been considered in several cases, and according to Adelman, it had been implied that the law should guard any competition that remained. That protectionist influence, Adelman observed, had been invoked in uses involving both vertical and conglomerate mergers. Adelman concluded that the enforcement of the Anti-Merger Act had demonstrated the same three sided conflict--among competition, protectionism, and laissez-faire or business statesmanship--that had prevailed throughout the history of the anti-trust laws.[54]

A popular national magazine editorialized that the Supreme Court decision in the Brown case had apparently extended Section 7 of the Clayton Act to growth of concentration in fragmented industries. That broader definition of a geographic market, it was feared, would pose a threat to retail chain operations.[55]

An article which appeared in the Yale Law Review was critical of the manner in which Section 7 had been applied in the Procter and Gamble case and in the Reynolds Metals case (FTC Docket 7009, 1956). In the Procter case, the trial examiner had emphasized that the criterion to

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[54] M. A. Adelman, "The AntiMerger Act, 1950-1960," American Economic Review, v. 51 (May 1961), pp. 236-244.

[55] "Less Room Than Ever for Mergers," Business Week, June 30, 1962, p. 98.

invalidate conglomerate mergers under Section 7 would be the economic power of the acquiring firm that could be used to drive out competition. The same guide, according to the author of the article, had been used in the Reynolds case even though the products of the acquiring company were not complementary to those of the acquired company as had been prevalent in the Procter case. The article continued by observing that if that interpretation were permitted to prevail, any merger could be invalidated. Those two decisions, according to the Review, represented a per se rule of protecting competitors which was contrary to the "protection of competition" proviso in Section 7. It was further observed that the decisions had not relied on any economic analysis to determine the effects on competition with that feature of Section 7 apparently ignored. It was concluded that such broad interpretations, definitely not intended by Congress, could have adverse effects on economic growth. The adverse effects would be demonstrated, according to the author, by a restriction in the flow of investment capital "which would bring with it a frozen industrial structure and lessening of capital innovation."[56]

The restriction of economic growth would be a rational assumption, if all mergers were declared illegal.

[56]"Conglomerate Mergers under Section 7 of the Clayton Act," Yale Law Review, v. 72, No. 6 (May 1963), pp. 1265-1281.

But would it be rational for reasonable men to permit interpretations of a law to become so broad that all the public would eventually suffer?

In 1964, a nationally circulated business publication reported that the number of mergers was still increasing despite restrictions. It was indicated that the merger figures utilized were obtained from a private financial reporting firm which had obtained the information from many sources--just like the Federal Trade Commission and the Department of Justice had to operate. The editors commented on that manner of procuring merger information. They concluded that there had been very little enthusiasm for pre-merger notification bills which had been introduced so often in the past by the late Senator Kefauver. In the editors' opinion, the two enforcement agencies would find a pre-merger notification administratively unfeasible.[57]

William H. Orrick was interviewed by a national magazine in 1964. Orrick declared that the antitrust philosophy of the Johnson administration was based on the premise that competition provided the lowest prices, highest quality, and was the best allocator of resources. Orrick said that the philosophy was the same that had prevailed in both the Kennedy and Eisenhower administrations.

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[57]"Mergers Keep Growing with a Difference," Business Week, March 21, 1964, p. 64.

Orrick freely admitted that the prosecution of merger cases was most difficult since the decisions, for the most part, had to be made in an area of uncertainty. Orrick stated that he believed that vigorous enforcement of anti-merger laws would not hamper economic growth as some critics had speculated, but if enough were of that opinion, then Congress would have to change the laws which protected competition. Orrick affirmed that competition was a part of our way of life, just as the Constitution had been for so many years.[58]

Milton Handler, law professor, was critical of Supreme Court decisions in anti-merger litigations during the 1962-1964 period. In the Brown Shoe case, according to Handler, the factors to be probed had been enumerated but the Court had indicated that the market could be sliced as thin or thick as the government desired. Handler was particularly critical of the decision made in the Philadelphia Bank case, which had departed from the Brown guide lines. The opinion in the bank case stressed the importance of preventing even a slight increase in concentration. Handler said that the word "slight" was not the same as "significant," and the use of the lesser magnitude would not, in his opinion, produce a firm which would control an undue market share. Handler observed that the

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[58]"What's Next for Antitrust," Dun's Review, June 1964, pp. 35-36+.

term "slight" was also utilized in the Court opinions in two subsequent cases, the Alcoa-Rome and Continental Can cases. In those two, according to Handler, the Court had even fashioned a market which had been contrary to well documented findings of the respective trial judges who had based their decisions on Brown Shoe guide lines. Handler was critical of economists who insisted that there was no competition in a market populated by few sellers. Handler explained that he could not visualize where a line could be drawn under a certain number of competitors, and decree that above or below that line, there would, or would not be, competition. Handler was particularly critical of the opinion in the Continental Can case in which it was stated that "an economic analysis of market behavior, performance, and ease of entry would be too complex or elusive to be evaluated." By that disregard, and supported by the Brown opinion, Handler said that the Court had been dealing with "ephemeral possibilities." There was nothing too complex, Handler argued, for the Court to reject post-acquisition losses after the Alcoa-Rome merger. Neither was there anything too complex when the Court rejected defense witnesses testimony who stated that the merger had not lessened competition. By such inconsistencies, Handler said the courts had created a modicum of uncertainty. To provide a certainty, the courts could hold that all mergers would be held illegal unless they had been previously cleared by an enforcement agency, or according to Handler, a ceiling could be placed on the number of permissible mergers.

> It hardly seems too much to ask the Court that it refrain from inventing imaginary markets which do not correspond to economic realities, and from nullifying mergers on the basis of imaginary possibilities rather than reasonable probabilities.[59]

Business Week was also critical of the 1962-1964 Supreme Court decisions. As to the preservation of the small business, the editors pointed out, a small company locked into its own market because its only potential buyers are forbidden to act by antitrust laws, would not be in an enviable position.

> The small company isn't prone to experiment in new fields when the chances of liquidating mistakes are lessened by an active antitrust enforcement policy . . . there is no legal remedy for many. They are a part of the 'costs' that court has assumed must be paid as part of the price for maintaining small competitors in the market, frequently against the tide of economic change. Congress alone can decide whether the costs to society and the business structure are excessive.[60]

Leonard Weiss published a study in 1965 in which he evaluated the role of mergers in six industries: Steel, Petroleum, Auto, Cement, Flour, and Brewing. Weiss found that internal growth and exit, traditionally attributed to economies of scale, were much more closely

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[59]Milton Handler and Stanley D. Robinson, "The Supreme Court vs. Corporate Mergers," Fortune, v. 71 (January 1965), pp. 164+.

[60]"Anti-trust Turns Tougher," Business Week, September 12, 1964, pp. 98-112.

related to a change in concentration at the four firm level than was merger.

> There were mergers at that level, but they were distributed among industries and periods in a fairly random way and offered little explanation of the net change in concentration. Merger did become important in concentration changes when more majors were considered but at the 8-20 firm level, they were more likely to represent rationalization rather than attempts to create monopoly.

Weiss concluded that most mergers since the 1920's could be defended as harmless and probably socially useful.[61]

In mid-1965, Donald F. Turner, Harvard Law School, was appointed to head the Antitrust Division of the Department of Justice. Turner promised to spell out guide lines on mergers, and to prosecute only cases with "rational" grounds instead of enforcing the letter of the law. The announcement paralleled the thinking of Justice Abe Fortas, President Johnson's first appointment to the Supreme Court. Fortas declared that the antitrust agencies had an obligation to determine whether the public interest would be served by attacking an acquisition.[62] About three years later, Turner did spell out guide lines, but they appeared in June 1968 shortly before his resignation from the Department of Justice in order to return to the law school. See Appendix I for the guide lines as presently in effect in

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[61] Leonard W. Weiss, "An Evaluation of Mergers in Six Industries," Review of Economics and Statistics, v. 47, May 1965, pp. 172-181.

[62] "Antitrust Gets a New Gospel," Business Week, August 14, 1965, p. 27.

the Department of Justice.

In 1966, the Supreme Court issued two more "land mark" decisions. In the Dean Foods Case (1966 Trade Cases, par. 71,788) the Court held that the Federal Trade Commission had the authority to seek an injunction barring consummation of merger, pending a decision on the legality of the merger. The FTC had sought such legislation for years, or even a court decision which would serve the same purpose, however any positive effect would be questionable. The Department of Justice had the authority for years, but had been successful in less than a third of its attempts to obtain restraining orders. A threat to use that power could enhance the Commission's bargaining position with proposed merger participants--to the extent of foregoing a mingling of assets during a litigation.[63]

During the same sitting, the Court broadened the government's power to overturn mergers between direct competitors. In the Pabst Brewing Case (1966 Trade Cases, par. 71,790), the Court held that Pabst's merger with Blatz Brewing Company was illegal when the merger created a firm that controlled 4.5 per cent of a market, if there were a trend toward concentration in the industry. Just three years earlier, the Court had declared in the Philadelphia Bank case that if a merged firm were to control

[63]"High Courts Tighten the Antitrust Reins," Business Week, June 18, 1966, pp. 40-41.

30 per cent of a market, with a trend toward concentration in that industry, it would be illegal. Since that decision, the percentages have decreased case by case.[64]

The courts have continued to broaden the interpretation given to Section 7 of the Clayton Act. By the same token there has been a considerable amount of erudite opposition since the early 1960's but it has been in the minority.

The rationale behind the anti-merger policy will be discussed in the next chapter. In addition, a brief examination of the "new" law will be reviewed relative to its impact on the business world--and remarks by qualified observers will receive attention.

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[64] Ibid.

CHAPTER VIII

EFFECTIVENESS OF AMENDED SECTION 7, CLAYTON ACT AS A PUBLIC POLICY

Anti-merger Today Versus Anti-monopoly, 1890

Public policy today is reminiscent of the late 1800's. A body of anti-merger law has emerged that indicates public policy toward monopoly has made the complete circle. In 1890, the public reacted and the Sherman Act was passed. With spasmodic enforcement, it was relatively ineffective as an anti-merger instrument. In 1914, the Clayton Act was passed to strengthen the Sherman Act. It was designed to stop an offender before the fact instead of after the fact as in Sherman Act violation. The Clayton Act was rendered ineffective by court interpretations.

In the late 1940's, the public demanded more enforcement, so the Clayton Act was amended in 1950. Public clamor for enforcement of the amended Act apparently reached a peak in the 1960's and as a consequence the most significant Supreme Court decisions have been made since 1962.

The editors of Business Week commented that it took twelve years for the amended Clayton Act to cross the street from the Capitol to the Supreme Court, and during that twelve years changes also occurred in the Court. Justices Black and Douglas were the minority in the Columbia Steel case and now they were the majority. Justice Harlan was the only remaining member of the Court that represented the old majority opinion, and in about half the cases, he was being joined by Justice Stewart, the last appointee of former President Eisenhower. Justices White and Goldberg (later in the United Nations) usually voted with the majority as the late President Kennedy's appointees. Justice Clark (since resigned) joined with Chief Justice Warren and Justice Brennan in forming the majority opinions.[1] There is definitely a bi-partisan flavor to the Supreme Court, but with the exceptions of Justices Harlan and Stewart, all are generally favorable to an anti-trust policy regardless of their political affiliations.

The Office of the Attorney General has changed with the administrations. With the exception of the first five years after enactment of the Celler-Kefauver amendment in 1950, all have given anti-merger policy a primary role in their operations.

The top personnel of the Federal Trade Commission has changed over the years. The Commissioners' success

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[1] "Antitrust Turns Tougher," Business Week, September 12, 1964, pp. 106-107.

since 1962 cannot all be attributed to sporadic successes on the part of past Commissioners, or the comparative leadership qualities of the respective Chairmen. The FTC filed about as many complaints during the five years prior to 1962 as it has since. A review of congressional hearings indicated that the present Chairman, Paul R. Dixon, may be of a more outgoing personality than his predecessors, and placed more emphasis on anti-merger work. But the anti-merger climate, too, improved and conditions were more favorable in which to emphasize that phase of the Commission's work.

It can be concluded that the successes of anti-merger work in the 1960's have been due to changes in people rather than changes in the statute.

Rationale Behind Anti-merger Policy

The tenor of Federal Trade Commission consent orders, and the Supreme Court and lower court decisions have not been based on any pre-set formulae. The decisions have presented a highly variegated pattern, tailored to fit differing market situations.[2] As a consequence, there has been a variance as well as a variety of economic factors that have been considered.

While oligopoly is freely mentioned as the target for anti-merger policy, there has been no concrete evidence

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[2]Bock, No. 93.

that the theory of oligopolistic behavior has been accepted by the courts. However, lengthy discussions on what was, and is, generally accepted as oligopolistic behavior have formed a part of the arguments during most litigations.

The element of economic or industrial concentration in a particular industry, or market, has focused on two possibilities generally accepted as being extant in an oligopolistic market. The increased concentration, or increased market share of a firm could place it in a position of being a virtual monopolist, or at least as a dominant firm, or a price leader in its market. In that position, the dominant firm could set a price at or near the monopolistic level. Generally, a monopolistic price is higher, does not respond to consumer demand, and involves a restricted output. If prices are set "administratively" by such a firm and output is restricted, it would cause a misallocation of resources, a higher rate of return on capital investment, and would aggravate a mal-distribution of income. Thus traditionally, excessive or superconcentration in an industry has been thought to lead to a situation detrimental to the public--hence the reasoning behind the invocation of an anti-merger or anti-concentration policy.

A second argument, used sparingly however, concerned the market behavior and price behavior where a small number of firms populated an industry. Each firm would have a price sensitivity to the price actions of any other. This would lead to what is called a "kinked" demand situation. A price normally above a competitive price would be set by one price leader firm at a level to realize a satisfactory rate of return. That price then would not be disturbed or changed frequently in order to maintain an industry-wide price equilibrium. Such a stable price is largely insensitive to consumer demand. This pricing behavior may be beneficial to some firms, probably most, but is detrimental to the firms which are unable to achieve economies of scale. In other instances, this administered price is harmful to the ultimate consumer because it is higher than a competitive price and is relatively inflexible.

Arguments have been advanced that present oligopolistic industries are being made more so by an increased concentration of economic and industrial power brought about through mergers and acquisitions. Further it has been maintained that the increased power of a firm in an industry would tend to restrict entry of new firms, and additionally, the merger-acquisition would also eliminate a competitor.

In summary, the increase of market power through concentration causes oligopolistic pricing policies to the detriment of the consumer and the nation. The increased market share resulting from a merger-acquisition would restrict entry into an industry and eliminate competition. These two premises form the backbone of anti-merger policy. In essence, the policy pursued has been to prevent a lessening of competition by the preservation of small independent firms. Since mergers and acquisitions, or so it has been philosophied, are contrary to public policy, almost any type of business consolidation has been found to be in contravention to Section 7 of the Clayton Act. The critical issues have centered around the question of who may be affected, how, and how seriously.

Impact of Amended Section 7

Case Pattern

Between January 1, 1951 and June 30, 1967, the Federal Trade Commission and Department of Justice issued a total of 202 complaints which charged violations of Section 7 of the Clayton Act. Most of the enforcement activities centered in the manufacturing-mining segment of the economy, roughly 75 per cent, and most of the complaints were filed where the acquired company had assets of $10 million or more. In that category there were 921 mergers, and 94 were challenged.[3]

These figures of course represent but a fraction of total merger activity. In a preceding chapter, it was

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[3]Willard F. Mueller, "The Celler-Kefauver Act: Sixteen Years of Enforcement" (unpublished and undated). Mueller is an economist with the Federal Trade Commission.

indicated that total activity in the manufacturing-mining sector had averaged about 700-800 per year in that period. Since 1965, the number has increased rather sharply. In 1966 about 1,200 were recorded, and in 1967, about 1,500 more were recorded by the Journal of Corporate Ventures.[4] The latter year resulted in the highest number of mergers-acquisitions ever recorded.

Analysis of Developments through Court Interpretations

Aims

The Supreme Court said in the Brown Shoe case that competition in general was to be protected, not an individual competitor. In the Alcoa-Rome case, the Court said that it was the intent of the law that a small business, if healthy, should be preserved.

Scope of Applicability

The Supreme Court held in the El Paso Natural Gas case that firms under the jurisdiction of regulatory agencies other than the Federal Trade Commission are subject to antitrust challenges. In the Philadelphia National Bank case, the Supreme Court said that the Bank Merger Act of 1960 did not prevent an antitrust challenge even if a merger had previously been approved by the banking regulatory agency.

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[4] Times-Herald, Dallas, Texas (Business), January 21, 1968.

Tests

Product Definition--"Line of Commerce" (product) could be viewed either broadly or narrowly in the context of the particular industry, i. e. if it were recognized by the industry or the public (Brown Shoe). The Court said that end uses of a product determined substitutability--that competition among products, not technical characteristics, would prevail in the showing of a lessening of competition. The Court added that a complete industry or product overlap was not necessary in proving that a merger was violative of Section 7 (Continental Can).

Product Extension--In the General Foods case, the Court held that a merger involving an extension of the acquiring firm's product line was illegal. In the Procter and Gamble case, the Court explained that a "product extension" acquisition was anti-competitive and lessened competition and was therefore illegal under Section 7.

Market Share--In the Brown Shoe case, the Court declared that a merger with horizontal aspects would be declared illegal on the basis of a smaller market share than had formerly been presumed.

The Court held in the Alcoa-Rome case that the acquisition of even a smaller percentage of the product market than had prevailed in the Brown Shoe case would tend to lessen competition.

In Continental Can the Court said that complete inter-industry overlap need not be shown to render a merger violative of Section 7. In the same case, the Court said that size of the market share of the resulting firm, if approaching a certain percentage share of the market, would render the merger invalid.

In the Philadelphia National Bank case the Court held that if a merger resulted in a new firm controlling 30 per cent of a market, it would be undue concentration, and in violation of Section 7.

Market Area--The Court said in Brown Shoe that "section of the country" could be viewed as nationwide or citywide or both; and that boundaries were drawn with sufficient breadth to include the competing products of each merging firm.

In the Philadelphia Bank case, the Court said that a "section of the country" would be an area in which the majority of the business originated.

Miscellaneous--The Court held in Brown Shoe that a vertical integration was like a tying contract which was illegal under Section 3 of the Clayton Act; and therefore a vertical integration would be anticompetitive in contravention of Section 7. In the same case, it was declared that qualitative and quantitative tests of monopoly power would be viewed functionally in context of the particular industry; and the tests took into account the market structure and conditions of entry.

In the Alcoa-Rome case, it was said that in an oligopolistic industry, an acquisition could make it more oligopolistic.

The Court in the General Foods case affirmed that the financial power (deep pocket) of an acquiring company could be used to inhibit entry by obtaining customer advantage through advertising and inducements to purchase other products from the acquiring company.

In the Penn-Olin case, the Court explained in its remand to the lower court, that the legality of a joint venture could not be based upon the assumption that one or the other partners could have entered a market without benefit of a joint venture.

The Court in the Philadelphia Bank case stated that a history of past acquisitions would be given substantial weight; and that any acquisition involving a scheme of stock or asset exchange would contravene Section 7.

In the Consolidated Foods case, the Court held that the possibility of an acquiring firm being able to enforce reciprocal buying of the acquired firm's products would be anti-competitive and in violation of Section 7. In the same case, the Court declared that post-acquisition conduct should be carefully evaluated since no one could forecast what the fate of the acquired would have been if there had not been a merger.

Defense

The Court said in the Brown Shoe case that economies of scale were recognized but would not normally constitute a defense sufficient to offset anti-competitive effects.

In the El Paso Natural Gas case, the Court held that if there were a reasonable probability that a firm could have entered a market other than by merger-acquisition, the acquiring firm would be in violation of Section 7. In the same case, the Court said that public convenience and necessity could not prevail over anti-trust requirements.

The Court stated in the Lone Star Cement case that where vertical aspects were present, the acquisition of a purely local firm (underlining mine) by an interstate firm would not be an acceptable defense to a violation of Section 7.

Proof

In the Alcoa-Rome case, the Court held that complete interindustry overlap need not be shown to render a merger invalid.

The Court in the Continental Can case affirmed that where a merger is of such size as to be inherently suspect, elaborate proof of market structure behavior need not be shown because undue concentration was proscribed by Section 7.

The Court held in the General Foods case that all possible requirements for determining a relevant market need not be present in all merger cases.

Comments

The decision rendered in the Consolidated Foods case could well be the forerunner of the Court's definition of a conglomerate merger and its anti-competitive effects. In that case, there had been no pre-merger competition and there had been no customer-supplier relationship.

As far as the FTC is concerned, probably as significant a decision as any occurred in the Dean Foods case in which the Court upheld the Commission's power to obtain a restraining order in Section 7 cases.

The very brief summarization of court decisions, and explanations presently form the basis of existing anti-merger law. The guide lines set forth should prove helpful to the enforcement agencies. On the other hand, the business community will know what types of transactions are suspect or likely to be challenged by the government.

Evaluations by Observers

Professor Handler said that a definitive body of anti-merger had not emerged. He cited the Consolidated Foods case where illegality was based on a presumption that the acquisition could have placed Consolidated in a position where it could have exerted reciprocal power (underlining mine). Handler was critical of the Supreme Court's reasoning in "share the risk" or joint venture operations. He explained that such transactions had heretofore rarely been challenged--if so the rule of reason prevailed rather than a presumption as to what might occur at some future date (underlining mine).[5] In essence, Handler opposes economic theory; however, he has not gone so far as to declare that theory should be disregarded in its entirety.

Professor James Rahl caustically criticizes the inconsistencies in Supreme Court decisions and said that almost any horizontal merger could be invalidated. He said that in the Philadelphia Bank case, the merger was defined as "bad" because there was an undue market share in a concentrated industry. Rahl declared that if neither concentration nor undue market share were present, the merger would be dangerous if it were part of a trend toward concentration as in the Brown Shoe case. Or if none of those criteria were met, Rahl asserted that a merger would be illegal if the acquired firm were a significant factor or a small independent which "Congress desired to protect" as in Alcoa-Rome.[6]

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[5]Milton Handler, "Emerging Anti-trust Issues: Reciprocity, Diversification, and Joint Ventures," Virginia Law Review, v. 49 (April 1963), pp. 433-447.

[6]James A. Rahl, "Anti-merger Law in Search of a Policy," The Antitrust Bulletin, v. 11 (1966), pp. 325-349.

Rahl continued by stating that vertical mergers were "bad" if they "may" foreclose competition from a substantial share of the market without producing any countervailing advantage as in Brown Shoe. Rahl said that if that condition were not present, if the acquiring firm had a "deep pocket" (financial reserves) the merger would be illegal since the acquired firm would benefit or have an advantage over its non-integrated competitor as in the Reynolds-Arrow case (1962 Trade Cases, par. 70,471). Rahl surmised that any conglomerate would have to bow to the "deep pocket" theory; or to reciprocity as it prevailed in the Consolidated Foods case. Reciprocity, according to Rahl, could also be used in invalidating any vertical merger.[7]

Rahl believed that some vertical and conglomerate mergers might possibly escape censure, but none could circumvent the opinion in the Philadelphia Bank case. In that opinion it was suggested that Section 7 was premised on a social preference for internal growth as opposed to growth by acquisition. If that theory, according to Rahl, were to be combined with the "potential competition" concept that emerged in Continental Can, then a merger would be condemned it were to forestall the possibility of augmenting competition by a socially preferable means.[8] (The

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[7] Ibid.

[8] Ibid.

potential concept that emerged in Continental Can, as well as Penn-Olin, held that entry into a new market could eliminate competition if one of the acquired might otherwise have entered.)

Actually according to Rahl, the Court appeared ready to suppress any merger that the Justice Department or the FTC might decide to attack. Rahl said the lack of a clear policy was a real problem . . . "we have no national policy on the meaning and application of Section 7 that commands a sufficient consensus and has enough clarity to serve as a reliable guide." Rahl suggested a policy similar to that supported by Bok and Turner. They had suggested specific guide lines under which a merger would be invalidated--for example where 10 firms comprised an industry, and each had about the same market share, a merger between any two would be disapproved. Rahl concluded that the two enforcement agencies should coordinate their efforts in evolving a coherent national merger policy.[9]

Professor Martin wrote at length on the decision made in the Brown Shoe case. He concluded that both vertical and horizontal mergers would likely be invalidated unless the firms could clearly demonstrate that competition would be increased. Martin continued that

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[9] Ibid.

the new policy enunciated in the Brown Shoe case could be applied to all mergers since 1950, and to inter-corporate relationships since 1914. Martin was uncertain what would happen to existing corporations which had operated in an oligopolistic market since 1900. Would it be fair, Martin questioned, to permit them to continue while currently striking down an attempt by "shoes" to create the same corporate structure? Martin at the time of his writing (1963) predicted that there would be strong pressures to repeal Section 7. Martin suggested that the Sherman Act could be utilized to reduce long standing centralization if its advantages to the public had not been clearly demonstrated. "Maybe the time is ripe to bring a carefully chosen Sherman case designed to bring the law on existing corporations into line with the new anti-merger policy."[10]

Professor John Narver in his book concluded that conglomerate mergers were not inherently pro-competitive or anti-competitive. In his study it was also observed that under some conditions, a conglomerate could very well promote competition, yet conversely, it could lessen competition. Effects of conglomerate mergers, according to Narver, could only be determined by considering the probable changes in the characteristics of the particular market.[11]

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[10] David D. Martin, "The Brown Shoe Case and the New Anti-merger Policy," American Economic Review (June 1963), pp. 340-358.

[11] Narver, p. 137.

Donald Turner, who later became Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in 1965 surveyed Supreme Court and Federal Trade Commission decisions in Section 7 cases. Turner belittled decisions which would protect the small and inefficient. He believed that such protection was at the expense of the consuming public who were not given the benefits inherent in economies of scale resulting from larger firms. Turner also said that there had been no evidence of a sharp decline in the number of small businesses, but he did recognize that there had been a slow rise in the concentration of assets, over a period of several decades. New entries had not been barred because of the alleged concentration, and Turner specified that Kaiser and Reynolds had both entered the aluminum field since World War II. Turner did not believe that Congress had given the courts and the FTC a mandate to campaign against super-concentration in the absence of any evidence of harm to competition.[12]

Professor Richard Heflebower discussed several court and FTC decisions that were rendered in 1962 and 1963. He described inconsistencies in the decisions in much the same manner as Rahl. According to Heflebower, antitrust laws had no meaning until the Supreme Court

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[12] Donald F. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," Harvard Law Review (May 1965), pp. 1313-1395.

provided definitive decisions. He considered that the decision in the Brown Shoe case was "far from a model of economic analysis or legal interpretation, but its meaning was clear"--the government and the courts had a distinct anti-merger attitude. Heflebower proposed that a narrower definition of "market" be accepted in Section 7 cases, with the burden to be on the defendant rather than the government. Secondly, he proposed that in predicting the effects of a merger, a bench-mark percentage should be set up. He suggested that in any horizontal or vertical merger resulting in the merged firm having a market share of over 20 percent, it should be invalidated. Heflebower mentioned a similar criteria which had been suggested by George Stigler, who also implied that mergers should be opposed if doubtful. Heflebower explained that the courts have limited information upon which to base effects of a merger. He said that if a merger were permitted and the merger developed into a proscribed oligopolistic or monopolistic situation, the error would be difficult to erase. Heflebower contended that if a merger were invalidated that would have enhanced competition, or been neutral, the social loss would be minimal. Heflebower argued that the courts must be able to predict the effects of a merger by answering the question of "which way to lean in the presence of non-definitive theory and sketchy evidence." The question to be weighed in Heflebower's opinion would be whether the social cost of error from a too easy merger policy would be more serious than from following a strict policy.[13]

Markham analyzed several of the court decisions. He believed that the new standards would impose new and significant restraints on the decision making processes of business. In each of the court decisions, according to Markham, there appeared to be a central thread running through them. That common denominator, according to Markham, was the claim by each of the defendants that its actions were merely the conventional means of economic growth. The fact is, according to Markham, that when one firm grows by merger, the relative size of its competitors diminished unless they countered with mergers of their own. On that basis, most mergers could be found in contravention of Section 7. "The voices of those in Congress and public life who are in accord with the new doctrine are clearly more audible than the voices of those who oppose it." Markham continued that in 1963 there were "bills in Congress, and in State Legislatures designed to protect small business from the rigors of competition, but few if any were designed to foster the competitive process itself."[14]

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[13]Richard B. Heflebower, "Policy and Economic Analysis," Quarterly Journal of Economics, v. 77, No. 4 (November 1963), pp. 537-558.

[14]Jesse W. Markham, "Antitrust Trends and New Constraints," Harvard Business Review, v. XLI (May-June 1963), pp. 90-91.

John J. Scott, General Counsel, Socony Mobil Oil Corporation, addressed a gathering of business men in 1964. Scott said that he favored antitrust legislation that was to be administered with wisdom and fairness, but he expressed concern over an unrealistic enlargement of the application of Section 7. He believed that the present policy was working at cross purposes with a concurrent goal of economic growth. Scott characterized the Brown Shoe decision as one that was close to an indictment of integration. Integrations, he contended, were but competitive efforts to effect cost savings. He believed that the approach in the Brown case, would in the long run restrict competition, penalize the consumer, and "impose a strait jacket on the national economy."[15]

Scott criticized the approach in the Procter and Gamble case. He was particularly upset over the Federal Trade Commission (and later the Supreme Court) minimizing the economies of scale claimed by the respondent. Scott indicated that he had lost faith in the "new policy" since he had always presumed that sensible business objectives would be compatible with the antitrust laws.[16]

Scott was critical of the government's approach in the Penn-Olin case. Scott believed that the government

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[15] John J. Scott, "Is Antitrust Hurting Growth?" Dun's Review, v. 83 (May 1964), pp. 55-56 and 78-86.

[16] Ibid.

had actually contended that a "share the risk" proposal which would lead to a chance of making a profit, was in contravention of Section 7. Scott pointed out that such a position would imply that any contributions joint ventures might make in the expansion of the national economy would be unacceptable. Scott claimed that such a position was ridiculous and should not be tolerated by rational men.[17]

Scott was critical about the decision made in the Consolidated Foods case. A merger which could have placed a firm in position where it could have engaged in reciprocal dealing--according to Scott, was contrary to past acceptable business practices. Trade relations, or reciprocity, had been practiced since time immemorial, and if that were to be a future indictment, then all conglomerate mergers would be per se illegal. Scott believed such an indictment went far beyond the scope or the intent of the antitrust laws.[18]

Scott argued that had the antitrust laws been strictly imposed over the past 100 years while the industrial capacity of the nation was being built, it would have been highly unlikely that the United States would have reached its present stature in the economic world. He contended that Section 7 should only be invoked where there was a real threat to competition as opposed to a theoretical probability that a merger would be

[17] Ibid. [18] Ibid.

anti-competitive. Scott said that Section 7 should be used sparingly, and not where the facts and the background of an industry have revealed that the basic objectives had been to achieve economies of scale. As to the latter, Scott argued that it was on that basis that the United States should be able to compete with foreign goods. He advocated the dropping of trade barriers. Scott asserted that such action would promote a genuinely competitive condition in the nation.[19]

In 1966, John Blair pointed out to the Senate Subcommittee on Antitrust and Monopoly that business concentration had increased during the period 1947-1963. The increase had been concentrated in the top 50 of the 200 largest manufacturers, but the average share of the top 200 had increased less than 1 per cent a year. In general, according to Blair, the number of industries in which the four largest firms had increased their output but slightly exceeded those that had suffered a decrease.[20]

Blair also pointed out that:

(1) Four of the very large industries with shipments in excess of $2.5 billion showed increases in concentration, but seven did not. Of the four, two were in

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[19] Ibid.

[20] U.S. Senate, Subcommittee on Antitrust and Monopoly, Hearings on Economic Concentration: Concentration and Divisional Reporting, Part 5, 89th Cong., 2d Sess., September 1966.

foods, one in textiles, and one in transportation equipment. Impliedly, the groups selling to the consumer increased in concentration, while those selling industrially, decreased in concentration.

(2) The share of the industries' man hours used by the largest producers was less than their share of the industries' shipments. Large industries were therefore apparently more efficient.[21]

Professor Samuel R. Reid, University of Illinois, testified that large publicly held firms which tend to merge were firms that were oriented more toward managerial interests as opposed to the interests of the stock holder. Reid claimed that his study had revealed that a number of firms had objectives--or acted as if they had--which resulted in a socially suboptimal allocation of capital when they favored acquisition rather than internal growth.

Reid suggested that the tax structure be modified so as to increase the attractiveness of internal growth. It was suggested that an increase of tax credits and an increased depreciation allowance on new investment and equipment could be used to promote internal growth. He also suggested that some incentive could be devised which would provide an incentive to dis-invest, such as the creation of tax debits on acquisitions. Reid contended

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[21] *Ibid.*, pp. 1892-1900.

that the wave of mergers that had occurred since the passage of the Celler-Kefauver bill in 1950 could have actually been influenced by a favorable corporate tax structure. He concluded that a change in the tax laws could be a more pragmatic method of curbing mergers-acquisitions which were not in the public interest than any application of Section 7.[22]

Johann Bjorksten, Economic Consultant, pointed out to the Sub-committee that the merger route to bigness was almost a way of life. It was not always successful according to Bjorksten since of the 5,400 mergers in a previous 10 year period, there had been a failure rate of 16 per cent in the 12 industries he had studied.[23]

Willard Mueller contended that Congress drafted a statute that was designed to prevent only anti-competitive mergers. It was not intended to prevent all mergers which might add to either market or aggregate concentration --some mergers might be in the public interest such as a merger which rescued a failing firm. The chief impact of anti-merger enforcement according to Mueller has appeared in the area of horizontal mergers where the numbers have steadily declined. The decision rendered in the Bethlehem Steel case (168 Fed Supp 576) in late 1958, according to Mueller, marked the beginning of the end for horizontal

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[22] Ibid., pp. 1909-1927. [23] Ibid., pp. 1927-1968.

mergers.[24]

Mueller pointed out five industries--shoe, steel, dairy, food, and cement in which anti-merger actions had affected the structure of the particular industries. Anti-merger activities in the food and dairy industries had illustrated the policies with respect to either non-horizontal mergers or the so called "market extension" mergers. In the cement industry, vertical acquisitions were the focus of attention. Overall, according to Mueller, the most important impact of the anti-merger policy has been its deterrent effect.[25]

The highly diversified Food Machinery Corporation (FMC) proposed a 1963 merger with the American Viscose Corporation. The Department of Justice sought a preliminary injunction which was denied; an appeal was later dismissed; and the Supreme Court affirmed the dismissal (U.S. v Food Machinery Corp. and American Viscose Corp.)[26] FMC contended that it merged only into areas where it had the expertise, and its mergers were motivated by profit alone. FMC pointed out an earlier merger with an armor manufacturer where by good management and a reduction of costs, the price of an amphibious tank sold to the government was cut from $70,000 to $22,000.[27] Merger policy in

[24] Mueller, pp. 31-59. [25] Ibid.

[26] Trade Cases, 1963, par. 70,865.

[27] "Giant That Makes Most Anything," Business Week, March 9, 1963, pp. 58-64.

1968 could very easily have invalidated the earlier FMC merger and the public would have been the loser. All mergers are not dangerous, nor should the policy be so inflexible that any anti-merger complaint would be tantamount to the finding of a violation of Section 7.

In a concluding chapter, a summarization of the development of anti-merger policies will be given. The implications of a strict interpretation of present day policy will be discussed. A suggested anti-merger policy conceivably acceptable to either opponent or proponent of existing anti-merger thinking will conclude the research.

CHAPTER IX

SUMMARY AND CONCLUSIONS

Summary

The concepts of anti-merger policy have undergone a transformation since the early days of the United States. The passage of the Sherman Act in 1890 was a public protest against monopoly and big business. A sporadic enforcement did little to deter the continued increase in business concentration. The public aroused itself again and enough pressures were forthcoming on Congress to cause the passage of the Clayton Act in 1914. The majority of the mergers were being effected by the acquisitions of stock and it was that merger device that was made illegal under the Clayton Act. It was believed that the Sherman Act would care for other questionable devices that tended toward monopoly or acted as a restraint of trade. In 1914, the Federal Trade Commission Act was enacted which created a Commission to administer the Clayton Act. One section of the Federal Trade Commission Act also made certain unfair business practices illegal, and that portion was administered by the Federal Trade Commission.

Neither the Clayton Act nor the Sherman Act as interpreted by the courts restricted a wave of mergers and acquisitions. Business evaded restrictions by purchasing the assets of its desired acquisitions. That method of evasion was long recognized by the Federal Trade Commission and was brought to the attention of Congress as early as 1921. A series of unfavorable court decisions highlighted the problem, and public indignation transmitted through Congress caused the Clayton Act to be amended in 1950. Section 7 of the Act was amended to include asset acquisitions along with stock acquisitions. The Federal Trade Commission believed that the law was all encompassing, and the threat of its use would restrict business concentration thereby permitting the free enterprise system to function as it was intended.

During the first five years after enactment of amended Section 7 of the Clayton Act, only eleven complaints were filed by the two jurisdictional agencies. (Section 15 of the Clayton Act authorized the Department of Justice to also investigate Section 7 violations.) The Commission and the Department of Justice used different approaches. The Commission tried for total dissolution of the merged firms which resulted in lengthy litigation. Justice conversely, used a consent decree as provided by the law. While that usage eliminated lengthy litigation, it did not provide the foundation for legal interpretations of Section 7.

The first problem area regarding interpretation of the amended act curiously enough was in the Commission itself. The Hearing Examiner used a Sherman Act test of legality of a merger and dismissed a complaint against Pillsbury Mills. The use of the more stringent Sherman Act tests was a common occurrence at the time. It was difficult without a higher court interpretation to differentiate between a Clayton Act lessening of competition and a Sherman Act restraint of trade. Other problems also developed during the early years when application of the law was attempted. The Federal Trade Commission believed it was hampered in that mergers were consummated prior to its knowledge which made it difficult to effect a dissolution in the event of a successful prosecution. Accordingly, the Commission lobbied for a pre-merger notification requirement to be placed on all mergers. The Commission was not authorized to restrain a merger pending investigation so it lobbied for authority to issue restraints. The Commission complained that the issuance of cease and desist orders required lengthy court procedures so it lobbied for authority to make its own cease and desist orders final. The three proposals were supported by the Department of Justice which also proposed that it be authorized to subpoena business records in Section 7 cases.

The foregoing problems could have possibly accounted for an apparent lack of aggressiveness displayed by both enforcement agencies. Their protesting voices were heeded by Congress which in 1955 appointed committees in both houses to hear questions regarding antitrust and monopoly, and to consider proposed amendments to amended Section 7 of the Clayton Act. The House Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary offered the more significant observations. Witnesses before the committee were government officials, business executives, and scholars from the field of economics. There were diverse opinions as to the effectiveness of amended Section 7. The proponents of a stronger Section 7 were primarily representatives of small business and government officials who denounced a growing concentration of economic power which was weakening competition. Contrariwise, the opponents of a stronger Section 7 who were in the minority disregarded economic concentration as a threat and characterized it as a myth. There were only two amendments to Section 7 which were enacted into law. After lengthy debates, the finality of Commission cease and desist orders was provided. After less lengthy debates, the Department of Justice was given the authority to subpoena business records in Section 7 cases.

The matter of annual appropriations was closely examined by the Committees on Appropriations. Each agency, generally, received increases each year of the

1956-1965 period; however, the requests for funds made by the Federal Trade Commission were subjected to penetrating scrutiny. Each year that agency received a lesser amount than requested, though increased somewhat from the preceding year. A review of the records of the hearings disclosed that most of the Committee were not convinced that the Commission was effectively utilizing its resources. Criticism was leveled at the apparent apathy displayed by the Commission in its pursuit of Section 7 actions. Conversely, the Antitrust Division of the Department of Justice had its budget approved yearly. Despite criticisms of the FTC, the appropriations provided the agency were sufficient to permit annual increases of personnel. In the period 1956-1965, total personnel in the FTC more than doubled. In the same period, total personnel nearly doubled in the Antitrust Division of the Department of Justice.

Section 7 activity in the period 1956-1960 increased markedly. That could have been caused by the thrust of congressional criticism. Too, both agencies had the benefit of five years experience in the administration of the law and that could have contributed to the increased activities. But the experience in the administration of the statute, and the threat posed by that law, had very little affect on the number of mergers and acquisitions. The pace was more rapid than during the preceding five year period.

Mere numbers of mergers and acquisitions does not necessarily connote undesirability, but some unwanted consolidation could have been disregarded. Undesirable transactions could have been overlooked by: (1) inability to compile an all inclusive list of mergers-acquisitions; and (2) a manifestly haphazard method of selecting a "probable violation," for an in depth examination.

There was some emergence of anti-merger law during the period but it was all contributed by the Department of Justice. The Federal Trade Commission changed its approach to Section 7 cases during the period. Where formerly the FTC would file in isolated instances, the new approach called for an industry wide emphasis as evidenced by complaints against the dairy, food, and paper industries. The period also marked another milestone in the progress of the Federal Trade Commission. The Commission had also switched to the negotiation of consent decrees in Section 7 violations. The Department of Justice had used that procedure for a decade. Several cases filed by the FTC which were in litigation were not decided until the period 1961-1965 which period also witnessed the emergence of the majority of anti-merger law as we know it today.

The period 1961-1965 also was significant in that the Department of Justice filed three times as many cases as the FTC. The total number of complaints filed during the period was significantly higher than in any preceding five year period. The increase attributed to the Department of Justice could have been aided by: (1) more than a decade of Section 7 experience; (2) favorable court decisions which gave a broader applicability to Section 7; and (3) generally improved enforcement procedures. The FTC during the congressional hearings justified the decline in numbers of Section 7 cases it had filed as not a true reflection of the agency's contributions to anti-merger policy. The FTC stressed its increased emphasis on the industry wide approach which would cause a lesser number of cases. A decline in FTC filings could also be attributed to the agency's use of business advisory conferences in which business was told, in advance, the type of mergers that would be suspect. A number of Supreme Court decisions in Section 7 cases emerged during the 1961-1965 period. In 1962 the Brown Shoe case was decided in favor of the government--filed seven years earlier by the Department of Justice. The case was considered a landmark in Section 7 law, and Brown Shoe has been used as a reference by courts since that date. Other cases decided by the Supreme Court in that period served to broaden the application of Section 7 to mergers and acquisitions, but the number of mergers and acquisitions have continued to increase.

Varied reactions have prevailed as a consequence of the court decisions. Scholars have written at length on the possible future economic repercussions if the law as it exists today is too strictly applied. Others have been as positive that a strict application of Section 7 will restrict economic concentration and permit free competition to exist as it was intended by Congress as early as 1914.

Conclusions

As a result of this research, the following conclusions are reached:

1. It is recognized that economic concentration has increased in certain industries and has decreased in others. John Blair supports that thesis along with others who appeared before congressional committees. The increase in overall concentration is meaningless because of the variations between industries. Likewise the measurement is subject to different interpretations. As Senator Hruska suggested in one of the hearings--if 1930 were used as a base year for comparisons, then concentration would probably show a decrease when compared to 1960. There is further controversy over the value of the concentration statistics, though it is believed that they at least emphasize problem areas where monopoly could exist. William Martin, an economist, supports that view, along with others.

2. A representative of the United States Chamber of Commerce while testifying before a congressional hearing, emphasized that the number of firms employing fewer than 100 persons (defined as a small business) had increased since 1945. If concentration is the enemy of anti-merger policy, then concentration has had little effect on the new entries.

3. Under the present policy it is conceivable that any type merger can be invalidated. That feature accents ambiguities in the law, and as a consequence there is a strong possibility that discriminatory treatment could result. That thesis is supported by Handler, David Martin, Rahl, and Scott.

4. Amended Section 7 of the Clayton Act as it is interpreted today is unfair. It will not permit present day firms to duplicate what others have done in the past. The "new" law accepts fait accompli because of the difficulties inherent in an "unscrambling" process which was demonstrated in the Pillsbury case.

5. An unreasonably strict application of Section 7 reduces the incentive to invest. If there were no opportunity for growth of an investment, there would be no incentive to invest. That thesis is supported by minority views in the congressional hearings. A decreased investment would aggravate the unemployment situation which in turn would adversely effect consumption and

national income. That thesis is also supported by minority views expressed in the congressional hearings.

The "deep pocket" or threat of unused economic power which dissolved the Procter Gamble-Clorox merger, and others, could likewise reduce the incentive to invest, and that would restrict economic growth. Adelman and Scott subscribed to that theory.

6. Divestments have been ordered on the basis that small independent firms which were acquired by a larger firm, should be returned to their former position in the industrial world. Once an acquired firm has lost its identity in the industry, as in the Pillsbury case and others, the possibility of it ever occupying the same position in the industrial society is remote. That point was belabored by some witnesses in congressional hearings and by the legislative minority members of committees. A so called "protectionist" thesis was announced by the Supreme Court when it stressed that the "social benefit of preserving small business would override economic benefits."

7. If social benefits are to override economic benefits, then one would have to disregard economies of scale. The benefits of economies of scale have been introduced in the majority of the cases, but the courts have been reluctant to accept these circumstances.

8. The term "reduction in competition" as used

in Section 7 proceedings is purely speculative. There is no way economists or anyone else can forecast the degree of competition before a merger, or what competition will likely be after a merger. Minority views in the congressional hearings unequivocally supported that view. Bok said that the term "reduction of competition" was only a value judgment.

9. The anti-trust philosophies of the past three administrations have been comparable. Eisenhower, Kennedy, and Johnson have each expressed a like interest in the pursuit of merger violations. That feature is implied throughout this writing and is supported by a recent statement of the Assistant Attorney General for Antitrust. Records will also reflect that the number of complaints filed over the past 10 years have been relatively the same, and that period spans the three administrations.

10. Section 7 violations should be assigned to one agency. The Antitrust Division of the Department of Justice and the Federal Trade Commission are rivals in the field of anti-merger work. Both agencies have jurisdiction under the statute. Over the years the Department of Justice has been the most successful in prosecuting Section 7 violations as well as taking less time in the proceedings. The Commission has ample work in other areas and in the interest of efficiency and economy, all Section 7 work should be assigned to the Justice Department.

The duplication of jurisdiction was discussed at length in the congressional hearings. One proposal was made that Section 7 cases be divided into economic cases or legal cases, with the Commission being assigned the economic cases.

11. If the present anti-merger policy is to be continued, a simple way to invalidate a merger-acquisition would be to set a concentration percentage goal, above which no merger would be permitted unless it could be shown that it would be in the public interest. Turner and others have suggested that approach, and prior to Turner's resignation from the Department of Justice he did set out such guide lines for that agency. The procedure utilized by the Antitrust Division of that department is set out in Appendix I. If such a policy were to be adopted by the Federal Trade Commission and the courts, would concentrations which have occurred in previous years be decentralized by the same yard stick?

The older concentrated industries that made annual reports to the Securities and Exchange Commission could be the subject of challenge if they reported a capital-earnings ratio above a certain percentage. In that way Turner's yard stick would be confined to specific instances. That feature was mentioned in the congressional hearings.

12. A change in the corporate tax structure, even with a strong anti-merger policy, could be compatible with

majority desires. It would eliminate human frailty extant in value judgments as to what is and what is not concentration. The tax would not be too steeply graduated to discourage internal growth yet it should be steep enough to discourage superconcentration. That feature, too, would go far in decentralizing existing concentration. Reid and others supported a restructuring of the tax system as the most practical way to handle merger policy.

The application of Section 7 as an instrument of policy has not to date resulted in a decrease of the number of mergers. Neither has Section 7 necessarily been in the interests of public policy. The threat of a vigorous application of the present body of anti-merger law is real, and a judicious usage is of paramount importance.

APPENDIX

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, MAY 30, 1968

The Department of Justice today released guidelines outlining its standards for determining whether to oppose corporate acquisitions or mergers under Section 7 of the Clayton Act.

Attorney General Ramsey Clark said the purpose of the guidelines is to insure that the business community, the legal profession and other interested persons are informed of the Department's policy of enforcing Section 7 of the Clayton Act.

Mr. Clark expressed hope that the guidelines would provide a basis for a continuing dialogue between government and business concerning the role and scope of anti-merger enforcement in the maintenance of a free competitive economy.

The Department anticipates that it will amend the guidelines from time to time, Mr. Clark said, to reflect changes in enforcement policy that might result from subsequent court decisions, comments of interested parties, or Department reevaluations.

Because changes in enforcement policy will be made as the occasion demands and will usually precede the issuance of amended guidelines, the Department said that the existence of unamended guidelines should not be regarded as barring it from taking any action it deems necessary to achieve the purposes of Section 7.

A copy of the guidelines is attached.

MERGER GUIDELINES

1. Purpose. The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act. (Although mergers or acquisitions may also be challenged under the Sherman Act, commonly the challenge will be made under Section 7 of the Clayton Act and, accordingly, it is to this provision of law that the guidelines are directed.) The responsibilities of the Department of Justice under Section 7 are those of an enforcement agency, and these guidelines are announced solely as a statement of current Department policy, subject to change at any time without prior notice, for whatever assistance such statement may be in enabling interested persons to anticipate in a general way Department enforcement action under Section 7. Because the statements of enforcement policy contained in these guidelines must necessarily be framed in rather general terms, and because the critical factors in any particular guideline formulation may be evaluated differently by

the Department than by the parties, the guidelines should not be treated as a substitute for the Department's business review procedures, which make available statements of the Department's present enforcement intentions with regard to particular proposed mergers or acquisitions.

2. General Enforcement Policy. Within the over-all scheme of the Department's antitrust enforcement activity, the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, *i.e.*, by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, of an economically undesirable nature. Moreover, not only does emphasis on market structure generally produce economic predictions that are fully adequate for the purposes of a statute that requires only a

showing that the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly," but an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision-making and business planning which involves anticipation of the Department's enforcement intent. Accordingly, the Department's enforcement activity under Section 7 is directed primarily toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct.

In certain exceptional circumstances, however, the structural factors used in these guidelines will not alone be conclusive, and the Department's enforcement activity will necessarily be based on a more complex and inclusive evaluation. This is sometimes the case, for example, where basic technological changes are creating new industries, or are significantly transforming older industries, in such fashion as to make current market boundaries and market structure of uncertain significance. In such unusual transitional situations application of the normal guideline standards may be inappropriate; and on assessing probable future developments, the Department may not sue despite nominal application of a particular guideline, or it may sue even though the guidelines, as normally applied, do not require the Department to challenge the merger. Similarly, in the area of conglomerate merger activity, the present incomplete state of knowledge concerning structure-conduct relationships may preclude sole reliance on the structural criteria used in these guidelines, as explained in paragraphs 17 and 20 below.

3. Market Definition. A rational appraisal of the probable competitive effects of a merger normally requires definition of one or more relevant markets. A market is any grouping of sales (or other commercial transactions) in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included. The advantage need not be great, for so long as it is significant it defines an area of effective competition among the included sellers in which the competition of the excluded sellers is, *ex hypothesi*, less effective. The process of market definition may result in identification of several appropriate markets in which to test the probable competitive effects of a particular merger.

A market is defined both in terms of its product dimension ("line of commerce") and its geographic dimension ("section of the country").

(i) Line of commerce. The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and use from the standpoint of that group of purchasers for whom the two products are interchangeable.

The reasons for employing the foregoing definitions may be stated as follows. In enforcing Section 7 the Department seeks primarily to prevent mergers which change market structure in a direction likely to create a power to behave non-competitively in the production and sale of any particular product, even though that power will ultimately be limited, though not nullified, by the presence of other similar products that, while reasonably interchangeable, are less than perfect substitutes. It is in no way inconsistent with this effort also to pursue a policy designed to prohibit mergers between firms selling distinct products where the result of the merger may be to create or enhance the companies' market power due to the fact that the products, though not perfectly substitutable by purchasers, are significant enough alternatives to constitute substantial competitive influences on the production, development or sale of each.

(ii) Section of the Country. The total sales of a product or service in any commercially significant section of the country (even as small as a single community), or aggregate of such sections, will ordinarily constitute a geographic market if firms engaged in selling the product make significant sales of the product to purchasers in the section or sections. The market need not be enlarged beyond any section meeting the foregoing test unless it clearly appears that there is no economic barrier (*e.g.*, significant transportation costs, lack of distribution facilities, customer inconvenience, or established consumer preference for existing products) that hinders the sale from outside the section to purchasers within the section; nor need the market be contracted to exclude some portion of the product sales made inside any section meeting the foregoing test unless it clearly appears that the portion of sales in question is made to a group of purchasers separated by a substantial economic barrier from the purchasers to whom the rest of the sales are made.

Because data limitations or other intrinsic difficulties will often make precise delineation of geographic markets impossible, there may often be two or more groupings of sales which may reasonably be treated as constituting a relevant geographic market. In such circumstances, the Department believes it to be ordinarily most consistent with the purposes of Section 7 to challenge any merger which appears to be illegal in any reasonable geographic market, even though in another reasonable market it would not appear to be illegal.

The market is ordinarily measured primarily by the dollar value of the sales or other transactions (*e.g.*, shipments, leases) for the most recent twelve month period for which the necessary figures for the merging firms and their competitors are generally available. Where such figures are clearly unrepresentative, a different period will be used. In some markets, such as commercial banking, it is more appropriate to measure the market by other indicia, such as total deposits.

I. HORIZONTAL MERGERS

4. *Enforcement Policy*. With respect to mergers between direct competitors (*i.e.*, horizontal mergers), the Department's enforcement activity under Section 7 of the Clayton Act has the following interrelated purposes: (i) preventing elimination as

an independent business entity of any company likely to have been a substantial competitive influence in a market; (ii) preventing any company or small group of companies from obtaining a position of dominance in a market; (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.

In enforcing Section 7 against horizontal mergers, the Department accords primary significance to the size of the market share held by both the acquiring and the acquired firms. ("Acquiring firm" and "acquired firm" are used herein, in the case of horizontal mergers, simply as convenient designations of the firm with the larger market share and the firm with the smaller share, respectively, and do not refer to the legal form of the merger transaction.) The larger the market share held by the acquired firm, the more likely it is that the firm has been a substantial competitive influence in the market or that concentration in the market will be significantly increased. The larger the market share held by the acquiring firm, the more likely it is that an acquisition will move it toward, or further entrench it in, a position of dominance or of shared market power. Accordingly, the standards most often applied by the Department in determining whether to challenge horizontal mergers can be stated in terms of the sizes of the merging firms' market shares.

5. <u>Market Highly Concentrated</u>. In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.)

6. <u>Market Less Highly Concentrated</u>. In a market in which the shares of the four largest firms amount to less than approximately 75%, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.)

7. <u>Market With Trend Toward Concentration</u>. The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly

unconcentrated, in which there is a significant trend toward increased concentration. Such a trend is considered to be present when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7% or more of the market over a period of time extending from any base year 5-10 years prior to the merger (excluding any year in which some abnormal fluctuation in market shares occurred) up to the time of the merger. The Department will ordinarily challenge any acquisition, by any firm in a grouping of such largest firms showing the requisite increase in market share, of any firm whose market share amounts to approximately 2% or more.

8. Non-Market Share Standards. Although in enforcing Section 7 against horizontal mergers the Department attaches primary importance to the market shares of the merging firms, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of Paragraphs 5, 6, and 7. The following are the two most common instances of this kind in which a challenge by the Department can ordinarily be anticipated:

(a) acquisition of a competitor which is a particularly "disturbing," "disruptive," or otherwise unusually competitive factor in the market; and

(b) a merger involving a substantial firm and a firm which, despite an insubstantial market share, possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage (for example, the acquisition by a leading firm of a newcomer having a patent on a significantly improved product or production process).

There may also be certain horizontal mergers between makers of distinct products regarded as in the same line of commerce for reasons expressed in Paragraph 3(i) where some modification in the minimum market shares subject to challenge may be appropriate to reflect the imperfect substitutability of the two products.

9. Failing Company. A merger which the Department would otherwise challenge will ordinarily not be challenged if (i) the resources of one of the merging firms are so depleted and its prospects for rehabilitation so remote that the firm faces the clear probability of a business failure, and (ii) good faith efforts by the failing firm have failed to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7 by a firm which intends to keep the failing firm in the market. The Department regards as failing only those firms with no reasonable prospect of remaining viable; it does not regard a firm as failing merely because the firm has been unprofitable for a period of time, has lost market position or failed to maintain its competitive position in some other respect, has

poor management, or has not fully explored the possibility of overcoming its difficulties through self-help.

In determining the applicability of the above standard to the acquisition of a failing division of a multi-market company, such factors as the difficulty in assessing the viability of a portion of a company, the possibility of arbitrary accounting practices, and the likelihood that an otherwise healthy company can rehabilitate one of its parts, will lead the Department to apply this standard only in the clearest of circumstances.

10. Economies. Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (*i.e.*, improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.

II. VERTICAL MERGERS

11. Enforcement Policy. With respect to vertical mergers (*i.e.*, acquisitions "backward" into a supplying market or "forward" into a purchasing market), the Department's enforcement activity under Section 7 of the Clayton Act, as in the merger field generally, is intended to prevent changes in market structure that are likely to lead over the course of time to significant anticompetitive consequences. In general, the Department believes that such consequences can be expected to occur whenever a particular vertical acquisition, or series of acquisitions, by one or more of the firms in a supplying or purchasing market, tends significantly to raise barriers to entry in either market or to disadvantage existing non-integrated or partly integrated firms in either market in ways unrelated to economic efficiency. (Barriers to entry are relatively stable market conditions which tend to increase the difficulty of potential competitors' entering the market as new sellers and which thus tend to limit the effectiveness of the potential competitors both as a restraint upon the behavior of firms in the market and as a source of additional actual competition.)

Barriers to entry resting on such factors as economies of scale in production and distribution are not questionable as such. But vertical mergers tend to raise barriers to entry in undesirable ways, particularly the following: (i) by foreclosing equal access to potential customers, thus reducing the ability of non-integrated firms to capture competitively the market share needed to achieve an efficient level of production, or imposing the burden of entry on an integrated basis (*i.e.*, at both the supplying and purchasing levels) even though entry at a single level would permit efficient operation; (ii) by foreclosing equal access to potential suppliers, thus either increasing the risk of a price or supply squeeze on the new entrant or imposing the additional burden of entry as an integrated firm; or (iii) by facilitating promotional product differentiation, when the merger involves a manufacturing firm's acquisition of firms at the retail level. Besides impeding the entry of new sellers, the foregoing consequences of vertical mergers, if present, also artificially inhibit the expansion of presently competing sellers by conferring on the merged firm competitive advantages, unrelated to real economies of production or distribution, over non-integrated or partly integrated firms. While it is true that in some instances vertical integration may raise barriers to entry or disadvantage existing competitors only as the result of the achievement of significant economies of production or distribution (as, for example, where the increase in barriers is due to achievement of economies of integrated production through an alteration of the structure of the plant as well as of the firm), integration accomplished by a large vertical merger will usually raise entry barriers or disadvantage competitors to an extent not accounted for by, and wholly disproportionate to, such economies as may result from the merger.

It is, of course, difficult to identify with precision all circumstances in which vertical mergers are likely to have adverse effects on market structure of the kinds indicated in the previous paragraph. The Department believes, however, that the most important aims of its enforcement policy on vertical mergers can be satisfactorily stated by guidelines framed primarily in terms of the market shares of the merging firms and the conditions of entry which already exist in the relevant markets. These factors will ordinarily serve to identify most of the situations in which any of the various possible adverse effects of vertical mergers may occur and be of substantial competitive significance. With all vertical mergers it is necessary to consider the probable competitive consequences of the merger in both the market in which the supplying firm sells and the market in which the purchasing firm sells, although a significant adverse effect in either market will ordinarily result in a challenge by the Department. ("Supplying firm" and "purchasing firm," as used herein, refer to the two parties to the vertical merger transaction, the former of which sells a product in a market in which the latter buys that product.)

12. Supplying Firm's Market. In determining whether to challenge a vertical merger on the ground that it may significantly lessen existing or potential competition in the supplying firm's market, the Department attaches primary significance to (i) the market share of the supplying firm, (ii) the market share of the purchasing firm or firms, and (iii) the conditions of entry in the purchasing firm's market. Accordingly, the Department will ordinarily challenge a merger or series of mergers between a supplying firm, accounting for approximately 10% or more of the sales in its market, and one or more purchasing firms, accounting *in toto* for approximately 6% or more of the total purchases in that market, unless it clearly appears that there are no significant barriers to entry into the business of the purchasing firm or firms.

13. Purchasing Firm's Market. Although the standard of paragraph 12 is designed to identify vertical mergers having likely anticompetitive effects in the supplying firm's market, adherence by the Department to that standard will also normally result in challenges being made to most of the vertical mergers which may have adverse effects in the purchasing firm's market (*i.e.*, that market comprised of the purchasing firm and its competitors engaged in resale of the supplying firm's product or in the sale of a product whose manufacture requires the supplying firm's product) since adverse effects in the

purchasing firm's market will normally occur only as the result of significant vertical mergers involving supplying firms with market shares in excess of 10%. There remain, however, some important situations in which vertical mergers which are not subject to challenge under paragraph 12 (ordinarily because the purchasing firm accounts for less than 6% of the purchases in the supplying firm's market) will nonetheless be challenged by the Department on the ground that they raise entry barriers in the purchasing firm's market, or disadvantage the purchasing firm's competitors, by conferring upon the purchasing firm a significant supply advantage over unintegrated or partly integrated existing competitors or over potential competitors. The following paragraph sets forth the enforcement standard governing the most common of these situations.

If the product sold by the supplying firm and its competitors is either a complex one in which innovating changes by the various suppliers have been taking place, or is a scarce raw material or other product whose supply cannot be readily expanded to meet increased demand, the merged firm may have the power to use any temporary superiority, or any shortage, in the product of the supplying firm to put competitors of the purchasing firm at a disadvantage by refusing to sell the product to them (supply squeeze) or by narrowing the margin between the price at which it sells the product to the purchasing firm's competitors and the price at which the end-product is sold by the purchasing firm (price squeeze). Even where the merged firm has sufficient market power to impose a squeeze, it may well not always be economically rational for it actually to do so; but the Department believes that the increase in barriers to entry in the purchasing firm's market arising simply from the increased risk of a possible squeeze is sufficient to warrant prohibition of any merger between a supplier possessing significant market power and a substantial purchaser of any product meeting the above description. Accordingly, where such a product is a significant feature or ingredient of the end-product manufactured by the purchasing firm and its competitors, the Department will ordinarily challenge a merger or series of mergers between a supplying firm, accounting for approximately 20% or more of the sales in its market, and a purchasing firm or firms, accounting <u>in toto</u> for approximately 10% or more of the sales in the market in which it sells the product whose manufacture requires the supplying firm's product.

14. <u>Non-Market Share Standards</u>.

(a) Although in enforcing Section 7 against vertical mergers the Department attaches primary importance to the market shares of the merging firms and the conditions of entry in the relevant markets, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of paragraphs 12 and 13. Clearly the most common instances in which challenge by the Department can ordinarily be anticipated are acquisitions of suppliers or customers by major firms in an industry in which (i) there has been, or is developing, a significant trend toward vertical integration by merger such that the trend, if unchallenged, would probably raise barriers to entry or impose a competitive disadvantage on unintegrated or partly integrated firms, and (ii) it does not clearly appear that the particular acquisition will result in significant economies of production or distribution unrelated to advertising or other promotional economies.

(b) A less common special situation in which a challenge by the Department can ordinarily be anticipated is the acquisition by a firm of a customer or supplier for the purpose of increasing the difficulty of potential competitors in entering the market of either the acquiring or acquired firm, or for the purpose of putting competitors of either the acquiring or acquired firm at an unwarranted disadvantage.

15. Failing Company. The standards set forth in paragraph 9 are applied by the Department in determining whether to challenge a vertical merger.

16. Economies. Unless there are exceptional circumstances, and except as noted in paragraph 14(a), the Department will not

accept as a justification for an acquisition normally subject to challenge under its vertical merger standards the claim that the merger will produce economies, because, among other reasons, (i) where substantial economies of vertical integration are potentially available to a firm, they can normally be realized through internal expansion into the supplying or purchasing market, and (ii) where barriers prevent entry into the supplying or purchasing market by internal expansion, the Department's adherence to the vertical merger standards will in any event usually result in no challenge being made to the acquisition of a firm or firms of sufficient size to overcome or adequately minimize the barriers to entry.

III. CONGLOMERATE MERGERS

17. Enforcement Policy. Conglomerate mergers are mergers that are neither horizontal nor vertical as those terms are used in sections I and II, respectively, of these guidelines. (It should be noted that a market extension merger, i.e., one involving two firms selling the same product, but in different geographic markets, is classified as a conglomerate merger.) As with other kinds of mergers, the purpose of the Department's enforcement activity regarding conglomerate mergers is to prevent changes in market structure that appear likely over the course of time to cause a substantial lessening of the competition that would otherwise exist or to create a tendency toward monopoly.

At the present time, the Department regards two categories of conglomerate mergers as having sufficiently identifiable anticompetitive effects as to be the subject of relatively specific structural guidelines: mergers involving potential entrants (Paragraph 18) and mergers creating a danger of reciprocal buying (Paragraph 19).

Another important category of conglomerate mergers that will frequently be the subject of enforcement action--mergers which for one or more of several reasons threaten to entrench or enhance the market power of the acquired firm--is described generally in Paragraph 20.

As Paragraph 20 makes clear, enforcement action will also be taken against still other types of conglomerate mergers that on specific analysis appear anticompetitive. The fact that, as yet, the Department does not believe it useful to describe such other types of mergers in terms of a few major elements of market structure should in no sense be regarded as indicating that enforcement action will not be taken. Nor is it to be assumed that mergers of the type described in Paragraphs 18 and 19, but not covered by the specific rules thereof, may not be the subject of enforcement action if specific analysis indicates that they appear anticompetitive.

18. <u>Mergers Involving Potential Entrants</u>.

(a) Since potential competition (<u>i.e.</u>, the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants into the market and:

(i) any firm with approximately 25% or more of the market;

(ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50% or more;

(iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or

(iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm.

In determining whether a firm is one of the most likely potential entrants into a market, the Department accords primary significance to the firm's capability of entering on a competitively significant scale relative to the capability of other firms (i.e., the technological and financial resources available to it) and to the firm's economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm's manifested interest in entry; or the natural expansion pattern of the firm; or the like).

(b) The Department will also ordinarily challenge a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive "disturbance" or "disruption" that such entry might create.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger inconsistent with the standards of this paragraph 18 the claim that the merger will produce economies, because, among other reasons, the Department believes that equivalent economies can be normally achieved either through internal expansion or through a small firm acquisition or other acquisition not inconsistent with the standards herein.

19. Mergers Creating Danger of Reciprocal Buying.

(a) Since reciprocal buying (i.e., favoring one's customer when making purchases of a product which is sold by the customer) is an economically unjustified business practice which confers a competitive advantage on the favored firm unrelated to the merits of its product, the Department will ordinarily challenge any merger which creates a significant danger of reciprocal buying. Unless it clearly appears that some special market factor makes remote the possibility that reciprocal buying behavior will actually occur, the Department considers that a significant danger of reciprocal buying is present whenever approximately 15% or more of the total purchases in a market in which one of the merging firms ("the selling firm") sells are accounted for by firms which also make substantial sales in markets where the other merging firm ("the buying firm") is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm.

(b) The Department will also ordinarily challenge (i) any merger undertaken for the purpose of facilitating the creation of reciprocal buying arrangements, and (ii) any merger creating the possibility of any substantial reciprocal buying where one (or both) of the merging firms has within the recent past, or the merged firm has after consummation of the merger, actually engaged in reciprocal buying, or attempted directly or indirectly to induce firms with which it deals to engage in reciprocal buying, in the product markets in which the possibility of reciprocal buying has been created.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger creating a significant danger of reciprocal buying the claim that the merger will produce economies, because, among other reasons, the Department believes that in general equivalent economies can be achieved by the firms involved through other mergers not inconsistent with the standards of this paragraph 19.

20. Mergers Which Entrench Market Power and Other Conglomerate Mergers.

The Department will ordinarily investigate the possibility of anticompetitive consequences, and may in particular circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market. Examples of this type of merger include: (i) a merger which produces a very large disparity in absolute size between the merged firm and the largest remaining firms in the relevant markets, (ii) a merger of firms producing related products which may induce purchasers, concerned about the merged firm's possible use of leverage, to buy products of the merged firm rather than those of competitors, and (iii) a merger which may enhance the ability of the merged firm to increase product differentiation in the relevant markets.

Generally speaking, the conglomerate merger area involves novel problems that have not yet been subjected to as extensive or sustained analysis as those presented by horizontal and vertical mergers. It is for this reason that the Department's enforcement policy regarding the foregoing category of conglomerate mergers cannot be set forth with greater specificity. Moreover, the conglomerate merger field as a whole is one in which the Department considers it necessary, to a greater extent than with horizontal and vertical mergers, to carry on a continuous analysis and study of the ways in which mergers may have significant anticompetitive consequences in circumstances beyond those covered by these guidelines. For example, the Department has used Section 7 to prevent mergers which may diminish long-run possibilities of enhanced competition resulting from technological developments that may increase interproduct competition between industries whose products are presently relatively imperfect substitutes. Other areas where enforcement action will be deemed appropriate may also be identified on a case-by-case basis; and as the result of continuous analysis and study the Department may identify other categories of mergers that can be the subject of specific guidelines.

21. <u>Failing Company</u>. The standards set forth in paragraph 9 are normally applied by the Department in determining whether to challenge a conglomerate merger, except that in marginal cases

involving the application of Paragraph 18(a)(iii) and (iv) the Department may deem it inappropriate to sue under Section 7 even though the acquired firm is not "failing" in the strict sense.

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