

St. John's Law Review

Volume 44
Number 5 *Volume 44, Spring 1970, Special
Edition*

Article 41

December 2012

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Recommended Citation

Solomon, Richard A. (1970) "The Concentric Merger and Section 7 of the Clayton Act," *St. John's Law Review*. Vol. 44 : No. 5 , Article 41.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss5/41>

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THE CONCENTRIC MERGER AND SECTION 7 OF THE CLAYTON ACT

RICHARD A. SOLOMON*

"The time has come, the walrus said, to speak of many things — of ships and sails and sealing wax, of cabbages and kings."¹ In many of today's industrial complexes, the foregoing could be a quote from the notice to directors to attend a forthcoming board meeting. Whether the free-form conglomerate corporation is a viable concept or merely one of the neuroses of the times, like free love and LSD, is not yet known. So diverse have been the short-run results of conglomerate enterprise that almost anyone's ideas as to why things go wrong or right are as good as anyone else's. What we do know is that many are afraid of conglomerates — afraid that diversity in the extreme cannot be controlled (in terms of successful operations);² afraid of the ways in which operating results are described to the investing public; afraid of the securities these firms sell in the market;³ and, of course, afraid that anything that big and that

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¹ L. CARROLL, THROUGH THE LOOKING GLASS, in ALICE IN WONDERLAND 164 (Pocket Book ed. 1951).

² The conglomerate concept begins with an idea that all businesses have a basic kinship — money — and that basic management skills are transferable from firm to firm regardless of industry lines. Poly-centric pragmatism then becomes the rationale of the free-form management group. Added stimulus is provided by a legal environment in which diversification is the only avenue left open to the acquisitive. See *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). No doubt this philosophy is held by many in full credence and with utmost good faith. This urge to merge, however, may have a tendency to become an end in itself. "What many conglomerators are doing is not paying sufficient attention to the necessity for operating successfully in mundane profit-and-loss terms when the creative acquiring is over." Burck, *The Merger Movement Rides High*, *FORTUNE*, Feb. 1969, at 79. Some writers would even challenge management bona fides in these premises, seeing mergers as symptoms of management megalomania. See M. MACE & G. MONTGOMERY, *MANAGEMENT PROBLEMS OF CORPORATE ACQUISITIONS* (1962); Boulding, *The Present Position of the Theory of the Firm*, in *LINEAR PROGRAMMING AND THE THEORY OF THE FIRM* (K. Boulding & W. Spivey eds. 1960); Machlup, *Theories of the Firm: Marginalist, Behavioral, Managerial*, 57 *AM. ECON. REV.* 1 (1967); Papandreou, *Some Basic Problems in the Theory of the Firm*, in *II A SURVEY OF CONTEMPORARY ECONOMICS* 183 (B. Haley ed. 1952). As to effects upon executive compensation of firm size rather than profitability, see McGuire, Chiu & Elbing, *Executive Incomes, Sales and Profits*, 52 *AM. ECON. REV.* 753 (1962). See also Bossons, Cohen & Reid, *Mergers for Whom-Managers or Stockholders?*, in *Workshop on Capital Market Equilibrating Processes* (Paper No. 14, Carnegie Inst. Tech. 1966).

³ The Accounting Principles Board of the American Institute of Certified Public Accountants is seeking to abolish pooling-of-interest accounting for acquisitions. *Wall Street Journal*, Oct. 31, 1969, at 7, col. 2. See also *Day of Reckoning?*, *Barrons*, April 3, 1967, at 3; Reid, *The Conglomerate Merger: A Special Case*, 2 *ANTITRUST LAW & ECON. REV.* 141, 161-62 (1968).

diffuse must possess some inherent powers to control the environments in which they operate in ways inimical to the national policy favoring competition as the ultimate economic regulator and resource allocator. And while fear does serve to start the adrenalin flowing, its self-escalation tends to frustrate any attempt to place the conglomerate phenomenon in its historical economic context and to study it on the basis of empirical data as that data are generated.

We are dealing with conglomerates, therefore, on the basis of broadly enunciated philosophies as to what is possible. And in that vein it would appear that harm is equally as possible as benefit in terms of the ultimate contribution, negative or positive, of these firms to economic and social well-being.

Could it be that the conglomerate is a paper tiger? Even if the answer is yes—and I suspect that in most cases that will prove to be true—it can still be a damage-generating instrument. While many conglomerate firms may be practically impotent in terms of market power, they may, perhaps because of this, be dangerous from the point of view of the spectacular nature of their failures⁴—failures which may not be predictable sufficiently in advance of the fact to permit efforts to thwart financial ruin of public and private investors. But this type of danger should be approached as financial regulation, not as market power regulation.

It shall be the purpose of this article to suggest that there is a great deal of erratic movement by those whose fear of conglomerates has led them to be the most vociferous in that premise. It is to be conceded that some of the response to this cacophony of invective has been less than enlightened and this has certainly not helped matters.⁵

There is a necessity that there be a capital market. Taxation⁶ and many other factors⁷ require that many businesses must be sold, either to the public or to another firm. This is a positive necessity. There is also

⁴ See Burck, *supra* note 2. See also *General Dynamics: In Trouble Again*, BUS. WEEK, Oct. 4, 1969, at 48; Ruckeyser, *Why Rain Fell on "Automatic" Sprinkler*, FORTUNE, May 1969, at 88.

⁵ "The fact that the Supreme Court does not always hit home runs should not, therefore, surprise. And for what it is worth, the critics aren't hitting many either." Zimmerman, *The Supreme Court and the Antitrust Laws: A Criticism of the Critics*, 34 ANTITRUST L.J. 42, 49 (1967).

⁶ See J. BUTTERS, J. LINTNER & W. CARY, *EFFECTS OF TAXATION ON CORPORATE MERGERS* (1950); Lintner & Butters, *Effects of Taxes on Concentration*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 239 (G. Stigler ed. 1955).

⁷ In most, but not all, of the cases studied the one single factor which characterized the decisions to sell was fear: fear about the future; fear that the product line was outmoded; fear that while company-rich although cash poor, the capital accumulated in a lifetime would be lost; fear that technology once reasonably simple was beyond the management's capacity to cope with; fear that key people were becoming dissatisfied with salary compensation and would leave to join enterprises where capital participation was possible.

M. MACE & M. MONTGOMERY, *supra* note 2, at 33.

a congeneric negative necessity — that the disposition of capital assets not occur in such a way as to contravene our preference for vigorous competition. There are two avenues of approach to this negative necessity — behavior (performance?) and structure. How these approaches meld (as well as where they do not meld) in the applicability of section 7 of the Clayton Act⁸ to conglomerate mergers⁹ is our inquiry.

The structuralists among us, and they are legion, share the basic precept that little if any good can come from trends toward concentration of ownership of productive assets in fewer and fewer hands. All non-monarchists must concede that a point could be reached at which economic and socio-political evils do spring from oligopoly; indeed, these evils would begin to manifest themselves substantially before the point were reached at which a small group of “friends” controlled the economy. It is quite likely that, considering the scale and sophistication of the economy at large at the end of the nineteenth century, we may have been well within that dangerous area of domination by the few. While we busted some important trusts and loosened the stranglehold somewhat, there

⁸ 15 U.S.C. § 18 (1964):

No corporation . . . shall acquire . . . the whole or any part of the stock . . . or any . . . of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

⁹ Defining the term conglomerate as applied to mergers has itself been the subject of diversity. S. OPPENHEIM & J. WESTON, FEDERAL ANTITRUST LAWS 323-24 (3d ed. 1968), indicates that the conventional definition includes all mergers that are neither horizontal nor vertical. They go on to point out some refinements in this definitional process, however. Professor Reid avers that to define conglomerate mergers as the residue left after accounting for horizontal and vertical mergers complicates analysis of the conglomerate phenomenon in terms of performance. Reid, *supra* note 3, at 142.

Kaysen and Turner assert that most mergers that appear superficially to be conglomerate will prove to have vertical or horizontal elements or both if the markets involved are carefully analyzed and defined. C. KAYSEN & D. TURNER, ANTITRUST POLICY 131 (1959). There is, therefore, a gray area between the purely horizontal or vertical merger on one hand, and the pure conglomerate where the firms are totally unrelated on the other. This includes the market extension merger and the product extension merger. The market extension merger is but a horizontal merger between firms that happen not to operate in the same geographic area. Their close kinship to the horizontal merger tends to place them in special jeopardy under section 7. *See* Beatrice Foods Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,244 (FTC 1965); Foremost Dairies, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,877 (FTC 1962); Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 ANTITRUST BULL. 175,177 (1956). Product extension mergers, bringing together firms with different products, are undoubtedly those which at first glance appear to be pure conglomerates. Where, however, the products of the combining firms are either technologically related or are sold into the same markets, they may fall short of the mark. In this article I shall use the term concentric to designate the product extension merger. *See* Reid, *supra* note 3, at 142. Where the products of the merging firms are not necessarily related in technology, but are sold into the same markets, I shall use the term converging concentric. And where the products of the combining firms are technologically related, but are sold into different markets, I shall use the term diverging concentric. *See* W. THORP & W. CROWDER, THE STRUCTURE OF INDUSTRY (TNEC Monograph No. 27, 1941).

followed wave upon wave of mergers,¹⁰ first horizontal and vertical, and, by the 1960's, conglomerate. Aggregate industrial concentration has grown significantly over the past 65 years, but, due to the expanded scale of the economy and the countervailing forces of such populist forces as organized labor, we are not approaching a state of economic dominance by the few in aggregate dimensions; even though Standard Oil is bigger now than before it was broken up.¹¹ Yet aggregate concentration is seen as a burgeoning threat to the interests all and sundry, and there is a hue and cry to bring section 7 cases to attack it.¹² Indeed, such a theory is already part of a complaint under section 7.¹³

Aggregate concentration analysis, however, does not address itself to the problems of market power within the context of specific cases. The statute speaks of "any line of commerce," and there is a measurable and smaller cosmos which has relevance to a particular merger. The industries in which the combining firms operate, those from which they buy and those to which they sell, are the proper parameters of significant inquiry. If a merger results in a firm which dominates or threatens realistically to dominate or reorient an industry along non-competitive lines, then it is of no consequence how much of the nation's productive assets are controlled by how many firms.¹⁴ The statutory problems are to be re-

¹⁰ An excellent review of the twentieth century history of aggregate concentration is to be found in S. OPPENHEIM & J. WESTON, *supra* note 9, at 317-23. The insomniac reader may wish to review, *inter alia*, R. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895-1956 (1959); G. NUTTER, THE EXTENT OF ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899-1939 (1951); J. WESTON, THE ROLE OF MERGERS IN THE GROWTH OF LARGE FIRMS (1953); SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., CONCENTRATION IN AMERICAN INDUSTRY (1957); SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., CONCENTRATION RATIOS IN MANUFACTURING INDUSTRY, 1958, pts. I & II (1962); *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2 (1965); FTC, LARGE MERGERS IN MANUFACTURING AND MINING, 1948-1967 (1968); FTC, MERGER ACTIVITY SET NEW RECORD LAST YEAR (1968); FTC, REPORT ON CHANGES IN CONCENTRATION IN MANUFACTURING, 1935 TO 1947 AND 1950 (1954); FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS (1955); FTC, THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS, 1947 (1949); FTC, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT (1948); Blair & Houghton, *The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940-47, A Reply*, 33 REV. ECON. & STATS. 63 (1951); Lintner & Butters, *Effects of Mergers on Industrial Concentration, 1940-47*, 32 REV. ECON. & STATS. 30 (1950).

¹¹ Standard Oil Co. v. United States, 221 U.S. 1 (1911).

¹² Address by R. W. Donnem, American Management Association, Nov. 10, 1969, in 5 TRADE REG. REP. ¶ 50, 263 (1969); see *The Celler-Kejauwer Act: A Review of Enforcement Policy*, in SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY 105 (Comm. Print 1963).

¹³ United States v. Ling-Temco-Vought, Inc., Civ. No. 69-438 (W.D. Pa. 1969).

¹⁴ Many conclusions about concentration ratios on an at-large scale refer to census of manufacturer's data. Presently available census of manufacturer's data has been called unreliable as indicators of aggregate concentration in the manufacturing sector because no attempt is made to cause this data to describe manufacturing assets or take into account the United States market impact of imports or of goods manufactured

solved within a smaller periphery. And if, within the context of a relevant product or geographic market as traditionally¹⁵ found in merger cases, the merger deserves sanction, the concentration questions are answered without further inquiry.¹⁶ Finally, on the question of aggregate concentration, we have the question of honesty. If we are so violently opposed to it, why is it that nothing is done about concentration and the already established firm?¹⁷

If aggregate references are immaterial, then in what frame of reference are we to evaluate notions of dimensions of firms? The courts and some commentators are clear that broad spectrum industrial groupings are not appropriate environments in which to measure the market power connotations of size distribution of firms. Each situation is evaluated from a narrow, wave-length perspective usually limited to the products of the combining companies.¹⁸ Section 7 tradition,¹⁹ therefore, tells us that the question is really what is the impact (now or later) of this merger upon further market dynamism (read competition). To do that we must first know the present state of the market, and here the structuralists have a field day. We know that price fixing equates with monopoly, that predatory price warfare may drive companies from the market, and that some forms of patent abuse will have the same effect. However, certain market struc-

domestically but for foreign markets. If these data are to be made relevant to competitive impact questions—vis-à-vis United States markets, significant adjustments should be made. Illustratively, one writer asserts that after such adjustments it could be seen that aggregate concentration in consumer products industries in the United States from 1954 forward tends to be static. Rose, *Bigness is a Numbers Game*, FORTUNE, Nov. 1969, at 112.

¹⁵ It used to take more than 15 years for a practice to become a tradition.

¹⁶ As to the ultimate put-on vis-à-vis aggregate concentration see Rose, *supra* note 14. To take an extreme example, if the 200 largest companies kept growing until they accounted for all the manufacturing in the country, and if each diversified to such an extent that all were equally represented in every market, then none of the top 200 companies would account for more than 0.5 percent of sales in any industry. The megacorps would be monstrously big, but none of them would have any great amount of market power.

Id.

¹⁷ See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1297 (1948). Professor Adelman also claims that aggregate size and concentration have no obvious or simple relation to market control, and, up to a point, this writer agrees.

¹⁸ See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957); *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). Some commentators (and all defendants in section 7 cases) argue that the measurement of a relevant product should take into account such broad spectrum alternatives. See Solomon, *Why Uncle Sam Can't Lose a Case Under Section 7 of the Clayton Act*, 53 A.B.A.J. 137 (1967). Professor Adelman, with whom Professor Bork would concur, asserts that our rise in living standards produces more discretionary income for the consumer, which would tend to make diverse discretionary items competitive across a great breadth, e.g., the trip to Florida competing with violin lessons for junior. Adelman, *supra* note 17, at 1296. *But cf.* Zimmerman, *supra* note 5, at 44: "[T]hirsty golfers may not appreciate a chocolate bar."

tures are characterized as competitively stagnant or about to be stagnant according to the size distribution of firms, so they say.²⁰ Behaviorists cling to the notion that, short of duopoly the evil goals of feudalistic businessmen should not be implied without evidence of improper conduct, and that numbers, without more, are no indicia of market power.²¹ The empirical data upon which we are now forming our conclusions about market power are unclear,²² inadequate and untried.²³ Of course, judges are

¹⁹ See note 15 *supra*.

²⁰ Measurements of undesirable intra-market concentration — oligopoly power present — vary from that which a lawyer should be able to deal with: C. KAYSSEN & D. TURNER, *supra* note 9, at 27 — Type 1 Oligopoly, first 8 firms have 50 percent of the market and the first 20 firms have 75 percent; Type 2 Oligopoly, first 8 firms have 33 percent of the market and the rest is unconcentrated: J. BAIN, *INDUSTRIAL ORGANIZATION* 413 (1959) — High concentration obtains when the first 8 firms have 70 percent of the market: G. STIGLER, *CAPITAL AND RATES OF RETURN IN MANUFACTURING INDUSTRIES* 57 (1963). Unconcentrated markets exist when (1) the market is national and the 4 largest firms account for less than 50 percent of its sales, or (2) the market is regional and the 4 largest firms have 20 percent. *Accord*, Nat'l Comm. on Food Marketing, *Food From Farmer to Consumer* 93 (1966); for the more esoteric, we must call upon more expert assistance. For an excellent discussion of summary indices of concentration, including the Lorenz Curve, the Gini Coefficient, the Pietra Ratio, the relative mean deviation intercept, and the Herfindahl Summary Index, see E. SINGER, *ANTITRUST ECONOMICS* (1968).

²¹ In the pure conglomerate merger, concentration ratios are not changed by the fact of the acquisition. It is simply a change of ownership without economic significance in the section 7 Clayton Act context. Reid, *supra* note 3, at 143.

²² Oligopolistic markets, for example, may be described in terms of demand curve distortions. Whereas a seller under conditions of pure competition would construct a demand curve that would tend to move more as a function of his own pricing, the seller under oligopolistic conditions must take into consideration the additional dependent variable of co-oligopolist reaction, with the result being a kinky demand curve. See F. MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 352 (1952). See also L. TARSHIS, *THE ELEMENTS OF ECONOMICS* (1947); Sweezy, *Demand under Conditions of Oligopoly*, 47 J. POL. ECON. 568-73 (1939). Kaysen and Turner also relate to this form of measurement.

We can identify market structure with the underlying forces that shape the factor-supply and market-demand curves facing the firm. In the competitive model, with the profit-maximizing firm which cannot influence the markets in which it deals, the market-demand and factor-supply situations determine the decisions of the firm.

C. KAYSSEN & D. TURNER, *supra* note 9, at 71 n.30. On the other hand, Chamberlin asserts that the description of imperfect competition by reference to a marginal revenue curve is a mere historical accident. He concedes that there is intrinsic merit in marginal curves in that their intersection reveals monopoly output better than the fitting of areas between curves of average cost and average revenue (until you have to deal with the single firm in isolation where the curves are beyond equilibrium), but that they do not indicate price or profits. E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 191-92 (7th ed. 1956). Another detractor of this approach is Harrod, whose thesis is that the equating of marginal revenue and marginal cost is a general principle for the individual firm under any circumstances whatever. It is just another way to say that firms attempt to maximize profits, and contributes nothing to distinguish imperfect competition from pure competition or monopoly. Harrod, *Imperfect Competition and the Trade Cycle*, 18 *REV. ECON. & STATS.* 84 (1936). If the foregoing seems tedious, see SINGER, *supra* note 20. But see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *HARV. L. REV.* 226, 279-80 n.200 (1960) to the effect that we cannot predict at what concentration ratio administered pricing will begin.

²³ See D. MARTIN, *MERGERS AND THE CLAYTON ACT* (1959); Bok, *supra* note 22, at 227,

ill-equipped to analyze masses of complex economic data as to probable future effects upon competition of present or past mergers. Therefore, in order to prevent bogging down the entire judicial process, the courts have formulated simplistic, talismanic formulae and have cut the Gordian knot as well as the throat of every defendant under amended section 7 who thought he would find justice on appeal.²⁴ It is meant here to say, more than just in passing, that the answer to the federal judiciary's inability to deal with vast empirical data without clogging the dockets desperately requires the establishment of a special antitrust court as a part of the federal court system. It is not sufficient to analogize conglomerate merger matters to per se violations of the Sherman Act in which no extended inquiry is appropriate. Structure and behavior, though liminally related, do not with equal ease accommodate themselves to short shrift treatment. Professor Mason's comment that "[t]he demand for full investigation of the consequences of a market situation or a course of business conduct is a demand for nonenforcement of the antitrust laws"²⁵ is a search for an easy way out, and too great an economic and personal commitment is made by the parties in a conglomerate merger to permit their interests to be dealt with in such a cavalier fashion.

And yet it is, of course, insufficient merely to criticize without an offer of help. Certain structural relationships do have within their interstices the potential to result in restricted competition. I suggest, however, that a good deal of the anticompetitive implications inherent in oligopoly are not controllable only by divestiture, as has been so frequently claimed.²⁶ Neither is the achievement of monopolistic behavior a necessary handmaiden of size. Several aspects of structure and behavior have been highlighted in the section 7 cases, and, depending upon the business facts

240-41, 279; Ruggles, *The Value of Value Theory*, 44 AM. ECON. REV. 140 (1954); Address by Commissioner Elman of the FTC, ABA Nat'l Inst. on Conglomerate and Other Modern Merger Movements, Oct. 1969.

We recognize the need for further refinement of economic evidence . . . and for additional knowledge, theoretical and empirical, about the behavior of oligopolistic industries. It would be less than candid to pretend that economic science has provided a complete or wholly satisfactory basis for public policy in this field. 1968 WHITE HOUSE TASK FORCE REPORT ON ANTITRUST POLICY, 115 CONG. REC. 5642, 5644-45 (daily ed. May 27, 1969) [hereinafter cited as NEAL TASK FORCE REPORT].

²⁴ See C. KAYSER & D. TURNER, *supra* note 9, at 129-30; Bicks, *supra* note 9, at 181; Bok, *supra* note 22, at 227; Lasky, *Proof of Complicated Economic and Technical Facts and Handling of Documents*, 23 F.R.D. 606 (1958); Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 185-87 (1953).

²⁵ Mason, *Market Power and Business Conduct: Some Comments*, 46 AM. ECON. REV. 471, 478 (1956). See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1964); *Standard Oil Co. v. United States*, 337 U.S. 293, 313 (1949); *Procter & Gamble Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967).

²⁶ See *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 330 (1961); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128-29 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. LAW & ECON. 43, 55-59, 68, 74 (1969).

of the particular merger, they may appear to have less serious antitrust implications than our present summary disposition of cases assumes.²⁷

The objections to large firm conglomerate acquisitive entry into an industry²⁸ evolve around two basic issues: (1) whether the mere fact of entry by merger, or the mere presence of the entrant, tend to transform the market into one in which competitive behavior is retarded (or, if the entered market is devoid of price competition prior to entry, whether that condition is aggravated by the merger); and (2) whether by dint of size and participation in other markets, the merging entrant is a threat to the continued viability of other firms or to the additional entry of other firms.

THE THREAT OF RATIONALIZED PRICING

The relationship of market structure to pricing behavior²⁹ is claimed to be a function either of fear³⁰ or of controllable conspiracy.³¹ The

²⁷ The writer realizes that libraries can be filled with the literature already extant in this area, and every effort will be made to avoid their unnecessary repetition.

²⁸ The reference here is limited to concentric mergers, whether convergent or divergent. Geographic market extension mergers (also generally included within the conglomerate category) too closely resemble horizontal mergers, as previously noted, and are thereby more immediate eliminators of actual competition. In that posture they are not and should not be given special consideration as a new phenomenon.

²⁹ That there is no incentive for the oligopolist to engage in price competition rests upon the assumption that the oligopolist expects his competitors to follow suit whenever he reduces his prices, but not to match his price increases. The resulting high elasticity of demand (large losses of sales) at higher prices and low elasticity of demand (small gains in sales) at prices lower than the prevailing level can explain why the oligopolist would not want to change his price even if his costs went up or down.

Machlup, *Oligopoly and the Free Society*, 1 ANTITRUST LAW & ECON. REV. 11, 19 (1967). "When one firm has forty to fifty percent or more . . . competition will seldom plague the industry." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 181 (1955). See also *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 172 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964); *Beatrice Foods Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,244 (FTC 1965); *Procter & Gamble Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967); G. MEANS, *THE CORPORATE REVOLUTION IN AMERICA* 94 (1962).

³⁰ Professor Bok suggests that oligopoly behavior, as a result of entry by a large firm, is a function of the smaller competitors subjectively recognizing the new firm as a retaliation threat. Bok, *supra* note 22, at 280. This recognition is supposed to be the point of dominance by the entrant. See also F. MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 352-53 (1952); Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672, 689-91 (1958); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1359 (1965).

³¹ Obviously, the likelihood is that some conspirators will break the price line as the number of conspirators increases. Assuming addiction to conspiratorial conduct, therefore, Professor Stigler may suggest that at least 50 percent of sales in an industry be accounted for by at least enough people to overcrowd the average hotel room. See Stigler, *supra* note 29, at 180; "People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." I. A. SMITH, *WEALTH OF NATIONS* 128 (Modern Library ed. 1937). See J. BLAIR, *INDUSTRIAL ORGANIZATION* 297-98 (1959); W. FELLNER, *COMPETITION AMONG THE FEW* 282-88 (1949); Machlup, *supra* note 29, at 16;

market in this context is a two dimensional environment, that is, it is said to be influenced in its pricing performance by those actively engaged in head to head competition in the market, as well as by those firms hovering on the fringes in the role of potential entrants.³²

Several cases in which the issue of potential merger-resulting price rationalization played a significant role have already been litigated under section 7, but they were, in all but one instance, other than convergent concentric mergers.³³ In the one true product extension case,³⁴ convergent concentricity, if present at all, was present by virtue of unrealistic definitions, because the product technology of the entered product market was closely parallel to the areas of technical expertise of the acquirer. These cases, therefore, are not fertile ground in which to plant theories of price rationalization resulting from acquisitive entry. Even if we assume

Markham, *The Nature and Significance of Price Leadership*, 41 AM. ECON. REV. 891 (1951).

³² United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173-74 (1964). The fringe area firm is often viewed as materially present notwithstanding that it sells nothing in the market because its presence tends to force industry members to keep prices down to entry-discouraging levels. United States v. Continental Can Co., 378 U.S. 441, 464-66 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 660 (1964); Beatrice Foods Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,244 (FTC 1965); Hines, *Effectiveness of "Entry" by Already Established Firms*, 71 Q.J. ECON. 132, 142-45 (1957); cf. Turner, *supra* note 30, at 1362, to the effect that where the market is already sufficiently competitive to enforce competitive behavior upon its members, that behavior will not be influenced by the threat of new entry. Obviously, therefore, price levels in the competitive model are supposed to be below that necessary to discourage new entry. That this can be harmonized with the desire to encourage new entry of course assumes that the competitive model is unconcentrated in the sense of size distribution of firms. See J. BAIN, *BARRIERS TO NEW COMPETITION* 145 (1956), and, whereas assumed increased entry barriers resulting from a merger may condemn it under section 7, Procter & Gamble Co. [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967), the absence of entry barriers is not necessarily an exonerating element. Ekco Products Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,879 (FTC 1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

³³ *Brown Shoe* — vertical

El Paso Natural Gas — market extension

Continental Can — horizontal (though products differed technologically, they were found to be in direct competition)

Alcoa (Rome) — vertical

Alcoa (Cupples) — vertical

Penn-Olin — market extension (technically not a merger case, but joint venture case)

Philadelphia National Bank — horizontal

Beatrice Foods — market extension

Ekco Products Co. — horizontal

Reynolds Metals Co. — vertical (In this case price warfare after the merger did result in injury to competitors and competition, but I suggest that the facts are unusual and that Arrow's post-merger management's handling of the matter was atypical.)

Consolidated Foods — product extension, but with reciprocity potential which will be discussed, *infra*, and in the RELIEF section of this article.

³⁴ Procter & Gamble Co. (Clorox), [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967).

that such entry by the large firm in the vertical or horizontal context threatens the future dynamism of price competition in the relevant market, it is a non sequitur to ascribe those attributes to the true concentric merger. Here we do not have a case of meager empirical evidence to substantiate economists' hypotheses; there is no evidence at all. In fact, from the point of view of the entering firm's impact, that firm is more likely to tread lightly or not at all with whatever market power is supposed to be included in its size, as a function of its unfamiliarity with the business.

The proposition that, upon achieving such familiarity, it will be a threat to price competition carries with it two serious implications. First, parallel pricing is only very rarely achievable without acts of conspiracy.³⁵ Secondly, it is impractical and illogical to assume in this day and age that a manager of any sophistication will intentionally wreck his operating results across the entire expanse of his geographical distribution area in an entire product line in order to achieve unrivaled dominance, even if the Robinson-Patman Act is not being enforced.³⁶ The management and profit-and-loss responsibility in the conglomerate model does not permit such grandiose power plays. Notions that this type of action is a substantial probability in the true product extension setting may have been viable at the turn of the century when investment spending realistically included predatory pricing costs, but that was another world.³⁷ In addition, the impact of evolving techniques of accounting for profitability which are tending to require divisional and product-line isolation of results will serve to make it more apparent when a company is pouring resources into loss operations, whether or not for predatory purposes. Such a trend will make it even more unlikely to subsidize losses as a way to seek immunity from competition,³⁸ if not from a Robinson-Patman Act

³⁵ Even in cases which deal with conspiracy, one of the most frequent types of conspiratorial conduct is the communication in which an errant conspirator is being admonished to get back in line. See, e.g., DeMaree, *How Judgment Came for the Plumbing Conspirators*, FORTUNE, Dec. 1969, at 95.

³⁶ See ENFORCEMENT section, *infra*.

³⁷ See *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1932). There was still a dinosaur in our midst as recently as 1966, but its extinction was assured by the Government with additional treble damage actions that should, between them, loosen that market dramatically. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. Grinnell Corp.*, 307 F. Supp. 1097 (S.D.N.Y. 1969). See also E. SINGER, *supra* note 20, at 261.

³⁸ 1969 PRESIDENTIAL TASK FORCE ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6472 (daily ed. June 16, 1969) [hereinafter cited as STIGLER TASK FORCE REPORT]; *Anti-trust Policy and the Conglomerates*, Address by George Stigler, McDonnell Inst. Research Conf., June 30, 1969. *But cf.* FTC, REPORT ON THE MEAT PACKING INDUSTRY pt. 5 (1920) (note the date); A. BURNS, THE DECLINE OF COMPETITION 451 (1936); C. EDWARDS, MAINTAINING COMPETITION: REQUISITES OF A GOVERNMENT POLICY 159 (1949); A. KAPLIN, BIG ENTERPRISE IN A COMPETITIVE SYSTEM 216 (rev. ed. 1964); Blair, *supra* note 30, at 688; Hale, *Diversification: Impact of Monopoly Policy upon Multi-Product Firms*, 98 U. PA. L. REV. 320, 364 (1950) (who characterizes this conclusion by saying that subsidization can be accomplished by any firm with money, regardless of diversification or mode of entry, *id.* at 346-55); Turner, *supra* note 30, at 1339-48.

perspective, at least from the viewpoint of the institutional investor in the company's securities, who is unlikely to view that phenomenon as good speculation.

OTHER FORMS OF LEVERAGE

Subsidization of predatory price cutting, as noted above in the conglomerate setting, is seen as a form of leveraging market positions; the rationale being that a firm's power in various markets may be cumulated for the purpose of directing decisive competitive thrusts in a particular market.³⁹ Since price is but one factor in competition, economists and tribunals have theorized as to how leveraging can be applied to other competitive tools. These other implements of business activity include advertising and promotion, tie-in sales or full-line forcing, the role of efficiencies or scale economies, purchasing, access to capital, and reciprocity power.

Advertising, especially since the *Procter & Gamble — Clorox*⁴⁰ case, has received a great deal of special attention vis-à-vis the conglomerate phenomenon in the setting of consumer products markets. The first judicial assertion in a modern case that advertising expenditure levels could affect competition within a market as well as the ability of new firms to enter successfully was, of course, the Supreme Court's statement in *American Tobacco Co. v. United States*.⁴¹ We have now reached what may be a stage of intense over-reaction on this subject with the possible result being the assumption of major policy positions that could injure advertising as a useful institution.⁴² In addition, whether there is room

³⁹ Leverage is viewed as multi-directional phenomenon. In the vertical acquisition context it is seen as one stage of production subsidizing a later stage. *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271 (1964); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (2d Cir. 1962); *United States v. Aluminum Co. of America (Cupples)*, 223 F. Supp. 718 (E.D. Mo. 1964); Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 29, 44 (1949). It is viewed as identical in both the horizontal and the market extension merger setting. *Id. See Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (merger with both vertical and horizontal aspects); *Beatrice Foods Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,244 (FTC 1965); *Foremost Dairies, Inc.*, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,877 (FTC 1962). In the concentric merger setting, inter-product relationships may tend to weaken the argument somewhat about the transferability of market power as well as its cumulative effect. *See Edwards, Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 344-48 (G. Stigler ed. 1955); Stigler, *supra* note 29, at 184. *But see C. KAYSEN & D. TURNER, supra* note 9, at 135. "The only leverage in a merger of this kind [conglomerate] is the leverage of money. Many firms without significant market power have plenty of money." *See also Bork, Antitrust in Dubious Battle*, FORTUNE, Sept. 1969, at 103; Clemens, *Price Discrimination and the Multi-Product Firm*, 19 REV. ECON. STUDIES 1, 3 (1950).

⁴⁰ [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967).

⁴¹ 328 U.S. 781, 797 (1946).

⁴² "Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives that he should consider in seeking to make an optimal allocation of his necessarily limited economic resources." *Procter & Gamble Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,673, at 21,586

within the ambit of antitrust considerations to evaluate the social merits of advertising is in great doubt—in this context those arguments tend to be epithetical rather than valuable.⁴³ It is not contended here that advertising (including non-media promotion) is not capable of abuse. On the contrary, the well endowed brutal competitor would turn naturally to this tool in no-quarter warfare.⁴⁴ Whether, however, no-quarter warfare is a real and present danger in a sophisticated age is at best doubtful. In addition, the relevance of aggregate dollars spendable on advertising by a firm is questioned by experts,⁴⁵ and the leverageability of advertising in the true concentric merger is but a matter of pure conjecture at this stage.⁴⁶

None of the leading cases under amended section 7 deal with tie-in selling or full-line forcing as an issue. Though an early case was faced with such an issue,⁴⁷ the Court approved the merger on the grounds that the merging firms were not competitors. From that time, 1913, until 1936,⁴⁸ tie-in selling was virtually ignored in any context. Since 1936, however, it has received significant attention in the Sherman Act setting as well as under section 3 of the Clayton Act where the "commodity" test is met.⁴⁹

(FTC 1963) (Commissioner Elman, Opinion). "[C]ost advantages of scale are of more than one kind, and . . . the kind involved in this merger [advertising], far from representing a net social benefit, is independently offensive to at least the spirit, if not the letter, of the antitrust laws." *Id.* at 21,585 (Commissioner Elman, Opinion).

⁴³ "[P]romotional expenditures by rival sellers which are mutually self-cancelling, so that the demand curves of the sellers are the same after the expenditures as they would have been without them, can also be termed clearly wasteful." C. KAYSEN & D. TURNER, *supra* note 9, at 69. See also Turner, *supra* note 30; cf. *Relief in Advertising Antitrust Cases*, Lecture by Richard Solomon, NICB Workshop, Advertising & Antitrust, New York City, 1968.

⁴⁴ See the discussion of the Clorox-Purex battle for Erie, Pennsylvania, in Procter & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,563, 21,576, 21,578, 21,583 (FTC 1963), *aff'd*, 386 U.S. 568 (1967).

⁴⁵ J. BACKMAN, ADVERTISING AND COMPETITION 44 (1967); J. DEAN, MANAGERIAL ECONOMICS 354-55 (1951); Schachte, *The View from the Market Place*, 26 ABA ANTITRUST SECTION 160 (1964); Telsar, *Advertising and Competition*, 72 J. POL. ECON. 537, 556, 558 (1964); Tenant, *An Economist's View*, 26 ABA ANTITRUST SECTION 168 (1964). On product failure despite heavy expenditures for advertising, see Schorr, *Many Products Fizzle Despite Careful Planning, Publicity*, in CONTEMP. AM. MARKETING 113 (1962). On brand loyalty, see Cunningham, *Brand Loyalty—what, where, how much?*, HARV. BUS. REV., Jan.-Feb. 1956, at 116; Cunningham, *Customer Loyalty to Store and Brand*, HARV. BUS. REV., Nov.-Dec. 1961, at 127, 134. But see J. BAIN, *supra* note 32, at 240, 250, 320; Bain, *Advantages of the Large Firm: Production, Distribution and Sales Promotion*, 20 J. MARKETING 336 (1956).

⁴⁶ Even in the matter of *Procter & Gamble—Clorox* it is notable that, despite the fact that P & G was the nation's largest advertiser, with a long record of intense media use, there was no note of efforts by P & G to transfer any of the brand identities to the Clorox trademark. The impact of the Commission's and the Court's position in that case, therefore, was merely aggregate dollars and efficiencies (which will be discussed *infra*). That dollars are mobile, alas, must be conceded.

⁴⁷ *United States v. Winslow*, 227 U.S. 202 (1913).

⁴⁸ *International Bus. Machs. Corp. v. United States*, 298 U.S. 131 (1936).

⁴⁹ *Compare International Bus. Machs. Corp. v. United States*, 298 U.S. 131 (1936) with *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United*

Basically this practice requires special kinds of dependence by the buyer upon particular products or services attainable only from the individual seller. That this dependence can occur as a firm's multiple mergers become more diverse must be conceded. That it should become a reason for preventing or undoing a merger is highly doubtful, as will be explained under the relief section of this article. Closely related to full-line forcing, of course, is exclusive dealing, and indeed, it was exclusive dealing case law that generated the quantitative substantiality rationale based upon structure and size distribution of firms that now permeates section 7 thinking.⁵⁰ Exclusive dealing, like tie-ins and full-line forcing, does not appear to be a danger in the section 7 context. It must be remembered that section 7 looks toward potentialities, and in that regard it should also take into account that the law on many behavior questions is well established and well known. Notwithstanding the intensity of price fixing conspiracies in the face of the fact that it is also well known that such acts are per se violations of the Sherman Act, one distinction must be borne in mind. Few industries, relatively speaking, are amenable to exclusive dealing or full-line forcing. These practices, to be imposable by a seller, require a special dependence on that seller that is a function of the absence of vertical countervailing power combined with a "special asset" (trademark, patent, unique product, etc.). These considerations are uniquely irrelevant in the convergent concentric merger, and totally impossible in the divergent concentric setting.

A sonorous dialogue is currently raging between Professor Bork of the Yale Law School⁵¹ and structuralists as to the role that should be played by merger-resulting efficiencies in section 7 cases of conglomerate character. With due deference to the magnitude of the credentials on both sides of this issue, I suggest that they both may be missing the point; the point (or points) being that very little evidence⁵² has yet been generated vis-à-vis the degree of efficiencies achievable through such mergers in the first instance, and the significance of its impact, if any, in the second. In the conglomerate context, except for the handling of money, it is in great doubt, despite public pronouncements by management people, that efficiencies are a prime motivating factor in the decision to merge.⁵³ And, with

States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941); United States v. Investors Diversified Services, Inc., 102 F. Supp. 645 (D. Minn. 1951). See also Hale, *supra* note 38. Similar problems may, of course, be dealt with under section 5 of the FTC Act as "unfair methods of competition." See FTC v. Texaco, Inc., 393 U.S. 223 (1968). On the other hand, see *Susser v. Carvel Corp.*, 332 F.2d 504 (2d Cir.), cert. granted, 379 U.S. 885 (1964), cert. dismissed as improvidently granted, 381 U.S. 125 (1965).

⁵⁰ Standard Oil Co. v. United States, 337 U.S. 293 (1949). See also Bok, *supra* note 22.

⁵¹ Bork, *supra* note 39.

⁵² "[A]lmost any statement on economies of scale rests on an unsteady base since the theory . . . of firm optimality is still an unsatisfactory notion in economics." Elzinga, *Mergers: Their Causes and Cures*, 2 ANTITRUST LAW & ECON. REV. 53, 64-65 (1968).

⁵³ *Id.* at 65-66. See also Gort, *Diversification Mergers and Profits*, in THE CORPORATE

some frequency, it is being learned that a great fallacy of the finance motivated conglomerate merger is that in order to achieve hoped for improvements in financial planning and control, as well as improved resource allocation in the acquired firm, the acquirer assumes complete financial risks of operations in a market in which it has no expertise in management whatever.⁵⁴ The idea that anyone with an M.B.A. degree who can construct an econometric model on a computer can operate any business on earth should not commend itself to people with experience.

In the concentric conglomerate merger there is no inherent merger-resulting efficiency from the perspective of its defensive use under the anti-trust laws in some very important areas. (Ultimately we are speaking of dollars saved which, regardless of source, can be used elsewhere.) First, as to production, the conglomerate merger entails less in acquisition-resulting efficiency than the horizontal merger, because there is no pooling of production skills and know-how, or the opportunity to close down less efficient facilities or to centralize production. There is no production economy in the sense of causing a move to a lower point on the firm's average cost curve.⁵⁵ On the management side, the point is rapidly reached at which efficiencies attained by spreading management resources across a broad expanse of diverse activities are offset by management's specialization loss.⁵⁶ The merger, therefore, can contribute economies only to the extent that in some areas the firm can obtain factors of production, marketing services or capital more cheaply than before the merger. This may be highly desirable, provided these are true economies and not merely the exercise of monopsony power. To make sense, however, from the purely business perspective, there must be a positive impact on overall firm profitability, or the entire conglomerate effort is meaningless. In that case the antitrust implications of the conglomerate phenomenon pale before the high probability that the movement will collapse of its own weight long before adverse competitive effects in particular markets become a threat.⁵⁷

MERGER 31, 33 (W. Alberts & J. Segall eds. 1961); Heflebower, *Corporate Mergers; Policy and Economic Analysis*, 77 Q.J. ECON. 537, 556 (1963); Markham, *Survey of the Evidence and Findings on Mergers*, in BUSINESS CONCENTRATION AND PRICE POLICY 141, 180-81 (G. Stigler ed. 1955); R. NELSON, *supra* note 10, at 103-04; Stigler, *Monopoly and Oligopoly by Mergers*, 40 AM. ECON. REV. 23, 24 (1950); cf. J. WESTON, *supra* note 10, at 62-85.

⁵⁴ Elzinga, *supra* note 52.

⁵⁵ Blair, *supra* note 30. *But cf.* Clemens, *supra* note 39. Clemens' thesis is that transferability of resources between products within the firm is much greater than is commonly assumed in economic treatises.

⁵⁶ Blair, *supra* note 30, at 680.

⁵⁷ To date, most of our information on firm profitability that is of antitrust significance has to do with size rather than diversity. See FTC, RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED AND SMALL BUSINESS (TNEC Monograph No. 13, 1941); Adelman, *supra* note 17; Dirks, *Wartime Earnings of Small Business*, 31 FED. RES. BULL. 16 (1945); Dirks, *Wartime Financing of Manufacturing and Trade Concerns*, 31 FED. RES. BULL. 313 (1945); Koch & Schmidt, *Financial Position of Manufacturing and Trade in Relation to Size and Profitability*, 33 FED. RES. BULL. 1091 (1947); Koch & Stockwell, *The Postwar Financial Position of Business*, 32 FED. RES. BULL. 1335 (1946); McConnell, *Corporate*

Before examining the significance, if any, of that stage of production or selling at which efficiencies might arise, we are met with the question of the subjective choice of priorities between the general concepts of efficiency and competition. No remarks about the role of efficiencies here would be complete without reference to Judge Hand's analysis in *United States v. Aluminum Co. of America*.⁵⁸ Judge Hand, speaking in the context of the Sherman Act stated:

[T]hroughout the history of these statutes [the federal antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.⁵⁹

It is seriously questioned whether that comment has relevance as one moves further and further away from the single firm dominance problem in the *Alcoa* case. Certainly, as we approach the concentric merger, that question must be restated and its traditional answer reevaluated in terms of the definition of the small unit today and what we may practically expect within a definition of effective competition. Fortunately, this question has had some attention,⁶⁰ and the relationship of market power and efficiency should receive a great deal more prior to broad pronouncements in judicial opinions based upon heretofore nonexistent empirical data.

The highway we are presently travelling in section 7 cases involves

Earnings by Size of Firm, SURVEY OF CURRENT BUS., May 1945, at 6; Warner, *Financial Developments in Manufacturing and Trade in 1944*, 31 FED. RES. BULL. 1191 (1945).

⁵⁸ 148 F.2d 416 (2d Cir. 1945).

⁵⁹ *Id.* at 429.

⁶⁰ Professor Bork takes a broad brush approach and asserts that a willingness to incur added costs resulting from assumed small firm inefficiencies in order to preserve atomistically structured markets is as improper a manipulation of the economy as monopoly practices. Bork, *supra* note 39. Hale would exonerate efficiency generating mergers where the behavioral antitrust statutes (section 1, Sherman Act; section 5, FTC Act; sections 2, 3 Clayton Act) could be used to curb abuses. Hale, *supra* note 38, at 364. Ironically, Professors Kaysen & Turner, though speaking in a Sherman Act context, seem to have thought about this issue along parallel lines with Professor Adelman:

[I]n so far as reduction of market power is incompatible with efficiency and progressiveness, we subordinate the first goal to the second. If, for example, the efficient scale of operation in a particular market is so large in relation to the size of the market that efficient firms are so few in number as to make their possession of market power likely, and the reduction of market power cannot be achieved except at the cost of a substantial loss in efficiency, our policy would call for no action against the power itself.

C. KAYSEN & D. TURNER, *supra* note 9, at 45. "A more promising line of inquiry . . . would be to discover the minimum size of firm needed to operate efficiently in a given industry." Adelman, *supra* note 17, at 1292. Kaysen & Turner do back off slightly on the same issue in the section 7 setting. C. KAYSEN & D. TURNER, *supra* note 9, at 129. The extreme position, which would counterbalance Professor Bork, is that, assuming no inherent efficiency advantage in the large firm over a small firm that could achieve scale economy in a given industry, the large firm will be kept from achieving and conferring benefits of efficiencies because of monopolistic practices. J. STEINDL, *SMALL AND BIG BUSINESS* (1945). See also Rostow, *The New Sherman Act: A Positive Instrument for Progress*, 14 U. CHI. L. REV. 567 (1947).

characterizing efficiencies according to the phase of firm operations in which they arise.⁶¹ This approach ignores the crude fact that scale economies mean dollars, and a dollar is as spendable in production as it may be in advertising and promotion, selling or any place else.

An important question, assuming the presence of merger-resulting efficiencies in the concentric merger, is what can the firm do with these extra dollars. It is generally assumed by the structuralists that this money will be used to drive competitors out of business and prevent others from entering the market. Actually there are three possibilities. The super-efficient firm may treat these savings as profits and either retain them or pay them out as dividends.⁶² It may indeed waste the money by purchasing a short-lived monopoly position. Or, and this is most likely, it may be forced to pass these efficiency savings on to customers with significant degrees of oligopsony power. If the market involves products sold to industrial customers, for example, two important characteristics should serve to exonerate efficiencies. First, efficiencies in advertising and promotion, characterized as the most onerous,⁶³ are not efficacious as tools of monopolization in industrial products markets. Secondly, the customer in such a market is generally a large volume buyer with sophisticated professionals handling the purchasing function and will probably, with its buying power, force these dollars to be passed along. In the consumer products area it must be borne in mind that intense media advertising is not employed in many product categories. Indeed, in many consumer products categories large expenditures in advertising would be useless. Some products simply do not move off the shelf because of a television commercial. In the few areas where intensity of television advertising can be seen to be a potentially decisive factor, structural relief may not be necessary to avert the feared consequences of large firm entry via merger.

Undoubtedly, the most dangerous form of leverage in the concentric merger context is reciprocity. Where the potential to use it is present, we may assume that without some form of prevention it will be used.⁶⁴ The

⁶¹ Selling costs — see E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 126-27 (4th ed. 1942); Blair, *supra* note 30, at 679-81. Advertising — see Procter & Gamble Co., [1963-1965 Transfer Binder] *TRADE REG. REP.* ¶16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967); Turner, *supra* note 30, at 1332-37. Access to capital generally — see FED. RES. BD., *STUDIES OF BANK LOAN RATES IN 1955 AND 1967* (1968); Archer & Faerber, *Firm Size and the Cost of Externally Acquired Equity Capital*, 21 *J. FINANCE* 69-83 (1969); Edwards, *The Banking Competition Controversy*, *NAT'L BANKING REV.*, Sept. 1965, at 1; Shepard, *Conglomerate Mergers in Perspective*, 2 *ANTITRUST LAW & ECON. REV.* 15, 28 (1968).

⁶² See NEAL TASK FORCE REPORT at 5645. Professor Edwards avers that this is a certainty in an oligopoly market in that pricing will be administered anyway. Edwards, *supra* note 39, at 344-48. See also Blair, *Technology and Size*, 38 *AM. ECON. REV.* 121 (1948). I will still persist in the notion that administered pricing is consistently a function of conspiracy, which does not bear on the relationship of the concentric merger to structure.

⁶³ Procter & Gamble Co., [1963-1965 Transfer Binder] *TRADE REG. REP.* ¶ 16,673 (FTC 1963), *aff'd*, 386 U.S. 568 (1967).

⁶⁴ See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965). Practically the only

only question of consequence about reciprocity is how to stop it. It is no more nor less than anticompetitive behavior that can be stopped injunctively without resort to divestiture, and it should not be grounds for divestiture under section 7 unless its post-merger use has already injured competitive vigor.⁶⁵

RELIEF

Those who would, with no more than the paucity of empirical data we now possess, on purely structural grounds declare that the concentric merger is a threat to competition, would with equal zest turn their thumbs down at the end of the litigation and demand that there be a severance of heads. Relief in section 7 matters has been built upon a framework of horizontal and vertical mergers where the act of combination of firms is itself a lessening of the number of participants in the market or an act of foreclosure. And even in these cases the courts have had nowhere to turn for guidance but to older Sherman Act cases where the question was what to do once monopolization has already been in flower. There is, however, no credible analogy between those horizontal and vertical matters and the situation of the firm entering a strange market, especially in the divergent concentric merger, notwithstanding that the entering firm be large, be a participant in other markets, or that a large number of firms in the entered market be single industry firms. In this context the entering firm is at an immediate disadvantage. Even though it retains the management of the acquired company, the investment risk is assumed by the parent, and there is an intelligent reluctance to permit the acquired firm's management to embark upon crusades for market share that involve a great likelihood of earnings dilution.

Dissolution and divestiture,⁶⁶ as remedies in corporate combination cases, have become the standard since their debut in 1911 in *Standard Oil Co. v. United States*.⁶⁷ It is claimed, and perhaps rightly so in the setting of the horizontal or vertical merger, that the very wording of section 7 suggests

dissenter on this point is Professor Bork, who views it as either neutral or beneficial, and, in any event, a mere hobgoblin. Bork, *supra* note 39. For a review of the *Consolidated Foods* case and general bibliography on this subject, see S. OPPENHEIM & J. WESTON, *supra* note 9, at 408-15. Probably the only known instance of a firm abstaining from the use of reciprocity where it might have had a chance to do so may be seen in *United States v. General Motors Corp.* (Locomotive Case), 5 TRADE REG. REP. ¶45,063 (1967) (dismissed for lack of evidence).

⁶⁵ See Address by George Stigler, *supra* note 38. There is, however, significant opinion that, absent predatory application of reciprocity power, the structural relationships are in themselves sufficiently pernicious to result in noncoercive reciprocity practice. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963). There is no evidence that such a result, if actual, would be of a magnitude sufficient to have cognizable section 7 implications.

⁶⁶ Divestiture would be an included remedy within dissolution. They differ only in mechanics of application. See G. HALE & R. HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* 370 (1958).

⁶⁷ 221 U.S. 1 (1911).

that the undoing of an acquisition is a natural remedy. This is undoubtedly a holdover from Sherman Act violations whose essence is intercorporate combination and control.⁶⁸ That it flows naturally into the application of section 7⁶⁹ to concentric mergers on the theory that section 7 is the new abortion license law to facilitate pre-natal disposition of gestating monopoly simply does not make sense.

To what, then, may we turn, short of declining to enforce section 7 at all against concentric mergers? At least until we possess a significant body of basic operating data on the effects upon market performance after acquisitive concentric entry we have a middle ground, which would be to permit the merger but impose injunctive restraints (marketing orders) upon certain areas of conduct to minimize the risks that those advantages, seen by some to be inherent in size, structure and leverage to a decisive degree, will be brought to bear to those infelicitous ends. Indeed, there is as much, no, more logic under the wording of section 7 to the adoption of this approach than can be found to justify the simplistic "off with his head" divestiture approach.⁷⁰

There are, indeed, many dissenters from this view, but I suggest that their dissent is based upon oversimplification of the problem and a search for an easy way out, Sherman Act thinking, resentment that relief in merger cases in general has been difficult of execution, or a desire to punish.⁷¹ If

⁶⁸ *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 330 (1961).

⁶⁹ *Id.*

⁷⁰ "[I]f anticompetitive effects of a merger are probable in 'any' significant market, the merger — at least to that extent — is proscribed." *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962).

If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed.

Id. at 337 n.65. That the courts and the FTC have wide latitude to fashion decrees aimed at control of specific abuse is well settled. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Cement Institute*, 333 U.S. 683, 726 (1947); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *Herzfeld v. FTC*, 140 F.2d 207 (2d Cir. 1944). "[T]he primary focus of inquiry . . . is upon the question of the relief required effectively to eliminate the tendency of the acquisition condemned by § 7. The required relief therefore is a remedy which reasonably assures the elimination of that tendency [toward monopoly]." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 325-26 (1961).

⁷¹ "Injunctive relief, that is, some form of order directing the acquiring firm to behave as if it did not gain this market power, is clearly unacceptable." Elzinga, *supra* note 26, at 45.

There still exists the attitude . . . that divestiture is a harsh and radical remedy: it is better merely to substitute some injunctive order directing the respondent to behave in a certain way, subject to governmental scrutiny. . . .

Of course, this notion is false. Divestiture is a conservative remedy since it eliminates the need for close regulation of future marketing activities.

Id. at 68. "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of section 7 has been found." 366 U.S. at 331. "[T]he

punishment is properly to be considered under the Sherman Act, then so be it. It should not be imposed where the standard of liability is conjecture about future possibilities resulting from an inherently innocuous act. There is even a question based upon the legislative history of the Celler-Kefauver amendment to section 7 whether, in non-horizontal mergers, anticompetitive potentialities are to be prevented by behavioral sanctions.⁷²

Irony of ironies! The cases in which moderated relief has been satisfactory to the Government — in which they have accepted partial divestiture, more than a marketing order yet less than complete dismemberment — have involved mostly horizontal or market extension mergers.⁷³ The marketing order, with one notable exception, has been limited to agreements between enforcement agency and defendant as to how the operation of the business was to be carried on during litigation.⁷⁴

The marketing order is a suitable disposition under section 7 for the concentric merger case. Its provisions may, in the main, be easily worked out. There is the great body of decrees in innumerable behavior cases under section 1 of the Sherman Act, section 5 of the FTC Act, and sections 2 and 3 of the Clayton Act on which to draw and in the bizarre case imaginative wording will flow swiftly from the fertile minds of opposing counsel. They need not involve the Government in the day-to-day operations of the defendants' business, and their efficacy can be maintained through a course of vigorous antitrust enforcement in general. As the ultimate in protections, in the event of failure of the marketing order, jurisdiction may be retained for the purpose of seeking divestiture at a later date.⁷⁵

marketing order is a bastard form of antitrust regulation." Elzinga, *supra* note 26, at 74. "The structural enforcement standard [of section 7] requires structural relief. . . ." *Id.* at 45. "As it turns out, relief decrees seldom result in truly independent firms." *Id.* at 46. "If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividend of their monopolistic practices. . . ." *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948). *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944) (Sherman Act context). For a review of the full panoply of forces militating for or against divestiture, see G. HALE & R. HALE, *supra* note 66, at 370-77.

⁷² See Justice Burton's dissent in *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 608, at 614-15 nn. 7, 8, citing the remarks of Senators Reid and Cummins during congressional deliberations leading up to the passage of the Act. 51 CONG. REC. 9272, 14,254-55, 14,419-20, 14,455 (1914) (remarks of Senators Reid & Cummins).

⁷³ *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); *Hooker Chem. Corp.*, 59 F.T.C. 254 (1961); *Scovill Mfg. Co.*, 53 F.T.C. 260 (1956); *Matter of Standard Oil of Ohio*, 437 BNA ANTITRUST & TRADE REG. REP. A-16, A-17 (Nov. 25, 1969) (McLaren says Sohio Merger Settlement may set pattern), 436 BNA ANTITRUST & TRADE REG. REP. A-19 (Nov. 18, 1969) (Justice Dep't agrees to Sohio-British Petroleum Merger); *Matter of Rockwell Standard Corp.*, 330 BNA ANTITRUST & TRADE REG. REP. A-16 (1967); *United States v. Reed Roller Bit Co.*, 227 BNA ANTITRUST & TRADE REG. REP. A-11 (1965 *Atlantic Refining-Richfield Oil Co.*).

⁷⁴ *E.g.*, acquired product line not to be advertised or promoted jointly with parent company's products. *Procter & Gamble Co. (Folgers)*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,858 (FTC 1967). As to absolute limitations on advertising spending levels, see MONOPOLIES COMMISSION, HOUSEHOLD PRODUCTS 41-42, 44-45 (London 1966).

⁷⁵ See *United States v. United Shoe Mach. Co.*, 110 F. Supp. 295 (D. Mass. 1953);

ENFORCEMENT

In the final analysis, attacks against conglomerate mergers under section 7 of the Clayton Act are but a part of the concern about the condition of markets in general. The entire issue is the extent to which this nation wishes the performance of markets to resemble the results of the competitive model. We cannot appease the national appetite for competition through bringing the spectacular case in the area getting the most press coverage. Effective regulation of business practices can only be achieved by a pervasive antitrust enforcement program. And that is precisely the situation that does not currently exist. Why we should be concerned, for example, with vague and conjectural hypotheses about the potential for the concentric conglomerate merger to facilitate predatory pricing, price fixing, reciprocity and other forms of restrictive practices, and not attack those self-same practices as they occur in the non-merger context is a question for which there is no rational answer.⁷⁶

We have, in fact, been languishing in a permissive antitrust doldrum for several years, stemming from a combination of inadequate enforcement appropriations, political sentiment against adequate enforcement which directly affects the degree of activity of the enforcement agencies,⁷⁷ and the total breakdown of effectiveness of the FTC.⁷⁸ Our agencies are not enforcing the Robinson-Patman Act or bringing cases in general trade restraint areas.⁷⁹ It cannot be expected that competition will be understood to be an important national attribute, or that, without action, the business community will take seriously either the enforcement agencies or the laws they enforce.⁸⁰ Speeches about what is ahead in enforcement do not substitute for enforcement itself in these behavioral areas.

United States v. General Motors Corp. (The Bus Case), TRADE REG. REP. (1965 Trade Cas.) ¶71,624 (E.D. Mich. 1965). *But cf.* Kaysen and Turner to the effect that any policy of permitting mergers and attacking the union subsequently if the anticompetitive potentialities of the combination achieve fruition is wasteful and should be discarded. C. KAYSEN & D. TURNER, *supra* note 9, at 127.

⁷⁶ The response of Dr. Stelzer that section 7 is really not being enforced except to protect comfortable, entrenched, old-line management in sluggish corporations who happen to be friends of an administration, though intriguing, can be but an aside comment, thoroughly ungermane to the principal issue of multi-lateral antitrust law enforcement. See Stelzer, *Antitrust Policy and the Conglomerates*, 44 ST. JOHN'S L. REV. 196 (1969).

⁷⁷ See C. KAYSEN & D. TURNER, *supra* note 9, at 247; REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, 34-35 (Sept. 1969).

⁷⁸ The ABA Report ascribes this to the Commission's being mired in self-viscerating conflict at the topmost level and a haven for incompetents and appointed "friends" at the staff level. In many respects, at least, its comments on the staff are inappropriate and incorrect. When permitted to bring cases, the staff has an overall favorable won-lost record while opposing the most high-powered antitrust defense counsel in the country. In addition, personnel recruitment by law firms and corporation law departments still place a premium on FTC experience when filling antitrust positions in their ranks. This writer's experience is that in general the competence level of most of the FTC staff compares well with that of the average corporate law department.

⁷⁹ ABA REPORT, *supra* note 77, at 17, 18, 21, 67, 68.

⁸⁰ *Id.* at 26.

Congress has also contributed to this condition of lethargy. In the price fixing area, for example, a maximum fine of \$50,000 against a company that may have enhanced its profitability by \$50 million over a 5 to 10 year period is a joke. It is a sick joke, and its shame is compounded by federal judges who consistently refuse to hand out stiff jail sentences and permit hard core recidivists to plead *nolo contendere*, thereby making the court an accessory to the suppression of treble damage claims. There are only two ways to stop price fixing — jail and opening the doors for those who have been victimized to recover damages.

CONCLUSION

The concentric conglomerate merger may be a threat, but that threat is not directly related to market performance in the antitrust sense. The dangers to the public at large stem more from investment risk factors than from dangers that we shall all, because of the conglomerate phenomenon, be mere serfs to industrial robber barons. We are ill advised to attack the concentric merger under the undocumented hypothesis that its characteristics are similar to those of horizontal, vertical or market extension mergers. Ultimately, it is but self-delusion to vituperate about potentialities for anticompetitive conduct in the section 7 setting and ignore the same conduct in the same or more concentrated market structure framework where the perpetrator is an established firm in the industry.