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# Antitrust -- Post-Acquisition Evidence and Conglomerate Mergers

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## NOTES AND COMMENTS

### Antitrust—Post-Acquisition Evidence and Conglomerate Mergers

In merger cases brought under section 7 of the Clayton Act,<sup>1</sup> trial often does not take place until several years after the merger. Because section 7 requires a predictive judgment as to the probability that a merger may substantially lessen competition,<sup>2</sup> there is a temptation to test probabilities against the particular post-merger history. A recent decision of the Supreme Court may be interpreted as indicating that post-merger evidence is not admissible. This note will consider whether the Court has put forward a general rule excluding post-acquisition evidence in light of the factual situation of that case and the methods used in reaching the finding of illegality.

In *FTC v. Procter & Gamble Co.*<sup>3</sup> the Court held that Procter & Gamble's 1957 acquisition of the Clorox Company violated section 7. Procter & Gamble was the leading firm in the detergent field. Clorox, with 49 percent of total liquid bleach sales, was the dominant firm in that industry, and together with its principal rival,

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<sup>1</sup> 15 U.S.C. § 18 (1964), formerly 38 Stat. 631 (1914), provides:

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 tend to create a monopoly.

See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-37, 247 (1960) [hereinafter cited as Bok], for a review of the legislative history of the Celler-Kefauver Anti-Merger Act, 64 Stat. 1125 (1950), which amended section 7. The technical additions and deletions are shown in *Brown Shoe Company v. United States*, 370 U.S. 294, 311 n.18 (1962).

<sup>2</sup> *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322-23, 332 (1962); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 589, 598 (1957); cf. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 308-09 (1949).

<sup>3</sup> 58 F.T.C. 1203 (1961) (remand order), followed, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,573 (1962) (summary of the FTC hearing examiner's second report), *aff'd as modified*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673 (FTC 1963), *rev'd and vacated*, 358 F.2d 74 (6th Cir. 1966), *rev'd and affirming Commission*, 386 U.S. 568 (1967).

Purex, accounted for almost 65 per cent of national sales. Six firms sold over 80 per cent of the nation's liquid bleach. The Court found that "all liquid bleach is chemically identical," and attributed Clorox's dominance to heavy advertising and promotional expenditures. Procter's acquisition of Clorox would probably injure competition because it eliminated Procter as a potential entrant and "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading smaller firms from aggressively competing. . . ."<sup>4</sup>

The Court focused its attention upon three probable anticompetitive effects of the merger. First, the merger increased opportunities for anticompetitive behavior, such as predatory pricing.<sup>5</sup> Second, the merger produced certain undesirable economies, chiefly in advertising.<sup>6</sup> Third, the merger caused structural alterations, through the elimination of a potential entrant into the concentrated industry, that would probably lessen competition. Also, Procter's merging into the industry had raised barriers to any further entry.<sup>7</sup>

As pointed out in a concurring opinion by Mr. Justice Harlan, the majority did not give much consideration to the question of the proper weight to accord post-acquisition evidence.<sup>8</sup> This was in many ways the main source of difference between the Commission and the Sixth Circuit. The FTC hearing examiner had decided that the merger violated section 7, but the full Commission had found, at first consideration, that the record did not offer the Commission "an informed hindsight upon which it can act," but rather allowed it to place "too much reliance upon treacherous conjecture."<sup>9</sup> Thus, the examiner was directed to consider post-acquisition developments. However, on second consideration, the Commission stated that in this case post-acquisition evidence was irrelevant and held the merger unlawful on the original record.<sup>10</sup> The court of appeals reversed the Commission, holding that the record, and particularly the post-acquisition history, did not support the claimed

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<sup>4</sup> 386 U.S. at 578.

<sup>5</sup> 386 U.S. at 575.

<sup>6</sup> 386 U.S. at 579.

<sup>7</sup> 386 U.S. at 580-81.

<sup>8</sup> 386 U.S. at 591 (concurring opinion of Harlan, J.).

<sup>9</sup> 58 F.T.C. 1203, 1207 (1961).

<sup>10</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,587 (FTC 1963).

probability of anticompetitive effects.<sup>11</sup> The Supreme Court reversed the court of appeals and largely adopted the Commission's method of analysis. The Court, by its brusque treatment of the point, seemed to hold that post-acquisition evidence is generally irrelevant; in fact, the Commission's finding may have been determined by the nature of the post-acquisition evidence introduced by Procter, and not by any position that all types of post-acquisition evidence should be excluded.

Throughout the proceedings Procter argued that post-acquisition developments should be considered to test the probabilities of anticompetitive effects.<sup>12</sup> Since the merger was conglomerate,<sup>13</sup> it did not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger.<sup>14</sup> Nor did it have the effect of automatically eliminating a competitor as in a horizontal merger.<sup>15</sup> Therefore, Procter argued, analysis of the anticompetitive potentialities of the merger required a broader scope of inquiry. The fact that the record failed to show any instances where the Commission's predictions had become reality meant that these claimed probabilities were mere possibilities and therefore too speculative to support a finding that the merger was unlawful.<sup>16</sup>

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<sup>11</sup> 358 F.2d at 84.

<sup>12</sup> 386 U.S. at 591 (concurring opinion of Harlan, J.).

<sup>13</sup> Conglomerate mergers in their pure form involve the merger of companies that are neither customers, suppliers, or competitors. Pure conglomerate mergers are rare. As pointed out by Professor Turner, management rarely enters a field in which they have no experience. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1315 (1965) [hereinafter cited as Turner].

<sup>14</sup> The simple vertical merger is the acquisition of a firm that buys the product sold by the acquirer, or sells a product bought by the acquirer. It may lead to an extension of market power from one level to another, as when a manufacturer obtains the main or primary source of a vital material. Furthermore, it may impair competition by foreclosing markets to competitors or to prospective entrants. Turner 1315, 1317.

<sup>15</sup> The simple horizontal merger involves acquisition of a firm producing an identical product or a close substitute and selling it in the same geographic market. Horizontal mergers eliminate competition that exists between two firms, and further increase market concentration. Turner 1315, 1317.

Few mergers are clearly *vertical* or *horizontal*, but may include characteristics of both. For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the merger was horizontal in some ways, vertical in others. Brown Shoe was primarily a shoe manufacturer, but also retailed some of its shoes. Kinney, the acquired firm, was primarily a retailer of shoes, but manufactured some also. The Court treated the merger as predominantly vertical.

<sup>16</sup> "Mere possibility" will not establish the statutory requirement that

The Commission argued that section 7 clearly does not require the existence of actual anticompetitive effects, but rather a conclusion as to the probability of various possible economic consequences of the merger. Except in the most obvious cases, economic theory does not permit completely confident judgments even when all possibly relevant facts have been assembled and considered.<sup>17</sup> Therefore, the addition of inconclusive post-acquisition evidence would serve no useful purpose but rather would tend to lengthen and complicate the litigation. The post-merger history of Procter-Clorox tended neither to confirm nor disprove the probability of anticompetitive consequences because it was difficult to know to what extent post-merger developments were caused by the merger, and not by other factors.<sup>18</sup> Furthermore, dependence upon post-acquisition evidence offered by the respondent showing a paucity of actual anticompetitive developments would allow controls to be evaded by the dissimulation of market power during the period of observation.<sup>19</sup> This policy consideration is similar to the rule against self-serving statements.<sup>20</sup> Thus, broadening the range of inquiry to include factors incapable of clear resolution might inhibit rational decision-making,<sup>21</sup> exhaust limited enforcement funds and curb the effectiveness of the Commission.<sup>22</sup>

Commissioner Elman reasoned that consideration of five factors, all present in *Procter*, might permit adjudication of the conglomerate merger with as much facility as percentage ratios afford in the case of a horizontal or vertical merger.<sup>23</sup>

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the effect of the merger "may be" to lessen competition substantially. *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 598 (1957).

<sup>17</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,573-74 (FTC 1963).

<sup>18</sup> *Id.* at 21,587.

<sup>19</sup> *Id.* at 21,574. Cf. 386 U.S. at 592 (concurring opinion of Harlan, J.).

<sup>20</sup> See 6 J. WIGMORE, EVIDENCE §§ 1714, 1732; 2 AM. JUR.2d *Administrative Law* § 385 (1962).

<sup>21</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963); cf. Bok 246; Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

<sup>22</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963); cf. 386 U.S. at 592 (concurring opinion of Harlan, J.).

"With 5 million U.S. companies in a 790 billion dollars annual economy, that's a large order for any Federal agency—particularly one with only 1,150 employees and an annual budget of 14 million dollars." NEWSWEEK, Oct. 23, 1967, at 82.

<sup>23</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,580 (FTC 1963). Cf. Elman, *The Need for Certainty and Predictability in the*

1. Is there a size disparity of the acquiring firm relative to the other firms in the industry;
2. Is the market so concentrated as to make *potential*, rather than *actual*, competition significant, and what is the position of the acquired firm within this market;
3. Does the merger involve the elimination of a significant potential entrant;
4. What is the position of the acquiring firm in other industries;
5. What sorts of economies are enabled by the merger?

The Commission did not consider whether one or more of these factors taken separately might be dispositive of the case.<sup>24</sup> Rather the merger of Procter and Clorox was condemned because of the probability of three anticompetitive consequences arising out of a conjunction of all five factors. An analysis of these three consequences will necessarily involve discussion of evidentiary requirements and will highlight the commission's general approach to post-acquisition evidence.

#### I. *Increased Opportunity for Anticompetitive Behavior*

Predatory pricing and its milder counterpart, disciplinary pricing, were two manifestly anticompetitive practices made more possible by the merger of Clorox and Procter.

Predatory behavior can be classified into three types: price warfare, promotional expenditure warfare, and use of Clorox as a loss leader. All three types were considered distinct possibilities by the Commission.<sup>25</sup>

Because Procter would be able to cover its losses with funds obtained from both other geographic bleach markets and the other product markets in which it was active, such as detergent, it might sell Clorox at a price lower than customary profit-maximizing considerations would dictate for the purpose of driving other competing bleach producers out of the market. Procter might achieve the same effect by greatly increasing advertising and promotional expenditures and eliminate rivals by using expensive procedures be-

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*Application of the Merger Law*, 40 N.Y.U.L. REV. 613 (1965); Address by Chairman Dixon, 14th Annual Spring Meeting of the Section on Antitrust Law, American Bar Association, in Washington, D.C., April 14, 1966, 5 TRADE REG. REP. ¶ 50,142 (1966).

<sup>24</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,581 (FTC 1963).

<sup>25</sup> *Id.* at 21,579. See 386 U.S. at 576.

yond their financial means.<sup>26</sup> Or Procter might use Clorox as a loss-leader, in order to yield off-setting profits on other Procter products, such as detergent. Clorox might be sold at prices below out-of-pocket costs for the purpose of increasing sales of complimentary products. Though not done with the intent to destroy rivals, this practice might have the same effect.<sup>27</sup>

Disciplinary pricing, or short-term predation done with the intent of preventing competing bleach producers from challenging Clorox's dominance, was a further possibility in *Procter*. Moreover, the possibility that Procter would resort to disciplinary pricing or out-right predation was interpreted by the Commission as a possible psychological restriction upon competition in the liquid bleach industry.<sup>28</sup>

There is some controversy among commentators as to whether the mere possibility of predatory or disciplinary behavior should be a negative factor in merger litigation.<sup>29</sup> It is argued that clear-cut examples of such behavior are largely lacking, and that furthermore, if such behavior were effective it would violate other antitrust statutes. For example, predatory pricing as an "attempt to monopolize" is a clear violation of section 2 of the Sherman Act,<sup>30</sup> and predatory pricing in one of several geographic markets violates the Robinson-Patman Act.<sup>31</sup> Loss-leader underpricing might be attacked as an "unfair method of competition" or an "unfair act or practice" under section 5 of the Federal Trade Commission Act.<sup>32</sup> Nevertheless, the Court apparently held that the increased possibilities of such behavior were negative factors in finding against the merger.

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<sup>26</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,564 (FTC 1963).

<sup>27</sup> *Id.* at 21,578-79. See Turner 1346-49.

<sup>28</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,579 (FTC 1963). See 386 U.S. at 579, n.3.

<sup>29</sup> *E.g.*, Turner 1346. Professor Turner argues that the possibility of predatory disciplinary behavior "seems so improbable a consequence of conglomerate acquisitions that it deserves little weight in formulating anti-merger rules based on prospective effects." However, the possibility of such behavior has played a major part in some merger cases. See, *e.g.*, 309 F.2d 223 (D.C. Cir. 1962) (Arrow Foil case); 233 F. Supp. 718 (E.D. Mo. 1964) (Cupples case).

<sup>30</sup> 15 U.S.C. §§ 1-7 (1964). See *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). See generally, Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956).

<sup>31</sup> 15 U.S.C. § 13a (1964). Cf. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960).

<sup>32</sup> 15 U.S.C. § 46 (1964). Cf. *FTC v. Nat'l Lead Co.* 352 U.S. 419 (1957).

Post-acquisition evidence demonstrating that the respondent had engaged in such anticompetitive behavior could be held by the enforcement agency to be decisive against the merger.<sup>33</sup> Yet, the failure of such a practice, largely within the respondent's control, to materialize would not be, under *Procter*, significant. In the former, the evidence would be relevant; whereas, in the later it would be irrelevant due to the obvious possibility that the respondent "held back."

## II. Undesirable Potential Economies

Both the Court and the Commission recognized that Clorox would enjoy substantial competitive advantages over other liquid bleach producers because of the use of Procter's substantial advertising discounts.<sup>34</sup> In fact one of the reports by Procter's promotion department emphasized that Procter would be able to make more effective use of Clorox's advertising budget due to the large discounts given Procter, as a major advertiser, by television networks and magazines.<sup>35</sup>

Commissioner Elman argued that such potential economies were undesirable.<sup>36</sup> Because all liquid bleaches were chemically identical, such advertising was merely persuasive rather than informational. Clorox, already the most heavily advertised bleach, was the most expensive.<sup>37</sup> As he saw it, price competition beneficial to the consumer had given way to brand competition beneficial only to the seller. Cost advantages enabling still more extensive advertising

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<sup>33</sup> See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965). There, Consolidated had attempted with some success, to follow a policy of reciprocal buying, or reciprocity. Simple "reciprocity" is a threatened withdrawal of orders if the products of an affiliate cease being bought, or a conditioning of future purchases on the receipt of orders for the products of that affiliate. However, "reciprocity" was not a factor in *Procter*.

<sup>34</sup> 386 U.S. at 580; [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,576-77 (FTC 1963).

<sup>35</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,577 (FTC 1963). These discounts were very substantial. For example, for the same expenditure Clorox could, by using the Procter discount, obtain 33 per cent more network television advertising, and it would be of a superior type.

<sup>36</sup> These advertising economies could be classified as false economies because they stemmed from sheer size, rather than greater efficiency. See *Turner* 1323-26.

<sup>37</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,585-86 (FTC 1963).



could, therefore, only impair price competition further, to the detriment of the consumer.<sup>38</sup>

To the extent that Procter had used its advertising discounts to buy advertising for Clorox, it was the utilization of undesirable economies. The failure of Procter fully to realize these savings was of little significance, for obviously it could do so.<sup>39</sup> Evidence showing that despite full utilization of discounts there had been no obvious change in competition might be relevant, though such an approach would necessarily involve the objection that the Commission simply was not equipped to enter into the sort of wide economic investigation that the evaluation of such an occurrence would entail. On the other hand, evidence that such competitive advantages available to Clorox caused competitors to merge might be admissible because it would involve a much narrower investigation. However, such an approach would not favor the respondent, but would instead be used by the government to show the decisive nature of such potential economies.<sup>40</sup> At this point it may seem that the government always wins when post-acquisition evidence is involved. But, if this be true to any extent, it is only because the evidence is relevant or manageable when offered by the government, but irrelevant or unmanageable when offered by the respondent.

### III. *Structural Alterations*

Conglomerate mergers do not obviously change the actual competitive structure of a given market because at least on the face of things they involve merely one company stepping into the place of another company which is neither a competitor, supplier or customer of the acquirer. However, certain subtle changes in the competitive relationships may be significant.

Two primary considerations in *Procter* were the loss of a potential entrant and the raising of substantial entry barriers.

Procter, at the time of the merger, was a successful, experienced

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<sup>38</sup> *Id.* One is reminded of cosmetic-manufacturer Charles Revlon's comment upon criticism of large advertising expenditures because they increased the price of the item: "We sell hope."

<sup>39</sup> [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,587.

<sup>40</sup> The criticism of advertising, in the Commission's opinion particularly, has led to speculation that it might indicate the start of direct government regulation of such marketing practices. See Bork, *The Supreme Court and Corporate Efficiency*, FORTUNE, Aug. 1967, at 92. *Quaere* if such regulation might be possible under section 5 of the Federal Trade Commission Act, note 32 *supra*.

firm in the household products field. It was familiar with the production and marketing of a complimentary line of products and had a history of internal expansion into related fields such as the abrasive cleanser industry.<sup>41</sup> Procter was one of a very few companies powerful enough to challenge Clorox's dominant position with some hope of success. Procter had considered independent entry into the liquid bleach industry prior to its acquisition of Clorox.<sup>42</sup> From these facts the Commission concluded that Procter was a uniquely qualified potential entrant. The liquid bleach industry was highly concentrated. Actual competition, while not entirely absent, was not vigorous. Under such circumstances potential competition from a likely entrant might serve the same function that actual competition served in other more competitive markets. For example, the Commission considered it likely that firms within the liquid bleach industry had curbed the trend towards high oligopoly profits in order to make entry as unattractive as possible. Therefore, Procter's merging into the industry by acquiring its potentially greatest competitor, Clorox, eliminated "one of the last factors tending to preserve a modicum of competitive pricing and business policies in the liquid bleach industry. . . ."<sup>43</sup>

Clorox, at the time of the merger, enjoyed certain competitive advantages that could discourage outside entrants: product differentiation and a reserve of accumulated consumer preference; some financial reserves; and considerable pricing flexibility. Though such factors had not deterred Procter's successful penetration of the abrasive cleanser market, such factors, supplemented by Procter's financial size and aggressive marketing techniques, tended to make entry barriers, in the appraisal of possible entrants, very high. Furthermore, expansion into new regional markets contemplated by existing bleach producers other than Clorox might be deterred. High entry barriers, made even higher by the Procter-Clorox merger, decreased the possibility of new entrants, and correspondingly diminished any residual potential competition effects.<sup>44</sup>

Evidence of post-acquisition entry, conceivably by firms such

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<sup>41</sup> In 1957 Procter introduced "Comet" cleanser and within 20 months obtained 36.5 per cent of the national market, though faced with substantial competition from established cleanser manufacturers, such as Purex (Bab-O). [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,564 (FTC 1963).

<sup>42</sup> *Id.* at 21,564-65.

<sup>43</sup> *Id.* at 21,584.

<sup>44</sup> *Id.* See Turner 1358.

as Colgate or Lever Brothers, into the liquid bleach industry might be relevant insofar as it would tend to disprove the argument that Procter was one of a very few potential entrants whose entry resulted not only in a significant diminution of potential competition, but raised entry barriers.<sup>45</sup> However, there are at least two possible objections to the use of such a post-acquisition entry as a means to refute probabilities. First, entry by a large firm does not necessarily imply that entry by smaller firms has not been effectively foreclosed by the merger. Second, the transformation of a predominantly small-firm industry into one dominated by large firms may be undesirable in light of Congressional concern for the preservation of allegedly beneficial small-firm competition.<sup>46</sup> Such post-acquisition evidence would be unlikely to succeed as a refutation of the government's arguments, and because of its negative implications might further harm the respondent's case.

There are two other possible structural alterations discussed by the Commission. Though they bear upon the issue of potential competition, they are more directly used to interpret post-acquisition developments. These two alterations are "triggered mergers" and possible broader definition of the relevant product market.

The Commission considered it likely that Procter's merger into the market might "trigger" defensive mergers among the smaller firms in the liquid bleach market. Such triggered mergers might be prompted by a desire to achieve greater competitive equality with Clorox, or to protect market shares in the face of a much more powerful competitor. The Court concluded that second-ranked Purex's merger with fourth-ranked Fleecy White was such a triggered merger.<sup>47</sup> This merger, it was argued, was the result of "the lesson of Erie," where Purex's attempt to enter a market dominated by Clorox brought on a price and promotional war. The result of this competitive warfare was that Purex withdrew from the market, and Clorox's market share increased.<sup>48</sup>

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<sup>45</sup> *But cf.* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

<sup>46</sup> *Accord*, United States v. Von's Grocery Co., 384 U.S. 270, 273 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 & n.43 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 320, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 588, 592 (S.D.N.Y. 1958).

<sup>47</sup> 386 U.S. at 578.

<sup>48</sup> 386 U.S. at 579 n.3.

Furthermore, Commissioner Elman stated that certain post-acquisition developments may require the consideration of their effects upon potential competition within a given product market.<sup>49</sup> For example, the post-merger development of a related item may itself influence competition within a given market. This situation was presented in the Commission's later decision against the acquisition of the S.O.S. Company by General Foods.<sup>50</sup> The fact situation was very similar to *Procter*,<sup>51</sup> but there were several major differences. For one thing, General Foods had not been in any meaningful way a potential entrant into the steel wool soap pad industry.<sup>52</sup> Furthermore, following the merger several large firms outside the steel wool industry had introduced plastic scouring pads. These were in some ways acceptable substitutes for steel wool soap pads. In the cleaning of Teflon-coated cookware they were directly competing, and in fact displacing, steel wool soap pads from a growing part of the market. The majority of the Commission defined the relevant market as the steel wool soap pad market. Commissioner Elman, dissenting, argued that the majority should have at least taken into account the influences that these post-acquisition developments probably would have on the real and potential competitive forces within the steel wool soap pad industry.<sup>53</sup> Thus, post-acquisition evidence in this context may be significant and may be entertained by the Commission.

#### IV. Conclusion

Three general observations concerning the admissibility of post-acquisition may be helpful.

First, to the extent that specific anticompetitive consequences within the control of the respondent have not materialized, this failure to act will not be significant. The enforcement tribunal would probably resist any attempt by the respondent to introduce such post-acquisition evidence on the ground that it was self-serving

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<sup>49</sup> [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,673 at 21,584 (FTC 1963).

<sup>50</sup> General Foods Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,465 (FTC 1966).

<sup>51</sup> *Id.* at 22,732-42. Here the majority set forth an eleven page "Comparison of Operative Facts in the General Foods and Procter & Gamble Cases."

<sup>52</sup> *Id.* at 22,746 (dissenting opinion of Commissioner Elman).

<sup>53</sup> *Id.* at 22,748-49 (dissenting opinion of Commissioner Elman).

and might have been manufactured by the holding back of market power during the period of observation.

Second, if such anticompetitive consequences have become apparent, the government is almost certain to use them against the legality of the merger.<sup>54</sup>

Third, the enforcement tribunal is unlikely to consider evidence showing that there has been no overall change in the market. Such evidence would be open to the objection that its evaluation would require that type of general economic investigation of all possibly relevant factors that the Commission wanted to avoid. The Commission would argue that such a broad survey would not be likely to be of any benefit, even if it were possible.<sup>55</sup>

The attitudes of the Federal Trade Commission are significant because they probably are largely shared by the Antitrust Division of the Justice Department. Both agencies have been successful in persuading the Supreme Court to adopt their arguments.<sup>56</sup> In *Procter*, the majority of the Court apparently approved of the Commission's handling of the case.<sup>57</sup> Thus the attitudes of the Commission are probably those of the majority of the Court.

In light of the Court's earlier decision in the *duPont-General Motors* case,<sup>58</sup> the Government's attitude towards post-acquisition evidence as set forth in *Procter* may become very significant. In *duPont*, the purchase of 23 per cent of General Motors stock was successfully attacked thirty years after the acquisition. The Court held that a merger may be attacked "whenever the reasonable like-

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<sup>54</sup> This "double-standard" is criticized in Day, *Conglomerate Mergers and "The Curse of Bigness"*, 42 N.C.L. REV. 511, 557 (1964); Reilly, *Conglomerate Mergers—An Argument for Action*, 61 N.W. U.L. REV. 522, 536 (1966); Solomon, *Section 7 of the Clayton Act*, 53 A.B.A.J. 137, 140-41 (1967).

<sup>55</sup> Cf. Cook, *Merger Law and Big Business: A Look Ahead*, 40 N.Y.U.L. REV. 710, 713 (1965); Phillips, *Some Implications of the Supreme Court's Antimerger Decisions*, 21 SW. L.J. 429, 440-41 (1967); Rill, *The Trend Toward Social Competition Under Section 7 of the Clayton Act*, 54 GEO. L.J. 891, 901 (1966).

<sup>56</sup> See, Note, 45 N.C.L. REV. 1015, 1019 n.27 (1967).

<sup>57</sup> One Commissioner has stated that the Court "is in full agreement with the Commission's approach to section 7 enforcement against conglomerate acquisitions." Address by Commissioner John R. Reilly, Antitrust Section of the Ohio State Bar Association, in Dayton, May 12, 1967, 5 TRADE REG. REP. ¶ 50,170, at 55,229 (1967). See also, J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967, 116 (1967).

<sup>58</sup> United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957). See Bromley, *Business' View of the duPont-General Motors Decision*, 46 GEO. L.J. 646, 653-54 (1958).

likelihood appears that the acquisition will result in a restraint. . . ."<sup>59</sup> The willingness of enforcement tribunals to consider not only probable anticompetitive consequences, but also their actual manifestation becomes significant when the respondent is denied in many instances from using the absence of such consequences to refute the Government's arguments.

However, the respondent may be able to use certain types of post-acquisition evidence, especially of developments arising beyond its control and going to the core of the government's analysis of potential competition.<sup>60</sup> Two examples—post-merger entry and the development of a related product that tends to broaden the relevant market—have already been mentioned. Furthermore, it should be clear from the discussion that relevant economic data gathered after the merger and not at all related to a respondent's post-acquisition behavior or probable anti-competitive effects generally should not be excluded merely because the studies, made after the merger, technically make such data "post-acquisition evidence." For example, a respondent will probably not make studies of relevant market or product class until after the merger when suit is brought; the admissibility of such evidence clearly should not be questioned.

More immediately, post-acquisition evidence will be decisive in the treble-damages action filed by Purex Corporation against Procter & Gamble.<sup>61</sup> Section 4 of the Clayton Act provides for treble-

<sup>59</sup> 353 U.S. at 592.

<sup>60</sup> See Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,574 (FTC 1963):

Specifically, we think that the admission of post-acquisition data is proper only in the unusual case in which the structure of the market has changed radically since the merger—for example, where the market share of the merged firm has dwindled to insignificance—or in the perhaps still more unusual case in which the adverse effects of the merger on competition have already become manifest in the behavior of the firms in the market.

For an example of disastrous mergers, compare Dresser Industries, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,513 (FTC 1963), with Fruehauf Trailer Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,260 (FTC 1965). However, neither of these involves the conglomerate situation. Observe that while future developments may cause the reopening of a case, they will not cause the Commission to modify a decree. Compare National Tea Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463 (FTC 1966), with Reynolds Metals Co., 56 F.T.C. 743 (divestiture order), 56 F.T.C. 1680 (1960) (petition to reopen denied), *aff'd*, 309 F.2d 223 (D.C. Cir. 1962).

<sup>61</sup> Cincinnati Enquirer, Oct. 24, 1967, at 38, col.2. The suit, filed in federal district court in Los Angeles, asks 174.5 million dollars in damages. Purex, at the time of the merger of Clorox and Procter, had total sales of 50 million dollars, but this includes sales of a variety of household products

damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Purex's complaint alleges that Procter-Clorox "engaged and continued to engage in severe and sustained predatory price cutting."<sup>62</sup> Implicit within Purex's claim for relief is the requirement that there be actual post-merger injury. However, neither the Court nor the Commission found that Procter had actually engaged in any definite anticompetitive behavior. Had there been any such behavior it seems highly unlikely that the Commission would have failed to use it against the merger, if only because an analysis based upon the actual manifestation of predatory pricing would have been far simpler. Therefore, it will be interesting to see to what extent, if any, the Commission might have considerably simplified their task by the use of such evidence.

K. G. ROBINSON, JR.

### Attorney and Client—Compensation of Indigent's Counsel in Federal Post-Conviction Proceedings

The North Carolina Supreme Court has recently held that counsel appointed to defend an indigent defendant in the courts of North Carolina cannot be compensated by the state for work done in the federal courts to vacate the state conviction.<sup>1</sup> The attorneys re-

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and not just liquid bleach. Observe that section 5(b) of the Clayton Act suspends the running of the statute of limitations during the pendency of government proceedings and for one year thereafter.

<sup>62</sup> *Id.*

<sup>1</sup> *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967), *cert. denied*, 389 U.S. 828 (1967). The attorneys were appointed in Mecklenburg County Superior Court in 1959 to defend Elmer Davis, Jr. who was charged with rape and murder under ch. 112 (1949) N.C. SESS. L. (required counsel for indigents charged with a capital offense). The conviction was appealed to the North Carolina Supreme Court which affirmed, *State v. Davis*, 253 N.C. 86, 116 S.E.2d 365 (1960). After a petition for rehearing was denied, the attorneys won a stay of execution and sought certiorari from the United States Supreme Court which was denied, *Davis v. North Carolina*, 365 U.S. 855 (1961). Attorneys then petitioned the federal district court for a writ of habeas corpus which was denied, *Davis v. North Carolina*, 196 F. Supp. 488 (E.D.N.C. 1961). On appeal the Fourth Circuit Court of Appeals reversed and remanded the case to the district court to determine whether Davis' confession was obtained within the bounds of due process, *Davis v. North Carolina*, 310 F.2d 904 (4th Cir. 1962). The district court again refused to grant the writ, *Davis v. North Carolina*, 221 F. Supp. 494 (E.D. N.C. 1963) and the court of appeals upheld the lower court in a 3-2 decision, *Davis v. North Carolina*, 339 F.2d 770 (4th Cir. 1964). The Supreme Court granted certiorari and in *Davis v. North Carolina*, 384 U.S. 737 (1966),