1965

The ABC's of Clayton 7: Amendment of 1950, Brown Shoe, The Court and Current Complexities

Various Editors

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Antitrust and Trade Regulation Commons, and the Law and Economics Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/vlr/vo110/iss4/14

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
NOTE

THE ABC'S OF CLAYTON 7: AMENDMENT OF 1950; BROWN SHOE; THE COURT AND CURRENT COMPLEXITIES†

TABLE OF CONTENTS

| I. INTRODUCTION | ................................................................. | 736 |
| II. PRE-CLAYTON HISTORY: THE SHERMAN ACT AND THE "RULE OF REASON" | ................................................................. | 736 |
| III. THE CLAYTON ACT OF 1914 | ................................................................. | 740 |
| A. Legislative History | ................................................................. | 740 |
| B. Judicial Interpretation | ................................................................. | 744 |
| 1. "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition" | ................................................................. | 744 |
| 2. "to restrain commerce in any section or community" | ................................................................. | 747 |
| 3. "tend to create a monopoly" | ................................................................. | 748 |
| C. The Legislative Loophole | ................................................................. | 748 |
| IV. THE 1950 AMENDMENT | ................................................................. | 750 |
| A. Congressional Debate | ................................................................. | 750 |
| B. Substantive Changes in Section 7 | ................................................................. | 754 |
| C. Judicial Interpretation | ................................................................. | 756 |
| 1. Degree of Concentration in the Industry | ................................................................. | 757 |
| 2. Market Share — Dollar and Volume Considerations | ................................................................. | 759 |
| 3. Ease of Entry into the Relevant Industry | ................................................................. | 760 |
| 4. Countervailing Power | ................................................................. | 760 |

† Editor's Note: The Recent Developments section of the Review has been omitted from this issue only. This Note represents the combined efforts of staff members of the Villanova Law Review. Included among the contributors are: William T. Define, Thomas J. Tomalis, Thomas J. Tumola, Edward J. O'Malley, Conrad J. DeSantis, Richard A. Wilmans, Robert O. Mickler, Richard H. Zamboldi.
5. Elimination of a Substantial Competitor

6. Restrictions on Supply Outlets and Competitive Opportunities in the Market for Others

7. Miscellaneous Factors

V. Brown Shoe: The Omnific Opinion

A. The Economic Setting

B. The Relevant Market

C. The Effect on Competition

1. The Vertical Level
   (a) The Share Foreclosed
   (b) Exclusionary Practices
   (c) The Incipiency Theory
   (d) Social Policy and Congressional Intent
   (e) Recognized Defenses

2. The Horizontal Level
   (a) The Market Share
   (b) Future Mergers
   (c) The Large Chain Operation
   (d) Advantages of an Integrated Complex

VI. PNB: Presumptive Illegality

VII. Conglomerate Mergers

VIII. Agency Enforcement

A. Criteria For Commencing Actions

1. The Merger of Law and Economics

2. The Effect of Size

B. Responsible Formulation

C. Proposed Reforms

1. A New Ingredient

2. Other Regulatory Components

IX. Conclusion
I.

INTRODUCTION

From the voluminous writings in the antitrust area one might be inclined to presume that the field has been effectively foreclosed. Further investigation, however, reveals that these efforts stand rather as impressive testimony to the complex and controversial nature of the subject. Indeed, much of this literature, contributed by economists and businessmen, is directed primarily at criticizing the underlying policy, rather than analyzing courts’ decisions within the existing framework. Thus, when one delimits from the broad area of antitrust literature the narrower market with which the lawyer is concerned, it seems that further writing should not be proscribed.

It is on this assumption that the following note is predicated. Its scope and purpose is to present an historically oriented discussion of Amended Section 7, with particular emphasis upon the landmark Brown Shoe decision. While proposals for further legislative action are considered, the focus is upon telescoping the past seventy-five years of development in order to place the decisions of the courts in proper perspective. This approach serves to emphasize the current decisional trend, thereby facilitating a prediction of how the courts should react to future anti-merger litigation.

II.

PRE-CLAYTON HISTORY: THE SHERMAN ACT AND THE “RULE OF REASON”*

The attitude of the American people toward great combinations of capital, be they termed monopolies or trusts, has traditionally been one of distrust and hostility. At the roots of this attitude lay both economic philosophy and the effects of hard, practical experience. Long before the Civil War, the view was widely adopted in this country that individuals, if left free to exercise their own judgment as regards business affairs, would, through competition, achieve the desired economic goals of fair prices, quality products, and the elimination of inefficiency in production. Underlying this philosophy was the traditional belief that the right to enter the business or profession of one’s choice is inherent in a democratic society. On the practical side was the lingering memory of the oppressive business practices of the English mercantile and industrial interests, practices that threatened to vest economic control of this young nation in the hands of a foreign power.1

Given this background, it is not difficult to understand the growing concern of the American nation over the discernible increase in varied

* William T. Define, Thomas J. Tomalis.
forms of business combinations, a growth having its beginnings in the post-Civil War era. With the advent of railroads and steam ships, and the great economic changes and adjustments brought about by the tremendous advances in our industrial life, an era of active combination began to dawn. The opening of new markets through rapid methods of transportation, the growing needs of modern machinery, the reduction in freight rates, and the advances in industries generally all contributed to this end. Financiers and capitalists everywhere undertook to combine and pool their interests and enterprises. Gigantic business combinations began to control the markets and establish monopolies in their particular line.2

The first industrial combination of large size, the Standard Oil trust, was created in 1879.3 In the succeeding decade others followed rapidly, using the trustee form of organization.4 However, posing an even larger problem at that time were the various kinds of loose agreements between firms on price and output policy.5

It soon became apparent that neither the common law nor state legislation could provide an adequate remedy6 and, therefore, the problem became a leading national issue in the campaign of 1888. In response to President Harrison's message urging "earnest attention" to the trust problem, numerous anti-trust bills were introduced in Congress in 1888 and 1889.7 The ultimate outcome was the passage of the Sherman Act8 on July 2, 1890, the first federal legislation giving expression to the traditional faith in the free enterprise system.

However, the Sherman Act had little immediate practical effect. Because its provisions were couched in sweeping generalities making judicial interpretation of paramount importance, the formation of business combinations continued apace in the absence of judicial action, slowed only by the panic of 1893. The ineffectual ruling of the Knight

5. See Pegrum, Regulation of Industry 143 (1949).
6. The various states were impotent or ineffectual in their attempts to curb the growth of monopolies because their jurisdiction was limited to their territorial bounds while the new titanic business combinations carried on business throughout the country.
8. 26 Stat. 209 (1890), formally termed "An act to protect trade and commerce against unlawful restraints and monopolies." The act provides in relevant part that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."
The decision in United States v. Trans-Missouri Freight Ass'n provided the initial effective utilization of the Act. Eighteen railroads entered into an agreement whereby they consented to maintain, between competitive points, such rates as a majority of their number should prescribe. It was further stipulated that if any member should lower its rates without obtaining the prior approval of the association it would be subject to a fine.

The Supreme Court, in an opinion by Mr. Justice Peckham, outlawed the combination. The Act of July 2, 1890, was construed as rendering illegal all contracts in restraint of trade, even though they be reasonable and of the type permitted at common law. Since the agreement under consideration clearly fell within the statutory language as interpreted by the Court, the Association was ordered to disband.

In his dissenting opinion Mr. Justice White, speaking for a four member minority, argued that "restraint of trade" was a technical phrase, embodying only those contracts which were unreasonable and therefore illegal at common law. In support of this position he undertook an extensive examination of the Congressional Record, while the majority was content to ignore this source. Whatever the merit of this contention, the decision established that the Act had overturned the common law rule.

Two years later, in the case of Addyston Pipe & Steel Co. v. United States the Court held illegal a price-fixing arrangement which had enabled six producers of cast iron pipe to maintain unreasonable prices. Since the combination directly affected interstate commerce, and not merely the local incident of production, the Knight case was distinguished and the Sherman Act held applicable.

However, as the case only involved a loose combination of firms it had little effectiveness in stemming the merger movement of the late nineties.

Rather, the end of the first great combination movement coincided with the second important Sherman Act case, one dealing with the applicability of the antitrust statute to combinations formed by the device of a holding corporation.

10. Markham's study, op. cit. supra note 3 shows 257 combinations involving 4,227 plants during the period from 1897 to 1904. Another study, SEAGER and GULICK, TRUST AND CORPORATION PROBLEMS (1929), showed that 225 combinations were organized from 1897 to 1903. Over a thousand firms disappeared by merger during the year of 1899 alone.
11. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
12. Id. at 343-47 (dissenting opinion).
13. 175 U.S. 211 (1899), affirming on appeal the opinion of Mr. Justice Taft at 85 Fed. 271, and adopting his reasoning almost in toto.
14. See PURDY, LINDAHLE, and CARTER, op. cit. supra note 7, at 310.
In the *Northern Securities* case, two parallel and competing railroads combined to eliminate rivalry between themselves, although competition continued to be supplied by other transcontinental roads. In requiring the dissolution of the combination, the Supreme Court held that: (1) all direct restraints of trade are unlawful, and not only those unreasonable in their nature; and (2) that a combination need not be shown to result in a complete suppression of trade. Rather it suffices that, by its natural operation, it tends to create a monopoly and to deprive the public of the advantages of competition. The case held conclusively that a combination formed under a state holding corporation charter was not sufficient to remove it from the federal government's jurisdiction under the Sherman Act.

This case provided the first victory in the Supreme Court for the government in a case involving a close knit combination. Moreover, it dispelled any illusion that the holding company device could be used to create a monopoly with immunity. The decision appears to have been an important factor in determining the form both of some important existing combinations as well as some formed subsequently.\(^{16}\)

The next important decisions to be handed down were the 1911 oil and tobacco cases,\(^{17}\) which concerned the legality of combinations brought about either through stock or asset acquisitions. These decisions proved to be somewhat ironical in that although the Sherman Act proved adequate to dissolve the combinations involved, the Court's interpretation of the Act pointed out the inherent weaknesses which led eventually to the need for the Clayton Act.

The American Tobacco Company had developed through a series of both stock and asset acquisitions, while the Standard Oil Company of New Jersey was primarily a holding company effected through the acquisition of stock alone. In neither case did the Court concern itself with the legality of a particular asset or stock acquisition, but rather it dealt with the combination as a whole, and the purposes and results of its organization.

While the government's victory in these cases demonstrated that a combination of manufacturing concerns could be dissolved regardless of whether organized as a holding company or as a single corporation, both cases involved actions of the defendant so obviously pointed toward domination of their respective markets that the same decision would have resulted under almost any interpretation of the Sherman Act. The importance of the cases lies in the fact that defendants were found to have violated the Sherman Act not because of a restraint of trade, but

---

16. For example, the tobacco combination in 1904 shifted its organization from the holding company form to an asset-owning corporation, allegedly because of the Supreme Court decision. While the Northern Securities case was in progress, the International Harvester Company was organized by uniting under the ownership of one corporation the properties of several previously independent corporations. *Martin*, *op. cit.* supra note 1, at 14-15.

because of an unreasonable restraint of trade. The cases enunciated the now famous "Rule of Reason", which Mr. Chief Justice White articulated as follows: "... the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve."\textsuperscript{18}

These decisions evoked a torrent of criticism which, though unjustified in light of subsequent history,\textsuperscript{19} had immediate positive effects. The Democratic party was moved to make the following statement in its national platform of 1912: "We regret that the Sherman Anti-Trust Act has received judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."

Thus, after 1911, for reasons both valid and invalid, a legislative adjunct to the Sherman Act was sought. The contention that the "rule of reason" had emasculated the Act was, however, entirely lacking in merit. To the contrary, the "rule of reason" was to become a valuable guide in resolving litigation under the Sherman Act.\textsuperscript{20} But while effective as a deterrent to monopolistic combinations, the Act lacked definite criteria by which to judge the legality of a particular acquisition of stock or assets. Therefore, while monopolies could not be formed all at once, they could still be created piece-meal. Consequently, this latter form became the principal method of effecting further mergers. And as merger activity continued to increase, so did the demand for legislative reform.

III. THE CLAYTON ACT OF 1914

A. Legislative History

Dissatisfaction with existing legislation thrust anti-trust policy to the foreground in the presidential campaign of 1912.\textsuperscript{21} Following the election, President Wilson, in his message to Congress, called for the

\textsuperscript{18} Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

\textsuperscript{19} A commentator close to the scene made the following observation concerning the effect of the oil and tobacco decisions on the future vitality of the Sherman Act: "A uniform course of decisions by the Supreme Court since 1911 shows that the 'rule of reason' was invoked in those two cases, not for the purpose of narrowing the scope and force of the Sherman Law, but for the purpose of enlarging same, and that in later decisions, the Sherman Law was enforced with a degree of vigor which approximated the maximum power of law. It was due to the fact that the mandates of the Court in these two cases were improperly executed, and not because of any weakness in construction placed on the Sherman Law, that the dissolution of the two great trusts affected met with widespread and just censure." Levy, The Clayton Law -- An Imperfect Supplement to the Sherman Law, 6 Va. L. Rev. 411 (1916), at 415.

\textsuperscript{20} See, e.g., United States v. Trenton Pottery Co., 273 U.S. 372 (1929), which elucidates the "rule of reason."

\textsuperscript{21} See Henderson, The Federal Trade Commission 1-48 (1924) for a detailed account of the political and legislative history of the 1914 legislation.
establishment of a trade commission to regulate corporate activity and arrest the growth of holding companies, although making no specific mention of mergers or asset acquisitions. In response thereto, a bill was introduced in Congress entitled: "An Act to supplement existing laws against unlawful monopolies, and for other purposes." The House Judiciary Committee reported the holding company section (originally Section 8 but later numbered Section 7) to the floor on May 6, 1914. The outright prohibitions contained in the House bill were further supplemented by criminal provisions which made any violation of the section a misdemeanor punishable by fine or imprisonment. After considerable debate on the floor, the bill was passed as originally reported by a vote of 277 to 54.

The Senate Judiciary Committee then began the legislative dissection of the House bill. It recommended the substitution of "commerce" for "trade" and that the words "in any section or community" be stricken because the committee believed that "... they are either surplusage, when applied to 'commerce' as defined in the bill; or if they are used in a more restricted sense, in a sense which would apply them to local transactions merely, they would attempt to regulate intrastate commerce and be therefore void." Furthermore, the Committee recommended the striking of the criminal provisions of the House bill and the addition of a new section providing for the administration, by the newly-created Federal Trade Commission, of those provisions which dealt with prohibitions of corporate practices.

The Senate voted to strike the criminal provisions of the House bill and amended the new section recommended by the Senate Judiciary Committee to make the procedure conform to that established by Section 5 of the Federal Trade Commission Act.

23. H.R. Rep. No. 627, 63d Cong., 2d Sess. 3 (1914). The section was worded as follows with the phrases which later became points of contention italicized:
   Sec. 8. 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 of such acquisition is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.
   No corporation shall acquire, directly or indirectly, the whole or any part of the stock 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, is to eliminate or substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to create a monopoly of any line of trade in any section or community.
24. 51 Cong. Rec. 9911 (1914).
26. Id. at 48.
27. 38 Stat. 717 (1914), as amended, 15 U.S.C. § 41 (1958). Section 5 provided that "unfair methods of competition in commerce are hereby declared unlawful." These "unfair methods" were not defined but rather it was left to the FTC to determine whether such methods were used. See Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517 (1962), for a comprehensive analysis of the effectiveness of Section 5.
the bill by striking out the words "eliminate or" in the first and second paragraphs because competition would necessarily be lessened if eliminated.\textsuperscript{28} At this point, amendments were offered to strengthen the standard of illegality under Section 7. Senator Reed proposed that the first paragraph be amended by eliminating the "substantial lessening of competition" test in favor of an unequivocal prohibition of one corporation acquiring the stock of another entity engaged in the same line of business.\textsuperscript{29} Another proposal advocated the absolute prohibition of intercorporate stockholding.\textsuperscript{30} Both of these efforts (to strengthen the standard of legality) were defeated upon subsequent votes.

However, other important amendments which resulted in significant changes in the standard of illegality were approved by the Senate. The Senate substituted the words "may be" for "is" and struck out the word "substantially" (without debate) in the first and second paragraphs so that acquisitions were prohibited where the effect may be to lessen competition. The basis for the change was the Supreme Court decision in the \textit{Northern Securities}\textsuperscript{31} case, which held that under the Sherman Act it was necessary to prove merely that the power to restrain trade had been created. As a result, the Senate met the House objections that the standard was weaker than that of the Sherman Act.\textsuperscript{32}

On September 2, 1914, the Clayton bill as amended was passed by the Senate and a Conference Committee composed of members of both houses was established to iron out the differences in the two versions of the bill. The committee reinstated the word "substantially" which had been stricken by the Senate. It accepted the Senate's amendment which struck out the words "in any section or community" but insisted on changing the phrase to read "or tend to create a monopoly." Additionally, in order to place a geographical limitation on the extent of all the market in which the effect must be felt, the Committee inserted a new phrase prohibiting a stock acquisition where the "effect . . . may be to . . . restrain such commerce in any section or community." The compromise bill was subsequently discussed and approved in both houses and President Wilson signed the bill on October 15, 1914.\textsuperscript{33}

\begin{itemize}
  \item \textsuperscript{28} 51 \textit{Cong. Rec.} 14419 (1914).
  \item \textsuperscript{29} \textit{Ibid.}
  \item \textsuperscript{30} \textit{Ibid.} at 14454.
  \item \textsuperscript{31} \textit{Northern Securities Co. v. United States}, 193 U.S. 197 (1904).
  \item \textsuperscript{32} 51 \textit{Cong. Rec.} 14464 (1914).
  \item \textsuperscript{33} 38 Stat. 731 (1914). The first two sections of the original Section 7 which became law:
\end{itemize}

\begin{quote}
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 of such acquisition 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 in any section or community, or tend to create a monopoly of any line of commerce. No corporation shall acquire, directly or indirectly, the whole or any part of the stock 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
\end{quote}
The Clayton Act represented a compromise between the House bill, which contained provisions designed to supplement the criminal sanctions of the Sherman Act, and the Senate theory that the newly created Federal Trade Commission rendered further legislation unnecessary.

During the legislature's consideration and development of the Act, the Senate Judiciary Committee noted that the Act's primary purpose was to destroy the seeds of monopoly before they blossomed forth into an uncontrollable chokeweed upon the national economy when its chairman said:

"Broadly stated, the bill in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

The first paragraph of Section 7 was to apply to operating companies which held stock in another firm, whereas the second paragraph was intended primarily to relate to holding companies which owed the stock of two or more firms. Certain exemptions appeared from other provisions of Section 7. For example, stock purchases solely for investment purposes and holding stocks of subsidiary companies for the actual carrying on of lawful business were permitted, so long as the standard of illegality in Section 7 was not violated.

The Clayton Act also contained several provisions for the administration of the Act generally and Section 7 specifically. Section 4 enabled a person injured by a violation of the antitrust laws to sue in a federal district court for treble damages. Section 16 provided that any person or corporation may seek injunctive relief against threatened loss resulting from violations of any of the antitrust laws, including Sections 2, 3, 7 and 8 of the Clayton Act. Section 15 invested the federal district courts with jurisdiction to prevent and restrain violations of the Clayton Act, and stated that it is the duty of the United States District Attorney, under the direction of the Attorney General, to institute suits in equity to

voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or of 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 of any line of commerce.

34. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914). But see Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 CORNELL L.Q. 28 (1928) and Note, 38 YALE L.J. 830 (1929), where it is argued that the principal purpose of the Clayton Act was not to supplement the Sherman Act by attacking monopolies in their incipiency but rather to reduce business uncertainty by the enumeration of outlawed practices.


enjoin such violations. Finally, Section 11\textsuperscript{88} gave the Federal Trade Commission, the Federal Reserve Board and the Interstate Commerce Commission authority to enforce compliance with Sections 2, 3, 7 and 8.

In concluding the legislative history, it might be interesting to note just where Congress intended the Clayton Act to be applicable. Clearly, Section 7 was intended to apply only to the then prevailing method of making corporate acquisitions, that is, stock acquisitions, and not to asset acquisitions. It was further directed only at “horizontal” mergers, that is, the acquisition by the acquiring firm of a firm which was in the same line of business, and not at “vertical” mergers, that is, the acquisition by one firm of another involved in an earlier or later stage of production or distribution of a product which the acquiring firm manufactured or sold. Nor was it aimed at “conglomerate” or “circuitous” mergers, that is, the acquisition of a business producing or selling totally unrelated products.

B. Judicial Interpretation

The courts, in attempting to interpret the language of Section 7, often made reference to other sections of the Clayton Act wherein similar language appeared. Section 2 prohibits price discrimination “where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . .”\textsuperscript{39} Section 3 bars exclusive dealing and tying agreements “where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”\textsuperscript{40} However, there are basic differences between these two sections and Section 7; for example, the use of the word “or” between the three qualifying phrases in Section 7 to imply that they are meant to be mutually exclusive. Nevertheless, since the courts have consistently turned to cases decided under Sections 2 and 3 to resolve Section 7 cases, their importance cannot be overlooked.

1. “may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition”

The words “may be” were equated to a “reasonable probability”, a definition given in an early Section 3 case\textsuperscript{41} which was to stand unassailed for more than twenty-five years. In this case, the Supreme Court declared that it did not consider it to have been the intent of Congress in using the words “may be” to prohibit the mere possibility, but rather the probability that there would be a substantial lessening of competition or tendency to create a monopoly. The Court buttressed its reasoning by pointing out that the requirement of a substantial lessening of competition

\textsuperscript{41} Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); Standard Oil Co. v. FTC, 282 Fed. 81 (3d Cir. 1922), aff’d, 261 U.S. 463 (1923).
further indicated that Section 3 was not aimed at every diminution of competition. This interpretation was later adopted in Section 7 cases and was regarded as settled law until FTC v. Morton Salt Co. In this Section 2 case, decided in 1948, the Court held that the Commission had authority to act upon the "reasonable possibility" that a violation of Section 2 had been committed. This standard, however, has since been limited exclusively to Section 2 cases; for in 1949, the Court, in Standard Oil Co. v. United States, quoted the "reasonable probability" rule from Standard Fashion and considered it to be settled law.

The alternative tests set up by Section 7 — the substantial lessening of competition; the restraint of commerce in any section or community; the tendency to create a monopoly — all involve economic factors which must necessarily be determined by the application of legal principles. Thus there arose the question whether the test under the Clayton Act was broader in scope than that of Section 1 of the Sherman Act which prohibits combinations that unreasonably restrain trade.

Prior to the Clayton Act, the Supreme Court decided in the famous oil trust and tobacco cases that not every restraint upon competition fell within the scope of the Sherman Act, but only those which were so unreasonable in extent as to be prejudicial to the public interest. Thus, the "rule of reason" became an integral part of the Sherman Act. However, in the Standard Fashion case, the Court refused to apply this standard in Section 7 cases. Since the Clayton Act was intended to supplement the Sherman Act, the Court ruled that it was necessary to establish a separate test for cases arising under the new Act.

A Section 7 case in 1922 declared that the qualifying phrases of Section 7 were mutually exclusive and that the reasonableness of the transaction would not be considered. The Court held that the effect,
and not the motive behind the transaction, was the primary issue under consideration. The fact that a "seller's market" existed at the time of the acquisition, rendering the trade for the seller's goods competitive, did not affect the decision, since market was considered irrelevant in determining the applicability of Section 7.48

However, the International Shoe decision,49 which involved probably the most important application of the qualifying phrase of Section 7, virtually overruled the Alcoa decision and greatly reduced the significance of the "substantially lessen" test. Mr. Justice Sutherland, speaking for a 6-3 majority, established the "public interest" test for Section 7 cases when he declared:

Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. . . . Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, . . . that is to say, to such a degree as will injuriously affect the public.50

The Court further reasoned that since the poor financial condition of McElwain at the time of acquisition would have ultimately resulted in insolvency, the prospect of future competition was virtually eliminated. Thus, no prejudice could possibly accrue to the public interest.

The clear import of International Shoe is that, although two firms may be in substantial competition prior to acquisition, such acquisition will not result in a Section 7 violation unless their combined trade involves a share of the market sufficient to render an adverse effect on the public interest probable. This "public interest" doctrine was followed by the lower courts in subsequent Section 7 decisions.51

48. Although the FTC was successful in obtaining an order for Alcoa to divest itself of the stock acquired in the new firm, the new firm became insolvent and Alcoa bought the physical property of the firm at a sheriff's sale after obtaining a court ruling that the debt owed Alcoa by the new firm was bona fide. FTC v. Aluminum Co. of America, 299 Fed. 361 (3d Cir. 1924).

49. International Shoe Co. v. FTC, 280 U.S. 291 (1930). International, the largest shoe manufacturer in the country, acquired the stock of McElwain Shoe Company, the largest firm in the industry, which at the time of the acquisition was in serious financial difficulty. International's sales were primarily in the smaller towns and cities where their less expensive but more durable shoes had particular appeal. McElwain, on the other hand, made more expensive dress-type shoes which it generally sold in the larger cities. It was found that less than 5 percent of each company's products were sold in competitive markets. The Court held that this did not constitute "substantial competition" within the meaning of the qualifying clause.

50. Id. at 297-98. The Supreme Court thus adopted the Sherman Act "rule of reason" into Section 7 contrary to the earlier holdings in Alcoa and Standard Fashion.

51. V. Vivaudou, Inc. v. FTC, 54 F.2d 273 (2d Cir. 1931); Temple Anthracite Coal Co. v. FTC, 51 F.2d 656 (3d Cir. 1931); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935).
2. "to restrain commerce in any section or community"

Prior to the 1950 amendment no case upheld a violation of Section 7 solely under the restraint phrase. However, it would be useful to analyze certain Clayton Act cases which have held that domination of the market could sufficiently restrain commerce so as to result in injury to the public.

In the early case of United States v. New England Fish Exchange,\(^5\) prosecuted by the Justice Department, stock acquisitions giving the acquiring firms control of all thirty-three dealers on the Fish Pier in Boston were held to violate Section 7 of the Clayton Act as well as Sections 1 and 2 of the Sherman Act. At that time the Fish Pier handled 75 percent of the interstate trade in fresh ground fish.

Further evidence that the courts will apply the domination of the market test without finding a specific intent to monopolize is found in the Columbia Steel decision of 1948.\(^6\) Although this was a Sherman Act proceeding, the Court, in testing for domination of the market, held that (1) it was first necessary to delineate the market in which the firms competed and then determine the extent of their competition in that market; (2) dollar volume alone is not controlling, but must be considered in conjunction with (a) the percentage of business controlled, (b) the strength of the remaining competitors, (c) whether the transaction results from business requirements or purpose to monopolize, (d) the probable development of the industry, (e) consumer demands, (f) other characteristics of the market; (3) because the relative effect of percentage command of a market varies in different markets, no minimum figures could be adopted to measure the reasonableness of a firm's purchase of the assets of a competitor.

The case of Standard Oil v. United States,\(^5\) represented the Justice Department's most recent attempt to apply the Sherman Act to vertical mergers prior to the 1950 Amendment and its lack of success is generally considered to have precipitated the Amendment. In this Section 3 case, the Supreme Court distinguished between situations where "substantiality" must be proved and those in which it may be inferred. The Court held

---

52. 258 Fed. 732 (D. Mass. 1919). See also the Standard Fashion case where tying agreements of a pattern manufacturer who controlled 40 percent of the national market and had a virtual monopoly in many cities were invalidated. Other Clayton Act cases where domination of the market was a decisive factor include Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941), where Guild controlled 60 percent of the women's dress market; International Business Machines Corp. v. United States, 298 U.S. 131 (1936), where IBM produced 81 percent of the tabulating cards sold; United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922), where United controlled 95 percent of the shoe machinery in the nation.

53. United States v. Columbia Steel Co., 334 U.S. 495 (1948). U.S. Steel had acquired the assets of Consolidated Steel, the largest fabricator on the west coast. The Court held the exclusion of competitors from supplying Consolidated Steel's requirements was reasonable after a finding that it produced only 3 percent of the total demand in the relevant market. The resulting decrease in competition between the two firms was held proper when shown that the products of the firms were widely different.

54. 337 U.S. 293 (1949).
that competition had been or would be substantially lessened by require-
ments contracts with independent gas retailers in a seven state area in-
volving $58,000,000 in sales in 1947, even though such sales comprised
only 6.7 percent of the total in that area. It is clear that the Court
abandoned the Sherman Act test as a measure of Section 3 violations and
ruled that once the transaction is found to affect a substantial market
share, further proof that competition has, or probably will be, diminished
is not required. This "quantitative substantiality" test became an integral
part of the new Section 7 in applying the "substantiality" phrase.

3. "tend to create a monopoly"

Great difficulty arises in determining whether this has any separate
meaning. For it must necessarily follow that if there is a violation of
the first qualifying phrase, i.e., a substantial lessening of competition,
there must also be a violation of the third qualifying phrase, since any
acquisition which substantially lessens competition must also tend to
create a monopoly. Indeed, the Alcoa case, discussed supra, may be cited
as the only Section 7 decision which relied solely on this particular quali-
fying phrase. In that case there had been no competition whatsoever
between the two companies prior to the merger, and the decision was
predicated solely upon a violation of the monopoly provision. This dis-
tinction was soon lost, however, when later cases applied the "substanti-
ality" test to competition in the industry as a whole rather than between
two firms. As a result, the "monopoly" and "substantially lessen" phrases
are not to be considered as separate and distinct tests but rather should
be viewed as counterparts.

C. The Legislative Loophole

As noted in the legislative history, Section 7 was not directed at the
acquisition of assets. The possibility of asset acquisition was discussed,
but was not deemed important to an Act directed primarily at the develop-
ment of holding companies and at the secret acquisition of competitors
through the purchase of such competitors' stock. This loophole was pri-
marily responsible for the judicial interpretations of Section 7 which
severely limited its effectiveness.

In 1926 the Supreme Court granted a writ of certiorari in three cases
which had resulted in conflicting views in the lower courts as to the
authority of the FTC to order divestment by the acquiring firm of the
assets of the acquired firm.55 The Court, considering the cases jointly,
reversed the decisions of each of the three lower courts.56 Mr. Justice
McReynolds, speaking for the majority, distinguished between a situation

55. FTC v. Thatcher Manufacturing Co., 5 F.2d 615 (3d Cir. 1925); Swift & Co.
v. FTC, 8 F.2d 595 (7th Cir. 1925); Western Meat Co. v. FTC, 4 F.2d 223 (9th
Cir. 1925).
56. 272 U.S. 554 (1926).
in which the Commission orders the acquiring firm to divest itself of stock, including the physical assets of the acquired firm, and a situation in which the transfer of the physical assets had already been completed prior to the issuance of a complaint by the Commission. In the Western Meat case, the acquiring firm had acquired the stock of the competitor and was ordered to divest by the Commission. However, subsequent to the order, Western Meat acquired the physical assets of the competitor. The Court reversed the lower court, which had dissolved the injunction against the acquisition of the assets of the competitor, and held that divestment must be actual and complete. Nor could the stock that was ordered to be divested be used to secure title to the physical property of the acquired firm.

In the Swift and Thatcher cases, the acquiring firms had acquired the stocks of the competitors in violation of Section 7. However prior to the filing of the complaint by the FTC they had secured the transfer of the physical assets of the competing firms. The Court resolved both cases similarly, holding that the Commission was without power under Section 7 to order the divestment of the assets acquired by Swift and Thatcher prior to the commencement of proceedings. Mr. Justice Brandeis wrote the dissenting opinion for the Swift and Thatcher decisions in which Chief Justice Taft and Justices Holmes and Stone concurred. The dissent argued that the purpose of Section 7 was not only "to prevent continued holding of the stock and the peculiar evils incident thereto" as stated by the majority but also "to prevent the peculiar evils resulting therefrom." Thus, if the acquiring firm received the physical assets after the complaint was issued and the FTC could require a re-transfer of the assets, then it should have similar power where the firm acquires the assets prior to the issuance of a complaint. To support its argument, the dissent cited Section 11 of the Clayton Act which permits action by the Commission whenever it "shall have reason to believe that any person is violating or has violated any of the provisions" of the earlier sections. (Emphasis added.)

The inherent logic of the dissenting opinion was to no avail. In the wake of this decision many corporations used the time between the Commission's preliminary inquiry and its issuance of a formal complaint to acquire the physical assets of competitors whose stock they had previously acquired in violation of Section 7.

The asset loophole was completely confirmed in Arrow-Hart & Hegeman Electric Co. v. FTC. Previously the question had remained open

57. Id. at 563 (dissenting opinion).
59. 291 U.S. 587 (1934). In a rather complicated series of transactions, a holding company was created and exchanged its stock for the stock of two competing companies, the Arrow Electric Co. and the Hart and Hegeman Manufacturing Co., both engaged in the manufacture of electrical wiring devices. Upon the issuance of a complaint by the FTC, but before an order to cease and desist was issued, the holding company assigned its acquired stocks to two newly-created holding companies, the
as to whether the Commission had authority to order divestment of assets if, after proceedings had begun but prior to the issuance of the order to divest, the acquiring firm completed the merger and disposed of the stock. In a 5-4 decision, the Supreme Court upheld this evasion of the authority of the Commission through the use of corporate dummies on the grounds that the Arrow-Hart & Hegeman Electric Co. (1) was not in existence when the FTC began its action against the dissolved holding company, (2) had never held any stock contrary to Section 7 and (3) could not be compelled to divest itself of physical assets. The asset loophole together with the International Shoe case thus nailed the lid on the coffin containing the weary and abused Section 7. Offending corporations could now escape Section 7 violations if they could perpetrate their adroit manipulations with sufficient celerity.60

The high hopes originally entertained for Section 7 of the Clayton Act foundered on the shoals of unsympathetic judicial interpretation. Congress recognized that competition is a basic cornerstone of our nation and that a monopolistic economy is incompatible with our concepts of liberty and democracy. But in attempting to insure effective competition, its faulty legislative draftsmanship seriously impaired the courts in interpreting the language of the Clayton Act. It created a loophole wide enough for the largest of corporate giants to pass through without danger of being caught.

The battle-scarred Section 7 was thus badly in need of repair at a time when a great tidal wave of corporate mergers during the post World War II boom threatened to wash away the remaining sands of legislative restraint on corporate activity. Failure of the Act to combat corporate evasions through the devices of asset acquisitions and vertical mergers relegated it to the status occupied by the Sherman Act in 1914 — limitedly effective, but easily side-stepped. Alarmed to the problem, Congress sought a remedy.

IV. THE 1950 AMENDMENT

A. CONGRESSIONAL DEBATE

Congress began the search for a workable amendment to Section 7 in 1943, following the final recommendations of the Temporary National

Arrow Manufacturing Co. and the H and H Electric Co. In return the original holding company received the shares of the new companies which were distributed to its shareholders and by corporate action it was then dissolved. The shareholders of the two new holding companies joined with the shareholders of the subsidiary manufacturing companies in approving a merger agreement whereby a new corporation, Arrow-Hart & Hegeman Electric Co., was formed which took over in its own name all of the assets formerly belonging to the manufacturing companies.

60. In United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D.N.Y. 1950), the court followed the Arrow-Hart decision. But in Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950), the asset loophole was closed under special circumstances.
Economic Committee (TNEC). 61 Thereafter, sixteen bills, receiving varying degrees of consideration were introduced in the 78th through the 81st Congresses until finally the Celler-Kefauver Act was enacted on December 29, 1950. 62

In its search for a solution, Congress was confronted with testimony and reports showing the extent and significance of corporate integrations and economic concentration. Prior to World War II, one-tenth of one per cent of the corporations in the United States owned 51% of the total corporate assets, 63 much of this concentration being attributable to corporate integrations. 64 From 1940 through 1947 financial periodicals reported 2450 corporate integrations which involved more than five billion dollars in assets, 65 this represented more than 5% of the total assets of manufacturing corporations as of 1943. Moreover, in excess of 50% of the net capital assets in fifteen important industries was controlled by the three largest companies in that field. 66 Under these conditions competition

61. Prior to 1943, 21 bills to amend Section 7 had been introduced in Congress. The 1950 Amendment grew directly from the final report in 1941 of the Temporary National Economic Committee (TNEC) which recommended that Congress empower the FTC to pass on the legality of proposed acquisitions, whether of stock or assets. TNEC, FINAL REPORT AND RECOMMENDATIONS 38 (1941).

62. For excellent studies in detail of the legislative history of the 1950 amending of Section 7, see Note, Section 7 of the Clayton Act: A Legislative History, 52 COLUM. L. REV. 766-81 (1952); MARTIN, op. cit. supra note 1, from 221-53.

63. Hearings on H.R. 515 at 15 (Commissioner Freer of the Federal Trade Commission). Other indications of the level of concentration are: 4% of all manufacturing corporations made 84% of the net profits of all manufacturing corporations. Ibid. Less than 1.5% of all industrial employers employ about 55% of all industrial workers. Hearings on H.R. 2357 at 13. The twenty-five largest manufacturing corporations owned 26.9% of the assets of all manufacturing corporations in 1948. NATIONAL CITY BANK OF NEW YORK, MONTHLY LETTER 69-70 (June 1949), reprinted in S. Hearings on H.R. 2734 at 227.

64. The FTC found that 25% of the growth of major steel producers was through external expansion rather than the construction of new facilities. The findings for individual firms were: Bethlehem 33%, Republic 66%, Jones & Laughlin 17%, Youngstown Sheet & Tube 25%, American Rolling Mill 20%, Inland 10%, Colorado Fuel & Iron 40%, U.S. Steel 7%. FTC, THE MERGER MOVEMENT: A SUMMARY REPORT 25, 28 (1948).

65. Id. at 7. This figure covers mining and manufacturing industries alone. Undoubtedly a greater number of acquisitions actually took place, since small transactions are often not reported in the financial manuals.

66. Percent of net capital assets owned by the three largest companies in the industry. REPORT OF THE FTC ON THE CONCENTRATION OF PRODUCTIVE FACILITIES 21 (1947).
could easily be seriously impeded and its benefits denied to the public even in the absence of agreement.

To combat these evils bills falling into three categories were introduced into Congress between 1943 and 1949, having as their object the amendment of Clayton 7. The first group of proposals followed the recommendations of the TNEC, which would have required the prior approval of stock or asset acquisitions where the corporations involved were larger than some specified absolute size. Those falling into the second category were designed to include asset acquisitions in the prohibitions of the statute under a standard of illegality identical with that of the original Clayton Act. The third grouping was comprised of proposals such as the one finally adopted advocating the prohibition of assets as well as stock acquisitions, but with a more restrictive standard of illegality. 67

Illustrative of the first category is a bill (H.R. 4810) introduced by Representative Kefauver in the House in 1945 which was unanimously approved by the House Committee on the Judiciary after being twice amended. 68 It provided that the prior approval of an acquisition of stock or assets by a corporation subject to the jurisdiction of the FTC had to be obtained from that commission if the acquisition would have unified the control of corporations, the sales of which had aggregated during the previous calendar year as much as 5% of the total sales in their lines of commerce. 69 The bill stated that the FTC should not approve an acquisition unless it found:

(a) that the acquisition will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry or line of commerce in which such corporations are engaged;

(b) that the size of the acquiring corporation after the acquisition will be compatible with the existence and maintenance of effective competition in the trade, industry, or line of commerce in which it is engaged;

(c) that the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce affected as materially to lessen the effectiveness of competition therein;

(d) that the acquiring corporation has not, to induce the acquisition or to eliminate the competition of the corporation sought to be acquired, indulged in unfair methods of competition in violation of the Federal Trade Commission Act, as amended. 70

The committee report was not indicative of an intent to effectuate a change in the Act's standard of illegality. Rather, the committee was attempting to utilize a prior approval provision apparently designed to

67. MARTIN, op. cit. supra note 1, at 222.
69. Id. at 6.
70. Id. at 7.
avoid the problems involved in dissolving an already accomplished merger. The House Rules Committee refused the bill a rule, and therefore the House as a whole never considered it, although it was later discovered that the Rules Committee objected only to the prior approval provision. The Committee then recalled Representative Kefauver's bill in an effort to allow consideration of some amendment of Section 7 and reported unanimously a new version (H.R. 5535) which omitted the prior approval provision. However, despite removal of this provision, the bill was again refused a rule, and it died with the 79th Congress. Similar bills introduced in the 80th and 81st Congresses were likewise rejected.

Then, in the initial session of the 81st Congress, Representatives Jackson, Hobbs, and Celler each introduced bills providing for the prohibition of asset acquisitions under a standard of illegality, stipulating the test to be the "lessening of competition," but omitting the acquiring-acquired test previously proposed. The identical bill was introduced in the Senate jointly by Senators Kefauver and O'Mahoney.

Following hearings by a subcommittee of the House Committee on the Judiciary, the full committee reported H.R. 2734 favorably, on August 4, 1949. Representative Celler by-passed the Rules Committee by having the bill debated in the House under suspension of the rules, even though this procedure required a two-thirds majority for passage. The House passed the bill without amendment on August 15, 1949, by a vote of 223 to 92, with 117 abstentions.

No hearings were held in the Senate on the bill introduced by Senators Kefauver and O'Mahoney. However, in September, 1949, and February, 1950, a Senate Judiciary subcommittee held hearings on the approved version of H.R. 2734. On June 2, 1950, the Senate Committee on the Judiciary reported the bill favorably with Senator Donnell presenting minority views. Only minor alterations were recommended by

---

71. Amending Sections 7 and 11 of the Clayton Act, Hearings on H.R. 515, U.S. Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 6 (1945).
72. Amending Sections 7 and 11 of the Clayton Act, U.S. House Committee on the Judiciary, 79th Cong., 2d Sess., H. Report 1820 (1946). (This stamped the bill as illustrative of the second category, i.e., H.R. 5535 would have prohibited asset acquisitions under the same conditions as those under which stock acquisitions were prohibited in the original Section 7.)
73. U.S. 81st Cong., 1st Sess., H.R. 988, H.R. 2006, and H.R. 2734. The "acquiring-acquired" provision applied the test of lessening of competition specifically as between the merging concerns. This provision was strongly objected to by many on the grounds that it would make practically all asset provisions illegal, even though they might have the effect of increasing competition in the lines of commerce in which the corporations were engaged. See Hearings on H.R. 515, 80th Cong., 1st Sess. 23 (1945).
77. 95 Cong. Rec. 11484-507 (1949).
the Committee, and the Senate passed the bill on December 13, 1950, by a 55 to 22 vote, with 19 not voting. It was approved by President Truman sixteen days later.

B. Substantive Changes in Section 7

The most important substantive revisions in the 1950 amendment were the changes in the wording of the first two paragraphs of Section 7. The following is the enacted Celler Amendment. Any words deleted from the original Section 7 are in brackets, while those added have been italicized.

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 [to] substantially to lessen competition [between the corporation whose stock is so acquired and the corporation making the acquisition or to restrain such commerce in any section or community] or to tend to create a monopoly [of any line of commerce].

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 [two] 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 stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be [to] substantially to 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 to tend to create a monopoly [of any line of commerce].

The heart of the amendment lies in the addition of the words "the whole or any part of the assets," which purports to place asset acquisition on the same footing as stock acquisition, and thereby plug the loophole which had allowed circumvention of the original section 7. While "assets" is undoubtedly the key word, it was nowhere defined in the amendment. The TNEC in 1941 had recommended a prohibition of the acquisition of assets and property of competing corporations over a certain size, unless the Commission found that the acquisition would benefit the public interest, adding: "The authority given would, of course, relate to capital assets of competitors and not to inventory or stock in trade." An earlier bill to amend Section 7 likewise excluded inventories from the

80. 96 Cong. Rec. 16573 (1950).
81. Id. at 17138.
82. 38 Stat. 730, 731–32 (1914), and 64 Stat. 1125 (1950).
definition of "assets." However, the failure to expressly exclude the term "inventories" from the meaning of "assets" in the Celler Act may be construed as a purposeful act of inclusion by Congress, consistent with its general tenor in passing the bill. It is probable that Congress contemplated a definition in harmony with the qualifying phrase of the section, "substantially to lessen competition," finding that an acquisition of "assets" has occurred where such purpose may have the effect of substantially abating competition. Certainly, it is more plausible that "assets" was used to fill a gap caused by its absence than to distinguish between types of assets.

A second major change was the elimination of the intercorporate or acquiring-acquired test, effected by deletion of the words "between the corporation whose stock is so acquired and the corporation making the acquisition." These words, in the context of the original Section 7, appeared to outlaw every merger where the corporations involved were engaged in any significant competition whatever, since a merger would not merely lessen intercorporate competition, but would eliminate it entirely. In practice, however, the test had been read out of the Act by requiring the competition between the corporations to be substantial and by accepting the Sherman Act standard of diminution of competition in the industry as a whole. Conversely, the abandonment of the acquiring-acquired clause has extended the coverage of the section into a heretofore exempted area. Generally, the belief had been that Section 7 applied only to horizontal combinations, not vertical or conglomerate acquisitions. But explicit legislative declarations have made it plain that the section as amended is intended to apply to all types of mergers and acquisitions.

The final major change effected in Section 7 sprang from the addition of the phrase "in any line of commerce in any section of the country." This phrase acts on both the lessening of competition and tendency toward monopoly tests of Section 7. "Section of the country" replaced "community," which acted only on the restraint of commerce test. Though "section of the country" may seem to imply a geographical area, the ultimate Congressional intent appears to refer to a trade area or area of effective competition. The industry-wide test of the old Section 7 was abandoned along with the theory that the lessening of competition had to take place in the area of competition of the acquiring or the acquired corporation.

85. This conclusion is supported by the Senate Judiciary Committee's refusal to heed a request made by letter from a lobbying group that inventories or stock in trade be excluded from the term "assets." S. Rep. No. 1775, 81st Cong., 2d Sess. 313-15 (1950).
88. This reasoning is supported by testimony in Hearings before the Subcommittee of the Committee of the Judiciary, United States Senate, on H.R. 2734, 81st Cong., 1st and 2d Sess. 3852 passim., 66-84 passim., 101-02, 132, 133, 144, 145 (1950).
"In any line of commerce," an apparently straightforward phrase, was intended by Congress to have an extremely significant effect. Commenting on it, the Senate report said: "It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition." (Emphasis added.)

If judicially recognized, this statement of Congressional intent could be most important in establishing a meaningful economic criterion. It would be impossible for a merger having a substantial detrimental effect in some particular market to escape condemnation on the theory that the share of the market foreclosed is insignificant when contrasted with the size and variety of the corporation's total activities.

At any rate, in proceedings under amended Section 7, delineation of the "line of commerce" and "section of the country" has become a threshold question and a necessary prelude to any finding of violation, since anticompetitive effects can be measured only within a specified trade area.

It should be clear that the Celler Anti-Merger Act accomplished more than the inclusion of assets within the prohibition of the statute. Amended Section 7 can be used to curtail the growth of a small corporation which attempts to attain monopolistic proportions through the acquisition of a number of small corporations in an industry where small corporations predominate. The omission of the acquiring-acquired test of competition has at the same time extended Section 7 to apply to vertical and conglomerate mergers. The Celler Act test of a substantial lessening of competition is more easily satisfied than the Sherman Act test of lessening of competition in an entire industry. Furthermore, the probable lessening of competition may be demonstrated in any section of the country, rather than in the nation as a whole, and may occur in a line of commerce which is not the principal business of the combining corporations. Thus was the Clayton Act reinforced; all that remained was the critical test of judicial interpretation.

C. Judicial Interpretation

The 1950 amendment was designed to strengthen the law concerning mergers and acquisitions. Yet paradoxically, the number of mergers and acquisitions increased steadily during the five years following its enactment. It is estimated that more than five hundred corporate mergers and acquisitions in manufacturing and mining activities took place in 1955, a record number for any year since the feverish merger activity of the 20's. For the 1951-1955 period as a whole, the total number was substantially higher than for any other five-year period in the last quarter century.

90. Ibid.
92. Ibid.
Apparently, amended Section 7 did not of itself inhibit those business concerns having merger inclinations. However, judicial interpretation in the following years demonstrated that the amended Section 7 was no mere “paper tiger.”

Interpretation of amended Section 7 both by the courts and the FTC has been anything but consistent. The decisions have clearly indicated that no mechanical quantitative or qualitative test can be deduced or is indeed desirable, and that any attempt to extract a set of precisely weighted factors therefrom is doomed to failure. An analysis of the course of judicial interpretation of the section, from its passage until the Brown case in 1962, illustrates that the courts and the FTC have varied greatly, not only in listing the relevant factors, but also in evaluating their significance.

1. **Degree of Concentration in the Industry**

The factor which has received the foremost consideration by the tribunals is the degree of concentration resulting from the acquisition in the market involved. Section 7 does not use the word “concentration” nor does it prohibit an increase in concentration as such. Where, however, an undue increase in concentration has been found, coupled with a determination of probable effect on market performance, the acquisition has been found to be detrimental to competition. It is probable that, in formulating this conclusion, the cases have drawn liberally from the legislative history of the Act which everywhere reflects Congressional concern with undue concentration.

The answer to the question whether concentration has increased excessively will depend on the number of firms used as a measuring rod. The Bethlehem Steel case held that in a concentrated market where competitors are few, a substantial increase in concentration is violative of Section 7. Had the merger been consummated, “instead of 12 producers controlling 83% of total industry capacity there would be only 11; instead of the Big 2 controlling 45% as against the present 10 with their 38%, they would control 50%. . . .” Therefore, in the industry’s framework, the merger rendered the possibility of effective competition from the rivals of the Big Two remote.

To the same effect is the Erie case where a merger which would have resulted in a combination of 86.8% of all the lake sand sold was found

---

95. Ibid.
98. Id. at 607.
to violate Section 7.\textsuperscript{100} And in the \textit{Brillo Manufacturing Company} case,\textsuperscript{101} the court held that where an oligopoly existed, even the smallest increase in concentration would contravene the Act.\textsuperscript{102}

On the other hand, where competitors are many, more must be shown in order to justify a holding of illegality. In \textit{E. L. Bruce Co. v. Empire Millwork Corp.},\textsuperscript{103} the court denied a preliminary injunction to restrain one major distributor of hardwood flooring from acquiring a majority stock interest in another. The plaintiff was alleged to be the industry leader, with an 8\% share of the national market, and defendant's subsidiary held a 5\% share. The court noted that there were some 170 concerns in the industry; that they competed vigorously; and that there was insufficient evidence of any reasonable probability that competition would be substantially lessened.

A third category of cases has as its peculiar characteristic a restricted geographic, competitive market area where almost any contemplated merger would unduly reduce competition and produce market dominance. In \textit{United States v. Maryland & Va. Milk Producers Ass'n},\textsuperscript{104} where the court held invalid an attempted absorption of the business of the largest independent dealer by the leading wholesaler in the area, as combining the affairs of the two concerns into a single operation, would have the effect of augmenting the influence of the latter and ridding the former of a troublesome rival.

In the \textit{Crown Zellerbach} case,\textsuperscript{105} the Commission ruled that a merger of the foremost competitors in the relevant "3 state area" market, whose combined production accounted for 62.5\% of the western production, was illegal, emphasizing that one immediate result of the acquisition was to remove from the western supplies market "an important, fully integrated competitor" and to increase significantly the size of the respondent in the relevant line of commerce "in which it already had a commanding lead."\textsuperscript{106} Ultimately, the court relied on "the tendency to concentration of power"\textsuperscript{107} to strike down the merger; it concluded that the acquisition of a rival firm by a larger one which resulted in a substantial increase in the concentration of power in the absorbing concern is to be prohibited.\textsuperscript{108} The court,

\begin{itemize}
\item \textsuperscript{100} The Third Circuit remanded the matter to the FTC for a redetermination because the FTC failed to consider the proper factors in defining relevant market areas.
\item \textsuperscript{102} Prior to Brillo's acquisition of the Williams Company, Brillo's share of the market was 45.3\% and Williams' 0.3\%. S.O.S., the largest company, had 50.9\%. Brillo Mfg. Co., Trade Reg. Rep. \textit{\textsuperscript{\$} 28667}, 37338 (FTC Order March 25, 1960). To the same effect, see Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (E.D. Mich.), \textit{aff'd per curiam}, 280 F.2d 747 (6th Cir. 1960).
\item \textsuperscript{103} 164 F. Supp. 446 (S.D.N.Y. 1958).
\item \textsuperscript{105} Crown Zellerbach Corp., Trade Reg. Rep. \textit{\textsuperscript{\$} 26923} (FTC Order Dec. 26, 1957), \textit{aff'd}, 206 F.2d 800 (9th Cir. 1951).
\item \textsuperscript{106} \textit{Id. at} 835.
\item \textsuperscript{107} \textit{Id. at} 827-28.
\item \textsuperscript{108} \textit{Id. at} 836.
\end{itemize}
along with the FTC's decision in the Foremost Dairies case,109 seemed to be going astray in reviving the discredited quantitative test and tending toward the fallacious concept that size alone determines the result.

2. Market Share — Dollar and Volume Considerations

Almost any decision under Section 7 of the Clayton Act deals with the market share of the acquiring and acquired companies. If the concentration in the industry is initially high, even the most minute acquisition will likely be challenged.110 However, standing alone, market share is not significant in determining the competitive consequences of a given acquisition. After weighing other competitive factors, the consequences will vary with the nature of the market involved.111

Yet it is true that the higher the market share, the more likely it is that competition will be affected by the acquisition; and the more closely a market share approaches monopolistic proportions the fewer additional facts are required for a determination of the competitive consequences. This view was expressed in the second Brillo decision,112 which reversed an earlier opinion wherein the significance of market share, when viewed in connection with heavy industry concentration, was totally ignored. And the FTC's decision in Erie Sand & Gravel Co.113 emphasized that where the sales of the merged companies amounted to more than 80% of all like sand sold in the relevant market, market dominance had clearly been achieved. In addition, the merged complex had become the only major supplier in several cities.

In the context of a static industry the tribunals have not been loath to find the requisite competitive harm where high-ranking companies are involved, even though the combined market share does not exceed 20%. Thus, in the Bethlehem case114 the combination between the second and sixth ranking producers increased defendant's share of the market from 16.2% to 20.9%. Pillsbury Mills, Inc.,115 dealt with a combination between the third and fifth ranking producers of family flour in the Southeast, moving the acquiring company to first rank regionally with a market share of 8.3%. The American Crystal Sugar case,116 involving a merger of

111. For example, in the first Brillo case [Brillo Mfg. Co., Trade Reg. Rep. ¶ 27243 (FTC Order 1958) at 36624], the FTC emphasized that "in addition to the facts concerning market shares, likewise important" is evidence pertaining to the "general competitive situation, number of competitors, and degree of concentration in the industry."
113. For subsequent history, see supra note 41.
the eighth and eleventh ranking producers of refined sugar nationally, resulting in the acquiring company's moving to fourth rank nationally and increasing its market share to 13% in the regional market.

3. **Ease of Entry into the Relevant Industry**

Ease of entry has been considered one of the most revealing indicia of competitive soundness. Thus, where the facts have shown, as in *United States v. Columbia Pictures Corp.*, that the industry was dynamically expanding and entry was relatively easy, the merger has been upheld.

However, a finding that an industry is static, or ease of entry difficult, has led the courts to conclude that increased concentration ordinarily results in adverse competitive effects. Indicative of this rationale is the opinion of the lower court in the *American Crystal Sugar* case where a trend towards concentration was predicated on the lack of new firms for thirty years, a quota system serving to bar new entry, the positive signs of deterioration of market structure conditions, and the recent acquisitions of several refineries by competitors. A like conclusion was reached as regards the iron and steel industry. And in the second *Brillo* decision it was stated that with respect to industrial steel wool that low profit margins, excess capacity, and a relatively static market constituted handicaps to profitable operations by existing smaller companies and imposed a formidable barrier to the success of new entries into the field.

Even where the entrance of new competitors has been shown, at least one case has required a further showing that the entrants would effectively replace the competition previously afforded by the acquired company.

4. **Countervailing Power**

The argument has been advanced that where a few outstanding companies set the pattern of competition in an industry, a merger of smaller companies might produce more effective competition. While this would

---

117. As the ATT'Y GEN. NAT'L. COMM. ANTITRUST Rep. (1955), states at 327: "New firms entering an industry may not all survive. Some may be weeded out in the competitive struggle, sometimes indeed after making their contribution either to pricing or to business methods. But reasonable opportunity for entry is needed if there is to be an assurance of a sufficient number of sellers to maintain effective competition and thus prevent markets from evolving gradually into a state of monopolistic stability."


122. *Crown Zellerbach Corp.*, Trade Reg. Rep. ¶ 26923 (FTC Order Dec. 26, 1957), aff'd, 296 F.2d 800 (9th Cir. 1961), which decision overthrew the merger after concluding that the new entrants were no competitive threat for sales to jobbers and converters, nor was there any indication that any new supplier would offer Crown the form of stiff competition provided by St. Helens.
augment the concentration in the industry, the net effect might well be to stimulate competition, rather than abate it. In addition, if mergers between smaller companies are not permitted, they may not be able to compete with each other, let alone with the larger concerns.

Efforts to set up this theory in defense of a challenged acquisition have met with a singular lack of success. In rejecting this thesis, one court has reasoned that "to the extent that a reduction in the number of significant firms in an industry reduces the incentive to reap a short term advantage by independent action, economic analysis indicates that increased concentration is detrimental to competition."

5. Elimination of a Substantial Competitor

Another factor much relied upon by the courts in evaluating competitive effects is whether the merger results in the elimination of an enterprise which has been a substantial competitive factor. Where such has occurred, the courts have almost universally held the merger violative of Section 7, regardless of whether the merger be horizontal or vertical.

6. Restrictions on Supply Outlets and Competitive Opportunities in the Market for Others

In vertical mergers, restricting or foreclosing sources of supply or outlets in the market generally is deemed the most important factor. The legality of such a transaction is tested by the existence of a reasonable probability that it will eliminate competition from a substantial share of the market either by (a) foreclosing a substantial source of supply, or (b) limiting significantly the competitive opportunities of others trading in the market involved.

Every merger of a supplier corporation with a customer results in the supplier's competitors being automatically foreclosed from the customer's trade. But such a merger should be free from legal sanction if the supplier sells only to the acquiring company, and if alternative sources of supply are available to the acquiring company's competitors. Nor should it matter that the customer buys only from the acquiring company, since the competing seller is not thereby deprived of a market for his goods. The sanction of Section 7 should be invoked only where vertical acquisition leaves competitors without needed supplies or channels of distribution.


To this effect have been the decisions in *Crown Zellerbach*,\(^{126}\) *Bethlehem Steel*,\(^{127}\) *Jerrold Electronics*,\(^{128}\) and *Maryland & Va. Milk Producers*.\(^{129}\) The *Reynolds*\(^{130}\) case has a noteworthy variation; there the requisite anticompetitive effect was found in the vertical line between the acquired company and its competitors, rather than in the foreclosure of competitors from sources of supply or outlets. The rationale of the decision is that an acquisition by a comparatively wealthy corporation violates Section 7 if that company's financial resources enable it to sell below cost, thereby injuring competition. A later case\(^{131}\) found this to be violative of Section 7 only when such resources are utilized to injure competition.\(^{132}\)

The *DuPont-General Motors* decision stands alone in defiance of this prevailing doctrine.\(^{133}\) There the Court held that in considering the competitive impact of a vertical acquisition, only the "quantitative substantiality" doctrine need be applied.\(^{134}\) However, neither the courts nor the FTC has since been inclined to blindly adopt the concept that foreclosure must be presumed where the business of the acquired supplier or customer accounts for a substantial percentage of the total market.

### 7. Miscellaneous Factors

The various tribunals have considered numerous other miscellaneous factors. Among the more recurring are the history of prior acquisitions,\(^{135}\) post-acquisition facts,\(^{136}\) and the expectations of the acquiring company.\(^{137}\)

---

132. In affirming the dismissal by the hearing examiner, the Commission described its position as follows:

This aspect of the acquisition is purely conglomerate and the worst thing that can be said of it is that the Visking cellulose sausage casings now have the backing of Union Carbide's one and one-half billion dollars instead of Visking's thirty-eight million. This showing alone will not support a finding that a lessening of competition is the probable result of Union Carbide's emergence as a sausage casing seller. Such an unfavorable prognosis must be based upon more solid ground. *Id.* at 20374.
134. *Id.* at 595. The Court maintained that in order to establish a violation of Section 7, two requirements of proof must be satisfied: (1) the market affected must be substantial, and (2) there must be a likelihood that competition may be foreclosed in a substantial share of that market.
At least one case has considered as decisive, in a close factual situation, the aggressiveness of management and the solidarity of market position. 138

A number of interesting observations can be culled from the amended Section 7 cases. Among them are: (a) The FTC has shown a willingness to intervene in situations which might be considered essentially local and as having little national importance, 139 thereby employing to the utmost the vital new concept of "any section of the country." (b) In the determination of the relevant "line of commerce," the tests of "reasonable interchangeability" 140 and "peculiar characteristics and uses" 141 which the courts purport to distinguish 142 are merely verbal variants of the same fundamental doctrine. If products can be used interchangeably, their individual uses or characteristics cannot be termed "peculiar" to themselves. On the other hand, if they cannot be reasonably interchanged, they must of necessity possess peculiar characteristics and uses. Of course, the terms may be distinguished by judicial manipulation of the word "reasonable," a term which lends itself to differing constructions. (c) The argument of "potential competition," 143 much invoked by harried defendants, has been treated with a total lack of sympathy, the tribunals displaying a tendency to apply it when it would facilitate finding a violation of Section 7, and a corresponding unwillingness to invoke it where its use would dictate a contrary result. 144

A reading of the cases cited in the preceding sections makes it clear that no one of the above-discussed factors is controlling or decisive. Rather, it is the presence of some, the absence of others, and the interrelationship of those found to exist which will be decisive of the litigation. The same reading should be sufficient to convince one that there is no set formula or easy test to determine whether or not Section 7 should be invoked. Any

140. Found in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956), at 404: "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered."
141. Found in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592-94 (1957) : "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' (Footnote omitted). Substantiality can be determined only in terms of the market affected. The record shows that automotive finishes and fabrics have sufficiently peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics (footnote omitted) to make them a 'line of commerce' within the meaning of the Clayton Act."
143. The argument can be stated as follows: A merger, though it may tend to increase market concentration, is not within the scope of Section 7 because there is other, as yet untapped, potential competition in the relevant market area.
generalizations on this point must of necessity be tentative; the tribunals had a mere twelve years to grapple with Section 7 prior to 1962, and further revision and clarification has since taken place.\(^\text{145}\) However, by the early sixties, one might reasonably venture the conclusion that a merger would be regarded as highly suspect when: (1) a substantial competitor is acquired by a top-ranking firm in the same industry, or an acquisition results in a total market share of about 15-20% in a context of a static industry, in which future entry of new competitors is unlikely; or (2) in cases of vertical acquisition where supplies are permanently foreclosed from a substantial market, or others trading in the market are left without independent sources of supply; or (3) where the acquisition disrupts the pattern of pre-existing competition in the acquired company's market.\(^\text{146}\)

Thus stood the judicial construction of amended Section 7 of the Clayton Act to June 25, 1962, on which date the Supreme Court, in a landmark decision,\(^\text{147}\) breathed further vitality into an already much revivified statute.

V.

**Brown Shoe: The Omnific Opinion**

A. The Economic Setting

*Brown Shoe Company v. United States*\(^\text{148}\) was the first case in which the Supreme Court made a detailed analysis of the scope and purposes of amended Section 7.\(^\text{149}\) The action was commenced in November 1955 when the Government filed a complaint seeking to restrain consummation of a contemplated merger between the G. R. Kinney Company, Inc. and the Brown Shoe Company, Inc. through an exchange of Kinney stock for that of Brown.

In 1955, Brown was the fourth largest shoe manufacturer in the country, producing about 4\(^\%\)\(^\text{150}\) of the Nation's total footwear production. Kinney, also a manufacturer of shoes, produced 0.5\(^\%\) of the national shoe production in 1955, making it the twelfth largest shoe manufacturer.

---


\(^{147}\) Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

* Thomas J. Tumola, Edward J. O'Malley.


\(^{149}\) 15 U.S.C. \$ 18 (1950). Such an analysis was not necessary to the disposition of the issues raised in Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960), and Jerrold Electronics Corp. v. United States, 365 U.S. 567 (1961), the only other amended Section 7 cases to come before the Supreme Court prior to Brown Shoe.

\(^{150}\) This percentage represented an annual production of about 25.6 million pairs of shoes, consisting of men's, women's and children's shoes.
Kinney, however, was principally engaged in operating retail shoe stores. At the time of the trial it operated the largest family-style shoe store chain in the United States. This chain comprised over 400 such stores in over 270 cities which made 1.2% of all national retail shoe sales by dollar volume, making Kinney the nation's eighth largest retailer of shoes. Brown was also a leading retailer of shoes. Through its ownership, operation or control of over 1,230 retail outlets, it was the third largest seller of shoes by dollar volume in the United States.

The contemplated merger thus had both vertical and horizontal aspects. In addition to the horizontal combination of Brown's manufacturing facilities and retail outlets with those of Kinney, there was a vertical integration between Brown's manufacturing facilities and Kinney's retail stores.

At the time of the merger, domestic shoe production was divided among a large number of manufacturers; however, the top four manufacturers produced 23% of the Nation's shoes. Among shoe manufacturers there was a tendency to acquire retail outlets. Beginning in the late 1940's and the early 1950's, many shoe manufacturers had either greatly increased their retail holdings or begun acquiring a substantial number of retail outlets. Once the manufacturers acquired retail companies, they supplied an increasing amount of the retail outlets' needs. The district court found that the manufacturer-dominated stores were foreclosing independent producers from previously available outlets. Another industry trend was a decrease in the number of firms manufacturing shoes — 10% in the eight years preceding the Brown case.

The development of Brown provides a striking illustration of this merger trend. Prior to 1951, Brown had no retail outlets, but by 1956 had acquired 845 such outlets. The acquisition of these retailers led to increased sales by Brown to the acquired companies. At the time of the merger Kinney bought no shoes from Brown; however, by 1957 Brown had become the largest outside supplier of Kinney's shoes, supplying 7.9% of all Kinney's needs. It was conceded by Brown that one of the reasons for the Kinney acquisition was to make Kinney's market available to Brown.

151. Kinney owned and operated four plants which manufactured men's, women's and children's shoes.
152. In 1955 the Kinney stores sold approximately 8 million pairs of shoes or about 1.6% of the national pairage sales of shoes.
153. Of these 1,230 outlets, Brown owned and operated 470. While the balance were independently owned, 570 of them operated under Brown's "Franchise Program" by which they agreed to sell only Brown's shoes. The remaining 190 outlets agreed to concentrate their purchases on Brown's line in return for certain aid from Brown. Brown's shoes were also sold through many retailers operating independently of Brown.
154. The twenty-four largest manufacturers produced 35% of the Nation's shoes, but the top four produced 65% of this production.
155. Since 1951, Brown also acquired seven companies engaged solely in shoe manufacturing.
156. Kinney obtained about 20% of their shoes from their own manufacturing plants.
B. The Relevant Market

In order to judge the probable effect of a given merger it is necessary to dispose of the threshold question of delineating the relevant market. For the extent to which competition will be lessened can only be determined in terms of the market affected.

Brown Shoe's criteria for determining the relevant product market was formulated by incorporating the "peculiar characteristics and uses" test with the "interchangeability of use" doctrine. The interchangeability of use doctrine, developed under Section 2 of the Sherman Act, had its origin in United States v. E. I. du Pont de Nemours & Co. (the Cellophane case). There, the lines of the relevant product market were said to depend on whether the commodities were reasonably interchangeable by consumers for the same purposes. "This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." In the du Pont-General Motors case, the peculiar characteristics and uses of the product were used to delineate the relevant line of commerce. This test was used under the original Section 7 of the Clayton Act, and recognizes narrower sub-markets within a broad product market. Under it the relevant question is whether the particular product has such peculiar characteristics and uses as will make it sufficiently distinct from all other similar products to constitute a "line of commerce."

In Brown Shoe, the Court conceded that the outer boundaries of a product market must be determined by "the reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it." But, citing du Pont-General Motors, it added a qualification to the interchangeability of use doctrine: "within the broad market, well-defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes." (Emphasis added.) The function of the concept of interchangeability of use was thereby limited to a determination of the outer limits of a product market; but within these outer limits distinct sub-markets may exist which must be examined in determining whether a merger will "substantially lessen competition" in "any line of commerce."

The boundaries of such a sub-market were to be determined by examining such "practical indicia" as "industry or public recognition of the sub-market as a separate economic entity, the product's peculiar

159. 351 U.S. 377 (1956).
160. Id. at 380-81.
163. Ibid.
characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."\textsuperscript{164} Applying those considerations to the facts before it, the Court had little trouble affirming the district court’s finding that the relevant lines of commerce were men’s, women’s and children’s shoes. Each product line was recognized by the public; was manufactured in separate plants; had characteristics peculiar to itself rendering it non-competitive with the other; and was directed toward a distinct class of consumers.\textsuperscript{165}

But even though the relevant lines of commerce were to be narrowly drawn, the Court made it plain that the boundaries of the relevant market had to be drawn “with sufficient breadth to include the competing products of each of the merging companies and to recognize competition, where, in fact competition exists.”\textsuperscript{166} Applying this reasoning, the Court rejected Brown’s argument that the medium priced shoes it manufactured occupied a product market different from the low priced shoes sold by Kinney. Since “agreement with that argument would be equivalent to holding that medium priced shoes do not compete with low priced shoes”\textsuperscript{167} a further division of product lines was deemed “unrealistic.”

Prima facie, the “practical indicia” enumerated in \textit{Brown Shoe} would seem to form a logical basis for determining a line of commerce having Section 7 significance. Such an approach, calling for full consideration of all indications of inter-product competition, would seem to result in the “well defined sub-markets” discussed in \textit{Brown Shoe}. But such a wide selection of practical indicia can give the government and the courts an almost unlimited justification to pick and choose its own product market. Furthermore, any possibility that the product market will be drawn too narrowly is foreclosed by the Court’s caveat that the relevant market must be drawn with sufficient breadth to “recognize competition where, in fact, competition exists.” An examination of some of the subsequent Section 7 cases applying \textit{Brown Shoe’s} approach for delineating the product market points out the insufficiency of such criteria in arriving at “well defined sub-markets.”

In \textit{Reynolds Metals Co. v. FTC},\textsuperscript{168} the District of Columbia circuit utilized the reasoning set forth in \textit{Brown Shoe} in defining the relevant product market. The case clearly illustrates the free hand that \textit{Brown Shoe} gave the courts in fitting a particular product within a particular “line of commerce.” Reynolds Metals Company, the world’s largest producer of aluminum foil, sought review of a Federal Trade Commission

\begin{footnotesize}
\begin{enumerate}
\item[164.] \textit{Ibid.} The indicia the Court listed reflect the reasons the Court used to delineate the product market in previous decisions. See generally, \textit{Bock, Mergers and Markets, An Economic Analysis of Case Law} 25-35 (1960).
\item[165.] The use of men’s, women’s and children’s shoes as the relevant lines of commerce was held by the Court to be appropriate for considering the vertical as well as the horizontal aspect of the merger, since the same considerations applied on the retail level as applied on the manufacturing level.
\item[166.] \textit{Brown Shoe Co. v. United States}, \textit{supra} note 162, at 326.
\item[167.] \textit{Ibid.}
\item[168.] 309 F.2d 223 (D.C. Cir. 1962).
\end{enumerate}
\end{footnotesize}
determination that Reynolds' 1956 acquisition of Arrow Brands, Inc., a company engaged in converting aluminum foil and selling it to the wholesale florist trade, violated Section 7.169 Reynolds argued for a product market that would include all decorative foil, that is not only florist foil, but that sold for packaging food products as well. The FTC, on the other hand, contended that the relevant line of commerce should be only the production and sale of decorative aluminum foil to the florist trade.

The court agreed with Reynolds that florist foil did not have peculiar characteristics and uses, since all decorative foil was gauged at approximately the same thickness. Nor were the decorative characteristics of foil sent to florists distinguishable from foil decorated by similar color, laminating or embossing but used, inter alia, as food wrapping. The court, however, affirmed the commission's decision, holding that the evidence otherwise indicated that florist foil should be treated as a distinct line of commerce. First, there were distinct customers, the sole purchasers of florist foil being wholesale and retail florists. Second, the industry recognized the sub-market as a distinct economic entity. Other decorative foil converters did not serve the florist industry, and the industry itself purchased only from florist foil converters and not from other decorative foil converters. Nor did other users of decorative foil purchase the lower priced florist foil. Finally, a definite price differential existed between florist foil and other decorative foil. The evidence showed a much lower price for florist foil as compared with the price of other colored or embossed foil of comparable quality.170 To the court, this price differential effectively obviated inclusion in the same market, and had an "important if not decisive bearing in the quest to determine the sub-market."171 Thus, in the Reynolds case, even though there were indications of potential interchangeability between florist foil and other decorative foil, the court nevertheless put the two products into separate lines of commerce. It would seem that the court should have accorded greater weight to potential interchangeability even though there were factors present showing an absence of actual interchangeability. Since a determination

169. Large foil producers such as Reynolds find it unprofitable to sell to small buyers small quantities of foil to be used for specific and limited purposes such as the decoration of flower pots or foodstuffs. As a result, Reynolds and other major raw foil producers sell in quantity to intermediaries known as converters, who came into existence to meet the needs of these small foil markets, which individually do not require a sufficient amount of foil to purchase it in the minimum quantities sold by the manufacturers. These converters purchase large quantities of foil from the producers in "jumbo" rolls, and after breaking them down and processing them with decorative features, they sell the processed foil to the several smaller markets. Arrow Brands, Inc., prior to and subsequent to the merger was engaged in converting "jumbo" rolls of foil into limited quantities which it then sold, in decorative form, almost exclusively to the florist trade.

170. Florist foil costs only $.75 to $.85, per unit, while other colored or embossed foil sold at prices ranging from $1.15 to $1.22 per unit.

171. Reynolds Metals Co. v. United States, supra note 168, at 229. The Court's reasoning on this point was in effect, that since "prudent business men" do not purchase the cheaper florist foil, it must be distinct from aluminum foil generally or else the many users of the latter would have begun to purchase the former at the lower price.
must always be made as to the possible effects of a particular merger, it would seem crucial that more consideration be given to possible interchangeability in fixing the relevant line of commerce. However, since Brown Shoe left open the question of the weight to be accorded any one of the "practical indicia" of inter-product competition, a court may assign whatever weight it chooses to considerations which the parties contend are relevant in determining the product market. A court is free to admit (as the Reynolds court did) that there are indications present that would form an evidential basis for determining that two products are in distinct lines of commerce, but proceed to hold that other indications dictate that a single line of commerce be recognized. Such an approach makes for unpredictability to say the least.

United States v. Continental Can Co. clearly demonstrates how an application of Brown Shoe can result in the creation of an arbitrary sub-market. Continental Can Company, the nation's second largest producer of metal cans, acquired Hazel-Atlas Glass Company, the nation's third largest producer of glass containers. It was conceded that the can industry and the glass industry were relevant lines of commerce. However, the government urged recognition of additional lines of commerce defined in terms of the end uses for which metal and glass containers were in substantial competition. Although the district court recognized inter-industry competition between glass and metal containers, it rejected, with one exception (containers for beer) the government's claims that existing competition between metal and glass containers had resulted in the products markets urged by the government. It believed that the government failed to make a distinction between "inter-industry or overall commodity competition and the type of competition between products with reasonable interchangeability of use and cross elasticity of demand which has Clayton Act significance.

The majority of the Supreme Court believed that no such distinction was necessary. They recognized that glass and metal containers have different characteristics which may disqualify one or the other from a particular use; that the machinery necessary to pack in glass is different from that used to pack in cans; and that a particular user of cans or glass ordinarily packs in only one or the other container and does not vacillate from day to day as prices fluctuate. But the terms "competition" and "reasonable interchangeability of use and cross-elasticity of demand" as used in Section 7 or in Brown Shoe were not intended to limit the

172. Brown Shoe Co. v. United States, supra note 162, at 323.
174. These were containers for the beer industry, the soft drink industry, the canning industry, the toiletry and cosmetic industry, the medicine and health industry, and the household and chemical industry.
175. For the purposes of this case, the word "industry" was used to refer to an aggregate of enterprises employing similar production facilities and producing the same products. United States v. Continental Can, supra note 173, at 444, n.2.
competition protected by Section 7 to that involving identical products. Furthermore, it was not necessary for interchangeability to be complete and cross-elasticity of demand immediate. Citing Brown Shoe for the proposition that interchangeability of use was not to be employed to obscure competition, but to "recognize competition where, in fact, competition exists," the Court found that competition did in fact exist between metal and glass containers. The record indicated that metal had replaced glass and glass had replaced metal as a leading container for some important uses and each was trying to expand its share of the market at the expense of the other. It was immaterial that the record failed to identify all end uses for which competition between metal and glass containers existed, since the Court believed that complete inter-industry competitive overlap did not have to be shown. There was sufficient data from which to conclude, at least prima facie, that "the area of competitive overlap between the two product markets was broad enough to warrant treating as a relevant market the combined glass and metal container industry and all end uses for which they compete." However, even though the Court was willing to draw the product market lines broadly enough to correspond with what it believed to be "competitive reality," it was not willing to include within this product market other materials competing for the same business. It was admitted that there may be a broader product market made up of metal, glass and other competing containers, but the existence of such broader markets did not necessarily negate the grouping of cans and glass into a single sub-market. The Court justified such a restriction of the product market merely by quoting its statement in Brown Shoe that "within the broad

178. The Court stated that its holding was based on the evidence "thus far revealed by the record" and that it had only made a prima facie determination as to the relevant line of commerce. 378 U.S. at 466. Mr. Justice Goldberg, in his concurring opinion, noted that since the district court dismissed the complaint at the close of the government's case, upon remand, defendant could not only rebut the prima facie inference that metal and glass containers may be considered together as a line of commerce, but could also prove that plastic or other containers in fact compete with metal and glass to such an extent that as a matter of "competitive reality," they must be considered as part of the relevant line of commerce. Id. at 466. However, even as a mere prima facie inference, delineation of the product market in this manner places an unfair burden on defendant. Cf., Handler and Robinson, A Decade of Administration of the Celler-Kefauver Anti-Merger Act, 61 Col. L. Rev. 629, 650 (1961).
179. Id. at 456. The Court justified fixing the relevant line of commerce across industry lines:
Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality. Where the area of effective competition cuts across industry lines; so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made. Id. at 457.
The line of commerce thus fixed by the Court was not pressed upon the district court. But the Court believed that since it was "co-extensive with the two industries, which were held to be lines of commerce, . . ." and since it was composed "largely, if not entirely, of the more particularized end use lines urged by the government in the District Court. . . ." [see supra, note 174,] nothing precluded them from reaching the question of its prima facie existence at this stage of the case.
market, well defined sub-markets may exist which in themselves constitute product markets for anti-trust purposes.”

On the basis of the Brown Shoe opinion the Court in Continental Can undertook the following reasoning process in fixing the relevant line of commerce. In determining the outer boundaries of the product market, competition must be recognized “where, in fact, competition exists.” Thus even though competition between glass and metal containers was not complete, there was what the Court believed to be substantial competition. Therefore, the combined glass and metal container industry was a relevant line of commerce. However, even though there may have been competition between glass and metal containers and other packaging materials, the inter-boundaries of the sub-market had to be limited to glass and metal containers since “within the broad market well defined sub-markets may exist.”

Delineation of the sub-markets in such a manner substitutes arbitrariness for economic analysis. If the Court was willing to recognize areas of competition between glass and metal containers, it should have also been willing to recognize areas of competition among glass and metal containers and other materials competing for the same business. If competitive reality was to be the all-important factor, competition among glass, metal and other containers should have been examined. However, since the guidelines set out in Brown Shoe call for a product market definition that is both narrow and broad, the majority could summarily dismiss certain areas of inter-product competition, while according full weight to others.

In United States v. Aluminum Company of America, the Brown Shoe approach allowed the government easily to find a relevant market on which to predicate a Section 7 violation. There Alcoa acquired the Rome Cable Corporation, a producer of both copper and aluminum conductors. Alcoa, on the other hand, produced no copper conductors, but did manufacture aluminum conductors. In defining the lines of commerce it was necessary to determine whether insulated aluminum conductor was an appropriate line of commerce separate and distinct from insulated copper conductor. The district court found: that the conductor industry did not differentiate between copper and aluminum insulated conductors; that copper and aluminum products are functionally interchangeable; and that there were no unique production facilities, distinct customers or specialized vendors for insulated aluminum conductor products. While recognizing a price differential between copper and aluminum insulated products, the district court believed that this did not foreclose actual competition. It therefore concluded that insulated

180. Supra note 162.
182. See infra.
aluminum conductors could not be regarded as a line of commerce distinct from their copper counterpart.\textsuperscript{184}

The Supreme Court did not dispute the district court's finding that such competition existed,\textsuperscript{185} but held that the degree of such competition did not preclude their division for the purposes of Section 7 into separate sub-markets, "just as the evidence of broad product markets in \textit{Brown Shoe Co. v. United States, . . .} did not preclude lesser sub-markets."\textsuperscript{186} The Court then proceeded to uncover a basis for holding that such a sub-market existed. It appeared that in the field of overhead distribution the competition of copper was decreasing.\textsuperscript{187} The Court believed that the record showed that fabricators of insulated copper conductors, utilizing a high cost metal, were "powerless to eliminate the price disadvantage under which they labor and they can do little to make their product competitive, unless they enter the aluminum field."\textsuperscript{188} Therefore, separation of insulated aluminum conductor from insulated copper conductor and placing the former in another product market was "proper." Further support was found for this differentiation in the conclusion that aluminum conductor dominated the overhead field while copper conductor remained "virtually unrivaled in other conductor applications."\textsuperscript{189}

The \textit{Alcoa} case vividly points out the insufficiency of \textit{Brown Shoe}'s "practical indicia" in delineating the bounds of the relevant product market. The Court could ignore findings which indicated that a single product market existed for the two types of conductors while holding that other indications — from which equivocal conclusions can be drawn — dictated the recognition of distinct lines of commerce. The Court did not consider the district court's finding of complete manufacturing interchangeability between copper and aluminum; nor did it consider the ruling that there was no industry recognition of a sub-market, distinct customers or specialized vendors for insulated aluminum conductor products. Because aluminum conductor dominated the overhead field while copper prevailed in all other conductor applications, the Court believed that the two conductors had distinct end uses. But as both types could be used as electrical conductors and therefore there was

\textsuperscript{184} \textit{Id.} at 510.  
\textsuperscript{185} \textit{E.g.} In 1959 insulated copper conductor comprised 22.8% of the gross additions to insulated overhead distribution lines.  
\textsuperscript{186} \textit{United States v. Aluminum Company of America, supra} note 181, at 275.  
\textsuperscript{187} Insulated aluminum conductor's share of the total annual gross addition to overhead utility lines was: 6.5\% in 1950; 51.6\% in 1955; 77.2\% in 1959.  
\textsuperscript{188} \textit{United States v. Aluminum Company of America, supra} note 181, at 276.  
\textsuperscript{189} \textit{Id.} at 274. Having thus determined that insulated aluminum conductor was an appropriate line of commerce distinct from its copper counterpart, the Court held (also contrary to the district court) that aluminum conductor (bare and insulated) was a submarket for purposes of Section 7: "Both types are used for the purpose of conducting electricity and are sold to the same customers, electrical utilities." \textit{Id.} at 286. This is a non sequitur in light of the Court's rationale as to why it held that aluminum conductor and copper conductor were distinct lines of commerce. However, the Court believed that having made the latter finding, the conclusion that aluminum conductor (bare and insulated) was a line of commerce was "a logical extension of the District Court's holdings." \textit{Id.} at 277, n.4. But see dissent \textit{Id.} at 286.
functional interchangeability between the two, areas of competitive overlap existed. To the Court, the price difference between the two types of conductors set them further apart. To ignore such a differential in determining the relevant line of commerce was "to ignore the single, most important, practical factor in the business."\textsuperscript{190} And the district court's conclusion that this price difference did not foreclose actual competition would seem reasonable. There was functional interchangeability; there were no unique production facilities; nor were there distinct customers or specialized vendors. In short, there was that type of supply and demand flexibility which could be used to eliminate a price disadvantage.

\textit{Brown Shoe} gave the courts considerable latitude in fixing the "line of commerce" for Section 7 purposes. As a result, in some cases a line of commerce has been invented — "a line of commerce which sprang into existence only when the merger took place and will cease to exist when the merger is undone."\textsuperscript{191} Granted, no precise rules can be set down for determining the relevant line of commerce in each case. But the Court in defining product markets having Section 7 significance must use more than the \textit{ad hoc} approach which \textit{Brown Shoe} allows. The Court should strive for some semblance of definiteness which up to now has been entirely absent.

The criteria set forth in \textit{Brown Shoe} to determine the appropriate geographic market was essentially the same as that used to determine the relevant product market. Just as a product sub-market was to be considered the appropriate "line of commerce," a geographic sub-market was also to be considered the appropriate "section of the country." The geographic market had to "correspond to the commercial realities of the industry and be economically significant."\textsuperscript{192} Consequently, the geographic market in some instances could encompass the entire nation, while under other circumstances it could be as small as a "single metropolitan area." The Court construed "any" in "any section of the country" quite literally:

The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated does not, in itself, place their merger outside the scope of Section 7. That section speaks of 'any . . . section of the country,' and if anticompetitive effects of a merger are probable in 'any' significant market, the merger — at least to that extent — is proscribed.\textsuperscript{193}

\textsuperscript{190.} \textit{Id.} at 276.
\textsuperscript{191.} United States v. Continental Can Co., \textit{supra} note 173, at 476 (Mr. Justice Harlan dissenting).
\textsuperscript{192.} \textit{Brown Shoe} Co. v. United States, 370 U.S. 294, 336.
\textsuperscript{193.} \textit{Id.} at 337. The Court gave the following illustration:
If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed. \textit{Id.} at 337, n.65.
The Court agreed with the undisputed conclusion of the district court that insofar as the vertical aspect of the merger was concerned, the relevant geographic market was the entire nation. Since "the relationships of product value, bulk, weight and consumer demand" enabled manufacturers to distribute their shoes on a nationwide basis (which Brown and Kinney did), the anticompetitive effects of the vertical merger were to be measured within this distribution area.

However, the Court did not agree with the lower court's conclusion concerning the relevant geographic market to be used in analyzing the horizontal aspect of the merger. The district court found that the effect of the horizontal merger had to be analyzed in every city with a population of over 10,000, as this was the only area in which both Brown and Kinney operated retail outlets. However, Brown wanted markets distinguishing between what it believed to be different competitive situations. It argued that in some cases the areas of effective competition should be defined so as to include only the central business districts of large cities, and in other cases so as to encompass the "standard metropolitan areas"195 within which smaller communities are found. But the Supreme Court held that the district court properly defined the relevant geographic market. The court's rationale in fixing the boundaries of the geographic sub-market was similar to that utilized in fixing the boundaries of the product sub-market. The geographic sub-market was to be large enough to include important competitive factors, but small enough to exclude those factors of little competitive significance. The markets fixed by the district court were deemed "large enough to include the downtown shops and suburban shopping centers in areas contiguous to the city, which are the important competitive factors," and yet were "small enough to exclude stores beyond the immediate environs of the city; which are of little competitive significance."197

The same approach used in Brown Shoe to determine the relevant geographic market within which to analyze the effect of a horizontal merger was followed in United States v. Philadelphia National Bank.198

194. The district court limited its findings to cities having a population of at least 10,000 persons, since Kinney operated retail stores only in such areas.

195. The U. S. Bureau of the Census defines a standard metropolitan area as "an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area. . . . Each area (except in New England) consists of one or more entire counties. In New England, metropolitan areas have been defined on a town basis rather than a county basis." 11 U. S. Bureau of the Census, United States Census of Business: 1954, 3.

196. By so defining the geographic market, less than one-half of all the cities in which either Brown or Kinney sold shoes through retail stores was represented. But Brown admitted that if the districts court's holding in this respect was proper, the number of markets in which both it and Kinney had retail outlets was sufficiently numerous so that the validity of the entire merger could be judged by testing its effects in those markets.


was the second and Girard the third largest of the forty-two commercial banks with head offices in the Philadelphia metropolitan area. This area consisted of the city of Philadelphia and its three contiguous counties in Pennsylvania. Philadelphia was the home county of both banks, but each had offices throughout the four-county area. The issue before the Court was whether the four-county Philadelphia metropolitan area was the relevant geographic market. The government claimed that it was, arguing that the principal anti-competitive effect of the merger would be felt in the area in which the banks' offices were located. The defendants, however, wanted a larger geographic market — one comprising the greater part of the northeastern United States. The district court, agreeing with the defendants, held that the four-county metropolitan area was not the relevant geographical market because PNB and Girard actively competed with other banks throughout the greater part of the northeastern United States.

The Supreme Court, however, agreed with the government. To the Court, the relevant question was not where the parties to the merger did business or even where they competed. The merger was to be analyzed within that part of the area of competitive overlap where the effect of the merger on competition would be direct and immediate. This depended upon "the geographic structure of supplier-customer relations." Convenience of location was found to be the most important factor in the geographic structure of depositor-bank relations. Since individuals found it impractical to conduct their banking business at a distance, they usually conferred the bulk of their patronage on banks within their local community. This inconvenience factor was held to have sufficiently localized banking competition to require that the relevant geographic market be limited to the four-county area in which defendants' offices were located.

Protection of the small depositor was an additional reason assigned for limiting the relevant geographic market to the four-county area. The defendants had argued that competitive alternatives were provided by large banks (from New York and elsewhere) which solicited business in the Philadelphia area and that therefore the relevant geographic market should be structured so as to include these competitors. However, the Court believed that competition from outside the area would be important only to the larger borrower and depositor. It therefore concluded that the four-county area was a valid geographic market for assessing the effect of the proposed merger upon the banking facilities available to the smaller customers — "a perfectly good 'line of commerce' in light of Congress'
evident concern, in enacting the 1950 amendments to Section 7, with preserving small business."

A further justification for limiting the relevant geographic market to the four-county area was found in the need for a "workable compromise." There was a need for "some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account . . . or so narrowly as to place [defendants] in different markets, because only the smallest customers are considered." Large borrowers and depositors might find it impractical to do their banking business outside their home community, while small borrowers and depositors may be confined to banking offices in their immediate neighborhood. But the four-county Philadelphia metropolitan area was believed to "roughly . . . delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business . . . ."

Certain points should be noted from the above analysis of Brown Shoe's product market criteria and its application in Philadelphia National Bank. The relevant geographic market was not defined merely in terms of the area of competition between the parties to the merger, but by the area of substantial competition—the area of competitive overlap. Further, Brown Shoe's footnote 65 makes it clear that a merger can still be proscribed even though the merging firms do not compete in every "section of the country." Customers of the merging companies were also considered. The area to which these individuals confined their patronage was deemed important in determining the lines of the relevant geographic market. Also, the type of customer was relevant in this connection. This is evidenced by the Court's concern with protection of small business, which caused it to draw the geographic market lines quite narrowly. Moreover, in drawing these lines, the court looked at the overall competitive picture and employed a "workable compromise." If a "workable compromise" results (as it did in Philadelphia National) in intentionally drawing geographic market lines sufficiently narrow to protect the "small" customer and to "preserve" small business, such a rationale can be justified. The Court would be carrying out the con-
gressional mandate to protect "competition, not competitors." However, such an approach has the same defect as the similar one employed in fixing the relevant product lines. Both make for unpredictability in an area where predictability is essential.

C. The Effect on Competition

Having delineated the relevant product market, the Court proceeded to consider the impact of the merger; for if the probable effect would be to substantially lessen competition in any section of the country, it would fall within the ban of the Act.

1. The Vertical Level

Regarding the vertical aspect of the merger, the Court relied on three criteria to strike it down. The primary factor was stated to be the share of the market foreclosed. But as a separate element it would be determinative only where the merger was of either monopolistic or de minimus proportions. In all other cases foreclosure was thought to be significant only when related to two additional factors — the nature and purpose of the arrangement and the history of the particular industry.

Relying on the testimony of Brown's president and the pattern which emerged from prior Brown acquisitions, the Court analogized the merger to a tying agreement. Since such a contract is inherently anti-competitive, it need only be shown that a relatively small share of the market was foreclosed. And as the instant merger involved one of the largest foreclosures possible in the industry, the Court had no difficulty in finding a serious threat to competition.

Finally, the structural development of the industry was examined and found marked by a growing trend toward concentration through

207. Brown Shoe Co. v. United States, supra note 192, at 320. See also, id. at 315-16.
210. The testimony demonstrated Brown's avowed purpose was to supply the line of high quality shoes which Kinney would require as it continued to expand into the suburbs. T. 1323.
212. In the case of International Salt Co. v. United States, 332 U.S. 392 (1947), the Court held that in any case involving a tying arrangement a substantial lessening of competition could be inferred from a finding that a not insignificant volume of commerce was affected.
213. This is to be distinguished from a requirements contract, which may be at the request of the buyer, and which requires a weighing of the probable impact upon competition. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961): See Generally, Handler, Recent Antitrust Development, 71 YALE L.J. 75, 81-88 (1961).
214. Brown Shoe Co. v. United States, supra note 2, at 331-32. Brown was the fourth largest manufacturer while Kinney, with over 350 outlets, was the leading independent retailer.
vertical acquisitions. This merger would only serve to accentuate the trend and destroy the fragmented character of the industry. And once such a trend is discovered, the contention that the industry remains vigorously competitive will not be heard.

Combining these factors with a reading of Legislative history that found a Congressional intent to halt such trends at their inception, the Court concluded that the merger should be prohibited.

It is clear that the design of Chief Justice Warren was to go beyond the facts of the case and enter into a comprehensive discussion of the amended section. Equally apparent is the writer's intent to establish a flexible approach, as evidenced by his refusal to rely on any one element without relating it to the other criteria discussed. Indeed, much of the criticism of the opinion is based upon an alleged failure to make adequate use of the economic data available on each issue. Yet in light of these objectives, the opinion represents an application of the Court's interpretation of the policies of the Act, and not an extensive investigation into the validity of the underlying economic theories. Thus, a merger which does not entirely deprive an industry of its competitive nature may sufficiently impair it to fall within the purview of the Act. An analysis of the Court's rationale indicates that such economically based criticisms are often wide of the mark.

a. The Share Foreclosed

Prior to the merger Kinney's controlled 1.2 per cent of the market and was the largest independent retailer in the industry. At that time it supplied 20 per cent of its own requirements. Post acquisition data shows that two years after the merger Brown was supplying 7.9 per cent of Kinney's needs. Thus the actual share foreclosed at the time of the decision was less than one-tenth of 1 per cent. And even if Brown should supply 50 per cent, its highest previous total, the share foreclosed would only slightly exceed .5 per cent.

How, then, did the Court conclude that the merger would substantially lessen competition? If Justice Harlan's approach is adopted, the significance of the foreclosure increases greatly. For Kinney represents a substantial portion of the market available to independent manu-


217. This is widened by the Court's lengthy review of the legislative history. Brown Shoe Co. v. United States, supra note 209, at 311-23.

218. For a discussion of the validity of such a before-after statistical comparison, see Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960).

219. Mr. Justice Harlan contended that the crucial figure is the percentage of the market foreclosed to independent manufacturers. Since the industry was heavily integrated, this figure would far exceed 1.2%. 370 U.S. 294, 369-74 (Dissenting opinion).
facturers. Yet the fact that those manufacturers who relied on Kinney for up to 40 per cent of their sales would be seriously injured does not necessarily mean that competition in an industry with over eight hundred manufacturers would be adversely affected.220 When the further factor of the ease with which these firms could develop their own outlets,221 or with which new retailers could enter the market, is considered, the objection that the Court is protecting competitors,222 and not merely competition, seems justified.

But the Court did not proscribe the merger solely because of this factor. Nor did it claim that this merger would of itself render the industry non-competitive. It only concluded that it tended to have this effect. The additional criteria considered by the Court seem to justify this result.

b. Exclusionary Practices

The Court relied to a large extent upon the conclusion that the nature and purpose of the acquisition was inherently anticompetitive. Drawing heavily upon Section 3 cases,223 the Court concluded that the merger had all the vices of a tying contract plus the added disadvantage of permanence. The clear purpose of the acquisition was to force Brown shoes through Kinney’s outlets. Therefore the share foreclosed need not be as great as if the purpose had been to secure sources of supply to the retailer.224 In the latter situation it would more closely resemble a requirements contract, which may be initiated by the customer, and is not necessarily anticompetitive.

The relevance of this distinction is questionable.225 The Act is not aimed at a particular type of merger, but rather at all acquisitions having the proscribed effect on competition. Further, the standard of the Section is completely objective. Absent a showing of detriment to competition the motivation behind the merger should be immaterial. To use intent as a basis on which to predicate such a result hardly seems to demonstrate probable effect.

It should be noted that the Court’s view of exclusionary practices is not unchallenged. It has been suggested that these are actually weapons of competition, equally available to all competitors, and that the Court

221. In its discussion of Legislative history the Court recognized the importance to be attached to this factor Brown Shoe Co. v. United States, supra note 209, at 322. See generally Report of Attorney General’s Committee to Study the Antitrust Laws 326-37 (1955).
is interfering with a desirable trend in the industry. This argument, however, goes directly against Congressional intent as well as the Court's view as developed in the Section 3 cases.

This divergence of approach does suggest, however, the basic split between Congress and the Court on the one hand and many economists on the other — a totally distinct view of what constitutes competition. To the former, the elimination of a significant market necessarily has an adverse effect upon competition. And the Court will not content itself with theories as to overall competitiveness in the industry when the case before it shows the available market on the decline. Nor can the Court accept the idea that the trend toward integration will increase competition. To allow wholesale vertical mergers in the hope that the resulting industry would be equally competitive would be to ignore Congress entirely.

The economist, on the other hand, is concerned with the allocation of resources to uses so as to obtain maximum efficiency for the benefit of the ultimate consumer. On the basis of this premise it has been pointed out that the industry could absorb sixty mergers of this size and still maintain a vigorously competitive posture. And if such is the natural object of the dynamics of the industry, it is urged that the Court should not interfere. The Court seems to meet these contentions in its discussion of the history of the industry.

c. The Incipiency Theory

Accepting the district court's findings that a cognizable trend toward concentration existed in the industry, the Court concluded that this was precisely the time to implement Congressional intent and arrest the trend before it gained additional momentum. The industry was still fragmented, a condition which the Congress desired to retain where possible.

It has been argued that the Court was careless in interpreting the available data, and that while the number of mergers had increased, there was no overall increase in market power. Rather these acquisitions had only permitted the manufacturers to retain their former share of the market. Yet granting this to be true, without such mergers the industry would have been more competitive as a result of continued fragmentation. In any case there are advantages to be gained through a mere increase

---

227. The opinion includes a thorough investigation into the legislative history, and its several statements from the Congressional Record which support the theory that Congress was attempting to preserve small business as an economic way of life. See, e.g., 95 Cong. Rec. 11486, 11489, 11494–95, 11498 (1949); 96 Cong. Rec. 16444, 16448, 16450, 16452, 16503 (1949).
229. Bork & Bowman, supra note 222, at 598. But see, Celler, Facts About Antitrust Myths, 9 Antitrust Bull. 607, 619–20 (1964), where it is suggested that this argument ignores the nature of the industry and the clearly demonstrated trend toward concentration.
230. See note 227, supra.
in physical assets, and it has been suggested that these may be sufficient to indicate that the industry is likely to become less competitive. 232

Such reasoning does not augur well for future mergers. Developed to its full extent, an incipiency based argument could be used to strike down all but the most insignificant mergers. But this also ignores the flexibility of the Court's approach, and the underlying theories.

d. Social Policy and Congressional Intent

In its attempt to effectuate legislative intent, the Court has taken a protectionist attitude toward small business. It will not sanction the use of vertical acquisitions to gain a significant competitive advantage. Indeed, the case has been said to stand for the proposition that a manufacturer will not be able to attain, through forward integration, advantages resulting from economies of scale. 233 Nor will it approve a merger which will foster a trend toward increased concentration throughout the industry. This leads to a two-part inquiry: (1) Is the Court's reading of legislative history justified and (2) To what extent should the Court take cognizance of economic theories.

The Court found an express purpose to retain local control over industry and protect small business. 234 It is interesting to note that the Court here relied upon the arguments made by the co-sponsors of the amended section while it rejected their views in its discussion of the change regarding asset acquisitions. 235

The Chief Justice also found a desire to retain "other values," and cited Learned Hand's view that the antitrust laws are aimed at preserving industry in small units for its own sake and regardless of cost. 236 This is a clear statement that waste is to some extent a necessary by-product of antitrust legislation. With such support in the Congressional Record it is not surprising that the Court refused to be guided by purely economic considerations as to what constitutes competition. So long as the Court is following the Congressional design, arguments which go to the underlying policy issues should be addressed to the Legislature. But the Court has not restricted itself to such a role.

In the Philadelphia National Bank 237 case Justice Brennan largely ignored the economic evidence proffered by both parties and dealt ex-


235. Id. at 313-14.

236. . . . it has been constantly assumed that one of their [the Anti-trust statutes] purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units . . . United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).

237. 374 U.S. 321 (1963). For a more complete discussion of this case, see infra, p. 786.
tensively with extra-judicial economic theory. While analysis of market behavior has long been considered relevant, the use of market structure as interpreted by theorists is a questionable basis upon which to predicate a finding that competition will probably be substantially impaired.

Such an approach opens the Court to justifiable criticism, particularly since the Bank cited no economists, and the authorities relied on by the Court are not definitive. Indeed Kaysen and Turner, the authors cited most frequently by the Court, began their work with the premise that the present laws are in need of drastic revision. If the Court is to assume a leading role in re-examining policy, it should not do so without considering all of the relevant authority.

e. Recognized Defenses

The Chief Justice was careful to mention particular situations where the Amended Section would not apply. First, he stated that two small companies could merge in order to be better able to compete with the industry leaders. This defense was first advanced and flatly rejected in the Bethlehem Steel case, where it was argued that the merger would increase competition with the industry leader U. S. Steel. The court stated that a consideration of benefits to one section which would flow from a merger that would substantially lessen competition in another area is outside the judicial scope. But it is clear that the case did not involve small companies.

The defense was also urged in the later Philadelphia National Bank case in that the merger would increase competition with the New York banks. This was combined with the argument that countervailing social and economic benefits mentioned in Brown were present in the form of the greater prosperity which would accrue to the entire Philadelphia area. This contention lost its vitality once the Court determined the relevant geographic area, for the merger involved the leaders within the four-county area. But the Court emphasized that the defense would be available where the factors enumerated in Brown were present.

This defense seems to be justified. A merger of two such small companies would add a strong competitor which hopefully would increase its market share at the expense of the dominant firms. And where the companies control relatively small market shares, foreclosure resulting

238. judicial notice of an economic theory so inconsistent with the present policy of the antitrust laws that its proponents recommend a legislative amendment to effectuate its implementation seems suspect as a judicial tool. Comment, Government Regulation of Bank Mergers: The Revolving Door of Philadelphia Bank, 62 Mich. L. Rev. 990, 1007.
239. KAYSEN & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959).
242. Id. at 617-18.
244. Id. at 363, 364.
from a vertical acquisition would not be excessive. Nor would the resulting market share in a horizontal merger be so large as to otherwise preclude it.

This balancing process allows a flexible approach whereby a merger with beneficial effects may be approved, if the size of the companies is not so large as to offset its value. But where it is so great as to seriously affect competition among the smaller firms, the price of increasing competition with the industry leaders is too high.

Only the countervailing power argument would have been available in the *Brown Shoe* case. But the Court concluded that the merger would have demonstrable anti-competitive effects "without producing any countervailing competitive, economic, or social advantages." It is doubtful whether the Court was suggesting that a showing of resulting economic and social benefits would suffice to immunize the merger, where its anticompetitive effects were substantial. But this quote does indicate that a larger share might be foreclosed where such benefits could be shown than in cases where these advantages were not present.

This element was present, along with the failing company doctrine in the subsequent *Lever Brothers* case. There the failing company, Monsanto, controlled 55 per cent of the low sudsing market and 5 per cent of the heavy duty detergent market through its product "All." Despite this large market share, advertising and promotional costs consistently exceeded profits, and Monsanto was determined to go out of business. Lever Brothers, although a significant factor in the heavy detergent market, had suffered severe setbacks in its attempts to enter the low sudsing market. Although extending section 7 to include the acquisition of a trade name, the court upheld the merger. The case has been interpreted as an application of the failing company doctrine.

This exception, first developed in the *International Shoe* case, has received the continued approval of both courts and Congress. It permits the acquiring company to interpose an absolute defense where 1) the acquired company was so depleted and the prospect of rehabilitation so remote that it faced the grave possibility of a business failure, 2) there was no other available purchaser, and 3) the purpose was not to lessen competition but to "facilitate the accumulated business" and avoid injurious consequences which would otherwise be probable. Subsequent cases established the requirement that the entire company, and not merely the division acquired, be on the verge of insolvency. Nor has a com-

---

247. Lever Brothers' contention that the mere acquisition of a trade name was not an asset within the meaning of Section 7 was rejected by the Court. This aspect of the decision is approved in *Farm Journal, Inc.*, 53 FTC 26 (1956).
pany qualified where its liquidation has been entirely voluntary. 250 And
the current approach of the FTC requires a showing that had the merger
not intervened, a reasonable probability was that insolvency would fol-
low. 251

The underlying rationale is that the public interest is served by keeping
a company in business for the advantages it gives the community —
employment and economic well-being. That rationale certainly is appropri-
ate in Lever Bros., even though Monsanto was not insolvent, for the
decision to abandon the product was final. And added to the public
interest in keeping “All” in the industry, was an increase, rather than a
depreciation in competition, according to available post-acquisition data.
Thus the countervailing economic and social benefits mentioned in Brown
are clearly present. This case is an excellent example of the value of
the flexible approach taken in Brown. For in the heavy detergent market
the merger increased the market shares of the four leading competitors
from 85 to 90 per cent, which would have led to automatic proscription
under a fixed standard.

The Lever Brothers case, however, will not aid appreciably in evaluat-
ing future mergers. It involved an unusual set of facts, Lever Brothers
being the smallest of the four companies which dominated the heavy
detergent market. Whether the same result would follow had one of the
other companies attempted to acquire Monsanto is uncertain. The Brown
Shoe opinion failed to restate the requirement of International Shoe
that there be no other available purchaser, an omission which may be
highly significant. However had another company purchased “All”,
competition would not have been benefited, and the “countervailing factors”
of Brown would not be present. The least that should be required is that
the smaller competitor be given priority where a failing company is
involved in order to both increase competition and protect the public
interest.

2. The Horizontal Level

Many of the criteria already discussed, and particularly those which
go to the underlying policy considerations, were also applied to the
horizontal aspect of the merger. The principal distinction is that there
no share had been foreclosed, and analysis centered about the size of the
market share controlled by the merged complex.

a. The Market Share

The Brown-Kinney share of the retail market varied from 5 to
57 per cent in the relevant geographic areas. In forty-seven selected

250. Cf. Erie Sand & Gravel Co. v. FTC, 291 F.2d 279, 280 (3d Cir. 1961),
wherein the court stated the defense may be permitted when the corporation is in such
dire financial straits that its termination and subsequent dispersal of its assets seems
inevitable.

cities the share exceeded 5 per cent in all three lines of commerce. Concluding that the district court had selected representative markets in which to judge the probable effects, the Court deemed the merger likely to have a substantial anti-competitive impact, and therefore struck it down. While regarding market share as the prime indicator of the validity of the merger, the Court continued its flexible approach by relying on a combination of factors.

b. Future Mergers

The Court reasoned that to approve the instant merger would force it to sanction all subsequent mergers in which the resulting market share did not exceed 5 per cent, thereby fostering the oligopoly which Congress sought to prevent. The difficulty with this approach is that every merger furthers oligopoly to some extent, and thus it has been stated that the Court is tending toward a per se rule. A further criticism is that even if there were wholesale mergers up to 5 per cent, a supposition which presumes an intent unsupported by the record, the industry would still contain far too many retailers to constitute an oligopoly.

Thus it seems that the Court was reiterating its incipiency argument, for it also made reference to a rising concentration in the industry. Combining these two elements, the Court apparently feared approval of this merger would provide the impetus for a further rash of mergers. And while certainly an effective means of preventing concentration, it is also a method of protecting localized business, an avowed goal of the Court.

As to the contention that the increase in mergers had not resulted in an increase in market power, the answer is that absent these mergers, the industry would have become further atomized, a highly desirable development. And in any case a substantial increase in physical assets imports a significant anti-competitive advantage.

c. The Large Chain Operation

By virtue of its size, the Brown-Kinney chain was thought to have the potential to drive smaller competitors out of business. It could insulate certain stores from competition, and through its ability to rapidly change styles thereby render independents incapable of maintaining a competitive inventory.

Here the Court seems to have stretched the incipiency argument to questionable lengths. Brown was not shown to have the ability to become a leader in styles. Yet the Court accepted the possibility of such development as sufficient. And even should Brown attain such a status, the assumption is that it will act with a predatory intent. The Court, then,

254. Bork & Bowman, supra note 229, at 599.
is condemning the capacity so to act. But whether this creates a probability that competition will be so injured, rather than a mere possibility, is doubtful. But this reasoning becomes more convincing when the relationship between the retail chain and the manufacturing operation is considered.

d. Advantages of an Integrated Complex

The Court further objected to the competitive advantages that a large integrated chain would possess. By eliminating wholesalers and increasing volume the retail outlets could sell at prices approximating cost. Increased efficiency, then, was relied on to strike down the merger. After recognizing that beneficial effects might accrue to the consumer, and that the act was designed to protect competition, and not competitors, the Court concluded:

But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

The Court is not protecting "competition" as defined by the economist, but rather that form of competition which is waged by small, independent businesses. This is the surest way of preserving competition generally throughout an entire industry.

VI.
PNB: Presumptive Illegality*

From the broad principles laid down in Brown Shoe more specific standards had to be carved out in order to establish some degree of certainty. The case of United States v. Philadelphia Nat'l. Bank represents one of the initial efforts in that direction.

The case involved a proposed consolidation between the Philadelphia National (PNB) and Girard Trust Corn Exchange (Girard) banks, respectively the second and third largest in the Philadelphia area. There were, at that time, forty-two commercial banking establishments in the four county area, some fifty-eight having been eliminated by mergers during the last fifteen years. Both PNB and Girard had participated

256. Brown Shoe Co. v. United States, supra note 209, at 344. This conclusion has been questioned, since the ability to withstand fluctuations may be due to factors such as pre-existing wealth which existed prior to the merger. 76 HARV. L. REV. 183 (1962).

257. Brown Shoe Co. v. United States, supra note 209, at 344.


259. PNB's total assets exceeded 1 billion dollars, while Girard's approximated 750 million.
heavily in this rash of merger activity which had resulted in concentration of 90 per cent of the area's total banking resources in the seven largest establishments.

As required by statute, the prior approval of the Comptroller of the Currency was obtained, even though the Attorney General, as well as the other two banking agencies, had recommended that it be disapproved. The Justice Department immediately brought this action to enjoin consummation of the merger. However, the District Court upheld the Comptroller, and an appeal ensued. The Supreme Court reversed, holding that the merger would violate Section 7.

The government's case was predicated largely upon finding a violation of the Sherman Act. Indeed, the consensus of opinion appears to have been that bank mergers did not fall within Amended Section 7, since banking activities generally were subject to an extensive and systematic regulatory scheme. And the majority, after examining the nature of commercial banking in the United States, concluded:

Federal supervision of banking has been called probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision. . . . The system may be one of the most successful (systems of economic regulation), if not the most successful.

However, Mr. Justice Brennan then proceeded to distort the legislative history and concluded that Clayton 7 was applicable. In light of the fact that the consolidation was neither a pure stock nor a pure assets acquisition, he concluded that the literal language of Section 7 was not controlling, and consequently treated the case as one of first impression.

260. Since 1950 PNB has increased 59 per cent in size due to mergers, while Girard grew by 85 per cent.

No insured (by FDIC) bank shall merge or consolidate with any other insured bank, or either directly or indirectly, acquire the assets of . . . any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank . . . .

In the interests of uniform standards, before acting on a merger . . . the agency shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System). . . .
265. As Mr. Justice Harlan remarked:

I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court. (Dissenting opinion at 373).
266. In 1956, Representative Celler introduced an amendment to § 7 (H.R. 5948) designed to prohibit any bank acquiring "the whole or any part of the assets of another corporation also engaged in commerce. . . ." See also, Gruis, Antitrust Laws and their Application to Banking, 24 Geor. Wash. L. Rev. 89 (1955); Klebaner, Federal Control of Commercial Bank Mergers, 75 Harv. L. Rev. 756 (1962).
268. Had the consolidation been a pure asset acquisition it would have been exempt, since the amended section extends only to asset acquisitions of those com-
The Court then concluded that the legislative intent was to reach "the entire range of corporate amalgamations, from pure stock acquisitions to pure asset acquisitions, within the scope of Section 7."269 Nor were the legislatively prescribed controls which pervaded the industry, and, more specifically, the Bank Merger Act of 1960, deemed a sufficient basis for inferring that Congress intended to insulate banking from the prohibitions of Amended Section 7. The Court found that since the 1960 legislation was enacted to cover the possibility that Clayton 7 would be held inapplicable, it would "do no violence to that design by dispelling the uncertainty."270

The Court further concluded that no exemption was conferred. Citing the general proposition that "[i]mmunity from the anti-trust laws is not lightly implied,"271 it held that there was not a sufficient showing of a Congressional intent to permit the evasion of Section 7.

While this aspect of the opinion has been the subject of a good deal of criticism it is not difficult to appreciate the dilemma facing the Court. A ruling that the Amended Section was inapplicable to bank mergers would have stripped the Court of all future control, regardless how obviously detrimental to competition the merger might be. The alternative, finally adopted by the Court, was to substantially disregard the Congressional Record and through a strained interpretation of the Amendment gain control of the banking industry.272

While the decision represents a clear case of judicial usurpation, it nevertheless appears to have been the wiser course. Nor does it force the Comptroller to abdicate the role intended by Congress. Indeed, in cases where the effect upon competition is less clear, the Court may yet treat the Comptroller's rulings with great deference.273 And even though Congress apparently did not intend to include banking under Section 7, it regarded vigorous competition as highly desirable. That wish, at least, will apparently be effectuated by the Court.

Having concluded that Section 7 was applicable, the Court turned to a consideration of the probable effect of the merger. The real issue here was the determination of the relevant geographic market, which is fully discussed, supra. For once it was determined that the merger was to be evaluated in the four county area, the conclusion that it be prohibited was a certainty.

270. Id. at 349.
271. California v. FTC, 369 U.S. 482, 485 (1962). This case held that FPC approval of a merger did not render Clayton 7 inapplicable, even though other competitive factors had been taken into account pursuant to the statutory command.
273. 9 Vill. L. Rev. 317, 324 (1964).
The effect of the merger would be to invest the resulting bank with 36 per cent of the deposits, as well as total assets, and 34 per cent of net loans in the four county area. The four largest banks in the area would have 78 per cent of the total assets. In light of the dimensions of these percentages, it is far from startling that the merger was proscribed. Rather, the significant factor is the approach adopted by the Court.

Realizing that "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded," the Court stated that elaborate proof of market structure may be dispensed with wherever it can be done without violating Congressional intent. The Court then concluded that "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30 per cent presents that threat." In arriving at this result the Court largely ignored the massive testimony compiled in the District Court and relied instead on various extrinsic economic treatises.

It should be stressed that, technically at least, the Court was not laying down a per se rule wherein a finding that the resulting market share exceeded 30 per cent would automatically require that the merger be struck down. Rather, in such a case, the government need not embark upon an elaborate demonstration of market structure, as that burden is shifted to the proponents of the merger. And while this may in practice place an insurmountable burden upon the merging companies, it at least purports to allow a consideration of other factors where they are deemed appropriate.

Nor is this approach inconsistent with the rationale of Brown Shoe. For that Court recognized that in certain situations a violation would be clear, while in others it would be equally apparent that the merger was lawful. Rather it was the intermediate gray area at which the extensive analysis in Brown Shoe was directed. Thus the Philadelphia National Bank decision is in no way contrary to Brown Shoe. Rather it represents the initial attempt to specify the limits within which a Brown type analysis must be undertaken.

275. Id. at 364.
276. The propriety of this approach generally has been discussed above. As for the theories of Kaysen and Turner, those authors proposed an attack upon existing "market power," a term they defined as "[t]he persistent ability . . . to restrict output or determine prices without boring a substantial share of the market. . . ." Once such power is demonstrated, the company will be broken up, unless it is the result of certain specified factors. Only by limiting undue market power will desirable levels of economic performance be maintained. KAYSEN & TURNER, ANTITRUST POLICY (1959).
277. . . . [T]he legislative history of Section 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act. On the other hand, foreclosure of a de minimis share of the market will not tend "substantially to lessen competition." Brown Shoe Co. v. United States, 370 U.S. 294, 328-29 (1962).
The underlying thesis involved is that certain market behavior is inextricably interwoven with certain market structures, and that once the structure is confirmed the market behavior will be presumed without necessity of further proof. While the proposition is not universally accepted, it would appear sufficiently well founded to permit the Court, in the interest of certainty, to shift the burden of proof in a relatively extreme situation such as existed here.

The minimum limit which the Court will eventually prescribe as the test is by no means certain. The primary source relied upon suggests a figure of 20 per cent. Whether the Court will reach this figure, or one even more restrictive, depends largely on the emphasis placed upon the "intense Congressional concern with the trend toward concentration."

VII.

CONGLOMERATE Mergers

A further question presented to the courts was whether to extend the scope of Amended Section 7 to other types of arrangements. As previously noted, it was held to include banking and other regulated industries, as well as the acquisition of patent and trade names. It has recently been determined that conglomerate mergers should also be included.

The language of Amended Section 7 is not particularly well suited to a determination of the issues presented by a conglomerate merger. For while certain measurable anti-competitive effects necessarily result from both horizontal and vertical acquisitions, the same cannot be said where no meaningful economic relationship existed prior to the merger. In such cases there is no percentage or share of the relevant market to be utilized in assessing the competitive impact of the merger. For this reason it has been suggested that perhaps Congress never intended to include conglomerates under Section 7. The courts, however, have rejected this view and begun to develop the necessary standards.

280. KAYSEn & TURNER, ANTItrust POLICY (1959). Other suggested figures cited by the Court are 25 per cent (Markham, Merger Policy Under the New Section 7: A Six Year Appraisal, 43 VA. L. REV. 489, 521-22 (1957)) and 20 per cent (Stigley, Mergers and Preventive Antitrust Policy, 104 U. PA. L. REV. 176, 182 (1955)). A somewhat different approach was taken by Bok, who suggested that a firm should not be permitted to increase its relative size by more than 8 per cent. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. REV. 226, 308-15 (1960).
282. Adelman, Acquire the Whole or Any Part of the Stock or Assets of Another Corporation, A.B.A. Antitrust Sec., 111 (1953); Blair, The Conglomerate Merger in Economics and Law, 46 GEO. L.J. 672 (1958). But see 49 VA. L. REV. 852 (1963), where it is suggested, quite properly, that the Congressional intent as interpreted in Brown Shoe requires that conglomerate mergers be included in the Amended Section.
The first of these, the so-called "deep-pocket" theory,283 originated in Reynolds Metals Co. v. FTC.284 That case involved the acquisition of Arrow Brands, Incorporated, one of eight companies converting aluminum for the florist trade, by Reynolds, the country's largest producer of aluminum foil.285 While the customer-supplier relationship between the two companies indicated that the acquisition was basically vertical, the court declined to treat it as such.286

Instead, the court relied upon the contrast between Reynolds' immense financial resources and the limited capital available to Arrow's competitors to strike down the merger. The decision, therefore, does not depend upon any pre-existing relationship in a given market. Rather, it suffices that the wealth thereby injected into the acquired firm will create significant competitive advantages.

As to the contention that the government had not demonstrated probable anti-competitive effects the court stated:

It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Section 7.287

However, the court emphasized that it was not laying down a per se rule, and proceeded to discuss several of the mitigating factors enumerated in Brown Shoe. It recognized, for example, that under similar circumstances a merger might be justifiable under the "countervailing power" doctrine.

It is unfortunate that the case did not present a closer factual situation, as this is one of only three significant decisions in the conglomerate area.288 But in light of the vast differences in financial resources, and

283. In the recent Consolidated Foods case the Court held that a merger which creates an atmosphere conducive to reciprocal buying "if the probable consequence of the acquisition is to obtain leverage in one field or another." While the Court did not lay down a per se rule, it only required a minimum showing as to the probable anti-competition effects. This was probably due to the difficulties in obtaining and tabulating relevant data. In addition, there was substantial post-acquisition data which reinforced the Court's conclusion. 33 U.S.L. Week 4377 (1965).

284. 309 F.2d 223 (D.C. Cir. 1962).

285. The court's conclusion that the florist foil converting industry was the relevant sub-market is fully discussed, supra ............ For the present discussion it need only be noted that, prior to the merger, Arrow accounted for 33 per cent of the relevant market while Reynolds' total assets were valued at 733.2 million dollars.

286. After noting that the merger would foreclose 33 per cent of the relevant market, the court continued:

However, neither the examiner nor the Commission rested their conclusions that Section 7 had been violated on this basis, nor should we. Reynolds Metals Co. v. FTC, supra note 168, at 229.

287. Id. at 229-30.

288. A test similar to the one under consideration was utilized by the FTC in the Procter & Gamble case. There, the merger was struck down because Procter & Gamble's advertising and promotional ability would give Clorox, the acquired firm, the distinct advantage of better advertising at lower costs. Thus, except that advertising ability rather than finances were being transferred, the cases are identical. Procter & Gamble Co., 3 Trade Reg. Rep. ¶ 15, 773 (FTC Feb. 28, 1962). See generally, 49 Va. L. Rev. 852 (1963).
the wealth of past acquisition data, the court was not forced to undergo an extensive economic analysis in order to arrive at this conclusion.

Yet to make the above quoted statement it was necessary to assume that Reynolds would transfer its wealth to Arrow, and that it would subsequently be utilized in such a way as to injure competition. It has been suggested, however, that Reynolds would effectuate such a transfer only if the expected rate of return be greater than that available elsewhere. The mere fact that the transfer has been made would indicate that the industry affords an opportunity for greater than average profits. And if this be true, Arrow's competitors would be able to obtain similar resources. Thus, the court should not interfere, as it is arresting a desirable economic trend merely to preserve competitors, and not competition. In addition, it is argued that Section 2, which prohibits destructive price-cutting, affords an adequate degree of protection.

Yet even if the foregoing is accepted, the criticism appears to be unjustified in light of the Brown Shoe decision. Indeed, it appears that the Reynolds Court religiously applied the rationale underlying that decision. For here the industry was comprised of small, sparsely capitalized firms. Entry into the market was extremely easy, and competition intense. An infusion of substantial capital into one of the firms could only create a serious imbalance in the industry, requiring Arrows' competitors to obtain similar financial backing. If the Court in Brown Shoe was willing to halt an existing trend before it transformed the entire industry, there is no reason why a merger which would of necessity initiate such a trend should be tolerated. The contention that an entire industry should integrate to achieve maximum efficiency should not be heard in the wake of Brown Shoe. The objection that the Court is actually protecting competitors is equally without merit.

VIII.

AGENCY ENFORCEMENT*

- For the last 30 years, it hasn't seemed to matter who brews the witches' broth — Republican or Democrat . . . It always seems to come out stronger — and to many tastes — more bitter.

A. Criteria for commencing actions

The implications of the Brown Shoe case, supra, and in practically every journal and trade regulation

289. 72 *Yale* L.J. 1265 (1963).

290. This is basically the same argument that was directed against the Brown Shoe decision. See text, supra p. 778 et seq.

* Robert O. Mickler.


treatise, are as varied as the individual views of all the authors. While the product market aspects have been explored supra, this part of the note will deal with the "general mood or climate of merger enforcement" viewed in the light of Brown Shoe as well as subsequent developments.

1. The Merger of Law and Economics.

Throughout the history of our Anglo-Saxon Common Law, significant developments have been forged by lawyers and their clients who wished to avoid certain of its rules and sanctions. Anyone reading the English property statutes "must have been struck by the consistency with which important Acts of Parliament were ignored or circumvented." Such a student must also contrast the inaction of the English Parliament with that of our own Congress and the running battles between our elected representatives and the trial counsel and lobbyists.

293. An excellent example of the disagreement was given at the meeting of the Subcommittee on Section 7 of the Clayton Act, Section of Antitrust Law, American Bar Association, held on Sunday, August 5, 1962. Some of the views expressed were:

Mr. Edgar Barton (a distinguished New York practitioner in the antitrust field):

The intent of the Chief Justice in writing the opinion he has written was to convey a general mood or climate . . . and he took the opportunity to go into a very long harangue on part . . . of the legislative history that lay behind Section 7.

You don't find any reflection of that permission for area expansion-by-merger in legislative history in this decision. I think there is no question. The mood of the opinion is horrible as far as Section 7 is concerned. Pp. 7-9.

Mr. George Reycroft (Chief of Section Operations of the Antitrust Division, Justice Department):

I would have to say that the mood is great. It has very optimistic overtones for the cases we now have pending . . . . In the shoe industry there was not a high degree of concentration, and I think the court's mood was obviously one of preventing that concentration taking place. Pp. 9-10.

Mr. Joseph Sheehy (Chief of the Federal Trade Commission's Bureau of Restraint of Trade):

I certainly wouldn't classify that carefully considered judicial opinion of the Chief Justice as an "harangue," not by the wildest stretch of the imagination. I think it is going to be very helpful to us in many of the cases we have up . . . . P. 10.

Mr. J. Wallace Adair (formerly, Chief of the Division of Mergers, FTC, now private defense counsel):

I think what the Supreme Court has said is that Congress set the mood and left it to the Court to determine the factors to be considered. . . . I expect we will see cases brought on a pure market share. P. 11.

294. Id. at 7. Remarks of Frederick M. Rowe, Chairman, Subcommittee on Section 7 of the Clayton Act.

295. The subtitle comes from Professor Bok's article, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960).


298. The most notable is the contest between Congress and its taxpayers, the latter continually inventing devices to take advantage of loopholes in the revenue laws and the former plugging up the loopholes as discovered and, likely as not, laying the lash over the backs of the discoverers. The antitrust laws and the labor laws are other notable examples. Id. at 387-88.
The most recent major encounter is the 1950 Amendment to Section 7 of the Clayton Act and the litigation in its wake. Prior to that time, it was assumed that any firm could increase its size by acquiring or merging with another firm unless the impact on competition was very substantial. In fact, the Supreme Court as late as 1948 refused to accept the argument (advanced by the minority) that the Sherman Act was aimed at bigness per se and that the mere elimination of substantial competition through the purchase of a competitor was illegal. As was seen, this freedom to merge was shortlived when the 1950 Amendment sounded its death knell. It was then settled that mergers with competitors, suppliers, customers and even previously unrelated businesses were forbidden where the effect of the merger would (or might) lessen competition substantially or tend to create a monopoly.

The remaining question of what amounts to a substantial lessening of competition or how much concentration tends to create a monopoly raises the problem. Here Congress left it up to the enforcement agencies, the FTC and Department of Justice, and to the courts to determine where the lines were to be drawn. It is suggested, without an attempt at resolution of the problem, that size alone—bigness—is the key which triggers investigations and sways the courts against the companies.

Averting to the Supreme Court opinion in the 1920 United States Steel case and its most famous and oft-quoted passage, it is pointed out that the legislature and antitrust enforcement officials constantly talk and act as if size alone were an offense.

Additional factors in the bigness equals violation equation are the quantitative nature of the data available and the fiscal problems of the two enforcement agencies. It has been shown that the 200 largest manufacturing firms made 1,956 acquisitions between 1951 and 1962 and that 339 of the acquired firms had over $10 million in assets. In fact, 216 of the top 1,000 firms in 1950 have since been acquired. The rich get richer!

Against this background, we have the statements of representatives of the FTC and the Justice Department that the number of cases will

301. The statute reads: "where the effect of such acquisition may be to substantially lessen competition between the corporation . . . so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1950).
302. Marcus, New Weapons Against Bigness, 43 HARV. BUS. REV. 100 (Jan.-Feb., 1965).
304. Id. at 451: "The Corporation is undoubtedly of impressive size . . . But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense."
305. MARCUS, supra note 302, at 100.
remain small. Of approximately 1,300 corporate mergers in 1963 only 17 were the subject of litigation. The explanation is that "it is not the shortage of mergers that troubles us ... it is the shortage of men to handle the mergers we can possibly handle." Of course, there are no statistics available to show how many contemplated mergers have been abandoned because of an antitrust phobia. They probably concern large companies in highly concentrated industries who are sensitive to antitrust dangers and rightly fear the probabilities of an attack.

It must also be noted that in the recent Lexington Bank case the "majority of the Supreme Court distinguished to death" the Columbia Steel case mentioned earlier. This case (Lexington Bank), the Philadelphia Nat'l Bank case and the more recent Continental Can case seem to indicate that a detailed inquiry is no longer necessary, at least where the size of the market foreclosed exceeds 30 per cent.

Whatever is necessary — and the "magic number" is not yet authoritatively determined — it is clear that size plays an important role. And that, apparently, is the end of agreement. There are those who were disappointed when the government failed to follow Brown Shoe with a program against bigness and those who were angered by "intemperance" in enforcement.

It is suggested, and rightly so, that the Supreme Court has "not yet gone to the point of holding that there can be inferred from mere aggregation [absent specific elimination of direct competition] the actual or potential injury to competition required by the statute." Yet the rule, hoped for by some, that concentration alone is sufficient must be distinguished from the rule that only the impact on the structure of markets is relevant. Concentration alone is not an adequate proxy for all the determinants of competitive behavior.

"No longer is concentration a means of determining whether firms are likely to have the ability to control [competitive] variables. [But if Philadelphia National Bank is followed] relative size ... becomes an evil in itself." It may be that any direct, present or prospective competition or vertical relationship will bring the case within the prohibition of

307. Subcommittee Meeting, supra note 293.
308. Fortas, supra note 291, at 111.
309. Subcommittee Meeting, supra note 293, at 24. Among the mergers abandoned during the past year when challenged under Section 7 were those involving Allied Chemical and General Foam, Humble Oil and Tidewater, and Chrysler and Mack Truck. 1964 ANNUAL SURVEY OF AM. L., Trade Reg. 124, n.5.
311. Address by Glen E. Weston before the Third Annual Corporate Counsel Institute, October 15, 1964, transcript p. 7.
316. Fortas, supra note 1, at 114.

http://digitalcommons.law.villanova.edu/vlr/vol10/iss4/14
Section 7. The Court, to date, has set aside acquisitions only where this has been found to exist or to be reasonably anticipated, although Mr. Justice Harlan dissenting in the Continental Can case flatly stated the majority was "laying down a 'per se' rule that mergers between two large companies ... are presumptively unlawful under Section 7."

Certainly there still are industries wherein combinations of two firms would not be regarded as a substantial threat to competition. "But there is a feeling among many antitrust lawyers that the rules now established ... give Section 7 such a broad scope that the extent of its application ... [will] depend upon work – allocation and policy decisions" of the enforcement agencies. It is this aspect, this broad agency discretion coupled with virtually 100 per cent acceptance of their decisions by the Court that must be the "battleground of the next few years."

2. The Effect of Size

As mentioned above, one of the main reasons for the bigness presumptively equals violation formula is the lack of men and equipment in the enforcement agencies and the resultant selective determination of the "enemy." This was discussed at the meeting of the Subcommittee on Section 7 in 1962 at which Mr. Joseph Sheehy, Chief of the FTC's Bureau of Restraint of Trade stated: "When [Edgar Barton, New York practitioner] says that the Commission ... considers that a merger is bad because they have brought it, I have to agree with him because we sift those out of thousands and we just don't bring [an action] unless they are bad." But a more important weapon in the hands of the government is the process of determining the relevant market. This has been discussed elsewhere in this note, but must be explored to some extent at this point.

Although the Supreme Court has not yet held that mergers of or by industry giants are per se illegal because of the size (either of the acquiring, acquired or amalgamated company) or of the pure market share, the Court seems inclined to validate any action by the enforce-
ment agencies so long as they have some basis, however slight, for finding a present or prospective[330] threat to competition. It thus appears important to note just what has been done in this area since 1962.

Since the relevant market area decisions have been covered supra, it will perhaps be sufficient to examine and contrast two recent Supreme Court cases. In United States v. Aluminum Co. of America[331] (Alcoa), the government[332] attacked Alcoa's acquisition of Rome Cable Corporation which produced but 0.3 per cent of the bare aluminum market in competition with Alcoa. They also competed for the purchasers of insulated aluminum wire and the combined market shares for both products (bare and insulated wire) were 27.8 and 1.3 per cent respectively. This, the Department felt, was a share sufficient to justify divestiture.

The defendants argued that the customers concerned were users of overhead wire for conducting electricity and that they could use copper wire as easily as aluminum. The district court[333] accepted this argument and decided that the combined share of the overhead conductor market which the particular companies enjoyed was insufficient to support the action. On appeal, the plaintiff convinced the Supreme Court that, although the end use was basically the same and the products were similar,[334] the insulated aluminum wire was sufficiently distinct from the copper to allow the two to be separated into submarkets.[335] On this basis, the Court sided with "Justice".

In the second of the two cases turning on definition of relevant product market (United States v. Continental Can Co.),[336] the government was faced with an attempted merger between companies producing different products (metal vs. glass containers). Here, too, the district court decided against the government[337] and held that Section 7 had not been violated because there was not sufficient cross-elasticity of demand for the two types of product.

The Supreme Court, finding that some food stuffs were packaged in both types of containers and that some producers switched from one to the other,[338] decided there was at least a prima facie showing that metal and glass containers belonged in the relevant product market and that the acquisition violated Section 7.

332. The action was brought by the Department of Justice.
334. Substantially similar were the physical characteristics and capabilities of the two products, the classes of customers and sellers and the production facilities.
335. Differences include an almost two-to-one ratio in price (copper-to-aluminum) and differences in the installation costs of the two products thereby tending to equalize the final costs-to-consumer.
338. It was also relevant that the producers of each type package were constantly seeking to expand their sales at the expense of the other and that the potential purchasers consider the relative prices in determining which material to use.
There are, of course, many more cases (and there will be more yet in the future), but these two serve to illustrate seemingly contradictory positions taken by the government and acceptance by the Supreme Court of any possible quantum of proof that the merger may substantially lessen competition. In Alcoa the plaintiff was required to and did show that products with similar characteristics belonged in separate product sub-markets, while in Continental Can Co. products with obviously different characteristics were successfully shown to be sufficiently similar to constitute but a single market.

Thus it may well be that a clear finding for the government on any one of the relevant market criteria is sufficient to justify their chosen relevant market — indeed, this may be implicit in the very concept of sub-markets. But this has never been as apparent as in the recent cases. These have given the government great latitude in the attack-point of a merger and have made defense of mergers attacked under Section 7 extremely difficult. In fact “the current state of the art of market definition means that the subjectivity and arbitrariness of merger standards are significantly increased.”

And other cases of the same term indicate that this “art”, this very versatile weapon in the hands of the government, will become critical when the concept of potential competition becomes mature. If the Court is determined to block all mergers at whatever cost in efficiency on a showing of some injury to competition, a not unlikely conclusion in view of its recent highly protective viewpoint, then it would be better to so state in explicit language. “Manipulation of the concept . . . so that plaintiffs [government] invariably prevail can only lead to confusion.”

B. Responsible Formulation

Where does all this lead? If we can confidently predict the Court will validate most any action which reaches its docket; if it will be resourceful in finding criteria indicating violation of Section 7; if that is, the portent to be derived from the recent decisions, then

the FTC and the Department of Justice have a profound obligation carefully to determine when and whether the public interest will be served by attacking an acquisition.

These agencies, the Justice Department and the Federal Trade Commission, now wielding important and largely discretionary power can no

341. See note 330, supra.
342. 1964 SUPRM4 COURT REV. 171, 189.
343. Fortas, supra note 291, at 106, explains the title of his address (“Portents for New Antitrust Policy”) as “Prophecies for a New Antitrust Policy of a Sinister, Evil or Forbidding Character.”
344. Id. at 116. (Emphasis added.)
longer be considered merely "the enforcement agencies" (as referred to above). But their policies in determining the types of acquisitions to attack, coupled with almost guaranteed success in selective forays due to fiscal and manpower limitations lead necessarily to a different conclusion. They must, as must Congress and the courts, recognize that they are in the business of economic regulation. The host of aborted mergers as well as the Clayton-conscious decisions of management to amalgamate regardless, stand as mute testimony to this function of the agencies.

Thus the agencies must "candidly and thoughtfully face the full implications of their roles" in the regulation process. No longer a branch of "whodunit" law enforcement, they must accept the role of regulation "cast in the form of individual, adversary proceedings." With the "new" Clayton Act beginning to drift toward per se illegality in extreme cases, the government agencies as well as Congress and the Court, must justify the direction in which we are heading. It may be that a per se approach would simply shorten and streamline the judicial process of an inevitable result. "Or, one might hold that regardless of economic performance, an unconcentrated market structure is a social good." But it may also be that there are many situations in which mergers and acquisitions may be beneficial and not harmful to the economy; that the free-wheeling economy requires tolerance for mobility and an assumption that no avenue of growth or expansion should be arbitrarily foreclosed except on the basis of a serious, sober showing of overriding public necessity in the particular case. What is needed, in the minds of some, is a rule of reason that would permit constructive mergers to meet competitive situations. We may ask, as did Mr. George H. Love, Chairman of the Board of Chrysler Corporation (after the government effectively blocked the acquisition of Mack Truck by Chrysler): "Does the forced spending of capital on uneconomic plants
[the only resultant avenue now available to Chrysler for expansion] make American industry more competitive in world markets?"355

These are the elements which the policy makers must and should consider and on which any forthcoming public confidence will or can be based. The antitrust laws are the Magna Charta of our competitive system and, as such, are neither statist nor socialistic in concept. They are, and well should be "measures designed in response to a felt necessity to preserve and guarantee a social and economic order... [W]ether they are wise or foolish, effective or futile, is therefore a legitimate and important matter for public concern."356 And faced with this "profound obligation" the agencies must justify their actions and their policies not only in terms of whether they win in the courts but in terms of economic effect.

C. Proposed Reforms

The Clayton Act is and continues to be a viable force and "an important and effective medicine for collusive and restrictive arrangements."357 In the antimerger area, there is a need for (and a use for, since business is not yet "critically ill") a preventive and energizing vitamin.

1. A New Ingredient

The most subtle and unpublicized first step in the right direction is the institution of Trade Regulation Rule proceedings announced by Commissioner Philip Elman358 in Permanente Cement Co.359 This will provide for a study and consideration of the problem360 throughout the entire cement industry. The Commission has apparently realized that it may be "uneconomical, inefficient, and inequitable"361 to proceed on a case-by-case attack. Such a procedure362 will produce a "better forum" than

357. Fortas, supra note 291, at 110. He there states that in the collusive area, most businessmen accept the diagnosis that they're sick and that "antitrust may be applied without offense even to holy scripture" if it participates in the collusive violations. See Comment, supra note 353.
358. Commissioner Elman has been credited with placing the FTC in the forefront of innovation with his "incisive mind and persuasive pen." To him is attributed "the most comprehensive conglomerate merger opinion yet written in the Procter & Gamble-Clorox acquisition case." [The Procter & Gamble Co., TRADE REG. REP. ¶ 16, 673] (FTC Transfer Binder 1963). Weston, supra note 311, at 18, 19.
359. 3 CCH TRADE REG. REP. ¶ 16, 885 (FTC Transfer Binder 1964).
360. Id. at 21, 924:

In recognition that the problem of vertical merger... is of growing importance and urgency and has apparently assumed industry-wide dimensions, the Commission has determined forthwith to institute a Trade Regulation Rule proceeding for the study and consideration of this problem.

361. Ibid. (Emphasis added.)
362. The announcement in the Permanente Cement Co. case gave no details as to how it will proceed but an indication may be gleaned from an address before the
would be offered by adjudicative proceedings against individuals who have taken the initiative in organizing and appraising the economic and market facts so important and relevant to Section 7.

In commenting on the Trade Regulation Rule announcement, Westion noted that Commissioner Elman may have retreated somewhat from his earlier expectations and found the Commission's desire to depart from the tried-and-true case-by-case tradition "rather disquieting" because there is no opportunity given for cross-examination and rebuttal of the government's economists (if the cigarette advertising cases offer any valid precedent) and because the "cement [and other] industry may discover that 'concrete cases make hard law' [when the rules] prove to be more rigid than the industry's best product."

Abe Fortas, on the other hand, found the announcement "a welcome indication of a realization that something more is necessary, in dealing with the economic - legal problem of mergers, than guerilla warfare or cavalry raids." And others have agreed that comprehensive industry-wide examination of the problems may be the only (or at least the best) effective and fair way of applying Section 7 in the long run. This may be particularly true in industries where the merger trend is merely reflective of reaction to depressed or fast-changing economic conditions.

The relative merits of such a procedure have been discussed as long ago as May, 1962 when Commissioner MacIntyre prompted the FTC to establish the Bureau of Industry Guidance for the formulation of such rules for anti-deceptive practices. At that time it was questioned whether they would be substantive in nature so as to have the force and effect of law or merely the vehicle of announcement of Commission policy. They also pose the interesting and perplexing question as to

National Industrial Conference Board on March 5, 1964, at which Commissioner Elman discussed a hypothetical rulemaking proceeding for mergers in the widget industry (reported in Westion, supra note 311, at 20):

After public hearings at which the FTC economists' study is introduced and all interested persons have been given a chance to submit data, views and arguments, the Commission would issue a report and promulgate "rules or standards that define the lawful limits of merger activity in the industry." The rules would specify particular markets in which mergers would be forbidden, identify the class of firms which by reason of size or other characteristics would be forbidden to make further acquisitions, and also the class of firms which would be permitted or even encouraged to engage in merger activity. RIP per se merger illegality: . . . If these rules are not obeyed the FTC would bring formal cease and desist proceedings under Section 7.

363. Id. at 21.

364. In remarks before the Briefing Conference on Antitrust and Trade Regulation Law, September 24, 1964, he stated that the object of rulemaking procedures "is not to promulgate per se rules or codes rigidly demarcating the lawful limits of merger activity" but that it should be regarded as "primarily a method of inquiry"; of finding facts, appraisal of the situation and publication of the conclusions. Ibid.

365. Id. at 24.

366. Ibid.

367. Fortas, supra note 291, at 119. Mr. Fortas did recognize that at least some of the particulars of the Rule are "dubious" as well as laborious and time-consuming.

368. 1964 Annual Survey of Am. L., 137 n.49 (1965).

the relative role of the Antitrust Division of the Department of Justice in the light of such FTC Rules.

Whatever the final outcome of the Commission's Rules, it is interesting to note that their guns have multiple ammunition and that they are using all available resources. On May 3, 1965, the hearing examiners determined that two cases involving the antimerger provisions of Section 7 should be reargued before all present members of the Commission. Aware their action would further extend the already lengthy period between complaint and decision, they decided "the advantages of a single approach to the mutual problems presented by these cases more than outweigh the disadvantages inherent in lengthened proceedings." In these decisions Commissioner Elman found himself in the minority since he felt that these cases should be disposed of without further delay (in fairness to the defendants), and that the Commission could thereafter move along "into a broad industry-wide administrative approach".

2. Other Regulatory Components

The predecessor to the Trade Regulation Rules is the pre-clearance procedure now available. (An important by-product of merger clearance practices is the consent decree). The practitioner is probably fairly familiar with this aspect of the Commission's work (which in this case includes similar services by the Department of Justice) which supplements the investigation of proposed and actual prosecutions on governmental initiative.

For the unfamiliar, corporations contemplating or interested in acquisition of additional facilities by merger may submit a request for an advance statement of whether the government will undertake or withhold action if the company should proceed. The request and reply (as to the likelihood of government action) are treated with full confidence and no extensive field investigation is made. In the event the merger is consummated, the agency may re-examine the actual case and determine its course of action free from any commitment in the reply. The relative criteria at that time is the same as in non-submitted cases with the additional factor of advance warning. One author, while con-

372. Ibid.
374. The clearance letter generally states that the agency "does not presently intend to take action ... though it reserves the right" to do so in the light of subsequent developments. On the other hand, a denial states the merger "may result in a violation of the antitrust laws ... and the government cannot undertake to withhold proceedings" if the merger is completed. Id. at 188. It is noted later in that article that some mergers are consummated after a denial letter but that action is withheld for various reasons; principally fiscal considerations mentioned earlier in this note. Five other reasons are given (though not intended to be inclusive). Id. at 193-94.
demning such procedure as "snares for the unwary, hoaxes perpetrated upon the unsuspecting, and, at best, ritual dances more notable for their form than for results," would nonetheless like to see established a small committee — "a Non-Royal Commission" — of public and private professionals to analyze the relative merits by industry and to establish a general set of categories and standards, implemented by a new form of pre-clearance.

Finally, mention must be made of other, foreign systems of regulation. Article 85(3) and Regulation 17 of the Treaty establishing the European Economic Community (EEC) provides for compulsory pre-notification of contemplated restrictive trade practices. Regulation 17 contains complicated rules specifying which agreements are subject to the notification requirement. Questions of timing are of the utmost importance, since the thrust of Regulation 17 is to attach different consequences to timely or tardy notification.

For American firms with business relations in Europe, the implication is clear that the situation demands immediate attention. And as an added feature the Treaty requires the EEC Commission to forward all notification information to the appropriate national authorities as well as to publish its decisions.

In this connection, it is well to note that Representative Emanuel Celler (D-NY), Chairman of the House Antitrust Subcommittee has re-introduced legislation (H.R. 7780) which would require companies to notify the Attorney General and the FTC at least 60 days prior to the projected consummation date of any proposed merger. It should be unnecessary to explain the implications of this bill. Only note that Representative Celler has sponsored similar bills in three previous Congresses. Similar legislation in Canada permits that government to keep appraised of developing trends though "to establish illegality, the merged companies must be shown to be put in a position to exercise virtually complete control over the trade or industry."

Thus, with our neighbors to the North and across the Atlantic improving on our system by coming forward with pre-action regulation and our own agencies espousing new theories (backed to the hilt by Congress and the Court) we now find ourselves taking stock in a position

375. Fortas, supra note 291, at 120.
376. EEC includes Belgium, Germany, France, Italy, Luxembourg and the Netherlands.
where changes of some kind must be made. Whether we advance to a *per se* illegality while still on an *ad hoc* system or develop an integrated, all inclusive planned approach (with the planners responsive to the popular will) is a question which cannot now be answered with assurance.

IX.

**Conclusion**

It is somewhat of an anomaly to entitle the final portion of any paper on Section 7 of the Clayton Act a conclusion. For the preceding discussion strongly suggests that the most significant period of anti-merger litigation has hardly begun.

The 1950 Amendment established a substantially different framework within which to assess the impact of a given merger. Yet in the twelve years prior to *Brown Shoe* there was surprisingly little litigation.

However, in that case the Court chose to enter into a comprehensive discussion of Amended Section 7, wherein it demonstrated a willingness to stringently enforce Congress' avowed purpose of preserving existing competition as an economic way of life. An incipiency–based approach was therefore adopted as the surest method of continuing this system. Yet even in the wake of that omnific opinion there was a good deal of uncertainty, much of which is traceable to the necessarily flexible approach taken by the Court.

The resulting need for clarification was quickly undertaken. Reacting to the compilation of extensive economic data encouraged by *Brown Shoe*, the Court in *Philadelphia National Bank* shifted the burden of proof in cases involving extreme market shares. Yet the Court appears to have determined that to extend this approach beyond the fairly obvious cases would impose a well-nigh impossible burden upon the merging companies. Thus, a continuation of prolonged litigation can be expected in the majority of cases.

A more questionable development is the Court's failure to inject even a minimum degree of certainty into the process of selecting the appropriate line of commerce. The several criteria listed in *Brown Shoe* suggest a variety of possible sub-markets for any given merger. And the government has been quick to seize the opportunity thus presented. For it is possible to gerrymander the boundaries of the broad market involved so as to insure the desired result.

The definition of the relevant market clearly presents a significant problem. While the avowed purpose of the Court to recognize competition where it in fact exists cannot be criticized, the ease with which the government has been allowed to manipulate the concept of sub-markets must be halted. The apparently inconsistent decisions on this issue only serve to emphasize the current instability.
In the brief period following *Brown Shoe* the Court has continuously broadened the scope of the Amended Section. Banking and other regulated industries, joint-ventures, and the mere acquisition of a trade name have been included thus far. And in the latest case considered, a new test was developed in order to reach certain types of conglomerate mergers previously considered by some to be beyond the reach of Section 7. While there was doubt expressed as to whether all of these areas would be included, it would seem that the Court reached the most logical conclusion. For even if Congress did not intend to specifically include one or more of these areas, the Court’s decisions will implement the broad legislative policy of maintaining an economic way of life.

Indeed, this willingness on the part of the Court to advance Congress’ goal of preserving an economic way of life has been the motivating factor behind recent decisions. It has caused the Court to reject a variety of economic arguments as wholly irrelevant. Thus the “other factors” listed in *Brown Shoe* take on added significance. For in any questionable merger a demonstration that one or more of these beneficial effects will result may be determinative. Conversely a failure to show that “competition” will in some way be enhanced will probably cause the Court to proscribe the merger.

In short, the basic policy of the Court is clear, and arguments which conflict with the legislative design must fail. Only by accepting this framework and developing the various defenses suggested by the Court can the merger defendant expect to achieve the desired result.