This dissertation has been microfilmed exactly as received

COLWELL, Billy Joe, 1931—
AMENDED SECTION SEVEN OF THE CLAYTON ACT, CONGLOMERATE MergERS, AND PREVENTIVE ANTITRUST POLICY.

The Ohio State University, Ph.D., 1963
Economics, general

University Microfilms, Inc., Ann Arbor, Michigan
AMENDED SECTION SEVEN OF THE CLAYTON ACT, CONGLOMERATE MERGERS, AND PREVENTIVE ANTITRUST POLICY

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University

By

Billy Joe Colwell, B.A., L.L.B.

**********

The Ohio State University
1963

Approved by

[Signature]
Adviser
Department of Economics
# TABLE OF CONTENTS

**INTRODUCTION: BACKGROUND, SETTING, AND SCOPE AND METHOD OF THE STUDY** ........................................ 1

*Industrial Merger Movements in the United States* .................................. 1

*The Evolution of the Antitrust Laws* ........................................ 5

*Conglomerate Merger Cases Under Amended Section 7 of the Clayton Act* ........ 14

*The Necessity for Guidelines to Conglomerate Antimerger Policy* .............. 17

*Methodology and Procedure of the Study* ........................................ 20

**PART I. THE ORIGIN AND INEFFECTIVENESS OF SECTION SEVEN OF THE CLAYTON ACT, 1914**

**INTRODUCTION** .................................................. 30

Chapter

1. **THE ORIGIN OF SECTION 7 OF THE CLAYTON ACT** ................................ 32

*Legislative History of the Clayton Act* ........................................ 32

*House passage* .................................................................................................................. 32

*Senate passage* .................................................................................................................. 33

*The Raison d'Être of Section 7* ................................................................. 35

*Substantive Provisions of Section 7--1914* ........................................ 46

"May be" ............................................................................................................................ 47

"To substantially lessen competition" .................................................. 50

"In any section or community" .................................................................................. 55

*Congressional Intent--Conclusions* .................................................. 57
# TABLE OF CONTENTS—Continued

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. <strong>THE SEARCH FOR NEW ANTITRUST CONCEPTS</strong></td>
<td>68</td>
</tr>
<tr>
<td>3. <strong>JUDICIAL INVALIDATION OF SECTION SEVEN</strong></td>
<td>82</td>
</tr>
<tr>
<td>The &quot;Assets Loophole&quot;</td>
<td>82</td>
</tr>
<tr>
<td>The Standard of Illegality</td>
<td>94</td>
</tr>
<tr>
<td>Section 7 After 1930—Federal Trade Commission</td>
<td>104</td>
</tr>
<tr>
<td>Administration of Section 7 by Other Agencies</td>
<td>106</td>
</tr>
<tr>
<td>Unsuccessful Alternative Approaches</td>
<td>110</td>
</tr>
<tr>
<td>Conclusions</td>
<td>113</td>
</tr>
</tbody>
</table>

## PART II. THE AMENDMENT OF SECTION SEVEN OF THE CLAYTON ACT

**INTRODUCTION: LEGISLATIVE HISTORY** | 121 |
| The House of Representatives | 121 |
| Bills and Hearings | 121 |
| The Seventy-ninth Congress | 121 |
| The Eightieth Congress | 122 |
| The Eighty-first Congress | 123 |
| Reports | 124 |
| The Seventy-ninth Congress | 124 |
| The Eightieth Congress | 124 |
| The Eighty-first Congress | 124 |
| Debate | 124 |
TABLE OF CONTENTS--Continued

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Senate</td>
<td>125</td>
</tr>
<tr>
<td>Bills and Hearings</td>
<td>125</td>
</tr>
<tr>
<td>The Seventy-ninth Congress</td>
<td>125</td>
</tr>
<tr>
<td>The Eightieth Congress</td>
<td>125</td>
</tr>
<tr>
<td>The Eighty-first Congress</td>
<td>125</td>
</tr>
<tr>
<td>Reports</td>
<td>126</td>
</tr>
<tr>
<td>Debates</td>
<td>126</td>
</tr>
<tr>
<td>4. FUNDAMENTAL OBJECTIVES OF THE AMENDMENT</td>
<td>133</td>
</tr>
<tr>
<td>Maintaining a Given Social Structure</td>
<td>133</td>
</tr>
<tr>
<td>Closing the Assets Loophole</td>
<td>137</td>
</tr>
<tr>
<td>Meeting the Inadequacy of Existing Antitrust Laws</td>
<td>139</td>
</tr>
<tr>
<td>Extending Section 7 to Include Conglomerate Mergers</td>
<td>151</td>
</tr>
<tr>
<td>Conclusion--Underlying Objectives</td>
<td>158</td>
</tr>
<tr>
<td>5. SUBSTANTIVE PROVISIONS OF AMENDED SECTION SEVEN.</td>
<td>165</td>
</tr>
<tr>
<td>The Development of a New Standard of Illegality</td>
<td>165</td>
</tr>
<tr>
<td>&quot;Substantially to Lessen Competition&quot;</td>
<td>178</td>
</tr>
<tr>
<td>The determination of &quot;substantiality&quot;</td>
<td>182</td>
</tr>
<tr>
<td>&quot;In Any Line of Commerce in Any Section of the Country&quot;</td>
<td>186</td>
</tr>
<tr>
<td>&quot;May Be&quot;</td>
<td>191</td>
</tr>
<tr>
<td>Conclusions Regarding Terms of the Amendment</td>
<td>194</td>
</tr>
<tr>
<td>Chapter</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
</tr>
<tr>
<td>6. ECONOMIC EVIDENCE CONSIDERED BY CONGRESS IN AMENDING SECTION 7 OF THE CLAYTON ACT</td>
<td>199</td>
</tr>
<tr>
<td>Economic Evidence Presented at Congressional Hearings</td>
<td>200</td>
</tr>
<tr>
<td>The House of Representatives</td>
<td>200</td>
</tr>
<tr>
<td>The 1945 hearings</td>
<td>200</td>
</tr>
<tr>
<td>The 1947 hearings</td>
<td>205</td>
</tr>
<tr>
<td>The 1949 hearings</td>
<td>208</td>
</tr>
<tr>
<td>The Senate</td>
<td>212</td>
</tr>
<tr>
<td>The Treatment of Economic Evidence in the Congressional Reports Relating to the Amendment of Section 7</td>
<td>215</td>
</tr>
<tr>
<td>The House Reports</td>
<td>215</td>
</tr>
<tr>
<td>The Senate Report</td>
<td>217</td>
</tr>
<tr>
<td>Economic Evidence Considered During Debate on the Amendment of Section 7</td>
<td>218</td>
</tr>
<tr>
<td>The House Debates</td>
<td>218</td>
</tr>
<tr>
<td>The Senate Debates</td>
<td>219</td>
</tr>
<tr>
<td>Conclusion--Congress' Interpretation of Evidence Concerning Economic Concentration</td>
<td>223</td>
</tr>
<tr>
<td>7. AN ANTI-OLIGOPOLY STATUTE: PREVENTING THE UNDESIRABLE CONSEQUENCES OF ECONOMIC CONCENTRATION</td>
<td>236</td>
</tr>
<tr>
<td>Specific Oligopoly Abuses</td>
<td>236</td>
</tr>
<tr>
<td>Condemnation of the Results of Economic Concentration</td>
<td>242</td>
</tr>
<tr>
<td>At the hearings</td>
<td>242</td>
</tr>
<tr>
<td>In the reports</td>
<td>244</td>
</tr>
<tr>
<td>In the debates</td>
<td>245</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS--Continued

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preserving Existing Levels of Competition</td>
<td>248</td>
</tr>
<tr>
<td>Conclusions</td>
<td>252</td>
</tr>
<tr>
<td><strong>PART III. AMENDED SECTION SEVEN OF THE CLAYTON ACT</strong></td>
<td></td>
</tr>
<tr>
<td><strong>APPLIED TO CONGLOMERATE MERGERS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>INTRODUCTION</strong></td>
<td>263</td>
</tr>
<tr>
<td><strong>8. THE FEDERAL TRADE COMMISSION AND CONGLOMERATE MERGERS</strong></td>
<td></td>
</tr>
<tr>
<td>The Procter and Gamble-Clorox Case</td>
<td>281</td>
</tr>
<tr>
<td>The Union Carbide-Visking Case</td>
<td>289</td>
</tr>
<tr>
<td>The Consolidated Foods-Gentry Case</td>
<td>292</td>
</tr>
<tr>
<td>The Foremost Dairies Case</td>
<td>311</td>
</tr>
<tr>
<td>The Reynolds-Arrow Brands Case</td>
<td>315</td>
</tr>
<tr>
<td>Conclusions</td>
<td>318</td>
</tr>
<tr>
<td><strong>9. ECONOMIC CONCEPTS RELEVANT (AND IRRELEVANT) TO THE CONGLOMERATE MERGER CASE</strong></td>
<td>326</td>
</tr>
<tr>
<td>&quot;Workable Competition&quot; and Amended Section 7 of the Clayton Act</td>
<td>328</td>
</tr>
<tr>
<td>Uncertainty as to the meaning of &quot;workable competition&quot;</td>
<td>328</td>
</tr>
<tr>
<td>Objectives of &quot;workable competition&quot; and of Amended Section 7</td>
<td>332</td>
</tr>
<tr>
<td>Complexity and vagueness of &quot;workable competition&quot; analysis</td>
<td>335</td>
</tr>
<tr>
<td>&quot;Conditions of entry&quot; in the Section 7 case</td>
<td>336</td>
</tr>
<tr>
<td>The Economics of Diversification</td>
<td>350</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS—Continued

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Economics of Diversification and Amended Section 7 of the Clayton Act</td>
<td>355</td>
</tr>
<tr>
<td>&quot;Competition&quot; Functionally Defined</td>
<td>359</td>
</tr>
<tr>
<td>The Lessening of Competition</td>
<td>365</td>
</tr>
<tr>
<td>Economic Theory and the Relevant Market</td>
<td>373</td>
</tr>
<tr>
<td>The Role of the Economist in the Section 7 Case</td>
<td>375</td>
</tr>
<tr>
<td>Conclusion: Orientation of Inquiry in the Section 7 Case Suggested by Economic Theory</td>
<td>379</td>
</tr>
<tr>
<td>10. LEGAL CONCEPTS RELEVANT TO THE CONGLOMERATE MERGER CASE</td>
<td>398</td>
</tr>
<tr>
<td>The Emphasis on Reasonable Probabilities</td>
<td>399</td>
</tr>
<tr>
<td>The Quantum of Evidence Necessary in the Section 7 Case</td>
<td>401</td>
</tr>
<tr>
<td>The repudiation of &quot;quantitative substantiality&quot;</td>
<td>404</td>
</tr>
<tr>
<td>Limiting the &quot;relevant factors&quot;</td>
<td>407</td>
</tr>
<tr>
<td>Conclusions relative to the quantum of evidence</td>
<td>412</td>
</tr>
<tr>
<td>The Relevant Market</td>
<td>417</td>
</tr>
<tr>
<td>The relevant product or service market</td>
<td>417</td>
</tr>
<tr>
<td>The relevant geographic market</td>
<td>422</td>
</tr>
<tr>
<td>Conclusions concerning the relevant market</td>
<td>425</td>
</tr>
<tr>
<td>Economic Size and Conglomerate Power</td>
<td>426</td>
</tr>
<tr>
<td>Economic size and power</td>
<td>427</td>
</tr>
<tr>
<td>Conglomerate power</td>
<td>431</td>
</tr>
<tr>
<td>Relationships established by merger</td>
<td>434</td>
</tr>
<tr>
<td>Intent</td>
<td>438</td>
</tr>
<tr>
<td>Conclusions</td>
<td>440</td>
</tr>
<tr>
<td>Chapter</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>11. GUIDELINES FOR IMPLEMENTATION OF ANTITRUST POLICY AS APPLIED TO CONGLOMERATE MERGERS</td>
<td>451</td>
</tr>
<tr>
<td>Limiting the Evidence in the Section 7 Case</td>
<td>453</td>
</tr>
<tr>
<td>The Handling of Economic Evidence</td>
<td>453</td>
</tr>
<tr>
<td>Limiting the Types of Economic Evidence</td>
<td>456</td>
</tr>
<tr>
<td>The Key Factor</td>
<td>461</td>
</tr>
<tr>
<td>All Other Relevant Factors</td>
<td>465</td>
</tr>
<tr>
<td>Relationships Established by the Merger</td>
<td>466</td>
</tr>
<tr>
<td>The opportunity to use conglomerate power</td>
<td>466</td>
</tr>
<tr>
<td>Economic advantage by merger</td>
<td>468</td>
</tr>
<tr>
<td>The Way in Which Competition Is Carried On</td>
<td>470</td>
</tr>
<tr>
<td>Judgment on the Ultimate Issue</td>
<td>471</td>
</tr>
<tr>
<td>Conclusions</td>
<td>477</td>
</tr>
<tr>
<td>12. CONCLUSIONS</td>
<td>489</td>
</tr>
</tbody>
</table>

APPENDIX A. Summary of Industry Studies Presented by Federal Trade Commission Staff at the 1945 House Hearings on Amending the Clayton Act, Section 7 | 498  |

BIBLIOGRAPHY                                                              | 504  |
INTRODUCTION: BACKGROUND, SETTING, AND SCOPE AND METHOD OF THE STUDY

Industrial Merger Movements in the United States

Analysts of the historical development of American capitalism generally point out that there have been three "waves of mergers" in this country. The first occurred between 1897 and 1903. It was this first era of industrial concentration that "gave America its characteristic twentieth century concentration of control."¹ Markham points to an earlier consolidation period from 1879 (the formation of the Standard Oil Trust in Ohio) to the panic of 1893.² This earlier period, however, was not so much characterized by increased formal concentration as by various loose agreements between firms concerning territorial, output, and pricing policies.³ Dynamic technology after the American Civil War and the resulting efficiencies in output of goods resulted in intensive competition, including price declines which made combinations attractive as a device for the maintenance of profitable operations.⁴ Prior to the 1890's anticompetitive conduct was limited primarily by the refusal of courts to

¹Footnotes for this Introduction will be found on pp. 24-28, infra.
enforce contracts held to be against the public interest as constituting restraints of trade, conspiracies to monopolize, and certain "unfair competition." In addition, courts used the doctrine of ultra vires to hold that it was contrary to public policy, and outside the scope of a corporation's charter authority, for a corporation to enter into a trust for the purpose of creating a monopoly. Action by the State courts in dissolving the Sugar Trust in New York and the Standard Oil Trust in Ohio provided a new search for arrangements whereby concentration could be achieved. The liberalization of the New Jersey incorporation statute in 1888 provided such a device by permitting, inter alia, stock acquisitions and exchange. Although the Sherman Act of 1890 was directed against monopolies, the E. C. Knight case encouraged the development of concentration through direct merger. In that case it was held that although the new combination, achieved by exchange of stock, controlled 98 per cent of the output of all refined sugar in the United States, the Sherman Act was not violated because manufacturing was in intrastate commerce, was not "commerce" within the meaning of the Constitution, and was therefore outside the power of Congress to regulate. By 1904, of the ninety-two major business combinations in the United States, seventy-eight corporations controlled over 50 per cent of their respective
product markets. Twenty-six of them controlled over 80 per cent. The trend was clearly toward the elimination of intra-industry competition through concentration of plants and firms under one firm.\textsuperscript{11} This consolidation movement transformed many industries, formerly characterized by many small and medium-sized firms, into those in which one or a few very large enterprises occupied leading positions. It laid the foundation for the industrial structure that has characterized most of American industry in the twentieth century.\textsuperscript{12}

The second consolidation period began immediately after the First World War and continued through the prosperity of the nineteen-twenties, reaching its peak and virtually ceasing in 1929.\textsuperscript{13} This period was characterized by merger activity in public utilities, banking, and the distributive and service trades, by combinations of firms of moderate size, and by the emergence of many different patterns of combinations: holding companies, chains, vertical, lateral, and conglomerate as well as horizontal.\textsuperscript{14} Holding companies, corporations designed for the purpose of holding stock in other corporations, played a significant part in the concentration of the 1920\textquotesingle s, which device avoided direct merger of competitors.\textsuperscript{15}

The third merger period began with, and has continued since, the Second World War. This present merger movement is characterized not so much by a desire to establish monopoly,
as was characteristic of the first merger movement, or financial control (as by the holding company), so prevalent in the second period, but by decisions directed toward business efficiency.

The forces involved are those which underlie the considered decisions by business executives. These which are basic have to do with the efforts of management to attain the advantages of scale in production and distribution so diversified as to product and as to distribution services performed as to level out peaks and valleys due to seasonal changes, changes in consumer demand, or shifts in the markets for their products.¹³

Second, the present merger movement is distinguishable in that there have been extensive acquisitions for diversification—conglomerate mergers. Of 2,091 mergers occurring between 1951 and 1954, 945 could be called "conglomerate," being classified as "to lengthen the product line," or for "diversification." Other mergers classifiable under other headings had conglomerate aspects.¹⁷

Third, a significant element in the recent merger pattern has been the absorption of relatively smaller firms by larger firms. For example, between 1940 and 1947, 2,450 mining and manufacturing firms disappeared, one-third of them being acquired by firms with assets in excess of $50 million.¹⁸

This study will be concerned with one particular aspect of the present merger movement—the "conglomerate"
merger. Mergers are generally classified as being of one (or a combination) of three kinds—vertical, horizontal, or conglomerate. Vertical integration refers to the acquisition of a supplier or a customer, a deepening or lengthening of the stages of production or distribution under one controlling firm. Horizontal mergers involve the acquisition or unifying of competitors. "All others" are referred to as "conglomerate." It is this latter type of consolidation—merger for diversification—which has been a pronounced characteristic of the post-World War II merger movement and will be the subject of the present study.

The Evolution of the Antitrust Laws

The Sherman Act was passed in 1890 as a general affirmation of the principles and benefits embodied in the concept of a competitive economy. The general objective of the antitrust laws is promotion of competition in open markets. It will not be the purpose of the present study to review the development of the law under the Sherman Act, the "modern view" of which "can start with Standard Oil Company of New Jersey v. United States" and the "rule of reason." The present study will consider Sherman Act
That there was great public concern over the "trust problem" and dissatisfaction with the Sherman Act is attested to by the fact that in the election of 1912, all three major political parties advocated strengthening the antitrust laws by prohibiting certain business practices and establishing a federal regulatory agency. The Clayton Act, entitled "An Act to Supplement Existing Laws Against Restraint and Monopoly, and For Other Purposes," contained four substantive provisions. As finally passed, these were the provisions: Section 2 which prohibited certain discriminations in price between purchasers of commodities; Section 3 which prohibited the use of certain tying contracts and exclusive dealing arrangements; Section 7 which prohibited certain acquisitions of stock; and Section 8 which prohibited certain interlocking directorships. This study will be concerned only with certain aspects of Section 7, the first two paragraphs of which, as enacted, read as follows:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of 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 voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.26

Chapter 1 will discuss more fully the aims and meaning of Section 7 as worded in 1914. In summary, the aims, as expressed by the Congressional Reports, were as follows:

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.27

The House Report stated:

The only possible excuse and justification for legislation against holding companies lies in the fact that the holding company intended to be reached by the law creates a monopoly, or attempts to do so, or restrains trade... There are certain corporations which may properly be interested with individuals other than its own stockholders, but experience has taught us that the "holding company" as above described no longer serves any purpose that is helpful to either business or the community at large when it is operated purely as a "holding company." Section 8 (enacted as Section 7) is
intended to eliminate this evil so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been made necessary by business experience and conditions, and the exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade. 28

From these and similar statements made during the debates over the Clayton Act, 29 it is clear that Section 7 was directed only against stock acquisitions, and was not intended to cover asset acquisitions. This issue, the "assets loophole," was eliminated by the 1950 amendment to Section 7. 30

Of central importance to the present study is the introduction into the antitrust field in 1914, with the Clayton Act, of the term "to substantially lessen competition" because of the peculiar applicability of this criterion to the conglomerate merger case. 31 It should be noted that the 1914 Clayton Act Section 7, by referring to competition between the corporations in paragraph one, supra, in connection with the lessening of competition, applied only to horizontal mergers, and paragraph two referred to holding companies owning shares in competitors. But the standard of illegality, "a substantial lessening of competition," was retained in the 1950 amendment, and made applicable to all mergers and acquisitions. Therefore, the first indications
of its meaning logically may be sought in the discussions concerning the 1914 Act. There is, however, almost nothing in the Congressional debates or in the House and Senate Reports that gives a clue as to what was meant by the phrase. Apparently it was a different standard of illegality from "restraint of trade" or "tendency to create a monopoly," since all three were listed. Representative Carlin pointed out that the Supreme Court had held in the Northern Securities case\textsuperscript{32} that the holding company had eliminated competition and thus restrained trade, but "(u)nder this bill there has to be only a lessening of competition. Competition may be lessened without restraint of trade. Competition may be lessened without attempt to monopolize."\textsuperscript{33}

Despite this expression of opinion, primary legislative concern was over the prevention of monopoly as, for example, was expressed in the Senate Report:

It is proposed, without amending the Sherman Act to supplement that act by denouncing and making unlawful certain trade practices which, while not covered by that act because not amounting to restraint of commerce or monopoly in themselves, yet constitute elements tending ultimately to violations of that act.\textsuperscript{34}

The House Judiciary Committee, in its report, stated:

The only possible excuse and justification for legislation against the holding company lies in the fact that the holding company intended to be reached by the law creates a monopoly, or attempts to do so, or restrains trade.\textsuperscript{35}
These latter statements, which are contrary to Representative Carlin's opinion, indicate that the Committees did not consider the lessening of competition as an offense in and of itself. Only in Senator Cummins' comments is there a statement to the effect that proponents of the measure desired not only to prevent monopoly or unreasonable restraints of trade in their incipiency, but that a new policy of preventing a diminution of competition was involved as a matter of legislative intent. He stated that competition maintained fair prices, that the alternative was government price fixing ("state socialism"), and

... The only protection we can secure is the willingness of one seller to dispose of his product at a fair price, knowing that he has a competitor who will if he does not. If we lose that protection, we shall be compelled to resort to the power of Government (to fix prices) ... 38

"Lessening of Competition" is neither an economic nor legal term of art, and its meaning was neither precisely expressed in law nor was it discussed or defined in the Reports or debates relative to the Clayton Act.

A strict reading of the provision concerning lessening of competition in Section 7 would outlaw any acquisition whereby the acquiring firm could direct decisions of the corporation whose stock was being acquired. Substantial lessening, under such a theory of interpretation, would result
from acquisition of enough stock to influence the decisions of the corporation whose stock was being acquired. And certainly total acquisition would totally eliminate competition between the corporations. Some of the proponents of the Clayton Act desired such a law. Senator Reed proposed that the law read:

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 in the same line or lines of business.\(^{37}\)

Insisting that this was necessary in order to control holding companies (in effect it would have eliminated them), Senator Reed (and others) insisted that the investigation and proof of a substantial lessening of competition between corporations would be extremely difficult, but suggested that

It is easy to ascertain whether a corporation is engaged in the same line or lines of business in which another corporation is engaged, but it is very difficult to tell whether the ownership of stock has substantially lessened competition, and yet there may be a very grave lessening of competition. You avoid the difficulty of proving that most difficult question of fact.\(^{38}\)

The Senate rejected this proposal by a vote of 22 to 27.\(^{39}\)

The Supreme Court, in its interpretation of Section 7 of the Clayton Act, did not make a literal reading
of the statute but ignored the "between the corporations" provision, and held that the competition which had been eliminated (in this case it was total) must have been a substantial amount of the business in the relevant market.40 Most damaging, however, to the concept of "substantial lessening of competition," was the definition of this term in the International Shoe Co. case. The Court held:

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. . . .41

This was the same criterion which had been applied to Sherman Act cases, and subsequent Appeals Courts held that the effect must be such as to give the power to raise prices and exclude competitors. This interpretation of Section 7 and the resulting cessation of Section 7 activity by the enforcement agencies will be discussed in Chapter 3, infra.

Dissatisfaction over the original Section 7 of the Clayton Act centered around the decisions culminating in the Arrow-Hart and Hegeman case affirming the inapplicability of
the law to asset acquisitions and the limitations on the Federal Trade Commission's power to pursue an unlawful stock acquisition once assets had been transferred.  
Numerous proposals were made for the amendment of Section 744 which culminated in the passage of the Celler-Kefauver Amendment which, as passed, reads:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

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

The changes in the Statute with which this study will be concerned are these:

1. The assets provision was added.

2. The standard of illegality was changed to make illegal acquisitions where in any line of commerce in any section of the country, the effect
a. may be substantially to lessen competition or
b. tends to create a monopoly.

3. The restriction of the law to the lessening of competition between the acquiring and the acquired firms was dropped.46

Emphasized throughout the hearings, debates, and reports concerning the Amended Section 7 was the idea of preventing a lessening of competition, even though there is nowhere a distinction between the two criteria "a substantial lessening of competition" and "a tendency toward monopoly." No standards for detecting either of these conditions are provided. Thus, as is typical of this area of the law, reliance is placed on the Federal Trade Commission to develop through its quasi-judicial functions standards for determining those acquisitions which are proscribed.47

Conglomerate Merger Cases Under Amended Section 7 of the Clayton Act

The Federal Trade Commission has, as of June, 1963, considered only three conglomerate merger cases.48 The Procter and Gamble case49 received the first detailed consideration of the problems presented by conglomerate mergers. In this case, the nation's largest soap producer was charged with violation of Section 7 of the Amended Clayton
Act for having acquired the Clorox Corporation, the nation's largest producer of household bleach. The hearing examiner ordered Procter and Gamble to divest itself of the Clorox facilities.50 Upon review before the full Commission, however, it was held that insufficient evidence of a lessening of competition or tendency toward monopoly since the acquisition had been presented.51 The case was remanded to the hearing examiner for further evidence of harmful effects following the merger.52 The hearing examiner, on the basis of such additional evidence, issued a second order of divestiture, and as of June, 1963, the matter was again pending before the full Commission.

The Union Carbide case53 centered around the vertical aspects of the merger in question. The conglomerate aspects concerned Visking's (the acquired company) regenerated cellulose sausage casings facilities. The hearing examiner ordered divestiture of all Visking's assets which had been acquired by Union Carbide, except those involving the manufacture of cellulose sausage casings.54 The Commission affirmed the hearing examiner's holding regarding the divestiture of the assets constituting the vertical aspects of the merger, and also upheld the examiner's refusal to order divestiture of the sausage casings facilities.55 The Commission stated that there was no evidence of a probable
lessening of competition simply because Visking's cellulose sausage casings "now have the backing of Union Carbide's one and one-half billion dollars instead of Visking's thirty-eight million dollars. Without further evidence of probable lessening of competition, there could be no order of divestiture." 56

The third case involving a conglomerate merger attacked the acquisition by Consolidated Foods Corporation, a large purchaser of canned and processed foods from independent suppliers, of a dehydrated onion and garlic producer (Gentry). 57 The hearing examiner ordered divestiture on the grounds that because of its buying power, Consolidated could coerce, and in fact had coerced, its suppliers into purchasing Gentry products, after the latter had been acquired by Consolidated. 58 Although there was evidence that a policy of reciprocity had been used, upon review the Commission upheld the order for divestiture and stated explicitly that the acquisition of opportunities for reciprocity constituted a reasonable probability of a substantial lessening of competition and that the post acquisitional data and conduct merely confirmed the "reasonable probabilities." 59

Although the Commission in the Procter and Gamble case and in the Union Carbide (Visking) case was unwilling to
settle for less than evidence that a lessening of competition had occurred, in the Consolidated Foods case it did recognize its responsibility under the wording "where . . . the effect of such acquisition may be (emphasis supplied) substantially to lessen competition." (Supra, p. 13.) The original proposal of Section 7 had stated, "where the effect of such acquisition is (emphasis supplied) to eliminate or substantially lessen competition." The wording was changed to "may be" during the Senate debates. Although the Commission had post acquisitional data in the Consolidated Foods case, it recognized its responsibility in evaluating "reasonable probabilities," and seems to have reversed its approach in the Procter and Gamble case.

The Necessity for Guidelines to Conglomerate Antimerger Policy

Although the Commission in the Consolidated Foods case recognized its responsibility for the evaluation of "reasonable probabilities," the case turned on a single issue--special competitive advantages due to opportunities for reciprocity, which policy had been carried out. The Commission laid down no general guidelines for the approach to conglomerate mergers in general, and there have been no cases reviewed by appellate courts. Nor have any trial
courts made decisions in cases brought by the Antitrust Division of the Department of Justice. Therefore, there are, as yet, no judicial pronouncements as to the criteria that may be employed by the enforcement agencies in evaluating this type of case. If the Federal Trade Commission is to carry out its Congressionally delegated authority and responsibility, it must develop a coherent approach in this area.

Second, Congressional concern over the dangers of the conglomerate merger is amply documented. The Federal Trade Commission has not moved against any of the acquiring companies in the areas specifically condemned by proponents of the Amended Section 7. The failure to develop guidelines to conglomerate antitrust policy has largely left this aspect of Amended Section 7 in limbo.

Another reason for the necessity for developing general criteria indicative of a probable lessening of competition stems from the perennial proposal for a pre-merger notification amendment to Section 7. In the present state of the Commission's thinking, it would be impossible for the bar, the business community, or the courts to determine the probable effects on competition of any given conglomerate merger.
Fourth, on June 1, 1962, the Commission began a policy of giving explicit rulings on the legality of contemplated mergers, advertising campaigns, and promotional plans. The parties seeking pre-merger clearance under this provision are to be informed whether or not the consummation of the merger would be likely "to result in further action by the Commission." In the light of the Commission's unwillingness or inability to develop general rules to policy in the area of mergers generally, it is understandable that the ruling also states that the Commission's clearance "may be revoked later if required by the public interest." With no decision as to even the factors that will be considered in the evaluation of the competitive effects of a conglomerate merger, it is unlikely that this policy of voluntary pre-merger clearance could become an effective litigation-avoiding device.

Finally, it should be recognized that the pace of acquisitions shows no signs of abating. During the eleven-year period, 1951-1961, the five hundred largest industrial concerns acquired some three thousand four hundred and four other corporations. The largest two hundred firms acquired one thousand, nine hundred and forty-three other firms. The House Select Committee on Small Business reiterated its condemnation of conglomerate mergers, quoting from the
Commission's 1948 Report on the Merger Movement: "As the Commission has previously pointed out, there are few greater dangers to small business than the continued growth of conglomerate corporation." The Committee's evaluation of the data concerning mergers through 1961 concludes with the statement:

The antitrust laws which failed to stem the horizontal and vertical merger movements of the 1890's and the 1920's have had no visible deterrent effect on the conglomerate merger movement of the 1950's and 1960's. History, indeed, reveals a striking cultural lag in the fashioning of restraints on the growth of concentrated economic power. The ranks of large business, as well as small business, are under pressure from the unabated trend toward superconcentration.

It will be the attempt of the present study to develop, from discernible Congressional intent, selected economic theory, and judicially developed concepts relative to other aspects of antitrust, restraints on the growth of conglomerate economic power providing for the implementation of legislatively determined public policy.

Methodology and Procedure of the Study

The purpose of the present study is in essence the development of guidelines for the implementation of a statute. Such guidelines will be developed from three major
sources: (1) Congressional intent as expressed in hearings, debates, and Congressional committee reports; (2) economic theory, such as can be made applicable to the litigation oriented processes of the enforcement agencies; and (3) judicially determined concepts in related fields which can be applied to the conglomerate case.

The study will proceed along the following lines:

1. Part I will discuss the origin of Section 7 of the Clayton Act in 1914. Congressional hearings, reports, and debates indicate the underlying philosophy and goals related to the antitrust laws and the felt necessity for restricting certain business practices. The original Clayton Act introduced new terminology into the antitrust field. The origin and meaning of these terms will be sought in their earliest setting, Chapter 2, infra. Finally, Part I will discuss the judicial interpretation of the original Section 7 which, combined with the Federal Trade Commission's reaction, resulted in the statute becoming, for all practical purposes, a dead letter regarding antimerger policy (Chapter 3, infra).
2. Part II will treat of the amendment of Section 7 in 1950, including the fundamental objectives of the amendment, the introduction of a new standard of illegality, an evaluation of the economic evidence upon which Congress based its considerations, and the conclusion that Congress intended primarily a "holding action" by prohibiting the creating of further oligopolies or mergers which would induce changes in competitive patterns. Source material for this part will consist primarily of Congressional hearings, reports, and floor debates. Additional discussion and comment will center around the literature in the antitrust field.

3. Part III will be concerned with the discovery of guidelines for the implementation of the Congressional policy discussed in Part II. The treatment of conglomerate mergers by the Commission will be discussed, with the conclusion that in its latest pronouncements, at least, the Commission is taking the correct position. From this fundamentally correct position, it is believed that, based upon a limited employment of economic theory (Chapter 9, infra), and judicial concepts developed in related
antitrust cases, the Commission can embark upon a program implementing Congressional intent relative to conglomerate mergers, without additional statutory authority. Chapter 11 will suggest the guidelines—the criteria which should and can be evaluated—in implementing such a policy.
Footnotes


4Homan, op. cit., p. 112.


6State v. Standard Oil Co., 49 Ohio St. 137 (1892) which dissolved the Standard Oil Trust, and New York v. North River Sugar Refining Co., 121 N.Y. 582 (1890) which held that the trust was a partnership of twenty corporations and that it was a violation of law for a corporation to enter into a partnership.


826 Stat. 209 (1890).


10Ibid.


Footnotes--Continued


23Attorney General's Report, op. cit., p. 5.

Footnotes--Continued


2538 Stat. 730 (1914).

28Ibid.


29Chapter 1, infra.

30The Supreme Court so held in Brown Shoe Co. v. United States, 370 U.S. 294, 298 (1962). Chapter 4, infra.

31Chapter 9, infra. The split infinitive was corrected grammatically by the 1950 amendment to read "substantially to lessen competition."


3351 Cong. Rec. 9 (1914).

34S. Rept. 698, p. 1.

35H. Rept. 627, p. 6.

3651 Cong. Rec. 16047 (1914).

3751 Cong. Rec. 14419 (1914).

38Ibid.

38Ibid.
Footnotes--Continued

40International Shoe Co. v. Federal Trade Commis-
sion, 280 U.S. 291 (1930).

41Ibid., 297.

42Standard Oil Co. of New Jersey v. United States,
22 U.S. 1, 58 (1911), applied to a Section 7 case in Temple
Anthracite v. Federal Trade Commission, 51 F. 2d 656, 660
(3d Cir. 1933).

43See Chapter 3, infra, and Arrow-Hart & Hegeman v.

44For a comprehensive account of the history of
the Amendment, see David D. Martin, Mergers and the Clayton
Act (Berkeley: The University of California Press, 1959),
chap. vii, and Note, Section 7 of the Clayton Act: A
Legislative History, 52 Colum. L. Rev. 766 (1952).


46The adoption and meaning of these changes will
constitute Part II.

47Blaisdell, op. cit., chaps. 1, 2; U. S. Congress,
House, Select Committee on Small Business, Antitrust Law
Enforcement by the Federal Trade Commission and the Antitrust
Division, Department of Justice, 81st Cong., 2d Sess., 1950,
H. Rept. 3236.

48These cases will be reviewed and the holdings
evaluated in detail in Chapter 8, infra.

49Matter of Procter and Gamble Co., FTC Docket
6901, CCH Trade Reg. Rep., Transfer Binder, Para. 15,245
(1961).

50Ibid., p. 20,256.

51Ibid., p. 20,257.

52Ibid., p. 20,259.
Footnotes--Continued


\[54\] Ibid., p. 20,374.

\[55\] Ibid., p. 20,370.

\[56\] Ibid., p. 20,374.


\[58\] Ibid., p. 20,975.

\[59\] Ibid., p. 20,979.

\[60\] H. Rept. 627, p. 17.

\[61\] 51 Cong. Rec. 14464 (1914). See also Chapter 1, infra.

\[62\] Part III, infra, especially Chapter 5.

\[63\] E.g., H. Rept. 14,486, op. cit.

\[64\] 16 C.F.R. Sec. 1.63 (1962)

\[65\] Ibid.

\[66\] Ibid.

\[67\] Ibid.

\[68\] Ibid, p. 59.

\[69\] Ibid., pp. 44-45.
PART I

THE ORIGIN AND INEFFECTIVENESS OF SECTION SEVEN OF THE CLAYTON ACT, 1914
INTRODUCTION

General dissatisfaction with the development of concentrations of economic power led all three major parties, in the election campaigns of 1912, to advocate further restrictions relative to certain business practices. The outcome of this dissatisfaction was the Clayton Act of 1914, Section 7 of which was concerned with certain stock acquisitions. (See Chapter 1, infra.) Although the specific terms of this statute were little discussed, Congressional intent to limit this particular type of business activity—inter-corporate acquisitions—was singled out as a practice that was seen as conducive to harmful end results, and subject, therefore, to restrictive legislation. This legislation introduced new terms into the antitrust vocabulary and thereby provided a basis for the present Section 7 of the Clayton Act. (See Chapter 2, infra.)

Judicial interpretation of the original Section 7, however, rendered the statute, for all practical purposes, a dead letter. First, the Supreme Court held that the standard of illegality under the Clayton Act was that which had been developed under the Sherman Act. Second, it ignored the "between the corporations" provision of the statute and held
that there must be a general lessening of competition in a market. The Federal Trade Commission and the Department of Justice did not attempt to develop criteria or cases to meet this test. Third, the Supreme Court held that the Commission lacked the power to order divestiture of assets, even if those assets had been acquired as a result of an illegal stock acquisition. (See Chapter 3, infra.)

Part I will capsule this history of the original Clayton Act, Section 7, as a necessary background to the amendment of the Section in 1950, which amendment (Part II) and its implementation (Part III) is the central subject of the present study.
Chapter 1

THE ORIGIN OF SECTION 7 OF THE CLAYTON ACT

Legislative History of the Clayton Act

House Passage.--The proposals submitted by President Wilson for implementation of the 1912 campaign platform were embodied in five bills introduced in the House of Representatives in 1913. The sections dealing with changes in the antitrust laws were referred to the Judiciary Committee of which Representative Clayton was chairman. Hearings were held from December 9, 1913 to April 6, 1914 on the general subject of the antitrust laws and their possible modification. After the House hearings were completed, Representative Clayton on April 14, 1914, introduced H.R. 15657, "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, And For Other Purposes," Section 7 of which provided

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,

*Footnotes for Chapter 1 will be found on pp. 61-67, infra.
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. 5

The Judiciary Committee issued a report recommending passage 6 to which three Committee members, and two Committee members, appended separate Minority Reports. 7 The House began debate on the measure on May 22, 1914 8 and the bill was passed, without amendment, on June 5, 1914 by a vote of: 277 yeas; 54 nays; 3 abstentions; and 99 absences. 9 After passage by the Senate, the bill as agreed to by the conference committee was passed by the House on October 8, 1914 by a vote of: 245 yeas; 52 nays; 5 answering present; and 126 absent, 10 and was signed into law by President Wilson on October 15, 1914. 11

Senate Passage.—The Senate did not hold separate antitrust hearings in 1914 but merely received H.R. 15657 and the accompanying Report. 12 Two Subcommittees of the Committee on the Judiciary compiled a collection of hearings 13 including: the House Report, 14 a summary of all antitrust prosecutions since 1890, 15 and antitrust hearings conducted in 1908. 16
Separate Senate hearings related to Section 7 were not held because most of the material which had been received by the House Committee on the Judiciary\textsuperscript{17} was also received by the Senate Commerce Committee, during its hearings on the Federal Trade Commission bill held from February 26 to March 27, 1914.\textsuperscript{18} The Senate Committee on the Judiciary issued a report unanimously recommending, with amendments, the passage of H.R. 15657.\textsuperscript{19} The Senate began debate on the measure on August 17, 1914\textsuperscript{20} and passed the measure with changes on September 2, 1914 by a vote of: 46 yea; 16 nay; and 34 not voting.\textsuperscript{21} The Senate received the conference committee report and passed the measure on October 5, 1914 by a vote of: 35 yea; 24 nay; and 37 not voting.\textsuperscript{22} The measure as finally adopted as Section 7 of the Clayton Act was as follows:\textsuperscript{23}

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) may be to (eliminate or substantially) 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 (trade in any section or community) 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 voting or granting of proxies
or otherwise, (is) may be to (eliminate or substantially) SUBSTANTIALLY lessen competition between such corpora-
tions, or any of them, whose stock or other share capital
is so acquired, OR TO RESTRAIN SUCH COMMERCE IN ANY
SECTION OR COMMUNITY, or TEND to create a monopoly of
any line of (trade in any section or community)
commerce.24

The Raison d'Être of Section 7

The House Report, in its recommendation for passage
of H.R. 15657, considered the purpose of the bill as follows:

Section (7) deals with what is commonly known as
the "holding company," which is a common and favorite
method of promoting monopoly. "Holding company" is a
term, generally understood to mean a company that
holds the stock of another company or companies, but
as we understand the term a "holding company" is a
company whose primary purpose is to hold stocks of
other companies. It has usually issued its own shares
in exchange for these stocks, and is a means of
holding under one control the competing companies
whose stocks it has thus acquired. As thus defined a
"holding company" is an abomination and in our judgment
is a mere incorporated form of the old fashioned trust.

At common law a corporation had no right to own
stock in another corporation, but from time to time the
various States have, by special statutes, permitted it,
until now certainly more than a majority of all the
states permit corporate stockholding either generally
or of certain kinds and under certain conditions.
This legislation in its early operation may have served
a useful, economic purpose. Trade and commerce could
do as well without steam and electricity as without the
idea of the commercial unit which is embodied in the
word "corporation." Hence there are certain corpora-
tions which may properly be interested with individuals
other than its own stockholders, but experience has
taught us that the "holding company" as above described
no longer serves any purpose that is helpful to either
business or the community at large when it is operated purely as a "holding company." Section (7) is intended to eliminate this evil so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been necessary by business experience and conditions, and the exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade.²⁵

As an example of the lack of clarity that characterized consideration of this measure, it is noteworthy that the House Report quoted above speaks only in terms of Section 7 being a "holding company" provision. Holding companies are considered, of course, only in the second paragraph of the Section. The first paragraph is concerned with horizontal and, after the DuPont-General Motors case, vertical mergers.²⁶ These latter types of acquisitions were not even mentioned in the House Report. The Senate Report quoted the above from the House Report, but likewise added nothing concerning the first paragraph of the Section.²⁷

In the floor debates in both houses, there was considerable discussion as to the intention and import of both paragraphs of Section 7. However, the first paragraph was rarely singled out for separate consideration; emphasis was placed on stock acquisitions generally as a technique of monopolistic firms in gaining economic power.

That the primary concern was with strengthening the Sherman Act generally so as to prevent monopolies and restraints
of trade in their incipiency is shown in the Senate Report which stated:

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.28

And on the Senate floor, Senator Cummins described the overall purpose of the bill in the following terms:

It is proposed, without amending the Sherman Act. . . to supplement that Act by denouncing and making unlawful certain trade practices which, while not covered by that Act because not amounting to restraint of commerce or monopoly in themselves, yet constitute elements tending ultimately to violations of that Act.29

As a further elaboration of the intent of the Senate Judiciary Committee members that the bill was designed not to alter the Sherman Act but merely to prevent the achieving of unlawful monopoly power, Senator Walsh, a member of the Committee, stated during the Senate debates:

I do not understand that any one of these sections applies to trusts and monopolies. I understand that the bill was not intended to reach the practices of trusts and monopolies. The members of the Judiciary Committee, at least, did not intend that it should. It was the common belief that the practices of actual trusts and monopolies are already amply taken care of by the law. It was intended to reach the practices that were not the practices of things which had developed into trusts and monopolies,
but were practices of trade which, if persevered in and continued and developed, would eventually result in the creation of a trust or a monopoly.30

Senator Cummins, floor leader of the proponents of the measure, was consistently badgered with the arguments that first, the Sherman Act was entirely adequate and second, that Section 7 introduced new concepts and standards into the antitrust field. The Senator's replies were to the effect that "every line and letter of the bill is intended to strengthen the antitrust law as it now exists."31 That there was need for supplementation was substantiated by the observation that

Every great monopoly or combination that is now in existence against which the court has turned its processes in the last fifteen years, has been formed since the enactment of the antitrust law in 1890.32

He thus expressed the hope that the Clayton Act would prevent the formation of monopolies and combinations in restraint of trade. In regard to the need for clarification of the Sherman Act, Cummins stated:

There are actions that business knows are illegal, and those it knows are legal. But there lies between these two zones a middle ground, the twilight zone . . . in which it is difficult to determine whether a given act has been condemned . . . or sustained . . . We must supplement this great Act [the Sherman Act] with such legislation as from time to time our experience shows is
necessary in order to make its principles effective. The bill now before the Senate is in harmony with the purpose of the antitrust statute. It has no other office except to render the principle of that statute more effectual than it now is.

In the House Report and in the debates, emphasis was also placed on the fact that the Clayton Act was merely supplemental to, and was not intended to substantially change the provisions of the Sherman Act. The House Report stated that

(n)othing substantial has been disturbed, nothing torn up by its roots, no parts rent asunder which can be left in wholesome combination . . . The bill is not designed to destroy or hinder business [by imposing new antitrust laws].

Representative Fess stated:

I would hate to see the Sherman Law repudiated. I would not want to subtract from it. I would like to define it and make it clear . . . [so that] the commission would have power to meet a single situation or individual incident.

Representatives Graham, Danforth, and Dyer in a minority report to the House (and each of them at different times during the House debates) stated that

This provision (Section 7) goes further than the Sherman Act of 1890 with relation to holding companies. Under that law the doing of any of these things (stock acquisition) with intent to create or actually creating a monopoly or restraint of trade is forbidden; and the law is fully ample and competent to take care of all such offenses and offenders. This Act, however, goes beyond and leads us into a most dangerous realm, for it makes
"elimination or [these two words were later omitted as surplusage] lessening of competition" the test of illegality; while the Sherman Act makes 'monopoly' or 'restraint of trade' the test of illegality . . .

The only possible excuse and justification for legislation against holding companies lies in the fact that the holding company intended to be reached by the law creates a monopoly, or tends to do so, or restrains trade. 36

Representative Webb answered this argument by stating that the purpose of the Clayton Act was only for the "supplementation by specification" of the Sherman Act, to condemn individual acts which lead to restraints of trade, that is, those acts later may develop into situations which would be illegal under the Sherman Act. 37

One group led by Representative Volstead insisted that the Clayton Act would weaken the Sherman Act; that the Northern Securities case 38 had held that the mere acquisition of monopoly power was sufficient to constitute a violation of the Sherman Act; but that under the provisions of the Clayton Act the prosecuting agency would probably have lost that case because it would have had to go further and prove that there was a lessening of competition. 39

Representative Carlin, in defense of this attack that the Clayton Act weakened the Sherman Act, insisted that in the Northern Securities case . . . The Supreme Court held that it had not only lessened competition but had eliminated competition,
and thus restrained trade. . . There is nothing about competition in the Sherman Law . . . There must be actual restraint of trade . . . Under this bill, there has to be only a lessening of competition. Competition may be lessened without attempt to monopolize. Competition may be lessened without conspiracy. It may be the natural effect of the putting together in close relationship by a holding company of two corporations that are natural competitors, or ought to be.40

These comments were part of an extensive debate concerning the status of the antitrust laws.41 Debate centered around language in the Northern Securities case42 where the Court held that the combination of the Great Northern and Northern Pacific under a holding company was "a combination in restraint of interstate and international commerce and that is enough to bring it under the condemnation of the [Sherman] Act."43 Thus the statement was made that there had been created a combination in restraint of trade as the proponents of the Clayton Act pointed out in their plea for new legislation which would prevent the formation of, and acts which would lead to, restraints of trade. This was the language emphasized by Representative Carlin.44 But the opponents of the Clayton Act stressed45 the language of the Court to the effect that

the mere existence [italics mine] of such a combination and the power acquired by the holding company and its trustee, constitute a menace to and a restraint upon the freedom of commerce which Congress intended to recognize and protect.46
The opponents of the Clayton Act emphasized the language that "There is no room for considering reasonableness when it appears that the necessary tendency of the particular combination . . . is to suppress free competition." Thus the proposed language of the Clayton Act to the effect that a stock acquisition would be unlawful where the "effect is to substantially lessen competition" would weaken the Sherman Act. To further complicate the matter, Mr. Justice Brewer had concurred, stating that the restraints were unreasonable, and without this concurrence, the decision would have gone the other way by a vote of five to four.

While Senator Cummins was arguing for the necessity of supplementing and strengthening the Sherman Act, he introduced into the Record Senate Report No. 1326 which included an analysis of the status of the antitrust laws.

The Senate Report had made the stronger interpretation of the Northern Securities case, but stated that the Standard Oil Company case and the American Tobacco Company case represented a drastic departure and weakening of the Sherman Act. The Report stated that Chief Justice White "contends that this 'rule of reason' must be applied in order to prevent the entire overthrow of the statute," and went on to say that it was now accepted doctrine by writers and
would be accepted by the Report writers that such was the state of the law. The Report continued, however:

It is one of the interesting things in our judicial history that so great had been the change in the personnel of the court that when the dissenting opinion of Justice White in 1896 (in the Trans-Missouri Freight Association case) became the opinion of the court in 1911, Justice Harlan was the only member remaining to protest against the reversal. He rendered his dissent in one of the most vigorous opinions that can be found in the reports . . .

The Report concluded that the "rule of reason" now rules, and now

In each instance it is for the Court to determine whether the established restraint of trade is a due restraint, or an undue restraint.

It is inconceivable that in a country governed by a written Constitution and statute law the Court can be permitted to test the restraint of trade by the economic standards which the individual members of the Court may happen to approve. If we do not immediately prescribe insofar as we can a legislative rule by which to measure the forms of contract and combination in restraint of trade with which we are familiar or which we can anticipate, we cease to be a government of law and become a government of men, and, more worse, of a very few men, and they appointed by the President.

There was thus expressed a felt need for Congressional statement of specific practices which were considered short of but ultimately causative of violations of the existing law. There is a strong hint here of a search for certain per se violations. But the Reports were quite clear that the outlawing of all stock acquisitions was not advocated.
Regardless of the level of sophistication concerning the concepts and terminology used in the statute, and in spite of the fact that the bill was attacked both as being too lenient and as being too strong, the general proposition can be stated that Congress intended to strengthen the antitrust laws, and that there was a desire on the part of the proponents of the measure to (1) strike at specific business practices which (2) were believed to be the devices used for the acquisition of monopoly power.\textsuperscript{55}

There is no basis, however, in the Congressional hearings, reports, or debates to indicate that Congress intended to also prevent the acquisition of assets, or that the mentioning of stock acquisitions alone was a mere oversight, or that it was assumed that asset acquisitions would be included in the proscription. This latter view was (erroneously) expressed in the hearings concerning the amendment of Section 7 which were held in 1945, 1947, 1949, and 1950. Such erroneous views were expressed by the Federal Trade Commission,\textsuperscript{56} by Senator Kefauver,\textsuperscript{57} Senator O'Mahoney,\textsuperscript{58} and by the House Report following the 1945 hearings.\textsuperscript{59} That this is an erroneous interpretation of the 1914 law was accepted by the Supreme Court in the duPont-General Motors case\textsuperscript{60} and in the literature concerning the subject.\textsuperscript{61} In fact, there are instances in both houses
which indicate conclusively that Section 7 was then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or a part of such competitors' stock. Representative Webb and Representative Carlin both pointed out that in the case of assets, acquisitions were in full light, could not be covered up, and that it was the secret purchase of stock against which the Act was directed. In the Senate, three Senators--Reed, Cummins, and Poindexter each introduced amendments to the Clayton Act which would have made illegal any purchases of stock of one corporation by another. But each of them went on to emphasize that what they were doing was proposing a return to the Common Law standard where stock acquisitions by a corporation were ultra vires, but that the outright purchase of assets had not been prohibited. Senator Cummins, when asked about the possibility of permitting small companies to acquire stock to prevent giant economic power from moving into a territory, replied that it should be done above board, not by stock acquisition. Representative Murdock, leader of the Progressive Party, which generally regarded the proposed amendment as too weak, recognized that the acquisition of assets was not included in the proscription, and pointed out with apt foresight that

The Clayton bill also attacks the form of monopoly, not its substance, in its attempt to
eliminate "holding companies." When in time the courts reach with banning decrees this provision the offenders will change the form of monopoly and escape with the substance of monopoly as before. 69

So while it is true that the "assets loophole" (described more fully below) did exist, there is no basis for saying that asset acquisition did come within the purview of the Clayton Act in 1914; all expressions of "Congressional intent" are to the contrary. Subsequent desire must not be allowed to cause a revision of the intent demonstrably contemporaneous with the time of legislative enactment.

Substantive Provisions of
Section 7 - 1914

Deliberations concerning the meaning and scope of the terms of Section 7 are not particularly instructive in attempting to determine "Congressional intent." No consideration of the terms was undertaken relative to stock acquisitions in the hearings inasmuch as the bill was first drafted after the hearings were concluded. However, new terms which were to become a vital part of the antitrust laws were introduced in this bill. Their origins should, therefore, be recognized.
"May Be." -- As stated above (page 32), H.R. 15657 originally stated that stock acquisitions were illegal where the effect of such acquisition "is to eliminate or substantially lessen competition between" the corporations.

The Minority Report by Representatives Nelson and Volstead insisted that the Sherman Act was adequate by pointing out that the Northern Securities case had held that a stock acquisition was violative of the Sherman Act when such acquisition "confers a potential power to lessen competition." They pointed out, however, that under the proposed amendment, "where the effect is [italics mine] to substantially lessen competition" would be a much weaker standard of illegality, and that the government would have lost the Northern Securities case. Similarly, in the House debates, Representative Nelson stated that this bill makes the test of a holding company's illegality not whether it has potential power to lessen competition, in substance held to be the law in the Northern Securities case, but instead it introduces a new element, and a dangerous one, whether the holding company actually uses that power with the effect of substantially lessening competition.

The House, however, passed the bill without amendment. The only amendment offered in the House was offered by Representative Volstead who proposed a new Section 7 which would have affirmed the standard of illegality of the Sherman Act, as he interpreted the Northern Securities case (that the
acquisition of potential power to lessen competition was illegal). Also, his proposal would have absolutely prohibited acquisition of stock by giving stock in exchange. Representative Volstead stated that the purpose of reaffirming the Sherman Act standard (as he defined it) was to do away with what he considered the stricter requirements of the proposed amendment (is to lessen competition). Similarly, in the Senate debates apprehension was expressed over the word "is." Senator Cummins stated that it was virtually impossible to prove a lessening of competition,

but down in our hearts we all know, and the whole American people know, that a relation of that sort does destroy independence of action, and that full, complete, and vigorous competition to which we are entitled in the commerce of the country.

Again, Senator Cummins, objecting to the "is" provision, said:

We ought not to be compelled to enter upon that inquiry. It is a statement that is immensely difficult of actual proof, although every reasonable, sane man knows that it does have a tendency to eliminate or lessen competition. (This) does tend to destroy the rivalry that should exist, therefore, when that one fact is shown--namely, that the two corporations are or ought to be competitive with each other--the stockholding becomes unlawful.

Senator Cummins was making this statement in support of his amendment that would outlaw all stock acquisitions in one corporation by a competitor. Earlier he had stated that all that should be necessary for the Federal Trade Commission to
show is that the two corporations were, or ought to be competitors, and that this would be a difficult enough problem, giving the illustration of the problems that would arise under this simple test in the case of coal and electricity firms or gas and electricity firms. The proposed amendment was rejected.

In order to meet these objections, Senator Reed moved to amend H.R. 15657 to read "may be" rather than "is" because "the law, as I understand it, is that a combination is illegal where the effect may be as well as where it is . . . to substantially lessen competition." This amendment was accepted without debate and with no further elaboration.

Thus, although Senator Reed disagreed with the interpretation that the Northern Securities case was as strict as the opponents of the measure asserted, he used their argument to insert this more rigorous standard of illegality and expressed the opinion that "this is part of the continually expressed idea of keeping the Clayton Act in full conformity with the Sherman Act." It is paradoxical that this term "may be" which was to strike such terror in the hearts of the opponents of the 1950 amendment to the Clayton Act (infra) should have had such humble origins, and have been intended only to bring the wording into conformity with what was believed by some to be the existing law in regard to the interpretation of the Sherman Act.
"To Substantially Lessen Competition."--H.R. 15657, as introduced and passed by the House (supra) had made stock acquisitions illegal where the effect is "to eliminate or substantially lessen competition" between the corporations involved, "or to create a monopoly . . ." Senator Cummins introduced amendments to the measure which would have prohibited all inter-corporate stockholding, which he said was necessary because "we all know that whether the stockholding is large or small proportionately, it must influence the motives of the managers of corporations."82 He further stated that at that time (1914) inter-corporate holdings, in order to come within the provisions of the antitrust law, must have proceeded to the extent, and must have the effect of an actual restraint of trade or commerce before it can be prevented, "and that restraint must be undue or unreasonable," and that further relief was needed in waging the war to preserve competition "so that we may prevent in the very beginning those relations which will lead these corporations into conflict with the antitrust law."83 Again, Senator Cummins called the Clayton Act a "gold brick" because "every sensible man knows that the ownership by one corporation of the stock of another does eliminate to a great extent competition and does substantially lessen competition."84 But objections were made that such a provision (complete
prohibition of inter-corporate stockholding) might be unconstitutional; that it was too extensive; and that it would disturb the business community, and the proposal was defeated. A similar amendment was introduced by Senator Thomas who stated that stock ownership in a competitive corporation "must necessarily lead to the control or at least to the influencing of the operations and policies of the corporation in which the stock is held." Similar proposals were introduced by Senator Poindexter and by Senator Reed. Each was defeated.

Senator Walsh introduced an amendment to eliminate the phrase "or to create a monopoly" because if the words "lessening of competition" were in the bill, this was recognized as "less than the creation of a monopoly and was therefore surplusage," and Senator Cummins said:

... you have prohibited the lesser thing, do you find it necessary to go forward and prohibit the greater thing? The injunction against the lessening of competition, of course, reaches every case of an alleged monopoly and reaches a great many others.

But this proposal also was rejected.

Then, in a brief proposal by Senator Shields, the word "substantially" was removed by the Senate without debate. Senator Shields stated that omitting the word
"substantially" leaves out the indefinite and uncertain measure of what constitutes a "substantial" lessening of competition.\textsuperscript{92} It should be noted here that, according to the interpretation of "lessening of competition" due to stock acquisitions given by Senators Cummins and Thomas, above (that any stockholding has the effect of lessening competition), this change would have had the same effect as the prohibition of all stock acquisitions of competitors. This is only one other instance of the lack of clarity on the part of the Senate as to what was actually involved.\textsuperscript{93} Thus, the Senate had removed the word "is," replaced it with "may be," and removed the word "substantially."

The conference committee, however, reinserted the word "substantially." In explaining this to the Senate, Senator Chilton, of the conference committee, stated:

The Senate criterion was "where the effect may be to lessen competition." In other words, the Senate struck out "eliminate" (as surplusage) and "substantially." My judgment is that there is very little difference between the two. To lessen is to substantially lessen. Competition is everywhere. A pleasant word, prompt and quick service, are both methods of competition. If a competitor takes one customer away, it is lessening, and possibly substantially lessening of competition, because when one customer shall be secured by one of the competitors, to that extent there may be no competition. But when House Section 8, which is Senate Section 6, came to conference the House conferees insisted that the words "eliminate or substantially lessen competition" should be the standard. The Senate conferees insisted that the language of the
Senate should be adopted, to wit, "where the effect may be to lessen competition." As always happens when men of ordinary sense, with men who want to carry out as best they can the instructions of their superiors, the conferees had to find some common ground upon which their minds could meet, and the result was a compromise, which is Section 7. That compromise was the adoption of the words "may be" instead of the word "is" . . . a victory for the Senate . . . we left in the word "substantially" which is a victory for the House . . . .

Senator Chilton concluded his explanation of the compromise with the assertion that he liked the combination of "may be" and "substantially" (from the Senate and the House respectively) better than either of the bills as originally passed because "it saves the small business man, who does not want to restrain trade and would not, if he could, create a monopoly." He was asked from the floor if he would add to that last statement, "and could not if he would," to which the Senator answered affirmatively.

Senator Walsh, also speaking in favor of the compromise, including the word "substantially," stated that

It went out [on the floor of the Senate] without argument, because there is not enough in the word to provoke argument. If it were out, the language would receive the same construction, because no court would find that competition was lessened unless it was "substantially" lessened. . . How much reason there is to dread disastrous results from such a construction is exhibited by the decision in the Union Pacific-Southern Pacific case, in which the traffic affected by the combination amounted only to eighty-eight one-hundredths of one per cent of the total tonnage of the Southern Pacific. Yet the court held that the restraint of trade was substantial enough to bring the combination under the condemnation of the law.
But Senator Reed and Senator Borah insisted that, although the words "tend to create a monopoly" (see below) had strengthened the measure, the reinsertion of the word "substantially" had ruined all the possible benefit of Section 7.9 Senator Norris stated that the conference version with the word "substantially" would mean that a great deal could be done to lessen competition and that by the time this word runs the course of the courts and winds its weary way through the various avenues of attack and defense under our judicial practice and procedure, and finally reaches the Supreme Court and receives an adjudication, it will have accomplished its purposes and ruined thousands of honest business men.98

Senator Clapp agreed and concluded (foreseeing the decision in the International Shoe case, described below) that with the word "substantially" in the measure, "the act prohibited must, in order to offend against the latter clause, be a general limitation upon commerce."99 Senator Reed expressed the fear that the word would provide a greater loophole to the trusts than does the word "reasonable" which the Supreme Court had recently read into the Sherman Act.100

Similar sentiments were expressed in the House concerning the reinstatement by the conference committee of the Senate's deletion of the word. Representative Hinebaugh stated that "the shrewd railroad manipulators could always defeat this."101 And Representative Volstead insisted that the provision weakened the Sherman Act.102
In conjunction with other wording of Section 7, the words "to substantially lessen competition" were intended to incorporate a sort of rule of reason into this Act, in conformity with the rule of reason relative to the Sherman Act announced by the Supreme Court in 1911. That is, acquisitions would be unlawful if they would lead to a restraint of trade which latter would be "unreasonable." In order to have this effect, the lessening of competition would, therefore, have to be "substantial," whether it was expressed or not. Also, the wording was designed to avoid any "per se" implications, since all attempts at outlawing all stock acquisitions, or even all stock acquisitions in competitors, had been rejected. And there was undoubtedly recognition of the fact that some acquisitions would not have undesirable economic consequences. The House Report provided for this latter by stating that the measure makes "such exceptions as seem to be wise."

"In Any Section or Community,"--H.R. 15657, as introduced and passed in the House (supra), stated that stock acquisitions were unlawful where the effect is to lessen competition or to create a monopoly "of any line of trade in any section or community." The Senate substituted the word "commerce" for "trade" because the former had "received
statutory and judicial interpretation," while the latter had not.\textsuperscript{104}

Then, without any debate, the words "in any section or community" were stricken.\textsuperscript{105} In explaining why this phrase had been omitted from the end of each of the paragraphs of Section 7, Senator Chilton, upon reporting the bill back from the conference committee, stated that

They were stricken out simply because a monopoly is a monopoly anywhere and everywhere. There is no such thing as monopoly in interstate commerce in a county, or monopoly in interstate commerce in a section or community. It is a monopoly in interstate commerce, that is what we have power to deal with, and to put in the words "in any section or community" would simply becloud the definition and make it, possibly, inconsistent with itself and with everything else. A monopoly in interstate commerce is a monopoly in interstate commerce; you cannot limit it; you cannot extend it. If it is not a monopoly, it is not one; and if it is, it is; and it was the deliberate judgment of the Judiciary Committee of the Senate and of the Senate itself that the words . . . were either meaningless or else a restriction that might destroy the law, and therefore should be stricken out; and your conferees carried out the judgment and the direction of the Senate in leaving them out.\textsuperscript{106}

Senator Chilton pointed out, however, that the House members of the conference committee had insisted that the Senate version which read "where the effect may be to lessen competition . . . , or to create a monopoly of any line of commerce," without the words "in any section or community," would

. . . change the section, and not accomplish the purpose intended by it; that a corporation might acquire the stock of another corporation, and there
would be no lessening of competition, but the tendency might be to create a monopoly or to restrain trade or commerce, and therefore there was added to the definition the following: ' or to restrain such commerce in any section or community' or 'tend' to create a monopoly of any line of commerce. 107

It is unfortunate that there was no record of the deliberations of the conference committee. The above is the only mention of the phrase "section or community," and as will be described below, 108 the Commission was to make no effort at developing this part of Section 7.

Also, there was no further discussion of what the word "tend," which was inserted by the House conferees, meant. Senators Borah and Reed, however, expressed the opinion that the word "tend" did strengthen the bill. 109

Congressional Intent- -Conclusions

Allyn A. Young, in analyzing the intent of Congress concerning Section 7, stated:

The Clayton Act was thus the outcome of eight months of deliberations, but in less degree than is true of most important federal statutes, and in a markedly less degree than is true of the establishment of a trade commission, did it represent a real focus of the opinion of a majority of the members of Congress. Despite the large majority recorded in its favor the general attitude of Congress was that of unwillingly doing a set task. For many members of Congress the casting of a favorable vote was a matter of political exigency. Administrative pressure, party discipline, the political power of organized labor, and the undoubted fact that a majority of the
voters at home would interpret a Congressman's vote against an "antitrust" statute as a vote for monopoly were the dominant factors in the situation.110

The lack of precision in understanding and the subsequent attempt at application of the intent of Congress are attributable to several factors. Among these are:

First, the terms were new, and hence the confusion as to whether the act would strengthen or weaken the Sherman Law. Added to this is the fact that, to many, the Supreme Court had reversed earlier decisions (the Northern Securities case) and established the "rule of reason" in the Standard Oil and the American Tobacco Company cases in 1911. There was sufficient language in each of the cases to prevent agreement as to exactly what had been decided regarding the application of the Sherman Law. Second, there was the fact that the bill had been drawn up after the hearings were concluded. Therefore, there was no specific wording for consideration which the hearing committees could discuss. This situation was aggravated by the fact that there was no preexisting administrative agency experienced in applying the terms and/or advising in the selection of the wording of the law. Third, it should be noted that the date of passage was in October of election year, and the conference committee was compelled to reach an accord quickly on new
concepts with very little in the way of guidelines from either house.

In spite of these difficulties, at least the following general statement can be safely made: Section 7 was a part of the Congressional policy of limiting aggressive business practices on the part of large, economically powerful corporations and to prevent those acts which would, it was felt, lead to violations of the Sherman Act. Implicit in this was a recognition of the difficulty of undoing the economic harm resulting from monopoly, and the virtual impossibility of restoring competitive conditions after they had ceased to exist. In the context of the Clayton Act generally, Section 7 was merely one of those practices (the others being tying arrangements, price discriminations, and certain interlocking directorates) which Congress saw as instruments whereby monopoly power could be developed and solidified. These "predatory practices" were considered the recognizable techniques by which large financial interests accumulated power prohibited by the Sherman Act, and therefore should be stopped in their incipiency. The purpose thus expressed was not to strike at existing monopolies, nor those practices which increase existing monopoly power, the feeling being that the Sherman Act
adequately took care of these situations. Rather, the purpose was to carry out the Sherman Act policy by prohibiting some trade practices because they lead to the development of monopoly.
Footnotes

1U. S. Congress, House, Trusts and Monopolies, 63d Cong., 2d Sess., 1914, H. Doc. 625, pp. 5-17.

2U. S. Congress, House, Committee on the Judiciary, Trust Legislation, 63d Cong., 2d Sess., 1914.

351 Cong. Rec. 6714 (1914).

4As considered in the House, this section was Section 8; in the Senate, it was Section 6; due to changes made by the joint committee after passage by both houses, it became Section 7. U. S. Congress, Senate, Federal Antitrust Bill, Comparative Print, 63d Cong., 2d Sess., 1914, S. Doc. 584, p. 8.

5Ibid., p. 1.


7Ibid., Part 3 and Part 4.

851 Cong. Rec. 9061 (1914).

951 Cong. Rec. 9911 (1914).

1051 Cong. Rec. 16344 (1914).

1138 Stat. 730 (1914).


14Ibid., p. 23.

15Ibid., p. 127.

16Ibid., p. 203.
Footnotes--Continued

17U. S. Congress, House, Committee on the Judiciary, Trust Legislation, op. cit.

18U. S. Congress, Senate, Committee on Interstate Commerce, Hearings on Interstate Trade, 63d Cong., 2d Sess., 1914.


2051 Cong. Rec. 14419 (1914).

2151 Cong. Rec. 14610 (1914).

2251 Cong. Rec. 16171 (1914).

23The words in parentheses were eliminated by the Senate; the words in italics were added by the Senate; the words in CAPITALS were added by the conference committee.


25H. Rept. 627, p. 17.

26United States v. E. I. duPont de Nemours and Co., 353 U.S. 586 (1957), in which the Supreme Court held that the F.T.C. was mistaken in its interpretation of the Clayton Act, and that the law applied to vertical mergers.


28Ibid., p. 1.

2951 Cong. Rec. 13848 (1914).

3051 Cong. Rec. 15820 (1914).

3151 Cong. Rec. 11380 (1914).

32Ibid.

3351 Cong. Rec. 11381 (1914).
Footnotes—Continued

Footnotes—Continued

34 H. Rept. 627, p. 7.
35 51 Cong. Rec. 8863 (1914).
36 H. Rept. 627, Part 2, p. 6.
37 51 Cong. Rec. 8979 (1914).
38 Infra, pp. 41-42.
39 51 Cong. Rec. 9591 (1914).
40 51 Cong. Rec. 9271 (1914).
41 51 Cong. Rec. 9271, 9077, 9086, 11381, 11319, 14462, and 14464 (1914).
42 Northern Securities Co. v. United States, 193 U.S. 197 (1904).
43 Ibid., p. 327.
44 51 Cong. Rec. 9271 (1914).
45 51 Cong. Rec. 9077 (1914).
46 193 U.S. 197, 327.
47 Ibid.
48 Ibid., p. 360.
50 51 Cong. Rec. 11381 (1914).
51 Standard Oil Co. v. United States, 221 U.S. 1 (1911).
53 S. Rept. 1326, p. 4.
Footnotes--Continued


Footnotes--Continued

6251 Cong. Rec. 9073-9074 (1914).
6351 Cong. Rec. 14226 (1914).
64Ibid.
6551 Cong. Rec. 14254 (1914).
6651 Cong. Rec. 14465-6 (1914).

67See, for example, State v. Standard Oil Co., 49 Ohio 137 (1892); and Hans B. Thorelli, The Federal Antitrust Policy (Baltimore: Johns Hopkins Press, 1955), Part II.

6851 Cong. Rec. 14255 (1914).
6951 Cong. Rec. 9073-9074 (1914).
70H. Rept. 627, Part 3.
71193 U.S. 197 (1904).
72H. Rept. 627, Part 3, p. 2.
7351 Cong. Rec. 9169 (1914).
7451 Cong. Rec. 9591 (1914).
7551 Cong. Rec. 9592-9596 (1914).
7651 Cong. Rec. 12990 (1914).
7751 Cong. Rec. 14255 (1914).
7851 Cong. Rec. 11533 (1914).
7951 Cong. Rec. 14257 (1914).
8051 Cong. Rec. 14464 (1914).
81Ibid.
8251 Cong. Rec. 11531 (1914).
8351 Cong. Rec. 11532 (1914).
Footnotes--Continued

8451 Cong. Rec. 12988 (1914).
8551 Cong. Rec. 12989 (1914).
86Ibid.
8751 Cong. Rec. 14317 (1914).
8851 Cong. Rec. 14419-14420 (1914).
8951 Cong. Rec. 14459 (1914).
9051 Cong. Rec. 14463 (1914).
9151 Cong. Rec. 14464 (1914).
92Ibid.
93At one point, Senator Cummins pointed out that there were only nine Senators present; he was corrected and informed that there were eleven Senators present. 51 Cong. Rec. 15860 (1914).
9451 Cong. Rec. 16002 (1914).
95Ibid.
9651 Cong. Rec. 16194 (1914).
9751 Cong. Rec. 15860 (1914).
9851 Cong. Rec. 16047 (1914).
99Ibid.
10051 Cong. Rec. 15860 (1914).
10151 Cong. Rec. 8861 (1914).
10251 Cong. Rec. 16343 (1914).
103H. Rept. 627, p. 17.
10451 Cong. Rec. 14029 (1914).
Footnotes--Continued

10551 Cong. Rec. 14031 (1914).

10651 Cong. Rec. 16047-16048 (1914).

10751 Cong. Rec. 16002 (1914).

108 Chapter 3, infra.

109 1 Cong. Rec. 15860 (1914).

110 Allyn A. Young, op. cit., p. 326.
Chapter 2

THE SEARCH FOR NEW ANTITRUST CONCEPTS

Just as economic theory concerning the organization of industry treated of only the two extremes, monopoly and competition, so did the conventional wisdom of this period polarize to the "benefits of competition" and the "evils of monopoly." Congress' concern with strengthening the Sherman Act was couched in terms of avoiding the evils of monopoly, and there was almost no recognition or development of the concept of "lessening of competition" as a separate and distinguishable offense worthy of concern. The only articulated concept concerning the competitive structure of the economy was that the Clayton Act was designed to prevent the formation of trusts and monopolies. So, to this extent, there was concern with the "maintenance of competition," but there was not a consideration of the effectiveness of competition short of recognizing its elimination by the establishment of "monopoly." In short, there was generally no distinction made between "lessening of competition" and "monopoly." Stagnation and stabilization were associated only with monopoly. Tight oligopoly equilibrium was not envisioned.
The most significant evidence that emphasis would be shifting from merely preventing monopoly to the maintaining of effective competition is found in the employment of the terms "lessening of competition" and "tend" to create a monopoly. But, as indicated above, these concepts received no extensive consideration by Congress in 1914.

There were, however, certain comments made in the reports and in the debates which indicated that there was developing a concern over the vigor of competition itself. Most instructive along these lines are the comments by Senator Cummins, who wrote the Senate report recommending passage of the Interstate Commerce Commission Act.¹ In all the discussions concerning antitrust matters in 1914 (during which, in the writer's opinion, more heat than light was usually shed) he showed perhaps the clearest understanding of the purposes of antitrust generally, and particularly that there were not only the two worlds of monopoly and competition. He stated the first question that should be asked as follows:

Should Congress attempt to maintain competitive conditions in the general interstate commerce of the country, where they still exist, and to restore such conditions where they have been destroyed, or should it accept the complete or partial [italics mine] overthrow of competition and resort to some other method of protecting people against the power of concentration and monopoly [?].²

*Footnotes for Chapter 2 will be found on pp. 80-81, infra.*
Senator Cummins further distinguished between "restraint of trade" and "restraint of competition," pointing out that the Sherman Act used the term "restraint of trade" because of its familiarity in the common law. He saw the Supreme Court as interpreting "restraint of trade" at common law as follows:

... a restraint of trade consisted of unreasonable restraint of competition [italics mine] as impaired substantially and to the public injury, the freedom of trade, or the freedom to trade. Interference with free competition was generally, but not necessarily a restraint of trade for there were some restrictions that could be put upon competition that left the competitive force as an adequate protection for the people. Hence the common law was that unreasonable, unfair, undue restraints upon and interference with competition, or competitive conditions constituted a restraint of trade.3

He then pointed out that the Sherman Act, even under the rule of reason, took care of such undue restraints, but that in order to maintain competition, it was necessary that additional business practices be prohibited. The business practice that he was particularly concerned with was the prohibition of stock holding in one corporation by another. As indicated above,4 he introduced amendments during the Senate debate on Section 7 which would have prohibited any intercorporate stockholding where the two firms were engaged in "a business which is in its nature competitive,"5 even though it would not amount to an undue restraint proscribed
by the Sherman Act. The reason for the necessity of this provision, Senator Cummins stated, was that intercorporate stockholding in competing corporations was "one of the things which, taken together with circumstances which we have often seen, constitute a violation of the antitrust laws." Any intercorporate holding of stock, he insisted, "will prevent that independence of action, that freedom of trade in business, which we are endeavoring to preserve." Thus, he was expressing a desire not only to prevent monopoly, but to prevent any lessening of competition between two corporations which he insisted was the only purpose for which intercorporate stockholding was designed.

Senator Cummins also stated that many theorists and business practitioners had come to take the position that economic centralization was a technological necessity, and that competition belonged to the past, but that these people recognized that some form of government price-setting would be necessary. Then he stated that the committee asserted its faith that regulation by competition is the best protection for the people. The report concluded this line of reasoning with the statement that

It is frequently declared that the law cannot compel men employed in like businesses to compete with each other. There is a sense in which this is true, but it is only technically true. What is meant when we use the phrase "maintaining competition" is maintaining competitive conditions. We can
both create and maintain competitive conditions, and until human nature is revolutionized, when competitive conditions exist there will be actual competition; but if for some extraordinary reason it shall fail, there will be, at least, a potential competition, tending to prevent undue prices and unfair practices.9

The above was one of the very few instances in which there was mention of the performance of a competitive economy, particularly as related to the determination of prices. In the House, Representative Webb emphasized that the reason for restraining holding companies was that they were not compelled to face the constraints imposed by a market characterized by generally competitive conditions, but that "in holding corporations the company controls the policy and price of commodities of constituent or subsidiary corporations."10 Senator Cummins, during the debates, emphasized the function of a competitive market as a superior price-determining mechanism, stating:

The only protection we can secure is the willingness of one seller to dispose of his product at a fair price, knowing that he has a competitor who will if he does not. If we lose that protection, we shall be compelled to resort to the power of government itself in fixing prices, and when we are compelled to employ the force of the Government in fixing the prices of all the commodities that we sell and use we will have entered the field of State socialism. For that reason those of us who do not want to resort to that power of the Government in protecting the people against the rapacity and the avarice of monopoly are so insistent upon preserving independence and competition.11

There was considerable condemnation of the Clayton Act, particularly on the part of the Progressive Party
members, on the grounds that the Act made no attempt to **restore** competitive conditions where they had already been virtually eliminated. Representative Nelson inveighed against the "monopoly privilege of levying tribute" (that profit above a "fair" rate of return), criticizing the regulated monopoly concept as leading only to lessening of efficiency, price fixing complications, corruption, business stagnation, and public ownership. Finally, he stated that "difficult as the problem of restoring competition may seem, it presents no such insurmountable obstacles as lie in the pathway of regulated monopoly. . . . This bill must be measured by the standard of its efficiency to restore competition."¹²

Representative Nelson opposed the bill throughout the hearings and debates (as did Representative Volstead) as being too weak. The latter objected to the legalization of stock acquisitions prior to 1914 and insisted that rather than legalizing the "existing trusts we should enact legislation to restore the full vigor of competition."¹³

Although he talked in terms of "monopoly power," Representative Helvering recognized that in "many industries" competition had been crushed and the Sherman Act could not be applied to these cases. He quoted from the publication **Engineering News** to illustrate how "monopoly" stifles invention and innovation, in the machinery and equipment industries.
That Representative Helvering was considering oligopolistic stabilization was indicated by his statement that "once competition is crushed out, then the need of economic management and progressive methods is no longer so essential . . . Likewise, the destruction of competition leaves in the market but a single force or a minimum of forces [italics mine] actuated by a common and a selfish motive."14

Another indication of the need for more than the Sherman Act standard of attacking monopoly, though the term "monopoly" was used, was given by Representative Morgan, who stated:

The one thing that we desire to destroy is monopoly; the one thing that we wish to properly control and regulate and bring under proper subjection is the great industrial corporation that really has power--the power to arbitrarily control prices and thus exact unjust profit from the people. We should have in mind this important fact, that the one thing we wish to maintain, and retain, and sustain is competition. We want to destroy monopoly and restore and maintain competition.15

Another instance in which it was recognized that lessening of competition less than monopoly power can be undesirable was given by Senator Thomas in support of his proposal to outlaw any stock acquisition by a corporation in another corporation. He recognized that stock ownership in a competitive corporation "must necessarily lead to control or at least to the influencing [italics mine] of the operational policy of the corporation in which the stock is held."16
As indicated above, there was very little suggestion of the content of the terms that were to become the important words in the Clayton Act. But there are instances in the debates showing that offenses separate from Sherman Act offenses were recognized. Representative Carlin, insisting that the Clayton Act strengthened the Sherman Act, asserted:

Under this bill, there has to be only a lessening of competition. Competition may be lessened without restraint of trade. Competition may be lessened without attempts to monopolize.17

He was, however, fitting this into his argument relating to preventing monopolies in their incipiency. And Senator Chilton, reporting back to the Senate from the conference committee, stated that the House conferees had inserted the phrase, "or to restrain such commerce in any section or community," because they felt that "the corporation might acquire the stock of another corporation and there would be no lessening of competition, but the tendency might be to create a monopoly, or to restrain trade or commerce."18

There was no further explanation of what was meant. This could be applied to a giant firm moving into a territory by acquisition, where it previously did not operate. In this case, on the surface there would be no lessening of competition, but there might be a tendency toward monopoly. Or, this provision could have been intended to apply to vertical
mergers, as the Supreme Court did apply it in the duPont-General Motors case.¹⁹

There was also the recognition of the possibility of conglomerate mergers being brought within the purview of Section 7. While Senator Cummins was urging his proposals to prohibit all stock acquisitions by corporations which were in competition, or ought to be, Senator Thomas asked about corporations investing in other non-competing corporations, e.g., a mining company investing in a local transportation company. While Senator Thomas did not consider the competitive effects, he insisted that the old common law prohibiting all such acquisitions was good, and should be restored. Senator Cummins agreed with the proposition but stated that since most states permitted intercorporate shareholding, such a provision would be going too far, and be contrary to public policy.²⁰ In another recognition of conglomerate mergers, Senator Thompson wanted to substitute an amendment by adding: "and when engaged in different lines of business where the effect of such acquisitions is to eliminate or substantially lessen competition." But by Senate rules it was too late for amendments, and the proposal received no consideration.²¹ Had it been otherwise that day, this study might have had very different materials to consider.
There was also recognition of the fact that market extension may have anticompetitive effects; that is, a firm expanding into a new territory where it previously was not operating. This is borne out by an exception to Section 7 which stated that

Nothing shall prevent a common carrier from extending any of its lines through the medium of the acquisition of stock, or otherwise, of any other such common carrier where there is no substantial competition between [italics mine] (the companies). 22

Thus, railroad companies were permitted to expand by acquisitions if there was no competition between the companies. This could only mean that someone drafting the provision recognized that expansion into new territory "where there is no substantial competition" between the corporations could have the proscribed effect. Otherwise, why would the exception have been made in the case of railroads?

Congressman Volstead also recognized the dangers of horizontal market extension by suggesting that the Clayton Act contained a loophole whereby "if a company now engaged in business decides to enter new territory, it can first purchase the capital stock of the corporation that would become its competitor; by doing so, it has not lessened competition, because until it enters the new field there is no competition to lessen." 23 These comments were made in connection with his objection that the bill would weaken the Sherman Act. In this
case, he insisted that by permitting the above-described expansion and prohibiting only that which involved a merger of actual competitors, economic power could still be tremendously concentrated.24

Thus, at least in these (albeit rare and isolated) instances, there are indications that (1) there was recognized a possibility of a lessening of competition in ways other than by the activities of holding companies, and the merger of directly competing companies, and (2) attention directed solely at "monopolists" would not yield the type of economic structure which was deemed most desirable.

The Texas antitrust statute of 1903 was indicative of the struggle to mold old terms to fit new circumstances, and to expand the restrictions upon economic power.25 That statute, in defining a monopoly, stated:

A "monopoly" is defined as a combination or consolidation of two or more corporations, either by bringing them under the same management or control for the purposes of creating a trust, or where any corporation shall acquire the stock or bonds, franchises, rights, or physical properties of any other corporation for the purpose of preventing or lessening competition, or where the effect tends to affect or lessen competition.26 [Italics mine.]

Since Texas was forty-seven years ahead of the national Congress in this regard, it seems strange that there was no consideration of such a definition, even as
early as 1914, especially since there was strong Populist and anti-big business sentiment in the Texas delegation. Perhaps this is also, however, another part of the failure of complete consideration of Section 7.
Footnotes


2Ibid., p. 2.

3Ibid., p. 3.

4Supra, p. 50.

51 Cong. Rec. 11531 (1914).

6Ibid.

7Ibid.

8See, also, Senator Thomas' and Senator Reed's similar proposals, supra, p. 51.

9S. Rept. 1326, pp. 3-4.

1051 Cong. Rec. 16047-16048 (1914).

1151 Cong. Rec. 14256 (1914).

1251 Cong. Rec. 9167 (1914).

1351 Cong. Rec. 9176 (1914).

1451 Cong. Rec. 9184 (1914).

1551 Cong. Rec. 9265 (1914).

1651 Cong. Rec. 12989 (1914).

1751 Cong. Rec. 9271 (1914).

1851 Cong. Rec. 16002 (1914).

18United States v. E. I. duPont de Nemours and Co., 353 U.S. 585 (1957), where the Court pointed out that the disjunctive statement in the first paragraph of Section 7 meant that any tendency toward monopoly, horizontal or vertical, was unlawful.
Footnotes—Continued

20 51 Cong. Rec. 11931 (1914).
21 51 Cong. Rec. 14458 (1914).
22 38 Stat. 730 (1914).
23 51 Cong. Rec. 9153 (1914).
24 Ibid.
25 Introduced by Senator O'Conor in the debates in the Senate in 1950 concerning the amendment of Section 7. 96 Cong. Rec. 16668 (1950).
26 Ibid.
Chapter 3

JUDICIAL INVALIDATION OF
SECTION SEVEN

The "Assets Loophole"

The first order issued by the Federal Trade Commission under Section 7 of the Clayton Act was against the Aluminum Company of America.1* In this case, the Cleveland Metal Products Co. was in competition with Alcoa in certain rolled aluminum lines. Alcoa, with its national monopoly of ingot aluminum, was the Cleveland Company's sole source of supply. The stock purchase device involved in this case was as follows: A new corporation, the Rolling Mill Company, was formed for the purpose of acquiring the rolling mill operations of the Cleveland Company. The stock in the Rolling Mill Company was subscribed to two-thirds by Alcoa, and one-third by the Cleveland Company.2 The Commission found that as a result of this acquisition, the Cleveland Company had ceased to be a competitor of Alcoa, and that the setting up of the third corporation (the Rolling Mill Company) to acquire the rolling mill was

... a device for the accomplishment of the purpose of the respondent to obtain control of the said rolling mill.

*Footnotes for Chapter 3 will be found on pp. 115-119, infra.
mill and business in its products instead of the
direct acquisition of stock in the Cleveland Metal
Products Co., and was in effect equivalent thereto;
the result of the use of this device, as completely
as though the respondent had obtained a controlling
stock interest in the Cleveland Metal Products Co.,
was to eliminate the actual existing competition
between the respondents and the . . . Cleveland
Metal Products Co. in the manufacture and sale . .
of sheet aluminum and aluminum cooking utensils,
to prevent the Aluminum Rolling Mill Co. from
becoming a competitor (in sheet) . . . and tended
to and did create in the respondent a monopoly in
the manufacture and sale in interstate commerce of
sheet aluminum.

The acquisition tended to and did bring about
a complete monopoly in the respondent of the produc-
tion and sale of sheet aluminum of certain much-used
and important sizes manufactured in the United
States, and tended to bring about complete monopoly
in the respondent of the sale, in interstate com-
merce, of all sizes of sheet aluminum manufactured
in the United States.3

Thus, the Commission held that the acquisition of
stock violated Section 7 of the Clayton Act, and ordered the
divestiture of the stock to someone completely unconnected
with Alcoa.4 The U. S. Circuit Court of Appeals for the
Third Circuit upheld the Commission's order.5 Alcoa insisted
that by buying two-thirds of the stock of the newly formed
corporation, it was not buying the stock of a competitor,
since at that time the new corporation was not producing any-
thing. The Court dispensed with this specious argument by
stating that its obligation was to look at "the effect of the
transaction." The Court held that even if they were not in
competition at the time of the acquisition, the transaction still comes within Section 7 (because) its effect upon actual competition as well as in destroying potential competition in a way to make later actual competition impossible [that is, the new company could have competed with Alcoa], was substantially to lessen competition between the corporations. . . And, second, that without regard to whether its effect was to substantially lessen competition . . . the stock acquisition did, in any effect, "tend to create a monopoly."6

The Supreme Court denied certiorari,7 and thus the Commission won its first case under the law, then eight years old, even in the face of an extra manipulation involving the formation of a third corporation. It thus appeared that the courts would be willing to pursue the various devices possible under corporation statutes, pierce the veil, as it were, and get at the substance of the evil intended to be proscribed by the Clayton Act. This probability, however, was narrowed considerably by three Supreme Court decisions in 1926.

Section 7 of the Clayton Act was tested in the Supreme Court in the companion cases of Western Meat Co.,8 Thatcher Mfg. Co.,9 and Swift and Co.10 These decisions were rendered together on November 23, 1926.11

In the Western Meat Company case, the Commission had ordered the company to divest itself of all the stock of an acquired competitor, the Nevada Packing Company.12
After the order was issued, the Western company acknowledged its intention to dispose of the stock in exchange for the assets of the Nevada Packing Company, and contended that the F.T.C. could not forbid this action. The Supreme Court held that the order of the Commission may validly provide that the stock be divested in such a way as to avoid acquisition of the physical assets of the competitor by the Western Co. by holding:

Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose. Preservation of established competition was the great end which the legislature sought to secure.

The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent.

Divestment of the stock must be actual and complete and may not be effected, as counsel for respondent admitted was intended, by using the control resulting therefrom to secure title to the possessions of the Packing Company and then to dissolve it. Properly understood, the order was within the Commission's authority. 13
Thus the Supreme Court reversed the Circuit Court of Appeals, Ninth Circuit, which had held that

Section 11 empowers the Commission when convinced that any of the provisions of the act have been violated to order the persons so violating the same to "cease and desist from such violations . . . in the manner and within the time fixed by said order." Thus is clearly expressed in the Clayton Act the evil which so far as concerns the present case is intended to be remedied, namely, the holding by one corporation of stock in another corporation engaged in commercial business where the effect thereof is substantially to lessen competition, restrain competition, or tend to create a monopoly, and no enlargement of the Commission's power is contained in the authority given it to fix a time and prescribe the manner of ceasing and desisting from such violation. 14

In both the Swift and the Thatcher cases, the respondents had, before the Commission filed complaints, acquired the physical properties of competitor companies through stock control which was found in each case to be unlawful under Section 7. Divestiture was ordered in each case. On appeal to the Seventh Circuit, Swift did not question the Commission's authority to order the divestiture of physical assets, but rather contested only the Commission's interpretation of the standard of illegality. 15 The Circuit Court upheld the Commission in every particular, but did not discuss the issue of divestiture of the physical assets.

The Federal Trade Commission sought enforcement of its order of divestiture against the Thatcher Company in the
Third Circuit Court, and here, the respondent resisted on the grounds that the stock had been acquired by the company president, and not the company itself, and further that the Commission could not order divestment of property other than stock. The Circuit Court held, in regard to the first contention, that the acquisition was done indirectly, and this is as unlawful as a direct acquisition. In regard to the second argument, the Court said:

. . . the Act is remedial, not punitive. . . Therefore the sole purpose of a valid order of the Commission must be to remedy, however the Commission must meet the situation as the offending corporation has made it. If it created the situation so as to defeat the statute, the offending party can not be heard to say that thereby the Commission is helpless and the law unenforceable. The familiar principle that a person cannot profit by his own unlawful act applies. Not in every case can the Commission reach property acquired through stock acquisition, but where, as in this case, the offending corporation has stripped the stock of its value and where, accordingly, the mere divesting itself of the stock would leave the corporation in full possession of the entire fruits of the forbidden transaction, we are of the opinion that the statute empowers the Commission to carry out its purpose by extending its hand to the property.

After reversing the Ninth Circuit (in the Western Meat Co. case, described above) and holding that the Commission did have the authority to order divestment of physical assets acquired pursuant to a violation of Section 7, the Supreme Court also reversed the Seventh Circuit in the Swift case, and the Third Circuit in the Thatcher case, holding
that such orders were beyond the power of the Commission.\textsuperscript{18}

The Court held that where the physical properties had been transferred \emph{prior} to the time when the Commission issued its complaint, the Commission had no power to proceed under the Clayton Act by seeking divestiture of such assets, even though a violation of Section 7 had occurred in acquiring the stock and the stock was used to acquire the assets. In regard to the Thatcher case, the Court said:

The court [Third Circuit] further ruled in effect, that as the stocks of the remaining three companies were unlawfully obtained and ownership of the assets came through this, the Commission properly ordered the holder so to dispossess itself of the properties as to restore prior lawful conditions. With this we cannot agree. When the Commission institutes a proceeding based upon the holding of stock contrary to Section 7 of the Clayton Act, its power is limited by Section 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it. The act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property had produced an unlawful status a remedy is provided through the courts . . . The Commission is without authority under such circumstances.\textsuperscript{19}

In reversing the Seventh Circuit in the Swift case, the Court said:

As all property and business of the two competing companies were acquired by the petitioner prior to the filing of the complaint, it is evident that no practical relief could be obtained through an order
merely directing petitioner to divest itself of valueless stock. As stated in No. 213 [the Thatcher case], we are of opinion that under Sections 7 and 11 of the Clayton Act the Commission is without authority to require one who has secured title and possession of physical property before proceedings were begun against it to dispose of the same, although secured through an unlawful purchase of stock. The courts must administer whatever remedy there may be in such situation.20

Therefore, in the Western case, where the acquisition of assets (1) followed an illegal acquisition of stock (2) after the issuance of a divestment order by the Commission, the Commission could prevent acquisition of the assets as well as the stock. But, in the case where the acquisition of assets, even pursuant to an illegal acquisition of stock, preceded the issuance of a complaint, the Commission could not seek disposal of assets.

The "liberal bloc" (Brandeis, Holmes, Stone, and Taft) dissented. Mr. Justice Brandeis wrote:

In my opinion, the purpose of Section 7 of the Clayton Act was not, as stated by the court, merely "to prevent continued holding of the stock and the peculiar evils incident thereto." It was also to prevent the peculiar evils resulting therefrom. The institution of a proceeding before the Commission under Section 7 does not operate, like an injunction, to restrain a company from acquiring the assets of the controlled corporation by means of the stock held in violation of that section. If, in spite of the commencement of such a proceeding, the company took a transfer of the assets, the Commission could, I assume, require a re-transfer of the assets, so as to render effective the order of divestiture of the stock. I see no reason why it should not, likewise, do this although the company succeeded in securing
the assets of the controlled corporation before the Commission instituted a proceeding. Support for this conclusion may be found in Section 11, which provides for 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. [Italics ours.] 21

Thus, Justice Brandeis saw an inconsistency in the majority's reasoning, and desired to cut through the form and get at the substance of the "evil sought to be avoided." This inconsistency was removed in 1934, though not in the manner that Justice Brandeis would have desired.

In the Arrow-Hart & Hegeman case, 22 the Commission originally issued its complaint against a holding company which held the stock of two manufacturing companies that were in competition. 23 Subsequent to the filing of the complaint, there was a physical merger of the two manufacturing companies through a transfer of the stock held by the holding company to two new holding companies and a transfer of the physical properties of the manufacturing companies to the Arrow-Hart & Hegeman Electric Company, a newly formed corporation, by the consent of the stockholders of the two new holding companies and the two manufacturing companies. The original respondent, the holding company, was dissolved. The Commission issued a supplemental complaint, making the Arrow-Hart & Hegeman Electric Company a respondent and charging that the transfer was an artifice and did not restore
competitive conditions and that the Commission's jurisdiction was not thereby ousted.\textsuperscript{24}

The Commission found that the stockholding of the original holding company violated Section 7 of the Clayton Act and that the subsequent transactions were a scheme to avoid Section 7 and did not restore competition between the two manufacturing companies. An order was then issued, directing the Arrow-Hart & Hegeman Company to divest itself of all the common stock of the two manufacturing companies and to include all the physical property in such divestiture. Since the Arrow-Hart & Hegeman Electric Company now held no stock, it could not rid itself of such stock, and the question was presented whether it could be compelled to separate the physical plants it had acquired.\textsuperscript{25}

The Circuit Court of Appeals for the Second Circuit affirmed the Commission's decision, holding that Congress intended to prevent, by Section 7, a corporate control which could be concentrated by prohibited acquisition of stock. Wrongful acquisition of the stock facilitates a merger or consolidation of assets. When ordered to divest itself of stock, the utmost good faith should be used by a corporation in order to remove as far as possible the corporate concentration of ownership caused by the wrongful acquisition of stock.

But if the merger by transfer of assets is completed before the Federal Trade Commission filed its complaint, it cannot be attacked under the Clayton Act. Thatcher Mfg. Co. \textit{v.} Federal Trade Commission (272 U.S. 55).\textsuperscript{28}
On certiorari, the Supreme Court reversed the Second Circuit Court, holding that the Commission was without power to order a divestment of property and limited the holding of the Western Meat Company (described above) by a five to four decision. The Court stated:

The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the act authorizes; may order a practice to be discontinued and shares held in violation of the act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy.27

Distinguishing this decision from the Western Meat Co. case, the Court explained:

Where shares acquired in violation of the act are still held by the offending corporation an order of divestiture may be supplemented by a provision that in the process the offender shall not acquire the property represented by the shares. Federal Trade Commission v. Western Meat Co., 272 U.S. 554. In the present case the stock which had been acquired contrary to the act was no longer owned by the holding company when the Commission made its order.28

In a well-reasoned and powerful argument, the minority of four insisted that a Commission must exercise powers conventionally deemed judicial, and that it must have the power to enforce compliance with orders issued pursuant to statutes. They pointed out that the purpose of the Clayton Act was to prevent a lessening of competition through stock
acquisitions, and that in this case as a direct result of the stock acquisition there had been a lessening of competition. Continuing, they said:

It is true that the holding company divested itself of the stock of the two competing operating companies before the Commission had an opportunity to make its order; but it does not follow that it had done all that the Commission could command and that thus the statute was satisfied. Mere divestment of the stock is not enough. The manner of divestment is likewise subject to the requirements of the Clayton Act. This Court has recognized that the purpose of the act is to restore the competition suppressed by the acquisition of the stock and has specifically held, over objections such as are now made, that the Commission has power not only to order divestment but to prescribe that it shall be done in a manner that will restore competition. Federal Trade Commission v. Western Meat Co., 272 U.S. 554... Just as in that case we upheld the Commission's order directing the surrender of one of the fruits of the wrongful stock ownership—the power to place a competing unit under the offender's combination—so should we now sustain the order commanding relinquishment of another of the fruits of that ownership—the accomplished merger.

In this, as in most schemes for regulation by administrative bodies, there must be a balance between the general and the particular. When courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation.29

The Supreme Court, however, held that the only instance in which the Commission could prohibit the exchange of wrongfully acquired stock for the physical assets of a corporation was when the order of divestment was issued while
the stock was still held. Therefore, as soon as a complaint was issued against stock acquisition, all that was necessary was the transfer of assets by some such device as in the Arrow-Hart & Hegeman case, before the order was issued, and the statute would be effectively circumvented—a glaring triumph of form over substance.

The Standard of Illegality

In the Alcoa case the Third Circuit Court stated:

The "effect" of a transaction which ended competition between the Aluminum Company and its one competitor in the manufacture and sale of wide sheets and ended competition between it and one of only two independent competitors in the manufacture of sheets of any width, was inevitably to lessen competition, and to lessen it substantially. On these facts, the Court had only to read the words "between (the corporations)" and was not concerned with the term "substantial." If this were not sufficient, the Court pointed out that violation of Section 7, "in the disjunctive, turns on the tendency of the transaction 'to create a monopoly.'" Later, picking up this line of reasoning, the Court stated:

But the lessening of competition is not the only effect of the acquisition of one corporation of the stock of another which the Congress sought to avoid. It intended as well to prevent a transaction "where
the effect" may "tend to create a monopoly," which is the effect which the Commission found in the acquisition of the stock of the Rolling Mill Company. A monopoly can be created by a transaction of stock acquisition when the effect is not to lessen competition between the corporations whose stock is acquired if the effect is to end competition existing elsewhere . . . as, for instance, the ending of competition with the Cleveland Company.33

This is for the reason that the lessening of competition and the tendency to monopoly are not always synonymous. There may be a lessening of competition between two corporations in a stock exchange that does not tend to monopoly.34

As indicated above, the Court in the Alcoa case recognized that the offenses were stated in the disjunctive. This would give, then, three offenses: to substantially lessen competition between the two corporations; to restrain commerce in any section or community; or to tend to create a monopoly in any line of commerce.

In each of the three cases reaching the Supreme Court in 1926,35 the Commission, however, had concerned itself almost exclusively with the relationship between the acquiring and the acquired corporations. In the Swift case the Commission gave little attention to given market conditions before or after the acquisition, ignoring the two possibilities of showing (1) restraint of trade in any section or community, or (2) a tendency to create a monopoly in any line of commerce. The Commission delineated as markets
several cities in Georgia, Alabama, and Florida where there had been competition between Swift and the companies it acquired. Emphasis was placed on the fact that the companies operated in the same area and sold a similar line of products, and that therefore the acquisition resulted in "total suppression of competition" between the acquired and acquiring firms.36

Similarly, in the Western Meat Co. case the Commission carefully pointed out that the acquiring and the acquired firms were in active competition in Nevada and California and that the effect of the acquisition was to eliminate the theretofore existing competition.37 On this basis alone, the Commission concluded the effect was to "restrain commerce in the purchase and sale of meat and meat products commonly known as the meat-packing industry in the States of Nevada and California."38 Thus, the Commission made no distinction between the lessening of competition between the two corporations and a restraint of trade or lessening of competition, contrary to the Court's statement in the Alcoa case. The Seventh and Ninth Circuit Courts of Appeals affirmed the Commission's findings and approved the orders only on the grounds that there was substantial lessening of competition because there was pre-existing substantial competition.39
In the Thatcher case the Commission ordered the Thatcher Manufacturing Company to divest itself of the stock (and the subsequently acquired assets) of four glass products manufacturing companies. Three of these latter companies were primarily milk bottle producers, and the acquisition increased Thatcher's share in the United States from 40 per cent of the milk bottle market to 70 per cent. The other acquired company made primarily fruit juice, condiment, whiskey, and soft drink bottles, with only a small amount of milk bottle production. The Commission found that there was substantial competition between the acquiring and the four acquired firms, just as it had done in the Western Meat Co. and the Swift cases and ordered divestiture of the stock and of the assets acquired as a result of the stock purchase, after concluding that the effect of the acquisitions was

(a) to eliminate all competition in commerce in the milk bottle business between the (companies);
(b) to restrain commerce in the milk bottle industry in the sections or community of the United States in which (they) were engaged prior to the acquisition; and (c) to tend to create a monopoly in commerce in the milk bottle business in that Thatcher manufacturing company.

The Court of Appeals in this case did not review the evidence but simply concurred in the Commission's findings and concluded that the evidence sustained the finding that the effect was violative of Section 7. But the Court disagreed with the Commission as to what constituted a
"substantial" preexisting competitive relationship between the two firms in the case of one acquisition. It stated that one of the acquired companies produced only 8,000 gross milk bottles per year out of 1,000,000 gross per year in the United States and that although the acquiring company's intention was (and subsequent action was) to shut down the milk bottle production operations of this company, its operations were so small that there was not existing substantial competition between the acquiring and the acquired firms. Thus the Court accepted the Commission's approach, namely, that the crucial issue was: was there existing substantial competition between the firms? On this basis, it upheld the Commission in ordering divestiture of three acquisitions, but denied it in the fourth (described above), ignoring the fact that the acquisition certainly did restrain trade in this section, that is, by shutting down the milk bottle producing facilities.

Based upon these three cases, the conclusion can be reached that the Commission placed its emphasis on the existence of substantial competition between the acquiring and the acquired firms; and then, if this substantial competition was eliminated (as any merger would do), the Commission used this as evidence of restraint of trade, or a tendency toward monopoly; in fact, it was the sole evidence relied
upon. It did not treat the latter two phrases as separate offenses, and, therefore, failed to develop any analysis of the competitive nature or lack thereof in the markets before or after the acquisitions. That is, no additional attempt was made to show that there would result a restraint of trade, or tendency toward monopoly.

As described above, each of these three cases was reversed by the Supreme Court because of the decisions concerning the disposition of assets acquired as a result of stock acquisitions, and there was no significant consideration of the standard of illegality.44

In view of the emphasis placed upon the importance of competition between the acquiring and the acquired firms, the decision of the Supreme Court in the International Shoe Company case45 should not have come as a great surprise. That part of the case which was in line with the Commission's interpretation of the Clayton Act was that the Commission had erred in finding that the acquisition by the International Shoe Company of the stock of the McElwain Company was unlawful, because the two companies were, prior to the stock acquisition, competing with each other only to a slight degree. On the basis of its definition of the markets for shoes, defining the product very narrowly, the Court found that

... in respect to 95 per cent of the business there was no competition in fact and no contest, or apparent tendency to contest, in the markets for the same
purchasers; and it is manifest that, when this is eliminated, what remains is of such slight consequence as to deprive the findings that there was substantial competition between the two corporations of any real support in the evidence.46

Again, on page 298, the Court said:

Obviously, such acquisitions will not produce the forbidden results if there be no preexisting substantial competition to be affected; for the public interest is not concerned in the lessening of competition, when, to begin with, [such competition] is itself without real substance.47

The above is the basic holding of the International Shoe case. And, as such, it would not have been a disastrous blow to antitrust policy directed against horizontal mergers. In the meat packing cases, and the Thatcher case (above), the Commission had relatively easy cases; the product was homogeneous and the companies were engaged in active competition. But rather than developing the idea that the mergers automatically eliminated competition and that this could cause a restraint of trade or a tendency toward monopoly in some line of commerce, the Commission had emphasized the substantiability of competition, between the firms, in a given product, and when this was shown, alleged this fact to show conclusively, with no further evidence, a restraint of trade or tendency toward monopoly.

Also, it should be noted that the Commission acquiesced in a very narrow definition of the products which
constituted a relevant market. In the Thatcher case one of the acquisitions was permitted because the product marketed was defined as "milk bottles" rather than as "glass beverage containers." Similarly in the International Shoe case, the Commission apparently made no serious effort to define the shoe market at all, and by default, left it up to the Supreme Court to decide the market in terms of men's, women's, and children's shoes, and of all classes, varieties, and prices as being in different lines of commerce.\textsuperscript{48} The Court splintered the market definition of shoes by mentioning the different shoe markets as: dress shoes; for men and boys; shoes of different quality; substitutes for leather; some were better fitted, more attractive and modern; some appealed to the city trade and some to the country trade; and some were big city and some were for small communities.\textsuperscript{49}

Perhaps, over time, there could have been a substantial evolution in the definition of markets (as there was) to lessen the harshness of the pure competition concept enunciated by the Supreme Court here, and the requirement of substantial competition between the acquiring and the acquired firms may not have proved a substantial obstacle. But the Court imposed upon the Clayton Act the standard of the Sherman Act by stating:

Section 7 of the Clayton Act as its terms and the nature of the remedy prescribed plainly suggest, was intended as a protection of the public against the evils which were supposed to flow from the undue
lessening of competition. In Standard Oil v. Federal Trade Commission, 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition, or unduly obstructing the due course of trade. So

The Supreme Court approved this language of the Third Circuit, continuing:

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 of competition to a substantial degree . . . that is to say, to such a degree as will [italics mine] seriously affect the public. So

Thus the Supreme Court wrote the word "is" back into the Clayton Act, and effectively removed any probability of the development of the standard "may be," so far as mergers were concerned.

In the dissent by Justice Stone, joined by Justices Holmes and Brandeis, the chief attack on the majority's decision was that there was substantial competition between the two companies. Justice Stone stated:

The opinion of the Court and the general testimony of petitioner's officers of their conclusions that there was no competition between the two corporations . . . seems to proceed on the assumption that manufacturers, each engaged in marketing a product comparable in price and adapted to the satisfaction of the same need, do not compete if they do not sell to the same distributors.
Without stating it in detail there appears to me to be abundant evidence that the competitive products made by two of the largest shoe manufacturers in the world, reached the same local communities through different agencies of distribution; the one, of petitioner, through sales directly to retailers throughout the United States, the other, of the McElvain company, through sales in thirty-eight States, chiefly to wholesalers located in cities, who in turn sold to the retail trade. From detailed evidence of this type the Commission drew, as I think it reasonably might, the inference that the rival products, through local retailers, made their appeal to the same buying public and so were competitive.

. . . The inference from this evidence seems irresistible that . . . the competing products were not only offered through different systems of distribution to the same retailers, but were by them offered and sold to the ultimate consumers in their communities. Both products being made and suitable for the same use, the fact that each presented some minor advantages over the other, it might reasonably be inferred, would tend to increase, rather than diminish, the competition.52

Justice Stone, then, was protesting primarily the narrow product definition used in determining the competitive market. The definition of product which he wanted to employ is essentially that of today.

Thus, the International Shoe case was decided on the grounds that there was not substantial preexisting competition between the two firms, but the Court added the provision that in addition, an acquisition would not be unlawful unless the effect was to seriously injure the public, as the law had been developed under the Sherman Act. And this, apparently,
could only be done by looking at the market situation, which the Commission had refused (or failed) to do.

Section 7 After 1930--
Federal Trade Commission

In spite of this holding by the Supreme Court, the Commission in two subsequent cases failed to make any effort to show that the consequences of the merger attacked would have a deleterious effect on the existing competitive situation.

The Commission had issued a complaint against the Temple Anthracite Coal Company in 1928, seeking divestiture of two acquisitions. The Commission clearly established that there was substantial competition between the companies since there was a homogeneous product, and of course the competition was eliminated. The Commission merely held that there had been a substantial lessening of competition between the two firms, and therefore ordered divestiture. Commissioner Humphreys dissented from the order, pointing out that although there had been substantial competition between the firms, and this was eliminated, there was no showing that the acquisition of stock had in any way tended to restrain commerce, tended toward monopoly, or was injurious to the public. He stated:

Under the decision of the United States Supreme Court in the recent case of the International Shoe Co., an order to cease and desist made by the Federal
Trade Commission, based on the statute involved, cannot be sustained until it is alleged and proven, and found by the Commission as a fact, that by the acts complained of competition will probably be lessened to "such a degree as will injuriously affect the public." In the instant case the complaint was purposely drafted as to omit such allegation.57

The Court for the Third Circuit agreed with Commissioner Humphreys and stated:

There are no facts found and we find no evidence produced before the Commission to show the relation between the percentage of coal mined and sold by the Temple Coal Co. and its subsidiaries and that sold by the (acquired company) to the total output of anthracite coal of the same kind and quality in the whole anthracite region. From the facts found as to the value of the annual output of the respective mines, it is quite apparent that the percentage of these mines to the total output cannot be consequential. Therefore, if competition were lessened, its effect upon the whole interstate trade in anthracite coal would not tend to create a monopoly through substantially lessening competition.58

The Federal Trade Commission voted to seek a writ of certiorari, but the solicitor general decided against such action.59

The Commission lost a similar case the same year in its prosecution of the V. Vivaudou Company engaged in the manufacture and sale of cosmetics.60 In this case, the Vivaudou Company had acquired two corporations also manufacturing cosmetics. Again, there was no consideration of the market structure, no consideration of the competitive nature of the industry, and there was no attempt at product
definition. Each company, however, sold throughout the United States.61

The Commission ordered divestiture, again with Commissioner Humphreys dissenting on the same grounds as in the Temple Anthracite case (above), but was reversed by the Second Circuit Court with the statement:

We must consider the extent of the trade carried on by the three companies and compare it with the volume of business carried on by their competitors previous to the period of ownership of the stock, and endeavor to ascertain whether the public interest has been affected. . . There can be no monopolistic tendency in acquiring control of properties which added 5 million dollars to the petitioner's already 3 million volume of business, when the total of the country's similar business, amounting to at least 125 million, is considered.62

Administration of Section 7
by Other Agencies

During the 36-year lifespan of the original Section 7 of the Clayton Act, the Justice Department filed only four cases alleging violation of that Section. Three of these cases, however, also involved allegations under Sections 1 and/or 2 of the Sherman Act. The one case in which the Justice Department obtained divestiture, the New England Fish Exchange case, was decided on the grounds that two different companies' numerous acquisitions constituted violations of the Sherman Act, and therefore also included violations of the Clayton Act.63
In the Associated Press case, Wide World Photos, Inc. had been acquired by Associated Press through stock acquisition, but the court held that there was not substantial competition between Associated Press and Wide World because Associated Press offered its photo service only to its members; Wide World offered its services to the public generally; and only seven Associated Press members were found to have subscribed to Wide World's service.64

The violation of Section 7 was not at issue on appeal to the Supreme Court.65

The other case involving both Clayton Act and Sherman Act allegations saw the Justice Department attempting to find a loophole in the "assets loophole." In the Celanese case, the acquisition had been accomplished by absorption under state statutes, rather than through stock acquisition.66 The Justice Department argued that the interests represented by the shares of stock in the merging corporation passed to the surviving corporation and that this represented more than the mere acquisition of assets since the surviving corporation obtained control over the merging corporation's profits and property which the former stock represented.67

But the court reasoned that under this theory, even the direct acquisition of assets would also have to be considered a
stock acquisition. And the court held that if there was a merger of corporations under state statutes, even if there had been an acquisition of stock incident to the merger, Section 7 would not have been violated. The conclusion was reached because, in its opinion, Section 7 was designed to deal with the secret acquisition of stock by a holding company, and that reorganization mergers under state statutes were not within the ambit of Section 7 and that to hold otherwise would be judicial legislation.

The instrumentality to combat this evil which the government says is a threat to a well balanced free competitive economy, must come from the Congress.\textsuperscript{68}

The Justice Department also attempted to have the International Shoe case modified by arguing that if a stock acquisition eliminates competition between the acquiring and the acquired corporations, there is a violation of the statute, regardless of the effect of the acquisition on the degree of monopoly in the market.\textsuperscript{69} The government argued in the Republic Steel case that Congress has, in effect, declared that substantial lessening of competition and public injury are synonymous, and . . . Congress did not intend to submit the general question of public injury to the courts.\textsuperscript{70}

The trial court, however, pointed out that the Supreme Court had held otherwise, and that in the interpretation
of the Federal Trade Commission Act, and of the Clayton Act, the only standard of illegality

with which we are acquainted is the standard established by the Sherman Act in the words "restraint of trade or commerce" and "monopolizing" or "attempt to monopolize," and by the courts construing the Sherman Act.\textsuperscript{71}

Section 11 of the Clayton Act provided for enforcement by the Federal Reserve Board for banking corporations, and by the Interstate Commerce Commission for common carriers.\textsuperscript{72} The I.C.C. brought three cases under Section 7, but in no case was there a significant interpretive development.\textsuperscript{73}

The Board of Governors of the Federal Reserve System did find a slight remedy for the "assets loophole" in the Transamerica case.\textsuperscript{74} The Board had charged violation of Section 7 due to a stock acquisition and while the hearings were in progress, the intention to transfer the assets was revealed. The Ninth Circuit Court of Appeals enjoined the asset transfer, pending conclusion of the issues concerning the legality of the stock acquisition. Thus the Court, acting as a court of equity, was able to prevent circumvention by transfer of assets, a technique which would not be employed by the Federal Trade Commission, since the courts had consistently held that it did not have the powers of an equity court necessary to prevent such action.\textsuperscript{75} After trial,
and on appeal, the Third Circuit held that there had not been shown to be competition among the banks acquired in what the Board of Governors had succeeded in proving were the relevant markets—the cities in which business was carried on.  

Section 16 of the Clayton Act provided for suit and injunctive relief by private parties. Some ten suits were brought under this provision, in none of which cases did the plaintiff obtain relief, and there were no significant interpretive developments.

Unsuccessful Alternative Approaches

The Supreme Court in the Philadelphia National Bank case stated:

Actually, the holdings in the three cases that reached this Court, Thatcher, Swift, and Arrow-Hart, were quite narrow. See generally Note, 26 Col. L. Rev. 594-596 (1926). They were based not on a lack of substantive power under Section 7, but on the enforcement Section, Section 11, which limited the FTC's remedial powers to "an order requiring such person to cease and desist from such violations . . . and to divest itself of the stock held . . . contrary to the provisions of Section 7. . . ."

The Columbia Law Review Note cited by the Supreme Court in the above quotation was written in response to the Second Circuit Court's holding that the Federal Trade
Commission was without power to order divestiture of assets pursuant to a violation of Section 5.80 The Note suggested that an administrative agency such as the F.T.C. should be considered as possessing inherent power to order divestiture of assets if it was found by the agency that such divestiture was necessary to prevent continuation of the unfair method of competition. Such an argument would equally apply to Section 7 cases.81 In the Gilbertville Trucking Co. case,82 the Supreme Court held that the powers of the Interstate Commerce Commission included the power to order divestiture, even though such power was not specifically enumerated, if such action was necessary "in the opinion of the Commission," to prevent continuance of such violation.83

In the Pan American case84 the Supreme Court stated: "The power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority."85 The Court then simply cited the Gilbertville case, above, and the Eastman Kodak case, apparently indicating that the latter philosophy of administrative law is overruled. Of course, this reversal concerning the power of administrative agencies came thirteen years after the power of divestiture was specifically granted to the Federal Trade Commission by the Celler-Kefauver Amendment to the Clayton Act.86
The Supreme Court in the Thatcher case had stated that "if purchase of property has produced an unlawful status, a remedy is provided through the courts." This statement led to the suggestion that

The Court did not hold that the Attorney General could not proceed against such acquisitions in a plenary suit. In fact, it intimated that he could, the decision being expressly limited to the powers of the Federal Trade Commission under its organic act.

The one instance in which the Justice Department made such an attempt was denied by the trial judge, and no appeal was taken. In the Celanese case, the Court held that the Arrow-Hart & Hegeman decision by the Supreme Court had held that asset acquisition or merger, regardless of the impact upon the stock of the company, cured any illegality, and reasoned that the Supreme Court, though split five to four on the decision, "unanimously agreed that corporate mergers do not violate Section 7."

After 1930, until 1950 when the Section was amended, the Commission issued only ten complaints, but no orders, under Section 7. This almost total cessation of activity in the merger field provided strong arguments for the proponents of the Amendment to the Section. The ineffectiveness of the original Section 7, plus the beginning of the present merger movement with the onset of the
Second World War, provided the foundation for aroused concern over the structure of the American economy. This concern, and the resulting amendment to Section 7 of the Clayton Act, is the subject of Part II, below.

Conclusions

Grammatically, recognizing the disjunctive statement of the offenses as the Supreme Court did later in the duPont-General Motors case, the statute could be construed as having no other meaning than that, if there is any competition between the two corporations, and that competition is lessened to a substantial extent, a violation of the law occurs regardless of how inconsequential the effect of the stock acquisition may be on competition generally in that field. The law would be violated when one firm acquired enough stock in a competitor to influence the company in which the stock was acquired, with the effect that it lessened the freedom and independence of action characteristic of "competition." Thus, the reading into the statute by the Supreme Court of the requirement that there be substantial competition (the International Shoe Company case) was the first attenuation of the strict wording of the Clayton Act. As such, this was merely reading in a sort of "rule of reason" which, in the case of horizontal mergers, would not have been
contrary to the spirit of the antitrust laws since the
Supreme Court had held that although the Sherman Act says
"every restraint," it meant only every "unreasonable
restraint."

But the Supreme Court went on, in the International
Shoe case, and completely ruled out the "lessening of competi-
tion between the acquiring and the acquired firms" as a
separate offense. Then, the next phrase of Section 7 says,
"or to restrain such commerce in any section or community,
or tend to create a monopoly of any line of commerce."
And after having read out the "lessening of competition" as
an offense since it applied only, in the Court's interpreta-
tion, to the relationship between the acquiring and the
acquired firms, the Court had nothing to fall back on except
the Sherman Act standard of illegality. The Federal Trade
Commission made no effort to develop criteria relative to
a "tendency" toward monopoly, and this possibility for
extending the scope of the antitrust laws against horizontal
mergers went by default. In fact, in no case did the Commis-
sion even attempt to show that the effect of an acquisition
would restrain trade or tend toward monopoly.

Combined with these adverse decisions, and especially
after the decision in the Arrow-Hart & Hegeman case providing
the escape loophole through asset acquisition even after a
complaint had been filed, the Commission virtually threw in
the towel.
Footnotes

1Matter of Aluminum Co. of America, 3 F.T.C. 302, F.T.C. Docket 238 (1921).

23 F.T.C. 302, 308.

33 F.T.C. 302, 310-311.

43 F.T.C. 302, 312.


6284 F. 401, 409.

7261 U.S. 616 (1923).


125 F.T.C. 417, 420.

13272 U.S. 554, 559-560.

14Western Meat Company v. Federal Trade Commission, 1 F. 2d 95 (9th Cir. 1924).

15Swift and Co. v. Federal Trade Commission, 8 F. 2d 595 (7th Cir. 1922).


175 F. 2d 615, 621.

18272 U.S. 554.
Footnotes—Continued

19 272 U.S. 554, 561.
20 272 U.S. 554, 563.
21 272 U.S. 554, 563–564.

24 16 F.T.C. 393, 421–423.
25 16 F.T.C. 393, 427.
27 291 U.S. 587, 590.
28 Ibid.
30 284 F. 401, described above.
31 284 F. 401, 406.
32 Ibid.

33 This statement by the Court was necessary because the existing competition was between Alcoa and the Cleveland Company. But Alcoa was purchasing stock in the Rolling Mill Company. The Court recognized, however, that the sole purpose of the Rolling Mill Company was to assume the functions of the Cleveland Company which were in competition with Alcoa.

34 284 F. 401, 407. It would have been interesting to see what the Court meant by this last statement, but the Court proceeded, "But, curtailing this discussion . . . "
35 272 U.S. 554. (Swift, Western, and Thatcher.)
Footnotes--Continued

385 F.T.C. 143, 149-169.
375 F.T.C. 417, 421.
385 F.T.C. 417, 422.
388 F. 2d 595, and 1 F. 2d 95.
406 F.T.C. 213.
416 F.T.C. 213, 240.
425 F. 2d 615, 617.
435 F. 2d 615, 620.

44 As described above, the Western Meat Co. case was reversed because the Circuit Court failed to permit divestiture of assets as well as stock, and the Thatcher and Swift cases were reversed because the Circuit Courts had permitted the Commission to order divestiture.


46 280 U.S. 291, 297.
47 280 U.S. 291, 298.

48 Contrast this to Brown Shoe Co. v. United States, 370 U.S. 294 (1962), Chapter 10, infra.

49 280 U.S. 291, 297.
50 280 U.S. 291, 298.

51 Ibid.
52 280 U.S. 291, 303-305.


54 13 F.T.C. 249, 251-260.
55 Ibid.
Footnotes--Continued

5613 F.T.C. 249, 263.
5713 F.T.C. 249, 262.


60V. Vivaudou, Inc. v. Federal Trade Commission, 54 F. 2d 273 (2d Cir. 1931).
6254 F. 2d 273, 275.

7011 F. Supp. 117, 121.
71Ibid.
7238 Stat. 730, 740 (1914).
Footnotes--Continued

74Board of Governors of the Federal Reserve System v. Transamerica Corporation, 184 F. 2d 311 (9th Cir. 1950).

75See pp. 92-94, supra, relative to the Thatcher case, 272 U.S. 554.

76Transamerica Corp. v. Board of Governors, 206 F. 2d 163 (3d Cir. 1953), cert. denied 346 U.S. 901 (1953).

7738 Stat. 730, 740 (1914).

78Martin, op. cit., pp. 200-212.


85371 U.S. 296, Fn. 17.


87272 U.S. 554, 561.

88Handler, op. cit., p. 266.

8991 F. Supp. 14, 16.

90F.T.C. Annual Reports, 1930-1950.

PART II

THE AMENDMENT OF SECTION SEVEN

OF THE CLAYTON ACT
INTRODUCTION: LEGISLATIVE HISTORY

Twenty-one proposals for the Amendment of Section 7 of the Clayton Act were introduced in Congress between 1921 and 1949.¹ No proposed measure reached the point of committee hearings, however, until 1945. From the time of these hearings, the drive for amendment was kept alive until the measure was signed into law by President Truman on December 29, 1950.² A brief summary of the history of the amendment is outlined below.

The House of Representatives

Bills and Hearings

The Seventy-ninth Congress.--Representative Kefauver introduced a bill for the amendment of Section 7 of the Clayton Act in the Seventy-ninth Congress on February 26, 1945.³ The bill was referred to a subcommittee of the Committee on the Judiciary,⁴ and hearings were held on May 23-25

¹Footnotes for this Introduction will be found on pp. 130-132, infra.
The Eightieth Congress.--In the Eightieth Congress Representative Kefauver reintroduced his proposals for the amendment of the Clayton Act as H.R. 515. Hearings were held under this resolution on March 19, 21, 26, and 28...
and April 21, 1947. H.R. 515 dropped any dollar size or "percentage of business" limitations and the prior approval provision, but it retained the "between the corporations" provision. 

It was during the hearings on H.R. 515 that the "between the corporations" provision was dropped, and the new standard of legality (Chapter 5, below) was developed. The measure, as modified in committee, was introduced by Representative Kefauver as H.R. 3736, but in spite of the (not unanimous) recommendation of the Committee on the Judiciary, the bill was refused a rule. Representative Kersten introduced a bill identical to H.R. 3736 in the second session of the Eightieth Congress, but it received no consideration from the Judiciary Committee.

The Eighty-first Congress.--In the first session of the Eighty-first Congress, measures, essentially the same as the bill reported out by the Judiciary Committee in the previous Congress (Representative Kefauver's H.R. 3736), were introduced by four representatives, including Representative Celler's H.R. 2734. Hearings were held on this resolution on May 18, 1949, and the first two paragraphs of this bill went on to become the Celler-Kefauver Amendment to Section 7.
Reports

The Seventy-ninth Congress.--Based upon the hearings on H.R. 2357, the Judiciary Committee issued a report, unanimously recommending passage of the measure.16

Upon Representative Kefauver's revising his bill to a state which he believed would be satisfactory to the Rules Committee (H.R. 5535), the Judiciary Committee unanimously recommended its passage 17 but as stated above, the measure was again refused a rule.

The Eightieth Congress.--From the hearings on H.R. 515, as modified by H.R. 3736, the Committee on the Judiciary issued House Report 596,18 recommending passage, with seven members and two members writing separate minority reports.

The Eighty-first Congress.--Based on the hearings on H.R. 2734 (Representative Celler's bill, and the others mentioned above), the Committee on the Judiciary issued a report unanimously recommending passage of the bill.19

Debate

Debate was held in the House on August 15, 1949 under suspension of the rules, with debate limited to twenty
minutes each for the proponents and the opponents.\textsuperscript{20} The bill received more than the required two-thirds vote with 223 yeas, 92 nays, and 117 not voting.\textsuperscript{21}

The Senate

Bills and Hearings

The Seventy-ninth Congress.--Senator O'Mahoney introduced a bill similar to Representative Kefauver's H.R. 2357 but no action was taken.\textsuperscript{22}

The Eightieth Congress.--Senator O'Mahoney introduced a bill which retained the prior approval provisions, applying to mergers over a given dollar amount, as S. 104.\textsuperscript{23} Hearings were held but were not published, and the bill was not reported out.\textsuperscript{24}

The Eighty-first Congress.--Senators Kefauver and O'Mahoney jointly introduced a bill, S. 56,\textsuperscript{25} which was identical to that introduced by Representative Celler as H.R. 2734. The bill was referred to the Judiciary Committee, and hearings were held on September 19, 21, 23, 26, 28, and 30, 1949 and February 13, 1950, the hearings being designated as hearings on H.R. 2734 since the measure had already passed the House.\textsuperscript{26}
Reports

After the House had passed H.R. 2734, the Senate Committee on the Judiciary, based upon its hearings (above) reported the measure favorably. Senator Donnell made a dissenting report.

Debates

Senate debates were held on H.R. 2734 on December 12 and 13, 1950 under a no amendment rule and the measure was passed on December 13, 1950 by a vote of 55 yeas, 22 nays, and 19 not voting.

The amended Act as passed was worded as follows (words in italics were eliminated; words in parentheses were added):

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. 31

Mr. Chief Justice Hughes in the Appalachian Coals case stated that the Sherman Antitrust Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." 32 This has been the generally accepted view of commentators on the Sherman Law, provided the basis for the development of the "rule of reason," and leads to criticism that the antitrust law is too vague and unclear. 33

What, then, is supposed to be the meaning of, and the Congressional intent behind, a law which "reaches far beyond the Sherman Act" (Section 7 of the Clayton Act, as amended in 1950)? 34 This part of the present study concerning the applicability of Section 7 to conglomerate mergers will review the hearings, reports, and debates (outlined above) and attempt to arrive at an estimate of the intent of Congress, particularly as it is found to be relevant to conglomerate mergers.
Professor Bok concludes that more than anything else the amended Clayton Act represents a "mood" of Congress.\textsuperscript{35} In the Brown Shoe case the Supreme Court spent thirteen pages discussing the legislative history of the amendment of Section 7, eight of which pages discussed eight factors motivating Congress in redrafting the Section.\textsuperscript{36} The American Bar Association's Section of Antitrust Law, Subcommittee on Section 7, meeting in August 1962 sought to determine if the Brown Shoe case accurately reflected an implementation of the "general mood or climate of merger enforcement" sought by Congress.\textsuperscript{37} Since the Supreme Court has come to place so much emphasis on Congressional intent, it is necessary that any suggestions relative to the applicability of Section 7 to conglomerate mergers fit these suggestions into the intent and mood of Congress exhibited by its extensive consideration of the measure. The Supreme Court, by its language in the Brown Shoe case, requires this. After footnoting the legislative chronology of the amendment, it stated:

\begin{quote}
\textit{(I)n the light of this extensive legislative attention to the measure, and the broad, general language finally selected by Congress for the expression of its will, we think it appropriate to review the history of the amended Act in determining whether the judgment of the court below was consistent with the intent of the legislature.}\textsuperscript{38}
\end{quote}

The purpose of Part II of this study is to determine the "intent of the legislature," especially as it relates to
conglomerate mergers. Chapter 4 will discuss the stated reasons for the amendment of Section 7: to prevent further collectivization in the American social, political, and economic structure; to plug the assets loophole; to strengthen the antitrust laws; and to include all types of mergers within the purview of the law. The desire to strengthen the antitrust laws led to the development of a new standard of illegality, viz., the substantial lessening of competition in a market generally. The development of this new standard and the other substantive provisions of amended Section 7 will be discussed in Chapter 5. Chapter 6 will review the economic evidence considered during the deliberations leading to the passage of the amendment, and Chapter 7 will conclude that, based on the considerations given the measure described in the preceding three chapters, Congress enacted basically an anti-oligopoly statute.
Footnotes

1For a detailed history of these proposals, see Note, "Section 7 of the Clayton Act: A Legislative History," 52 Colum. L. Rev. 766 (1952).


491 Cong. Rec. 2 (1945).


691 Cong. Rec. 10168 (1945).

791 Cong. Rec. 11077 (1945).


12The "between the corporations" provision, sometimes called the "Clayton Act Standard," or the "acquiring-acquired" test refers to the wording of the original Clayton Act which proscribed any (stock) acquisition 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, in the second paragraph, applying to holding companies, "... may be to substantially lessen competition between such corporations . . . ."

1394 Cong. Rec. 9351 (1948).
Footnotes--Continued

1495 Cong. Rec. 1237 (1949).


2195 Cong. Rec. 11507 (1949).

2291 Cong. Rec. 1410 (1945).


24A part of the hearings was introduced by an opponent of the amendment, Mr. Gilbert Montague, in his testimony before the House Subcommittee No. 3, in 1949. H. Hearings, 1949, op. cit., pp. 123 ff.


Footnotes--Continued


28Ibid., p. 11.


3138 Stat. 730 (1914), 64 Stat. 1125 (1950). It perhaps also should be noted that the substitution of the word "one" for "two" in the second paragraph makes that paragraph a repetition of the first in its meaning.


34S. Rept. 1775, p. 5.


36370 U.S. 294, 315-323. If the footnotes were printed in full-size type, the discussion would be approximately trebled in length.


38370 U.S. 294, 312.
Chapter 4

FUNDAMENTAL OBJECTIVES
OF THE AMENDMENT

Maintaining a Given
Social Structure

Throughout the hearings, reports, and debates concerning the amendment of Section 7 of the Clayton Act, there was always implicitly present, and frequently made explicit, the proposition that Congress was not dealing in strictly economic concepts. Rather, it was recognized that economic organization is part of and inseparable from political and social values. Summarizing this "holistic" approach, Senator O'Mahoney stated at the House hearings in 1945:

The problem of the world is the readjustment of individual rights and organized power. Our economic system is carried on for the most part by organizations. Our political system has been geared to individuals. . . . We have conflict between individual economic freedom and organized economic control; and the question that is propounded to us is whether or not we intend to do anything about it or intend to permit this steady drift (toward centralization) to continue.

You cannot hope to prevent the steady trend toward concentrated government unless you prevent the
steady trend toward concentration of economic power. [Previously, Senator O'Mahoney had described the relationship between concentrated economic power and the rise of "fascism, totalitarianism, socialism, and communism." ] You cannot hope to decentralize government through the states and local communities if you do not undertake to preserve free enterprise in the states and in the local communities. The two things are absolutely tied together; and the history of the last fifty years has been the steady loss to the government at Washington of political power by the people of the states, because we have permitted the loss of economic power to economic concentrations of the kind I have been describing. If we permit ourselves to lose our local economic independence, the loss of local political power is inevitable.1*

Senator O'Mahoney concluded with the question:

"Are we going to try to maintain a competitive system, or are we going to allow the drift toward more and more concentration to continue?" 2

Similar views were expressed through the consideration of the amendment, and consistently the desire to prevent "further concentration" in the economy was stressed.3

These comments show that the regulation of business activity and practices is based not only upon economic considerations but that there is believed to exist a direct relationship between the form of industrial organization and the general social and political structure. Also, there may

*Footnotes for Chapter 4 will be found on pages 160-164, infra.
be noted here a strong touch of economic determinism—as our economic organization goes, so goes the socio-political organization. Therefore, taking a certain social and political structure as the accepted norm, economic organization must be controlled in such a way as to permit the continued existence of the desired political and social structure.

Virtually all the proponents of the amendment, particularly when they found an opportunity for rhetoric, expounded a strong strain of Jeffersonian egalitarianism. And while the ideal of numerous small business firms comprising an atomistic (near) perfectly competitive economy may be inconsistent with contemporary techniques of production, there can be no doubt that the proponents of the amendment desired to strive for this ideal to the greatest extent possible, even at the expense, if necessary, of some degree of economic efficiency (see Chapter 9 below). There were no indications that the advocates of the measure were willing to accept the world of John R. Commons, composed of collectives—giant firms, labor unions, and political parties. Nor, given an alternative, would they accept as desirable a system of countervailing powers, presided over by a necessarily greater power—government.
The general "evil" of large industrial cities was cited by Representative Bryson in his comment that "the chance that a baby would die within one year after birth was considerably greater in big- than in small-business cities." And he insisted that small businesses retain civic consciousness, asserting that "under local management the legitimate profits of industry tend to remain at home and promote the well-being of the home town. Under local ownership, there are strong social and civic ties that bind the community together." And Senator Kefauver objected to the managerial revolution by asking the rhetorical question:

Shall we permit the economy of the country to gravitate into the hands of a few corporations, even though they may have very widespread stockholder distribution, with central-office managers remote from the places where their products are made, and the destiny of the people determined by the decisions of persons whom they never see, or even know of?  

There was thus expressed the general distrust of bigness in business as a corrupting influence on what was conceived to be the ideal in a democratic social structure. There was a feeling that concentrations of economic power run counter to the benefits of individual entrepreneurship, and that one of the ill effects of big business is that it diminishes the scope of entrepreneurship, forcing small businesses to restrict their freedom of economic activity under the shadow of the giants.
Closing the Assets Loophole

It was generally stated that the primary purpose for the amendment of Section 7 was to close the "assets loophole" resulting from the line of cases culminating in the Arrow-Hart & Hegeman case.\textsuperscript{12} Proposals for such an amendment had been made by the Federal Trade Commission first in 1928, and in each of their Annual Reports up to 1948 except in the years 1931-1934 inclusively.\textsuperscript{13}

Representative Kefauver,\textsuperscript{14} the F.T.C.,\textsuperscript{15} and the 1945 House report following the 1945 hearings\textsuperscript{16} took the position that the omission of an assets provision was either inadvertent or that it was implicitly included in Congress' intent, and that the assets loophole was created by the Supreme Court. As Representative Kefauver expressed it,

The bill is not complicated. It proposes simply to plug the loophole in Sections 7 and 11 of the Clayton Act.

The Clayton Act was passed in 1914 on the theory that it should be the purpose of the Federal Government to prevent monopolistic mergers by making them illegal in the first instance. The purpose was to prevent monopoly rather than merely to punish it after it had taken place. The intent of Congress at the time the Clayton Act was passed is definite and indisputable. An examination of the reports of the House and Senate committees and of the debate fully confirms this point. The Congress which passed the Clayton Act had in mind that monopolistic corporate mergers would be accomplished by one corporation purchasing the capital stock of another. The purchase of capital stock was the way mergers were being consummated at that time. The holding company device was generally used. This is prohibited in Section 7.
Section 11 of the same act provides that if, after a hearing, the Federal Trade Commission finds that Section 7 has been violated, the Commission shall issue a cease-and-desist order and direct the divestment of the stock involved.

Within a few years after the passage of the Clayton Act corporations conceived a means of bypassing the plain intent [italics mine] of the act by purchasing the physical assets of their competitors rather than the capital stock. As a practical matter these two sections became a dead letter in 1926 as a result of the Supreme Court decision in the case of Federal Trade Commission v. Western Meat Co. . . .

The loophole was further widened by the decision of the Court in the case of Arrow-Hart & Hegeman Electric Company v. Federal Trade Commission . . .

The question may be asked why Congress did not foresee these potential defects in the law when it originally passed the Clayton Act in 1914. The answer is to be found in the nature of the great consolidation movement of 1897-1905, which formed the economic background behind the passage of the Clayton Act. . . . Most mergers were effected through the purchase of stock . . . 17

That this view of the purpose of the original Section 7 is not correct has been pointed out in the Introduction to Part I above. It was most recently rejected by the Supreme Court in the Brown Shoe case. 18 Section 7 was originally directed only against stock acquisitions, and whenever asset acquisition was mentioned, the supporters of the bill insisted that they were not attempting to prohibit open and above-board acquisitions. 18

Be that as it may, there can be no doubt that the moving force, providing the foundation upon which the proponents
of the amendment could stand, was the assets loophole. One of the recommendations of the Temporary National Economic Committee had been as follows:

The law (Section 7) has fallen short of its objectives, in part because the law does not prohibit the acquisition of assets of competing corporations, thus affording a convenient way of circumventing the obvious intention of the law. The committee recommend that Section 7 of the Clayton Act be amended so as to include within its prohibitions the acquisition of assets of competitors under conditions applicable to stock under the existing law. 20

This reason for the amendment was stressed throughout the hearings, 21 reports, 22 and debates. 23 So concerned were the members of the House committee with the problem of "closing loopholes" that the 1949 report stated:

The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition, such as, for example, lease of assets. It forbids not only direct acquisitions but also indirect acquisitions, whether through a subsidiary or affiliate or otherwise. 24

Meeting the Inadequacy of Existing Antitrust Laws

The proponents of the amendment of Section 7 pointed out the anomaly resulting from the difference in the antitrust laws between the law relating to "loose-knit" combinations and the policy of permitting mergers which accomplished
the same results as conspiracies to restrain trade by price fixing, controlling output, etc. Senator O'Conor, in charge of the bill on the Senate floor, pointed out several cases in which the Justice Department had successfully prosecuted under the Sherman Act and the Clayton Act the activities and contracts of supposed competitors and then they had merged to avoid the law, therefore emphasizing the need for a tightening up of the law in regard to "tight-knit" combinations. He suggested that

. . . the more effective is the enforcement of the law against collusion among competitors, the greater is the incentive to achieve the same ends through purchase, consolidation, and merger. Thus, price fixing, division of markets, limitation of production, limitation of grades and types of products produced, exclusion of competitors, and other agreements prohibited when practiced by separate companies may be perpetuated as between any two companies through merger.25

Herbert A. Bergson, Chief, Antitrust Division, Department of Justice, stated:

It is now settled beyond dispute that agreements between two competitors to fix prices, to allocate territories, or to engage in other restrictive practices are illegal under the Sherman Act. It is a strange contradiction that the most effective and permanent means of lessening competition, namely acquisition of a competitor, should be permitted to continue.26

Perhaps the most effective committee appearance in opposition to the amendment to Section 7 was by Mr. Gilbert H. Montague, a practicing antitrust attorney and former
professor of antitrust law at Harvard University, from New York. He appeared at the House hearings in 1947, 27 in 1949, 28 and the Senate hearings in 1949. 29 At each of these hearings, his initial argument was that the Sherman Act was entirely sufficient to take care of any offenses against which the American economy needed protection. In support of this argument, he relied upon a number of (then) recent court decisions, from which he produced extensive extracts to substantiate his argument. The first case upon which he relied was the American Tobacco Company case. 30 Mr. Montague presented such quotations as the following:

We agree with the lower Court that such actual exclusion of competitors is not necessary to that crime [violation of Section 2 of the Sherman Act] in these cases, and that the instructions given to the jury correctly defined the crime [conspiracy to monopolize]. A correct interpretation of the statute and of the authorities make it a crime of monopolizing, under Section 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain power to exclude competitors from any part of the trade or commerce . . . provided they also have such a power that they are able as a group to exclude actual or potential competition from the field, and they have the intent and purpose to exercise that power. 31

At this point, Mr. Montague emphasized that all that was necessary was the power to exclude competitors. When Chairman Walters of the House Committee on the Judiciary asked, "Even if it does not exercise that power?" the reply was: "Even if it does not exercise that power, but if it has
it, and the possession of that power is so great that it can exclude competition, and raise prices, then it has violated the law."\textsuperscript{32}

Mr. Montague continued, quoting from the \textit{Alcoa} case:

It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opens, and to face every new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret exclusion as limited maneuvers not honestly industrial, but actuated solely by desire to prevent competition, can such a course, indefatigably pursued, be deemed not exclusionary. So to limit it would, in our authority, emasculate the act; would permit just such consolidations as it was designed to prevent...\textsuperscript{33}

In order to fall within Section 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as commanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.\textsuperscript{33}

Mr. Kelley, General Counsel for the Federal Trade Commission, objected that the \textbf{American Tobacco Company} case was a conspiracy case, but Mr. Montague quoted from the Supreme Court that the petition on \textit{writ of certiorari} was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act."\textsuperscript{34}
Mr. Montague then introduced the A & P case\textsuperscript{35} to show that the trial courts are willing to follow the language of the Aluminum Company case as approved in the American Tobacco Company case, quoting:

That Congress desired to go to the utmost extent of its Constitutional power in preventing restraints of trade and attempts to monopolize such as the information charges here, it appears very clear. The obvious purpose was to use that power to preserve the competitive business economy. This plan, this mechanism, did not break down; it never needed more than proper execution and proper enforcement. Too often, I fear, we enact a new law to cure maladministration of the old one.\textsuperscript{36}

Mr. Montague quoted the Yellow Cab case\textsuperscript{37} to emphasize that an antimerger law is not needed because

The fact that these restraints occur in a setting described by the appellee as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanction which Congress had imposed. The corporation inter-relationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.\textsuperscript{38}

The International Salt Company case\textsuperscript{39} was given as proof that even small restraints of trade are prohibited.

The volume of business effected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of
monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly" and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.40

This, of course, was a Section 3 case, but Mr. Montague made the point that in a post-1947 Supreme Court, such standards would also be applied to Section 7.41 Emphasis was put on the motion picture cases42 to show the extensive scope of the Sherman Act. Quotations included:

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that every restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement.43

On the record as we read it, it cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit.44

For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power.45

At the 1947 House hearings Mr. Montague had stressed the adequacy of the Sherman Act by pointing out that the Department of Justice had recently established an anti-merger division and that it had brought suit against the Columbia Steel Company, a U. S. Steel subsidiary, regarding the purchase
of the Geneva plant.\textsuperscript{48} At the 1949 House and Senate hearings, Mr. Montague was noticeably silent on this case, and his only substantive comment regarding it was in a submitted, prepared memorandum in which he said:

\begin{quote}
United States v. Columbia Steel Company\textsuperscript{47} does not weaken the tobacco ruling, for the Columbia Steel decision was controlled by the narrowness of the charge in the complaint and by the Attorney General's previous approval of the purchase of the Geneva plant.\textsuperscript{48}
\end{quote}

In refutation to Mr. Montague's arguments, Herbert A. Bergson, Chief, Antitrust Division of the Department of Justice, at the House hearings in 1949 stated:

\begin{quote}
Accordingly, the Clayton Act was directed only to stock acquisitions. Since that time, however, court decisions have limited the application of the Sherman Act in this field (mergers) with the result that neither the Clayton Act as it now reads nor the Sherman Act, as it is now interpreted, is adequate to deal with the problem of asset acquisitions.

The latest decision of the Supreme Court on the subject, United States v. Columbia Steel Co., demonstrates the need for more effective legislation.\textsuperscript{49}
\end{quote}

Senator Kefauver, appearing at the House hearings in 1949, stated:

\begin{quote}
It was hoped by Mr. Montague and others who were opposing this legislation that the Department of Justice would win the Consolidated Steel case, which would have had the effect of restraining mergers even though they did not get to the big proportions of 35, 40, or 50 per cent of the industry.
\end{quote}
However, the Department of Justice has lost the Consolidated Steel case.

I do want to urge, while there is still time to save our free economy, before we reach the point of concentration where we are going to have a demand for state control of these basic industries, in order to preserve our free enterprise system where every person and small corporation can have an opportunity of competing, that this Committee exercise its good judgment and plug this loophole in Section 7 of the Clayton Act and carry out the apparent intent of Congress when it passed the Act in 1914.50

In the Senate debates, the argument was also presented that the Sherman Act was sufficient. Senator Donnell pointed out that the Court of Appeals for the Tenth Circuit in the Shotkin case had said:

But regardless of the intent of the parties, if the inherent tendency of the combination, agreement, or concert is substantially to lessen, hinder, or suppress competition, in the channels of the trade or commerce, it comes within the sweep of the Act.51 Senator Donnell used this to substantiate his position that assets acquisitions are now adequately covered.52 In insisting that the Sherman Act was adequate, he stated:

Although the proof adduced by the government failed in that suit (the Columbia Steel case) to prove its contention that the acquisition of Consolidated—that is, of its assets—would unreasonably lessen competition in the respect charged, and consequently, the Court held that the proposed contract was not forbidden by Section 1 of the Sherman Act, it is nevertheless obvious that the Court accepted the proposition that the sale of assets if an unreasonable lessening of competition were proved would be illegal. . . . In this connection, the Court stated, "On the record before us, and in agreement with the trial court, we conclude that
the government has failed to prove its contention that
the acquisition of Consolidated would unreasonably
lessen competition in the three respects charged, and
therefore the proposed contract is not forbidden by
Section 1 of the Sherman Act.53

Senator Donnell seems in this instance to have
missed entirely the intent of the proponents of the amend­
ment. That is, they were desiring to extend the coverage of
the Sherman Act, and did not desire that acts be illegal only
where they tend to unreasonably lessen competition, but that
a new standard was being proposed—that of a substantial
lessening of competition. Senator Kefauver took the floor
following Senator Donnell and stated:

When the Columbia Steel case was first brought
and was pending, I remember very distinctly that the
distinguished lawyer to whom the Senator from
Missouri (Senator Donnell) referred, Mr. Gilbert
Montague, who is indeed a very capable lawyer, and
has been most effective in contesting this bill
over a period of many years, based his argument
against this bill on the grounds that the Depart­
ment of Justice had wisely brought the Columbia
Steel case, and that if the position of the Depart­
ment of Justice prevailed in that case—as he was
sure it would—the problem of monopolistic mergers
could be adequately taken care of by the Sherman
Act, thus making unnecessary the passage of this
bill.

Of course, we all know that the Department of
Justice lost the Columbia Steel case; that argument
lost its force, particularly since the merger
involved represented a very substantial acquisition
with a substantial effect on competition.... I
believe that if Section 7 of the Clayton Act had
been amended as the pending bill proposes, the
acquisition which was made by the United States
Steel Corporation in that case would not have been
permitted.54
So effective had been Mr. Montague's presentation at the House hearings in 1947 that nine of the members of the Committee on the Judiciary submitted minority reports to House Report 596, stating:

While the Commission has repeatedly referred to the Supreme Court rulings in the Swift, Thatcher, and Arrow-Hart cases, it still has not shown any necessity for this legislation. These cases limiting the remedy under Section 7, as well as the International Shoe case dicta on what constitutes substantial competition, are all old cases. Since these opinions were rendered, the Court has greatly expanded the reach of the antitrust laws and overruled many earlier restrictive rulings.55

As indicated in the present writer's discussion of the International Shoe case,56 the case actually turned on the decision that there had not been substantial preexisting competition, due to the extremely narrow definition of what constituted the market, and the Court had merely proceeded on its own initiative to discuss the necessary impact that the substantial lessening of competition must have upon the market generally—that injury sufficient to come within the scope of the Sherman Act. But, this latter language of the Supreme Court had been followed in subsequent Circuit Court of Appeals decisions.57 Mr. Montague, at the House hearings in 1947, had emphasized that the reconstructed Court would read the language of the International Shoe case (1930) in a new light, and apply the stricter standards which he pointed
out were characteristic of more recent cases (the Aluminum case, the American Tobacco Co. case, and the motion picture cases.)

Mr. Montague also presented all of his arguments pertaining to the adequacy of the Sherman Act in the 1949 hearings in both houses, but the Committee on the Judiciary of the House while acknowledging the potency of the Aluminum case and the American Tobacco Co. case insisted that in the latter case, the charge of conspiracy was so intermingled with the finding that the case failed to provide any clear cut basis for proceedings against the particular problem with which the pending bill was concerned. In regard to the Aluminum Co. case, the report stated:

It is important to note that the Supreme Court did not affirmatively endorse the statement of the special court that 90 per cent control by one corporation is enough to make an unlawful monopoly, per se, or the statement that it was doubtful whether 60 to 64 per cent would be enough, and that 33 per cent is certainly not enough.

On top of these considerations . . . the Supreme Court in a decision subsequent to the Aluminum and Tobacco decisions, held that the acquisition of the largest steel fabricator on the West Coast by the largest steel producer on the West Coast (which itself is a subsidiary of the largest steel producer in the nation) did not violate the Sherman Act. (U.S. v. Columbia Steel et al., 334 U.S. 495.)
After discussing Mr. Montague's arguments that the Sherman Act was adequate, the Committee Report stated:

However beneficial these decisions may prove to be in the enforcement of the Sherman Act, we do not believe they solve the entire problem. Nor do they convince us that Congress should no longer rely on the Clayton Act or not make attempts to cure its obvious defects.

It should be noted that the House report of 1949 was unanimous, even though five of the nine members who dis­sented two years earlier in the House report were still serving on the committee.

Senator Donnell had written a minority opinion in the 1950 Senate report stating that the Sherman Act was entirely adequate to handle even a substantial lessening of competition. Senator Kefauver, in refuting this position, stated in the debates:

The Minority views seemed to rely primarily on the case of United States v. Columbia Steel Company . . . for the argument that the Sherman Act already makes illegal asset acquisitions which have the effect of substantially lessening competition. In that Sherman Act case, the court devoted a large portion of its opinion to discussion of the relative sizes and productive capacities of the corporations concerned in proportion to the size and productive capacity of the total market involved. However, it does not follow from the application by the Court in the Columbia Steel Company case to the Sherman Act standard of reasonableness that the acquisition of assets would not have been considered substantial [italics mine] had the matter arisen under the Clayton Act strengthened as provided by this bill.
Along with the attitudes and understanding concerning the concepts of concentration, described below in Chapter 6, it seems reasonable to conclude that the Columbia Steel Company case had a most decisive effect upon the passage of the Amendment to Section 7 of the Clayton Act.

**Extending Section 7 to Include Conglomerate Mergers**

That the Congress intended to prohibit all mergers, including conglomerate mergers, within the scope of Amended Section 7 of the Clayton Act where the effect may be substantially to lessen competition or tend to create a monopoly, is amply borne out in the hearings, reports, and debates. The Federal Trade Commission Report, *The Present Trend of Corporate Mergers and Acquisitions*, was introduced into the hearings held by the House Judiciary Committee in 1947. In this report, the Commission stated:

The third avenue of expansion, the conglomerate acquisition, contributes greatly to the concentration of economic power, since it results in the absorption of many small firms in different and often completely unrelated lines of activity. Examples of conglomerate acquisitions are provided by the recent acquisitions of Maytag Washing Machine Company in buying into a producer of chicken brooders; of American Type Founders, Incorporated, a manufacturer of printer's type and printing machines, in purchasing manufacturers of high fidelity radio sets and chromium and plastic furniture. . .
The traditional rationalization for mergers is less applicable to this type of acquisition of firms in completely dissimilar and unrelated fields than to the horizontal and vertical types because of the great difficulty in obtaining thereby any important advantages of production and distribution.

Perhaps the most important danger which is inherent in these conglomerate organizations is the economic power which they can wield over a large number of different industries. Threatened with competition in any one line of its fields of enterprise, the conglomerate corporation may sell below cost or may use other unfair methods in that field, absorbing its losses through excess profits made in its other lines of activity, all rationalized in the name of "meeting competition." The conglomerate corporation is thus in a position to strike out with great force against small business in a variety of different industries. There are few greater dangers to small business today than the continued growth of the conglomerate corporation.63

Charts introduced by the Commission showed that

Conglomerate acquisitions, in which there is no discernible relationship in the nature of business between the purchasing and the acquired firm, represented 22 per cent of the total number of acquisitions for the period 1940-1946.64

Conglomerate acquisitions were made in substantial numbers by beverage, metal fabricating, machinery, transportation equipment, and drug corporations. In addition, many acquisitions of this type were made by non-manufacturing concerns, notably reflecting the absorption of manufacturing firms by financial and banking interests.65

In the FTC's 1948 report, The Merger Movement, A Summary Report,66 the definition of conglomerate acquisitions and many examples of how different corporations had thus
expanded, included: "the purchase of a can machinery firm by a diesel engine manufacturer; the acquisition of a paper bottle company by a large maker of precision parts of aircraft, diesels, and autos; and the merger of a leading vacuum cleaner manufacturer with an oil burner firm." In the report was a fold-out chart showing the organization of American Home Products Company, originally a drug and pharmaceutical firm but having expanded by acquisitions into the lines of: food specialties; waxes and polishes; chemicals; dyes and paints; insecticides; cosmetics; and others, including a small steel fabricator.

The House report from the 1949 hearings made it quite clear that conglomerate mergers were intended to be included, if they had the proscribed effect of (a) the probable lessening of competition, or (b) a tendency toward monopoly. The fold-out charts which had been prepared by the FTC in its report (above) were included in the House report, along with the statement that since the 1914 Act included the words between the corporations,

It has been thought by some that this legislation applies only to the so-called horizontal mergers. But in the proposed legislation, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firms has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a
second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.

If, for example, one of a number of raw material producers purchases firms in a fabricating field (i.e., a "forward vertical" acquisition), and as a result thereof, competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms.

The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers. 68

Representative Celler appeared before the Senate Subcommittee of the Committee on the Judiciary and presented the charts from the FTC's Summary Report and described them to the Committee. He first described the Borden Company—how they had expanded vertically, horizontally, and by conglomerate mergers:

Then you see how, in conglomerate manner, they reached out in other directions not related to their basic product, dairy products, milk, and ice cream, and they acquired the Farallone Packing Co., packing sardines and fish oil—I wonder what in thunder they do with fish oil and sardines. They do not mix same with the milk, I hope.

Then they acquired Soya Bean Products Co. They acquired pharmaceuticals, and on the other extreme they acquired Dog Pet Foods, and they went into the plastics business. They went into businesses wholly unrelated to dairy products, milk, ice cream, and so on, and if the loophole is not plugged in our anti-trust laws, they will branch out from two soya bean
products companies to acquire many other soya bean products companies, and they will branch out with their one pharmaceutical company, the F. W. Straub and Co., of Chicago, Ill., to acquire any number of other pharmaceutical companies. The same way with plastics. There will be no end to the acquisition of power and influence of the Borden Company.70

That Representative Celler was absolutely correct regarding the policies and intentions of the Borden Company is borne out by an observation of its recent merger activities. Since 1953, the plastics operations of the Borden Company have been integrated, both vertically-forward and vertically-backward, the cosmetics operations have been extended horizontally, and the dairy and allied lines have expanded to Puerto Rico, Caracas, and Mexico City.71

Mr. Celler then presented his third chart, demonstrating an organization that was primarily conglomerate:

We offer a third chart that indicates the widespread activities of the American Home Products Co. in their conglomerate acquisitions of all kinds of unrelated products. First they bought out competing drug and pharmaceutical houses... the horizontal acquisitions. Then you see the unrelated acquisitions. They bought out five food specialty houses. They bought out five concerns making waxes and polishes, bought four chemical outfits; they bought four dye and paint manufacturing outfits. They bought insecticide outfits, cosmetic outfits.

Where is it going to all end?72
One of only two comments in the House concerning conglomerate mergers was when Representative Michener stated that the new bill was too strong.

A manufacturer of low price shoes could not merge with a manufacturer of high price shoes because, since either company could decide to add the other line, the effect may be to substantially lessen competition between them. 73

Here Representative Michener is referring to the type of conglomerate merger often called "rounding out the line." He saw this amendment, therefore, as reversing the International Shoe Company case. 74 He also recognized the more truly conglomerate merger by stating:

A manufacturer of electric washing machines buys out a radio manufacturer. Before the merger, the two companies were not competing in any manner. Either could decide to go into the other line, however, and thus compete with the other. This merger could therefore be unlawful since the effect may be to lessen competition. 75

Representative Michener is here expressing a view which, in some future case, the Federal Trade Commission will perhaps hope the Courts will accept; that is, that the entry of the manufacturer into a new line by acquisition is virtually automatically a lessening of competition, at least in terms of potential competition. Before the acquisition, the acquiring firms represented the most substantial competitive threat to the existing manufacturers. Once the
firm, however, has bought into the industry, rather than built in, he is automatically removed as a competitive threat in that market.

Representative Boggs described the types of acquisitions including the nature of conglomerate mergers:

A third avenue of expansion, and this is one of the most detrimental movements to a free enterprise economy, is the conglomerate acquisition. This is the type which carries the activities of giant corporations into all sorts of fields, often completely unrelated to their normal operations. In times such as these when big corporations have such huge quantities of funds, they are constantly looking around for new kinds of business to enter. By this process they build up huge business enterprises which enable them to play one type of business against another in order to drive out competition.76

In the Senate debates, the only mention of conglomerate mergers was by Senator O'Mahoney, who used an easel to display the FTC charts showing the different types of mergers. Concerning conglomerates, he stated:

(N)early 25 per cent of the mergers by acquisition of assets represented what was known as conglomerate mergers; that is to say, corporations buying other corporations dealing in unrelated businesses. For example, the Universal Match Co. purchased a number of candy corporations. This widespread entry of corporations into unrelated lines of manufacturing is, in part, a result of the extraordinary accumulation of liquid assets in corporate treasuries because of their operations during the war, and because we have not taken the steps necessary to prevent this constant concentration which closes the door to enterprise by the citizens of the States which are represented by every Senator upon this floor.77
Conclusion—Underlying Objectives

Senator O'Conor, summing up the reasons for passage of the amendment, listed the following:

1. To restore meaning to Section 7 . . .
2. To close the avenue by which through mergers corporations can attain the same ends which are now prohibited if they are accomplished through conspiracy or collusion among independent firms.
3. To halt the continuous long term upward trend in economic concentration.
4. To protect the independence of small business, and
5. To protect and preserve the American System of free enterprise. If concentration continues to increase the nation will surely sink into some form of collectivism—fascism, socialism, or communism. The replacement of free enterprise by any of these forms of collectivism is unthinkable. Yet, unless the trend upward toward increasing concentration is arrested, collectivism may well be upon us.78

The economic evidence concerning the "upward trend in economic concentration" will be discussed more fully in Chapter 6. Suffice it at this point to say that proponents of the amendment saw economic power gravitating more and more into the hands of larger and larger corporations. Without clear discussion as to why, or the theoretical economic considerations regarding economic efficiency, such concentration was adjudged undesirable. Congress desired to prevent any acquisition by one corporation of the property owned by,
or representing, another that might produce increased concentration and its assumed attendant evils. And, as will be discussed in Chapter 7, the means sought to be employed in implementing the above objectives was to prevent any lessening of competition generally, in any market, which might result from a merger.
Footnotes


2Ibid., p. 15.


4See, e.g., Frederick L. Nussbaum, A History of the Economic Institutions of Modern Europe; An Introduction to Werner Sombart (New York: Crofts, 1953).

5See Chapter 9 below.


Footnotes--Continued


12 Arrow-Hart & Hegeman v. Federal Trade Commission,
291 U.S. 587 (1934), Chapter 3, supra.

13 F.T.C. Annual Reports, 1928-1948.

14 H. Hearings, 1945, pp. 4-5.


16 U. S. Congress, House, Committee on the Judiciary,
Amending Sections 7 and 11 of the Clayton Act, 79th Cong.,
as H. Rept. 1820.

17 H. Hearings, 1947, pp. 4-5.

18 Brown Shoe Co. v. United States, 370 U.S. 294,
311 (1962).

19 See Chapter 1, supra.

20 U. S., Temporary National Economic Committee,

21 H. Hearings, 1945, pp. 5, 20, 35; H. Hearings,
1947, pp. 12, 20, 26, 68, 83; U. S. Congress, House,
Amending Sections 7 and 11 of the Clayton Act, Hearings
Before Subcommittee No. 3 of the House Committee on the
Cited herein as H. Hearings, 1949.

22 H. Rept. 1480, pp. 2-3; H. Rept. 1820, p. 3;
U. S. Congress, House, Committee on the Judiciary, Amending
(1949), Report 1191, pp. 4-5. Cited herein as H. Rept. 1191;
U. S. Congress, Senate, Committee on the Judiciary, Amending
An Act Approved October 15, 1914, 81st Cong., 2d Sess. (1950),
Footnotes--Continued


24 H. Rept. 1191, pp. 8-9.


26 H. Hearings, 1949, p. 74.


31 328 U.S. 781, 809.

32 H. Hearings, 1947, p. 137.

33 United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).

34 H. Hearings, 1947, p. 142.


38 332 U.S. 218, 221.


40 332 U.S. 392, 396.
Footnotes--Continued

41H. Hearings, 1949, p. 98.


43334 U.S. 100, 123.

44334 U.S. 110, 127.

45334 U.S. 131, 171.

46H. Hearings, 1947, p. 121.


48Ibid., p. 226.

50Ibid., p. 13.

51Shotkin v. General Electric Co., 171 F. 2d 236 (10th Cir. 1948).


53Ibid.


55H. Rept. 596, p. 12.


57Temple Anthracite and Vivaudou cases. See Chapter 3, supra, pp. 104-105.

58H. Rept. 1191, p. 9.

59Ibid.

60H. Rept. 596, p. 7.
Footnotes--Continued

61 96 Cong. Rec. 16672 (1950).
63 Ibid., pp. 308-309.
64 Ibid., p. 308.
65 Ibid., p. 310.
67 Ibid., p. 60.
68 Ibid., p. 72.
69 H. Rept. 1191, p. 11.
70 S. Hearings, 1949, p. 65.
72 S. Hearings, 1949, p. 65.
73 95 Cong. Rec. 11721 (1949).
74 280 U.S. 291 (1930).
75 95 Cong. Rec. 11721 (1949).
76 95 Cong. Rec. 11726 (1949).
77 96 Cong. Rec. 16449 (1950).
78 96 Cong. Rec. 16669 (1950).
Chapter 5

SUBSTANTIVE PROVISION OF
AMENDED SECTION SEVEN

The Development of a New
Standard of Illegality

As pointed out earlier, the House Resolution (H.R. 515) as originally submitted retained the language of the existing Section 7 of the Clayton Act to the effect that an acquisition was unlawful if the effect was to substantially lessen competition between the acquiring and the acquired corporations. This provision caused a great deal of concern especially on the part of the opponents of the measure, but also on the part of proponents of the amendment. It was generally pointed out that if Section 7 were reenacted containing the "between" provision, the Supreme Court might very well read this language literally, and the effect would be to prohibit virtually all mergers between corporations which were in competition in any way. And it was recognized by all parties that there may be instances in which the merger, particularly of small firms, may very well strengthen

*Footnotes for Chapter 5 will be found on pp. 196-198, infra.
the general competitiveness of a given market. Mr. Montague, in his testimony opposing the bill, stated:

"Now, the little fellows can get together and give the big fellows competition, and as long as the little fellows don't get so big as to be able to exclude competition, or raise prices, there is no violation under the (present) law. The little fellows are absolutely stopped by this legislation proposed here, from ever getting together with any of their competitors, so that it is a most extraordinary case of a bill being put forward as helping small business, when there is nothing but a handicap to small business, and it does not touch the big companies at all, except to insure them against the possibility that there can be any merger of small competitors, smaller than themselves, so as to build up a company which will be effective against a large company."

Representative Case was the moving force in the adoption of a new standard of illegality, stricter than the Sherman test of "reasonableness" but not so strict as to prohibit all mergers. While the language referring to competition between the acquiring and the acquired corporations was still in the proposal, Mr. Joseph D. Henderson, presenting the case for the American Association of Small Business, Incorporated, was testifying in favor of the amendment, and stated that certainly a company had the right to sell out. Representative Case pointed out that

"You don't have the right to do that. You would not have an absolute right to do it under this bill as it is drafted now... I think an exception might be made in such cases, but if it should be made, it
must be done by express language . . . if you are in substantial competition, the law would prevent it [selling out].³

Representative Case had indicated that it should be recognized that there are many instances in which mergers actually do promote competition, and that it is the intention at least on his part that there should be provision to insure the maximum of efficiency; but that under the proposal as presented, there was an arbitrary rule that no corporation could acquire the stock or assets of a competitor.

You are doing something that absolutely prevents, it seems to me, the whole course on which business has grown up in this country, without giving a rule of reason or flexibility whatever to take care of the real purpose, which is to increase competition. I am wondering whether an arbitrary rule, which is what this is, with no discretion, is the wise way of approaching this problem, or whether it would be better to leave it in the hands of the Department of Justice.⁴

Representative Case was here ignoring the language (dicta) in the International Shoe case in which the Supreme Court had interpreted the wording to mean (1) that there must be substantial preexisting competition between the firms, and (2) that there must then be an injurious effect to the public such as would come within the purview of the Sherman Act. In justification of his above comment, however, he pointed out that even reenactment of existing wording may very well be looked at anew by the Supreme Court, and the literal wording be applied in all cases.
Federal Trade Commissioner Freer replied:

I am afraid that the best answer I can make here is that we don't agree . . . that such rigidity is one of the bill's purposes. I would say that the Commission supports this bill which repeats the language of the previous act because that seems the way of embodying that part of the decision law defining the test of what is a substantial lessening of competition tending toward monopoly, or the test of what constitutes restraint of commerce in any line of commerce, or in any community, or area, etc. 5

By this language, Commissioner Freer was apparently expressing the desire for a reenactment of the law, including the standard enunciated in the International Shoe case--that the injury must be such as to unreasonably restrain trade.

Representative Case replied:

Well, sir, I don't believe you can assume that any rule that the Commission has worked out under the law with reference to stock acquisition would carry over into this new situation. It seems to me that you have got something where the plain language of the statute, if it should be amended, would prevent any such rule of reason at all as to competition . . . But you are changing the law, and you have quite a different picture, and it just makes me wonder if we should not consider whether this might not harm our objective--promoting efficiency. 6

The comments by Representative Case seem to be the first instance in which anyone had seriously considered the literal import of the words--a substantial lessening of competition between the corporations. As suggested above, perhaps the Federal Trade Commission was attempting to retain the language that had been virtually ignored by the Supreme
Court, and then be in a position to prevent mergers simply upon proof that there was preexisting competition. William T. Kelley and Commissioner Freer assured the Committee on the Judiciary that it was not their intention to prosecute small businesses which might have the effect of increasing competition and that small businesses therefore had nothing to fear. They also relied, in this regard, upon the standard of illegality announced in the International Shoe case, that is, that the effect on competition must be an unreasonable restraint. But Representative Case desired to shift the emphasis to the competitive situation in a market generally, and establish a criterion most promotive of a competitive market structure, whether it meant permitting mergers or prohibiting them.

The statements by Representative Case (above) were made on March 19, 1947. On March 26, Mr. Kelley reappeared before the Committee with a suggested change in the proposed amendment. He stated that

Now, when it came to construe that original language [the words "between the corporations"], however, the Supreme Court did not accept the effect on competition between the corporations under a literal construction of the language as the only test of illegality, but applied, rather, you might say, the Sherman Law test, namely, the demonstrable effect on competition in industry.
That is brought out in a number of cases, notably the International Shoe case, and other cases, in the Circuit Courts of Appeal. Now, literally read, the language in question prohibits practically all acquisitions of stock or assets between competing corporations—and without regard to their effect on competition generally.

Now, the enactment, or rather the reenactment of such language in this bill here might be construed just as it has been construed by the courts, and that rather applies the Sherman Law test, and does not stop many of the mergers that perhaps should be stopped in the public interest, and certainly lead to this concentration of economic power.

Now, the point I am making is that the Sherman Law is not an effective remedy, and is not adequate, and under its interpretation and enforcement, in a long line of decisions, it has not reached many of the acquisitions that I think are not in the public interest.

On the other hand, under the terms of this bill as it is written, there is a definite standard—but the trouble I find with this bill is that I think the standards are too rigid, and thinking about this, in line with the questions of Congressman Case, I have worked out some language that I am going to lay before you. I want a rigid standard and I do not want it too rigid. At the same time, I want to get a standard of legality that will be as good as we can do. It is a difficult situation.

If you have 515 before you, I have here, with a view of finding and formulating some acceptable middle ground, and solving what might become an irreconcilable difference between two opposing philosophies, I offer the following suggestion:

I would strike out the following language, "between the corporation whose stock is, or whose assets are, so acquired and the corporation making the acquisition, or to restrain such commerce".

I am trying to strike a level between the interpretation of the Courts under attempts to monopolize in the Sherman Law, and letting in, under the bars, to acquire stock and consolidate and merge, those corporations, where, after they get together, the effect will
not be to substantially lessen competition or to create a monopoly in the place where they do business.  

Mr. Walter B. Wooden, Assistant General Counsel for the FTC, further explained, regarding the removal of the "between" provision, that under the Court's interpretation the Sherman Act test was applicable to Section 7.

Representative Case asked:

Are you happy with that?

Mr. Wooden: No, I am not. It seems to me that the whole philosophy of Section 7 from its inception was to set up a new standard and a standard that would result in curbing corporate mergers before they reached the status where the Sherman Law test would be applicable.

Mr. Case: Now, at what point . . . ?

Mr. Wooden: That is the point. I suppose we will have to proceed on the lines of trial and error, but the original section, even as printed in this bill, did carry the standard of the effect on competition between the acquiring and the acquired corporations.

Now, we have proposed an amendment which would not apply that rigid a standard, and the standard which has been suggested by our amendment we conceive to be an in-between standard, somewhere between the two extremes of the Sherman Act test, on the one hand, and the test of the effect on competition between the two corporations, on the other.

Representative Kefauver, testifying before the Committee on March 19, 1947 stated: "The bill is not complicated.
It proposes merely to plug the loophole in Sections 7 and 11 of the Clayton Act. But, on March 21, and March 26, 1947, the inquiries by Representative Case, and the proposed change in the proposed amendment by the Federal Trade Commission were introduced and discussed as described above. On March 28, Representative Kefauver again appeared before the Committee and stated:

The question, as I see it, as to whether to merely plug the loophole, and accept the rule of reason which has been written into Section 7 by the Courts, or whether to accept the amendment submitted by the Federal Trade Commission, is an important question for the Committee to decide.

I feel that in view of the fact that the ordinary layman and perhaps some members of Congress who do not have a chance to read these opinions, may feel that the language actually means what it says; that if there is any competition between the two companies, the merger cannot be consummated, that it would be better to adopt an amendment proposed by the Federal Trade Commission.

Since there had been this introduction of a new standard, it was suggested that the intention of the Committee regarding the wording be made explicit. Herbert A. Bergson, Chief of the Antitrust Division, Department of Justice, stated:

I understand it is the intention of the framers of H.R. 2734 [the successor to H.R. 515] that a different test should apply from that now governing mergers under the Sherman Act. ... [Here he is referring to the Columbia Steel case.]
In my opinion, the bill would become largely meaningless if it were merely to enact the same test as that applied under that Act. It seems clear, however, that the language used in the bill, and the purpose for which this legislation is being considered renders such a construction unlikely. The Committee may wish to make this clear in its report.¹³

Mr. Kelley agreed with this statement, and recommended that the House report should state explicitly:

(1) That your purpose in omitting the language now in the Clayton Act which tests the legality of a stock acquisition by its effect upon the corporations immediately involved, was to avoid making the prohibition of the law applicable to inconsequential acquisitions, distinguished from acquisitions that materially change the number, size, or power of the enterprises engaged in competition;

(2) That you do not regard the bill as applied only to acquisitions the result of which would be an impairment of competition in proportions great enough to constitute a violation of the Sherman Act;

(3) That the purpose of this bill is like that of the Federal Trade Commission act, in that it seeks to cope with anticompetitive developments in their incipiency.¹⁴

The House Committee accepted these recommendations and included such a statement in their report:

Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.

Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition, but as a result of a series of acquisitions. This bill is intended
The Senate Report was more explanatory in the details of the development of the new standard:

The present wording of H.R. 2734 is intended to cover more than is prohibited by the Sherman Act and yet to stop short of the stated test of the present Section 7 of the Clayton Act. Section 7 of the Clayton Act was originally written to reach effects beyond those prohibited by the Sherman Act, extending to the reduction of the competition which had previously existed between the acquiring and acquired companies. This latter feature, namely the effect on competition between the acquiring and acquired corporations, has been regarded as the distinctive "Clayton Act test," insofar as it relates to Section 7 of the Act.

The purpose of H.R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. But here a problem presented itself. While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies. The present wording of H.R. 2734, but beginning with H.R. 515, introduced on April 24, 1947, represents an attempt to solve this problem. Several steps have been taken in order to achieve a solution.

The Committee believe that the excessive sweep that has been given to Section 7 of the Clayton Act by these two features [the acquiring-acquired test and the use of the word "community"] of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this
legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The Committee wish to make it clear that the bill is not intended to revert to the Sherman Act test.16

Senator O'Conor, during the Senate debates, discussed the removal of the "between the corporations" provision as serving the purpose of removing any possibility of an interpretation that would prohibit inconsequential acquisitions of stock or assets. Here, he was, as was the case in most of the explanations concerning this change in the standard of illegality, particularly concerned with the small corporations merging in order to make competition more effective. Although he recognized that the Supreme Court had not looked at the "between the corporations" provision, but had looked at the entire market, he wanted to remove the possibility that the Court would look at the literal meaning of the phrase in the future. He stated that the strict interpretation of the phrase would have prohibited all mergers of competitors.

Instead of making the test of the law the effect of the acquisition on competition between the acquired and the acquiring companies, the proposed bill substitutes the more general test of the effect on competition generally in any line of commerce in any section of the country. And to come within the prohibition of the bill, the effect on that competition must be "substantial."17

One of the most telling contrasts between the Sherman Act standard and the proposed new standard was indicated by
Senator Donnell's comment in his minority report in which he was insisting that the Sherman Law was adequate in that it prevented any unreasonable lessening of competition. Quoting from the Supreme Court in the Columbia Steel case, he said:

> On the record before us, and in agreement with the trial court, we conclude that the government has failed to prove its contention that the acquisition of Consolidated would unreasonably lessen competition in the three respects charged, and therefore, the proposed contract is not forbidden by Section 1 of the Sherman Act.18

Senators Kefauver and O'Connor, in replying to this statement, pointed out that there was no doubt in their minds that the acquisition in the Columbia Steel case did substantially lessen competition, and that if the proposed Amendment to Section 7 had been in effect, such an acquisition would have been unlawful. Here, the contrast was drawn between the Sherman Act test of "unreasonable lessening of competition" and the new proposed standard of "substantial lessening of competition."

As indicated in the discussion concerning the demise of the original Section 7, it was pointed out that the Commission considered Section 7 a dead letter because the Courts required that there be an effect on competition generally and that, to the extent sufficient to constitute a Sherman Act violation. But the Commission steadfastly refused to consider the competitive nature of the markets involved
before and after the mergers, and the effect of the merger on such competition. From the nature of their surrender, and the statements made concerning the proposed amendment, it would appear that the Commission desired that the "between" provision be retained, and that the courts would interpret the reenactment of Section 7 to mean that mergers would be prohibited where there was substantial competition between the corporations, which competition was eliminated by the acquisition. In other words, the Commission's approach to prevent the feared growth of economic concentration was to prohibit any mergers between competitors. Representatives of the Commission pointed out that small business would be protected as a matter of policy, as it had been in the past, and that they would not attempt to prevent mergers that were inconsequential or had the effect of increasing rather than decreasing competitive conditions. This would have left a great deal of discretion in the hands of the Commission, and Representative Case, fearing that administrative and judicial interpretation might some day go too far so as to prohibit all mergers between competitors, then induced the Commission to shift its position to a criterion based entirely upon the competitive situations in a given market before and after a merger, and the probable effect of the merger upon the competitive nature of such
relevant market. There was thus established the new standard, a substantial lessening of competition.

"Substantially to Lessen Competition"

Mr. Kelley, in summing up his recommendations to the House Committee on the Judiciary in 1949, stated that the House report should explicitly state:

(4) That you intend the bill to apply to acquisitions which have been such effects [sic] as substantial reduction of the number of competitors, or reduction of the number to such a point as to restrain unduly the variety of choices available to persons who must deal with the remaining concerns, or provisions of a decisive advantage of one business enterprise over its rivals, or encouragement toward the adoption of policies calculated to maintain prices by reducing output.19

The House report, following these hearings, did make such a statement under the heading "Would the Bill Merely Duplicate The Sherman Act?" The report stated:

The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition even though this effect may not be so far reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens
to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.28

Senator Kefauver, in rebuttal to Senator Donnell's statement in Senate Report 1775 that the Sherman Act was entirely adequate, after stating that he believed that the Columbia Steel case was a strong argument in favor of the proposed amendment, and that the decision would have been the other way if the criterion had been a "substantial" lessening of competition, rather than an unreasonable lessening of competition, quoted approvingly from the International Salt case21 for an indication of what "substantial" lessening of competition might mean for Section 7. Since the Columbia Steel case had placed so much emphasis on shares of the market, Senator Kefauver hoped that the interpretation of a "substantial" lessening of competition would turn on the International Salt decision. He pointed out that the Court, in that case, had not taken into consideration the total volume of salt produced in the industry, nor the share sold by the International Salt company. Quoting the Court, he stated that

The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly" and it is
immaterial that the tendency is a creeping one, rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement (332 U.S. 392 (1947)).

Senator Kefauver was thus hoping that the Court would perhaps shift from comparing market shares to simply looking at the business carried on by the respondent, and if such business was not insubstantial, it would come within the meaning of "substantial" lessening of competition. That is, if the business were quantitatively (not relatively) substantial, it could be condemned.

While there was no explicit approval by either house's reports of the language in the Standard Oil case, nor in the International Salt case (both Section 3 cases), the House report did state:

Under H.R. 2734, a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition or (b) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.

Senator Donnell, in his minority report in Senate Report 1775, objected to the criterion of a "substantial lessening of competition, and specifically objected to the Standard Stations decision--

The extent by which a lessening of competition may constitute a substantial lessening thereof is also indeterminant in advance of final adjudication.
The Supreme Court of the United States has held that in the case in which 6.7 per cent of the total sales in a particular area are controlled by a company, such control is such that its effect "may be to substantially lessen competition, or tend to create a monopoly in a line of commerce," as used in Section 3 of the Clayton Act. Standard Oil Company of California et al. v. United States (337 U.S. 293, 1949). 28

Following the Standard Stations case, there was a flurry of comment concerning the idea of a "quantitative substantiability" test relative to a substantial lessening of competition, that is, if the amount of business removed from competition by a tying contract (International Salt) or an exclusive dealing arrangement (Standard Stations) were of substantial volume, was the showing of market shares, or further economic evidence necessary? The Attorney General's Committee to Study the Antitrust Laws insisted that (1) considering the narrowness of the Court's decision in the Standard Stations case, and its subsequent decisions, there has not been established any general rule of "quantitative substantiability," and (2) "in no merger case—horizontal, vertical, or conglomerate—can a 'quantitative substantiability' rule substitute for the market tests Section 7 prescribes." 28

Dr. John Blair states that when the House report was written stating that the standard of "lessening of competition" was to be interpreted as it had been interpreted
relative to other sections using the words, the report did not mention the Standard Stations case because there was not intended to be introduced a "quantitative substantiality" test. But there were at least the above two instances of the recognition of such a test. Senator Kefauver approved the International Salt case, expressing the hope that relative to Section 7 it would only be necessary to show that the quantity of commerce affected was substantial; and Senator Donnell expressed fear that the new criterion would be applicable to shares as small as those in the Standard Stations case, in which case the court talked only in terms of the amount being of a substantial quantity. This issue will be discussed more fully in Chapter 6 relative to the economic evidence appropriate in a conglomerate Section 7 case.

The Determination of "Substantiality."—So intensive were the attacks on the measure on the theory that it would prevent the merging of small corporations to enable them to compete better with large concerns, that at one point Representative Celler insisted that the proposed amendment was even weaker than the existing law.

Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of some competition, is not forbidden; the act
deals only with such acquisitions as probably will result in lessening competition to a substantial degree. . .

In truth and in fact, the addition of the words "in any section of the country" are less restrictive, in a certain sense, than the present wording of Section 7, because it must be substantially lessened in any section of the country, whereas the present act, in effect, reads: "The acquiring of stock of another corporation engaged in commerce where commerce is lessened between the two corporations." In other words, we make it more burdensome for the Federal Trade Commission to prove a violation under the wording of the proposed bill, than under the present law.28

Here Representative Celler is either exhibiting unfamiliarity with the prior interpretation of Section 7, or simply arguing a selling point. It is assumed here that he is doing the latter, under attack that the bill would hurt small business.

At one point in the 1947 House hearings, Representative Case suggested substituting the words "substantial restraint of trade" for "substantial lessening of competition." Representative Kefauver expressed the opinion that since "restraint of trade" was used in Section 1 of the Sherman Act, it would be interpreted too closely according to that law's standard. Mr. Kelley, Chief Counsel for the FTC, interjected at that point:

Now, I realize that competition is one thing that cannot be measured by yardstick. You cannot realize whether there is one or five per cent less or what it is, but from all the facts and
circumstances here, a substantial lessening under this, or the reasonable probability that the effect may be that, I think I would prefer the words "substantial lessening of competition" rather than "to restrain trade." 29

Representative Case asked Mr. Kelley if he thought perhaps the words "restraint of trade" might require "some of these per se bad acts?" To which Mr. Kelley replied: "I think that this language is a little more applicable in this precise situation." 30

Again, at the Senate hearings, Mr. Kelley—in remarkably similar phrases—said:

In the first place, you cannot measure competition with a yardstick. You can take testimony til Kingdom come, and you cannot determine whether competition has been lessened five per cent or ten per cent. But here you have a body of experts and you have one company buying into another, the stock or the assets. Now, you have in the record the size; how much business they control; all of the subsidiary facts, and circumstances upon which they can base a judgment as to whether the effect may be to have the results specified in the statute. That means not a certainty, not a conjecture or guessing, but a judgment of reasonable probability under all the facts and circumstances and evidence in the case [as to whether or not there has been a substantial lessening of competition]. 31

In regard to this last comment, Senator Donnell, an opponent of the measure throughout its history, stressed that Section 11 was also being amended to come into conformity with the Administrative Procedures Act, with the language that "The finding of the Commission, authority, or board as to the
facts, if supported by substantial evidence, may be con-
cclusive." He added:

In other words, there may be substantial evidence both ways. There may be substantial evidence that competition is not going to be interfered with sub-
stantially. There may be substantial evidence that it is going to be interfered with substantially, and that evidence may be like the old Justice of the Peace in the Knickerbocker History of New York. It might be just evenly balanced, but the Commission can take an evenly balanced case where the burden of proof has not been sustained by either side, and may make a finding that, because it is supported by substantial evidence, is conclusive. That is correct, is it not? Under the language of this bill?

Mr. Kelley: Yes. But, likewise, the same thing is true of the judge or jury.

Senator Donnell: I am talking about the Federal Trade Commission, now. You talked about the experts, to whom you referred as experts, that are going to decide these questions.

Mr. Kelley: I think the Commission should be experts.

Senator Donnell: I am not going to make any remarks in regard to the quality or anything of that sort of any individual, except to say that we had a vote this afternoon on whether a particular man was going on the Federal Trade Commission should be confirmed over there, and there was quite a substantial difference of opinion as to whether Mr. John Carson was qualified to serve on that Commission. He was confirmed by the Senate by a very substantial majority. But there may be those who would at least question whether or not Mr. Carson has shown the quality of expertness that would enable him to decide so that his decision would be conclusive as to whether or not the effect of an acquisition may be substantially to lessen competition.

At any rate, Mr. Kelley, the body that is to make the determination and that is to make a determination that will be conclusive if supported by substantial evidence is the Federal Trade Commission; that is right, is it not?
It was recognized, then, that reliance would be placed to a very high degree upon the FTC in evaluating all the evidence to determine if this standard had been violated. Following the above dialogue, there was additional discussion concerning judicial review, and the proponents of the measure generally concluded that there was substantial protection through the courts, the procedure being direct from a Commission decision to the Circuit Court of Appeals, and then to the Supreme Court.\(^{33}\)

"In Any Line of Commerce in Any Section of the Country"

The proposals introduced in the House of Representatives in 1945 and 1947 for the amendment of the Clayton Act contained the wording of the original Act, prohibiting mergers where the effect was to substantially lessen competition between the corporations in any section or community [italics mine]. There was a great deal of concern centered upon the literal reading of the provision which would have prohibited all mergers between corporations if there was competition between them. The "between" provision was removed as described above, by the proposals put forth by Mr. Kelley of the Federal Trade Commission. An equally tumultuous controversy raged around the words "in any section or community." Congressman Walter particularly pursued this point
of attempting to define the meaning of a "section or community"; the problem of two filling station operators across the street from each other; whether Minneapolis and St. Paul represented one or two trade communities; and the relationship between the product and the "section or community."³⁴

Mr. Montague stated that

If a man who had been successful with a filling station in Washington chose to buy out two or three others, there might be some lessening of competition in his immediate trade area; there might be some substantial lessening of competition within a few blocks, and that would be considered in this section as a trade area and that man would be violating the law. ... Once more, I state, this is legislation that is directed against the little fellow, and not against the big corporations. ...³⁵

At the Senate hearings, Senator Donnell pursued the problem of trade area with hypothetical examples, giving a few exact facts, and then demanding a "yes or no" answer as to whether the law as written would be violated. He even succeeded in getting Mr. Kelley, the FTC's General Counsel, and Dr. John Blair, the FTC's Assistant Chief Economist, to contradict each other as to the definition of "section of the country."³⁶

Included in his proposals concerning the elimination of the "between" provision, in his suggested amendment to the proposed amendment, Mr. Kelley inserted "in any line of commerce, or in any section, community, or trade area,
there is a reasonable probability that the effect may be to . . . 

Concerning this proposed change, Representative Kefauver stated that he approved the change eliminating the "between" provision, but

the amendment says "community, section, or trade area." It might well be argued, as it has been by Mr. Montague, that "community" refers to a very small part of the section of a city, so that if there were two filling stations operating in a community, they could not merge. So, I recommend that the community part be stricken out and that the language be, "section, trade area, or line of commerce."

If the Committee would like, I would be glad to prepare a bill and furnish every member with a copy with the amendments as I find them recommended, and these other amendments written in.

Upon rewriting, Representative Kefauver drafted H.R. 3736, introduced June 5, 1947, which had the present wording--

"where in any line of commerce, in any section of the country" the effect may be to substantially lessen competition.

The House report following the 1949 hearings made only this brief comment concerning the "section of the country" provision:

The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specific effect may appear on a Nation-wide or industry scale. The purpose of the bill is to protect competition in each line of commerce, in each section of the country."
In the Senate report, Senator Donnell in his minority report, stated:

The term "any section of the country" is not defined in the bill and would have to be determined by the Federal Trade Commission or the court. But the majority report went into considerable detail explaining what was involved in the phrase. In explaining the attempt in drafting the bill to reach a middle ground between declaring a per se violation in the case of mergers of competitors on the one hand, and requiring the Sherman Act test of unreasonableness on the other, the Senate report stated that

Another step which had the same general effect is also to be found in the legislative history of the present bill. As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened "in any community of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Continuing, the Senate report stated:

Although it is, of course, impossible to define rigidly what constitutes a "section of the country," certain broad standards reflecting the general intent of the Congress can be set forth to guide the Commission and the Courts in their interpretation.

What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for
all products a uniform definition of "section," whether such a definition were based on miles, population, income, or any other unit of measurement. The section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk. As the Supreme Court stated in Standard Oil Co. v. United States (337 U.S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."

In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.

It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well. 42

The Senate report also stated:

The phrase "in any section of the country" was made applicable to both the lessening of competition and the tendency to create a monopoly. As the bill originally stood, it applied only to the former. . . Similarly, the phrase "in any line of commerce," was also made applicable to both [lessening of competition and tendency toward monopoly]. As the bill originally stood, the phrase applied only to the tendency to create a monopoly. 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. 43

This statement in the Senate report was prompted by the discussion concerning the words "section of the country" during the
Senate hearings. Representative Patman, Senator Donnell, and Senator O'Conor, in comparing Representative (then Senator) Kefauver's rewrite of the 1947 House Resolution, concluded that the word "community" had been omitted for fear that a literal interpretation would prohibit all but de minimus mergers, and the reference to "trade area" was deleted as redundant, after it was decided that the words "section of the country" referred not to a definite geographic area of the country, but rather to the geographic area of effective competition in the relevant line of commerce.44

"May Be"

There was also considerable opposition to the Clayton Act amendment centering around the words "may be" substantially to lessen competition, even though these words had been in the statute since 1914. This controversy centered around language in the Morton Salt case which stated:

The Statute requires no more than that the effect of the prohibited price discrimination "may be substantially to lessen competition, or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the Statute does not require that the discrimination must in fact harm competition, but only that there is a reasonable possibility [italics mine] that they "may" have such an effect."45

Continuing, the Court said:

As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory pricing
upon the "reasonable possibility" that different prices for like goods of competing purchasers may have the defined effect on competition. Mr. Montague stressed this at the Senate hearings, Senator Donnell in his minority report used much the same language as Mr. Montague as the latter presented his arguments in the House hearings and the Senate. And Senator Donnell repeated the same material in the Senate debates, the gist of the argument being that the FTC and the courts could reach all sorts of wild-eyed conclusions, based upon the "merest possibility" conjured up in the minds of anti-business bureaucrats and life-tenure judges.

But the Senate report was quite explicit in the meaning of the words "may be."

The words "may be" appear in the bill in defining the effect on competition of the forbidden acquisitions. Acquisitions are forbidden only where in any line of commerce, in any section of the country, the effect "may be" substantially to lessen competition or tend to create a monopoly.

The use of these words means that the bill, if enacted, would not apply to the mere possibility, but only to the reasonable probability of the prescribed [sic] effect, as determined by the Commission in accord with the Administrative Procedure Act.

The words "may be" have been in Section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.
Mr. Bergson, Chief of the Antitrust Division of the Department of Justice, appearing before the House Committee, stated:

That the tests should be different seems clear. For example the Clayton Act as this bill would amend it, would make unlawful those mergers that may substantially lessen competition, whereas, under the Sherman Act, it must be shown that the merger, to be unlawful, will substantially lessen competition. [Italics mine.]

In such matters, the expert judgment of the Federal Trade Commission will be given great weight by the Courts.32

The House reports did not, however, discuss the meaning of the words "may be," but Senate Report 1775 (quoted above, p. 192) was quite specific. Similarly, the meaning of the words was not discussed in the House debate, but there was considerable discussion of the term in the Senate.

Senator Donnell objected to the words "may be" by stressing the difficulty which the courts would have and insisting that "(t)he word may probably does not mean the mere possibility, but may mean either the reasonable possibility or at most a probability under the circumstances disclosed"--and therefore too vague for enforcement. Senator Kefauver stated that the objection to the phrase "may be" is thirty-six years too late since the words "where the effect may be to substantially lessen competition" have been employed in
Sections 2 and 3 since 1914 as a measure of price discrimination and other conduct which falls short of accomplished monopoly.53

He also quoted from Senate Report 1775 to the effect that the amendment referred to a "reasonable probability," as determined by the Commission in accord with the Administrative Procedure Act. And he relied on the Standard Stations case:

(B)ut we do not think the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would, under the circumstances disclosed, probably lessen competition or create an actual tendency to monopoly. (Standard Fashion Co. v. Magrane-Houston Co. (258 U.S. 356-57).)54

Conclusions Regarding Terms of the Amendment

As described in Chapter 4 (above), Congress desired to prevent further concentration of economic power at the expense of the independence of small businesses, and to preserve to the greatest extent possible what it conceived as a desirable socio-economic structure. It was believed that competition among independent rivals held the key to this desired state. Therefore, any "substantial lessening of competition" was seen as a threat to this ideal. And since mergers had been singled out as early as 1914 as one of the particular business practices which should be subject to public scrutiny,
and since it was felt that the Sherman Act was inadequate to the task, the expressed desire was to proscribe any merger, however accomplished, which may substantially lessen competition or tend to create a monopoly, in any competitive trade area.

There was no separate discussion of the word "tend" and there was no explanation of the terms "in any line of commerce." And while there were only scattered comments, primarily by the opposition, concerning the danger of permitting the Federal Trade Commission freedom in developing the meaning of the terms of the Act, it was generally assumed that the Commission would exercise its expertise and through a process of trial and error (as pointed out by the appellate courts) develop meaning of the terms. More of this role of the FTC will be discussed later.
Footnotes

1Supra, pp. 121-123.


3Ibid., p. 37.

4Ibid., p. 23.

5Ibid.

6Ibid., pp. 23-24.

7Ibid., p. 20.

8Ibid., p. 12.

9Ibid., pp. 115-118.

10Ibid., p. 257.

11Ibid., p. 4.

12Ibid., p. 132.


14Ibid., p. 37.


Footnotes--Continued

18S. Rept. 1775, p. 17.
20H. Rept. 1191, p. 8.
21International Salt Co. v. United States, 332 U.S. 393, a Section 3 case.
23Ibid.
24H. Rept. 1191, p. 7.
2895 Cong. Rec. 11719 (1949).
30Ibid.
32Ibid., pp. 34-35.
33Ibid.
Footnotes--Continued

38 Ibid., p. 127.
39 H. Rept. 1191, p. 8.
40 S. Rept. 1775, p. 17.
41 Ibid., p. 4.
42 Ibid., p. 6.
43 Ibid., p. 8.
44 S. Hearings, 1949, pp. 132-149.
46 334 U.S. 37, 47.
48 S. Rept. 1775, p. 16.
49 H. Hearings, 1949, p. 74.
50 96 Cong. Rec. 16603 (1950).
51 S. Rept. 1775, p. 6.
52 H. Hearings, 1949, p. 74.
Chapter 6

ECONOMIC EVIDENCE CONSIDERED BY CONGRESS
IN AMENDING SECTION 7 OF THE CLAYTON ACT

Throughout the hearings held in 1945, 1947, and 1949 by the House of Representatives, and in 1950 by the Senate, there was a great deal of discussion concerning the structure of the American economy. The proponents of measures strengthening the antitrust laws emphasized that there was a trend toward concentration of production and economic power. There was considerable attempt at refutation of the data, which had been compiled primarily by the Federal Trade Commission, and, as indicated at the conclusion of this chapter, strict argument that there was increasing "concentration" in the economy is on weak ground. However, it is necessary to consider the data as presented at hearings, in reports, and during the debates, and the comments made concerning these data, in order to aid in the establishment of the intent of Congress concerning the amendment of Section 7 of the Clayton Act. In other words, the evidence presented, even if incomplete or unsophisticated, may be indicative of the mood and intent of Congress.
The House of Representatives

The 1945 Hearings.--Senator O'Mahoney, appearing before the Subcommittee on the Judiciary, holding hearings on proposals to amend Section 7, introduced records of the War Production Board, showing the degree to which certain industries had become concentrated. For example, he pointed out that in farm machinery in 1940, there were 1,600 companies, and of that number eight did 82 to 85 per cent of all business. Of thirteen companies engaged in the manufacture of domestic ice refrigerators, three companies did 50 per cent of the business. In electrical household appliances, of 250 companies, 50 handled 75 per cent of the business. In the manufacture of stoves, there were 210 companies--and 25 companies did 60 per cent of the business. He went on to emphasize that during the Second World War, 75 per cent of all prime war contracts were handled by 100 corporations. Then he detailed a considerable amount of information concerning the $8 billion worth of contracts handled by General Motors and proceeded to point out that General Motors represented an "empire" larger than many states. Then, in chart form, he listed the gross revenues and number
of employees for 21 corporations and political units, showing six corporations as outranking New York State in this regard. Next followed: New York City, California, Standard Oil of Indiana, Illinois, Ohio, etc., etc.¹*

This was primarily an attack on bigness as such, showing the size of corporations, but then he proceeded to attack the manner in which firms had grown by showing data from Standard and Poor concerning mergers in radio, television, publications, electrical appliances, tire and rubber, investment, electric lighting, and in foods.²

Representative Kefauver introduced an article by Eugene Whitmore (economist, management consultant, and free lance writer) which had been prepared for the TNEC, entitled: "Expansion Policies of 200 Companies," which was made a part of the record.³ This article stressed that the "giants"—for example, U. S. Steel, General Motors, General Electric, General Foods, etc.—would "scarcely exist in their present commanding positions without a policy of merger" as the moving force in their histories.⁴ But the article goes on to state that many other corporations much, much smaller than these giants have also grown primarily

*Footnotes for Chapter 6 will be found on pp. 231-235, infra.
through mergers. Mr. Whitmore described the growth patterns of many firms pointing out that although in many instances expansion has been due to research, experimentation and development, the bulk of the growth in leading firms has come about by mergers. At the conclusion of the article, the author lists, in six pages of fine print, the merger patterns and histories of 200 companies.\(^5\) This essay had been included in the final report of the Temporary National Economic Committee.\(^6\) Along with this statement, Representative Kefauver introduced the recommendations of the TNEC concerning mergers, which included, as was included in the 1945 proposed amendment, provisions for prior approval of certain mergers by the FTC.\(^7\)

Roger E. Barnes, Chief Statistician for the FTC,\(^8\) produced a report compiled by himself for the Commission entitled "Important Acquisitions and Concentrations in Industry, 1939-44." The report shows 832 acquisitions during the period, either through purchase of assets or of the control of capital stock. Of this total, 479 represented acquisitions of capital assets, and 345 represented purchases of capital stock, while eight were of undetermined method. These 832 companies were acquired by 430 corporations. He then presented a list, twelve pages of fine print, showing each of the acquisitions. Mr. Barnes also introduced into
the record a report prepared by himself for the Commission, entitled "Survey of Acquisitions, Mergers, and Growth of Swift and Co." Swift and Company really began packing meat in 1855. It was then that G. F. Swift borrowed $20 from his father, bought a heifer, dressed it, and then a day or two later sold the meat from the rear end of a wagon to his neighbors along the Cape Cod roads." The sales of Swift and Company had risen to $1.5 billion by 1944. The study details the process of growth and the expansion of the firm into other lines. Acquisitions by Swift and Company began in 1887 and show a continuous pattern of growth, primarily by acquisition and merger, comprising three and one-half pages of fine print. Mr. Barnes concluded that the company now (1944)

has forty-nine packing plants, and it operates 113 dairy and poultry plants for manufacture of butter and ice cream and for collection of poultry, eggs, and other products. In addition, the company handles cheese, margarine, cottonseed products, coconut, soybean, and peanut oils, cooking oils, rock salt, phosphate rock, fertilizers, animal feeds, sulphuric acid, glue, gelatin, glycerin, soap, ice, etc.

Everette McIntyre, attorney for the FTC, introduced into the record a "Statement concerning Some Consolidations, Mergers, and Acquisitions which have occurred in the Copper and Lead Industries." This study is a monumental collection of data showing how concentration had grown in the copper
industry in the United States from 1915, when the three largest producers produced 24 per cent of the industry output, until 1937 when the three largest firms produced 78 per cent of the output. Similar information is presented concerning the lead industry, showing an even higher concentration there. The report then analyzes the history, structure, and board membership of Anaconda, Kennecott, and Phelps-Dodge. For each of these leaders in the lead and the copper industries, the report shows the history of acquisitions, and the present corporate structure. Extensive charts make impressive presentations of the high degree of concentration in these industries.

There were then introduced into the hearings, by members of the FTC staff, twelve other industry studies showing merger patterns, concentration ratios and changes, and techniques of expansion. 12

In addition to these reports by the Commission staff, a statement by George W. Muller, Department of Commerce, was introduced into the record. 13 This report showed the concentration of assets holding and of sales in 76 industries, and the relationship between inventories and fixed assets. Also, there was included a chart showing the number of corporate tax returns by asset size. 14
J. Leonard Townsend, Counsel for the Board of Governors of the Federal Reserve System, presented some data on the concentration occurring in the banking industry. For example, he pointed out that from 1933 to 1944 the share of deposits held in the 100 largest banks increased from 32 per cent of total deposits to 50 per cent. Expressed as percentages this means that of the approximately 14,000 banks which control $130 billion in deposits, only 1.0 or 1.2 per cent of these banks control 56 per cent of all the deposits of the country. Then follow eight pages of tables, showing the number and deposits of all banks in the United States by periods (1914-1944), for the nation as a whole, by geographic regions, and by the 100 largest banks in the country.15

The 1947 Hearings.--In the opinion of the writer, the most important economic evidence considered in the 1947 hearings (in the House) was "The Present Trend of Corporate Mergers and Acquisitions" (1947) by the Federal Trade Commission, introduced into the hearings16 by Representative Kefauver and discussed in some detail by Commissioner Freer.17 This report also included all the studies by the FTC which had been presented at the 1945 hearings, listed above.
This 1947 FTC report included an analysis of mergers and acquisitions of manufacturing and mining concerns, by industry, 1940-46, showing that the greatest number of acquisitions took place in the food, textile and apparel, chemicals, non-electrical machinery, and transportation equipment industries, with a considerable number also taking place in petroleum and coal products, primary metals, and the beverage industries. Nearly one-third of all the acquisitions were in three industries: namely, food, non-electrical machinery, and textiles and apparels—"all predominantly small business fields." Other small business fields which had come under the domination of large industrial concerns were the steel drum, tight cooperage, and wine industries. The report stated:

The logical counterpart of this characteristic of the current merger movement is the relatively small number of acquisitions which have taken place in the more highly concentrated industries, such as automobiles, tobacco, and rubber products. . . One of the most outstanding characteristics of the current merger movement lies in the fact that most of the actions have consisted of the acquisition of small companies by large corporations. . .

Nearly one-third (32 per cent) of the companies merged since 1940 have been absorbed by the very largest corporations—those with assets exceeding $50,000,000. Another 41 per cent of the total has been taken over by corporations with assets ranging from $5,000,000 to $40,000,000. Hence, nearly three-fourths of the total number of firms acquired during this period have been absorbed by large corporations with assets of over $5,000,000. At the other end of
the scale, the distinctly small firms, those with less than $1,000,000 of assets have made only 11 per cent of the acquisitions.

The largest firms, those with assets of $50,000,000 and over, acquired an average of some four firms each, while the smallest acquiring firms, those with assets of under $1,000,000, acquired an average of less than one and one-half firms each.

The predominant role of the giant corporation in this current merger movement is strikingly illustrated by the fact that since 1940, 71 out of the 100 largest manufacturing corporations have bought up 278 concerns, or 17 per cent of all companies acquired; and, in addition, 49 of the second 100 have purchased 175 firms, or 10 per cent of all the companies acquired. In other words, 120 out of the top 200 corporations have bought up 453 companies, or 27 per cent of the total.

The Commission then proceeded to illustrate this material in chart form and presented in table form the number of acquisitions by the most active acquiring firms. Continuing its findings, the report stated:

The impact of the merger movement on small business is clearly shown by the fact that fully 90 per cent of all the firms bought out since 1940 held assets of less than $5,000,000, and 70 per cent had less than $1,000,000 of assets. On the other hand, only four per cent of the total number of acquired firms had assets of over $10,000,000.

In short, the figures indicate, conclusively, that the major impetus behind the current merger movement had been the desire of giant corporations to consolidate their wartime gains and to expand the scope of their domination through acquisitions of smaller, independent enterprises.

Then, the report broke down the mergers by type of merger under three headings: horizontal, vertical, and conglomerate, and these were broken down into industry groups,
according to the acquiring concern. The most extensive conglomerate merger activity was in the area of "non-manufacturing," notably financial and banking interests. Also, there were extensive conglomerate mergers in beverage, metal fabricating, machinery, transportation equipment, and drug lines.

The 1949 Hearings.---Prior to the 1949 hearings in the House of Representatives, the FTC issued a Summary Report on the Merger Movement. This was an analysis of 2,450 mergers occurring between 1940 and 1947, showing how concentration had increased in specific industries, repeating a great deal of the information contained in the 1947 report (discussed above), and drawing further conclusions from what the FTC saw as a continuing merger movement. In appraising the overall effects of economic concentration, the report emphasized that

One-third of the total value of all manufactured products was produced under conditions where the leading four producers of each individual product turned out from 75 to 100 per cent of the value of the product. No less than 57 per cent of the value of product was produced under conditions where the largest four producers of each product turned out more than half the total.

This report also emphasized that high profits and mergers have fitted together in a pattern throughout history, pointing out that in 1947 the net working capital held by the 78 largest listed manufacturing corporations (each with total assets over
$100,000,000 at the end of 1946) rose from 5.4 billion of
net working capital in 1935 to 8.4 billion in 1944, and to
10.0 billion by June 30, 1947. The report commented:

The economic power residing in these reservoirs
of net working capital may readily be visualized by
a comparison of the net working capital held by the
78 giant manufacturing corporations with the total
asset value of all manufacturing corporations with
assets of less than $1,000,000 . . . Thus, as of
the end of June, 1947, the 78 giants had sufficient
net working capital to buy up the assets of 90 per
cent of the number of all manufacturing corporations.22

Then there followed charts and descriptions of the
principal types of mergers, shown in the earlier report, and
comprising the remainder of the 1947 report.

This report came in for considerable criticism
during the 1949 House hearings. Mr. Gilbert H. Montague
emphasized that the report was misleading because these
2,450 mergers

(are) less than one per cent of the number of new
corporations which have been organized during that
same period in the manufacturing and mining fields,
and less than one-tenth of one per cent of all the
new industries started in the United States between
1940 and 1947.23

He also stated that the FTC had failed to take into considera-
tion the reasons for the mergers; that in many instances it
was because of the fact that a person was retiring, wanted to
get out of the business, or switch into other lines.24
Earlier, at the hearings, Representative Celler had insisted that Lever Brothers, Palmolive-Peet, Colgate, and Procter and Gamble dominated the soap manufacturing industry to the extent of 96 per cent of sales, and that the group of 1,000 independent soap producers was rapidly disappearing. Mr. Montague attempted to refute this assertion by introducing into the hearings a statement made by Dr. A. D. H. Kaplan at the American Soap and Glycerin Producers Association meeting, in which Dr. Kaplan encouraged the "1,200 of the smaller units of your membership" by pointing out that small businesses were continuing to grow much more rapidly than were businesses either failing or being absorbed, and that "small business during the last half century reveals that it possesses more life than any fabled cat."  

Further relying upon Dr. Kaplan, Mr. Montague introduced some excerpts from his book entitled *Small Business, Its Place and Problems.* In this book, Dr. Kaplan pointed out that, in regard to chain stores, they actually decreased in number of units while independent retail stores increased in number; employment increased more rapidly in independents than in chains; and employment grew much more rapidly in small business than in large firms. He presented a great deal of statistical evidence designed to show that small businesses
can play and have played a vital role, and that they have
grown and expanded throughout recent years much more rapidly
than have giant corporations. 29

Dr. John M. Blair, Assistant Chief Economist for
the FTC, attacked Dr. Kaplan's findings, saying

I can state categorically and without any
equivocation that the sample which they drew,
and I know its nature because it was obtained
from our shop, is not a representative or a
scientific sample, and you cannot place very firm
conclusions upon a sample which is not scientific
or representative. 30

Mr. Montague introduced another critical evaluation
of the FTC report, entitled "A Review and Analysis of the
which was prepared by the National Association of Manufactur-
ers, New York. The FTC report was criticized on the grounds
that it did not take into consideration the entry of new
small firms, which would show an average increase in concentra-
tion of only one-tenth of one per cent, which would take
1,000 years to bring about the results feared by the FTC.
The criticism continued by stating that the FTC report
"clearly indicates that the merger movement is only a temporary
situation due to the War, and the tax structure," and
emphasized the vigor of small firm competition which was
faced by the "giants." Then, it presented tables to show the
mergers and acquisitions from 1940 to 1947 as a percentage of
the number of firms in existence in each industry. This appeared, then, to be a very small percentage.\textsuperscript{31}

\textbf{The Senate}

Senator O'Conor introduced into the Senate hearings\textsuperscript{32} the FTC report entitled "The Present Trend of Corporate Mergers and Acquisitions" (1947), which had been submitted to the House committee in 1947, and which also had been transmitted to the Senate as a report under the Federal Trade Commission Act.\textsuperscript{33} In his testimony, Senator O'Conor quoted extensively from this report, emphasizing the information concerning the acquisition of small concerns by large concerns, and the data concerning the industries in which the largest three firms contributed to more than 50 per cent of the output. Senator Kilgore\textsuperscript{34} repeated a great deal of the statistical information contained in the FTC report discussed above. Later, Senator O'Conor\textsuperscript{35} introduced a long list of acquisitions which had occurred between 1947 and 1949, subsequent to the FTC report.

Mr. Lambert H. Miller appeared for the National Association of Manufacturers opposing the measure. He introduced into the record the criticisms of the FTC report which had earlier been given to the House Committee by Mr. Montague,
and also introduced an article by Lintner and Butters criticizing the FTC report. 36

Also, in refutation of the contention that there was increasing concentration in American industry, Dr. Willford I. King, Chairman of the Committee for Constitutional Government, introduced extensive evidence to show that those measurements which show an increase in concentration are very slight, and that there are measurements which show that there has been deconcentration. In number of business enterprises, compared to number of corporations, the figures were as follows:

\[
\begin{array}{c|c}
1929 & 6.08 \\
1936 & 5.93 \\
1945 & 7.17 \\
\end{array}
\]

In regard to the share of corporations in total income originating in business in the United States, the percentage of total business originating in corporations had increased from 58.06 per cent in 1929 to only 61.00 per cent in 1948. The percentage of the assets of all manufacturing corporations in the United States held by the 25 manufacturing corporations having the largest assets showed the following:

\[
\begin{array}{c|c}
1929 & 23.9 \\
1939 & 28.8 \\
1948 & 26.0 \\
\end{array}
\]

Dr. King concluded therefrom that there was a depression-created increase in concentration, but that it was presently
declining. He also produced tables showing the relative concentrations of the assets and net income of all reported corporations in the United States compared for five different years between 1931 and 1946. These figures also showed that corporations above $5,000,000 in assets had declined as a percentage of the total assets in the economy, and the same was true for percentage income. Next were presented four Lorenz curves, showing the deviation from equal distribution of assets, and of incomes. His conclusions were that

1. during the last twenty years, the number of individual enterprises has grown faster than the number of corporations.
2. during the same period, corporation income has increased only slightly more than has the income of individual enterprises.
3. from 1900 to 1945, the income of the twenty largest manufacturing corporations expanded a little faster than did the income of all manufacturing corporations.
4. during World War Two, the 200 largest manufacturing corporations did not grow as fast as did the 800 smaller manufacturing corporations.
5. between 1929 and 1948, the assets of the 25 largest manufacturing corporations grew slightly more than did the assets of all manufacturing corporations.
6. when all corporations of the United States are taken into account, no tendency toward a consistent increase in concentration of industry is found to exist, and the concentration of net income is shown to have decreased markedly since 1940, being much less now than in 1936.37

There was some discussion of the techniques and showings of the Lorenz curves, but the questioning of Dr. King consisted
primarily of his position that it would be for all practical purposes impossible to establish monopoly power in industries unless it were a technological necessity.

Information was also introduced to show "Percentage of Net Capital Assets Owned by Three Largest Companies."

These percentages owned by the three largest companies go down to 50 per cent in primary steel. They include: aluminum, tin cans and other tin ware, linoleum, copper smelting and refining, cigarettes, distilled liquors, plumbing equipment and supplies, rubber tires and tubes, office and store machines and devices, motor vehicles, biscuits, crackers, and pretzels, agricultural machinery, meat products, dairy products, and primary steel.

In addition, "Percentage of Net Capital Assets Owned by Eight Largest Companies," running from 74 per cent for glass and glassware down to 36 per cent for woolens and worsted goods include: glass and glassware, aircraft and parts, industrial chemicals, carpets and rugs, electrical machinery, footwear (except rubber), canning and preserving, grain-mill products, drugs and medicines, brake and other products, and woolens and worsted goods.38

The Treatment of Economic Evidence in the Congressional Reports Relating to the Amendment of Section 7

The House Reports

The reports from the hearing committees in both houses did not contain any new information, but did repeat statistics showing "increased concentration." The 1945
hearings in the House were followed by Report Number 1480 which stated:

It seems quite clear that the dominant position now occupied by a few large companies in many industries points to the need for public regulation and approval of all future acquisitions by companies already controlling important segments in their respective industries. Further acquisitions by any of the dominant interests of the steadily decreasing number of corporations in many lines cumulatively injure the public interest by progressively restraining and eliminating competition and strengthening the monopolistic positions of already dominant corporations. . . The present trend of great corporations under single management control to increase their economic power through the acquisition of their competitors is not fundamentally based on meritorious competitive development. 39

Likewise in the report following the 1947 hearings, the statistics showing the nature of the mergers that had occurred (as shown in the FTC report) were repeated, and the conclusion was reached that "The accumulation of giant economic interests must be held in check if our basic competitive system is to remain." 40

The House report following the 1949 hearings also repeated a great deal of the information that had been presented during the hearings, from the FTC reports, and included fold-out parts illustrating the different types of mergers and giving specific examples of how certain corporations had grown vertically, horizontally, and conglomerately. 41
The Senate Report

The writers of the Senate report had apparently been impressed with the data presented by Dr. Willfred I. King, above, but not in the way which he desired. Rather than accepting Dr. King's conclusions that the trend toward concentration is not significant, the figures that he did present of the existing level of concentration were taken as evidence that some legislation was needed:

The figures which he presented revealed an extraordinary level of concentration. Thus, his figures show that in 1916, the latest year for which such data are available, one-tenth of one per cent of the total number of all American corporations--the giant firms with assets of $100,000,000 and over--owned 49 per cent of the assets of all American corporations; two per cent of the number of corporations owned 78 per cent; 8 per cent of the number owned 89 per cent of the assets; and 12 per cent owned 92 per cent of the assets. At the other end of the scale, 45 per cent of the number of corporations--the small firms with assets of $50,000 or less--owned less than one per cent of the assets.

The figures presented by Dr. King also show that in the field of manufacturing alone, the 25 largest corporations in 1948 owned 27 per cent of the total assets of all manufacturing corporations, or a little more than an average of one per cent of the assets for each of the 25 corporations.

The enactment of the bill would limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.42

In a minority report, Senator Donnell quoted at length from the Lintner and Butters article,43 emphasizing
that the latters' study had concluded that "mergers have been responsible for such a small percentage of the total growth of large firms since 1940 that their effect on the overall level of industrial concentration has been very small." 44

Economic Evidence Considered During Debate on the Amendment of Section 7

The House Debates

Since debate in the House was limited to twenty minutes for each side, there was not extensive discussion, but extension of remarks was permitted for the record, and printed in the Congressional Record. Representative Keating repeated some of the data contained in the FTC's Summary Report. 45 Representative Boggs also quoted a question-and-answer dialogue concerning the concentration from the FTC report. 46 Representative Douglas repeated a great deal of the data, especially concerning the concentration in the electric industry, and the number of industries in which the top three or four dominated sales in the market, as well as the nature of the acquisitions shown in the FTC report. 47

In opposing the measure, Representative Byrne introduced the National Association of Manufacturers' critical analysis of the FTC report, and additional information showing
that small businesses were increasing much more rapidly
than were large businesses. 48

The Senate Debates

There were only two days of formal Senate debate
concerning the amendment to the Clayton Act. 49 There was
not any significant presentation or discussion of the data
concerning mergers; only occasional mention was made of some
of the statistics from the FTC reports.

Senator Douglas, however, did discuss the article
by Lintner and Butters. The article quoted the FTC's Report
on the Merger Movement at pages 25-27:

Thus . . . the preponderant number of firms
have been acquired by the very largest corpora-
tions . . . (and) fully 90 per cent of all the
firms bought out since 1940 had assets of less
than $5 million . . .

The evidence thus points clearly to the
conclusion that, insofar as its impact on
concentration is concerned, the outstanding
characteristic of the current merger movement
has been the absorption of smaller, independent
enterprises by larger concerns. 50

Lintner and Butters agreed with the Commission that
larger acquirers were relatively more active than small
acquirers, and that most acquired firms were small.

We, however, develop additional points which
seem to us to essentially reverse the major
conclusions on the contribution of mergers to
increasing general concentration. For the most
part, the apparent contradiction between many of
our findings and those of the Commission is
explained by the fact that the Commission analyzed
primarily data on the number of mergers, whereas
our analysis also takes full account of the size of the merged companies.51

To substantiate Lintner and Butters' contention that there had not been a general increase in concentration due to mergers, their conclusion was that

The aggregate assets acquired through mergers expressed as a percentage of the aggregate assets of all the firms in each size class listed in Moody's are much smaller for companies with assets of over $100 million than those for companies with assets of less than $100 million. The proportion is roughly constant at a much higher level for companies with assets of from $5 million to $100 million. It appears to be still higher by a substantial margin for the listed companies with assets of less than $5 million.52

Their findings in this regard are shown in Table 1, column III. Senator Douglas' figures are used in column IV.

Table 1

RELATIVE GROWTH BY MERGER
FOR DIFFERENT SIZE FIRMS (1940-1947)

<table>
<thead>
<tr>
<th>Asset Size Class (Acquiring Firm)</th>
<th>II</th>
<th>III</th>
<th>IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>(in millions)</td>
<td>Total Number of Acquisitions</td>
<td>Average Percentage Growth of Acquiring Company</td>
<td>Acquired as Percentage of Total Assets of Group</td>
</tr>
<tr>
<td>Under $1</td>
<td>119</td>
<td>143.0</td>
<td>0.8</td>
</tr>
<tr>
<td>$1 - 5</td>
<td>368</td>
<td>68.1</td>
<td>3.7</td>
</tr>
<tr>
<td>5 - 10</td>
<td>254</td>
<td>33.4</td>
<td>6.8</td>
</tr>
<tr>
<td>10 - 50</td>
<td>584</td>
<td>18.7</td>
<td>8.2</td>
</tr>
<tr>
<td>50 - 100</td>
<td>227</td>
<td>13.8</td>
<td>11.6</td>
</tr>
<tr>
<td>Over 100</td>
<td>438</td>
<td>2.3</td>
<td>3.9</td>
</tr>
<tr>
<td>Total</td>
<td>1990 (average)</td>
<td>8.0</td>
<td>5.3</td>
</tr>
</tbody>
</table>

SOURCE: (1) Lintner and Butters, op. cit., Table 5, p. 42. (2) Ibid., Table 7, p. 43. (3) Senator Douglas, 96 Cong. Rec. 16619 (1950).
Senator Douglas objected to these conclusions by pointing out:

These figures are on the basis of assets of those concerns making acquisitions only. However, in terms of all the corporations within the various size groups, the showing is quite different. Thus, the ratio of total assets acquired to total assets of all corporations within a given size class shows that (the largest acquiring corporations--at least up to the $100 million--grew more by mergers than did smaller acquiring companies as a class).

Thus, through a subtle error, Lintner and Butters' figures indicate that small business fared better with mergers than big business, which the above table (Column IV of Table 1) refutes and demonstrates that the opposite is true.53

Lintner and Butters did not exactly err in their conclusions, but recognized that

in large part, these findings are explained by the very great differences in average size of acquiring companies in the differing size classes--which, of course, reflects the high level of industrial concentration already existing.54

Thus, Lintner and Butters' percentages were weighted by the fact that larger firms had been acquiring much smaller firms; therefore, their growth by merger is a small percentage. And their figures (column III of Table 1) show only the growth of acquiring companies. Senator Douglas' figures, on the other hand, are weighted by the fact that smaller firms acquired fewer firms numerically than did larger firms, and he included as a base all firms in that size class--not only acquiring firms as Lintner and Butters had done. Lintner
and Butters were showing the effect of mergers on the growth of acquiring firms; Senator Douglas was emphasizing the growth of firms by merger within classes which included all the firms within that class. And this is the point that the proponents wanted to make—that big businesses as a class, or classes, had grown more rapidly by mergers than had small businesses as a class, or classes.

Proponents of the amendment desired to demonstrate this fact to those opponents of the bill who stressed the importance of and necessity of permitting small businesses to merge. The point was that it was not the small businesses which had been merging, or were desirous of merging, anyway, but that it was the large corporations which had been acquiring smaller corporations.

Senator O'Conor stated that while there existed many differences of opinion relative to whether or not concentration was actually increasing, there was substantial agreement that the level of economic concentration was extremely high. He then repeated the data which had been introduced at the Senate hearings, showing that in fifteen industries the three largest companies owned over 50 per cent of the assets in each industry, and that in eleven other industries, eight companies owned from 74 per cent to 36 per cent of the assets. Senator O'Connor then stated:

The purpose of the proposed bill is to limit further increases in the level of economic concentration resulting from corporation mergers and
acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly.55

In other words, further "increases in concentration" were to be checked by preventing mergers which may "substantially lessen competition."

Conclusion--Congress' Interpretation of Evidence Concerning Economic Concentration

The FTC's Summary Report on the Merger Movement and the Lintner and Butters article, described above, brought forth a flurry of comment centering around the issue as to whether or not there had been an increase in economic concentration due to mergers, and, in fact, whether there had been any increase in concentration in the American economy generally. Blair and Houghton, both of the Commission staff, refuted particular aspects of the Lintner-Butters article, but conceded in a footnote that

If the Commission had made any general statement on this point [concentration in the American economy generally, as having increased], it would probably have concluded, based on its data, that the recent mergers have not "substantially" increased concentration in manufacturing as a whole.56
Professor Adelman proceeded to enlighten everyone to the effect that there had been no increase in concentration and that the FTC had indeed perpetrated an enormous fraud upon the Congress by insisting that there had been.\textsuperscript{57} This brought forth a reply by John Blair,\textsuperscript{58} a rejoinder by Professor Adelman,\textsuperscript{59} and a further rejoinder by Lintner and Butters.\textsuperscript{60} A comprehensive survey of the relevant literature on concentration from the beginning of the present century was reviewed by Professor Mason with the conclusion that "It has been demonstrated that between 1931 and 1947 there was no substantial increase in concentration in manufacture."\textsuperscript{61} This seems to be the general conclusion of most technical statistical analyses.\textsuperscript{62} However, it is undeniable that there has been increased concentration in some particular industries, as was clearly pointed out in the FTC's \textbf{Summary Report}.

But the Courts have apparently accepted the fact that Congress saw an increase in economic concentration.\textsuperscript{63} For example, the Supreme Court, in the \textbf{Brown Shoe} case, stated as one of the reasons for passage of the amendment of the Clayton Act:

\begin{quote}
It is apparent that a keystone in the erection of a barrier to what Congress saw as the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.\textsuperscript{64}
\end{quote}
This section of the Brown Shoe case has elaborate footnoting, but there are no footnotes concerning the statement "what Congress saw as the rising tide of economic concentration."

In his attempt to dispose of the argument, Professor Bok stated that

> even in the foggy world of antitrust, it is no simple thing for a court to overrule a major premise of Congress by appeal to the supervening authority of the Review of Economics and Statistics.\(^{65}\)

A great deal of paper, ink, and tempers could have been saved, and diverted to the more constructive purpose of implementing the intent of Congress, if more attention had been paid to the extremely unsophisticated definition of "economic concentration" which had been employed in the FTC report, and as the term was used by the various proponents of the measure. Professor Adelman in one article even conceded that Congress was not aware of and had no desire to become aware of the sophisticated analysis of concentration ratios.\(^{66}\)

What, then, was the meaning of the term as it was employed by Congress? The FTC's Summary Report on the Merger Movement stated:

> To the extent that . . . [internal] expansion takes place more rapidly in large than in small enterprises, economic concentration is obviously increased. External growth--with which this report is concerned--takes place through the combining
together of existing firms by means of acquisitions, mergers, or consolidations, and through the creation of other types of combinations such as trusts and holding companies. To the extent that this process takes the form of the creation of new large enterprises out of existent smaller concerns, or the buying up of small concerns by larger enterprises, concentration is, of course, increased.\textsuperscript{67}

There was thus not taken into consideration the impact of new firms, or the expansion of existing small firms, as being a factor in preventing "economic concentration." In fact, nowhere in the hearings, reports, or debates is there any mention of an increase in concentration in the economy generally, except in the Lintner-Butters article, and even in the refutation of this article Senator Douglas was concerned only with showing that larger corporations as a class grew by merger more rapidly than did smaller corporations as a class. And no attention was paid to other data by the article showing that by other measurements, there had not been substantial over-all increase in economic concentration. There was no attempt to compare the level of economic concentration in the economy generally as it existed in 1947 with earlier levels of concentration. All that was shown, discussed, and repeatedly emphasized was the level of concentration that existed at that time. That level was considered alarmingly high and a threat to a desired socio-economic structure; the number of mergers had grown greatly in recent years; small
firms were being absorbed by larger ones; and it could not be gainsaid that mergers contributed to the existing (undesirably high) level of economic concentration, particularly in certain industries.

Perhaps both the FTC report and many Congressmen can be criticized for adopting an extremely simple and crude meaning for the term "increasing economic concentration," but their definition seems to have been along these lines: When a large firm buys a small firm, there is an increase in concentration. In fact, when any two firms get together and there is then one, there is obviously a more concentrated economy than there previously was, ceteris paribus. Starting from this simple premise, Congress was then presented with a significant body of facts showing the level to which concentration had risen in many industries which had at one time been small firm industries, and facts showing that acquisitions were being made in small firm industries by giant firms, and this constituted an "increasing economic concentration." Rather than criticizing Professor Adelman as exhibiting the obfuscating proclivities of the academic mind, it would perhaps be kinder to say that the problem is essentially one of semantics. Corwin Edwards says:

If one assumes that there is significance in the growth of these relatively large corporations [by merger] as compared to smaller corporations, the same
figures may properly be described as showing an increase in concentration. 68

The FTC and the Congress taking an extremely simple meaning for a term, and the statisticians developing a technical meaning and concepts to prove the simpler meaning incorrect, adds little or nothing when in reality the two sides are not talking about the same thing. Greater progress generally, and a greater contribution to the implementation of the mandate of Congress can be realized if an effort is made to extract meanings from the mood and expressions of Congress, rather than becoming pedagogic and pedantic.

The overriding aim—the mood of Congress—was to attempt to preserve, to the highest degree possible, an economy characterized by relatively small, independent, competing firms. Any disappearance of small firms, especially due to absorption by larger ones, is an increase in concentration in terms of Congressional semantics.

Other writers 69 have pointed out a great hiatus between the concept of "increasing concentration" and the standard of illegality—"a substantial lessening of competition." There was not offered any evidence that an increase in concentration automatically meant a lessening of competition. If Congress really wanted to prevent all future increases in concentration, regardless of how that term is
defined, why didn't it say so? This seeming hiatus disappears, however, if the above interpretation of the use of "increasing concentration" is correct. In that case, the connection between the standard presented to the enforcement agencies and Congress' fear of "increasing economic concentration" becomes clear. During the hearings and debates, and in the reports, it was stressed that Congress did not intend to prevent all mergers (e.g., two small firms uniting to combat giants, which mergers might increase competition). All mergers increase economic concentration, according to the above offered definition. But Congress desired to prevent only those mergers--those increases in economic concentration--which would have a deleterious effect on competition in a market generally. It is believed that this is a correct interpretation of the mood of Congress because the underlying reason or rationale for preventing great economic concentrations was that they stifled initiative and competition. But only those increases in concentration--those mergers--which actually had a reasonable probability of lessening competition were to be prohibited. This interpretation calls for no torturing of the legislative record but rather stands out quite clearly, and failure to recognize it does an injustice to Congress.
Martin states that no clear cut answer was given to the issue of "the relationship between corporate concentration and the degree of effectiveness of competition in the economy." This is true only in the sense that there were no neat academic essays giving concise introductory and concluding paragraphs summarizing such relationship. The records, particularly the hearings, are replete with reasons for the condemnation of high levels of concentration, summarized in the belief that they destroyed competitive initiative and opportunities. The perceived evils of tight oligopoly were repeatedly emphasized. This will be the subject of Chapter 7. While a great deal of work has been done by economists, the latest by Professor J. M. Clark, to show that "competition," whatever adjectives may be used to modify it, can exist in highly concentrated industries, the proponents of amended Section 7 found sufficient evils in oligopoly in enough instances that they imputed its meaner side to all oligopolies and enacted basically "an anti-oligopoly statute."
Footnotes


2Ibid., p. 12.

3Ibid., p. 22.


5Ibid., p. 27.


7See pp. 121-122, supra.

8H. Hearings, 1945, pp. 66 ff.

9Ibid., p. 81.

10Ibid., p. 84.

11Ibid., pp. 87-126.

12Ibid., pp. 145 ff. These studies are summarized in Appendix A.

13Ibid., p. 333.

14Ibid.

15Ibid., p. 337.


18Ibid., p. 305.
Footnotes--Continued

19Ibid., p. 308.


21Ibid., p. 19.

22Ibid., p. 20.


24Ibid.

25Ibid., p. 15.

26Ibid., p. 56.

27Ibid.


29H. Hearings, 1949, p. 111.

30Ibid., p. 113.

31Ibid., p. 120.


Footnotes--Continued

34 S. Hearings, 1950, p. 16.

35 Ibid., p. 57.


38 Ibid., p. 17.


43 Lintner and Butters, op. cit.

44 H. Hearings, 1949, p. 374; S. Rept. 1775, p. 11.

45 95 Cong. Rec. 11720 (1949).

46 95 Cong. Rec. 11725 (1949).

47 95 Cong. Rec. 11779 (1949).

48 95 Cong. Rec. 11731 (1949).

Footnotes--Continued

50 Lintner and Butters, op. cit., p. 37.

51 Ibid.

52 Ibid., p. 32.


54 Lintner and Butters, op. cit., p. 34.


59 Ibid., p. 356.

60 Ibid., p. 364.


Footnotes--Continued

---

63 Professor Adelman pointedly criticizes the Court in Bethlehem Steel, 168 F. Supp. 576 (S.D.N.Y. 1958), for relying on Section 7 to "prevent further economic concentration." "It is humiliating to have our courts decide it on the basis of what economists showed nearly a decade ago was a made-up story." M. A. Adelman, "Economic Aspects of the Bethlehem Opinion," 45 Va. L. Rev. 684, 685-6 (1959).

64 370 U.S. 294, 316 (1962).


66 M. A. Adelman, "Rejoinder," 34 Rev. of Econ. & Stat. 174 (1952). This issue also contained comments on the issue of concentration by Corwin D. Edwards (p. 156), George W. Stocking (p. 161), Edwin B. George (p. 168), and A. A. Berle (p. 172).


68 Edwards, op. cit., 34 Rev. of Econ. & Stat. 156.


70 Ibid.

Chapter 7

AN ANTI-OLIGOPOLY STATUTE: PREVENTING THE UNDESIRABLE CONSEQUENCES OF ECONOMIC CONCENTRATION

Throughout the hearings held by the House and the Senate concerning the amendment of Section 7 of the Clayton Act, witnesses favorable to the measure usually talked in terms of the monopolistic practices of giant firms; the oppression of small business by concentrations of economic power; and practices from which they could get no relief. These complaints were universally from industries in which there was high concentration of output (over 70 per cent) by a few (eight or fewer) firms.

Specific Oligopoly Abuses

Mr. George J. Burger, owner of the Burger Tire Consultant Service, New York City, described the decline in numbers, and resulting concentration in tire retailing and tire manufacturing, since 1921. In 1921, there were 300 independently owned and operated tire manufacturing establishments, and about 100,000 independent tire retailers. In 1947, there were only 21 independent tire manufacturers and fewer
than 50,000 retailers. But of the 21 independent tire producers, the Big Four represented 92.7 per cent of all output. Mr. Burger explained this concentration as follows:

Some failed because they could not stand the gaff of the fierce, and oftentimes very unethical, competition that has characterized the industry. A significant number of the strongest smaller companies were taken over by larger competitors. It is with these companies that were merged, and the methods employed in their acquisition, that we are here concerned.1

Upon being asked what he meant by "unethical" competition, Mr. Burger replied:

Well, in 1939, the rubber tire industry was faced with a nation-wide sale called the 50-Off--big page advertisement throughout the whole United States. All these three companies did was take a publicly advertised tire; for instance, they would put a fictitious price of $15, and they would make the public believe that there was 50 per cent off. In other words, the inference there was that the dealers were buying it at 60, 70, or 80 per cent; and when the Federal Trade Commission went and entered a cease-and-desist order, I think in the Spring of 1940, that stopped. What we call "vicious competition" then, through the company owned stores. [Sic.] The three companies--Goodrich, Goodyear, and Firestone--operated 2,000 stores. There is no competition, Congressmen, so far as the sale of passenger car tires is concerned, through company stores, but the trouble is done in the sale of truck and bus tires through these company owned stores, with sales made like "discontinued brands," "discontinued designs," and that continued for nine months, up until just before Pearl Harbor. Also, direct selling to customer accounts by manufacturers. That is what I'm talking about--vicious competition that was faced by all the independent dealers throughout the United States.

*Footnotes for Chapter 7 will be found on pp. 260-261, infra.
Only last week, or the week before, close to 100,000 tires of a private brand make were offered in Middle Atlantic and midwestern department stores at 25 per cent discount. Now, the average tire dealer, the small dealer in tires, is paying a price that is around that figure. He cannot hope to compete with such a vicious competitor. That is what the tire dealers are faced with, to my knowledge, and they have been faced with that from 1925 right up to the present time.²

Mr. Burger then detailed in several pages the history of acquisitions by the leaders in the rubber tire industry.³

Similarly, Mr. Sharkey, General Manager, National Association of Independent Tire Dealers, Inc., Washington, D. C., stated the manner in which dealers for Western Auto, Sears & Roebuck, or the Esso Stations, had in effect, a "subsidy," by their parent organizations, and an advantage over the independent tire dealers. This "subsidy" consisted, it was asserted, of a financial interest on the part of the manufacturer, so that the latter was willing to throw his weight behind the tire dealer in destroying the independent dealers. Mr. Sharkey continued:

Because of this control, these manufacturers have been in the position to create other forms of distribution, have fostered the development of these firms by giving favored purchasers preferential prices, such as in the case of private brand merchandise being sold by mass distributors, mail order houses, and oil company chains.⁴
Mr. Willis J. Ballinger, Economic Advisor, National Federation of Small Business, appeared in support of the bill, stressing that "Today America needs a new antitrust policy—one that will be effective in driving monopoly out of business." He stated that the giant corporations

... are often able to establish "the price leader" type of monopoly... its dictated prices which smaller competitors prudently observe because of fear of economic retaliation...

The giant corporation possesses the means to discipline price cutters. One favored method of reprisal was the price war. Where economic resources were so disproportionate between a giant corporation and smaller competitors, it was easy for the giant corporation to outlast smaller competitors in a price war. Smaller competitors, therefore, fearing a price war and bankruptcy, tended to fall into line, and the price leader type of monopoly became the prevalent and effective form of business organization.

In the above, Mr. Ballinger was talking in general terms; but then, he talked about specific instances—price leadership in the steel industry; expansion and concentration in the milk industry; and expansion and concentration in the bread industry. Regarding the latter, he said:

The little fellows could not survive price wars, and many of the little fellows were frozen out by consignment selling of big corporations, which is a very wasteful way to sell bread but it is very effective to put the other fellow out of business. They pile the bread up to the ceiling so that there is no place for the little fellow's bread, and the next morning, they take back all unused bread.
Other businessmen testified to similar oppressions in industries with concentrated output.\(^8\) One of the most impressive stories was related by Charles J. Beck, Fredericksburg, Virginia, a bakery owner and operator, who related that after he had taken over defunct bakeries in Fredericksburg and Newport News, and started to operate successfully, the General Baking Company of New York moved in.

A big loaf of bread was brought in to our territory, only where we were operating, in Fredericksburg and in Newport News, especially, and a sixteen ounce loaf was the exact weight that everybody was putting out in that area. And a 24 ounce loaf replaced that loaf of bread (for the General Baking Company) which is eight ounces more in weight, which would almost figure four cents a loaf. The price stayed the same... This bread was made over in Norfolk by an enormous bakery, I think, a $100 million corporation, General Baking Company. They did not raise the weight for their loaf of bread in Norfolk. They made the small loaf for Norfolk and then made a 24 ounce loaf for Newport News and hauled it across that ferry at about $2.50 a trip and sold it in Newport News. The price was the same but it was eight ounces heavier, and it only meant that if we followed suit, we would go broke, and if we did not follow suit, we would lose our business.\(^9\)

Continuing, Mr. Beck stated:

So I brought this before the Federal Trade Commission, and after deliberating for about three years, and I had to run down to Washington many and many a time and to Newport News and Norfolk and Richmond for the trial and hearings, after about three and one-half years, I got notice that there was not enough evidence, and the case was thrown out. Of course, it was being fought by a very large law concern in New York. I think there were fifty lawyers in the concern, and they had 5 to 10 lawyers here every time we had a hearing, and it was thrown out.\(^10\)
The discussion continued, and Mr. Beck related a conversation he had with the Supervisor of Taxation for the State of Virginia, Mr. Leake, who pointed out to Mr. Beck that the General Baking Company paid no income tax to the State of Virginia because they did not make any money. Mr. Beck was told that he could make $60,000 in Virginia and pay income tax on it, but that if he used it to help destroy a competitor in West Virginia, he could prorate his expenses, and not pay any taxes in Virginia at all. When he asked if this would be legal, the Supervisor of Taxation said, "Yes, it is legal," to which Mr. Beck replied: "I call it legalized racketeering." 11

Included in the material considered by the House Committee in 1949 was a report entitled, "The Integration Movement in the Southern Textile Industry and Its Regional Significance," prepared by Solomon Barkin, Director of Research, Textile Workers Union of America, CIO. This was a scholarly industry analysis, tracing the development of the Southern textile ownership pattern from the 1860's to 1944. Barkin discussed the concentration of mill ownership in the South, vertical integration in the textile industry and the economic significance of consolidation in the integration movement. Regarding the latter, he found the first significant
result was that the production of specific fabrics would be more closely aimed at variations in demand.

"Because of the great percentage of mills where management and selling are now under the control of the same management, there will not be repetition of what happened during the last depression. Production will be controlled, and therefore, very little curtailment will be needed to keep production and demand in balance." [Quoted from Daily News Record, a textile trade journal, May 18, 1943.] The success of the textile interests in curtailing production in fabrics and constructions in oversupply have already been displayed. Quoting from the New York Journal of Commerce, "Rather than pile high cost goods, which they may later have to sell off at a loss, mills prefer curtailing production or, wherever possible, switching it to more desirable lines of cloth." This deliberate preference for curtailing operations to piling up inventories is also suggested by the elimination of third-shift and six-day operations throughout the industry.12

Condemnation of the Results of Economic Concentration

At the Hearings.--In most instances in which proponents of the amendment of Section 7 were talking about the evils of tight oligopolistic concentration, they usually spoke in terms of "monopoly." Mr. Walter B. Wooden, Assistant General Counsel for the FTC, testified that

In time of inflation, it is the monopolistically held industries that are in position to most readily advance their prices and threaten the American standard of living. . . . In times of depression, such as 1932, it is precisely the most concentrated industries where prices are maintained in the face of collapsing demand, curtailed production, and mounting disemployment.13
Oligopolistic pricing came in for considerable condemnation during the discussion of the amendment. Dr. John D. Clark, then a member of the Council of Economic Advisers, testified that

The method of operation and the character of management decisions which is split up among a large number of business firms, no one of which has a very large percentage of business, is for every manager at all times, to get just as much business as he can. As a result, even in periods of depression, his effort is to operate at as high a level as he can, and this maintains employment. The policy of the manager of a very large firm, who knows that his own decisions with respect to volume of production and price will influence the total market, is very different because that firm is disposed, in periods of depression, not to maintain the volume of the market by cutting the price, but rather to try to sustain the price by reducing the volume of production.14

Economic concentration was also condemned as being a situation in which product innovation was stifled. Mr. Kelley, General Counsel for the FTC, testified:

New products are going to come on the market. Many corporations will supplement their lines, some in lines that had been in the market before the war, but a great many of them are new, and because of that is a reason to stop this concentration of wealth, not stop national growth and development as that is fine, but to stop it where the purpose is to acquire another company, to get them out of the road because they do not like their competition.15

FTC Commissioner Davis testified that in highly concentrated industries there was likely to be patent suppression.

All my observations on these matters show that that is true. That is where we have the suppression
of important inventions. In other words, that concern will have all industry, machinery, advertising, and sales geared to certain specific forms of a commodity. There will be new inventions developed and patents obtained which will show vast improvement, we will say, in the commodity in question and it will frequently happen that that controlled industry will buy the patents which can ordinarily be had for a low price and keep the public from getting a more modern piece of merchandise.16

Also, there was incorporated into the House Hearings of 1949 and into the Senate Hearings a copy of the FTC's Summary Report of the Merger Movement which included in its general condemnation of highly concentrated industries the statement:

This . . . pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival.17

In the Reports.--The 1949 House report called attention to the staff report prepared by the Small Business Committee of the House, Seventy-ninth Congress:

The report . . . shows that during the time of lowering of prices, in competitive industries there is a substantial reduction, but that in closely held or monopolistic industries the prices either remain the same or there is a very small reduction (see pp. 92-93 of Report).18

The Senate Report quoted, by way of introduction, from the FTC's Summary Report of the Merger Movement, page 7:

Where several large enterprises are extending their power by successive small acquisitions, the
cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which 3 or 4 large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rivals.18

In the Debates.--Representative Bryson expressed concern with the problem of outside control of local enterprises which had come, for example, from Northern interests purchasing local Southern textile concerns. He stressed that this led to businesses' failure to take into consideration local needs and problems, tended to suppress competition, and caused higher prices and instability of employment.20

Price leadership and oligopolistic stagnation was criticized by Representative Yates as the greatest danger to the American economy at that time.

The greatest danger to competition today is not the growth of single large monopolistic companies in various industries, but the growth of industrial oligarchies in which power over the industry is divided among three or four large concerns. When three or four producers take the places of 20 or 30, the chances are great that price competition will be crippled, that declining markets will be dealt with by restriction of output instead of by price reduction, that the big concerns will adopt a live-and-let-live policy toward each other at the sacrifice of their efficiency and their progress, and that the remaining small competitors will be either bought out or reduced to vassals who meekly follow the large enterprises. We want competition, not business oligarchy. We can't rest
on the hope that the courts will interpret the Sherman Act in such a way as to call each of three or four large concerns monopoly or a combination in restraint of trade. Instead, we must prevent the mergers by which these large concerns grow large. 21

During the debates in the House, there were introduced into the Record several "Extensions of Remarks" concerning the hearings (then) currently being held by the Committee on the Judiciary (from July 11 to August 5, 1949--Hearings on the Study of Monopoly Power, Committee on the Judiciary, House of Representatives, 81st Congress, First Session). Representative Celler made extensive comments about the content of the hearings relative to the undesirable oligopolistic practices growing out of highly concentrated industries. He introduced into the Record a summary of comments made by various witnesses.

Dr. Teper gave details of the squeeze on clothing manufacturers because of concentration in the textile industry on the one hand, and among the buyers and distributors of women's clothing on the other. Secretary Brannon stated that business concentration both in buying farm products and in selling to farmers has forced the concentration of certain features of agriculture, under government auspices and regulations. Dr. Hamilton emphasized that concentration tends to render the management of an industry secure and to give it both the power and the inclination to exclude new men with progressive ideas. He cited Henry Ford as an example of a man whom the bankers would have obstructed had they been able.

Mr. Arnold suggested that modern conditions called for more stress on decentralization of industry and for keeping absentee ownership of local enterprises to a minimum in order to preserve important social and political values.
Professor Adams suggested that in making laws to foster competition it is necessary to be clear as to the kind of competition to be fostered. Perfect competition is not possible or necessary. The definition should be in terms of basic objectives of the law; protection of the consumer, prevention of price or production controls based on size, protection of new technology from artificial frustration, and maintenance of legal and economic freedom of entry for new enterprise.22

Representative Celler introduced into the Congressional Record a speech which he had made on September 2, 1949, on the NBC Network:

When an industry is concentrated to the point where a Big Three or Big Four can dominate the field, administer the prices, control production, and interfere with new entries into the industry, it is not a healthy situation. Some of the smaller independents may be efficient and well able to cut their prices and take business away from the leaders, especially in their own locality. But they are afraid of retaliation by the big concerns that have financial resources to pay the cost of a price war.23

Senator Kefauver introduced into the Record, after making comments on it, a speech which he had delivered over the NBC Network on August 7, 1949. He continued to use the word "monopoly" while referring to oligopolistic industries. He stated:

If a product is picked at random, there is a better than one to one chance that the four largest producers of that product account for 75 per cent or more of its production.

It is thus apparent that the country is to a very large extent under the control of monopoly.24
Senator Kefauver then proceeded to enumerate the evils of "monopoly" as follows:

(1) Monopoly eliminates the incentive to increase efficiency, reduce cost and introduce new and better products, and contribute generally to economic progress...

(2) Monopoly tends to result in lower production and employment than would prevail under competition, since monopolies tend to restrict production and employment in order to maintain prices. There is no greater danger to the economy today than the very real possibility that, if we do have a downswing, monopolies will curtail production, throwing millions of workers out of their jobs, in order to maintain their prices.

(3) Monopoly retards the normal economic growth of our great underdeveloped regions, such as the South and the West, since monopolies tend to hold back the growth of new regional industries which might compete with their own investments, while at the same time using these areas only for the purpose of exploiting irreplaceable raw materials.

(4) Monopoly leads to big labor on the one hand and big government on the other, and a substitution of government control for the free play of competitive forces as the regulator of economic activity. Monopoly inevitably leads to government regulation and ultimately to socialism.

(5) Finally, and perhaps most important, monopoly blights the opportunity for economic independence--particularly for the young people, by taking over one industry after another and thus gradually narrowing the field in which small business is permitted to exist. 25

Preserving Existing Levels of Competition

As an additional indication that the proponents of the amendment of Section 7 were interested in preventing a
lessening of competition, rather than in enacting a "trust busting" statute, there were several comments to the effect that if a policy of stopping further increases in concentration (however defined) were inaugurated, then competitive forces would become operative and a desirable economic structure would develop. So impressive to the committeemen had been the presentation of the evidence concerning the degree to which economic concentration had already risen, that at one point, Representative Gwynne inquired:

Has not the horse already been stolen? I mean by that, have not we gone so far along this road of economic and political concentration of power that it is going to be difficult if not impossible to get back?

Senator O'Mahoney replied:

I do not think so, because I have a deep and abiding faith in the principles upon which this government was founded. I believe that the people can control both their economic welfare and their political welfare, and that they ought to. I believe that if they do not, then a managed economy and a managed political system will take their place.26

Commissioner Davis referred to the "inquiry directed to whether it was too late to enact this legislation . . . if the horse had already been stolen,"

I wish to give my opinion in reply to that to this effect, and that is that that is true to a very considerable extent, but it is not true entirely, by a long measure. In other words, the degree of concentration which we now have, in my opinion, is not a circumstance to what we will have if the Congress does nothing to stop this continued rapid flow of industrial power into a few hands and a few companies.27
The following day, Commissioner Davis testified concerning his belief that tight oligopolistic industries tended to impede technological progress and suppress inventions, through "illegal" arrangements. Alluding to the question as to whether it was too late to pass another antitrust measure, he stated:

My reply to that is this: that if we remove these illegal handicaps, the limitations upon free competition, that in all likelihood would mean that new inventions would be made and enterprising citizens will come forward and enter that industry and create competitive units to compete with the monopoly. 28

Representative Carrol saw the task of the amendment primarily as one of essentially holding the line.

Our problem is to maintain competition. Everyone who has studied this problem knows that competition has been weakened during the past several decades. Actually we have lost rather than gained ground since the days of the great trust-busting operations. From 1940 to 1947, more than 2,450 independent manufacturing and mining companies went out of existence as a result of mergers. This movement has been especially serious since the end of the war. In industry after industry, three, four, five, or six huge corporations dominate prices, production, and employment. This movement must be held within bounds. The government must use its power to preserve the freedom to compete. If this freedom is destroyed, these huge industries may become economic states within the nation, exercising so much power as to endanger our system of government. 29

Representative Patman recognized that the amendment would bring under scrutiny only future mergers, and that there
was nothing in the measure to attack the existing levels of concentration.

The effect of this bill may be much like locking the barn door after the horses have been stolen. It does not apply to existing mergers, which in the meantime have escaped restraints by the Congress many years ago. That is another subject which may require further legislation. Existing entrenched bigness is a threat to free enterprise in this country. I am not saying that existing bigness is an evil in itself, but it is a threat. However, . . . this bill does not apply to this problem. This bill does apply to future mergers, to mergers which may be accomplished or sought to be accomplished from now on. To this extent, the bill is a good bill, and altogether salutary. It may be a late hour to lock the barn door, but you may be sure that all the horses are not stolen yet.  

Representative Keating made one of the most lucid descriptions of the preventive aspects of the bill as follows:

In view of the present level of concentration in the industries which I have cited above [lead and steel production], the question may be raised as to whether, in passing this bill, we might be locking the barn door after the horse is stolen. That would be true for those industries in which big business has already swallowed up most of its smaller competitors. As the Federal Trade Commission itself has noted, "Intensive merger activity can hardly be expected to take place in those industries which have already become so highly concentrated that there remain only relatively few competitors still available for purchase. It is difficult, for example, to conceive of any further widespread merger activity taking place in such industries as steel, rubber tires, copper, glass, and many other highly concentrated fields."

But while it is obviously not reasonable to expect further intensive merger activity in those industries in which small business has already been practically eliminated, there are numerous important segments of
the economy in which small business is still an important competitive factor, and it is in these areas that the protection afforded by this bill is of the greatest importance. Unless the bill is enacted, there is every reason to believe that, like the steel and copper industries, these traditionally small business fields of which I am speaking will also come under the control of a few large corporations. That this is indeed a very real and positive danger is revealed by the fact that most of the acquisitions during the recent merger movement have actually taken place in what have commonly been regarded as traditionally small business industries.

Therefore, if we are to save the remainder of the economy from the same fate which has already befallen too many of the important industries—if we are to protect and preserve small business in those fields in which small business is still an active and dynamic force, it is absolutely imperative that we plug this wide open loophole in the antitrust laws by passing H.R. 2754.  

Conclusions

In at least one place in the hearings, reports, or debates, each of the following (observed or believed) undesirable consequences of economic concentration was condemned. Conversely, it can be said that competition, resulting from a decentralized economic system, was praised because it prevented the following undesirable economic consequences:

"Administered prices"

curtailment of output and employment rather than price reduction and price competition

prevention of entry and growth of new and small firms
rising prices faster than competitive industries
sustained prices during depression
"undue economic power" not based on efficiency
live-and-let-live policies
disincentive to innovate
loss of local social consciousness, responsibility, and control
suppression of inventions
exploitation of some areas of the country by the economically powerful
injury due to the power of concentrated advertising and selling
loss of economic opportunity and independence for the youth of the country
the cause of big labor unions
the drift toward centralized governmental power, socialism, or fascism.

In general, it was concluded that competition, in all its dimensions, was lessened by the existence of tight oligopoly. There were no attempts to assert that there could be "workable" or "effective" competition in highly concentrated industries. And while this latter may be considered a significant gap in the information available to the Congress, no such ideas were even considered. There was a virtually complete condemnation of concentrated industries as leading to the above enumerated evils. Each of the evils was described
as existing in some concentrated industries, or the opinion was expressed that such was a consequence of concentration.

The purpose was to prevent concentration (oligopolies) in which it was believed that the above evils inevitably inhered. It was recognized that these concentrations had come about in large measure by mergers; these concentrations caused the lessening of competition in the dimensions listed above; and therefore Congress proscribed any merger which would probably lead to a lessening of any of the facets of competition.

The Supreme Court in the Brown Shoe case stated that the keystone in the erection of a barrier to what Congress saw as a rising tide of economic concentration "was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." While proponents of the original Section 7, and of its 1950 amendment, generally stated that the broad purpose of the Clayton Act was to prevent monopoly in its incipiency, it seems that the Supreme Court has most accurately put its finger on the intent of Congress--namely, the preventing of a lessening of competition in its incipiency. As illustrated by the many citations in this part of the present study, the most expressive proponents of the amendment stated that the danger to the American economy
lay not in the development of pure monopoly in the highly concentrated industries, but in competitive, open industries still operating in the area of competition becoming concentrated with the assumed attendant economic consequences to follow. The Supreme Court in the Brown Shoe case emphasized the importance which it saw Congress attaching to the cumulative effect of mergers and quoted House Report 1191 as saying, "The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition. (House Report 1191, p. 8.)." The nipping of a substantial lessening of competition in the bud is a significantly more ambitious and a stricter standard even than "nipping monopoly in its incipiency," but that is the Supreme Court's recognition of Congress' intent.

The overriding concern of Congress relative to the amendment of the Clayton Act was conditioned by a belief in the virtues of individualism generally, and, specifically, in the opportunity for the individual to develop his capacities in a competitive society. Competition was considered a positive virtue, and the stimulant which would bring forth the best in man and society. Concentration of power, in any form, was considered inconsistent with this ideal. And it was implicitly recognized that competition,
if exercised in certain ways, could lead to the destruction of competition. From the earliest consideration of the Clayton Act, especially from the 1912 election campaigns, there was recognition that not all conduct by economic interests could fit into a system of competition most conducive to social and economic development. In other words, certain competitive practices must be held in check to prevent the destruction of a competitive economy; the limits of competition must be set. In keeping with the Protestant ethic, the limiting of competitive activity took the form of "thou shalt nots." Accordingly, the original Clayton Act prohibited certain practices under certain circumstances, or which produced certain results. This negative approach is also in keeping with the norm that government intervention in economic decision-making should be as minimal as possible, and that the greatest degree of freedom of economic activity should be permitted. It is implicitly assumed that greater freedom is retained when there are enumerated prohibitions, with the balance of activity left to the individual's initiative and discretion, than when rules which must be followed positively are prescribed.

One of the prohibitions in the original Clayton Act applied to mergers under certain conditions. This Act was never effectively implemented. Between 1945 and 1950, a
substantial consensus developed in Congress that the American economy had reached a state of undesirably high concentration. And a direct (perhaps causative) relation was seen between economic concentration and political concentration, both of which were considered antithetical to a society based on a philosophy centered around the individual and the competition of individuals.

Further, there was a consensus that high economic concentration produced a number of economic consequences (listed above) which were contrary to the precepts of a competitive economy. There was nowhere an attempt to show that competition could remain a vital force in highly concentrated industries, or in a generally highly concentrated economy. And it was clearly shown that mergers had contributed significantly to the high levels of economic concentration, particularly in "numerous" industries which had once been small business, competitive industries. Also, the rate of mergers was seen to be increasing, and (probably) any merger was considered an increase in economic concentration as, perhaps, in an unsophisticated sense, it is--concentration is greater than it would have been in the absence of the merger.

But Congress did not desire to set specific limits on merger activity; all suggestions as to dollar size of percentage share of sales limitations were rejected. Nor was
it considered desirable to proscribe all mergers. There were numerous suggestions that some mergers, particularly the small combining in an industry to compete with "giant leaders," were conducive to enhanced competition. Therefore, only those mergers (increases in concentration) which showed a reasonable probability of lessening competition were proscribed. Therefore, the amendment was designed to prevent any lessening of competition generally, by mergers. This is in conformity with the underlying philosophy of regulating economic activity, to the least extent possible, so as to produce the beneficial results of a competitive economy.

The intent of Congress may be summarized as follows:

(1) the end sought is a competitive economy—and society;
(2) economic concentration is destructive of competition;
(3) mergers contribute to economic concentration;
(4) therefore merger activity must be controlled;
(5) but some mergers may increase competition;
(6) therefore, prohibit only those mergers which may substantially lessen competition or tend to create a monopoly.

Thus, the administering agencies, the Federal Trade Commission and the Department of Justice are presented with an economic-legal standard. Congress was in a particular
mood--alarm--over economic concentration and its assumed attendant consequences. To meet the threat, it prescribed that those mergers which may substantially lessen competition should be prevented. It remains for the enforcement bodies to implement this legal standard to carry out the desire of Congress--the prevention of further attenuation of competition due to mergers.

Part III of this study will consider the means by which this policy may be implemented relative to conglomerate mergers. This Part will describe specifically the nature of conglomerate mergers, and note the particular problems involved in implementing the statute relative to this type of merger. Chapter 8 will consider the relevant (and irrelevant) concepts and aids that may be derived from economic theory. Chapter 9 will review judicially developed concepts and terms which can be applied to conglomerate merger cases. The consideration of conglomerate mergers by the FTC up to January 1963 will be discussed in Chapter 10. Chapter 11 will suggest general guidelines and criteria for the implementation of an effective antitrust policy relative to conglomerate mergers.
Footnotes


2Ibid., pp. 47-48.

3Ibid., pp. 41-46.

4Ibid., p. 63.

5Ibid., p. 96.

6Ibid.

7Ibid., p. 97.

8Charles W. Holman, Secretary, National Cooperative Milk Producers Federation, and Fred I. Raymond, Manufacturer, Chicago, Ill., in ibid., pp. 101 ff.

9Ibid., p. 110.

10Ibid.

11Ibid., p. 111. Virginia's laws and tax policies were, of course, not at issue but are simply another example of policies, contrary to antitrust, which encourage the growth and abuse of economic power.


14H. Hearings, 1949, p. 32.

Footnotes--Continued

16Ibid., p. 137.


2096 Cong. Rec. 11725 (1949).

2196 Cong. Rec. 11493 (1949).


25Ibid.

2696 Cong. Rec. 11722 (1949).

27Ibid., p. 18.

28Ibid., p. 32.

29Ibid., p. 137.

3096 Cong. Rec. 11498 (1949).


32370 U. S. 294, 316.

33Ibid., p. 318, fn. 32. This statement was suggested by Mr. Kelley at H. Hearings, 1949, p. 37, "the Committee Report should make it clear that the amendment seeks to cope with anticompetitive developments in their incipiency."
PART III

AMENDED SECTION SEVEN OF THE CLAYTON ACT

APPLIED TO CONGLOMERATE Mergers
The Attorney General's National Committee to Study the Antitrust Laws stated that there are two distinct roles to be fulfilled by the professional economist relative to the antitrust laws:

(1) To isolate and define the economic concepts relevant in helping to answer questions posed by the law, and, to the degree to which they may be useful, to adapt them to the different standards established by different statutes, on the one hand; and (2) on the other, to examine the legal standards themselves in the light of economic knowledge in order to evaluate their appropriateness.  

This Part of the present study is concerned with the implementation of a statute. The standards are taken as given, as prescribed by Congress, as discussed in Part II above. The antitrust laws stem from a blend of economic, social, and political considerations and objectives, but the laws are directed at essentially economic phenomena and economic activity. But when we turn to administration of the various statutes, we find ourselves in a legal milieu. Although administration of Congressionally determined legal standards are frequently left to "administrative agencies,"

*Footnotes for this Introduction will be found on pp. 278-280, infra.
such as the Federal Trade Commission, and procedure is somewhat attenuated compared to courtroom practices, the basic setting is one of litigation. Therefore, the economic evidence which is relevant to any antitrust case must be fitted into an adversary proceeding.

A body of law has been built up in the judicial arena commonly referred to as "antitrust law." The use of economic evidence must be fitted into the framework of this law, with only such extensions as are consonant with existing legal concepts and procedures. This does not mean that there is not room for extension of "antitrust law." Quite to the contrary, each case does, by the very fact that it is a new case, make new law. But in the administration of Section 7, economic theory, analysis, and concepts must be subordinated to the adversary process and the statutory norms as set by the Congress. Massel states that

Economists must recognize the distinction between their activities in administration and policy formulation. The solution of a practical administrative problem requires acceptance of the bounds of the current state of the law and legal procedures.3 [Emphasis added.]

Before further discussion of the treatment of conglomerate mergers under Section 7, a more exact definition of "conglomerate" mergers should be set forth. Further, such a definition should also be functional in nature—that is, the
very definition should be instrumental in solving the problems connected with the administration of the law relative to this type of merger. The economist must define his terms in a way which is indicative of the economic significance of the term, relative to the statutory norm. In other words, the definition of conglomerate mergers must be framed in the light of the purposes to be served by the law, viz., the prevention of a lessening of competition.

In the Introduction to this study, conglomerate mergers were defined as those "in which there is no discernible relationship in the nature of the business between the acquiring and the acquired firms." This definition was taken from the FTC's Summary Report on the Merger Movement which further described the significance of conglomerate mergers.

With the economic power which it secures through its operations in many diverse fields, the giant conglomerate corporation may attain an almost impregnable economic position. Threatened with competition in any one of its various activities, it may sell below cost in that field, offsetting its losses through profits made in its other lines—a practice which is frequently explained as one of meeting competition. The conglomerate is thus in a position to strike out with great force against smaller business in a variety of different industries. As the Commission has previously pointed out, there are few greater dangers to small business than the continued growth of the conglomerate corporation.
John M. Blair, who helped write the above quoted report, later pointed out that the term "conglomerate" could be used to describe a firm operating in separate geographic markets, as well as one operating in separate product markets. This elaboration of the term "conglomerate" was made because the term "horizontal" was considered applicable to a merger in which the acquired and the acquiring firms were competitors. But if the two firms operate in entirely distinct geographic areas, even though they deal in identical products, there is no merging of competitors, no horizontal merger. This type of merger is referred to as conglomerate because the economic consequences and characteristics are similar to product conglomerateness, that is, the firm is operating in economically discrete markets.6

Corwin Edwards goes to great lengths attempting to establish when markets are functionally discrete, and when there are cross-elasticities, and reaches the conclusion that the best terminology which we have is the phrase "significant degrees of incoherence in business functions," and this can be determined only by an analysis of the actual operational patterns in a given trade.7 Professor Triffin has pointed out that in a very real sense all goods are competitive. He rejects the notion of an "industry" and says that the demand curve which a firm conceives as the one it faces in a market
can be determined only by an observation of the operations of that market. 8 Triffin discusses the conceptual possibility of "isolated selling," 9 and states that "cross-elasticity of demand is zero for a pure monopolist and infinite for a pure competitor," 10 but that these "should be conceived as limiting cases" 11 since, for example, such pure monopoly is "quite fantastic." 12 Massel states that "while economists frequently use the concept of cross-elasticity of demand, no method has been developed for gauging it . . . At present the term merely sums up a general impression." 13 And Stocking concludes that "in the hands of judges in antitrust the concept [of cross-elasticity] is probably not of much use." 14

Thus, in determining whether or not a merger is "conglomerate," there must be recognized first, from a study of the operations of the firms, the interrelatedness of the actual operations of the corporations, or the lack thereof. There will be found instances of overlapping aspects of a merger--horizontal, vertical, and conglomerate. For purposes of this study, however, a conglomerate merger will be considered as one in which the firms operate in "functionally discrete" markets, product or geographic. Regardless of the name applied to the type of merger, it is the probable effect of the merger that must be brought under scrutiny.
Conglomerate mergers are those in which the firms are not competitors, and the impact of vertical integration is not significant, especially if we think of vertical as applying to a customer-supplier relationship.

Professor Adelman defines a conglomerate merger as the acquisition of "unrelated facilities." He then proceeds to illustrate with mathematical precision that "unrelated" means a negative correlation, and that there is a conglomerate effect only when the profits of two or more activities united by merger are statistically independent. And, in such a situation, there is by definition no "conglomerate advantage." The only advantage Professor Adelman sees is some advantage as a result of some type of integration, and therefore the merger is not conglomerate. 15

Professor Adelman is placing complete reliance on the strict meaning of the term used in the original definition by the FTC, namely "no discernible relationship." It is suggested that this is an inadequate and misleading analysis for several reasons. First, as pointed out by Triffin (above), there is no such thing as an economically independent line of trade or commerce, except as a limiting theoretical concept, which is of no help in the real world of antitrust litigation. The term "unrelated facilities" cannot be given a real world meaning equivalent to the cipher
in mathematics. Secondly, this approach defines away too easily a situation with which Congress was concerned, and creates a definition alien to the meaning intended by the legislature. Third, it leaves without a classification those mergers in which there is no competitor (horizontal) or customer-supplier (vertical) relationship. Fourth, it fails to recognize that even though there may be no "discernible relationship" between the firms before the merger, the merger may create relationships which were the concern of Congress, and which Congress saw as having an adverse effect on competition. And fifth, it fails to recognize that there are relationships other than with pre-merger competitors, suppliers, or customers, which are created, and may be affected by the merger.

This penchant for the niceties of mathematical exactness fails to take into account the dynamic setting in which competition is carried on.

Corwin Edwards has pointed out that the conglomerate firm has four types of market advantage: (1) its capacity to spend money and take losses at any point where it encounters a small rival; (2) its enjoyment of discriminations and preferences; (3) its ability to control distributors, customers, and sources of supply by tie-in sales and exclusive dealing arrangements; and (4) its ability to strengthen its position
through exchanges of favors with other large enterprises. He also mentions four types of non-market advantage enjoyed by the large (especially the conglomerate) firm. These are advantages in litigation, in political power, in reputation in numerous dimensions, and in finance. Professor Stocking, however, insists that none of these market advantages are to be realized unless "integration lowers costs or brings greater security," and that the special favors which large firms may gain by exchanging accommodations with each other can be explained in the traditional monopoly power versus economic efficiency context. Adelman states that the conglomerate firm does not have advantages which enable it to destroy competitors in one line unless it has some monopoly in another line, and that the basic monopoly power then should be attacked.

Several writers have suggested that the only significant advantage short of some use of monopoly power by the conglomerate firm is in its ability to obtain capital more easily and cheaply. But each of these opinions concerning the conglomerate firm, or a conglomerate merger, ignores a significant economic characteristic of the firm operating in discrete product or geographic markets, and that is: the firm's ability to shift its operations into areas of its choice in order to escape the normal constraints
and pressures of a competitive market which a single line or single area producer would face. J. M. Clark states that "the advantage gained by diversification does not appear inherently objectionable,"\textsuperscript{20} even though the "firm also reduces its total risks by combining those of diverse products."\textsuperscript{21} This economic advantage may be sufficient to condemn the merger.\textsuperscript{22} Also, Professor Clark ignores the opportunities presented by the ability to shift profits between products and "strike out" where competition is weakest (infra). Further, Clark makes no attempt to justify diversification by merger.

The advantage of a multi-product firm was recognized by Representative Boggs during the House debates concerning the amendment of Section 7.

In times such as these, when big corporations have such huge quantities of funds, they are constantly looking for new kinds of businesses to enter. By this process they build up huge enterprises which enable them to play one type of business against another in order to drive out competition.\textsuperscript{23}

And it has long been recognized that the firm operating in markets discrete as to product, geography, and customers, prices not according to average total cost, but according to the nature of competitive conditions in each market.\textsuperscript{24} Thus, even if a firm is operating at normal profits (however that term may be defined) in some areas, it has the ability to
take these normal profits, and pick another product or geographic market where competition is weakest in obtaining a position which it could not otherwise achieve. Or, if the conglomerate firm is operating in one market where there are a number of vigorous initiators of competitive action, the conglomerate firm need not necessarily rely upon its own competitive strength in that market but can call on its resources from elsewhere. Professor Lanzillotti offers empirical evidence of the ability of a diversified firm to insulate itself even from the initiating competitiveness of its fellow oligopolists in one particular line. He further points out advantages where there is some degree of relatedness between the different lines. These advantages occur in the form of fuller use of productive facilities, distribution, and in buying, selling, advertising, finance, and research, none of which would be available, or are not available in as great a degree to a single line producer. As will be discussed in Chapters 9 and 11, if these advantages come about as a result of a merger, and threaten to give the firm a decisive advantage, the merger is proscribed. Thus far, the above discussion is not intended to place any judgment on the conglomerate firm. The discussion is merely to point out the particularizing characteristics of the firm which operates in discrete markets.
An example of the FTC's treatment of the nature of conglomerate firms is found in the Foremost Dairies case. In that case, a government witness, Mr. Turnbow, was describing the advantages of the conglomerate dairy firm.

He has an advantage in that he is able to do research. He is able to have a control laboratory. He is able to put in equipment that costs a lot of money but will process a larger volume of product.

The president of the respondent firm freely testified that diversification as to territory is an important factor in the ability of a dairy company to compete by spreading its risks over all in that it can "hedge" losses in one area with profits in another, in consequence of its geographic diversification. Respondent also introduced Professor Adelman as an expert witness who testified as to the economic and statistical character of "hedging" and diversification to establish the proposition that no "competitive advantage" within the purview of Section 7 had been attained due to the merger into a new territory. The hearing examiner, however, stated:

It is concluded that the testimony of Mr. Adelman, on this point, is incompetent and does not successfully contradict the foregoing testimony of Mr. Turnbow (and the president of the Respondent).
Professor Stigler states that

The essence of this type of firm, as I understand it, is that, although the firm need not have an appreciable degree of market power in any one market, it, because of the many markets in which it operates, and the large resources it possesses, acquires a power to sell and buy on preferential terms. I must confess that the exact mechanics by which the total power possessed by the firm gets to be larger than the sum of the parts escapes me.29

The positions taken by Professors Stigler and Adelman are basically in error in that they fail to recognize the ability of the conglomerate firm, vis-à-vis the single line or single area producer, to shift resources. Also, there is a misplaced emphasis in that the law (Section 7) does not speak in terms of increased market power; it speaks in terms of a reasonable probability of a substantial lessening of competition. Of course, the former can cause the latter. But it is criteria for the determination of the latter for which we must search.

Professor R. C. Clark summarizes the definition of conglomerate mergers and their economic significance relative to antitrust policy most satisfactorily by defining such mergers simply as "the fusion of two firms sharing no common competitive market between them, and bearing no vertical relationship to one another of supplier-customer."30 And

It is submitted that the dominant individualizing characteristic of the conglomerate firm is the ability to shift financial resources and competitive
strength through a broad front of functionally discrete markets, strategically altering the selected point of greatest impact as time, place, and market conditions require. 31

Kaysen and Turner suggest that the standards of illegality in the conglomerate merger case seem wholly illusory and that standards and data are too speculative and conjectural to offer any sound hope that conglomerate acquisitions can ever be brought within the sweep of the act. 32

Professor R. C. Clark answers this by stating:

The conglomerate firm derives its strength from its financial resources, its size, from a number of non-market advantages, and most important, from its ability to shift these advantages from one market to another. If these attributes do not fall into customary molds of monopoly and market power, then new fronts of economic theory and analysis must be explored, and new dimensions of economic reality must be penetrated. 33

Such a bold statement, however, is followed by his final sentence in this article:

As with all antitrust enforcement, specific guidelines must be hammered out on the forge of individual cases and litigated controversies. With the swift pace of merger activity at the present time, we can hope that such clarifying specifications will soon be forthcoming. 34

No such specific guidelines are suggested by Professor Clark other than

Any conglomerate merger which triggers this strategic shifting of financial resources and competitive strength should be prohibited by Section 7, if it substantially lessens competition or tends to create a monopoly. 35
Professor Clark's if, however, is the entire Section 7 case. No matter what may be the attributes or powers of the conglomerate merger, there is no violation unless there is a reasonable probability of a substantial lessening of competition.

This Part of the present study will develop and recommend an approach to the analysis of the effect on competition of conglomerate mergers. The suggested approach will be "dynamic" in nature in that it centers upon the way in which competition (competitive activity) is carried on—the conduct patterns of those engaged in the trade or line of commerce—rather than an approach based upon a description of the existing competitiveness of a given market. Chapter 8 discusses the cases which have been dealt with by the FTC relative to conglomerate mergers. Chapter 9 considers the contributions that Economics as an organized discipline can make toward developing guidelines to conglomerate anti-merger policy. In this connection there must also be considered the parts of economic theory which are irrelevant, unworkable in antitrust policy implementation, or misleading. But most important, of course, there will be discussed the contributions of economic theory which do afford a basis for research and analysis of particular cases. Chapter 10 will review judicially developed concepts relative to antitrust
policy which can (must) be transferred to their appropriate function in conglomerate merger cases. And Chapter 11 will suggest specific guidelines for the treatment of the conglomerate case, taking into account the intent of Congress and the role of the Federal Trade Commission as an expert body evaluating economic phenomena in a legal proceeding.
Footnotes


3Ibid., p. 184.

4Supra, p. 5.


9Ibid., p. 103.

10Ibid.

11Ibid., p. 104, fn. 9.

12Ibid., p. 133.

13Masset, op. cit., p. 245.


Footnotes--Continued


21 Ibid.

22 See Chapters 9 and 11, infra.

23 95 Cong. Rec. 11469 (1949).


27 Matter of Foremost Dairies, F.T.C. Docket 6495, Initial Decision, p. 65 (mimesographed print).

28 Ibid., p. 66.
Footnotes--Continued


31 Ibid., p. 272.


33 R. C. Clark, op. cit., p. 274.

34 Ibid., p. 275.

As of January 1, 1963, the Federal Trade Commission had given consideration to only three mergers conventionally denominated as "conglomerate." In a fourth, it considered "horizontal market extensions" which it stated must be considered in the same light as "conglomerate" mergers. Also, in one other case, a vertical integration merger, the Commission talked not in terms of the traditional vertical foreclosures, but in terms of conglomerate power possessed by the acquiring corporation. These cases will be discussed below with a view toward determining trends in the Commission's thinking regarding this type of merger, and the tentative conclusion will be made that the Commission is "on the right track."

The Procter and Gamble-Clorox Case

On August 1, 1957, Procter and Gamble Co., the largest American producer of soap and soap products, a producer
of approximately 35 products, with assets of over $688 million and sales of $1.156 billion, acquired the Clorox Chemical Co., the largest American producer of household liquid bleach (48.4 per cent of sales), with annual sales of $40 million and net income of $2.6 million, in exchange for P and G stock valued at approximately $30 million. The FTC filed a complaint on September 30, 1957, alleging violation of amended Section 7 of the Clayton Act. The allegation was that the acquisition may substantially lessen competition or tend to create a monopoly in the household bleach industry; more specifically,

Household liquid bleach producers may be unable to compete with the respondent due to one or more of the following:

a. Respondent's market position
b. Respondent's financial and economic strength
c. Respondent's advertising ability and experience
d. Respondent's merchandising and promotional ability and experience
e. Respondent's "full line" of cleansing and laundry products.
f. Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space
g. Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, or merchandising experience and ability.14

*Footnotes for Chapter 8 will be found on pp. 322-325, infra.
Testimony at the hearings centered around the structure of the household bleach industry—in 1957, Clorox had 48.8 per cent of sales, Purex had 15.7 per cent, Fleecy White had 4.0 per cent, and the twelve remaining producers comprised the balance. There was a detailed description of Clorox's and particularly P and G's selling and merchandising methods—Clorox spent approximately $5.3 million on advertising in 1957, and P and G was the nation's largest advertiser (ahead of General Motors), budgeting approximately $82.5 million for that purpose in 1957. Also, specific instances of increases in Clorox's sales under P and G and a general increase in Clorox sales in the country as a whole were shown. Testimony was given by representatives of nine small household bleach producers generally to the effect that they feared Clorox even more now with P and G's added strength.²

On June 17, 1960, the hearing examiner ordered P and G to divest itself of any holdings in the Clorox corporation on the grounds that there was a reasonable probability of a substantial lessening of competition and a tendency toward monopoly because

a. Clorox's dominant position had been increased as a result of the acquisition and the various advertising campaigns, sales promotions programs, and devices engaged in since the acquisition.
b. P and G's financial and economic strength, and its advertising and promotional experience gave the Clorox product an undue advantage over its competitors.

c. P and G's ability to command consumer acceptance and retain valuable shelf space in independent and chain grocery stores as a result of its advertising and promotion experience and financial resources.

d. Clorox's position, under P and G's control, had been enhanced to the detriment of actual and potential competition and its position threatens to become larger.

e. Increasing tendency of concentration of competitors in the household liquid bleach industry.

f. Clorox, through P and G-inspired advertising and sales promotion, has the ability to prevent the entry of additional competitors, and to prevent competitors from expanding by normal methods of competition.3

In its appeal from the hearing examiner's decision, P and G emphasized that there had been increased competition since the acquisition; that there had been no changes in the industry which were anticompetitive in their nature; that only proper and legal merchandising methods had been followed subsequent to the merger; and that the gain in Clorox's sales were negligible and, in any event, would have been accomplished by Clorox without P and G's assistance.4

Counsel supporting the complaint attempted to place emphasis on the advantages possessed by P and G's added influence in the sale of Clorox by stating:

P and G has added to Clorox P and G organizational and management advantages, which were either
not possessed, or not possessed to as great an extent by Clorox Chemical Co., in the following manner:

1. Research and development
2. Market research
3. A national sales force of direct salesmen
4. Coupon and premium redemption organizations
5. Home appliance sales organization
6. Home economist staff
7. Management skills, experience, and competence in merchandising
8. The most complete line of household laundry and cleaning products in America to aid in selling and promoting the laundry product Clorox.
9. A billion dollar concern accustomed to enjoying far greater market shares than Clorox Chemical Co. possessed, and against much more formidable competition and the financial ability to better withstand adverse industry problems, or to engage in deficit financing for merchandising purposes for subsequent gain.5

Counsel also insisted that there were "changes to be reasonably expected in the future . . ." and pointed out that the hearing examiner had ignored or refused to adopt a number of facts indicative of these changes that might be reasonably expected. These included:

1. P and G has the ability to save substantial sums in merchandising Clorox by effective economies in manufacturing, advertising, and selling.
2. No other liquid bleach producer produces such a full line of soaps, detergents, and cleaners.
3. For all producers of record, except P and G, liquid bleach is their primary product. Adverse competitive effects to that product thus affect them in a substantial portion, if not all, of their operations.
5. P and G's sales of liquid bleach represent less than 4% of its total sales of all products. . .
Clorox represented practically 100% of sales of the Clorox Chemical Co.

6. P and G can buy network TV advertising for Clorox considerably cheaper than the Clorox Co. or any other liquid bleach producer.

Thus, counsel was suggesting the ways in which there was a reasonable probability that Clorox as a part of P and G would possess—and in all probability employ—these significant advantages which it now has over its competitors, and that this would give Clorox an undue competitive advantage as a result of the merger.

On June 15, 1961, the Commission (with Chairman Dixon and Commissioner Elman not participating) remanded the case to the hearing examiner for "further evidence concerning the competitive effects of the aforementioned acquisition." The Commission stated that further hearings were necessary because:

1. Conglomerate mergers were within the purview of Section 7, but they do not have the "automatic" effects of a vertical or horizontal merger, and therefore, the determination of the effects "is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition, and to the premerger status of the
acquired and acquiring corporations. Consequently a consideration of post-acquisitional factors is appropriate."

2. That while the hearing examiner was correct in considering the post-acquisitional activities of Clorox, for example, Clorox's systematically countering the promotional activities of Purex, there was not sufficient evidence to show that the results "would" occur in other market areas that Purex or other producers may attempt to enter.

3. Clorox's share had increased (in the national market) by only .3 per cent or .42 per cent and the hearing examiner had failed to consider the pre-acquisitional growth trend of Clorox; and this failure "detracts from his conclusion that there has been a substantial increase in the dominant market position held by Clorox as a result of the acquisition."

4. Counsel supporting the complaint pointed out a number of changes which might reasonably be expected in the production and merchandising of liquid bleach. These changes "have not been shown to have come about, and the hearing examiner should undertake to determine if any of these policies have been put into effect."
In his second initial decision, hearing examiner Haycraft followed essentially the same format in his opinion and reached the same conclusions. Evidence of market shares was taken up to fiscal year 1961, showing that Clorox sales had increased since 1957 from 48.4 per cent of the market to 51.9 per cent. It was also shown that Clorox's advertising, especially on TV and radio, had increased substantially—from $400,000 to $648,800 from 1957 to 1960. And it was shown that Clorox's growth rate had increased, except in the final year, fiscal 1961, when it dropped as advertising had dropped to $379,100.

On appeal to the Commission (pending as of January 1963), respondent used averaging to show that in a four-year period prior to the acquisition, its growth rate had been .975 and that in the four-year period since the acquisition, its growth rate had been .825 per year. It insisted that its increase in advertising had been solely due to the competitive nature of the market and that there was, in any event, no direct relationship between advertising and sales.8

Counsel supporting the complaint introduced evidence concerning changes in manufacturing and distribution, personnel changes, changes in advertising and promotion, and the changes and trends in market shares.10
In his legal argument, counsel made a lengthy presentation to the effect that the Commission should look at the reasonable probabilities rather than to inquire into what had happened in the industry, and require certitude of a lessening of competition, and relied on the Commission's language in the Foremost Dairies case that:

The necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some market, or that its overall organization gives it a decisive advantage in efficiency over its smaller rivals.\textsuperscript{11} [Emphasis supplied.]

The Union Carbide-Visking Case

The Union Carbide Corporation, on December 31, 1956, acquired all the assets of its largest customer, the Visking Corporation. This was a classical vertical merger with the nation's largest producer of polyethylene resins (from which Visking made finished polyethylene plastic products) acquiring its largest purchaser of this material. Considering this aspect of the acquisition, the Commission ordered divestiture by Union Carbide of those assets of Visking which were connected with plastic production.\textsuperscript{12}

Half of Visking's business, however, approximately $25.6 million, was in the production and sale of regenerated
cellulose sausage casings. This was considered a separately
distinguishable line of commerce, and this aspect of the
merger was therefore conglomerate. Visking produced 60 per
cent of the nation's cellulose sausage casings, and its two
licensees, American Viscose Corporation and TeePak Corpora-
tion, produced the remainder. Visking's patents expired in
December 1957. FTC counsel did not significantly develop a
case seeking divestiture of these assets, but rather, rested
upon the assumption that total divestiture of Visking's
assets would be the remedy if the vertical aspects were
condemned. The hearing examiner, however, separated the two,
and refused to order divestiture of the sausage casings produc-
ing facilities. He stated:

While past competitive conduct of the acquiring
corporation furnishes at best an instedly footing
from which to prognosticate such conduct in the
future with the newly acquired unit, it is some help
in forecasting the future state of competition in
the new line of commerce. None of that is here.
All that is here is that in this market two com-
mmercial strangers are united and the product of one,
sausage casings, now has the financial backing of
a billion and a half dollars of assets (1957)
instead of something less than one hundred million
formerly, and that, ergo, this financial power can
be used to drive everyone else out of the market.
Such a forecast on this loose and spotty record calls
for a temerity and clairvoyance which I do not
possess.13

On appeal to the Commission, counsel supporting the
complaint argued that TeePak was a very small producer, and
that the cellulose sausage casings were its only product; that this left two giants, Union Carbide and Avisco, to dominate the market. The patents had expired but the giants with great financial, research, and other resources would be able to effectively exclude new entrants from an industry that would otherwise be attractive.\textsuperscript{14}

In Respondent's Appeal Brief, it did not mention the cellulose sausage casings aspect of the merger, but in the Answer Brief, it attacked counsel supporting the complaint--but only on the grounds that Section 7 does not require divestiture of all assets acquired, but only those which might contribute a substantial lessening of competition.\textsuperscript{15}

The full Commission was as summary as, if less poetic than the hearing examiner in its dismissal of the conglomerate aspects of this case with the comment that

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 casings seller.\textsuperscript{16}
The Consolidated Foods-Gentry Case

Consolidated Foods is a large processor, wholesaler, and retailer of foods. Consolidated in 1958 had eight divisions and subsidiaries engaged in processing food products, twelve units which sold products of Consolidated and other food processors at wholesale, and three units which were engaged in the operation of retail stores. Between 1950 and 1955, Consolidated grew in sales from $174 million to $268.3 million, and its assets increased from $60 million to $99 million in that period. No data were introduced as to the extent to which mergers had contributed to this growth, but the uncontested statement was made that Consolidated had grown, since its incorporation in 1941, to a large extent by mergers.¹⁸

On April 30, 1951, Consolidated acquired the assets of Gentry, Inc., in exchange for common stock having a market value of approximately $1.0 million. The assets had a net value at that time of $1.6 million. Gentry was dissolved and reorganized as a division of Consolidated. Gentry was engaged primarily in the production and sale of dehydrated onion and garlic; and these, it was agreed, were the relevant lines of commerce in this case, even though Gentry also sold capsicum spices such as paprika, chili pepper, chili powder
and hot peppers. It was further agreed that this was a conglomerate merger even though Consolidated as a wholesaler and retailer had purchased a small amount of Gentry's products for sale at retail and to other retailers. Gentry's sales in 1951 were $3.6 million, which accounted for 27 per cent of the dehydrated onion sales in the United States, and 48 per cent of the dehydrated garlic sales.¹⁹

At the time of the acquisition, there were only four producers of dehydrated onion and three producers of dehydrated garlic. Prior to the hearings, in 1958, one producer of dehydrated onion left the industry; in 1959, a new company began production of dehydrated garlic and onion, and in 1961 this new company was acquired by McCormick, a processor and distributor of a variety of spices, seasonings, condiments, and other products. Basic Vegetable Products, Inc., was and is the largest producer of both dehydrated onion and garlic. Its sales of dehydrated onion average about 60 per cent of the market, and its sales of dehydrated garlic average about 46 per cent of the market.²⁰

Extensive documentary evidence in the form of Consolidated's intercorporate communications, and testimony by witnesses showed that Consolidated had developed and pursued a policy of coercion in their selling to the "unholy fifteen." The "unholy fifteen" were fifteen food processors
from whom Consolidated purchased extensively, and who were substantial users of dehydrated onion and garlic, but who made no purchases of these products from Gentry, either before or after Consolidated's acquisition. Pressure, usually beginning with polite suggestions, and, in at least seven cases, becoming direct threats, was brought to bear on suppliers of Consolidated. For example, in the case of Gerber's Baby Food Products, Consolidated's vice-president in charge of Gentry attempted unsuccessfully to make sales to Gerber. In a letter to Gerber, he stated:

Be assured of the fact that we want to work very closely with your company... We, in Gentry, realize that Gerber's Baby Food products are a wonderful line and we are happy to see them selling exclusively in the Divisions of our Consolidated Grocer's Corporation.

On the same date, a letter was written to the president of Consolidated, stating that Gentry should have a better "shake of the dice" from Gerber, and stating that Consolidated used Gerber's Baby Food Products exclusively, so there should be no reason at all why Gerber Food Products should not use Gentry's material exclusively, and we don't mean up to 50%, as has been tentatively promised us, we mean 100%.

Subsequently, the president of Gerber Products was contacted by the chairman of the board of Consolidated, and Gerber then began making purchases from Gentry. 21
The hearing examiner held that Section 7 of the Clayton Act prohibited conglomerate mergers such as this and that the record was clear that the acquisition had the proscribed effect of substantially lessening competition, or tending to create a monopoly. Consolidated was ordered to divest itself of all assets connected with Gentry, and it was ordered that such assets, or control thereof, should not be acquired by any stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with Consolidated.22

The hearing examiner held that the acquisition of Gentry not only created a protected market for Consolidated, that is, those purchasers which were already customers of Gentry, but in addition, the acquisition served as an inducement for concerns to buy onion and garlic dehydrates from the Gentry division of Consolidated where such firms were present suppliers of Consolidated, or "where such concerns were desirous of becoming suppliers of Consolidated," and that

The acquisition of Gentry gave Consolidated the opportunity to use express or implied business coercion to induce suppliers purchasing dehydrated onion and garlic from other sources to purchase some or all of their requirements from the Gentry Division of Consolidated. There is ample evidence in the record that both Gentry and Consolidated have exercised pressure and have attempted to influence, by affirmative action, some of Consolidated's suppliers to purchase a substantial part if not all of
their dehydrated onion and garlic requirements from Gentry. Consolidated was successful in some instances, even though objections had been raised to the quality of Gentry's products as compared to products of its competitors. This indicates the value of the so-called reciprocity policy when used as a competitive weapon.23

On appeal to the Commission from the hearing examiner's decision, Consolidated relied upon the Commission's Procter & Gamble decision (Docket 6901, described above) to support its position that there must be extensive consideration of post-acquisitional data, and on such decisions as the Pillsbury case24 and the Brillo case25 to the effect that "informed determinations as to actual or probable competitive effects can only be based on analysis of all facts of record pertaining to the relevant market."26 As will be described in Chapter 11, this problem of "all relevant factors" is a major obstacle in handling any merger case, and particularly a conglomerate case. In the present case, Consolidated insisted that the hearing examiner had ignored "most of the evidence in this record consisting of 3,585 pages of transcript and 751 exhibits."27

Consolidated also relied upon the Commission's Union Carbide decision which held that proof of a large disparity in sales and assets "will not support a finding that a lessening of competition is the probable result" of a conglomerate acquisition.28
Consolidated made weak attempts to argue that the amount of sales which they could capture due to their policy of reciprocity could not be considered "substantial," and that furthermore, there were food processors-distributors who competed with Consolidated, and therefore were refusing to buy from Gentry after it became a division of Consolidated because they did not want to aid a competitor in any respect. Consolidated's argument centered on the proposition that post-acquisitional data showed no substantial lessening of competition. These arguments consisted of the following points:

1. That sales of dehydrated onion and garlic had increased tremendously from 1948 (8.5 million pounds) to 1958 (23.3 million pounds).

2. That there had been continued improvements and innovations in procurement, processing, and marketing.

3. That the leader in the industry, Basic, had testified that competition in 1958 "through the industry" was "much more severe" than in 1951.

4. That the exit of one firm from the industry was not due to competitive conditions, but that that firm desired to shift its entire operations to the frozen french-fried potato business. One firm had entered the industry and become
established quickly enough to become attractive to McCormick, which purchased it. It was insisted that there were a number of potential entrants into this industry, including the one which had dropped out, which had retained active membership in the industry association, had the necessary dehydration equipment, and was considering reentry.

5. That the policy of reciprocity (according to Consolidated's expert witnesses) would not be sufficient to directly affect competitive conditions.

6. That while Consolidated's dehydrated onion market share had increased from 24 per cent in 1948 to 35 per cent in 1958, its dehydrated garlic market share had decreased from 53 per cent in 1949 to 39 per cent in 1958. (However, the only substantial drop in market shares was in 1958, when Gentry's share dropped from 47 per cent (1957).) It was insisted that this information prevents a conclusion that reciprocity was effective in stifling competition.

7. That there were no ways in which the size or economic power of Consolidated could be used to bring about a substantial lessening of competition in the products. As stated above, Consolidated relied on the Union Carbide case to the effect that this showing of great disparity in size would not support a finding of a reasonable probability of a substantial lessening of competition. Reliance was placed on
the Procter & Gamble decision that there must be proof that the financial powers of the acquiring firm have been utilized before a violation of Section 7 could be found. And Consolidated even attempted to use the Commission's decision in the Reynolds Metals case, arguing that the Commission did not reply on the size or resources of Reynolds in comparison with the smaller producers of florists' foil, but that it was the use of Reynolds' resources that was emphasized.

It is extremely unlikely that Arrow on its own could have built a new plant valued at $500,000 or more, which it was able to do after the merger with financing from the respondent. Upon appeal, counsel supporting the complaint summarized their argument as follows:

The acquisition of Gentry by Consolidated created a substantial change in the dehydrated onion and garlic industry and resulted in the replacement of Gentry by a substantially stronger over-all competitive unit in an industry composed of relative equals. It created a gross disparity between the total competitive strength of Consolidated Foods Corporation and the three small competitors, which indicates a serious industry imbalance, the effect of which may be to substantially lessen competition or tend to create a monopoly.

The competitive position or share of the market enjoyed by Gentry, under respondent's control, in the production and sale of dehydrated onion and garlic has been enhanced to the detriment of actual and potential competition.

Regarding the problem of post-acquisitional data, counsel supporting the complaint, on appeal, insisted that
the relevant post-acquisitional data in a conglomerate merger case was not changes in market shares as would be relevant in a horizontal merger case, but rather that the changed relationships between the producers constituted the crucial impact of the merger.

The replacement of Gentry by a product-diversified, market-diversified Consolidated Foods, brought about a material change in competitive prospectus from the viewpoint of the three remaining competitors. . . . The gross disparity between the total competitive strength between Consolidated on the one hand and the individual strength of the two small competitors on the other, indicates a serious industry imbalance.31

Counsel argued that permissive and fair competition can be subdivided into three separate areas--price competition, quality competition, and service competition, and that it was in these three areas that the industry was competing prior to the acquisition. However, it was pointed out that a fourth competitive factor had been introduced and this was Consolidated's power to invoke a policy of reciprocity and thereby capture of the market in these lines which it would not have been able to do through the legitimate competitive practices. Counsel admitted that they had not presented any evidence as to the amount of direct competition which was foreclosed by the acquisition.

This, of course, is because there was none (immediately as a result of the acquisition). Consequently, comparisons of pre-merger market
share of the acquired and the acquiring concerns have no place in this record of conglomerate acquisition.\textsuperscript{32}

It was pointed out that the principal relevant areas of inquiry in this case which would satisfy the \textit{Pillsbury} and the \textit{Procter \& Gamble} decisions included:

1. Pre-merger line of commerce characteristics;
2. Competitive strength of the acquiring concern;
3. A small number of competitive units in the lines of commerce;
4. The relative disparity in comparative strength of the acquiring concern and the other competitive units in the lines of commerce;
5. An acquisitional product, the Fourth Force (opportunities for reciprocity) vested in the acquiring concern which gave it a substantial and unfair advantage over other competitive units in the lines of commerce;
6. Exploitation of this Fourth Force advantage by the acquiring concern, manifested, in part, by express or implied coercion;
7. A post-merger showing of a substantial increase in disparity in competitive strength between the acquiring concern and its competitors.\textsuperscript{33}

Thus, it was insisted that the post-acquisitional data should deal not with changes in market shares or sales, but with changes in structural relationships within the industry.
Counsel also argued that Section 7 may be violated notwithstanding the fact that the vigor of post-acquisitional competition had increased. The argument was that if competition had actually become more vigorous, and it is clearly demonstrated that one of the competitors (in this case Gentry owned by Consolidated) is in a position so that it clearly has a power to withstand and destroy competitors, then competition is placed in jeopardy because of the increased likelihood that the giant will use its power to extinguish the other competitors. And this strength came about because of the merger; therefore, it is prohibited.\textsuperscript{34}

The Commission, per Commissioner Elman, upheld the hearing examiner in every substantive conclusion in its decision dated November 15, 1962. Commissioner Anderson dissented (writing no dissenting opinion) and Commissioner Higginbotham did not participate.

Commissioner Elman stated that the gravamen of the case was that the merger was illegal because it created a serious danger that Gentry would acquire a protected market in which fair competitive opportunities would be denied to other sellers of dehydrated onion and garlic as a result of the trade practice known as "reciprocity." It was stated that this position must be weighed in the light of the fact that amended Section 7 was designed to "nip in the bud" such
changes in the structure of an industry, produced by corporate acquisitions, as are likely to bring about substantial lessening of competition; and that the inquiry does not focus on overt anti-competitive trade practices as such (as does the Sherman Act, and Section 5 of the FTC Act), but rather on changes in market or industry structure that are effected by the challenged merger and that may have anti-competitive consequences. 35

The issues of the case were stated to be three in number:

First: Is business reciprocity as presented in this case anti-competitive in its effect?

Second: If it is, did the acquisition transform sufficiently the market structure of this industry so as to create an environment conducive to anti-competitive reciprocity?

Third: If so, is the threat to competition sufficiently substantial to bring the merger within the prohibitions of Section 7? 36

Concerning the first issue, Commissioner Elman concluded that as shown in this case, business reciprocity is anti-competitive in its effect. In reaching this conclusion, he relied on three cases in which the Commission had held that overt and coercive implementation of reciprocity is
an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.\textsuperscript{37}

In the \textit{Waugh Equipment Co.} case, officials of Armour and Co., meatpackers, purchased Waugh Equipment Co., a minor manufacturer of draft gears, used by railroads. Armour was a major rail shipper and within six years, Armour officials had used Armour's pressure on the railroad companies to increase Waugh's share of the sale of draft gears from 1.0 per cent in 1924 to approximately 35 per cent in 1930.\textsuperscript{38}

The Commission concluded in that case that Waugh and Armour's officials had "taken advantage of a competitive weapon oppressive and coercive in nature" which tended to suppress competition by preventing railroads from "exercising their free will and judgment in determining which device was the most efficient and which would serve their needs at lowest net costs over a period of time."\textsuperscript{39} It was held that Respondents had "thus injected an element in the competitive field which was unfair and abnormal."\textsuperscript{40}

In the \textit{Mechanical Manufacturing Co. case}\textsuperscript{41} Swift and Co. officials had undertaken the same practices through purchase of the subject company, and the Commission also issued a cease-and-desist order in this case on the same grounds as in the \textit{Waugh} case. And in the \textit{California Packing Corp. case}\textsuperscript{42} a large food processor required its suppliers to
use the loading terminals of an acquired subsidiary, and the principal consideration for California Packing's purchases from its suppliers became the amount of tonnage which that supplier shipped through the subsidiary's terminals.

The Griffith case was quoted by Commissioner Elman to the effect that large scale buying "may (not) be used to stifle competition by denying competitors less favorably situated access to the market."  

It was pointed out that this is precisely the vice of reciprocity as manifested in the cases mentioned above. It transformed substantial buying power into a weapon for "denying competitors less favorably situated access to the market." It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his produce. In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and ultimately, the allocation of resources.

It was pointed out that in many respects reciprocal buying bears a close resemblance to the unlawful business practice of entering into tying agreements, such as were condemned in the Standard Stations case. Commissioner Elman also relied on economic literature to support the conclusion that a diversified firm can use a policy of
reciprocal buying that gives it an advantage over its competitors, not due to legitimate competitive practices.

The large diversified firm has better opportunities for using reciprocal buying than the single-line producer. . . A firm that makes many products can more readily find a supplier that is also a potential purchaser; it may readily persuade its supplier to buy from it. If a mere suggestion is not adequate, a threat to withhold patronage may do the trick. . .

Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increase its sales. . .

The large diversified firm producing for sale to other industries has an advantage in the strategy of reciprocal dealing.48

In regard to the second issue, it was held that Consolidated's acquisition of Gentry had presented it with an opportunity, previously unavailable, to reap a profit from sales in one product area—dehydrated onion and garlic—on the sheer strength of its buying power in other markets and not on the basis of "a better product or a lower price." Further, it was recognized that the other competitors in the industry did not possess the ability to establish such relationships. And while it was admitted that this would certainly be an appropriate case for a Section 5 proceeding, since there had been coercive use of this power, it was held
that this was also an appropriate instance for the invocation of Section 7, since the latter section was designed to eliminate anti-competitive effects directly attributable to a merger, and that in their incipiency.\(^{47}\)

Commissioner Elman then turned his attention to the issue of whether there was a reasonable probability of a substantial lessening of competition by asking the question: "What, then, are the probabilities here?" Again, there was comparison to tying contracts as condemned in the Standard Stations case.\(^{48}\) And while it was recognized that a reciprocal buying relationship is not as clear-cut as a tying contract, the Commission considered Consolidated's entire share of the onion and garlic dehydrates industry as influenced by this power.

The latent force of Consolidated's buying power, therefore, undoubtedly exceeds one-fourth of both markets by a substantial margin.\(^{49}\)

Further, in discussing the probabilities, the Commission pointed out that there were the many instances in the record in which Consolidated had actually used that power, and cited the Brown Shoe case\(^{50}\) as saying that past behavior of the merging firms may be significant in showing potential market foreclosure. The Commission emphasized that Section 7 uses the term "may be," not "has," and that respondent has not chosen to systematize and vigorously enforce its reciprocal buying policy is
of far less significance than that it obtained the power to do so by merger, and that by actually using its power on occasion, to disadvantage competitors unfairly, respondent demonstrated that its possession of such power posed a real and substantial, and not merely abstract or theoretical, threat to competition.51

Although there was no trend toward concentration in this industry, it was pointed out that the industry was already extremely concentrated, with two firms accounting for better than 85 per cent of both product lines, and that therefore it would be extremely easy for the industry to slip into a virtual monopoly position. If amended Section 7 was designed to prevent trends toward oligopoly, "it is a fortiori desirable to remove, so far as possible, obstacles to the creation of genuinely competitive conditions in an (already) oligopolistic industry."52

Another probability of this acquisition's lessening of competition lay in the fact that with Consolidated being able to exert its reciprocity pressure over a substantial segment of the industry, new entrants could not reasonably hope to penetrate despite superiority of price, quality, or service, and, therefore, competition would be lessened whether or not Gentry could expand its market share. The Commission quoted the Supreme Court as saying, "remaining vigor cannot immunize a merger if the trend in that industry is toward
oligopoly." Nor, therefore, can it "immunize a merger" if preexisting oligopoly is thereby significantly reinforced or more firmly entrenched. "Vigor" of competition is diminished, rather than increased by a merger that adds an anticompetitive element to an already overwhelmingly concentrated industry.54

As for the issue of substantiality in the lessening of competition, the Respondent had attempted to establish the proposition that the amount of commerce affected by reciprocity was a very small part of Consolidated's sales of onion and garlic. However, the Commission treated Consolidated's entire share of the market, over one-fourth in each product, as being under the influence of this potential anti-competitive practice.

There are several characteristics of Commissioner Elman's opinion that deserve special attention.

1. Throughout much of the opinion, it appears that he is struggling (and he is successful) to avoid using the words "per se." But, in at least five instances, he compares reciprocal buying arrangements as analogous to tying contracts, and then quotes the Standard Stations case to the effect that "tying agreements serve hardly any purpose beyond the suppression of competition."55

2. Although the post-acquisitional conduct of Consolidated in attempting to expand its sales is recognized, Commissioner Elman treats this only as evidence showing
corporate history which demonstrates a reasonable probability that there will be a substantial lessening of competition. This conduct is not used directly to show a lessening of competition. And the implication is quite strong that it is the acquiring of the power to implement a policy of reciprocity which is condemned. This facet of the case, combined with point (1), above, leads this writer to the conclusion that Commissioner Elman is, in effect, saying that if a merger creates a set of relationships between firms so that a large buyer is manufacturing a product which his suppliers use, the establishment of this relationship creates a reasonable probability of a substantial lessening of competition in the sale of that product.

3. The opinion relies very strongly on the comparative structure of the industry before and after the acquisition—namely, that the onion and garlic producers, although few in number, are also relatively small dollar-wise, at least compared to the economic size of the acquirer in this case. While there is no change immediately in the structure of the industry, relative to shares of sales, the structure of the industry is particularly conducive to the implementation of a policy of reciprocity. It is in this connection that the structure of the industry becomes important in a conglomerate merger case, as contrasted to a horizontal case where the
structure of the industry that must be considered is the changes in market shares due to a merger.

The Foremost Dairies Case

The Matter of Foremost Dairies also considered the problem of conglomerate mergers and the Commission's decision in this case may be instructive of what can be expected in future decisions such as its forthcoming second decision in the Procter & Gamble case. The case, decided April 30, 1962, involved a number of horizontal mergers, and a number of "geographic market extensions." As was pointed out in the introduction to this Part, some writers will call this type of merger "conglomerate." In this case, both the hearing examiner and the Commission stated that this type of merger must be considered in the same light in which a conglomerate merger is considered. The principal market extension considered in this case was the acquisition of Philadelphia Dairies, the leading--though not considered the "dominant"--milk and ice cream supplier in Philadelphia, by Foremost Dairies.56

Counsel supporting the complaint had insisted that

1. The industry in which the acquisition was made was one which was characterized by a high degree of concentration, and a significant disparity between the dominant concerns, and the remaining local, individual competitors.
2. Each acquired concern has been eliminated as a potential competitor.

3. Substantial competitive advantage has accrued to Foremost, the acquirer.57

Counsel stressed the elimination of potential competition.

Additionally, the evidence conclusively establishes the elimination of potential competition. The very existence of the Foremost Dairy Empire in many communities must be regarded as a deterrent to those who would otherwise be willing to enter the field. There is, of course, no way to measure the extent of this influence, but it certainly should not be ignored. More importantly, however, the acquisition of the dairy concerns and their assimilation into the Foremost organization forestalled potential competition. The cumulative effect of these mergers was to destroy "potential competition in a way later to make actual competition impossible." [Citing the case of Aluminum Co. of America v. Federal Trade Commission, 284 F. 401, 408.58]

The hearing examiner rejected counsel's arguments on the ground: first, that there was nothing in any decisions or quoted excerpts from reports of House or Senate Committees which supported the contention that the acquisition of corporations in geographical areas where Foremost had never done business was violative of the statute; and second, that unless Foremost entered an area in which an acquired firm was already the "dominant firm," gaining a competitive advantage immediately, there could be no violation of Section 7. He also relied on the philosophy of the Commission's P and G decision by stating that there had been no evidence that since the acquisition Foremost had used any
of its power illegally; there had been no illegal discriminator pricing, financing, or investment in cabinets and equipment which were used by its customers. Also there was no proof that Foremost's national advertising had given it a competitive advantage; Foremost had not increased its advertising budget in proportion to its acquisitions, nor was there any evidence indicating that it had utilized national advertising to a greater extent since the acquisition than it did before. 59

Neither side discussed the issue on appeal to the Commission, but the latter picked up the issue in its discussion of the cumulative effect of mergers.

The Commission in its decision stated that the hearing examiner was correct in pointing out that geographic market extensions should be treated the same as conglomerate mergers in considering whether they were violative of Section 7:

This potential market advantage of the conglomerate firm is also possessed by the firm which sells a single product, but sells it in many separate markets. In this case, its operations in individual markets are not constrained solely by market conditions peculiar to it. 60

The Commission pointed out that the FTC's Summary Report of the Merger Movement, which was made a part of the House and Senate hearings, in connection with the amendment
of Section 7, was instructive relative to conglomerate mergers.

... With the economic power which it secures through its operations in many diverse fields, the giant conglomerate corporation may attain an almost impregnable economic position. Threatened with competition in one of its varied activities, it may sell below cost in that field, offsetting its losses through profits made in its other lines—a practice which is frequently explained as one of meeting competition. The conglomerate corporation is thus in a position to strike out with great force against smaller business in a variety of different industries. As the Commission has previously pointed out, there are few greater dangers to small business than the continued growth of the conglomerate corporation. [Citing the Report of the FTC on the Merger Movement, 1948, p. 59.]

The Commission pointed out that there had been numerous examples where the actual practice, or existence of power, of shifting resources had been found to violate the Sherman Act. And it was emphasized that the test under Section 7 is not intended to be mergers resulting in substantial market power and actual elimination of competition but rather mergers which may tend to lead to this end result. This distinction between proof as to actual injury required under the Sherman Act, and potential injury under Section 7 is well documented in decisions involving horizontal and vertical mergers... The necessary proof of violation of the Statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its overall organization gives it a decisive advantage in efficiency over its smaller rivals.

It was then pointed out that Foremost Dairies had been expanding both by internal expansion and by mergers, and
that it was moving closer and closer to Philadelphia Dairies' market areas. Then, rather than moving into the area and competing with Philadelphia Dairies, Foremost entered that market by the acquisition of Philadelphia Dairies, the leading firm in that market. The Commission stated that this resulted in the elimination of actual competition, but that there was also involved the elimination of potential competition between the respondent and Philadelphia Dairies throughout the six-state area in which the latter operated.

When such established firms enter new markets by acquiring the leading independent firms, they destroy potential competition in two ways: They eliminate the acquired company as a competitor in the acquired firm's markets, and the acquired firm is removed as a potential entrant into the acquiring firm's markets. Such mergers dry up the most promising source of potential competition.64

The Reynolds-Arrow Brands Case

On January 21, 1960, the Commission upheld the hearing examiner's order of divestiture requiring Reynolds Aluminum Co., the nation's largest producer of aluminum foil, to dispose of its holdings in Arrow Brands. Arrow was a purchaser of aluminum foil from Reynolds (its sole source of supply) who converted the foil into (the line of commerce) florists' foil.65
Reynolds repeatedly emphasized that there was no foreclosure, no shut-off, of available foil for the florists' foil converters, and that there was no increase in concentration. Both the hearing examiner and the Commission recognized that these were the traditional competition-stifling effects of vertical and horizontal mergers, but emphasis was placed on the fact that the law (Section 7) does not ignore "the capture of small markets from small businessmen."66

After determining that florists' foil was the appropriate line of commerce, the hearing examiner stated that the situation presented by this case was one of an arena of little equals being invaded by a giant, "in imminent danger of being forced out of a formerly commercially livable enterprise by reason of the acquisition."67 Strong emphasis was placed, by both the hearing examiner and the Commission, on the fact that the industry was composed of small fabricators, always numbering fewer than a dozen, relatively uniform in competitive strength, and that the industry had been characterized by vigorous competition in the form of price, quality, service, and creative presentations, and that there had been uniform, regular price declines. This was contrasted to the primary aluminum industry which had been characterized by "unused capacity and sustained prices,"
which were "suggestive of administered prices."

It was concluded that the entry of a giant integrated primary aluminum producer, which was the primary supplier to this industry (florists' foil) would drastically upset the competitive pattern.

Further, it was pointed out that Reynolds' vast financial resources could be used to easily destroy any of the florists' foil competitors. Reynolds brought with it into this small business industry its $600 million in resources with, for the year 1959, $40 million set aside for expansion. Five hundred thousand dollars had been set aside for expansion of florists' foil converting facilities, which it was stated none of the other competitors could equal; Arrow's advertising budget had been increased significantly; and Arrow, previously a profitable concern, had sustained losses in the years following the acquisition due to price wars in which Arrow's share of the market increased 19 per cent, while that of all other producers declined. Thus, there were clear illustrations of Reynolds' use of its economic power to destroy competitors, and on the basis of this post-acquisitional datum, there could clearly be determined a tendency toward monopoly.
Conclusions

In view of cases subsequent to the Procter & Gamble case, it is the opinion of the present writer that the Commission cannot continue to be guided by its original decision, particularly as requiring extensive post-acquisitional data concerning the observed effects of the merger.

Former FTC Chairman Earl W. Kintner (who participated in the original P and G decision) stated that the Reynolds case may provide useful guidelines to future conglomerate cases.

The acquisition by a large and powerful diversified company of a small company in a discrete industry historically shared by a number of small companies competing on equal terms, followed by drastic competitive injury to the smaller competitors might be demonstration of anti-competitive effects sufficient to satisfy the statutory requirements, even if the acquisition was truly conglomerate.70

And Jacobs asserts that

If Reynolds had manufactured batteries instead of aluminum foil, it probably would have absorbed the price decreases, and could have constructed a new plant, and practically everything else the Commission said concerning the effects of the merger would have been applicable. Perhaps, then, the Reynolds case, unintentionally, gives us a clue as to how the prosecutors might approach conglomerates, namely, select those which involve large companies moving into predominately business fields; let them occur, and then watch the industries very closely for possible anti-competitive developments. If these appear, then sue for divestiture.71
The most distressing part of these comments by Messrs. Kintner and Jacobs is that they continue to rely on the position that there must be shown actual conduct or results which are damaging to competitors (competition). Mr. Kintner is in effect maintaining his position that there must be an actual use of economic power which has an observable effect upon the market. It is explicitly stated in several cases (discussed in Chapter 10) that not even the Sherman Act requires a use of economic power or the overt demonstration of an intent to injure competitors. To read such a requirement into Section 7 in connection with conglomerate mergers, or any other mergers, would be to limit that law more strictly than the Sherman Act, rather than "go far beyond" it. If the advice of Mr. Jacobs were followed, i.e., let the mergers occur and then watch the industry, even the utmost haste on the part of the Commission could not, in many industries, prevent the destruction of competitors (competition) after observable effects of the merger began to occur.

The Consolidated Foods case can, in one sense, be considered a relatively narrow case—dealing with the establishment of relationships conducive to a policy of reciprocity. In the opinion for the Commission, Commissioner Elman repeatedly stated that it was the coming into being of the power to carry
on a policy of reciprocity which was condemnable under the statute. But these strong statements can perhaps be considered as dictum in view of the fact that there were numerous examples of Consolidated using its coercive pressures (reciprocity) to gain sales for Gentry. But Commissioner Elman held that these were only illustrations of the existence of the power to gain an undue advantage over competitors. In a situation not involving a relationship conducive to reciprocity, it is conceivable that the Commission (even Commissioner Elman) would not use such strong language as was used in the Consolidated case.

The Foremost Dairies case represents the only instance in which the Commission has ordered divestiture of a conglomerate type acquisition, where there was no showing of any post-acquisitional effects other than (1) the replacement of a "large, leading" independent by a giant national firm and (2) thereby eliminating potential competition. Since the Commission held that this merger must be treated the same as a conglomerate merger, this may furnish a more significant clue to future decisions than does the Reynolds case. At least in the Foremost case the Commission was willing to reach a decision based solely upon the structure of the markets, and the change in that structure, the change in the economic power of the competitors, as a result of the
merger. The importance of this element in the conglomerate merger case will be discussed more fully in Chapter 11. With these small beginnings, especially in the Foremost case where a divestiture was ordered in the absence of post-acquisitional anticompetitive results, and in the Consolidated case with the statement that it is the existence of anticompetitive relationships which is condemnable, the Commission is seemingly developing a policy in conformity with the intent of Congress (as described in Part II) which is directed toward preventing a lessening of competition rather than waiting for it to occur.
Footnotes


2Ibid., pp. 4-9.

3Ibid., pp. 51-52.

4F.T.C. Docket 6901, Respondent's Appeal Brief, pp. 9-17.

5F.T.C. Docket 6910, Appeal Brief From Initial Decision, p. 50.

6Ibid., pp. 51-56.


8Ibid., pp. 20,258-9.


10F.T.C. Docket 6901, Appeal Brief, Second Initial Decision, pp. 5-29.

11Ibid., p. 23.


14F.T.C. Docket 6826, Appeal Brief of Counsel Supporting the Complaint, pp. 6-7.

15F.T.C. Docket 6826, Respondent's Answer Brief, pp. 7-11.

16Matter of Union Carbide, op. cit., p. 20,374.

Footnotes--Continued

18Ibid., p. 20,974.
19Ibid.
20Ibid.

22Ibid., pp. 19-21.
23Ibid., p. 9.


26F.T.C. Docket 7000, Respondent's Appeal Brief, p. 2.
27Ibid., p. 5.


30F.T.C. Docket 7000, Answer Brief, p. 7.
31Ibid., p. 12.
32Ibid., pp. 12, 99.
33Ibid., p. 100.
34Ibid., p. 105.

36Ibid.
3738 Stat. 719 (1914).
Footnotes--Continued

39Ibid., p. 247.
40Ibid.
47Ibid.
48337 U.S. 293 (1949).
52Ibid., p. 20,981.
Footnotes—Continued


55 337 U.S. 293, 305-306.


58 Ibid., p. 104.

59 Ibid., pp. 105-106.

60 Matter of Foremost Dairies, op. cit., p. 20,686.

61 Ibid.


63 Matter of Foremost Dairies, op. cit., p. 20,687.

64 Ibid.


66 Ibid., p. 765.

67 Ibid.

68 Ibid., p. 761.

69 Ibid.

70 Earl W. Kintner, Address, Annual Meeting of the New York State Bar Association (mimeographed), pp. 41-44, January 21, 1961.

ECONOMIC CONCEPTS RELEVANT (AND IRRELEVANT)
TO THE CONGLOMERATE MERGER CASE

In the voluminous literature concerning the rela-
tionship between economic theory and enforcement of the anti-
trust laws, conclusions are usually reached along the lines
that "there is a great need for further development of
economic theory along lines that will enable it to provide
discerning insight into the probable effects of corporate
mergers and acquisitions."¹ Weston states:

The greatest present need is for additional
guidance from economists on criteria of effective
competition and for operational concepts for measur-
ing the increases or decreases in competition,
substantial or otherwise.²

Neither Martin nor Weston makes any positive suggestions
along this line; both merely point up the need for such
guidance.

In Massel's recent work dealing with the legal and
economic issues posed by antitrust, his pleas for a break-
through in economic theory relative to antitrust enforcement

¹Footnotes for Chapter 9 will be found on pp. 387-397, infra.

326
become redundant. For example, he states that "There is a tremendous need to improve the uses of economics and related disciplines in antitrust proceedings." And, again recognizing that the tasks confronting the user of economic analysis must be relative to a statutory standard, he states:

Above all, economists must realize that in order to be employed in antitrust, their tools of analysis must be operational--tools that fit the requirements of the legal system.

Further, "There is no operational theory for judging the effects of a merger."

As far as economic theory goes, Massel agrees with Professor Markham that "the paths of economic theory and merger literature have rarely crossed," much less merged.

While the present writer cannot hope to rise fully to the needs expressed by such writers as Massel, Martin, Weston, and Markham, this chapter of the present study will suggest that if (1) economists recognize the limits and boundaries of their science and/or art as it has developed to date, and (2) new emphasis is given to the intent of Congress and the prescribed statutory norms, then a way is indicated in which the Section 7 case can be simplified and economic theory and the economist's role can be made operational.

Before considering the positive contributions which can be made by economic theory, two important matters relative
to merger policy will be discussed, one of which (the concept of workable competition) is misleading in that it treacherously misdirects the searcher into a Serbonian bog; and secondly, the economics of diversification which is irrelevant as a defense to a Section 7 inquiry, and may instead serve to condemn a merger.

"Workable Competition" and Amended Section 7 of the Clayton Act

Uncertainty as to the Meaning of "Workable Competition."--It should be recognized first that there is no clear consensus among economic writers as to exactly what the concept of "workable competition" includes. Markham states that

An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shape them have been thoroughly examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater gains than social losses. 8

Mason states that a market is workably competitive when market conditions impose

a set of limitations on the scope of action of the individual buyer or seller. The limitations prevent the exploitation of buyers by sellers too few in number or in collusion with each other and prevent the exploitation of sellers by buyers. 9
In any event, the term grew out of J. M. Clark's 1940 article based upon the recognition of monopolistic competition and of imperfect competition. Clark defined workable competition as rivalry in which

The selling unit usually seeks maximum net revenue under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as "the same" product.

Adelman conceives of workable competition as merely an extension of the neo-classical model, designed to take into account product differentiation and fewness of numbers. Others have suggested that the shift from neo-classical models is one of kind rather than merely one of degree in that the theory of workable competition does not provide a closed system; there are no equilibria, but only a qualitative evaluation.

Some have taken the view that the concepts of workable or effective competition form a vast apology for business practices of a monopolistic sort.

These excursions generally turn out to represent alibis, excuses, or extenuations of what would otherwise pass as predatory arrangements or, less frequently, vice versa, as explanations of the bad effects of maneuvers that, on their face, appear innocent, if not indeed beneficent.
In milder language, Stocking has pointed out that the concept is vague, deceptive, and dangerous in that it leads to acquiescence in the status quo.\textsuperscript{17}

In spite of the uncertainty as to what the body of literature represents or purports to describe, Clark's original article has brought forth a great deal of literature, primarily descriptive of the "dimensions" of competition.\textsuperscript{18} But almost the entirety of this work is concerned with the various facets of competition which may be used in the describing of a market, and is directed toward, at most, a descriptive evaluation of existing market circumstances. The descriptive nature of the concept of workable competition is in a very real sense a continuation of neo-classical analysis in that it holds the existing arrangements constant at any point in time and then, to the extent judgments are made, there is the determination as to the workability or effectiveness, or lack thereof, of competition. Massel states that this is a result of the fact that

Economic analysis has been concerned primarily with appraising and guiding policy. With this focus, economists tend toward an interest in how decisions are made, rather than in making them, and they are frustrated at less than a closed system analysis and have an aversion to value and "loose probability" judgment such as the law calls for.\textsuperscript{19}
Wiseman criticizes economic analysis generally on the grounds that economic theories developed theories of markets which were not intended for practical application in the administration of antitrust and related laws. These theories do not fit the theory of litigation or negotiation. They require long chains of deductive reasoning about concepts which have no observational counterpart. They tend to oversimplify analysis by using a restricted number of variables which leave little room for important differences of degree.20

And even if we take into account the fact that workable competition is not a closed system, there are no significant offerings as to the probable consequences of a merger. The emphasis on description and evaluation inhibits the effectiveness of prognostication. Weston states that although a vast body of writing in this area has accumulated, it is in the main descriptive, having achieved little progress toward finding answers to the basic theoretical issues raised by merger activity.21

And Martin states that the analysis in each of the theoretical discussions usually restricts itself to comparison of what the effects may be "all other things remaining equal" in a market containing one firm, a few firms, or a very large number of firms, and that only with certain assumed resulting patterns of conduct, anticipations, and other things taken as given can theory predict the probable outcomes.22 But one of the most significant contributions of the theory of workable competition is a recognition that the resulting patterns
of conduct, and the probable conduct that may result from a merger—the reaction of would-be initiators—is extremely diverse, and that anticipations change as a result of mergers.\textsuperscript{23}

Objectives of "Workable Competition" and of Amended Section 7.--In addition, the goals of the theory of workable competition and of Section 7 of the Clayton Act are not the same. Assuming that the norm of workable or effective competition is a market environment which public policy measures could not improve upon without offsetting social losses, there must be recognized the fact that Congressional policy is directed toward preventing a lessening of competition without consideration of offsetting social benefits or efficiency. (See Part II, supra, and the discussion concerning the economics of size and diversification, infra.)

J. M. Clark points out two distinctions between the goals of effective competition and antitrust policy.

Section 7 forbids mergers where the probable effect will be a substantial lessening of competition. The statute is silent on the possibility that competition might previously have been too severe, so that a lessening might be in the public interest, but the statute opposes lessening by action of the interested competitors.\textsuperscript{24}

and

Antitrust authorities also appear in general to accept product differentiation as enriching the range of alternatives the buyer is given to choose from,
and as a competitive rather than a monopolistic feature, so long as the freedom of competitors in this respect is not interfered with.\(^{25}\)

It is not unfair to say (without condemning it as an apology) that the concept of workable or effective competition has dealt primarily with descriptions of the circumstances under which there may be "competition" yielding "socially desirable" results even in the face of a high degree of concentration of sellers and/or buyers.\(^{26}\) But as was pointed out in Part II, during the hearings, reports, and debates concerning the amendment of Section 7, there was no consideration of the fact that there might be the type of competition which Congress desired where there was fewness of competitors, and the record is replete with evidences that it was believed by the Congress that, from an economic, social, and political aspect, the most desirable economic structure was one of numerous independent rivals. Economists who are interested in current problems of antitrust enforcement "should keep in mind that there are important non-economic aspects of the law."\(^{27}\) An attempt to apply the principles of workable competition would require the court to study competition in all its malleable dimensions, whether or not a merger hinders the operation of market forces, and then the court would have discretion in assessing the social desirability of the hindrance of the social-economic advantages of
that imperfection of competition. Such a policy is not in
keeping with the standards prescribed by Section 7.28 As
will be discussed in Chapter 10, the Supreme Court has held,
in line with earlier decisions, that remaining vigor and
effectiveness of competition will not insulate a merger if
there is a trend toward concentration in that industry.29

Dirlam and Kahn point out that neither structure
nor performance can be effectively employed in implementing
the antitrust laws. Their position is that the antitrust laws
should be viewed as insuring "fair play," and that the courts
must look to the way business firms "play the game" to
determine violations of the antitrust statutes.

The function of antitrust can only be to see
to it that no one attempts to stifle or prevent the
process of competition by collusion, by unreasonable
financial agglomerations, or by exclusion. Illegality
must inhere in the act, not in the result.30

Bok recognizes that the law cannot muddle through
the problems involved in an antitrust case without the
economist's assistance. But neither can the law follow the
economists

who bid us enter the jungle of "all relevant factors"
telling us very little of the flora and fauna that
abound in its depths, but promising rather vaguely
that they will do their best to lead us safely to our
destination.31
Complexity and Vagueness of "Workable Competition"

Analysis.--A final criticism of attempts to employ the concepts of workable competition in the administration of Section 7 concerns the fact that the analysis calls for the consideration of more factors than can be handled effectively. Professor Machlup concludes that

So many different elements enter into what is called a monopolistic position and so complex are their combined effects that a measurement of "the" degree of monopoly is even conceptually impossible.32

And Professor Stigler points to the lack of precision concerning each of the dimensions of the theory of workable competition.

There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasoned modifications of the rigorous and abstract criteria of perfect competition.33

He thus took the position that the Attorney General's Committee Report in recommending inquiries along the lines suggested by the theory of workable competition, in effect, offered no guidelines at all.

This vagueness or lack of guidelines on the part of the theory of workable competition has also resulted in a lack of effectiveness of empirical research. Markham points out that there have been developed no correlations which show that within a certain probability range the merger can be expected to produce (or increase) competition by a substantial
amount... Researchers, having no set of hypotheses as a point of departure, have relied principally upon the art of description and enumeration. Accordingly a vast body of merger literature shows a lack of cohesive purpose that may have followed from empirical testings of merger theory.34

In addition to the "on the one hand, but on the other hand" nature of most of the "dimensions" of workable competition, there is nothing in the theory which indicates the relative importance of any one of the factors. In attempting to evaluate the probable effect of a merger, there are no guidelines indicating to the administrative agency or the court how much weight is to be given to any one factor, or which ones might outweigh others.

"Conditions of Entry" in the Section 7 Case.--The problem of "entry" will illustrate the non-feasibility of the "workable competition" approach to the enforcement of Section 7. First, there are the uncertainties concerning the effectiveness of low barriers to entry in producing the most socially desirable market environment. There is a lack of theoretical certainty that low barriers to entry will be productive of an effectively competitive market. Bain points out that under some circumstances, a dominant firm may feel that the profits to be gained before the arrival of new entrants will be large enough to outweigh the advantages of
charging a price so low as to discourage entry, in which case there may be price leadership, continuing even after entry, with over-capacity.

A principal hypothesis developed in the analysis of the effects of the condition of entry is that with "ineffectively impeded" entry (with barriers not high enough to make entry forestalling price policies desirable) there is a significant probability of price policies leading to structural instability, excessive entry, and chronic or quasi-chronic excess capacity—all this provided that for some reason or other seller concentration becomes fairly high and competition among established sellers can be significantly restricted.35

Thus the questions remain: Do low barriers to entry produce socially desirable results? How much weight should be given to this factor in the merger case if the results are uncertain? What other factors will overcome evidence of low barriers to entry and lead to condemnation of the merger? And, most important, what effect does this issue have on the reasonable probability of a substantial lessening of competition?

The crucial point is, however, that the analysis of barriers to entry and potential entry help only to describe the effectiveness of competition in a given market. But the issue in a Section 7 case is not the effectiveness of competition in a market, it is the probability of the merger causing a change (a substantial lessening) in the competitiveness of that market. The theories of workable or effective competition
suggest that in evaluating the workability or effectiveness in a given market, the ease or difficulty of entry is a substantial factor in limiting the conduct of producers in that market, even though they be few in numbers or highly concentrated. The idea of potential entry due to low barriers to entry is basically that potential entry, as well as actual (presently encountered) competition, forms a part of the restraints imposed on competitors in a market milieu. The constraints facing an operator in a market are not only those imposed by actual competitors, but those posed by potential competitors. Potential competitors, then, are part of the full range of competition which a firm must take into account in its conduct. The suggestion is then made that relative to the Section 7 case, the existence of potential competition due to low barriers to entry tends to mitigate the probability of a substantial lessening of competition—the merger is less likely to substantially lessen competition if there are low barriers to entry and therefore numerous potential entrants. There are two ways in which freedom of entry may be pertinent to determining the relevancy to the Section 7 case. First, the advent of new companies may serve to erode the immediate gains in relative size that accompany the merger, and second, potential competition may be such a threat that it will prevent a dominant firm from exercising its market power in a harmful way.36
In addition to the fact that even the theory does not tell us unambiguously that such alleviation of the effects of a merger would be forthcoming, a second reason for not injecting the issue of conditions of entry into the Section 7 case is that it misdirects the inquiry. The issue in the Section 7 case is not whether there are potential entrants or low barriers to entry. The issue is: is there a reasonable probability of a substantial lessening of competition? Therefore, to the extent that part of the competition in a given market setting is represented by potential competitors due to low entry barriers, the issue is not the existence of ease of entry or low entry barriers, but rather: does this merger present a reasonable probability of a substantial raising of the barriers to entry, to the extent that potential entrants are now less likely to enter than they were before? What is the impact upon these potential entrants? The fact that barriers to entry may have been low and potential competitors numerous before the acquisition is not determinative of the issue of the impact of the acquisition upon those barriers to entry or the readiness of potential competitors to enter.

Potential entrants could be affected in a way which is (1) neutral, (2) the same as, or (3) opposite to the effect upon actual competition. If the effect is neutral, then the
effect of the merger on actual competition can be determinative; if the effect is the same, the decision would be the same; and there is nothing in economic theory or reason to suggest that barriers to entry would be lowered, or potential entrants would be encouraged, that is, potential competition increased, if there could be found a substantial lessening of actual competition. Therefore, in any case, the inquiry would represent only added investigation and conjecture. Speculation concerning the probable effect upon probable competition adds another dimension to an inquiry when the conclusions would in all probability be the same. The record would be lengthened and emphasis misplaced by such added inquiry.

An illustration of misplaced emphasis concerning entry is afforded by the Brillo case. In that case, the hearing examiner considered evidence concerning the existence of patents, with the respondent insisting that a new German machine could produce steel wool in competition with Brillo but counsel supporting the complaint argued that the machines were not yet proven and probably could not produce an acceptable grade of steel wool, and various other aspects of such matters as costs and earnings were conjectured upon. The hearing examiner concluded that entry was reasonably easy and because of this and other reasons found for the respondent.
On review the Commission, however, did not look at the barriers to entry as such, but analyzed the impact upon potential competition in the same light as the impact upon actual competition, that is, in the light of market conditions as they were changed by the merger. The Commission held that

In the light of these matters, it also is apparent that handicaps to potential operators and normal business growth which existed in the industrial (steel wool) market impose formidable barriers to the success of new entrants into the field. Hence, conclusion of easy entry into the market is of dubious validity.39

The factors which the Commission relied upon were: most importantly, the increase in Brillo's market share from (following the acquisition of Williams) 29.1 per cent to 47.3 per cent; a progressively widening disparity in resources and sales volume between Brillo and other producers (with one exception); and the acquisition of a second, geographically separate plant, which no other producer had. There were no factors considered in evaluating the probability of a substantial lessening of competition relative to potential competitors separately considered, from those factors relevant to the effect upon actual competition. The Commission did not even consider the conditions of entry as such, and made no mention of the evidence introduced at the hearings. They emphasized only the probable effect of the acquisition on competition, and included any potential competition, whatever
it might have been, within the scope of their analysis of
the impact of the merger.40

A third reason for rejecting an inquiry into the
extent of potential competition in the Section 7 case is that
although such an inquiry may be applicable to a case under
Section 2 of the Sherman Act, it is not applicable to the
former since the issues are different. In the Sherman Act
Section 2 case where the charge is monopolization or attempt
or conspiracy to monopolize, the issue is whether or not the
defendants have

the power to control and dominate interstate trade
and commerce in a commodity to such an extent that
they are able to exclude actual or potential
competitors from the field, accompanied with the
intention and purpose to exercise such power.41

But Section 7 is violated far short of any such situation
and as described above, theory suggests that potential
entrants prevent any producer or producers from raising
prices and limiting output, and gaining "excessive profits,"
however that may be defined. In other words, potential entry
represents a restraint upon the use of monopoly power. But
there can be a substantial lessening of competition short of
conduct which would produce the stimulus for potential
entrants to become active in a line of commerce. There may
develop stable prices (at profit levels which remain at entry
forestalling levels); oligopolistic price leadership;
live-and-let-live policies; cessation of innovation in selling, merchandising, or product improvement; or simply agreements (sub rosa or overt) not to invade each other's territories—all of which developments represent a substantial lessening of competition, and none of which would necessarily, or even probably, be offset by the existence of potential entrants. Particularly in the conglomerate merger case is there likely to be a lessening of competition without a tendency toward monopoly. In this type of case, there is no present increase in market share; no foreclosure of competitors; and therefore, no "tendency toward monopoly." A lessening of competition may occur because of a removal of "the incentive to provide services and to innovate and achieve greater efficiency and output at reduced prices through research." There is nothing to suggest that potential competition would act to prevent such a lessening of competition.

The Section 2 of the Sherman Act case, however, is predicated upon the acquisition of the ability to raise prices, limit output, or exclude competitors (the attainment of monopoly power) in which case potential entrants can be very important since they do serve to limit this power, assuming that some way could be devised to show that this check exists. A similar dichotomy between the two statutes will be discussed
in Chapter 10 concerning the relevant product lines. In the
Section 2 (Sherman Act) case, where the charge is monopolization, substitute products must be considered—that is, potentially competitive products. But in the Section 7 case, the courts have recognized that there may be a substantial lessening of competition even though substitute products exist.43

Fourth, it may well be that the courts will explicitly exclude potential competition as a defense in the Section 7 case. The Crown Zellerbach case represented an excellent opportunity for the application of the concept of low barriers to entry and the existence of many potential suppliers. The line of commerce in that case was "census coarse paper" which could be produced without significant machinery conversion, by any producer who produced "all other coarse papers." The "all others" production was over three times as great as that of "census coarse papers." So there was a great reservoir of potential entry, facing virtually no technical or sales organization barriers. The bases for the hearing examiner's decision finding violation of Section 7 were essentially two: (1) Crown's share of "census coarse papers" production, in the relevant geographic market, was increased from 81.7 per cent to 87.4 per cent as a result of the acquisition of St. Helens, and (2) St. Helens had been a source of supply to jobbers and
converters. After the acquisition, jobbers and converters were confronted with having to buy from Crown who was also a competing jobber and converter.\textsuperscript{44}

The hearing examiner, in reply to Crown's defense that potential shifting would prevent "any producer attempting to obtain a competitive advantage," simply stated that "such contention cannot be used to justify or excuse the acquisition which has a present serious impact upon competition." It was pointed out that all of these machines are now engaged in the manufacture of types of paper for which there is a present customer demand, and for which types and grades and paper sales organizations have been developed to sell . . . while flexibility of these machines is recognized, it does not have any serious impact upon the competitive situation existing in the West so far as the acquisition of St. Helens is concerned, nor does it have any serious impact upon the present dominant position of the respondent.\textsuperscript{45}

On review, the Commission recognized the convertibility of production facilities, but stated that

While this may indicate a potential for increased competition from paper companies now producing papers other than those involved in this proceeding, it does not appear that this is a substantial factor to be considered. Many paper mills produce in those areas of competition for which they are most appropriately equipped. Economic factors control to a large extent types of papers which will be produced in particular mills. From the circumstances presented in this record, it does not appear likely that substantial shifts in production are to be expected, at least under ordinary market conditions.\textsuperscript{46}
The Court of Appeals for the Ninth Circuit stated that

It is not altogether clear just how material prospects of new entrants may be in a case of this kind. Perhaps it is doubtful whether a concern like Crown, which has accomplished a merger which under ordinary standards cannot be permitted to stand, can avoid the consequences by saying . . . prospective new competitors will serve to offset the consequences of the merger.47

And the Court quoted with approval from Professor Bok:

The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market, or concentration is for some other reason declining, there will be one less substantial firm that would have existed but for the merger, and an adverse finding under Section 7 is predicated on the presumption that competition would have benefited had that firm remained independent. (Bok, op. cit., footnote 31, at 327, note 299.)48

The Court approved the Commission's finding that "Under the circumstances, it does not appear that new entrants will measurably offset the lessening of competition apparent in this record."49

In the Brown Shoe case, the Supreme Court pointed out that the defendant had argued that "the shoe industry is at present composed of a large number of manufacturers and retailers and that the industry is dynamically competitive." The Court stated, however, that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly."50 Thus, if actual vigorous competition cannot
immunize such a merger, it would seem that a fortiori potential competition would not serve as a defense.

Fifth, as a practical matter, an inquiry into conditions of entry would be extremely complex and difficult to administer, either before the Commission or a trial court. Chapter 11 will deal extensively with the problem of the quantum of evidence to be introduced into the Section 7 conglomerate merger case. As a matter of probative value, such an inquiry would become almost entirely conjectural. Also, exactly what evidence would be necessary to show the ease of entry is itself open to numerous imponderables. What account should, or could, be taken of the cost of obtaining customer acceptability? Is cost of technical operations itself determinative? Whose expert testimony could describe costs and probable success of new entrants? (existing operators? engineering consultants? marketing experts?) The inquiry could go on forever and still be speculative and conjectural only, unless. . . There is one aspect of entry which can be used in the Section 7 case, and that was pointed out in the Brown Shoe case, in which the Court stated that any merger must be viewed in the context of the particular industry, and one of the factors which could properly be taken into account is whether that industry "had witnessed a
ready entry of new competition, or the erection of barriers to prospective new entrants."

It is believed that the Court thus put the problem of entry, as it is related to the Section 7 case, in its proper perspective. That is, the inquiry should be into the recent history of the industry to see if there have been entrants, and this, of course, can be proven without theorizing or speculating upon conditions of entry. If entry is easy, and there are no substantial barriers to potential competition, as a practical matter, it will be shown in the structure of industry, relevant to actual entries, and will be extremely important in determining the Section 7 case. This aspect of entry—that which is observable—will be considered as an important part of the structure of the industry, which will be suggested, in Chapter 11, as the most important factor to be looked at in the conglomerate merger case.

Thus, while entry, as such, will constitute an important part of the consideration of the structure of an industry which will be most important in determining the probable impact of a merger, an analysis of conditions of entry and potential competition is considered to be an unworkable inquiry, not productive of clues as to the probable effect upon competition resulting from the merger in question.
The same, or similar, reasons for rejecting a consideration of the conditions of entry as being valid to the Section 7 inquiry, apply to many of the other inquiries suggested by the concept of workable, or effective, competition, such as "opportunities for innovation," "natural limitations on resources," "economies of scale," or "special national policies," "long run supply and demand picture," etc.53

Logically, in determining whether a merger is likely to produce a substantial lessening of competition, there could be an analysis of each of the facets of competitiveness in a given market; then there would be necessary a consideration of the impact of the merger upon each of these dimensions of competition; and then, somehow, they would all be thrown into the hopper, and the determination would be made as to the probable effect. But, the evaluation would not be in terms of a "better" economic outcome; the statute would still demand only that there be determined whether or not competition had been lessened.

But there is a much simpler, more direct way, suggested by economic theory. This chart for an exodus will be described after first disposing of another issue which is often misleading in consideration of the conglomerate merger case.
The Economics of Diversification

Although the present study is concerned with conglomerate mergers—mergers for diversification—economic analysis concerning this subject is intermixed with discussions of size and economies of scale. This is the case because most analyses of the economics of the diversified firm have borrowed from theories related to size and economies of scale and dovetailed the two subjects. In fact, of course, the economics of diversification is directly related to the growth in size of the firm, hence, a natural concurrent consideration of economies connected with the growth of the firm. Other studies have dealt specifically with an analysis of the advantages and disadvantages of diversification.

More specifically, the business advantages (efficiencies) usually attributable to diversification include: an ability to spread overhead costs, though these advantages have been questioned; the ability of a firm to make better use of all its resources including fuller use of productive facilities and raw materials, although it is suggested by some that the conglomerate firm has less economic efficiency justification on these grounds than other types of mergers; a "managerial divisibility" savings, but this may be offset by a loss of specialization, management overwork, or coordination
costs;\textsuperscript{60} advantages in sales promotion;\textsuperscript{61} better direction and channeling of research;\textsuperscript{62} the enhancement of economic security and stability of earnings;\textsuperscript{63} gain in tax advantages;\textsuperscript{64} and advantages in finance.\textsuperscript{65} As will be pointed out later, these advantages of the conglomerate firm, or these advantages accruing as a result of a conglomerate merger, to the extent that they do exist or come into being, rather than serving as a justification for a merger, may very well be the basis for condemning the merger.

In the literature concerning the diversified firm, and particularly mergers for diversification, discussions concerning the "disadvantages" of such firms or mergers are often interspersed with policy considerations. For example, Hale and Hale in discussing the disadvantages of diversification point out only one aspect devoid of policy considerations—namely, that in some instances diversification causes excessive selling costs and increased capital requirements. The other "disadvantages" included: ease in the establishment of tying arrangements and full line forcing; discriminatory price cutting, \textit{i.e.}, one product or geographic area making up for price cutting in another so as to overcome competition; exclusion from markets; control of substitutes; artificially maintained continuity of corporate existence;
avoidance of market appraisal of new ventures; subsidies to ancillary or marginal products; and price rigidity. 66

And as was pointed out in the Introduction to this Part concerning the definition of conglomerate mergers, the conglomerate firm by its very nature has the "advantage" of the ability to shift its resources from one "functionally discrete" product or geographic market to another. Corwin Edwards cites four types of market and four types of non-market advantage which he sees as the base for condemning conglomerate mergers. 67 In addition, attention has been directed to specific business practices peculiar to the diversified firm. Particularly if a firm has a degree of monopoly power in one area, it may use that power to gain advantage over competitors in another area. Adelman points out that

The term "leverage" describes the use of a monopoly position at one stage to acquire one at an earlier or later stage (vertical leverage); or to extend it to an adjacent market area (horizontal leverage). 68 Blair points out that this same type of leverage may be used by the conglomerate merger to push with a superior advantage into new product areas as well. 69 And Lanzillotti describes in an empirical study how this leverage was actually used in the hard-wood floor-covering industry. 70 Also, the
opportunities for the use of reciprocity in the conglomerate merger have been recognized. All of these comments are directed toward indicating that there are certain specifics about the conglomerate acquisition which may cause an adverse effect upon competition, and come within the condemnation of Section 7. In summary, most of the criticism of mergers for diversification, and enumerations of their "disadvantages," have usually been based upon the economic advantages which give the firm an enhanced competitive position, or relationships which are established which give a non-economic competitive advantage.

The Economics of Diversification and Amended Section 7 of the Clayton Act

The assertion is often made by defendants in an antitrust action involving a merger that the merger will enable them to compete better, or that it promotes efficiency. In fact, in almost any merger case, the defendant could argue that he will be a better competitor because of the efficiency engendered by the acquisition (otherwise, why would he have entered the venture?). Increased efficiencies due to diversification, however, cannot be used as a defense in the Section 7 case. This part of the antitrust laws involves only two basic
issues: (1) is there a reasonable probability of a substantial lessening of competition in (2) a relevant market?\textsuperscript{73}

House Report 1191 emphasized that it was the effect of the merger that was crucial, pointing out that it would not be necessary for the government to speculate as to what is "in the back of the minds" of those who promote the merger.\textsuperscript{74} Good intentions seem never to have served as a defense, but in the \textit{Brown Shoe} case the Supreme Court held that the intention to gain an economic advantage (by vertical integration) was the ground for condemning that merger.\textsuperscript{75}

Similarly, in the conglomerate merger case, rather than the advantages of diversification serving as a defense, they may well serve as a basis for condemning such an acquisition. House Report 1191 stated some possible ways in which there may arise a "substantial lessening of competition":

\begin{quote}
\textit{... increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive ... or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.}\textsuperscript{76}
\end{quote}

Thus if the advantage accruing to the firm because of the conglomerate merger "threatens to be decisive" or "establish(\textit{es}) relationships" injurious to competitors, the very advantages of diversification may condemn the merger. This smacks of pure protectionism toward competitors. However, it must be remembered that the Congress made mergers suspect. None of
the advantages of diversification are condemnable under Section 7 if diversification is carried out by internal growth. Mergers were singled out, from the time of the original Clayton Act, as a form of business activity to be brought under restraints. The protectionist sentiment here expressed will be elaborated upon below in the definition of "competition" and "lessening of competition."

Various court decisions have accepted the position that in determining public policy relative to Section 7, Congress placed other values higher than efficiency. In the Bethlehem Steel case, the court said:

In approving the policy embodied in these acts [the Clayton and the Sherman Acts], Congress rejected the alleged advantages of size in favor of the preservation of a competitive system (95 Cong. Rec. 11486, 11496).\(^77\)

And the trial court in the Brown Shoe case stated that regardless of these (reasons for the merger) the Congress has, down through the years, definitely tightened the screws upon acquisitions in the effort to prevent mergers and acquisitions where competition is substantially lessened, tendency toward monopoly is created, or both.\(^78\)

And the Supreme Court in that case stated:

We cannot fail to recognize that Congress desired to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional high costs and prices might result from maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.\(^79\)
Thus, there must be taken into account the tremendous importance of recognizing the distinction between the discussion concerning the economics of and justification (in an economic efficiency context) for diversification as such, and the consideration of diversification by merger, in the light of amended Section 7 of the Clayton Act. Advantages achieved by the diversification merger are made suspect by Section 7.

Analogous to the distinction between the matter of the advantages of diversification, and the consequences of diversification by merger, is J. M. Clark's discussion of diversification as a manner of promoting effective competition in an oligopolistic setting. Clark's position is that actual entry, or even potential entry of a firm by diversification into an industry, serves to promote effective competition in that industry which faces such a threat. But he specifically discounts diversification by the acquisition of existing firms as a means for injecting competition into an oligopolistic setting.

It is true that if the new firm has new ideas and capacities, something new has really been added, which may enlarge and transform the effectiveness of the productive unit. However, this is an imponderable and uncertain matter, and the bare fact of new ownership affords no guarantee that it will happen. It is about as likely to happen from a revitalization of an existing management without transfer to a new firm.
These comments were made in connection with Clark's definition of what constituted "entry." Bain had specifically limited his discussion of barriers to entry to new firms and new productive facilities, although he did recognize that diversification entry by building new facilities was a source of potential competition. And Clark agrees with Hines that diversification by merger cannot be considered "entry" if there is no change in the total number of firms, there has been no entry from the point of view of the group of sellers. (and) the concept of entry implies an enlargement of numbers.

Clark points out that it is quite proper to distinguish creation of new diversified facilities from the mere taking over of existing facilities by a new business unit. The economics of diversification and the economics of diversification by merger must therefore be considered separately, both in economics and in law. Hines goes on to point out that the established firm which diversifies (by building) into a new line has economic advantages over the completely new firm, but that the former has certain policy drawbacks. Diversification by merger, he sees, however, as much worse.

More insidious would be mergers between two firms who are potential entrants into one another's markets. Thus, two chain store systems, presently operating in different regions, or two manufacturers producing different products, might threaten one another with
entry. But if they merge, they remove their threat. Amidst the numerous recent "conglomerate" mergers, many may have this effect--and it is doubtful if the amended Clayton Act can reach them.\textsuperscript{86}

As was pointed out in Chapter 8, above, in the Foremost Dairies case, the FTC did hold, precisely on these grounds, that a merger did violate Section 7.

The Procter & Gamble case represented an opportunity for the Commission to hold that diversification by merger eliminated P & G and Clorox as potential competitors in the household bleach industry. There was evidence in the record that P & G was considering diversification into the bleach industry by building as it had done in the case of the household cleanser "Comet."

The promotion department . . . recommended that the company should acquire the Clorox business rather than try to enter the market by introducing a new brand, or by trying to expand a sectional brand. This was because it was felt that the latter course would require "a very heavy investment" to achieve a major volume in the field. It was recommended that: "taking over the Clorox business, however, could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well.\textsuperscript{87}

All of the above comments are not intended to imply that simply because a conglomerate merger yields advantages to the firms, the merger will be condemned. Such will be the case only if there is a reasonable probability of a substantial lessening of competition, as "competition" and "lessening of
competition" are defined below. But, at the risk of repetition, it must be made clear that the very advantages and opportunities which may arise due to diversification by merger may afford a basis for condemning that merger.

"Competition" Functionally Defined

As was pointed out above relative to the definition of "conglomerate," the attempt to implement and guide in the administration of statutory norms must begin with the definition of terms, which definitions are instrumental in such implementation. Economic theory has long been concerned with a normative definition of "competition," that is, the description of various equilibria under assumed conditions. Even the theories of monopolistic and imperfect competition did not represent a substantial departure from this approach. The theory of workable competition, however, shifted the emphasis, to a large degree, to the dynamic process of competition, although it retained normative judgments which only modified the norms of pure and/or perfect competition, by stating that competition was "workable" if public policy could not produce a better economic performance.88

In his latest work, however, J. M. Clark goes further and concentrates his approach on "competition as a
dynamic process." Here, competition is defined as "an activity (as distinct from a state of hypothetical equilibrium) which may be viewed as a series of initiatory moves and defensive responses. . . ."89 And emphasis throughout is placed upon the fact that the sine qua non of any market situation that may be called competitive depends upon initiating moves by some of the participants in that market.

Competition between business units in the production and sale of goods is the efforts of such units, acting independently of one another (without concerted action), each trying to make a profitable volume of sales in the face of offers of other sellers of identical or closely similar products.90

Clark emphasizes that competition consists of both the moves of initiators and the defensive responses of others. Both these sets of conduct make up the total competitive milieu.91 Courts have, also, on occasion looked at competition in a dynamic setting. Competition has been defined as "the conflict for advantage,"92 or as "independent endeavor of two or more persons . . . within the market place to obtain the business patronage of others."93

"Competition," therefore, can be viewed, not as that nirvana of equilibrium which could exist under only the most unlikely conditions, but as the conduct of competitors in the struggle for advantage in a market setting. A lessening
of competition would then be represented by either (1) a diminution or cessation of initiating moves or (2) a diminution or cessation of responses to the moves of initiators.

... competition may be measured by the degree to which persons selling in the same geographic product markets attempt through rivalry to preserve and increase their profits by maintaining and augmenting their market share. ... Conversely, events which produce a slackening of innovation, a stabilization of price, in general, which cause a reduction in efforts to increase market share at the expense of competitors--tend to lessen competition.94

Further, the theories of imperfect, monopolistic, workable, or effective competition have pointed out that the rivalry for business advantage is characterized by more than price competition. This rivalrous conduct is also carried on in terms of advertising, promotional, and other selling efforts, including the rendering of service, and by product design, improvement, or other differentiations leading to real or supposed desirability.95

For purposes of the present study, "competition" will be defined as the initiating (and responding) conduct of business firms to gain profit advantage by either of three types of competitive conduct: (1) price, (2) those activities which can be generally grouped as selling effort, and (3) those activities which can be grouped as yielding a more attractive product.
This definition of "competition," usable in applying Section 7 of the Clayton Act, avoids the approach of the theories of "workable" or "effective" competition in that these latter are instrumental in describing the effectiveness of competition--the competitiveness of a market--but are either not useful at all, or extremely cumbersome in attempting to determine the impact of a merger upon the competitiveness of that market. "Workable competition" analysis usually indicates that market performance can remain "acceptable" even though there are changes in competitive patterns or a lessening of competition in some of its dimensions. The Congressional intent regarding Section 7 was that competitive patterns should not be changed or competitive activity reduced due to mergers. This again points up the difference between the economist's two functions: (1) evaluating the validity of laws and (2) seeking to aid in implementing laws. Section 7 does not speak in terms of the effectiveness of competition, but rather in terms of a prevention of a lessening of competition, whatever the level of competition may be. Therefore, it is not necessary to look at the effectiveness of competition in the light of what some sort of "best" market situation would yield. Instead, we can look directly at
competition, as it is carried on, and if there is a reason-
able probability that competitive activity will be inhibited
by a merger, the statute is violated.

This definition of "competition" serves to explain, in
large degree, the protectionist elements found in antitrust
statutes. As described in Part II, above, there was
virtually a universal acceptance on the part of the proponents
of the Celler-Kefauver Amendment, of the proposition that the
disappearance of competitors by mergers led to a lessening
of competition, and there was, for all practical purposes,
no distinction between competition and competitors. The
House Report stated that a lessening of competition may occur
when one firm realizes "an increase in relative size to the
point where (the merging company's) advantage over its
competitors threatens to become decisive."99

A great deal of ink has been spilt lamenting this
protectionist sentiment on the part of the Congress.100 But, it
is suggested that the thrust of the criticism here should
be recognized as related to policy. That is, the argument
is really that such protectionism is economically undesirable.
The present study, however, is concerned with the implementa-
tion of a Congressionally determined policy which is based
upon the belief that the sine qua non to competition is a
number of independent competitors, and if these competitors are injured or put at a competitive disadvantage, or refrain from competitive conduct because of a merger, such a merger is proscribed. Congress, not burdened with the niceties of an imaginary market situation which economists called "competition," rather saw "competition" as competitors in action, and attempted to prevent a diminution in that freedom of conduct.

The present writer is unable to determine who coined the catechism "It is competition, not competitors, which the antitrust laws protect," but the Supreme Court in the Brown Shoe case stated:

Their expansion is not rendered unlawful by the mere fact that small, independent stores may be adversely affected. It is competition, not competitors, which the Act protects. 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. 101

The Ninth Circuit Court of Appeals in the Crown Zellerbach case was less circumspect in its statement that "Congress was not concerned about increased efficiencies; it was concerned about the competitor..."102 This protectionism in the statute, however, is not an attack on the gaining of
competitive advantage by efficiency, imagination, innovation, selling effort, or any other competitive conduct--it is an attack on the gaining of that advantage by merger. If the initiatory competitive moves are impeded or blocked, stifled or stymied as the result of a merger, or if the responsive (defensive) moves of a competitor are altered or crushed or would become useless, because of a merger, that merger is proscribed.

The Lessening of Competition

Economic theory also provides us with a useful tool in describing a "lessening of competition." The tool that can be thus employed is commonly referred to as the "kinked" demand curve. Robinson¹⁰³ and Chamberlin¹⁰⁴ originally pointed out the existence of, and significance of, the individual firm's sloping demand curve--that is, that each seller experiences (within limits) a flexibility in the terms of his offerings as to price, product, and selling effort, except in the rare case of pure or perfect competition. Further analysis of the operations of imperfect competition led to the development of the concept of a kink in a firm's demand curve as developing at a point at which the would-be
initiator concludes that any moves on his part would be more than offset by the responding moves of his rivals.

The kinked oligopoly demand curve hypothesis merely maintains that oligopoly firms are apt to believe correctly that their rivals will follow suit in the event of price reductions but not in the event of price increase. The producer runs into perfectly elastic demand if he tries to raise the price. The hole in the marginal-revenue function always appears just below the price actually prevailing. (Continuing in a footnote: Because at this price there exists no well defined elasticity. The elasticity jumps; it is different upward from what it is downward.)

It is recognized that the theory of the kinked demand curve suggests a rigidity which in all probability does not occur in actual market settings, particularly over time. The concept is employed here merely for illustrative purposes, to indicate the phenomenon of a change in the subjective evaluation of market conditions occurring in the attitude of a would-be initiator.

Rather than showing the kinked demand curve in the conventional manner, the same phenomenon can be shown so as to indicate the conduct of initiators in terms of advertising or other selling effort outlays, promotional expenditures, and product improvement, as well as price changes. Assume that the product sells for $1, costs are constant over the significant range of output, and that all other things remain equal with total production costs being $0.75. Profit, then,
is $0.25 and a decrease in selling price per unit, or increases in selling costs or product improvement represent a reduction in profit per item. The Y axis (Figure 1) shows profit per item, and the X axis shows the quantity which can be sold at each profit per item amount.

Figure 1. The "kinked" demand curve relative to price, selling effort, or product change.
Assume that the producer is incurring five cents advertising costs. Then profit will be $0.20 per item.

Will the entrepreneur increase these outlays by $0.05, or add $0.05 to production costs by way of improvement in quality or service, or lower his price so as to reduce profit per item by $0.05?

Such an initiating move will be profit elastic if the percentage change in sales volume is greater than the percentage change in per unit profit.

Case I: If the entrepreneur believes that the extra five cents cost (or equal reduction in price) reducing profit per unit from $0.20 to $0.15 will lead to a sales increase from 100 to 150, he will take such initiating action.

\[
\begin{align*}
\text{original profit} & = 0.20 \times 100 = 20.00 \\
\text{new profit} & = 0.15 \times 150 = 22.50
\end{align*}
\]

or, if

\[
\frac{\% \text{ change in quantity}}{\% \text{ change in } p (\text{profit per unit})} > 1
\]

is greater than one, the move is profit elastic.

\[
\frac{\frac{50}{125}}{\frac{5}{17.5}} = \frac{0.400}{0.286} = 1.40
\]
Case II: If, however, the entrepreneur anticipates that such action on his part would increase sales to only 125 units, he would not take such action.

\[
\begin{align*}
\$0.20 \times 100 &= \$20.00 \\
\$0.15 \times 125 &= \$18.75
\end{align*}
\]

The demand curve is profit inelastic.

\[
\frac{25}{112.5} = \frac{.222}{.286} = .777
\]

In this latter case, the firm will not take the initiating action. The difference in the two cases is illustrative of the lessening of competition in the sense that if the firm that would have been an initiator (Case I) ceases to be an initiator, or changes its anticipations and therefore its conduct (Case II) because of a merger, there is a lessening of competition within the meaning of Section 7 of the Amended Clayton Act. The theory of the kinked demand curve is that the conjectural demand curve changes from elastic to inelastic due to changes in the structure of the industry--changes in the size of firms, increasing fewness of firms, and recognition that initiating action will be nullified by the response of the others. Mergers can produce that fewness.
conglomerate case, the recognition that a "giant" firm is bringing its resources into the line of commerce, or the relationships established (reciprocity) may induce competitors to change their attitude regarding the anticipated outcome of an initiating move. If we define "competition" as the conduct of competitors, this is a lessening of competition due to the merger.

The theory of the kinked demand curve is based upon the proposition that the demand curve is a subjective evaluation on the part of the entrepreneur as to the prospective outcome of initiatory moves. "The rivals' expected responses are the chief factor determining the character of the (demand) function." 108 The kink develops when, in consideration of changed market conditions, and the anticipated retaliatory conduct of competitors, firms realize that initiating moves would not yield a more profitable position. More specifically, in relation to Section 7, if the merger has a reasonable probability of significantly causing the entrepreneur to change his evaluation of the profitable prospects of initiating moves, the statute is violated by the merging companies. It is well established that competition, as defined above—the rivalry in obtaining customers and profits—includes selling effort, product improvement, and price competition.
A turning from any of these forms of competition, as a result of a merger, may be grounds for finding that the statute has been violated.

The bill is intended to permit intervention . . . when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. 109

If a merger induces another firm to cease any type of competition in which it would have engaged, the merger is placing an added constraint upon the initiator. 110

The above theory does not, however, tell us when the kink develops, or the specific circumstances which will induce initiators to refrain from altering their terms of offer. Discussions concerning the kinked demand curve do, however, suggest the prime consideration that induces firms to cease initiatory moves in terms of price, and establish an oligopolistic stability. This is when firms become "large" enough and "few" enough, or the disparity between the "leaders" and the rest of the industry becomes such that any would-be initiator will take into account the reaction of his important competitors; and when he concludes that the move would not be productive of added profit, he does not act. 111 This suggests that the structure of the industry—the number of competitors, relative size, market share, and
disparity of size—is of crucial importance in evaluating the impact of a merger upon the would-be initiator's evaluation of the outcome of his initiating moves.\textsuperscript{112}

Though theoretical discussions have centered around the structure of the industry as influencing the decision whether or not to reduce prices, the same reasoning is applicable to decisions as to whether or not to increase selling effort or initiate product improvement. If a survey of the market, and an appraisal of the anticipated reaction of the competitors to an advertising campaign, leads to the conclusion that such outlays would be useless because of the greater power of an opponent, and therefore the decision is made to refrain from such initiating action, and if that decision was reached because of a merger changing the structure of the industry, that merger is proscribed. The merger has caused a lessening of the independent action of a competitor. Senator O'Conor, the floor leader for the 1950 amendment to Section 7, in summing up the reasons for passage of the amendment, listed as Number Four: "To protect the independence of small business."\textsuperscript{113}
Economic Theory and the Relevant Market

The introduction of the concepts of monopolistic and imperfect competition, recognizing the downsloping demand curve as relevant to the firm, called into question the parameters of the "industry." Both Chamberlin and Robinson suggested the criterion of substitutability in terms of product use and technological similarity limited the boundaries of a "product market." Triiffin states that both these criteria are acceptable in limiting the practical boundaries for any given inquiry. And it is generally recognized that cross elasticities of demand define economic substitution, and afford a basis for defining a "commodity."

As will be pointed out in more detail in Chapter 10, however, the Courts in the Section 7 case, relying upon their interpretation of Congressional intent, have held that such a definition of the relevant market product only sets the "outer bounds" of the legal "line of commerce ... in any section of the country ..." and that there are economically recognizable "submarkets" in which there may be a substantial lessening of competition, even though there exist substitutes. Thus, while economic theory does not take us as far as the Courts have gone, it does point the way toward determining
the relevant market, both in the broader sense and the narrower meaning within Section 7. And this technique which theory suggests and which the Courts have called for is an analysis of the realities of the market situation. Triffin points out that in a very real sense, all goods compete, but with different degrees of closeness.

And Clark suggests that "substitution" itself is theoretically meaningful, but perhaps not operational in that the term can have at least three important meanings: first, it can relate to the differentiated competition—products that satisfy the same principal want, and do not vary radically as to production techniques or differentiation; second, products that appeal to the same principal wants but are "inherently" and inescapably different, due either to different materials, or basically different techniques; and third, products which "serve independent wants" but compete only in the sense that all goods compete for the spenders' incomes. He suggests that in analyzing the competitiveness of the market, not only is an analysis of substitute products important, but there must be "recognition that in some important matters, diversities
of situation, size, motivation, and time perspective are of essential importance in determining the result."¹²⁰

Therefore, in determining the relevant market, there are no pristine guidelines, but rather there must be an ascertainment of the pattern of conduct, the way in which competitors struggle for advantage, and the relationships that exist which influence a competitor's moves.

The Role of the Economist in the Section 7 Case

It is believed that the above contributions of economic theory constitute the basis for the implementation of Amended Section 7 of the Clayton Act, including its relevancy to the conglomerate merger case. Too frequently, there is a failure to distinguish between the suggestions for statutory administration which can be derived from economic theory, and the fact that the entire Section 7 case is an inquiry into economic phenomena.¹²¹ Massel asserts that economic inquiry is useful at every stage of the trial: "defining the issues, collecting the data, presenting the evidence, developing the arguments, and assisting in the judicial decisions,"¹²² and that the economist should serve as general coordinator of the research methods applied by statisticians, market analysts, cost accountants, and
occasionally sociologists and psychologists. All this, in spite of the fact that "there is no operational theory for judging the effects of a merger." Thus, Massel reaches the conclusion that the best thing to do is for the economist as market analyst to pursue every type of economic data that is "relevant." "For the immediate future, we must use a full kit of tools . . ." 

The present writer's position is that direction can and must be given to the economic inquiry involved in a Section 7 case; that economic theory provides a basis for such a directed inquiry; and that the role of the economist, if properly directed toward the heart of the case, can be of invaluable service. Mr. Theodore A. Groenke, an antitrust attorney of Chicago, Illinois, states that

Since the acts described in the statutes are presumptively illegal, there is, in fact, practically no room for defense except upon the ground that they do not produce the prohibited competitive effects. This defense requires detailed study of the market involved and prognostication of the potential impact of the conduct upon competition in the market. He then lists the services which the economist can render as:

(a) Advice as to the dimensions of the market and what evidence should be assembled to prove its dimensions.

(b) Assembly of market data and compilation of these data into meaningful exhibit form.

(c) Advice and assembly of data concerning the operations of various competitors within the market,
particularly when it is necessary to collect and utilize such data without disclosing the identity and operations of individual firms in the market.

(d) Advice and assembly of data showing market trends.

(e) Assistance in evaluation of market evidence offered by the prosecution.

(f) Assistance in preparing evidence and testimony concerning the potential competitive effect of the acts of the defendant in question.

(g) Service as an expert witness to testify as to the potential competitive effects of the conduct of the defendant in question.

(h) Service as an expert witness to authenticate relevant data and explain to the Court its relevance and significance.\textsuperscript{127}

Mr. Groenke hastens to add, however, that he does not suggest that economists' opinions as to the potential competitive impact of the practices at issue will be determinative of the case. This is the decision to be made by the trial or hearing finder of fact. He suggests that economists' testimony on this ultimate issue—the impact upon competition—will not be considered since this decision is within the province of the judge only.\textsuperscript{128}

Corwin Edwards states that the economist in the Section 7 case is useful in (1) selection of the case, based upon the importance of the companies or the industry in the economy; (2) development and evaluation of the economic evidence; (3) helping to keep the volume of economic evidence
within manageable limits; and (4) evaluation of the economic evidence. 129

Throughout Massel's discussion of the role of economics and the economist, it seems that greatest emphasis is placed upon the fact that the economist must be an accumulator and presenter, and interpreter of economic information. 130 And the role of economic theory seems to be played down since it offers no body of guidelines to policy, in Massel's opinion. Mueller states, also, that while a knowledge of economic theory is valuable, it is as a gatherer of market data that the economist as an economist is most valuable.

The antitrust economist must be far more than a theoretical economist, although facility with economic concepts is indispensable in cutting through the maze of industrial facts which might confront him. The antitrust economist must know his industry. 131

This knowledge of the industry, however, must necessarily be channeled in some direction. The following represents essentially a suggestion for the orientation of economic inquiry.
Conclusion: Orientation of Inquiry in the Section 7 Case Suggested by Economic Theory

As stated above, an attempt to apply the analysis of "workable" or "effective" competition to the Section 7 case is rejected because that inquiry is directed toward an evaluation of the competitiveness of a market compared to a vague norm—a market situation which could not be improved upon by public policy measures. But the issue in the Section 7 case is not the effectiveness of competition, but whether or not a merger will probably cause a lessening of competition. Theoretically, the impact of a merger could be determined by evaluating the competitiveness of the market in all its dimensions, and then attempting to assess the impact of the merger upon each of the dimensions of competition, and finally, reevaluating all the dimensions of competition to see if there is a reasonable probability that the competitiveness of the market will be moved farther from the norm. This method is rejected primarily because of the fact that, first, economic theory provides no guidelines as to how the various factors are to be weighed, how much weight is to be given to each, or even how to evaluate the impact of the merger upon
any one of the dimensions of competitiveness. Secondly, such an inquiry would bury the enforcement agencies in a morass of information. (This issue of the quantum of economic evidence necessary to determine the Section 7 case will be discussed more fully in Chapter ll.) The most important step that can be taken to permit the use of economic theory in the Section 7 case is to divert attention from the evaluation of the competitiveness of the market in a normative sense, and direct attention toward competition as the conduct of competitors in the struggle for advantage within a given market. Economic theory tells us that there are three principal categories of competitive activity, viz., price competition, selling effort, and product improvement. A lessening of competition, then, is a diminution in the rivalry for advantage in any of these aspects of competition. If that diminution in competitive rivalry is due to a merger, and the impact within a given market is substantial, the merger is unlawful. Further, economic theory tells us that it is the subjective evaluation of the probable outcome of initiating competitive moves, or defensive moves, based upon the anticipated conduct of others in the market, which determines the competitive conduct of a firm. If this evaluation of the prospects of an initiating move is altered because
of a merger, and the impact is substantial, the merger is proscribed.

But, economic theory does not tell us when such a subjective evaluation will change. It does, however, point to some clues as to where the economist can look in his analysis of the market situation and the information that he should accumulate, which information will furnish the basis for a judgment of the crucial issue: will competitors' conduct be altered substantially because of the merger? The approaches of "workable competition" analysis in evaluating the effectiveness of a market and of determining the reasonable probability of a substantial lessening of competition are similar in that they should look at competition as competitors (initiators and responders) in action. However, the Section 7 case need not go on and evaluate the effectiveness of competition in terms of market performance. The Section 7 case stops with the question: is there a reasonable probability that, because of the merger, would-be initiators will lessen their actions? Economic theory does provide a frame of reference for an empirical analysis of certain market data which will provide a basis for a judgment on this ultimate issue—the reasonable probability of a substantial lessening of competition.
J. M. Clark lists the forces tending toward the maintenance of effective competition as first, the freedom of an individual to engage in any business; second, access to the factors of production; and third, a climate in which participants in an industry can and do maintain independence of attitude and policy, and in which there are enough independent firms to afford opportunities for substantial increase in the market share of any who compete successfully. Naturally the climate needs to be one in which such competitive initiative will not be suppressed by effective trade discipline; for that, one must look to the antitrust laws.\footnote{132}

In Clark's concluding remarks, he states that different aspects of competition should be developed in different ways, and that we must distinguish between these aspects: first, \footnote{133}

\[ \ldots \text{the conditions of competition; largely the market, the mores, and the structure of the trade or industry.} \]

As will be further detailed in Chapter 11, the development of antitrust law, as well as the above discussed elements of economic theory, indicates that this is the most significant factor in evaluating either the competitiveness of a market or the impact of a merger upon the competitive activities of participants in that market. From the development of the theories of monopolistic and imperfect competition, it has been recognized that the structure of the
industry is the key factor in influencing the would-be initiator's evaluation of the demand curve which he faces. Clark states: "I would urge that it is generally easier to observe the objective conditions and structure of the industry and draw conclusions about the character of the demand curves, than the other way around." It is the rivals' expected responses which are the chief factor in determining the character of the function, and the structure of the industry is the key factor in determining what the rivals' expected responses might be.

After stating that we may look at the conditions of competition, Clark states that

Next come competitive activities, the most strategic of which consists of changing the character and terms of the firm's offerings, as to product, selling activities, or price, the change being an initiatory or a response, aggressive or defense. Since competition can be viewed as the competitive struggle of rivals, it is suggested that in addition to an analysis of the market structure, an appraisal of the probable impact of a merger can be determined by a study and analysis of the way in which competition is carried on. As will be pointed out in Chapter 10, the Courts seem firmly determined that market structure alone will not be determinative in a Section 7 case. There must be consideration of "all other
relevant factors." It is submitted that in the issue of a substantial lessening of competition, the "other relevant factors" should consist of an analysis of the way in which competition is carried on. Then, when a given merger is under consideration, the issue as to whether or not there is a reasonable probability of a substantial lessening of competition can be determined by an exposition of the way in which competition is carried on, in the light of the changed structure of the industry due to the merger. In the light of the evidence thus revealed, there must then be reached a judgment on the part of the hearing examiner (and the Commission) or the trial judge as to whether would-be initiators will probably change their initiating conduct (or their defensive moves) as a result of the merger. The economist as the market analyst must inquire into the realities of competition as it is carried on in that industry and marketplace; and develop a clear picture of the market structure and the competitive behavior of the participants in that market. And upon these facts, a judgment must be reached by the determiner of the ultimate issue.¹³⁶

The above two areas of inquiry, structure and the nature of the competitive struggle, represent a basis for the determination of the pertinent issue, but such economic
analysis does not present a substitute for judgment.\textsuperscript{137} The final judgment on the issue must be made by the Commission or the Court.

Micro-economic theory has, by and large, not dealt explicitly with the expectations of businessmen other than as such expectations and motivations are taken as givens and held until a logical outcome, an equilibrium, is described. An exception which does consider expectations and changes in expectations is dealt with in the theory of the kinked demand curve which tells us that under certain circumstances, a kink may develop due to changes in the subjective evaluation of the responses of competitors, made by a would-be initiator. Theory does not tell us the circumstances under which the kink will develop, but does suggest that the structure of the industry must be such that the would-be initiator can evaluate the anticipated responses of his rivals. It is the number of firms; the recognition that conduct by the initiator will induce response by others; the recognition that one's conduct may be nullified by the conduct of others due to fewness; and the recognition of shares of the market, and relationships, which change the conduct of would-be initiators.\textsuperscript{138} Therefore, a change in the structure of the industry would be the key factor in
determining whether or not a kink will develop in the demand curve relative to any of the types of competitive conduct in that market. The other market phenomenon which can give a clue as to whether or not the conduct of initiators will change is an analysis of the way in which competition is carried on. Then, in the light of the changed structure of the industry, and the way in which competition is carried on, the determiner of fact finds the issue joined: Does a given merger present a reasonable probability that a kink will develop so that initiators' moves will be inhibited?
Footnotes


4Ibid., p. 156.

5Ibid., p. 167.

6Ibid., p. 162.


8Jesse W. Markham, "An Alternative Approach to the Concept of Workable Competition," 40 Am. Econ. Rev. 349, 361 (1950).


Footnotes--Continued


19Massel, op. cit., p. 177.


21Weston, op. cit., p. 62.

22Martin, op. cit., p. 322.


24Ibid., p. 54.

25Ibid., pp. 46-47.

Footnotes--Continued


35 Bain, op. cit., p. 189.


Footnotes--Continued

356 F.T.C. 1672, pp. 1675-76.

39 Ibid.

40 Ibid., pp. 1777-79.


43 See Chapter 10, infra, relative to product and geographic markets.


46 Ibid.


48 Ibid., fn. 39.

49 Ibid., fn. 40.

50 370 U.S. 294, 334.

51 See also Bok, op. cit., pp. 258 ff.

52 370 U.S. 294, 322.


54 For a review of the theoretical considerations of size, diversification, and consolidation, see Donald Dewey, Monopoly in Economics and Law (Chicago: Rand McNally, 1959), pp. 25-42.
Footnotes--Continued


58Dean, op. cit.; Hale and Hale, ibid.


60Weldon, ibid.; Corwin D. Edwards, Big Business and the Policy of Competition (Cleveland: Western Reserve University Press, 1956).

61Hale and Hale, op. cit.
Footnotes--Continued


66 Hale and Hale, op. cit., pp. 240 ff.


68 M. A. Adelman, "Integration and Antitrust Policy," 63 Harv. L. Rev. 27, 44 (1949). The latter part of the quotation refers to what the present writer would prefer to call geographic conglomerate extension.


Footnotes--Continued


75370 U.S. 294, 331.

76H. Rept. 1191, p. 8.


79370 U.S. 294, 345.


81Ibid., p. 114.

82Ibid., p. 5.

83Bain, Barriers to New Competition, op. cit., p. 215.


85J. M. Clark, Competition as a Dynamic Process, op. cit., p. 114.
Footnotes--Continued

86Hines, op. cit., p. 145.

87F.T.C. Docket 6901, Initial Decision (mimeographed), p. 10. In its forthcoming opinion, it is anticipated that at least Commissioners Elman and Higginbotham will hold that the merger is condemnable because of the elimination of potential competition resulting from the merger.

88See the discussion concerning the use of the concept of "workable competition" relative to Section 7, supra.

89J. M. Clark, Competition as a Dynamic Process, op. cit., p. 471.

90Ibid., p. 13.

91Ibid., pp. 471 ff.


95See J. M. Clark, Competition as a Dynamic Process, op. cit., for the latest developments along these lines, a review and comments upon the literature, and especially pages 217-230, 233-235, 245-251, 264-267, passim.

96Watkins, op. cit.

97Chapter 7, supra.


99H. Rept. 1191, p. 8.
Footnotes--Continued


101 270 U.S. 294, 345.
102 296 F. 2d 800, 825.
103 Robinson, op. cit.
104 Chamberlin, The Theory of Monopolistic Competition, op. cit.
107 Machlup, ibid.; Fellner, op. cit.
109 H. Rept. 1191, p. 7.
110 The same analysis would hold true if we used the term "margin elasticity" rather than "price elasticity." (J. M. Clark, Competition as a Dynamic Process, op. cit., pp. 149-150.) In the former case, the equivalent "kink" would be a change from margin elasticity greater than unity to less than unity. Again, this would, in the Section 7 case, have to be based upon an evaluation of the probable consequences of the merger on the would-be initiator's subjective reaction to the merger, i.e., would the merger likely produce a change in outlook regarding initiating moves?
Footnotes--Continued


113 96 Cong. Rec. 16669 (1950).

114 Chamberlin, op. cit., p. 131; Robinson, op. cit., p. 68.


117 370 U.S. 294, 326; and Chapter 10, infra, "The Relevant Market."

118 Triffin, op. cit., p. 88.


120 Ibid., pp. 102-112, quotation at p. 117.

121 For example, Massel, op. cit., Chapters 6 and 7, is rarely clear as to whether he is talking about the contribution of economic theory in which case he says "there is, today, no organized body of principles for economic analysis which will provide guidelines for solving the pointed decisional problems affecting competition" (p. 181), or if he is talking about the gathering, organizing, and presenting of economic data by the economist as a market researcher, in which case "Economic inquiry can be useful at every stage of the trial procedures." As a consequence, he opts for the workable competition approach to solving antitrust problems and
Footnotes--Continued

concludes that even though there are no principles which provide guidelines, if we can just keep on gathering more and more facts, somehow this will solve the problem.

122 Massel, op. cit., p. 159.
123 Ibid., pp. 156-157.
124 Ibid., p. 162.
125 Ibid., p. 197.
127 Ibid., pp. 101-102.
128 Ibid.
130 Massel, op. cit., Chapters 6 and 7.
132 J. M. Clark, Competition as a Dynamic Process, op. cit., p. 487.
133 Ibid.
134 Ibid., p. 103.
135 Ibid., p. 487.
138 See Chapter 11, infra.
Chapter 10

LEGAL CONCEPTS RELEVANT TO THE CONGLOMERATE MERGER CASE

The gravamen of the Section 7 case, conglomerate or otherwise, is that (1) there is a reasonable probability of a substantial lessening of competition (2) in any line of commerce, in any section of the country.¹ No conglomerate merger cases have been carried beyond the Federal Trade Commission to the Courts of Appeal, nor have any Justice Department conglomerate cases advanced beyond the trial court. Therefore, there are as yet no established legal concepts directly relevant to this type of merger. But since the Clayton Act, as amended, prescribes the same standards of illegality to all types of mergers,² borrowing and adapting of antitrust—and especially Section 7—concepts must afford guidelines to determining the legality of a conglomerate merger.³

¹Footnotes for Chapter 10 will be found on pp. 443-450, infra.

398
Adjudicated cases indicate the importance of determining the probable consequences of a merger. But the issue remains open as to the amount and type of evidence necessary to prove the probability of a substantial lessening of competition. Decided cases give only a general clue that there must be something more than an analysis of the industry structure and changes in such structure due to the merger. Similarly, there are only general guidelines as to the determination of the relevant market. The decisions indicate, however, that in the Section 7 case there are standards which are peculiarly applicable to that type of litigation, as distinguished from Sections 1 and 2 of the Sherman Act. This chapter will review the decisions which can be made relevant to conglomerate merger cases in determining the product and geographic market; the quantum of evidence necessary to prove a reasonable probability of a substantial lessening of competition; and finally, other antitrust cases which give a clue as to the way in which conglomerate power may be recognized as anticompetitive will be discussed.

The Emphasis on Reasonable Probabilities

The Supreme Court in the Brown Shoe case so strongly desired to emphasize the necessity for prognostication
concerning the impact of a merger that it misquoted the statute.

Eighth, Congress used the words, "may tend substantially to lessen competition" [emphasis supplied], to indicate that its concern was with probabilities, not certainties. [The Court inserted fn. 39 reviewing the House and Senate Reports discussed in Chapter 8, above, and also cited various Congressmen from the Congressional Record.] Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.¹⁸

In the same case, the Court also stated, "But the very wording of Section 7 requires a prognosis of the probable future effect of the merger."⁵ Emphasis throughout the Brown Shoe case,⁶ the Crown Zellerbach case,⁷ and the Reynolds-Arrow Brands case,⁸ was placed on the fact that there is not required a "certainty or actuality of injury to competition,"⁹ but that probabilities must be determined. The Ninth Circuit Court of Appeals in the Reynolds case 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 7.¹⁰

Thus the concept of lessening of competition was brought into parallelism with the concept of "attempts to monopolize" and "monopolization" in that all that is required is that there exists the capacity or potentiality--to lessen competition in
the Section 7 case, or to exercise monopoly power in the Section 2 case under the Sherman Act.\textsuperscript{11}

The Quantum of Evidence Necessary in the Section 7 Case

In the conglomerate, as in all other merger cases, there is no clearly defined statement of the quantum of evidence necessary to prove a substantial lessening of competition. The statute provides "no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may 'substantially' lessen competition or tend to create a monopoly."\textsuperscript{12} The Federal Trade Commission, the Department of Justice, and the Courts are apparently searching for the middle ground which will satisfy the requirement of "a reasonable probability" and at the same time not turn the Section 7 case into a "dumping ground"\textsuperscript{13} for all conceivable evidence as to the effects of a merger.

In the Commission's initial approach, in the Pillsbury case, counsel supporting the complaint, appealing from the hearing examiner's dismissal of the complaint due to the lack of certain information, based his appeal upon the Standard Oil case\textsuperscript{14}--that the respondent had a substantial
share of, and was one of the leading factors in, the relevant market, and that the acquired companies had a substantial share of business and were important competitive factors in the relevant markets.\textsuperscript{15} Complaint counsel in attempting this approach relied upon the language in House Report 1191 to the effect that the tests of illegality under the amended Section 7 were intended to be "similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."\textsuperscript{16} The Standard Oil case had been decided two months prior to the passage of the Amended Clayton Act. The position was taken that if as a result of the merger the amount of competition that was eliminated was "quantitatively substantial," this amounted to "a substantial lessening of competition."\textsuperscript{17}

The Supreme Court in the Standard Oil case had severely limited the scope of inquiry where restrictive devices (exclusive dealing contracts) were applied to a substantial segment of the trade-in that case less than 7.0 per cent of the market. The Court refused to require inquiry into (1) whether competition had increased or diminished during the exclusive dealing period, (2) whether the contract was being employed by established oligarchs in the trade or against them, or (3) whether the contracts were
reasonable in duration considering the business needs in that industry.\textsuperscript{18} Such inquiries were held to be not necessary because the results of such inquiries would be inconclusive and speculative, and such inquiries would be an investigation into the "reasonableness" of the restrictive devices, which type of inquiry Congress had intended to foreclose by passage of the Clayton Act.\textsuperscript{19} The Court held that the standard of proof desired by the defendant would be virtually impossible to meet, at least most ill-suited for assessment by courts.\textsuperscript{20} Stating that the issue was whether proof that a substantial portion of commerce is affected was sufficient, or whether it "must be shown that competitive activity has or probably will diminish," the Court concluded that "the qualifying clause of Section 3 [where the effect . . . may be to substantially lessen competition. . . .] is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."\textsuperscript{21} This decision provided the basis for the opinion by some that the Supreme Court had initiated a doctrine of "Quantitative Substantiality."\textsuperscript{22}

The hearing examiner did not pass upon the merits of the case, dismissing the complaint due to the failure of complaint counsel to present certain data. On appeal to the Commission, the latter repudiated the approach requested by
complaint counsel. The hearing examiner in the Brillo case did essentially follow the quantitative substantiality idea, only to be rejected (perhaps) by the Commission on review (infra). 23

The Repudiation of "Quantitative Substantiality."— Upon review of the Pillsbury case, the Commission stated that Section 7 cases are not to be decided on the basis of per se tests.

There must be a case by case examination of all relevant factors in order to ascertain the potential economic consequences of the challenged merger. 24 [Emphasis supplied.]

The majority of the opinion was concerned with the acceptability of certain evidence but the Commission indicated clearly that it would not accept the doctrine of quantitative substantiality. Similarly, in the Brillo case the Commission remanded the case and, without indicating what factors should be considered, directed that "all relevant economic factors" be taken into account. 25

The Commission distinguished between Section 7 and Section 3 as interpreted in the Standard Oil case by stating that Section 3 was designed to protect buyers and sellers in the market process, but that Section 7 was directed toward adverse changes in competitive patterns and toward protecting competition on an over-all basis.

Competition is a complex and constantly changing phenomenon. It has never been sharply defined. Injury
to competition, as distinguished from injury to a competitor, is seldom capable of proof by direct testimony and may therefore be inferred from all the surrounding circumstances.\textsuperscript{26}

The Attorney General's Report approved the approach of the Commission in the Pillsbury case and specifically rejected the concept of quantitative substantiality. "In no merger case--horizontal, vertical, or conglomerate--can a 'quantitative substantiality' rule substitute for the market tests Section 7 prescribes."\textsuperscript{27} Most writers agree with the principle that the elimination of a quantitatively substantial factor in a given market by a merger does not of itself prove a violation of Section 7.\textsuperscript{28} Representative Celler appeared to be exercising hindsight in his contention that the law intended to incorporate the Standard Oil case's rule into merger cases.\textsuperscript{29} In conclusion it can be stated that at the present time the law of Section 7 is dominated by the proposition that, in principle at least, there must be a general analysis of "relevant economic factors" and that a simple showing of market shares will not suffice.\textsuperscript{30} However, when percentages become "substantial," they may be determinative. "Sometimes, the market share foreclosed may be so large as to support the necessary inference of substantial lessening of competitive opportunity."\textsuperscript{31}
The Supreme Court in the Brown Shoe case specifically approved the Pillsbury case and reviewed the language of Congressional reports as to the evidence which might indicate the reasonable probability of a substantial lessening of competition; such effects could be determined by finding that

A whole or material part of a competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size of the acquiring corporation had increased to such a point that its advantages over competitors threatened to become "decisive"; that an "undue" number of competing enterprises had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. (H.R. Report No. 1191, 81st Cong., 1st Sess., 8).

and that

Each of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests even though the case of Standard Oil Co. of California v. United States, . . . , said to have created a "quantitative substantiality" rule for suits under Section 3 of the Clayton Act, was decided while Congress was considering H.R. 2734. . . But this aspect of the Standard Oil decision was neither specifically endorsed nor impugned by the bill's supporters. 32

Thus, it appears that the present approach to the Section 7 case must be that there is no "quantitative substantiality" rule and that "all relevant factors" must be considered. Immediately below there will be discussed,
however, the fact that all authorities have agreed that the emphasis must be on relevancy. Chapter II will suggest that the key factor in all decided Section 7 cases has been the market structure and the most important consideration of market structure has been market shares.

Limiting the "Relevant Factors."--The Supreme Court in the Brown Shoe case stated that

Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the Courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of a market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market powers; but only a further examination of the particular market--its structure, history and probable future--can provide the appropriate setting for judging the probable anticompetitive effect of the merger. See, e.g., Pillsbury Mills, Inc., 50 FTC 555; United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (D.C.S.D.N.Y.) . . . and see U.S. Att. Gen. Nat. Comm. To Study the Antitrust Laws; Report 126 (1955).33

This statement, on its face, may be taken as an indication that the Supreme Court leans heavily in favor of broad economic inquiries in every Section 7 case. But the "further inquiry" called for (the industry's structure, history and probable future) is relatively meaningless in the context in which it was used by the Court. The most significant aspect
of industry structure, and the only one that has ever played a determinative role in a Section 7 case is the market shares (for horizontal merger cases) and the relationships between buyers and sellers (in the vertical cases). The "History" called for in the Brown Shoe case clearly means trends in the industry, particularly trends in concentration. This is an integral part of any study of the structure of an industry and was relied upon heavily in the Brown Shoe case. And, of course, "probable future" is the issue to be determined. Further, it should be noted that Mr. Justice Clark in his concurring opinion stated that the case was actually very simple; that the acquisition represented a substantial foreclosure in shoe retailing (the vertical aspects of the case); and that Kinney handled "a substantial volume of sales" (the horizontal aspects). A substantial lessening of competition was adequately demonstrated in eight steps in a concurring opinion comprising less than three pages.

The approach of the Commission in the Pillsbury case which the Supreme Court apparently endorses is by no means a wide open inquiry. In that decision, the Commission (albeit in a footnote) stated:

The utilization of this approach does not mean that Section 7 cases are to be considered dumping grounds for masses of economic data. In our previous consideration of this case, we held that a prima facie case was established despite the fact that the
development of the significant market factors in the record as it then existed was something less than exhaustive. We do not read our decision as standing for the proposition that broad economic inquiries into every conceivable relevant factor are necessary or even desirable in Section 7 cases. If a general examination of a limited number of important market factors establishes the statutory requisites or compels a conclusion that the statutory tests have not been met, then further economic detail is superfluous. To launch a minute scrutiny of unimportant economic indicia is merely to pile Pelion upon Ossa.\(^3\)

And in the *Brillo* case, upon second remand to the hearing examiner, the Commission stated:

> It seems to us that the hearing examiner's first ruling upon the motion, which, upon appeal, we reversed and remanded, was unduly preoccupied with pursuing the so-called quantitative substantiality doctrine--in this case to a point unjustified by existing judicial precedents interpreting the requirements of Section 7 of the Clayton Act--and thereby giving overwhelming consideration to market shares to the complete exclusion of all other relevant economic factors. However, the hearing examiner, in the initial decision now before us on appeal, with an ambivalence that we deem unjustified by our remand direction, seems repelled by that which he once embraced. He now ignores the great and perhaps conclusive weight to be given to these very same considerations when viewed in connection with an already existing heavy industry concentration and other relevant record facts. When we refused to adhere to the rigid yardstick utilized by the hearing examiner in his earlier ruling, and directed that he look at all the relevant facts of competition, we did not want to be taken to conclude that in certain situations the rigid yardstick of market shares might not only be extremely meaningful, but indeed perhaps, conclusive, and under some circumstances on the issue of probability of competitive injury or tendency to monopoly. Obviously, the more concentrated an industry, the more meaningful it becomes; indeed, the more meaningful any additional single evidentiary element bearing on this issue becomes.\(^5\)
The Attorney General's Report recognizes that "sometimes the market share foreclosed may be so large as to support the necessary inference of substantial lessening of competitive opportunity,"\textsuperscript{38} but that in some cases "it may become relevant to examine questions like: . . . ."

There then follows an (a) through (g)--with (b) being omitted--enumeration of various aspects of market analysis including a multitude of conjectural blind alleys such as: what determines whether changes will be made in sales methods; what is the long run supply and demand picture and how does it influence the character of competition; and what special national policies modify the conditions under which companies compete.

The Crown Zellerbach case relied upon the Standard Oil case to the effect that "a standard (for determining illegality) of such proof, if not virtually impossible to meet, at least is most ill-suited for ascertainment by courts."\textsuperscript{40} That Court further specifically repudiated the approach, above described, suggested by the Attorney General's Report,

We are left in the dark as to what we should do with the answers to all these questions once we have them; what questions would prove the merger good,--what ones prove it bad?\textsuperscript{41}
The Court reviewed the percentages of market shares prior to and subsequent to the merger and stated that "This alone justified the Commission's finding that the reasonably probable result of the acquisition would be substantially to lessen competition..." The Supreme Court denied certiorari in Crown Zellerbach on the same day that Brown Shoe was decided.

The Bethlehem case, approved by the Supreme Court in its footnote 38 of the Brown Shoe case, stated that it was unnecessary to consider the contentions of the two schools--"quantitative substantiality" and "qualitative substantiality"... So much has been said by opposing commentators that it has become more a battle of words than a search for the correct interpretation of Section 7.

The Court then proceeded to demonstrate the changes in percentage shares in the market and found the horizontal aspects of the case in violation of the amended Section 7 on this ground.

Finally, in the Philadelphia Bank case, the Supreme Court specifically approved the narrowness of the Crown Zellerbach and the Standard Oil decisions as applied to a Section 7 case, stating that

And so in any case in which it is possible, without doing violence to the Congressional objective embodied in Section 7, to simplify the test of illegality, the Courts ought to do so in the interest of sound and practical judicial
administration. See Union Carbide Corp. . . . (concurring opinion). This is such a case. 46

In the Brown Shoe case, the Supreme Court had cited the Standard Oil case with approval eight times, and in the Philadelphia Bank case stated that Congressional concern warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger that produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. 47

Thus the Supreme Court has taken the position that market structure is the most important evidence in a Section 7 case and that market shares alone may be determinative.

Conclusions Relative to the Quantum of Evidence.--The American Bar Association's Subcommittee on Section 7 reached only the general conclusion that in the Section 7 case, the Court in the Brown Shoe case was "unwilling to settle for any single decisive test." 48 Joseph Sheehy, Chief of the FTC's Bureau of Restraint of Trade, expressed the opinion that the case opened the door to a significant simplification of the trial record, and he
believed that the Supreme Court took basically the position that the Bureau had taken in the original Pillsbury case.

We filed that back in 1955, and I am sure that the learned Chief Justice didn't see it; but the basic position taken there are the positions that the staff took before the Commission in 1953 in Pillsbury. So if you just turn the clock back eight years, I think we will have it made on the staff.49

Mr. Reycraft stated:

I think that if you went through this opinion here, and listed every specific type of category of evidence that the Court considered relevant, and then went and lined it up in every case you had, you would end up with pretty much of a mess. I think the impression I get is that any one of these factors is going to be sufficient to make a merger unlawful, and that the government--at least the Department of Justice, I would think and hope--will concentrate on those basic aspects of the case which are its strongest forte, and also perhaps will rely on fewer lines of commerce.50

These comments indicate that the enforcement agencies in all probability do not intend to attempt cases unless there is quantitative substantiality. Such a policy is certainly in conformity with Congressional intent. Martin goes so far as to state that where the market shares are as great as in Brown Shoe,

(Unless a company is able to) demonstrate clearly that the mergers are likely to increase competition and thus promote the public interest . . . any vertical or horizontal acquisition in any significant market is particularly subject to challenge if a trend toward concentration exists.51
Although the Supreme Court in the Philadelphia Bank case, described above, asserted that it was relying on the shares of the market as a sufficient criterion to prove a reasonable probability of a substantial lessening of competition, in every instance where the market shares were mentioned, the changes which had been occurring in the concentration of the industry were emphasized. In each of the Supreme Court Section 7 cases--Philadelphia Bank and Brown Shoe--and in Crown Zellerbach and the Bethlehem case, the Courts relied on only two types of evidence to determine the horizontal aspects of the cases: (1) the market shares held by the merging companies, and (2) trends toward concentration in the industries.

It is the conclusion of the present writer that these two factors, having in fact formed the basis for decision in these cases, will constitute the key factors in future conglomerate merger cases as well as in other Section 7 proceedings. The most important aspect of the Philadelphia Bank case is that the Court directs that the decision be made on the most fundamental grounds possible and that, then, additional evidence becomes superfluous. The denouement of the controversy over "quantitative substantiality" and the quantum of evidence necessary to prove the reasonable
probability of a substantial lessening of competition has been twofold, viz.: (1) The most significant and the best evidence on this issue should be relied upon, and inquiry should stop when a violation is found; additional economic analysis is unnecessary. (2) The first and most basic evidence is the market structure, especially evidence showing the percentage shares of the parties to the merger, and trends toward concentration by merger both in the industry and on the part of the merging firms. This evidence may be decisive in some cases and render other evidence unnecessary. We are still left without clear guidelines as to what evidence might make out a violation where market shares and trends are not conclusive. These will be discussed below.

Applying these conclusions to the conglomerate merger case, there may seem, at first glance, to be a hiatus in that the conglomerate merger does not immediately increase concentration or the market shares in any line of commerce held by either of the merging firms. However, as will be described below, courts have recognized the anticompetitive effects of economic size and the power which that size carries. Therefore, the inquiry into the probable effects of a conglomerate merger must also begin with a determination of the relative sizes of the acquired and of the acquiring firms, both in absolute and relative terms—the size of the
acquiring firm relative to the firms in the industry of the
acquired firm, and perhaps the relative size and importance
of the acquiring firm in its own industry.

Finally, relative to trends toward concentration
which so concerned the Supreme Court in the Brown Shoe case,
although there is no immediate increase in concentration in
either the acquiring or the acquired firms' industries in a
conglomerate merger, there is an increase in concentration
in the American economy in that previously independent firms
are now under one corporate organization. This is part of the
increased concentration that proponents of the amended
Section 7 so vehemently opposed during debate on the bill. A
The Supreme Court in both the Philadelphia Bank case and the
Brown Shoe case emphasized Congress' desire to retain, to
the highest degree possible, an economy characterized by
"numerous independent units." A conglomerate merger, and
particularly a series of conglomerate mergers, or a trend
toward horizontal concentration in either industry in which
a conglomerate merger occurs, constitute destruction of these
independent firms and a trend toward concentration.
The Relevant Market

Amended Section 7 proscribes mergers where the effect may be to substantially lessen competition in any line of commerce, in any section of the country. As antitrust law has developed, "any line of commerce" has become a search for "the relevant product or service market" as, ostensibly, the starting point of any case and the "relevant geographic market." It will serve no purpose in this study to develop or extensively review the decisions treating of definition of the relevant market, or to consider the controversy as to whether the lines of commerce are the same in Sherman Act and Clayton Act cases. There are no indications that the line of commerce issues will be different in the conglomerate case as distinct from other Section 7 proceedings. Only the latest developments relative to this issue will be reviewed here, leading to the conclusions (1) that the Courts have recently greatly liberalized the concept and (2) placed emphasis primarily on established patterns of trade rather than economic theory relative to substitutability and cross-elasticities of demand, perhaps clearing up some of the "foggy boundaries."

The Relevant Product or Service Market.--The Supreme Court stated in the Brown Shoe case that the outer boundaries
of a product market are determined by the reasonable inter-
changeability or the cross-elasticity of demand between the
product itself and the substitute products for it. But the
Court continued:

However, within this broad market, well defined
submarkets may exist which, in themselves, constitute
product markets for antitrust purposes. . . The
boundaries of such submarket may be determined by
examining such practical indicia as industry or public
recognition of the submarket as a separate economic
entity, the product's peculiar characteristics and
uses, unique production facilities, distinct customers,
distinct prices, sensitivity to price changes, and
specialized vendors. Because Section 7 of the Clayton
Act prohibits any merger which may substantially
lessen competition "in any line of commerce" [emphasis
supplied], it is necessary to examine the effects of a
merger in each such economically significant sub-
market to determine if there is a reasonable
probability that the merger will substantially lessen
competition.

In deciding the product market in that case, the Supreme
Court found that the relevant lines of commerce were men's,
women's and children's shoes.

These lines are recognized by the public; each
line is manufactured in separate plants; each has
characteristics peculiar to itself rendering it
generally non-competitive with the others; and each
is, of course, directed toward a distinct class of
customers. . . In this case any further division
of product lines based on "price/quality" differ-
ences would be "unrealistic" . . . Further division
does not aid us in analyzing the effects of this
merger.
The Supreme Court also cited with approval the determination of the product market by Judge Weinfeld in the Bethlehem-Youngstown case. In the latter case, the Court found eleven appropriate product lines, and in the process stated that the criteria laid down by the duPont-General Motors and duPont-Cellophane cases were not controlling in a Section 7 case.

Monopoly power was defined by the Supreme Court in the Cellophane case as "the power to control prices or exclude competition." Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under Section 7 of the Clayton Act is not whether a merger may result in a company having power over prices or the power to exclude competition. The issue under Section 7 is whether there is a reasonable probability of a substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes. The merger of two producers of a product may substantially lessen competition or tend to create a monopoly in the market for that product even though it does not substantially lessen competition or tend to create a monopoly in the broader market embracing all the products which are reasonably interchangeable with that product.

The lines of commerce, e.g., hot rolled sheets, cold rolled sheets, track spikes, buttweld pipe, etc., were distinguished as separate lines of commerce because in the patterns of commerce as they existed, these products had peculiar characteristics and uses for which there were no effective substitutes. The manufacture of such products requires special know-how and experience, huge capital investment, and a trained labor force. The
products of the iron and steel industry are generally distinct one from the other and as a group distinct from the products of other industries. They are sold in a recognized market with its own competitive standards.68

The Crown Zellerbach case emphatically approved Judge Weinfeld's reasoning and likewise held that even though there was substitutability and extensive potential substitutability of production facilities, the patterns in the paper industry and the terms and definitions which had grown up were determinative. Quoting from the Bethlehem-Youngstown case (p. 592),

The evidence established that the defendant's production flexibility or mill product line theory is indeed pure theory. In practice, steel producers have not been quick to shift from product to product in response to demand. Moreover, the evidence establishes that the continuing relationships between buyers and sellers in the steel industry make such shifts unlikely.69

The Court found that Census coarse paper was different from other papers in its relevant market in that it served different purposes, had different physical characteristics, was composed of different quality paper, and had different end uses than those which petitioner would have included within the relevant market, and that "as a practical matter, no one in the industry or interested in it or having anything to do with it has any difficulty in distinguishing one type of paper from the other."70
The Court of Appeals for the District of Columbia in the Reynolds-Arrow Brands case held that the Supreme Court in the Brown Shoe case, in listing the criteria for "well defined submarkets," was listing these in the disjunctive, and that any of the criteria may serve as a basis for delineating a product market. Again, in this case, there was ample substitutability and productive facilities, but the Court held that the product was distinct because of:

1. public and industrial recognition of it as a separate economic entity, (2) its distinct customers, and (3) its distinct prices.71 [The product was florists' aluminum foil.]

Finally, in the Philadelphia Bank case, the Supreme Court held that "commercial banking" was a separate line of commerce even though some of the activities in this category were competitive with other institutions, some were exclusive, and in some the banks had only a "settled consumer preference, insulating them to a marked degree from competition; this seems to be the case with savings deposits."72

In conclusion, it can be stated that the Supreme Court's opinion is "in sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities,' Crown Zellerbach v. Federal Trade Commission, 296 F. 2d 800, 811 . . ."73 As was stated above, it is not the purpose of this review of cases to determine
whether Section 7 cases have radically departed from Sections 1 and 2 Sherman Act cases. This issue has been effectively circumvented by the Courts' development of the doctrine of "submarkets" as "lines of commerce." It is clear, however, that the test of reasonable interchangeability and cross-elasticity has been greatly modified, and that the enforcement agencies, in establishing the universes upon which to base market shares, can pick a much narrower product than was previously thought possible.74

The Relevant Geographic Market.--The Supreme Court in the Brown Shoe case stated, relative to Congressional intent concerning the amendment of the Clayton Act,

The deletion of the word "community" in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant "section of the country. (But that) . . . Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition.75

The Court approved Judge Weinfeld's approach to determining the geographic market in the Bethlehem-Youngstown case and stated that

Just as a product submarket may have Section 7 significance as a proper "line of commerce," so may a geographic submarket be considered as the appropriate "section of the country" . . . Congress
prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area. . . 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 the merger outside the scope of Section 7.76

In this case the Court rejected the geographic area as being either downtown market areas or "standard metropolitan areas," and accepted "cities with a population exceeding 10,000 and their environs as a reflection of the market."77 This is in conformity with other decisions where the general guideline is that the geographic area must be the "area of effective competition in the known line of commerce, (which) must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."78

In the Philadelphia Bank case, various aspects of commercial banking extended further than others, but the Court held that

[There should be] some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger on competition seem insignificant, only because the very largest bank customers
are taken into account in defining the market, or so narrowly as to place appellees in different markets because only the smallest customers are considered.  .  .  . (The four county area) is the area of effective competition. 79

Of particular interest in the Philadelphia Bank case is the statement by the Supreme Court that, relative to the "section of the country" issue,

The proper question to be asked in this case is not where the parties to the merger do business, or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. 80

It is because of this statement that the present writer, at the beginning of this section, stated that the Section 7 case "ostensibly" begins with the definition of the relevant market. Statements such as the above lend strong support to a position that, if it can be shown that any significant segment of the economy, or of even a local economy, may be adversely affected by a merger, then the area in which the effects may be felt constitutes the appropriate section of the country. In other words, the relevant market is determined by the adverse effects upon competition, and the case does not actually begin by first delineating the market. 81

Mr. Adair, former attorney for the FTC, at a discussion of the Brown Shoe case, stated:

At the Commission, I always took the position that the effects were the thing that you were looking at. If you could find the effects in an
industry, or any sub-part of an industry, then you could reasonably be sure that you would prove enough factors to satisfy the court that was the proper line of commerce.\textsuperscript{82}

The \textit{Philadelphia Bank} case must certainly strengthen this position.

\textbf{Conclusions Concerning the Relevant Market.--}The significant expansion and liberalization of the "relevant market" issue described above relies almost entirely upon established trade patterns and relationships. The Supreme Court has accepted this approach as an integral part of Congressional intent relative to Section 7. This is consistent with the definition of a substantial lessening of competition given in Chapter 9 above, i.e., that a lessening of competition in a Section 7 meaning is a change in the way of carrying out competitive activities, due to a merger. Competitive activities and relationships are established by the realities of the trade at any given point in time. The Supreme Court has established that these realities of trade and commerce, the patterns of relationships, and areas of operation are to be used in establishing the universe within which the effects of a merger are to be judged. The purpose of the inquiry is to determine if, as a result of the merger, there is a reasonable probability that the patterns of competition may be
adversely affected. Therefore, the effective area of competition and relationships must be the area of analysis, both as to product and geographic limits.

The Courts' concern with protecting established lines of commerce and established customers is in keeping with a dynamic view of competition. "Competition" is competitors in action, not a normative set of conditions. Similarly, the reliance upon established patterns of trade to define the relevant market appears to be merely the laying of the foundation for the finding of a violation. In reality it is further implementation of the policy that existing levels of competition shall not be impaired or lessened by merger.

Economic Size and Conglomerate Power

The discussion above on the quantum of evidence necessary to prove the Section 7 case pointed out that cases dealing with the horizontal aspects of mergers lead to the conclusion that shares of the market and trends toward concentration have been the only criteria used in deciding those cases. These criteria, as will be elaborated upon in Chapter 11, also have meaning in the conglomerate case, and, in fact, will
form the foundation of such a case just as they do in the horizontal case. Various bases for the decisions in the vertical aspects of Section 7 cases also afford guidelines to the handling of conglomerate cases. These guidelines deal with relationships established as a result of merger. Chapter 11 will describe more fully the manner in which the proof of reasonable probability of a substantial lessening of competition in the vertical case can be made applicable to the conglomerate case. The present section will describe and review these criteria as developed in decided cases. There will also be considered here the description of other factors which can be used as evidence of a reasonable probability of a substantial lessening of competition. These latter include (1) economic size and power, and (2) conglomerate power. From the vertical cases, the useable evidence of a reasonable probability of a substantial lessening of competition include (1) relationships established by the merger, and (2) intent.

Economic Size and Power.--The Supreme Court and lower courts have, in every instance in which it was appropriate, stated the principle that the mere intrusion of bigness will not invoke the antitrust laws. However, it is also
accepted antitrust doctrine, even under the Sherman Act, and therefore a fortiori under the Clayton Act as amended, that

size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. . . .
Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served . . . , and the leverage on the market which the particular vertical integration creates or makes possible.86

And

size should be jealously watched. In the final analysis, size is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous.87

The Supreme Court has consistently recognized the particular desire of Congress to retain, to the highest degree possible, an economy characterized by numerous small businesses.88

Applying this philosophy to various cases, emphasis on size and the accompanying power to adversely affect competition has been pointed out in the following cases:

United States v. Griffith (1948) illustrated that buying power for the entire theater circuit was brought to bear upon independents.

Size carries with it an opportunity for abuse, and the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power.89
In *United States v. Swift* (1932), the meatpacker was attempting to obtain relief from an antitrust consent order, signed 12 years earlier, enjoining it from engaging in the sale of "groceries" and the retailing of meat. Mr. Justice Cardoza stated that, "in its fundamentals, the case involves a giant complex of economic power... Here the defendants were huge and remain huge after the decree." The reasons given for denying Swift's request were that the expanded operations would involve almost no increase in overhead costs and that predatory practices in the past were coupled with the opportunities presented by the requested expansion. "Their low overhead and their gigantic size would still put them in the position to starve out weaker rivals." 

In the *Reynolds-Arrow Brands* (1962) case, although it involved a vertical integration, the Court placed primary emphasis in finding anticompetitive effects on Reynolds' size and economic power compared to the other firms in the line of commerce of the acquired firm.

The truer picture of anticompetitive effects emerges from even the most cursory consideration of the post-acquisition competitive postures of the eight previously independent florists' foil converters vis-à-vis one another. Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its
competitors who were contending for a share of the market for florists' foil. The power of the "deep pocket" or "rich parent" for one of the florists' foil suppliers in a competitive group where previously no company was very large, and all were relatively small, opened the possibility and power to sell at prices approximating costs or below and thus to undercut and ravage the less affluent competition.92

Schwartz sums up this point by stating:

A principle that pervades all the antitrust laws is that legal rights innocent in themselves easily become the instrument of abuse when lodged in the hands of economic giants. Given an enterprise of sufficient size, even the elementary legal privileges of contract, to acquire property, to expand one's business in anticipation of anticipated demand, have been circumscribed.93

Although reliance is never placed on economic size alone (of course, "giant" varies in absolute terms from industry to industry), it is large size compared to other members of the same industry that affords the attack on bigness. That is, size carries with it the power of abuse in a particular market setting. Just as this is true in the horizontal or vertical Sherman Act cases, above, the same reasoning must be applicable to the conglomerate case. Comparative "giant" size will be suspect, especially when a "giant" enters an area characterized by relatively small units. Perhaps more important than size per se, however, is the fact that a large corporation, operating in discrete areas of competition--the conglomerate firm--has particular competitive advantages.94
Conglomerate Power.--As described in Chapter 9 above, conglomerate power is the ability of a firm, operating in separate markets, to shift its resources in order to gain competitive opportunity as the occasion arises. In several decisions, competitive advantages due to conglomerate power have been condemned as having anticompetitive effects:

In the Swift case, mentioned above, the meatpacker was denied its request to expand into "groceries" and the retailing of meat, and the request was rejected because of petitioner's past record of abuses and opportunities for abuse presented by the economic advantages of integration and operating in different lines of food service. Swift and Company petitioned again in 1960 for the right to enter retailing and the "grocery" business. The District Court dutifully reviewed evidence presented by the petitioner that there was no danger of monopolization because: diversified competitors had come on to the scene; Swift's share of slaughtering had declined; there had been new entry and competitors had grown more rapidly than the petitioner; competitors had lower fixed costs, modern facilities, and higher profit margins; refrigerator cars were widespread; and integration had no real economic advantage. The Court replied to these arguments by stating:

If the defendants were permitted to sell groceries and fresh milk at wholesale along with their meats, the
competitive advantage of offering a full line of products and the economies resulting from large volume and combined management and sales staff would afford the defendant a competitive advantage similar to that which has already eliminated the butcher shop, the green grocer, and the bakery from the retail trade. 97 [Emphasis supplied.]

In United States v. Griffith (1948), picture distributors used monopoly power to destroy competition through "product discrimination." Monopoly towns were used as a leverage to gain competitive advantage in competitive towns. 98

In the United Shoe Machinery (1953) case, United discriminated between machine types in its leasing. The different machines were treated by the Court as different lines of competition. Where there was competition, the prices were substantially lower, and where there was no competition, higher prices and profits were realized so that "a ten year investment would be returned in 2.21 years; where there was competition, the return was in 6 years." 99

The Supreme Court in the Brown Shoe case specifically used conglomerate power as one of the bases for condemning the vertical aspects of that merger.

Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent
The Court of Appeals in the Reynolds-Arrow Brands case emphasized that it was not necessary to prove that there had been a use of economic power, but gave evidence of such power being shifted to one particular area illustrating actual anticompetitive effects where, as an apparent consequence of retroactive price reductions for Arrow foil after the acquisition of florists' foil, sales of five or seven competitors had by 1957 dropped from 14 per cent to 47 per cent below 1955 sales. Arrow's sales over the same period increased by 18.9 per cent. Thus comparatively great economic power, plus the ability to shift it, was clearly demonstrated to the Court's satisfaction, as in violation of amended Section 7 of the Clayton Act. Reynolds had in fact used its position as the "rich parent" of the acquired firm to destroy competitor customers. But the Court stated that it merely used this as evidence of probable lessening of competition or tendency toward monopoly.

In each of the cases mentioned above, the conglomerate power of the firm was condemned as having anticompetitive effects. In each case, the conglomerate power was to the economic advantage of the defendants. The Clayton Act is not
an attack on economic efficiency per se. It is an attack on economic efficiency gained by merger when the economic advantage so gained threatens to impair or disturb patterns of competition.\textsuperscript{103} A conglomerate merger which results in advantage due to the spreading of overhead costs, advantages of a "full line" offering, or other competitive economic advantages which "threaten to become decisive," is proscribed.

We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. 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.\textsuperscript{104}

Relationships Established by Merger.--In the vertical aspects of Section 7 cases, the Courts have found not only that foreclosure of competitive market outlets or supplies has an anticompetitive effect, but that relationships established as a result of a merger can demonstrate a reasonable probability of a substantial lessening of competition. Of particular interest here, relative to the conglomerate merger, is the holding that when a firm is thrown into the position of being a competitor to its supplier, there is
a likelihood that competition will be diminished. The Court in the Bethlehem-Youngstown case held that

From a competitive standpoint the most desirable source of rope wire for a nonintegrated wire rope company is a rope wire manufacturer, such as Youngstown, which produces its own wire rods and which does not compete in the manufacture and sale of wire rope. The competitive disadvantages to the independent wire rope fabricator of purchasing rope wire from a competitor are: (1) in a period of shortage of rope wire a competitor-supplier may supply his own needs first; (2) the competitor-supplier, as a sales argument against the independent, may point to the latter's dependency upon him, the supplier, for raw materials; (3) if the independent sells wire rope below his competitor-supplier's price for wire rope he may lose his source of supply, thus giving his supplier a form of price control over him; and (4) the opportunities for a price squeeze on the independent are enhanced, since the supplier may shift his profit between rope wire and wire rope in such a manner as to narrow or eliminate the independent's margin of profit on wire rope. As to this latter disadvantage, for several years prior to the trial and at the time of the trial the price of rope wire (the raw material) had been raised several times while the price of wire rope (the ultimate product) remained virtually constant. In effect the steel producers raised the price of the raw material sold to the independent fabricators, but did not raise the price of the ultimate product which some of the producers, including Bethlehem, sold in competition with the independents. The evidence establishes that the independents were caught in a price squeeze.\textsuperscript{105}

In the Crown Zellerbach case, the FTC had found that independent jobbers, having to deal with a competitor as a supplier, following the merger, would probably lessen
competition in the paper products involved. On appeal, the Ninth Circuit Court held that

All we can say about this is that the Commission's finding with respect to these disadvantages to jobbers and converters found justification in the record and was supported by evidence which the Commission had the right to accept. Crown argues that only six of the jobber witnesses testified to these adverse effects on jobbers. If those six who testified had these experiences, then, in the absence of contradictory testimony by others, it can be inferred that the conditions described existed generally. We cannot hold the Commission's findings on this point clearly erroneous.106

This statement was followed by footnote 37 which specifically approved the above language from the Bethlehem-Youngstown case and referred to Adelman's contention that relying upon a competitor as a source of supply "could not be a disadvantage from a competitive standpoint."107 The Court held, "It would appear to be within the competence of the Commission to consider this to be a competitive disadvantage."108 If Adelman needs any proof of the precarious position of the independent fabricator dependent upon a supplier-competitor, he might ponder the position of the florists' foil fabricators in the Reynolds-Arrow Brands case following the acquisition.

The Supreme Court held in the Brown Shoe case that

In addition, a vertical merger may disrupt and injure competition when those independent customers of the supplier who are in competition with the merging customer are forced either to stop handling
the supplier's lines, thereby jeopardizing the goodwill they have developed, or to retain the supplier's lines, thereby forcing them into competition with their own supplier. See United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 613. \[109\] [Emphasis supplied.]

It should be noted also that the Supreme Court recognized the possibility of full line forcing (italics in the above quotation) due to a vertical merger, which is akin to a policy of reciprocity in the conglomerate case.

Also, in the Philadelphia Bank case, the Supreme Court specifically approved this holding in the Bethlehem-Youngstown case with the statement that

The test of a competitive market is not only whether small competitors flourish, but also whether consumers are well served.\[110\]

The traditional aspects of foreclosure due to vertical integration are: (1) that previous suppliers will be denied an outlet, or (2) that previous customers will be denied a source of supply, or (3) a combination of (1) and (2). These concepts can be related to the conglomerate merger in the situation where the line of the acquired firm can be integrated into the operations or selling or distribution channels of the acquiring firm, thereby foreclosing prior middlemen or suppliers, or leaving them to compete with the company which is now their supplier. Closely related to this is the opportunity in the conglomerate case (sometimes) to
implement a policy of reciprocity. This relationship can also give a significant competitive advantage and when accomplished by merger may be unlawful.\textsuperscript{111}

Intent.--Prior to the Brown Shoe case, it seemed that evidence relating to intent would not play a part in determining the Section 7 case. The only concern with "intent" in antitrust was the intent involved in conspiracy, monopolization, and the attempt to monopolize. But there developed quite clearly, in this regard, a concept of "constructive intent."

\ldots we pointed out in United States v. Griffith \ldots that "specific intent" is not necessary to establish a purpose or intent to create a monopoly, but that the requisite "purpose or intent" is present if monopoly results in a necessary consequence of what was done.\textsuperscript{112}

And it seemed quite clear that good intentions or a lack of desire to exercise monopoly power would not serve as a defense.\textsuperscript{113} The only defense would be evidence indicating that there was not a reasonable probability of a substantial lessening of competition\textsuperscript{114} or that competition in the line of commerce involved would be enhanced.\textsuperscript{115} And the intent of Congress was, in this matter, that it would be "unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote the merger."\textsuperscript{116}
The Supreme Court in the Brown Shoe case, however, while acknowledging the above statement from the House Report, stated that

Evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger. . .\textsuperscript{117}

In at least five places throughout the case, the Court stated that the intent of the merging parties should be taken into account. The "intent" which the Court was in this instance discussing was "economic or business purpose," and, in this case, all of the discussion concerning "intent" was directed against the defendant. The business purpose of this merger was to provide an outlet for Brown shoes which the Court found may foreclose sales outlets to others, or deny Brown shoes to other outlets. This examination of intent (economic purpose) surrounding the merger is another part of the Court's frequent expression in that case to the effect that economic advantage, when gained by merger, causing probable foreclosure and thereby injury to competition, and increasing concentration, is unlawful.\textsuperscript{118} There is no indication in the case that good intentions can be usefully employed as a defense.
Conclusions

Decided Section 7 cases provide legal criteria adequate for implementation of effective conglomerate anti-merger policy as expressed in Congressional hearings, reports, and debates. There have been developed in the horizontal and vertical cases specific types of evidence which the courts have accepted as proof of a reasonable probability of a substantial lessening of competition. These same classes of evidence, described above, can be transferred to a conglomerate setting to provide sufficient guidelines to a policy consistent with the purposes of Amended Section 7 of the Clayton Act. Chapter 11 will more specifically state the guidelines for the implementation of such a policy.

The types of evidence used in proving a reasonable probability of a substantial lessening of competition which may be transferred to a conglomerate setting are:

(1) Emphasis is placed upon reasonable probabilities. This necessarily calls for a judgment based upon all factors considered. More than a possibility is called for, and less than certainty is demanded. The trial judge or the Federal Trade Commission must make this decision, which, if based upon evidence, will be sustained by the appellate courts.¹¹⁹

(2) The most important criterion is the market shares of the parties involved in the merger. In the conglomerate
merger case there must be taken into consideration the market shares of both the acquired and the acquiring firms. This gives an indication of the relative economic power of each of the firms.

(3) Trends in the industry, related to concentration, must be considered. These have been held to be of great significance in both the horizontal and the vertical cases and should be equally applicable to the conglomerate case. There should be considered trends in the industries of both the acquired and the acquiring firms, and any trend toward conglomerate mergers--disappearance of independent firms in the acquired firm's line of commerce.

(4) Closely related to an examination of market shares and concentration is evidence related to the relative size of both the acquired and the acquiring firms in their industries. In the conglomerate case, of particular importance will be the size (economic power) of the acquiring firm compared to the firms in the line of commerce of the acquired firm.

(5) The relevant markets will be determined by empirically determined patterns in the industry so as to be "sufficiently inclusive as to be meaningful in terms of trade realities."
(6) The commercial relationships established as a result of the merger must be examined. Opportunities for tie-ins, reciprocity, and full line offering, or other economic advantage gained as a result of the merger, taken into consideration with the other factors here enumerated, may be evidence of a reasonable probability of a substantial lessening of competition. In this connection, the "intent" or economic purpose of the merger must be examined.

Chapter 11 will outline guidelines for conglomerate antimerger policy, based upon these types of evidence and the economic theory discussed in Chapter 9.
Footnotes


3H. Rept. 1191, p. 8, states that the tests of illegality under the amendment are intended to be similar to tests applied in interpreting the same language as used in other sections of the Clayton Act. See also Brown Shoe Co. v. United States, 370 U.S. 294, 322.

4370 U.S. 294, 323.

5Ibid., p. 332.

6Ibid.

7Crown Zellerbach v. Federal Trade Commission, 296 F. 2d 800 (9th Cir. 1961); certiorari denied, 370 U.S. 293 (1962).


10309 F. 2d 223, 230.


12370 U.S. 294, 320.
Footnotes--Continued

14337 U.S. 293.
16H. Rept. 1191, p. 8.
17Ibid.
18337 U.S. 293, 309.
19Ibid.
20Ibid., p. 310.
21Ibid., p. 314.
2450 F.T.C. 555, 572.
2650 F.T.C. 573, 575.
Footnotes--Continued


32370 U.S. 294, 320, fn. 36.

33370 U.S. 294, 322, fn. 38.


35370 U.S. 294, 316, 343-4.

36Ibid., p. 355.

3750 F.T.C. 555, 565.

3856 F.T.C. 1673, 1675.


40296 F. 2d 800 (9th Cir. 1961).

41Ibid., p. 836, fn. 32.

42Ibid., p. 837.

43370 U.S. 293 (1962).


Footnotes--Continued


49Ibid., pp. 24-25 (Sheehy).

50Ibid., pp. 27-28 (Reycraft).


53The Supreme Court also emphasized the anti-competitive effects of a trend toward vertical integration. 370 U.S. 294, 331.


55See Chapter 7, supra, pp. 248-252.

56370 U.S. 294, 332, 343.

57Ibid., p. 314.

58See an extensive review of the cases and copious footnoting in Massel, op. cit., Chapter 8, pp. 236 ff.; and Bock, op. cit.


61353 U.S. 586.

62370 U.S. 294, 324.
Footnotes--Continued

63Ibid., pp. 325-326.
64370 U.S. 294, 326, fn. 44.
66Ibid., p. 591.
67Ibid., p. 693, fn. 36.
68Ibid., pp. 692-693.
69296 F. 2d 800, 813.
70Ibid., p. 814.
71309 F. 2d 223, 228.
72374 U.S. 321, 357.
73Ibid.
74The writings on defining the product market are legion. For a most comprehensive bibliography, see Massel, op. cit., Chapter 8 footnotes.
75370 U.S. 294, 319.
76Ibid., p. 336.
77Ibid., p. 338.
79374 U.S. 321, 361.
80Ibid., p. 357.
81See, e.g., Bock, op. cit., p. 42.
Footnotes--Continued

82 A. B. A., Subcommittee on Section 7 of the Clayton Act, op. cit., pp. 41-42 (Adair).

83 See Chapter 9, supra, "'Competition' Functionally Defined."

84 See Chapter 9, supra, pp. 365 ff.

85 For the latest pronouncement, see 370 U.S. 294, 328-329.

86 334 U.S. 131 (1948).


88 370 U.S. 294, 332, 343; see also Chapter 8, supra.


92 309 F. 2d 223, 229.


94 See Chapter 9, supra.

95 See Chapter 9, supra, pp. 353 ff.


Footnotes--Continued

98334 U.S. 100. See also Blair, op. cit., p. 678.

99United States v. United Shoe Machinery Corp.,

100370 U.S. 294, 343.

101309 F. 2d 223, 230.

102Ibid.

103See Chapter 9, supra; also, H. Rept. 1191, p. 8;
370 U.S. 294, 302.

104370 U.S. 294, 343.

105168 F. Supp. 576, 621. Note also the comment
relative to the "conglomerate" power to shift profit margins
in an industry characterized by both integrated firms and
 independents.

106296 F. 2d 800, 841.

107M. A. Adelman, "Economic Aspects of the Bethlehem

108296 F. 2d 800, 841.

109370 U.S. 294, 323, fn. 40.

110374 U.S. 321, 367.

111See the description of the Consolidated Foods
case, Chapter 7, supra, and George W. Stocking and Willard
F. Mueller, "Business Reciprocity and the Size of Firms,"

112334 U.S. 131, 135.

113334 U.S. 100; 328 U.S. 781, 809, 811.

114370 U.S. 294, 325.
Footnotes--Continued


116 H. Rept. 1191, p. 8.

117 370 U.S. 294, 328, fn. 48.

118 See Chapter 9, *supra*, relative to economic advantage being proof of a reasonable probability of a substantial lessening of competition.

Chapter 11

GUIDELINES FOR IMPLEMENTATION OF ANTITRUST POLICY

AS APPLIED TO CONGLOMERATE MERGERS

The 1950 Amendment to the Clayton Act was an attempt by the Congress to tighten the law regarding public policy toward close-knit business arrangements—intercorporate stock and/or assets acquisitions. In order to carry out an avowed policy of retaining to the highest degree possible a decentralized economy, Congress proscribed mergers where the effect may be to substantially lessen competition since it was believed that certain mergers did tend to lessen competition and yet not come within the Sherman Act. No specific guidelines were given to the determination of the circumstances under which a merger could be judged as conducive to, or threatening to bring about, a substantial lessening of competition, or tendency toward monopoly. Particularly relevant to the conglomerate merger, however, was the general statement that such an effect may arise when there is an increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be

*Footnotes for Chapter 11 will be found on pp. 482-488, infra.
decisive, (an) undue reduction in the number of competing enterprises, or (an) establishment of relationships between buyers and sellers which deprives their rivals of a fair opportunity to compete.\textsuperscript{2}

A merger may be adjudged illegal when "the effect of an acquisition may be a significant reduction in the vigor of competition."\textsuperscript{3}

This chapter will suggest guidelines for the implementation of Congressional intent relative to conglomerate mergers. These guidelines are not intended to represent a "how to do it" outline for the enforcement agencies, but rather are to suggest the analytical approach to be made by both the enforcement agencies and the merging parties in considering whether a merger is lawful. These guidelines also provide the substantive defense of the conglomerate case. Recent cases provide a significant impetus toward simplification of the Section 7 case generally, and indicate that the contributions which economic theory--particularly the theory of "workable competition" or "effective competition"--can make are relatively narrow.\textsuperscript{4} It is believed that the guidelines here suggested reduce the Section 7 inquiry to its most objective form, rely upon the evidence which is most free from "mere speculation," place the responsibility of the enforcement agencies in proper perspective, and conform to
the intent of Congress. There will be considered here: the necessity of limiting the evidence; the key factor; other relevant factors; and the necessity for judgment on the ultimate issue.

Limiting the Evidence in the Section 7 Case

The Handling of Economic Evidence

Considerable attention has been given to the vast quantity of economic evidence introduced into antitrust proceedings and the techniques for handling such evidence. The Judicial Conference of the United States has devoted considerable attention to the problem. In 1951, the Conference adopted the "Prettyman Report" -- "Procedure in Antitrust and Other Protracted Cases," and has devised rules for the handling of economic evidence.

Although the present study is directed primarily toward an analysis of the types of evidence which may be used in proving a reasonable probability of a substantial lessening of competition, and no extensive comment will be made here concerning the legal technicalities of introducing such evidence, it must be recognized that expeditious handling of
such evidence is of significant importance in carrying out an effective antitrust program. Judge Prettyman has pointed out that there are two types of scientific and economic evidence and testimony which can be given. One is the identifiable, empirical facts pertaining to an economic issue. The other is not facts as such, but theories including in many instances so-called expert conclusions (opinions), opinions of relevancy, and conclusions as to the ultimate issue, i.e., a probable lessening of competition. The present study is concerned primarily with a part of the latter type of evidence—the substantive content of the evidence necessary to reach the ultimate issue.

The technical handling of economic evidence has received considerable attention in legal literature, and numerous suggestions have been made relative to expediting technical presentations. Most notable among these are the pre-trial conference; the use of interrogatories and depositions; document authentication prior to trial or hearing; authentication and stipulation of statistical material; use of the discussion technique; the split trial; and early mutual disclosure of evidence.
Judge Prettyman, undoubtedly the authority in this matter, states, however,

I have never been able to see why we lawyers and judges should move through our professional processes in mule carts while the rest of the world goes by in motor cars or jets; or why we seek out facts with unaided natural eyesight while all other professions use electro-microscopes. There ought never be the slightest hesitation on the part of lawyers in coming forward to improve the processes of litigation. Our present subject is a good example. The business world, the commercial world, the financial world, have no trouble in ascertaining economic facts of this sort with sufficient accuracy to form bases for transactions of enormous values and complexities. I do not see why lawyers should not invent methods of doing the same thing with a sufficient satisfaction for the purposes of the law. I do not know what those satisfactory processes might be.  

The present guidelines are not in answer to Judge Prettyman's plea for a solution to technical legal problems, but are a more direct attack on the underlying problem--outlining the economic evidence which is relevant and which should be considered. The Courts have generally been receptive to techniques expediting the handling of complex data. In the Brown Shoe case, for example, the Supreme Court stated that "there is no reason to protract already complex antitrust litigation by detailed analyses of proliferal economic facts, if the basic issues of the case may be determined through study of a fair sample."
Limiting the Types of Economic Evidence

Many of the reasons for limiting the economic evidence which should be considered relevant in the Section 7 case were discussed in Chapter 9. The literature concerning the quantum of evidence necessary in such proceedings is tremendous. On the one hand, there have been those who have taken the position that Section 7 introduced the quantitative substantiality rule, meaning that if a merger eliminated a "substantial" share of the market, there should be no further inquiry, \(^{11}\) or that the Clayton Act introduced certain per se principles. \(^{12}\) At the other extreme have been proponents of the broad economic inquiry, attempting to base the case upon some analysis related to the literature centering around the concept of "workable competition." \(^{13}\) Others have suggested that the law be amended to provide specific percentages for determining the illegality of a merger. \(^{14}\) As was suggested in Chapter 9, the "open inquiry" approach seems to be bottomed in a general feeling that more data will solve the problem. Massel, for example, recognizes the need for simplifying and regularizing the Section 7 inquiry, but succumbs, in his conclusions, to "Brookings Disease" (Researchitis) and can only offer the solution that additional data and study are required. \(^{15}\)
Expediency is one important reason for limiting the types of evidence as well as devising better techniques for introduction of the evidence. A merger is of extreme importance to the parties and the sword of possible enforced divorce hanging over their heads should be removed or used as promptly as possible; the problem of unscrambling assets, particularly in a setting of dynamic technology, becomes more and more acute with the passage of time; and the expense to respondents and the government is unnecessarily increased if superfluous or irrelevant evidence is entered.16

But perhaps more important than the time involved with the introduction of vast quantities of economic evidence is that the enforcement agencies are often "buried in undigested gobs of fact which they do not understand."17 Even those who advocate a broad inquiry admit that "it is extremely difficult to devise tests that can be administered by a court of law."18 Also, such an inquiry may reach a point of diminishing returns. Superfluous, irrelevant, or indeterminate evidence may lead to confusion, considerably increasing the possibility that "errors in logic and inference will increase, and the grasp of the conceptual framework of the case tends to be lost."19
The hope of economic theory (workable competition) making a great contribution to antitrust enforcement is attractive, but

the allure of greater recognition to academic considerations was more than offset by a recognition of the utter impossibility of enforcement, as well as by a feeling that enforcement based on these tests did not represent the intent of Congress. Like the problem of understanding the infinite, the human mind is simply incapable of comprehending the infinite details which have been considered by applying the laborious legal procedures of presenting evidence and making findings . . . on each of the standards of workable competition outlined in the Report of the Attorney General.20

The search for the past twelve years has been for guidelines to the implementation of the Section 7 case, oscillating between the extremes of the Commission's original approach in the Pillsbury and Brillo cases calling for "all relevant factors," to the Philadelphia Bank case based on percentages alone.21 In the light of recent cases, it appears certain that the Supreme Court, in the conglomerate merger case, will require information relative to market shares and economic size and "something else." In the Philadelphia Bank case, a horizontal merger, market shares was all that was required. Since the conglomerate merger case does not involve an increase in market shares, or an immediate trend toward concentration in any one line, it is believed that "something else" will be required.22
Neither the Justice Department nor the FTC has attempted to formulate criteria relative to the conglomerate case (or, for that matter, for any merger cases).

It would seem that if the courts have been able to crystallize general standards, administrative agencies should be able to do something of that sort, even though they can hardly take as many years to get the job done. 23

Commissioner Elman, in his concurring opinion in the Union Carbide case, stated that

within the framework of the broad statutory provisions, the Commission has the duty to formulate, as best it can, specific criteria for determining the legality of corporate mergers. To be sure, it is the obligation of the hearing examiner to confine the scope of a Section 7 proceeding as narrowly as the issues permit. But it is our responsibility to instruct the examiner as to the matters which are controlling. It is not enough, in my view, to direct the examiner "that he look at all the relevant facts of competition. . . . If a merger is clearly unlawful on this single narrow ground, quickly demonstrable by easily ascertainable objective data, it is neither helpful nor desirable to make a further inquiry by considering evidence relevant to other possible bases for a finding if illegality. Only in the event that the illegality of the merger is not apparent upon application of this test, should an economic inquiry of broader range be undertaken. 24

The Supreme Court, in the Philadelphia Bank case, specifically approved this language, and stated that

And so, in any case in which it is possible, without doing violence to the Congressional objective embodied in Section 7, to simplify the test of illegality, the courts ought to do so in the interests of sound and practical administration. See Union Carbide . . . concurring opinion . . . 25
This position of the Supreme Court is precisely opposite that taken by the Commission in the Brillo case, which Commissioner Elman was condemning in his Union Carbide concurring opinion. The Brillo opinion had held, on the second remand, that market shares was the most important evidence, and in some cases might be determinative, but that, in any event, all factors should be considered. On July 31, 1963, the Commission finally issued its third opinion on the Brillo case, deciding it on market shares alone, and relying on the Philadelphia Bank case.

It is believed that the types of evidence discussed in Chapter 10, fitted into the guidelines suggested below, follow the spirit of the Philadelphia Bank case. It will be suggested that the size and market shares of the firms involved comprise the key factor in the conglomerate case, as in other Section 7 proceedings. But due to the particular nature of the conglomerate merger, discussed in Chapter 8, above, and Chapter 9, that "something more" must be shown. This something more in the conglomerate case consists of relationships established as a result of the merger and the manner in which competition is carried on in the lines of commerce involved, with each of these viewed in the light of the first criterion. Based on these data, a judgment must be made by the trial judge or the Commission.
The Key Factor

Only certain aspects of industry characteristics generally denominated as "structural" factors are useable or have been used in Section 7 cases. The key factor in the conglomerate merger case will be particular aspects of industry structure. These include size, market shares, and trends in the lines of commerce involved. These are the prime elements in every Section 7 case. These data constitute the only basis for the decisions by the Supreme Court in the case of horizontal mergers, and along with the "other relevant factors," discussed below, constitute the only evidence used in deciding Section 7 cases. Neither the Courts nor the Commission have devised useful ways of implementing other economic evidence relating to structure, conduct, or market performance in the Section 7 case.

The assertion that primary reliance in determining the ultimate issue in the conglomerate Section 7 case rests on structural factors is based upon economic theory, empirical studies, Congressional intent, and the Courts. Economic theory informs us that as firms become fewer, and thereby relatively "larger," there is a change in competitive patterns, a change in the attitude on the part of the competitors. Statements by Congressmen relied upon economic theory, empirical studies, and crude
observation to conclude that economic concentration signif-
icantly reduces the vigor of competition.\textsuperscript{36} The Supreme
Court has held that economic size, market shares, and trends
in the industry provide the evidence necessary to determine
the Section 7 (horizontal) case, and the starting point of
any Section 7 inquiry.\textsuperscript{37} Adelman states that this approach
is an attack on size as such.\textsuperscript{38} This is only a half truth.
The attack is on size and its attendant economic power
and advantages when they occur by merger. Congress saw size
and market position as the key element in determining the
vigor of competition.

If market power can be identified at all, it
certainly must be identified with a particular
firm's share of a relevant market, and less
certainly, with the firm's absolute size.\textsuperscript{39}

Although Bock succeeds in listing eleven structural factors
that have been considered in 96 Section 7 cases, there are
actually only the three groupings of structural evidence
presented below.\textsuperscript{40}

The groups of structural evidence which have been
used in Section 7 cases and can be made applicable to the
conglomerate case include:

(1) Size. Economic size, relative and absolute, has
been shown in different ways in different cases.

Acceptable comparisons and statements of size
relative to the acquired and the acquiring firms may be in terms of assets, income, sales, profits, shipments, or production.\textsuperscript{41} The size of both the acquiring and the acquired firms, and a comparison of their sizes is pertinent. The relative size, measured in any or a combination of the above dimensions, of the acquired firm compared to other firms in the line of commerce of the acquired firm; the relative size of the acquiring firm in its industry; and the size of the new conglomerate firm, compared to the size of the firms in the line of commerce of the acquired firm will all provide useful information, when taken into account with the other factors listed below.

(2) Market Shares. In any case, a survey of the line of commerce must be made in order to demonstrate the importance of the removal of the acquired firm from the position of an independent competitive unit. This information will reveal the number of firms, the disparity between the largest and the other firms, demonstrate the degree of concentration already existing, and in the light of the economic size revealed by the inquiry suggested by (1)
above, indicate the importance of the acquisition relative to competitive patterns. This information has been held to be the starting point, and the prime factor in the Section 7 case.42

(3) Trends. The Supreme Court in the Brown Shoe case and in the Philadelphia Bank case relied very heavily upon Congressional intent as reflected in the latter's concern over increasing concentration, to find that both horizontal and vertical trends in industries afforded a strong basis for condemning mergers.43 Similarly, in the conglomerate merger case, trends toward horizontal concentration in the line of commerce of the acquired firm, vertical integration removing independent competitors and foreclosing markets, and trends in conglomerate mergers absorbing previously independent units and thereby contributing to increased concentration in the economy generally, will constitute valuable evidence. Rather than permitting the fact that independents have disappeared to serve as a defense for future mergers "in order to compete more effectively," the Supreme Court has held that Congress' desire was that trends toward concentration should cease.44
These market structure characteristics have, in fact, constituted the sole evidence in horizontal cases. Absolute size, though suspect, will probably never be determinative in a Section 7 case, but market shares plus trends in the industry have been. Still, no definite market shares constitute a rigid dividing line. The analysis above, about which it can be said "all is relative," does, however, provide a basis for judgment in the horizontal case.\textsuperscript{45} In the vertical cases which have been decided, other relevant factors have been found to be manageable as evidence, and indicative of whether there is a reasonable probability of a substantial lessening of competition. These will be considered below.

All Other Relevant Factors

Since there is no immediate increase in concentration or increase in market shares in the conglomerate case, other factors will be considered. In addition to the market structure factors enumerated above which will form the starting point for the inquiry, there can be added another element of the structure of the industry: the relations that are created as a result of the merger. Courts in decided cases have found that the establishment of certain relationships are conducive to anticompetitive effects.\textsuperscript{46} Related to the
conglomerate merger, these relationships that may be established are the opportunities for reciprocity; the opportunities for integration into sales, management, and/or distribution facilities, or production facilities; and opportunities for tie-ins or full line offerings. Also, a descriptive analysis of the way in which competition is carried on in the lines of commerce involved, and by the parties to the merger, can afford substantial insights into the possibility of anticompetitive effects. These two groups of economic evidence involve the most significant contribution that can be made by the economist relevant to the task of the enforcement agencies. That is, the economic analyst must know the industries of both the acquired and the acquiring firms, the relationships that exist within the "industry," and between the "industries," and the competitive conduct and patterns in the industry.47

Relationships Established by the Merger

The Opportunity to Use Conglomerate Power.--It is clearly recognized that the outstanding characteristic of the conglomerate firm is its ability to shift from one discrete economic submarket to another,48 and that this ability can be
considered as having anticompetitive effects, particularly in the light of the economic size (absolute and especially relative size) of the acquired and of the acquiring firms, and of the firm subsequent to the merger. Such an ability to shift may induce a reduction in the vigor of competition. It was suggested in Chapter 9 that, just as economic theory holds that evolving fewness and bigness of firms in a particular line causes a kink in the subjective demand curve of competitors, similarly the introduction of a conglomerate firm into an industry may induce a reduction in competition—a change in competitive practices, due to the changed size (new economic power) of the acquired firm as a result of the acquisition. Just as in the case of the theory of the kinked demand curve, there is no clear-cut indication of when there will be a lessening of competition—price competition or otherwise. But, as will be pointed out below, this is a matter of judgment which must be made by the finder of fact. The concrete facts can only reveal the newly established relative size of the firm, and the existence of conglomerate power. Beyond that, a judgment must be made. Decided cases, and empirical evidence, give adequate grounds for the enforcement agencies using this as a basis for their ultimate decision.
Economic Advantage by Merger.--The economist involved in the Section 7 case must further exercise his expertise by attempting to determine the opportunities which the conglomerate merger may present for the economic advantages listed above—reciprocity, etc., etc. Also, there may be foreclosure of suppliers or customers, as in the vertical case, of the previously independent firm, if the line is of such a nature that the product can be in some way integrated into the acquiring firm's operation—e.g., in sales or distribution. All of these economic opportunities and economic advantages, accruing to the merging firms, have been used as evidence of probable anticompetitive effects. Mere possibilities for these relationships will not suffice, but inquiry into the economic purpose of the acquisition (intent), combined with the opportunities presented, are legally valuable and administratively manageable evidence. It certainly is not required that the enforcement agencies wait until these advantages of the merger are put into effect and demonstrate their consequences. Again, a judgment must be made as to whether the advantage may give "undue advantage," or "threaten to become decisive." In this matter, there is a hazy line between the vertical and the conglomerate merger. For example, if a firm
is engaged in selling "groceries" and produces some of the groceries it sells, and then says the producer of another type of grocery item, is this a conglomerate or a vertical acquisition? As was stated in Chapter 9, the name given to the merger is unimportant. It is the probable economic effects which must be determined. For purposes of this study, as described in Chapter 9, such a merger would be conglomerate in its emphasis in that the firms were operating in what, before the merger, would be classified as separate lines of commerce in a Section 7 proceeding, if there was no already established relationship of supplier-customer. And even if the latter relationship did exist, many of the elements of the conglomerate case would weigh heavily in the evaluation of the case.53

The trial court in the Brown Shoe case stated that

If, by advantages in buying, selling, insurance, assistance in business planning and practice, advertising, and credit arrangements, the percentage of the retail sales by the combined company-owned and company-controlled shoes increases; so, likewise, does their power to control price increases; so likewise does their power to sell more and more of their own shoes tend to create a monopoly.54

Economic advantage gained as a result of merger has formed the basis for decision in vertical cases and is equally applicable to the conglomerate case.
The Way in Which
Competition Is Carried On

Economic theory has long recognized that price is not the only aspect of competition which can be diminished. The generally recognized modes of competition are: price, product improvement based upon research and development, and sales effort. This aspect of "market conduct"—the patterns of competitive activity—taken in the light of the "market structure" elements described above, provides manageable evidence for the conglomerate merger case. The Supreme Court in the Brown Shoe case recognized that the power of a large firm to dominate style could have an anticompetitive effect relative to small independent producers and retailers. Similarly, in any industry characterized by a high degree of minor product differentiation, involving a constant struggle for consumer acceptance, either by real or imagined product improvements, the entry of a "giant" firm by conglomerate merger into that industry may result in the development of follow-the-leader patterns in style and product improvement as well as in price—which economic theory has long recognized. Similarly, in the case of selling effort, if a sizeable portion of the sales dollar is involved in demand generation, the entry of a firm with a "giant" advertising budget and advertising know-how may reduce vigor in selling effort and bring
about the cessation of struggles to gain increased market shares. Again, the determination of whether there is a reasonable probability of a substantial lessening of competition in any of these dimensions must be determined by the structure elements described above, and the advantage in any of the facets of competition which may be brought to bear as a result of the merger. Here, evidence relative to selling techniques, budgets, and staff; research and development budgets, facilities, and staff; and the combined resulting picture of such factors can be useful. Decisions based on these data again call for judgment on the part of the decider of fact.

Judgment on the Ultimate Issue

There is no doubt that the task of evaluating economic evidence and determining the reasonable probabilities that may flow from a merger is a formidable one. But that is precisely the task confronting the enforcement agencies--the Federal Trade Commission or the trial judge in the Section 7 case. The Commission virtually abandoned the original Section 7 as part of its regulatory functions by refusing to attempt market analysis.58

Market power is an elusive quantity. It is not possible, nor will it ever be possible, by calculating
market shares, dividing \( p_{mc} \) by \( P \), or by other
hocus pocus to present an unambiguous measure of
monopoly . . . (but) a judgment concerning market
power is of the essence in merger policy.  

The Commission has not been particularly active in
formulating an antimerger policy based upon the amended
Clayton Act. Apparently there will be no prescribed guide­
lines to the hearing examiners for the handling of such
cases, but rather, presumably, in the future, a significant
body of case law will be developed.  

Certainly, the Com­
mission has not seized the initiative toward the implementa­
tion of Section 7 policy. The most distressing aspect of
the entire Brillo fiasco was that after seven years, the
Commission, in its third decision, finally decided the case
on market shares alone, but relied on the Supreme Court's
decision in another Section 7 case in so doing. Of course,
the Commission is always subject to the ultimate review of
the Supreme Court. But this completely reverses the
anticipated role of the Commission in merger policy. It was
assumed that the Commission would acquire a high degree of
expertise and be the initiator and leader in matters dealing
with the economy.  

The failure of the Commission to assume a vigorous
initiative regarding Section 7 may be attributed to several
factors. It has been suggested that expertness can become stagnation.

One of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable can, in fact, be overcome by fresh, independent minds. Or, it is possible that the Commission viewed a simplified and organized approach to the Section 7 case--or particularly a quantitative substantiability approach--as a refutation of its own expertise, and asserted the need for a complete economic analysis in order to determine the merger's competitive effects. Also, at the time of the passage of Amended Section 7 of the Clayton Act, economic theory and empirical studies were deeply involved in the concept of "workable competition" and the general over-all analysis of market performance. The Commission failed to realize that its mandate under Section 7 did not call for a comprehensive evaluation of the competitive milieu of a given market but was actually involved in a much narrower issue, calling only for a determination as to whether there was a reasonable probability of a substantial lessening of competition, or tendency toward monopoly, regardless of what the market situation might have been. It failed to realize that the issues involved in imperfectly competitive market analysis, carried
to ultimate conclusion, were not the same as the issues in the Section 7 case. Although the theories of imperfect competition gave an indication of the factors which could be looked at in order to determine whether there was a reasonable probability of a substantial lessening of competition, Section 7 does not call for such a comprehensive analysis. The conclusion relative to the ultimate issue in the Section 7 case—the reasonable probability of a substantial lessening of competition—is extremely difficult because, by the very nature of the case, concrete empirical data do not exist; there are no statistics for the future. And, neither economic theory nor the law provided concrete guidelines as to what factors should be weighed. The various degrees of proof required in legal proceedings start with, in degrees of certainty, proof "beyond a reasonable doubt." This standard is required in criminal cases. In "severe" civil suits, there must be "clear, unequivocal, and convincing" proof. The ordinary civil suit requires a "mere preponderance of the evidence." The standard used for judicial review of administrative commissions, such as the FTC and trial judges, is that "findings must be supported by the evidence." Judicial review of the Commission's findings will be discussed below. The problem which has
seemingly presented the greatest obstacle to the Commission has been, not that it will not be supported on its ultimate judgment, but that it is, itself, charged with determining a fact which is only a reasonable probability. This is a vaguer standard than even the "mere preponderance." As early as 1905, Mr. Justice Holmes stated that the Sherman Act like many others, and like the Common Law, in some cases, directs itself against the dangerous probability (of monopoly) as well as against the completed result.  

To a certain extent, the finding of a reasonable probability must be based upon an evaluation of a number of possibilities. The very prospective nature of the statute denies a reliance on post-acquisitional data. The legislation was intended to be preventive, and not designed to attempt to rectify competitive situations after they have become observable. This is the crucial task of the Commission--to develop guidelines upon which to base its finding of fact, which fact is whether there is a reasonable probability of a substantial lessening of competition. Once this fact has been found, appellate courts will be extremely reluctant to upset the finding. This is adequately demonstrated by appellate decisions relative to other Sections of the Clayton Act.
It has been held that it is not necessary for the Commission to produce consumers to testify as to their deception in a Section 5 proceeding. And the representation in the advertisement need only have "the capacity to deceive." When that fact is found, the Commission's decision will not be disturbed. The Commission, in such a case, has the right to "look at the advertising in question, consider the relevant evidence in the record that would aid it in interpreting the advertisement, and then decide for itself whether the practices . . . were unfair or deceptive." And, if the Commission arrived at its findings fairly "and had substantial evidence to support it, so that it cannot justly be said 'to be palpably wrong and therefore arbitrary,' it is our duty to uphold the Commission's findings." It has also been held that the appraisal of the evidence in arriving at the ultimate issue is for the Commission, not the Courts. "The meaning of an advertisement to the public and whether it is calculated to deceive is a question of fact." The Supreme Court has stated in connection with a Section 2(b)--price discrimination--case that

The determination from the evidence whether the respondents acted 'in good faith' to meet a competitor's equally low prices, within the meaning of Section 2(b) of the Act is for the Commission. . . The appraisal of the evidence and inferences to be drawn from it are for the Commission, not for the courts.
Conclusions

It is believed that the guidelines listed above provide an outline of sufficient evidence for the evaluation of the competitive effects of a conglomerate merger. These factors will constitute both the affirmative prosecution case, and the defense. At least one defense attorney has stated, "There is, in fact, no room for defense except upon the ground that they do not produce the prohibited competitive effects," and then proceeded to enumerate the structural factors and the prognostication that must be based upon them. The Supreme Court has made short shrift of defenses, stating that remaining vigor of competition is not a defense if there is a discernible trend toward concentration; economic advantage is nowhere permitted as a defense; and the argument that the merger will enable the parties to "compete better" has not been successful. The Supreme Court has, however, given dictum recognition to the "failing company" doctrine. Both the affirmative and the defense case must turn upon the size of the firms, market shares, trends in the industry, the relationships established by the merger, and the way in which competition is carried on. These factors represent a manageable quantum of evidence, provide a basis for implementation of Congressional intent, and
provide a sufficient basis upon which the enforcement agencies and the determiner of fact can base a judgment.

In summary, under existing statutory standards analysis to determine the legality or illegality of a conglomerate merger should proceed along the following lines:

1. The relevant market, product or service and geographic, must be established in terms of the operations of the firms involved. According to present judicial interpretation, the established patterns of commerce upon which the merger may be expected to have an impact constitute the "line of commerce" and "section of the country."

2. An analysis of the parties to the merger is required. Such an analysis should include the following: the companies' histories, especially their record of growth by merger or otherwise and their antitrust histories; the nature of the companies' operations, e.g., whether single line or diversified, integrated or single stage, local market or national; the size of the companies in absolute terms and compared to each other; and the significance of the particular line of commerce to each of the firms' total operations.

3. The position of each of the firms in the line(s) of commerce involved must be determined by an "industry survey." Such a survey will show the following: the shares of sales accounted for by each of the participants in the line; the
number of firms; the disparity in shares between the leading firm(s) and others, and the position of the acquired firm; the degree of concentration; the trend toward concentration; whether firms have been entering and/or leaving the line; the growth of the line of commerce compared to the growth of firms in that line. Collection, presentation, interpretation, and analysis of such required data constitute the function of the professional economist in the preparation and litigation of this category of merger cases under Section 7 of the Clayton Act.

4. The business economist as an "industry expert," to use Federal Trade Commission terminology, must determine the nature of the possibilities for future developments based upon relationships created by the merger. That is, structural relationships created between the line of commerce of the acquired company, and the intrusion of the acquiring company must be qualitatively evaluated. Opportunities and the "intent" (business purpose) relative to reciprocity, tie-in arrangements, full-line forcing, and the degree of integration into existing operations, must be discovered and considered. The ability to implement these opportunities must be analyzed. In this regard, the position of the acquiring firm, both before and after the consolidation, compared to the other firms in the line of commerce at issue must be established.
Of primary importance here is the "economic power" of the acquirer vis-à-vis the other firms, the degree of integration and/or conglomerate which already exists, and the trends in such relationships.

5. The economist may also find, through an analysis of the way in which competition is carried on, clues to the opportunities for a gaining of proscribed economic advantage. Depending on whether competition is characterized by price, product differentiation and improvement, or selling effort, the ability of the acquiring firm vis-à-vis the other producers in that line becomes important. In this matter, relative financial strength and research and sales budgets, staffs and experience become important.

6. Based upon such data and analysis, the finder of fact--the trial court or the hearing examiner and the Federal Trade Commission--must base judgment on the fact issue: Is there a reasonable probability of a substantial lessening of competition or tendency toward monopoly? No substitute for this amount of economic analysis appears adequate for handling the problems defined by Section 7 and recent relevant judicial interpretation.

7. In an ideal or theoretical sense, greater clarity in conglomerate merger policy could be attained if legislative adoption of prima facie size limits--whether measured in terms
of market share, total employment or otherwise—or performance standards were made. However, this action would presuppose a consensus which does not exist either among economists or in the legislative branch. In fact, if there is a present consensus it is in favor of a flexible case-by-case approach to this area. Given the absence of agreement in favor of adoption of such rigid legislative standards, effective and even partially predictable application of present somewhat diffused legislative standards requires the sort of analysis suggested above. The finder of fact, whether trial court or the Federal Trade Commission, so advised, must base its technical legal judgment on the fact issue.
Footnotes

1Chapter 6, supra.


Ibid.

4See Chapter 9, supra.


Footnotes--Continued


12Richard D. Clark, "Conglomerate Mergers and Section 7 of the Clayton Act," 36 N.D. L. Rev. 255 (1961), at p. 270, "The Clayton Act was an effort to overcome the 'rule of reason' by introducing 'per se' tests of illegality."


16McAllister, op. cit., and Dession, op. cit.


Footnotes—Continued

19Bok, op. cit., p. 295. See also Chapter 9, supra.


21Chapter 10, supra.


29370 U.S. 294, "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power," at p. 321.
Chapter 10, supra.

31 Chapter 9, supra, and especially Robert Triffin, Monopolistic Competition and General Equilibrium Theory (Cambridge: Harvard University Press, 1940), pp. 103 ff.


33 Chapter 6, supra.

34 Chapter 10, supra.


36 Chapter 6, supra.

37 Chapter 10, supra.


40 Bock, op. cit., pp. 90 ff. Her listing is overlapping in some cases, e.g., "size and growth history of the acquiring company" and "past acquisitions by the acquiring company" or, in some cases, she lists conclusions as aspects of structure, e.g., "accelerating a trend toward vertical integration."
Footnotes--Continued

41Ibid., Chapter 3.

42Chapter 10, supra.

43Ibid.

44370 U.S. 294, 346, with the exception of the "failing company" doctrine, of course, remaining as a defense.

45Note, "'Substantially to Lessen Competition': Current Problems of Horizontal Mergers," 68 Yale L. J. 1627 (1959). "No other criteria have been found to be workable from an administrative point of view.

46Chapter 10, supra.

47Chapter 9, supra.

48Ibid.

49Chapter 10, supra.

50Chapters 9 and 10, supra.

51Chapter 10, supra.

52Ibid., and H. Rept. 1191, p. 8.

53See, e.g., the discussion of Reynolds-Arrow Brands, supra, pp. 315-317.


55Chapter 9, supra.

56Chapter 10, supra.

57See, e.g., Triffin, op. cit., pp. 104 ff.

58Chapter 3, supra.
Footnotes--Continued


60 See, however, Commissioner Elman's plea to the hearing examiners for guidelines, supra, expressing a long-standing complaint with regard to the inability of the Commission to move rapidly.

61 See Chapter 9, supra, and Bok, op. cit.


64 Note, 68 Yale L. J. 1627, op. cit.

65 See Chapter 9, supra.


70 Charles of the Ritz v. Federal Trade Commission, 143 F. 2d 676, 680 (2d Cir. 1944).
Footnotes--Continued

71Zenith Radio Corp. v. Federal Trade Commission, 143 F. 2d 29, 31 (7th Cir. 1944).

72Ibid.

73Gulf Oil Corporation v. Federal Trade Commission, 150 F. 2d 105, 108 (5th Cir. 1945).


Chapter 12

CONCLUSIONS

The Clayton Act of 1914 was a reflection of dissatisfaction with earlier attempts to control private economic power. The Sherman Act, as an affirmation of the philosophy underlying a competitive free enterprise economy, had not produced the desired economic and social structure. The Clayton Act sought to bring within the sphere of public control certain specific business practices. One of these was intercorporate stock acquisitions. This is the primary aspect of Congressional intent that must be recognized. It is the *sine qua non* for the implementation of Section 7 of the Clayton Act. This study concludes that the Supreme Court in its original interpretation of the Clayton Act, as well as much of the business community, the bar, and many lower courts as late as 1963, fail to recognize this important point—that Congress made intercorporate stock and, after 1950, assets acquisitions specifically subject to public scrutiny. While a certain quantum of latent laissez-faire is present in American ideology, Congress has decided otherwise in the case of such acquisitions.
Original Section 7 of the Clayton Act was rendered impotent by a series of Supreme Court decisions. The rationale for this judicial action includes:

(1) The Court's original interpretation of the Statute ignored the "between the corporations" provision and held that there must be lessening of competition in a market generally.

(2) The Court held that the Sherman Act standard of illegality should be applied to Clayton Act problems.

(3) The Court denied the Federal Trade Commission equity powers which would have enabled it to pursue substance rather than form.

Finally,

(4) The Commission contributed to the debacle by failing, through refusal or incapacity, to develop general standards indicating what precisely constituted a "substantial lessening of competition" in a market.

The Supreme Court's treatment of Section 7 of the Clayton Act illustrates the "striking cultural lag in the fashioning of restraints on the growth of concentrated economic power."¹ Thirty-seven years after the Court held

---

¹Footnotes for Chapter 12 will be found on p. 497, infra.
that the Federal Trade Commission had no inherent power to pursue the substance of a transaction and order the divestiture of physical assets held as a result of an illegal stock acquisition, it held that regulatory agencies did have such inherent power. The belated discovery of this inherent power, however, followed by thirteen years the specific grant of such power to the Federal Trade Commission by the Congress.

Analogous to the Supreme Court's refusal to depart from Sherman Act standards of illegality were its holdings relative to the injunction in labor disputes. Section 6 of the Clayton Act declaring that "the labor of a human being is not a commodity or article of commerce," and Section 20 forbidding injunctions in specified instances, were effectively nullified by the Supreme Court in the Duplex Printing case. In that case, the Supreme Court held that the statute was "declaratory merely of what would be law without the statute." Similarly, the Supreme Court refused to recognize the Clayton Act as a new substantive law.

The large number of corporate mergers beginning with and continuing through and after the Second World War led to increased concern on the part of those fearful of the economic and social consequences of large concentrations of economic power. Available data revealed a degree of concentration
sufficient to cause great concern in Congress. The existing
degree of concentration was attributable, in large measure,
to merger activity. This was the "increasing concentration"
with which Congress was concerned. The observed and
anticipated undesirable consequences pursuant to a highly
concentrated economy were discussed thoroughly. The
conclusion that increased concentration led to undesirable
economic and social consequences was all but unanimous. No
serious attempt was made to justify the economic performance
of concentrated industries. This may illustrate the not
atypical failure of American business to adequately conceptu-
alize its actual position. As the Supreme Court later
recognized, Congress was concerned with preserving a particular
economic and social structure, to the highest degree possible,
even at the cost of some inefficiencies. Undesirable
consequences were seen as following economic concentration
and these "evils" were summed up in the term "a lessening of
competition." Any merger that produced a reasonable
probability of such a substantial lessening of competition
was proscribed.

The 1950 Amendment to the Clayton Act was clearly
intended to introduce a new standard of illegality—the
reasonable probability of a substantial lessening of competition
in a relevant market. All mergers, whether vertical, horizontal, conglomerate, or a mixture of the three types, were specifically brought within the ambit of the statute, and made subject to the above standard.

The enforcement agencies have not been particularly active in Section 7 cases. This is especially true of the Federal Trade Commission, which has seemingly been at a loss in determining just what factors should be evaluated in attempting to implement the statute. The Commission in large measure has failed to live up to its responsibilities in taking the initiative and leadership in interpreting the antitrust laws. An outstanding example of this failure is its recent decision in the Brillo case, which, after being through three hearing examiner proceedings and two remands, was finally decided in reliance upon a United States Supreme Court decision. In other words, rather than the Commission exercising its statutorily expected expertise, it vacillated several years on this case, and followed rather than led the Supreme Court in the formulation of legal-economic evaluation techniques. Of course, the Commission's interpretation of the Clayton Act will always be subject to judicial review. However, in fact determination, if based upon substantial evidence, the Commission is the ultimate determiner
of such issues, and for this, judgment must be exercised based upon adequate information and clear concepts. It is the responsibility of the Commission to make clear the factors that are properly to be considered in arriving at this judgment. Such guidelines are needed for the staff in the investigation and preparation of cases, by the bar for advice to clients, and by the business community in order to avoid litigation when possible, and in order that cases under Section 7 may be determined expeditiously on the basis of known and predictable rules of law.

Confusion in the implementation of Section 7 stems from several bases:

(1) The Commission desired to avoid simple "quantitative substantiality" analysis, perhaps on the ground that such an evaluation would be too simple, and an affront to its "expertise." As an opposite extreme, cases went to the quagmire of "all relevant factors."

(2) Expertness can become merely a rut; analysis and evaluation can lead only to further analysis and evaluation to the detriment of both decision making and effective action.

(3) At the time of the passage of the amendment to the Clayton Act, 1950, economic analysis, relevant in
this context, was concerned primarily with the process of evaluating the performance of imperfectly competitive markets. There was a failure to distinguish between the process by which evaluation of the performance in a market is made, and the simpler statutory issue which is only whether there is a reasonable probability of a substantial lessening of competition regardless of the existing level of competition. For the determination of this issue, evaluation of the effectiveness of the market in terms of some set of norms is not necessary.

It is not believed that additional legislation is needed to implement the intent of Congress, as here assessed, relative to the 1950 Amendment of Section 7 of the Clayton Act. There are no judicial impediments to carrying out such intent. In fact, the Supreme Court has taken the initiative and pointed the way. Sufficient judicial pronouncements and a selected use of economic theory provide a basis for effective Section 7 action in conglomerate as well as in other cases. The Federal Trade Commission should, however, specify the guidelines or criteria which it will apply to Section 7 cases. Those which should be enumerated as
pertinent to the conglomerate merger case are the subject of Chapter 11, supra. The Commission has issued detailed guidelines in regard to, e.g., false advertising, and guidelines for the staff in the evaluation of "bait advertising."

Although as indicated in Chapter 8 above, it is believed that the Commission has embarked upon the correct approach, the intent of Congress will not have been carried out until the Commission is able to move with dispatch and vigor. Commissioner Elman's statement in his concurring opinion in the *Union Carbide* case to the effect that the Commission must provide guidelines to the hearing examiners, rather than simply require an evaluation of the "relevant economic factors," is a minimum necessity. The development of guidelines for the hearing examiners, the Commission staff, and the bar and the general public could lead to a significant decrease in uncertainty, wasted time, wasted volumes of evidence, and wasted antipathy toward a law designed to preserve a social and economic structure adjudged by the Congress of the United States to be the most desirable. Reasonable men may differ concerning the wisdom of Clayton Act policy. However, this study concludes that, insofar as affirmative action has been taken, it is in accord with that policy.
Footnotes


4 38 Stat. 730 (1914).

5 38 Stat. 732 (1914).


7 Ibid., p. 375.


APPENDIX A

Summary of Industry Studies Presented by Federal Trade Commission Staff at the 1945 House Hearings on Amending the Clayton Act, Section 7

(1) "Consolidations in the Farm Implement Industry," by J. Q. Adams, FTC staff economist. This was primarily an analysis of the six leading farm implement manufacturing companies, which together provided 80 per cent of sales in the industry (1940). The industry was broken down by products into 28 classes with a showing of how, in each of the classes, concentration in the hands of the big six had proceeded; a history of all the acquisitions of each of the firms was given, along with charts showing the extensiveness of each company's holdings. Each of these organizational charts that were shown for the large corporations were drawn in such a way, even though with straight lines connecting the parts, to give an octopus-like appearance. Adams pointed out that there had been three merger periods in the farm implement industry: the first from 1870 to 1900; the second from 1900 to 1905 with the founding of the giant corporations; and the third from 1910 to 1945 which was "characterized by
the lengthening of line by the rapidly growing dominant companies, and the acquisition and removal from the field of competing lines."

(2) "Methods of Consolidation in the Electrical Industry," by W. T. Mitchell, FTC. In presenting the charts showing the organization of the General Electric Company with all its subsidiaries, it was necessary to present a six-page fold-out and an equally lengthy fold-out was shown for the Westinghouse Company. Described in this report were the methods by which the two companies had acquired the businesses of other manufacturers and distributors. Detailed listings of both stock and asset acquisitions were given, and the history of expansion into electric appliances and supplies was described, for both the companies.

(3) Survey of Acquisitions, Mergers, and Growth of Chemical Manufacturing Corporations," by A. E. Lundvall, FTC. This report was an analysis of the growth of E. I. duPont de Nemours and Company, Allied Chemical and Dye Company, Union Carbide and Carbon Corporation, and American Cyanamid Company. Here also impressive charts were used to illustrate the extensiveness of the holdings of each of the corporations; financial and operating records were given for
the years 1925 to 1944 to show the growth of these companies. The return to duPont on its General Motors common stock was shown to be, from the years 1927 to 1944, an average of 49.29 per cent. A great deal of other profit data, before and after taxes, was shown for each of the three companies, along with their earnings per share, and the comparatively small amounts of cash dividends paid per share, indicating retained earnings for merger expansion.

(4) "Acquisitions and Concentration in the Bread Baking Industry," by M. C. Steele, FTC. This report gave an extensive analysis of the four largest bread baking companies in the United States and showed the extensive holdings of each one of these, and the way in which they had grown by merger over the years. Also, profit data were shown; the rate of return on total borrowed and invested capital increased directly from 8 to 11 per cent with the increase in size of the firms. Also, there was shown the increase in the rate of return from the years 1936 to 1944 for each of the bread baking concerns.

(5) "Survey of Acquisitions, Mergers, and Growth of Packaged Foods Corporations," by M. C. Steele, FTC. This was an analysis almost entirely of General Foods Corporation and
its forty subsidiaries, showing the methods by which each was acquired and the profit structure of the corporation.

(6) "Survey of Acquisitions, Mergers, and Growth of Building Materials Corporations," by W. B. Horne, FTC. This report also merely listed a history of the acquisitions of the Celotex Corporation, Certainteed Products Corporation, and Pittsburgh Plate Glass Company, and showed the present (1944) organization of the parent company and its subsidiaries.

(7) "Survey of Acquisitions, Mergers, and Growth of Drug Manufacturing Corporations," by Roger F. Barnes, FTC, showed the growth and development of the leading drug manufacturing and distributing concerns, their rates of profit and the methods by which they grew, and the extensive diversification of McKesson & Robbins and American Home Products Corporation.

(8) "Memorandum Concerning the Salt Industry and Some of the Mergers and Acquisitions Which Have Occurred Therein," by G. A. Stephens, FTC. Information was presented concerning the extent of salt uses in agriculture, industry, medicine, and the home, and showing the extent of the holdings of International Salt Company in each of these areas, and the
way they expanded, primarily by mergers, to the point where the two largest companies produced about 40 per cent of the entire industry output. The other leading company was Leslie Salt Company, and the immediately following largest salt producers were Armour, Swift, Cudahy, and General Foods.

(9) "Acquisition of Physical Assets of Competitors in the Dry Ice Industry," by Everett F. Haycraft, FTC. The commercial manufacture of dry ice did not begin until about 1926. Mr. Haycraft outlined the history of the industry showing a continual stream of mergers and acquisitions. But he did not summarize his findings in regard to concentration except for the statement that the Michigan Alkali Company manufactured and sold about 17 per cent of the total quantity in 1941.

(10) "Additions of Capital Stock or Assets of Competitors in Milk and Milk Products Industries," by A. H. Tackett, FTC. This report showed a history of the acquisitions of, growth in the assets held by percentage shares of the market in different states, and the companies that had been acquired by the National Dairy Products Corporation, the Borden Company, and the Pet Milk Company.

(12) "Concentration in the Rubber Tire Industry and the Rubber Boot and Shoe Industry," by Edward Fischer, FTC. After giving a great deal of data concerning the actual acquisitions and the value of the acquisitions, this report concluded by showing the number of concerns which had disappeared in the industry and the increased shares which had gone to the giants between the years 1935 and 1945.
BIBLIOGRAPHY

Public Documents


U. S. Senate, Committee on Interstate Commerce. Hearings on Interstate Trade. 63d Cong., 2d Sess., 1914.


Books


Articles


_____. "Does Large-Scale Enterprise Result in Lower Costs?" 38 American Economic Review 122 (1948).


Cases


Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F. 2d 676 (2d Cir. 1944).


Gulf Oil Corp. v. Federal Trade Commission, 150 F. 2d 106 (5th Cir. 1945).


Northern Securities Co. v. United States, 193 U.S. 197 (1904).


Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).
State v. Standard Oil Co., 49 Ohio St. 137 (1892).


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


363 U.S. 825 (1960), oral argument postponed


V. Vivaudou, Inc. v. Federal Trade Commission, 54 F. 2d 273 (2d Cir. 1931).

Western Meat Co. v. Federal Trade Commission, 1 F. 2d 95 (9th Cir. 1924), certiorari granted 268 U. S. 685 (1925), reversed 272 U. S. 554 (1926).

Zenith Radio Corp. v. Federal Trade Commission, 143 F. 2d 29 (7th Cir. 1944).

FTC Dockets

Matter of Aluminum Co. of America, FTC Docket 238, 3 F. T. C. 302 (1931).


Statutes


I, Billy Joe Colwell, was born in Guadalupe County, Texas, March 15, 1931. I received my secondary-school education in the public schools of Lockhart, Texas, and my undergraduate training at The University of Texas beginning in 1949. In January, 1951, I enlisted in the United States Navy during which service my primary duty was as Personnelman aboard the U.S.S. KASKASKIA (AO-27) operating in the Korean theatre. I was discharged in September, 1954 and re-entered The University of Texas that month. After enrolling in The University of Texas Law School in 1955, I received the Bachelor of Arts degree in 1956 and the Bachelor of Laws degree in 1958. In the latter year I was admitted to the State Bar of Texas.

While pursuing graduate work in Economics at The University of Texas in 1958-1959, I was employed as a Teaching Assistant, and in the Summer of 1959 as grader for Professor Robert H. Montgomery. In October, 1959, I was appointed University Fellow at The Ohio State University, where I specialized in the Department of Economics. I completed my course work and examinations for the Doctor of
Philosophy degree while employed as Assistant Instructor and Instructor at Ohio State from 1960 to 1962.

From June, 1962 to August, 1963, I worked in Washington, D. C. as Business Economist (Industrial Organization) for the Federal Trade Commission, Bureau of Economics, Division of Economic Evidence. I am presently employed as Assistant Professor of Economics at The University of Texas.