

St. John's Law Review

Volume 55
Number 2 *Volume 55, Winter 1981, Number 2*

Article 4

July 2012

Perceptible Competitive Impact--It's the Next Best Thing to Selling There: Jim Walter Corp. v. FTC

G. Clifford Korn

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Korn, G. Clifford (1981) "Perceptible Competitive Impact--It's the Next Best Thing to Selling There: Jim Walter Corp. v. FTC," *St. John's Law Review*. Vol. 55 : No. 2 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol55/iss2/4>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

COMMENTS

PERCEPTIBLE COMPETITIVE IMPACT— IT'S THE NEXT BEST THING TO SELLING THERE: *JIM WALTER CORP. v. FTC*

Section 7 of the Clayton Act proscribes the acquisition of the stock or assets of one person by another person when the combination which results may substantially lessen competition or tend to create a monopoly "in any line of commerce or in any activity affecting commerce *in any section of the country.*"¹ The intent of

¹ Clayton Act § 7, 15 U.S.C. § 18 (1976) (emphasis added), *as amended* by Antitrust Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1157 (original version at ch. 323, § 7, 38 Stat. 730 (1914)). Section 7 provides in pertinent part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting 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.

Id. Two significant amendments to section 7 have been the Celler-Kefauver amendment, ch. 1184, 64 Stat. 1125 (1950), and the Antitrust Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1157. The Celler-Kefauver amendment was enacted to stem a rising tide of economic concentration through corporate mergers and acquisitions. *See S. REP. No. 1775*, 81st Cong., 2d Sess. 3 (1950); *Note, Section 7 of the Clayton Act: A Legislative History*, 52 *COLUM. L. REV.* 766, 767-68 (1952). Neither the original section 7 of the Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914), nor the Sherman Act, 15 U.S.C. §§ 1-7 (1976), were effective deterrents to such combinations. *See Note, supra*, at 768-69. The original section 7 of the Clayton Act proscribed acquisitions of stock, but not of assets. *See id.* Furthermore, according to the House Report accompanying the Celler-Kefauver amendment, it was unclear whether section 7 proscribed nonhorizontal mergers. *H.R. REP. No. 1191*, 81st Cong., 1st Sess. 11 (1949). The Sherman Act, although it effectively curbed monopolization and restraints of trade, was not available to prevent incipient tendencies towards monopoly. *See Note, supra*, at 768. The Celler-Kefauver amendment broadened section 7 to include both stock and asset acquisitions, *see id.* at 770; *Bok, Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *HARV. L. REV.* 226, 234 (1960), and impliedly extended section 7 to cover all types of mergers and acquisitions: horizontal, vertical, and conglomerate. *See H.R. REP. No. 1191*, 81st Cong., 1st Sess. 11 (1949).

Recently, the Antitrust Improvements Act amended section 7 in two respects. The

the section is to forestall incipient monopolistic tendencies,² and it operates by invalidating acquisitions or mergers whose probable present or future result is anticompetitive.³

As a prerequisite to establishing a violation of the Act, section 7 requires that the government define a relevant product mar-

amendment substituted "person" for "corporation" in the text of section 7, thereby extending the section's sanctions to noncorporate entities. See H.R. REP. No. 96-871, 96th Cong., 2d Sess. 2 (1980). Additionally, the amendment inserted the words "or in any activity affecting commerce" after "commerce" each time that word appears in the first three paragraphs of section 7. Antitrust Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1157. Thus, the amendment overruled *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975), which held that section 7 jurisdiction does not attach unless both the acquired and the acquiring companies are engaged in interstate commerce. See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 275-76 (1975); H.R. REP. No. 96-871, 96th Cong., 2d Sess. 2 (1980). The Antitrust Improvements Act does not alter the substantive standard of section 7, however; courts should "continue to examine whether the effect of . . . [an] acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" H.R. REP. No. 96-871, 96th Cong., 2d Sess. 2 (1980).

² S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914). The Act's objective of forestalling incipient monopolistic tendencies was reiterated by Congress during its consideration of the Celler-Kefauver amendment. See S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949). See also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

³ Section 7 prohibits acquisitions or mergers whose effect "may be substantially to lessen competition." 15 U.S.C. § 18 (1976), as amended by Antitrust Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1157. The words "may be" do not refer to "the mere possibility but only to the reasonable probability" of a substantial lessening of competition. S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950); see *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974). Certainty of injury to competition, however, need not be proved. *United States v. Marine Bancorporation, Inc.*, 418 U.S. at 622-23; *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Moreover, substantial lessening of competition may be established by postacquisition evidence. See 2 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 11.07[1] (1980). But cf. *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) (probative value of postacquisition evidence showing absence of anticompetitive effects is limited). Additionally, in deciding a section 7 case, the court must predict the impact of the merger on present and future competition, since, "[i]f the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

In assessing the competitive effects of a merger, factors considered significant by the Justice Department include the size of the industry and of the merging firms, the number of companies in the industry, rank in the industry of the merging firms, barriers to entry to the industry, whether the industry is growing or declining, dynamic or stable, the effect of the merger on suppliers of raw materials and on patterns of distribution of the finished product, and whether competition generally may be significantly reduced. *The Antitrust Aspect of Mergers*, Address by Attorney General Herbert Brownell, Jr., to the New York Chapter of the Public Relations Society of America (September 30, 1954), reprinted in [1971] 1 *TRADE REG. REP. (CCH)* ¶ 4270.16, at 6455. For a thorough discussion of these and other factors considered by the courts, see 3 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 19.02[1]-[13] (1980).

ket—the “line of commerce”⁴—and a relevant geographic market—the “section of the country” within which substantial anticompetitive effects are or will be demonstrable.⁵ Traditionally, a relevant geographic market has been defined as the area in which the relevant goods or services are marketed and where consumers may obtain supplies.⁶ Recently, however, in *Jim Walter Corp. v.*

⁴ See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957). The relevant product market generally encompasses those goods or services which reasonably can be interchanged by consumers. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962); see E. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS* 246 (1968). Product characteristics which assist in defining a relevant product market include the unique properties and uses of the product, specialized manufacturing techniques, identifiable and fixed vendors and clientele, and a price unaffected by that charged for other products. *Brown Shoe Co. v. United States*, 370 U.S. at 325. See, e.g., *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962). The relevant product market generally includes both a product and its substitutes, although it does not necessarily encompass all substitutes. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). “The circle must be drawn narrowly to exclude any other product to which . . . only a limited number of buyers will turn; in technical terms, products whose ‘cross-elasticities of demand’ are small.” *Id.* Compare *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (sufficient pricing and end use differences exist between aluminum wire and copper wire to place them in separate relevant product markets) with *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (glass and metal containers are interchangeably used for packaging in certain industries and thus are within the same relevant product market). For a more thorough discussion of relevant product market criteria, see 3 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 18.03[1]-[2] (1980).

⁵ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); see *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Only after the relevant markets are established can the court proceed to the second phase, an assessment of whether the merger or acquisition may substantially lessen competition within these markets. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). See also 2 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 15.04[2] n.12 (1980). In *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Court implied that a substantial lessening of competition in violation of section 7 could be proved without first establishing a relevant geographic market. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). The concurring opinions in *Pabst* strongly opposed such a standard. See *id.* at 555 (Harlan, J., concurring); *id.* at 562 (Fortas, J., concurring). *Marine Bancorporation*, however, expressly dispelled the *Pabst* inference that substantial lessening of competition could be proved without first defining a relevant geographic market. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 n.20 (1974).

⁶ See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620-21 (1974); 2 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 15.04[2] (1980). Several tests have been utilized to further delineate the area of operations constituting the relevant geographic market. Although it is not charted by “metes and bounds,” *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966), it must be an economically significant region, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962), and it is limited to the area where the acquired firm conducts significant marketing efforts for its goods and services. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974). Moreover, it is clearly the

FTC,⁷ the Fifth Circuit Court of Appeals expanded the traditional notion of a relevant geographic market, holding that it may be defined as either the area where the acquired firm makes significant sales, or where the acquired firm has a perceptible competitive impact on the pricing and marketing strategies of other firms within its product market.⁸

Involved in *Jim Walter Corp.* was the acquisition of the stock of Panacon Corporation (Panacon) by Celotex Corporation (Celotex), a Jim Walter Corporation (JWC) subsidiary.⁹ Both JWC and Panacon, acting through their subsidiaries, marketed tar and asphalt roofing materials.¹⁰ Prior to the acquisition, JWC claimed an 8.83% market share of domestic sales of such products, and Panacon an 8.79% share.¹¹ Nationally, JWC was the fifth largest producer and Panacon was sixth, although 93% of Panacon's sales were concentrated in twenty-six states.¹² A substantial proportion of JWC's tar and asphalt roofing materials were distributed in the same twenty-six states.¹³ After the acquisition, JWC possessed a 17.62% share of the national market and was the second largest producer nationwide.¹⁴

In 1973, the FTC commenced an investigation of the acquisition and subsequently issued a complaint charging that the acquisition violated section 7.¹⁵ In an administrative hearing, the FTC held that the relevant geographic market comprised the entire United States and ordered JWC to divest itself of the Panacon division which produced tar and asphalt roofing materials.¹⁶ JWC moved for reconsideration of the divestiture order and, upon de-

area of "effective competition" between the acquiring and acquired firms. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961) (antitrust action under section 3 of the Clayton Act).

⁷ 625 F.2d 676 (5th Cir. 1980).

⁸ *Id.* at 682.

⁹ *Id.* at 678.

¹⁰ JWC marketed tar and asphalt roofing products through Celotex, while Panacon marketed these products through Philip Carey, a Panacon division. *Id.*

¹¹ *Id.*

¹² *Id.* at 678, 681.

¹³ Brief for Petitioner at 7, *Jim Walter Corp. v. FTC*, 625 F.2d 676 (5th Cir. 1980).

¹⁴ 625 F.2d at 678.

¹⁵ *Id.*

¹⁶ *Id.* at 679. At hearings before an administrative law judge, two relevant geographic markets were established, the entire United States and the twenty-six state region where Panacon marketed the bulk of its products, but on appeal to the full commission, only a national geographic market was found. *Id.*

nial of that motion, appealed to the Fifth Circuit.¹⁷

The substantive issue on appeal¹⁸ was whether the relevant geographic market was, in fact, nationwide, or restricted to the twenty-six state region within which Panacon sold the bulk of its products.¹⁹ To resolve this question, the court first looked to the definition of a relevant geographic market formulated by the Supreme Court in *United States v. Marine Bancorporation, Inc.*²⁰ In *Marine Bancorporation*, the relevant geographic market was defined as the area in which the acquired firm directly competes—where it makes significant sales or markets goods or services to a significant degree.²¹ Rejecting a narrow reading of this definition on the ground that it would be inconsistent with the legislative history of the amended section 7,²² the *Jim Walter Corp.*

¹⁷ *Id.*

¹⁸ A threshold procedural issue in *Jim Walter Corp.* was whether the FTC had jurisdiction over the action. *Id.* Prior to the Antitrust Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1157, a jurisdictional prerequisite to actions under paragraph one of section 7 was that both the acquired and the acquiring firms be engaged in interstate commerce. See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 275-76 (1975); note 1 *supra*. JWC, a holding company, argued that it was not engaged in interstate commerce since it acted only through its subsidiaries. 625 F.2d at 680. The Fifth Circuit, however, found that because section 7 was directed at proscribing the anticompetitive activities of holding companies, it would be "illogical" to suggest that the commercial activities of a subsidiary cannot be imputed to its parent for section 7 purposes. *Id.* Otherwise, holding companies could never be defendants in section 7 actions. *Id.*

A second jurisdictional objection raised by JWC was that the commission did not have jurisdiction over it because Celotex was an indispensable but unjoined party to the proceedings. *Id.* at 681. Addressing the objection, the court held that the question of indispensability is not jurisdictional, and that, in any case, the court may retain jurisdiction as long as joinder is made before a final decision is handed down. *Id.*

¹⁹ 625 F.2d at 678.

²⁰ *Id.* at 681 (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618-21 (1974)).

²¹ *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620-21 (1974). In *Marine Bancorporation*, both the acquiring and acquired corporations were banks. *Id.* at 606-07. The acquiring corporation was based in Seattle, Washington and had no branches in Spokane. *Id.* The acquired corporation, on the other hand, operated solely in Spokane. *Id.* at 607. The Supreme Court found that the Spokane metropolitan area was the appropriate relevant geographic market because that was the region within which the acquired firm marketed its services to a significant degree and directly competed against other firms. *Id.* at 620-23.

²² 625 F.2d at 682 (quoting S. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950)). The Senate Report accompanying the Celler-Kefauver amendment advised that:

[A]lthough 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.

S. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950).

court concluded that the *Marine Bancorporation* test sanctioned a broad relevant geographic market encompassing the acquired firm's area of significant competition.²³ This area, according to the court, is either where significant sales are made by the acquired firm, or alternatively, where its sales and other marketing activities have a "perceptible competitive impact" on the marketing strategies of other firms.²⁴ This latter market, the court stated, may be measured either by "statistical evidence of pricing interdependence" between geographic areas, or by nonstatistical evidence of regional market interrelatedness.²⁵

In adopting the perceptible competitive impact test, it is submitted that the Fifth Circuit has augmented antitrust law with a new and useful standard by which a relevant geographic market may be defined. Nevertheless, it appears that two significant factors—a possible conflict with Supreme Court precedent and problems of proof—militate against general acceptance of the perceptible competitive impact standard. Unlike the significant sales test, which is a relatively objective standard for defining the geographic market,²⁶ the perceptible competitive impact test requires a more subjective inquiry into the competitive effects of the acquisition in issue.²⁷ Although such inquiry is not foreign to traditional section 7 analysis, prior to *Jim Walter Corp.* it had been reserved for the second tier of such analysis—the determination of whether there had been a substantial lessening of competition in the *predefined* market.²⁸ Indeed, the perceptible competitive impact

²³ 625 F.2d at 682.

²⁴ *Id.*

²⁵ *Id.* at 682-83. Having ascertained the test of a relevant geographic market, the Fifth Circuit turned to the question of whether the factual predicate required to sustain the FTC finding of a national market had been established. Judging that a nationwide relevant geographic market based on perceptible competitive impacts was not supported by substantial evidence, the court concluded that the merger should not have been analyzed within the context of such a relevant market. *Id.* at 683. Thus, it vacated the district court decision and remanded the case for further proceedings. *Id.*

²⁶ The significant-sales test typically involves a determination of market-share. *See, e.g., United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 666-67 (1974); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621, 643 app. (1974). Market-share, in the context of delineating a relevant geographic market, is equivalent to the percentage of sales of the relevant product which a firm commands in a particular region. *See generally* Kintner & Postol, *A Review of the Law of Horizontal Mergers*, 66 *Geo. L.J.* 1405, 1442-43 (1978).

²⁷ *See* notes 45-47 and accompanying text *infra*.

²⁸ *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620-21, 623-42 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-98 (1974). In measuring the substantiality of anticompetitive effects, a second tier inquiry, *see* note 5 *supra*, it is

test is facially analogous to the doctrine of potential competition which has been employed to assess the competitive effects of, *inter alia*, geographic market extension mergers.²⁹ By definition, a geographic market extension merger is the combination within the same relevant product market of firms operating in different geographic markets.³⁰ Even though, in such a situation, the substitution of the acquiring firm for the acquired firm will not affect the concentration of the market,³¹ nor will it necessarily affect the in-

necessary to review "economic and historical" factors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962). One such factor is a trend toward concentration in the industry. *See United States v. Von's Grocery Co.*, 384 U.S. 270, 276-78 (1966). Market-share, however, is also vital in determining substantiality. In *United States v. Continental Can Co.*, 378 U.S. 441 (1964), the Court stated that market-shares are the "primary indicia" of market power. *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964). *See generally* 3 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 19.01[3] (1980).

²⁹ The potential competition doctrine serves to invalidate an acquisition by a company which operates outside of the relevant product or geographic markets, yet is "so situated as to be a potential competitor and likely to exercise substantial influence on market behavior." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32 (1973); *see Comment, The Potential Competition Doctrine After Marine Bancorporation*, 63 *Geo. L.J.* 969, 969 (1975) [hereinafter cited as *Potential Competition*]. The doctrine is useful only when the market structure of the firms operating in the relevant market may be characterized as oligopolistic, since potential entrants do not influence pricing behavior in a truly competitive market. *Potential Competition, supra*, at 971; *see United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 630-31 (1974). Potential competition analysis contemplates whether the acquiring firm is either an actual potential entrant or is perceived as a potential entrant into the market of the acquired firm. *See generally Potential Competition, supra*, at 970-75; *Comment, Antitrust: The Supreme Court Recognizes "Economic Realities" in the Banking Industry*, 59 *MINN. L. REV.* 609, 617 (1975). The actual potential entrant theory considers whether deconcentration of the relevant market would result if an outside acquiring firm were prevented from entering the market other than by *de novo* entry or through a toe-hold acquisition. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973); *United States v. First Nat'l State Bancorporation*, 479 F. Supp. 1339, 1347 (D.N.J. 1979). The perceived potential entrant theory looks to whether the acquired firm exerts a favorable influence on competition within the relevant market by being *perceived* by firms within that market as a likely *de novo* entrant. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 639 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-34 (1973); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967).

³⁰ *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622, 641 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 527-32 (1973); *BOC Int'l Ltd. v. FTC*, 557 F.2d 24, 25-30 (2d Cir. 1977); *United States v. First Nat'l State Bancorporation*, 479 F. Supp. 1339, 1341-42 (D.N.J. 1979); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1231-58 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974). *See also* Merger Guidelines of Department of Justice, *reprinted in* [1977] 1 *TRADE REG. REP.* (CCH) ¶ 4510, at 6881.

³¹ Assume, for example, that X corporation has a 20% market-share of the New York City geographic market, and that Y and Z corporations claim, respectively, 30% and 50% market-shares. Should P partnership acquire X corporation, the relative market-share percentages within the relevant market would not change, because X's market-share has merely

tra-market relationship of the competitors,³² the geographic market extension merger is still subject to section 7 scrutiny.³³ This is so because the removal of the acquiring firm as a potential entrant into the target's geographic market may have significant anticompetitive consequences.³⁴ Indeed, the potential competition doctrine recognizes that substantial competitive effects may be exerted within a given geographic market by the imminent presence of a firm on the fringe of such market.³⁵

By analogy, albeit implicit, the *Jim Walter Corp.* court has summarily elevated to threshold status a similar inquiry into competitive effects—in this case, those exerted by the acquired corporation—for the purpose of defining the relevant geographic market. In so doing, it is arguable that the Fifth Circuit has promulgated a geographic market definition which is inconsistent with the traditional standard espoused by the Supreme Court.³⁶ Although the Court's guidelines for circumscribing a relevant geographic market have not been static, even at their outermost boundary they have never been as expansive as the *Jim Walter Corp.* perceptible competitive impact test.³⁷ The broadest relevant geographic market

been converted into P's market-share. Furthermore, the number of firms in the market would not decrease, because the elimination by acquisition of X implies the entrance by acquisition of P.

³² See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973). After a firm outside of a relevant geographic market enters into that market by means of merger or acquisition, its competitive conduct "may be the mirror image of that of the acquired company." *Id.* On the other hand, of course, if the acquired firm is "operated at lower cost as part of a large enterprise . . . enabl[ing] it to drive less efficient smaller competitors out of business," the acquisition may tend to reduce competition within the relevant market. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1322 (1965).

³³ Pursuant to the Celler-Kefauver amendment, ch. 1184, 64 Stat. 1125 (1950), all mergers, however characterized, are subject to section 7 scrutiny. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949); note 1 *supra*.

³⁴ In *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), involving a conglomerate merger of the product extension type, *id.* at 577, the Court listed several factors determinative of whether removal of the acquiring firm as a potential entrant may have substantial anticompetitive effects: whether firms within the relevant market are influenced by their "predictions" of marketing activities by firms outside of that market; whether barriers to entry are low; whether there are few potential competitors, so that entry by one would be significant; and whether the acquiring firm is the most likely entrant. *Id.* at 581.

³⁵ See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973); note 29 *supra*.

³⁶ See notes 38-40 and accompanying text *infra*.

³⁷ See notes 38-40 and accompanying text *infra*. Indeed, even the distributional test of a relevant geographic market promulgated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962), presupposes that the acquired firm actually operates within the defined

adopted by the Supreme Court followed from utilization of a functional test. This test presumed that the perimeter of the relevant geographic market was dependent on several variables going to the range of distribution of the relevant product.³⁸ These variables included transportation costs, the bulk and weight of the relevant product, and the uniqueness of the relevant product.³⁹ Subsequently, the Court held that a relevant geographic market is delineated by the area in which an acquired firm markets its goods or services and directly competes in commerce.⁴⁰ What these tests have in common is that they define a relevant geographic market in terms of the area where merging firms operate and buyers seek supplies, not in terms of pricing interdependence, or other competitive impacts, between geographic regions. The *Jim Walter Corp.* perceptible competitive impact test, on the other hand, does consider inter-market economic effects in establishing a relevant geographic market.⁴¹ While the Fifth Circuit stated that such an approach finds support in the legislative history of section 7⁴² and in dicta in *Marine Bancorporation*,⁴³ it is far from certain that the

market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962).

³⁸ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962).

³⁹ *Id.*; see *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 817 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 528-29 (2d Cir. 1958). Viewed from the consumer's perspective, the range of distribution of a product or service is that area within which a "purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (antitrust action under section 3 of the Clayton Act).

⁴⁰ See *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 667 (1974); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974). There may be more than one relevant geographic market if, for example, the acquired firm markets its goods or services locally, regionally, and nationally. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974).

⁴¹ 625 F.2d at 682-83.

⁴² *Id.* at 682 (quoting S. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950)); see note 22 and accompanying text *supra*.

⁴³ 625 F.2d at 682. The *Jim Walter Corp.* court acknowledged and, indeed, purported to apply the current Supreme Court formulation of a relevant geographic market, which the *Marine Bancorporation* Court characterized as the area of significant marketing activities and of direct competition by the acquired firm. See *id.* (quoting *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620-21 (1974)). *Jim Walter Corp.* broadly interpreted the meaning of significant marketing activities, however, adopting the perceptible competitive impact test, which turns not on the availability of goods, but rather on interregional economic effects. See 625 F.2d at 682. *Jim Walter Corp.* builds upon *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) and *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). *RSR* found that a national relevant geographic market was supported by evidence of nationwide pricing interdependence. 602 F.2d at 1323. Similarly, *Bethlehem Steel* held that the relevant geographic market includes the

expansive market definition obtained under the perceptible competitive impact standard is reconcilable with the judicial trend to narrowly define the relevant geographic market.⁴⁴

A second, more practical problem which might preclude the general acceptance of the test espoused in *Jim Walter Corp.* is the nature of the inquiry required. Certainly, a relevant geographic market defined by perceptible competitive impacts is more abstract and, hence, more difficult to establish than a significant-sales relevant market.⁴⁵ One of the evidentiary predicates for a finding of perceptible competitive impacts, according to *Jim Walter Corp.*, is proof of regional market interrelatedness.⁴⁶ Definition of a relevant geographic market in terms of regional market interrelatedness requires the court to utilize the economic theory generally known as cross-elasticity, which measures the effect of a change in price of product X on the supply of or demand for product Y.⁴⁷ Because elasticity is a function of interrelatedness between several variables,⁴⁸ definition of a relevant geographic market in such terms is a complex task.⁴⁹ In contrast, the traditional standard of delineating a relevant geographic market—the area of significant sales or marketing activities—permits courts to readily determine the area in which an acquired firm makes significant sales, without engaging in complex economic analysis.⁵⁰ Proceeding to

region “where the trade in a product is affected by, and is not independent of, the trade in that product in other areas.” 168 F. Supp. at 599-600.

⁴⁴ See note 55 *infra*.

⁴⁵ Cf. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 366 (1970) (substantial lessening of competition is more readily proved by market-share than by market behavior).

⁴⁶ 625 F.2d at 682-83; see *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 599-600 (S.D.N.Y. 1958). When regional markets are interrelated—not independent of one another—a rise in the price of product X in region A, for example, will increase the demand for a substitute product in region B. See generally P. SAMUELSON, *ECONOMICS* 432-33 (10th ed. 1976).

⁴⁷ C. AMMER & D. AMMER, *DICTIONARY OF BUSINESS AND ECONOMICS* 104 (1977).

⁴⁸ D. ORR, *PROPERTY, MARKETS, AND GOVERNMENT INTERVENTION* 70 (1976).

⁴⁹ An important assumption underlying cross-price elasticity analysis is that “all variables and parameters other than those being studied are fixed.” D. NICHOLS & C. REYNOLDS, *PRINCIPLES OF ECONOMICS* 536 (1971). See L. ABBOTT, *ECONOMICS AND THE MODERN WORLD* 9 (2d ed. 1967). This “*ceteris paribus*” assumption is fine in theory, but breaks down outside of the classroom, complicating courtroom economic analysis. See generally M. BRENNAN, *THEORY OF ECONOMIC STATICS* 28 (1965).

⁵⁰ See note 26 and accompanying text *supra*. The goal of the courts is to achieve sound, practical, and consistent judicial administration. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963). Indeed, one commentator attributes the Supreme Court's failure to create “coherent and rational” rules of antitrust law to four factors: some Justices

the second tier of section 7 analysis,⁵¹ it can then be determined whether the acquisition substantially lessens competition within the relevant market.⁵² If, in this regard, the acquiring firm is outside of the area of significant sales, then, and only then, must the court resort to the more economically oriented standard of regional market interrelatedness, through application of potential competition theory.⁵³

Despite the possibility of conflict between traditional Supreme Court relevant geographic market guidelines and the *Jim Walter Corp.* perceptible competitive impact standard, and notwithstanding the complexity and subjectivity of the inquiry, it is submitted that the *Jim Walter Corp.* test is justified as an alternative to the significant-sales test. By allowing the Justice Department to challenge a merger which has anticompetitive effects outside of the traditionally delineated relevant geographic market, the perceptible competitive impact test further implements the "any section of the country" language of the Clayton Act.⁵⁴ For example, assume that

are emotionally and ideologically hostile to "Big Business;" antitrust law may be too difficult for the Justices to accurately apply; the defense in an antitrust case typically accepts the conceptual framework of the government's position without attempting to propose new theories for ascertaining anticompetitive effects; and the Expediting Act, ch. 544, §§ 1-2, 32 Stat. 823 (1903) (current version at 15 U.S.C. §§ 28-29 (1976)), impeded development of a body of non-Supreme Court antitrust decisions by providing for direct appeal from the district court to the Supreme Court. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 326-27 (1975). Notably, the Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 4, 88 Stat. 1708 (amending 15 U.S.C. § 28), which substituted appeal to the circuit court for direct appeal to the Supreme Court, should result in the development of a body of intermediate appellate case law, thus minimizing the significance of the fourth factor. Posner, *supra*, at 327 & n.154. See generally *Jim Walter Corp. v. FTC*, 625 F.2d 676 (5th Cir. 1980); *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

⁵¹ See note 5 *supra*.

⁵² See note 28 and accompanying text *supra*.

⁵³ See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623-42 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-36 (1973). The potential competition theory itself has been attacked as an unwieldy concept. One commentator contends that the doctrine should be discarded because it is difficult to identify and rank potential entrants; there is no theoretical or empirical evidence establishing the minimum number of potential competitors needed to affect competition within the relevant market; and there is no evidence that the elimination of a potential competitor has ever had an adverse impact on competition within a relevant market. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 122-24 (1976).

⁵⁴ See note 22 *supra*. It is suggested that the Celler-Kefauver amendment's insertion of "section of the country" in place of the narrower "community" phraseology of the original section 7 may have been intended solely to restrict section 7 actions to economically significant regions, and that the section does not permit relevant geographic markets to be found

X partnership markets milk and has significant sales in New York, with perceptible competitive impacts on milk firms in New Jersey and Pennsylvania. Assume also that Y partnership sells milk in New Jersey and that Z partnership sells milk in Pennsylvania. Y acquires X. The traditional significant-sales test, coupled with potential competition theory, will allow for judging the impact of the acquisition in New York. The effect on competition in Pennsylvania, however, would not ordinarily be subjected to scrutiny. If the perceptible competitive impact test is applied, though, the relevant geographic market will encompass Pennsylvania, and the government for the first time may attempt to prove a substantial lessening of competition in that region. Substantial anticompetitive effects might result from the merger in the preceding hypothetical if the following additional facts are established. Z partnership perceived X partnership to be a likely entrant into the Pennsylvania milk market. Accordingly, Z maintained low prices for its dairy products. Z did not perceive Y partnership as a likely entrant. The purchase of X by Y may dispel Z's perceived threat of entry into its market by other firms. Z may then raise prices. Here, the perceptible competitive impact test, operating in tandem with the potential competition doctrine, could suffice to invalidate the acquisition of X by Y should substantial lessening of competition in Pennsylvania be proved.⁵⁵ Thus, definition of the geographic market in accordance with the perceptible competitive impact standard would afford the means to define a geographic market sufficiently broad to encompass the area of violation.

In addition to expanding the area in which the Justice Department may seek to establish the existence of a section 7 violation, the perceptible competitive impact test, if generally accepted, can be expected to have an impact on the second tier inquiry—whether competition has been substantially lessened. In order to understand this relationship, it is important to recognize at the outset

in any section of the country unless *actual* marketing activities are established.

⁵⁵ *But see* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622 (1974), where the Court held that "in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor." *Id.* The extent to which this statement by the Supreme Court forecloses use of the perceptible competitive impact test in a potential competition case depends on the construction of *Marine Bancorporation's* "like this one" phraseology. At least one circuit court has held that the definition of geographic market espoused in *Marine Bancorporation* should be limited to a highly regulated local industry. *RSR Corp. v. FTC*, 602 F.2d 1317, 1323-24 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

that, although the substantiality standard applies to all types of mergers—horizontal, vertical, and conglomerate⁵⁶—the tests of substantiality differ. For example, horizontal mergers, involving combinations between firms operating in identical relevant product and geographic markets,⁵⁷ are usually judged by market-share statistics.⁵⁸ In such mergers, market-share may suffice without other evidence as proof of undue concentration and may establish a prima facie case of a section 7 violation.⁵⁹ The percentage of market-share which properly may be regarded as undue is smaller if the market exhibits a trend toward concentration.⁶⁰ Market-share statistics are also of use in analyzing conglomerate mergers,⁶¹ but because there are no preexisting direct economic relationships between the acquiring and acquired firms, the more subjective potential competition test is utilized.⁶²

⁵⁶ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

⁵⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 334-35 (1962). To characterize a merger as horizontal, the acquired and acquiring firms must have been competitors prior to the merger. *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 56 (S.D.N.Y. 1966); see *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1371 (9th Cir.), cert. denied, 439 U.S. 982 (1978); *United States v. International Harvester Co.*, 564 F.2d 769, 771 (7th Cir. 1977).

⁵⁸ See, e.g., *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486, 495-98 (1974); *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964); *Stanley Works v. FTC*, 469 F.2d 498, 504 & n.13, 505-08 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973).

⁵⁹ See *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120, 123 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-98 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 366 (1970). Once a prima facie case of substantial lessening of competition is established through a showing of undue market-share, it is incumbent upon the acquiring firm to prove that such statistics falsely depict the acquisition's probable effect on competition. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975).

⁶⁰ See *United States v. Von's Grocery Co.*, 384 U.S. 270, 276-78 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 & n.72 (1962).

⁶¹ See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 571-73, 575 (1967); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 73 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974). In *Kennecott Copper Corp.*, a copper producer acquired Peabody Coal Company, one of two leading coal producers and distributors in the United States. 467 F.2d at 69. The relevant product market was bituminous, sub-bituminous, and lignite coal. *Id.* at 70. The relevant geographic market was the entire United States. *Id.* at 71. Hence, the merger was of the conglomerate product market extension variety. While invalidating the acquisition, the court looked to the market-share of firms in the coal industry, *id.* at 73, and concluded that the relevant product market was tending toward greater concentration. *Id.* at 79. Additionally, the court applied the potential competition theory, basing its decision, in part, on the fact that Kennecott was a likely entrant into the coal product market. *Id.*

⁶² See Shea, *Antitrust Policy and the Conglomerate Firm: "A Rose is a Rose is a Rose,"* in CONGLOMERATE MERGERS AND ACQUISITIONS: OPINION & ANALYSIS, 44 ST. JOHN'S L. REV. 533, 535 (Special Ed. 1970). Other devices also are utilized to determine whether a conglomerate merger produces substantial anticompetitive effects. These include potential

Hence, it should be apparent that the characterization of a merger is largely determinative of the standard of substantiality to be applied.⁶³ The characterization of a merger, it must be remembered, is a function of market definition.⁶⁴ To the extent that the perceptible competitive impact test defines a different, and usually more expansive market than obtains under the traditional significant-sales test, use of the new approach may transform a merger previously characterized as a conglomerate geographic market extension merger under the significant-sales approach into a horizontal merger. This can be illustrated as follows. Assume that Panacon Corporation markets products throughout the west coast. Its operations, however, have nationwide perceptible competitive impacts. Assume also that JWC, a corporation intent on acquiring Panacon, operates exclusively on the east coast. If, then, a western relevant geographic market is defined in accordance with the traditional standard of significant sales by the acquired firm, a merger between JWC and Panacon would be of the geographic market extension type and, thus, the potential competition doctrine would be employed to determine its legality. If, however, a national relevant geographic market is defined under the *Jim Walter Corp.* standard of perceptible competitive impacts, a merger between JWC and Panacon would be of the horizontal variety and, therefore, the second tier inquiry would involve the more objective market-share investigation.

It is submitted that when a conglomerate merger is converted into a horizontal merger merely through utilization of a broad relevant geographic market test, such as perceptible competitive impacts, the market-share which may properly be regarded as undue should be greater than that which would suffice had the market been defined and the merger characterized pursuant to the significant sales test. Indeed, the effect of increased concentration is *direct* in a significant-sales horizontal merger, since the acquired and acquiring firms are competing for the same buyers. Market-share,

reciprocity, *id.*, see *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965), and the tendency of the merger to raise barriers to entry, see *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-79 & n.3 (1967). See also 3 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 19.02[2], [3], [11] & [12] (1980).

⁶³ *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 587 (1967) (Harlan, J., concurring) ("different sets of circumstances may call for fundamentally different tests of substantial anticompetitive effect").

⁶⁴ See generally 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 17.01 (1980); 3 *id.* § 18.02.

in this situation, is highly relevant,⁶⁵ and even a low combined market-share could properly trigger section 7 sanctions.⁶⁶ The effect of increased market-share, however, is somewhat *indirect* in a perceptible-competitive-impact horizontal merger, because the acquired and acquiring firms are competing for different buyers. Hence, the increased market-share generated by the merger is not composed of a greater share of buyers within the same buyer pool, but rather is an aggregation of shares of independent buyer pools. Thus, it is suggested that the quantum of market-share deemed undue in a perceptible-competitive-impact horizontal merger should be greater than that deemed undue in a significant-sales horizontal merger.

Notably, in addition to bearing upon the substantiality standard to be applied, the characterization of a merger frequently is determinative of whether the Justice Department will challenge the acquisition. Indeed, the Department of Justice has developed guidelines for judging whether mergers or acquisitions are in violation of section 7.⁶⁷ The guidelines vary in accordance with the type of merger.⁶⁸ For example, horizontal mergers generally are chal-

⁶⁵ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 343 (1962). Market-share is "one of the most important factors" in judging the anticompetitive effects flowing from a merger. *Id.* Indeed, in several horizontal merger cases, the Supreme Court has focused almost entirely on market-share and industry concentration. See, e.g., *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 366 (1970); *United States v. Von's Grocery Co.*, 384 U.S. 270, 276-78 (1966). See generally 3 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 19.02[3][a] (1980). But see *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market-share, while of great significance, is not conclusive).

⁶⁶ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Low market-share is sufficient to trigger section 7 prohibitions when other factors are present, such as a trend towards greater market concentration, or when the acquiring firm is a national chain. *Id.* at 344-45.

⁶⁷ Merger guidelines of Department of Justice, reprinted in [1977] 1 TRADE REG. REP. (CCH) ¶ 4510. The Justice Department's merger guidelines commence with a statement that they are intended to "acquaint the business community," and others, with current Department of Justice standards for challenging acquisitions or mergers under section 7. *Id.* The necessity of publicizing such information was emphasized by the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), wherein it was stated that "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded." *Id.* at 362. For an example of reliance on the Justice Department guidelines during prosecution of a section 7 action, see *Stanley Works v. FTC*, 469 F.2d 498, 504 n.13, 505 n.16 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973).

⁶⁸ In the case of horizontal mergers, the Justice Department guidelines provide that such mergers will not be challenged unless the combined market-share of the four largest firms in the market is approximately 75% or more and the combined market-share of the acquired and acquiring firms is greater than or equal to 8%. Merger Guidelines of Department of Justice, reprinted in [1977] 1 TRADE REG. REP. (CCH) ¶ 4510, at 6883-85. Alterna-

lenged by the Department when the acquiring and acquired firms possess a combined share of at least 8% of the market.⁶⁹ Conglomerate mergers of the geographic market extension type are challenged when the acquired firm has approximately a 25% market-share and the acquiring firm is a likely *de novo* entrant into the acquired firm's geographic market.⁷⁰ The choice of which guidelines to apply, and hence the choice of which suits to prosecute, requires a characterization of the merger. To the extent that merger characterization is a function of the manner in which the geographic market is defined, the standard used to define the market may determine, at least under the present guidelines, whether the government will challenge a particular acquisition.⁷¹ For example, assume with reference to the preceding hypothetical that Panacon's share of the west coast market was 93%, but its share of the nationwide market was only 3%. Assume also that JWC, operating entirely on the east coast, commands 4% of the national market. Under the traditional significant-sales test, the merger would be characterized as geographic market extension. Therefore, since Panacon's share of the west coast geographic market is above the Justice Department's threshold of 25%, the merger would be contested by the government. If, on the other hand, the *Jim Walter Corp.* test was utilized to define the geographic market, the merger would be of the horizontal variety, and apparently would escape challenge by the Justice Department, at least under current standards, since the combined JWC-Panacon market-share is less than 8%. Nevertheless, since the gravamen of the conduct is realistically unaffected by the definition of the market, the Justice Department can be expected to contest such acquisition. Hence, it is submitted that if the perceptible competitive impact test is gener-

tively, if the combined market-share of the four largest firms is less than 75%, the Justice Department will not prosecute unless the combined market-share of the acquired and acquiring firms is 10% or more. *Id.*

In the case of geographic market extension mergers, the Justice Department generally will not challenge such mergers unless the acquiring firm is a likely entrant into the relevant market and the acquired firm possesses a 25% share of the market. *Id.*

⁶⁹ See note 68 *supra*.

⁷⁰ *Id.*

⁷¹ The decision to prosecute has been important since the Antitrust Division of the Department of Justice had "an unbroken string of successes in the Supreme Court in the 1950's and 1960's." Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 881 (1976). In the 1970's, however, the government lost several important cases. *Id.* (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)).

ally accepted, fairness demands that the government develop and publish an alternative set of guidelines, reflecting the broader relevant geographic market within which a section 7 violation can be established.

CONCLUSION

The perceptible competitive impact test promulgated by *Jim Walter Corp.* as an alternative to the significant sales test represents a useful addition to section 7 analysis, notwithstanding that it defines a relevant geographic market which is broader than that heretofore formulated by the Supreme Court and that it requires an initial subjective assessment of competitive effects. It is not suggested, however, that the perceptible competitive impact test should supplant the traditional significant-sales test. Indeed, in most cases the significant-sales test should continue as the standard by which a relevant geographic market is defined since it is less subjective and more susceptible to consistent application than the *Jim Walter Corp.* evidentiary standard of regional market interrelatedness which, in essence depends on a regional cross-elasticity test.⁷²

The *Jim Walter Corp.* perceptible competitive impact test is justified, however, as an alternative to the significant-sales test for delimiting a relevant geographic market when it permits scrutiny of mergers that have substantial anticompetitive effects outside of the traditional relevant market. It must be recognized, though, that acceptance of the perceptible competitive impact test requires the modification of several of the established ground rules of section 7 proceedings—such as the criteria for determining which mergers the government will protest and the level of market-share deemed undue in a perceptible-competitive-impact horizontal merger—to accommodate the theory.

G. Clifford Korn

⁷² 625 F.2d at 682-83; see notes 45-47 and accompanying text *supra*.