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# A LAWYER'S VIEW OF CONGLOMERATE MERGERS

JOHN T. LOUGHLIN\*

## INTRODUCTION

The number of definitions of conglomerate mergers is but slightly exceeded by the number of writers on the subject. However, a very simple definition will suffice: any merger of companies in unrelated markets. The questions to which this article is addressed may be stated with equal simplicity:

1. Are existing antitrust laws adequate to deal effectively with conglomerate mergers?

2. If so, what antitrust standards should be applicable?

My answer to the first question is that existing law is adequate to deal with conglomerate mergers to the extent that such mergers merit antitrust intervention. To explain that answer and to develop a response to the second question requires exploration of certain popular enforcement concepts.

## SECTION 7 AND HORIZONTAL MERGERS

The furor resulting from Antitrust Chief McLaren's present crusade against the conglomerate merger movement has tended to obscure the fact that it was motivated, at least in part, by the antitrust enforcement policies of his predecessors.

The Celler-Kefauver amendment to section 7 of the Clayton Act<sup>1</sup> became law on December 29, 1950. Remediating what had been described by the Federal Trade Commission in its 1947 Report on Mergers<sup>2</sup> as a monstrous loophole in the 1914 law, the new statute was greeted with a rash of inactivity, suggesting that the FTC had greatly overstated the urgency of the need for a new statute. The first case under the new legislation was not filed until almost two years after the enactment,<sup>3</sup> and the next two years saw only two new cases.<sup>4</sup> But as time went on, largely as a result of increasing congressional pressures, the pace of litigation quickened. It was soon discovered that section 7 cases could be effectively used to fatten administrative budgets. Then too, the Antitrust Division, which had been subjected to the same congressional attention, entered into competition with the Commission for section 7 cases. In 1955, five complaints were filed, two by the FTC<sup>5</sup> and three by the Antitrust Division.<sup>6</sup>

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<sup>1</sup> 15 U.S.C. § 18 (1964).

<sup>2</sup> FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948).

<sup>3</sup> Pillsbury Mills, Inc., FTC No. 6000 (June 16, 1952).

<sup>4</sup> Crown Zellerbach Corp., FTC No. 6180 (Feb. 15, 1954); Luria Bros., Inc., FTC No. 6156 (Jan. 19, 1954).

<sup>5</sup> Union Bag & Paper Corp., FTC No. 6391 (June 30, 1955); Farm Journal, Inc., FTC No. 6388 (June 30, 1955).

<sup>6</sup> United States v. Schenley Indus., Inc., 3 TRADE REG. REP. (1957 Trade Cas.) ¶ 68,664, at 72,700 (D. Del. 1957) (consent decree); United States v. General Shoe Corp., 3 TRADE

As congressional interest continued, as competition between the two enforcement agencies grew, and as their budgets increased, there developed substantial numbers of cases, which in turn ultimately gave birth to a rule of law: *Any horizontal merger opposed by either the Federal Trade Commission or the Antitrust Division is unlawful.*

This rule did not become absolute until the 1950 statute had been law for approximately 16 years, the case delineating it in its absolute form being *United States v. Von's Grocery Co.*<sup>7</sup> However, the development of the rule followed a clearly traceable path. In the earliest cases in the 1950s, the issue of anticompetitive effect was of great importance; injury to competition was either shown to exist or to be reasonably predictable on the basis of evidence on the record. For example, the leading case of *FTC v. Crown Zellerbach*<sup>8</sup> involved the acquisition by a company controlling approximately 50 percent of its market, of a company with an additional 12 percent of that market. In addition to the 62 percent market share of the combined enterprise, the record delineated specific anticompetitive consequences of the acquisition, such as restrictions placed by the combined enterprise upon the ability of independent distributors to obtain needed goods which they had previously obtained from the acquired company and which, after the acquisition, had been diverted to the acquiring company's owned or favored channels.

*Crown Zellerbach*, decided in 1961, was followed two years later by *United States v. Philadelphia National Bank*,<sup>9</sup> in which a 30 percent market share resulting from a horizontal acquisition was found to be "inherently anticompetitive," obviating the need for a showing of anticompetitive effect and thus establishing what amounted to a per se rule for horizontal acquisitions involving substantial market shares. It was held that a showing of economic benefits to the citizenry or to business in the areas concerned was beside the point; the acquisition was deemed unlawful because it contributed to concentration.<sup>10</sup>

The Supreme Court carried this principle to the ultimate extreme in *United States v. Von's Grocery Co.*,<sup>11</sup> where it condemned a horizontal merger which had created a combined market share of about 7.5 percent of the retail grocery sales in the area, again without actual demonstration of existing anticompetitive effects and, more importantly, without delineation of specific predictable anticompetitive effects. Thus was the per se rule extended to acquisitions involving inconsequential market shares.

In my own view, the concept that the basic purpose of the Clayton Act

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REG. REP. (1956 Trade Cas.) ¶ 68,271, at 71,227 (D. Tenn. 1956) (consent decree); *United States v. Hilton Hotels Corp.*, 3 TRADE REG. REP. (1959 Trade Cas.) ¶ 68,253, at 71,171 (D. Ill. 1959) (consent decree).

<sup>7</sup> 384 U.S. 270 (1966).

<sup>8</sup> 296 F.2d 800 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962).

<sup>9</sup> 374 U.S. 321 (1963).

<sup>10</sup> *Id.* at 370-71.

<sup>11</sup> 384 U.S. 270 (1966).

is to prevent economic concentration by "keeping a large number of small competitors in business"<sup>12</sup> misses the point of the statute. Rather than *keeping* smaller companies in business, the intent of the law is to preserve a competitive environment which encourages small businesses to enter and helps them to survive; and then, if they so choose, permits them to exit, reaping the reward for their efforts by selling at the best price. The *Von's Grocery* rule is absolute as to any horizontal merger opposed by the Government because every such acquisition per se makes a contribution to economic concentration, at least when measured as of the moment of the acquisition — which is as far as the enforcement authorities have desired to look, for to look farther could complicate the economic picture and upset tidy rules of thumb.

The preoccupation of the enforcement authorities with horizontal acquisitions had two important consequences: (a) the number of horizontal mergers substantially diminished; and (b) the growth-minded companies were compelled to seek acquisitions in non-horizontal areas. This search for different types of mergers was not only necessitated by the prevailing anti-horizontal merger policies, but even appeared to be somewhat encouraged by the authorities.<sup>13</sup> This administrative approach provided fertile ground for the new breed of conglomerators today defending their moves in court.

It is not at all surprising that in March of 1968 (two years after the decision in *Von's Grocery*), the Federal Trade Commission reported that conglomerate mergers had reached a "record level," accounting for 83 percent of all large mergers.<sup>14</sup> The Commission then announced the institution of a major study of conglomerate mergers,<sup>15</sup> a study which formed the basis for a staff report published in November of 1969.<sup>16</sup> Also, by early 1968, the Antitrust Division had joined in the view that conglomerate mergers might require attention; for instance, a trade journal headline stated that the Antitrust Chief had concluded that "Legislation is Needed to Expand Scope of Attack on Conglomerate Merger." It is interesting to note that at this very time and thereafter, officials of both the Commission and the Division were taking bows for their success against horizontal mergers. For example, one such official expressed great pride in the fact that the horizontal merger had become a very "rare bird." Yet at the same time, the enforcers' laments about the new conglomerate wave were demonstrating that the "victory" over horizontal merger had been a Pyrrhic one.

<sup>12</sup> *Id.* at 275.

<sup>13</sup> "If we exercise reasonable restraint in formulating rules on other kinds of mergers, a tough rule on horizontal mergers simply shuts off some merger alternatives, not all." Conference Transcript, *Basic Antitrust Questions in the Middle Sixties* (National Industrial Conference Board, March 3, 1966).

<sup>14</sup> 349 BNA ANTITRUST & TRADE REG. REP. A-12, 13 (Mar. 19, 1968).

<sup>15</sup> 365 BNA ANTITRUST & TRADE REG. REP. A-10 (July 9, 1968).

<sup>16</sup> BUREAU OF ECONOMICS, FTC, ECONOMIC REPORT ON CONGLOMERATE MERGERS (1969) (hereinafter cited as FTC REPORT).

*Section 7 and Conglomerate Mergers*

Returning to the questions posed at the beginning of this commentary, the strong affirmative answer to the first, *i.e.*, that existing antitrust laws are clearly applicable to conglomerate mergers and competent to prevent any conglomerate merger which should be prevented for legitimate antitrust reasons, is based upon the language and legislative history of the statute. There is no exclusion of conglomerate mergers — any such view is but a vestige of the antitrust enforcers' past preference for the horizontal variety of cases (the challenge of conglomerate cases was apparently easy to resist when "lead pipe cinch" horizontal cases were available). The question was answered succinctly and definitively by the Supreme Court in *FTC v. Procter & Gamble Co.*,<sup>17</sup> when it stated: "All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate, or other."<sup>18</sup>

The second key question relates to the standards to be applied to conglomerate merger enforcement. The single sentence quoted above from *Procter & Gamble* answers this question as well, and the conclusion is firmly supported in the legislative history.<sup>19</sup> Section 7 has a single standard: substantial lessening of competition or tendency to monopoly. Translating this for conglomerate merger purposes, the logical test would appear to be that a conglomerate merger will be regarded as unlawful when it is reasonably predictable, on the basis of economic expertise, that the merger will *substantially lessen competition* with (a) competitors of either of the merged corporations; (b) customers of either of the merged corporations; or (c) suppliers of either of the merged corporations.

In applying the above test, it is emphasized that in any type merger, "injury" must not be assumed from increases in efficiency or service, product improvements or innovations, or reductions in cost. Where such results are obtainable, there is absolutely no reason why their benefits should be denied to the economy. Competitors encountering this type of "injury" should use their time and efforts to imitate or improve upon the advances of the merging companies, rather than attempting to persuade the antitrust authorities in Washington to oppose the merger. An inexcusable antitrust attack was that which aborted the proposed merger of Abbott Laboratories and Nuclear-Chicago Corp. several years ago, on the basis, among others, that the combination would have been able to pioneer advances in medical

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<sup>17</sup> 386 U.S. 568 (1967). Here, the Court held that Procter & Gamble's acquisition of Clorox was proscribed by section 7 due to the competitive advantages which would inure to Clorox from the merger. One main advantage would be access to the substantial advertising discounts given to Procter & Gamble by virtue of the great volume of media resources purchased.

<sup>18</sup> *Id.* at 577.

<sup>19</sup> The House Report accompanying the bill amending the Clayton Act in 1950 sought "to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal. . . ." But, it adds, ". . . which have the specified effects of substantially lessening competition . . . or tending to create a monopoly." H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949).

applications of nuclear energy.<sup>20</sup> Such progress benefits both humanity and competition by providing competitive incentive for all others in the field. Similarly, economic success also serves to attract outsiders to the new field.

Let us turn now to the tests which Antitrust Chief McLaren has outlined in the antimerger complaints resulting from the anticonglomerate crusade launched in 1969.<sup>21</sup> His basic tests are three: (1) effects upon potential competition; (2) reciprocity effects; and (3) economic concentration effects. Only the third is new in the conglomerate merger context; the first two tests have already achieved a measure of acceptance, but it would be a mistake to apply them without in-depth economic analysis.

The decision in *United States v. Penn-Olin Oil Co.*<sup>22</sup> established that the effect upon potential competition is an appropriate subject for consideration under section 7. However, the concept is by no means an easy one to apply if that section is to accomplish its stated purpose of preventing competitive injury; it must be recognized that the potential competition test has a capacity for evolving into a gambit to apply the "easy" horizontal merger tests to mergers which lack horizontal overlap. Foreclosing the entrance of a company which has considered entry by internal expansion may not be sufficient when related to the injury criterion of existing law, for in many industries entry by internal expansion will tend to have a greater potential for competitive injury than entry by acquisition. At the same time, by denying an existing company its right to sell out to an entering company at a decent profit, the value of existing companies in the industry is diminished, thereby compounding the destructive effect upon them. Since many industries cannot be entered effectively without merger, precluding that type entry will also tend to exclude the competition of the "potential" competitor who has surveyed the industry and concluded that entry is impossible except by acquisition or merger. And, finally, it should be noted that the oft lamented "disappearance" of the acquired company will usually be temporary, simply because this type of disappearance generally stimulates the birth of new independent companies.

This discussion is not intended to suggest that necessarily all entry acquisitions by large companies should be deemed lawful. Obviously, where a company deploys its size and power to produce post-acquisition competitive injury, or where these results are clearly predictable on the basis of expert economic inquiry, this affords a basis for divestiture, as was the case in the Procter & Gamble acquisition of Clorox.<sup>23</sup>

The second major test in the pending conglomerate merger cases, that

<sup>20</sup> However, due to the termination of the merger, the complaint was dismissed.

<sup>21</sup> See, e.g., *United States v. International Telephone and Telegraph Corp.*, 306 F. Supp. 766 (N.D. Ill. 1969); *United States v. Ling-Temco-Vought, Inc.*, Civil No. 69-438 (W.D. Pa., April 14, 1969).

<sup>22</sup> 246 F. Supp. 917 (D. Del. 1965), *aff'd. mem.*, 389 U.S. 308 (1967). Here, the Court extended section 7's prohibition to joint ventures as well as mergers by potential competitors.

<sup>23</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

of reciprocal effects, has also achieved acceptance, and when properly applied, generally has substantial relevance to the injury criterion of section 7. Indeed, one may well question the previous inaction of the enforcement agencies during the development of a business weapon which is available in its objectionable forms only to the most powerful companies.

It is to be hoped, however, that in utilizing the reciprocity test, the enforcement authorities and the courts will analyze carefully the facts of each case, avoiding application of the concept to remote possibilities. For example, one of the adverse reciprocal effects alleged in the complaint against the merger of Ling-Temco-Vought (LTV) with Jones & Laughlin Steel Company (J & L)<sup>24</sup> consists of the following: J & L buys iron ore from mining companies, the operations of which necessarily require the use of mining cable, a product produced by the Okonite subsidiary of LTV. Whether this is a real or a remote example of reciprocity appears to depend upon development of other factors, such as: (1) whether mining cable is an important day-to-day element of mining expense; (2) whether mining companies sell their products under contractual relationships negotiated on the basis of supply and demand in a bargaining context in which cable purchases might be considered a comic intrusion; (3) whether competing cable manufacturing companies are large, integrated and well able to wage competition.

Reciprocity appears to be a crucial element of the complaint in the case involving the acquisition of Automatic Canteen by International Telephone & Telegraph Corp. (ITT).<sup>25</sup> ITT has hundreds of plant and office establishments and literally thousands of suppliers throughout the country. Automatic Canteen, of course, operates food and vending concessions in business establishments on a nation-wide basis. Here, the subject for economic inquiry appears to be less complex; to determine if, now that ITT, through Automatic Canteen, is engaged in the food and vending business, suppliers of food and vending service to ITT facilities and suppliers are in jeopardy of foreclosure from this business.

Reciprocity, as such, is not the basic subject of this article, but it should be noted that, like the current conglomerate merger movement, reciprocity as it exists today represents, in part, past failures of antitrust enforcement. For example, just a few years ago one of Mr. McLaren's predecessors indicated that he was not excited about reciprocity.<sup>26</sup> It has also been reported that a national association of trade relations experts was created at the suggestion of a staff member of the Federal Trade Commission.<sup>27</sup> Under these

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<sup>24</sup> *United States v. Ling-Temco-Vought, Inc.*, Civil No. 69-438 (W.D. Pa., April 14, 1969). The major theory upon which this action is based, however, is that the merger eliminated the competitive threat posed by LTV's potential independent entry into the oligopolistic steel industry.

<sup>25</sup> *United States v. International Telephone and Telegraph Corp.*, 301 F. Supp. 1066 (N.D. Ill. 1969).

<sup>26</sup> Address by Donald F. Turner before the American Bar Association's Antitrust Section, April 14, 1966.

<sup>27</sup> *A Customer Is a Friend*, FORTUNE, June 1965, at 194.

circumstances, it is hardly appropriate for the enforcement agencies to strike too deeply or too boldly against everything that has reciprocal aspects.

I do not mean to defend reciprocity. Coercive or systematic reciprocity is offensive to economic morals, injurious to competition and unhealthy for the company practicing it. In one sense it appears to be selling on the strength of purchasing muscle, but in another real sense, it represents a selling weakness, tending toward ineffective purchasing and increasingly weakened ability to sell on the merits of the particular product or service involved. In view of the foreclosure effect, action against reciprocity is surely in order. But that action should be reasonable, balanced and temperate; it is rather late in the day to outlaw all horse-trading or to outlaw mergers because incidental horse-trading may be feared.

It is regrettable that the enforcers' interest in reciprocity had to be awakened by the use of this issue as a tool to combat mergers, for reciprocity can also result from internal expansion into a new field. Since such entry is promoted by the enforcement agencies, it would appear that enforcement in such instances must be limited to terminating the practice of reciprocity rather than the entry. Similarly, in merger situations any reciprocity evil may often be terminated without divestiture. Thus, in merger cases where reciprocity is the sole anticompetitive result, it may be possible to limit divestiture orders to those cases where it is predictable that substantial reciprocal effects will occur even in the absence of the active *practice* of reciprocity. Where, however, a merger will merely afford the opportunity to practice reciprocity, an order forbidding the practice would suffice.

We move now to the third and, clearly, the most important and most controversial criterion guiding Mr. McLaren's anticonglomerate crusade — what has been described as the "super-concentration" theory. The complaint in *United States v. Ling-Temco-Vought, Inc.* alleges:

Ownership of manufacturing assets in the United States is becoming increasingly concentrated. The proportion of the total assets of the nation's manufacturing corporations held by the 200 largest firms increased from 48.1 percent in 1948 to 54.2 percent in 1960 and 58.7 percent in 1967. The great bulk of this increase in concentration has resulted from mergers and acquisitions.<sup>28</sup>

One astonishing aspect of the super concentration theory advanced in the current series of conglomerate merger cases is that President Nixon's chief trustbuster appears to have adopted the economic theme of President Johnson's principal antitrust economic expert, Dr. Willard Mueller of the Federal Trade Commission. The statistics in the current complaints are similar to those contained in a statement by Dr. Mueller before the House Ways and Means Committee Hearing on March 12, 1969.<sup>29</sup> The complaint language also parallels the thrust of the recent FTC Staff Report entitled *Eco-*

<sup>28</sup> Civil No. 69-438 (W.D. Pa., April 14, 1969).

<sup>29</sup> 401 BNA ANTITRUST & TRADE REG. REP. X-1 (1969).



*conomic Report on Corporate Mergers*,<sup>30</sup> which commences as follows: "In unprecedented fashion the current merger movement is centralizing and consolidating corporate control and decision-making among a relatively few vast companies."<sup>31</sup>

Similar words have been heard before, most notably in the Temporary National Economic Committee Report on its "Investigation of Concentration of Economic Power"<sup>32</sup> in 1941, but all of these arguments and statistics sound rather mild when contrasted with the earlier complaint of a politician who stated, "The relentless, remorseless and unyielding grasp of monopoly is upon every avenue of trade and commerce." That statement was made in 1890.

Economic concentration is the same catchword criterion which purportedly justified the questionable decision in *Von's Grocery*.<sup>33</sup> One important difference should be noted, however. When Mr. McLaren uses the concept of concentration in his anticonglomerate program, he refers not to concentration within a specific industry, but rather, to "super concentration" in industry as a whole. Taken alone, this proposed new conglomerate merger test amounts to an attack upon size.

To demonstrate the impropriety of economic concentration as a test for conglomerate mergers, it is helpful to explain why that test has been improperly applied to horizontal mergers. Acceptance of the contention that horizontal mergers are presumptively anticompetitive demonstrates a lack of faith in competition, an unawareness of changing national needs, and a lack of appreciation of the practical effects of most horizontal mergers. It is "horse and buggy" antitrust philosophy premised on two presumed needs: (1) to prevent a decrease in the number of competitors and (2) to protect the other remaining competitors from the supposedly increased efficiency and ability of the newly merged organizations. The first proposition, that the combination of two successful competing businesses is violative of antitrust principles because a competitor is eliminated and concentration is increased, assumes a static structure and neglects the important fact that merger activity is often one of the greatest stimulants to the economic birth rate. This may be illustrated by what might be termed the "Fat Cat Doctrine." Suppose that a certain alley is populated by two vigorous, combative cats, one of whom subsequently disappears. Thereafter, as a result of the lack of competition, the remaining cat has a tendency to fatten and relax. When this occurs the alley of the "fat cat" is sure to be invaded by several lean and hungry young cats.

An example of a merger which quickly produced substantial new entry occurred in 1960, when there was just one company of a specific type serving

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<sup>30</sup> FTC REPORT at 1-21.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> TEMPORARY NATIONAL ECONOMIC COMMISSION, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER (TNEC Monograph No. 21, 1941).

<sup>33</sup> See note 12 *supra* and accompanying text.

the entire city of Las Vegas, Nevada, with great efficiency and with great personal attention to the needs of the individual customers. When this business was acquired by a substantial national company in the same business, the Federal Trade Commission Staff objected that the acquisition would entrench the dominant company and would deter or foreclose entry due to the fact that small companies in this essentially service business would be unable to compete with the "national giant." However, the record showed that by the time the Commission had completed its investigation, almost a dozen new companies had entered the business. They were able to do so because the national company was unable to provide the personal service at which small local companies excel. With some exceptions (*e.g.*, automobile manufacturing, newspapers, steel, glass), horizontal mergers tend to encourage the birth of new companies.

Contrary to popular theory and the second proposition above, horizontal mergers more often benefit rather than injure the remaining companies. And generally, the bigger the merger, the more it may help the remaining independent competitors; the new entity is unable to retain all of the business formerly held by both of the merging companies, and old and new independents quickly seize upon this opportunity to improve their own position.

A specific example may be seen in the merger in Milwaukee, Wisconsin, of the two leading department stores, Gimbel's and Schuster's. The Government sued,<sup>34</sup> expecting its case to be bolstered by testimony from the smaller competitors in the area that the combination would be injurious. Much to their surprise, the trustbusters found that most of the competing department stores were pleased with the merger because they knew that the new combination could not control the business of both the old stores, and that the smaller competitors would actually have more rather than less business.

The concept of perpetuating decentralized merchandising systems is of doubtful validity in an economic climate which demands national, as well as local merchandising and service systems. Congress desired to protect competition, not an unchanging head count of competitors; and horizontal mergers often represent a normal and healthy method of competition. Congress was much more interested in the well-being of consumers, than in the perpetuation of specific "Mom and Pop" grocery stores. The crowning error, however, is the fact that in seeking to protect small business, existing horizontal merger policy tends to have the opposite effect.

This is not to minimize the importance of "Mom and Pop" and their corner store; modern social and economic needs are such that the consumer requires more than those benefits which flow from size in the production and distribution of new and finer goods. Indeed, modern times demonstrate that a progressive "Mom and Pop" have been able to do far better than their predecessors in the 1930s and 1940s. They may charge somewhat more

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<sup>34</sup> United States v. Gimbel Bros., Inc., 202 F. Supp. 779 (D. Wis. 1962).

for many items, but the higher price generally reflects individualized service which is far beyond the capabilities of the large chains. In fact, today "Mom and Pop" often fare so well that they expand their activities until ownership of a small chain of neighborhood stores is achieved. However, we eventually find them "minding the store" or stores, moving toward retirement and facing a merger policy which prohibits the most successful in their class from selling to buyers who are both willing and able to pay them the best price. This ignores a basic principle of practical economics, *i.e.*, that the "right of exit" at a fair price is one of the best incentives to new business entry. In addition, it ignores the fact that the exit of one local independent through merger with a national or larger regional organization, not only aids those remaining independents, but generally has a direct tendency to *increase* their number by attracting new entries.

Speaking before the annual antitrust program of the National Industrial Conference Board in March, 1968, leading antitrust economist Dr. Irston Barnes noted the fact that Government antitrust activity too frequently is "inconsistent with maintaining a healthy, competitive free enterprise economy."<sup>35</sup> He stated:

Merger law enforcement offers a disturbing demonstration of antitrust actions which are often irrelevant to a competitive economy. This deplorable state of affairs has come about not because there is any dearth of mergers which invite antitrust attention but because the court-devised tests of illegality are meaningless in terms of preserving competition.<sup>36</sup>

Down through the years, a substantial amount of economic mischief has been perpetrated in the name of antitrust. Past and current antimerger policy is an example. Indeed, the negative effect of the prevailing guidelines tends to frustrate and thus injure the competition intended to be protected.

Some horizontal mergers are obviously anticompetitive. But as a general proposition, only acquisitions by a dominant company or a combination producing such a company raise a genuine threat to competition. All others should be almost presumptively lawful because they serve to create more effective competition for the leaders; and at the same time the union of two companies in a market often tends to make that market more rather than less attractive for the entry of new and smaller companies. Actually, small and medium sized competitors probably should be encouraged to merge, for through combination they improve their ability to compete, to survive, to profit and to serve. It is true that the enforcement agencies cannot be said to state general opposition to small mergers, but the *Von's Grocery* case gives them the power to do so effectively if they should so choose.

The enforcement record against horizontal mergers strongly indicates

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<sup>35</sup> Transcript, *Seventh Conference on Antitrust Issues in Today's Economy* (National Industrial Conference Board, 1968).

<sup>36</sup> *Id.*

"overkill." It is the thesis of this article that a similar "overkill" against conglomerates is a distinct possibility if the super concentration theory is adopted; that the overall result of too much antitrust control could well be worse than too little control; and that this would be injurious to the economy as well as bad antitrust.

For purposes of discussion (and with obvious risk of oversimplification), conglomerate mergers may be divided into three categories. The first includes those which have no anticompetitive consequences and which possess a sound economic rationale. A second category, suspected by many to exist, is the "house of cards" type — those motivated primarily by financial and stock market considerations. Although lacking sound business rationale, these involve no adverse antitrust consequences. The third category consists of conglomerates which may, in the words of the amended Clayton Act, "substantially lessen competition."

As to the first category, there is neither a need nor a basis for the Government to act. While financial considerations may be important in motivating the combination, economic benefits do flow from the merger. The most desirable combinations will be those which involve sufficient economic relativity to permit increased managerial effectiveness and yet enough difference to assist in eliminating cyclical vulnerabilities.

As to the second category, the action of the marketplace is sufficient to preserve competition. The lack of a firm base may soon produce voluntary divestiture of poorly fitting parts or even a break-up of the entire organization. Some budding conglomerates have already been compelled to perform a veritable corporate strip-tease as they rapidly shed acquisitions. This voluntary divestiture occurs without need for antitrust intervention; indeed, there is no relativity to antitrust considerations. Far from injuring competitors of the acquired company, such acquisitions often provide them with splendid opportunities to increase their percentage of the market. This illustrates the point that Mr. McLaren's tax and securities arguments, as well as his other allegations, are unrelated to antitrust, except that their thrust tends to make antitrust intervention less meaningful, and even unnecessary.

As to the third, the antitrust enforcers in earlier administrations (with very minor exceptions) avoided the challenge, at least partially because such cases presented new and difficult problems of proof. Instead, they preferred to concentrate on the "push-over" horizontal cases, while taking refuge in the position that new legislation was needed to control conglomerate growth. All should be grateful to new Antitrust Chief McLaren for at least having the courage to give existing legislation a chance; however, such gratitude should be tempered by recognition that the thrust of the McLaren attack goes far beyond traditional antitrust concepts and may involve danger to the economy. The apparent effort to employ the "superconcentration" theory not only against specific mergers, but against the conglomerate move-

ment in general (a movement which, paradoxically, antitrust helped to start and which, in very large part, involves non-antitrust issues), amounts in its ultimate analysis to an attack upon corporate size. Throughout antitrust history, the enforcement chiefs and the courts have consistently adhered to the principle that size alone is not an offense. Adoption of the "super concentration" theory would constitute a sharp reversal of this guiding yardstick.

Whether there has been a trend toward dangerous economic concentration is primarily a question for statisticians and economists. To a lawyer standing on the side lines of that statistical debate, it appears that each side is able to muster up a set of figures establishing some point, until the other side rejoins with its own collection of figures. That is the trouble with statistics. I should like to note only two points which have been neglected.

The first is that in the current statistics of the economists who portray the evils of galloping concentration, no reference whatsoever has been made to one of the economic epithets which Franklin Delano Roosevelt employed so effectively in his political campaigns. More specifically, what has happened to FDR's "Sixty Ruling Families"? The answer, of course, is that a great deal has happened. Stock control of practically all major industrial corporations has become so splinterized that no individual or family can be said to control any of the biggest corporations. Further, to a great extent this has been accomplished by mergers and acquisitions which brought substantial blocks of new shareholders into these corporations.

But there has been an even greater influence, producing what might be described as a significant form of economic deconcentration. The latest available statistics indicate that at the present time more than 26 million Americans are shareholders of American corporations.<sup>37</sup> Comparable statistics for 1952 indicated that less than 6 million persons owned stock. Moreover, statistics for the last several years show that the *rate* of increase of Americans owning stock is rapidly increasing. It should also be noted that these statistics do not reflect the many additional millions of citizens who have a beneficial interest in American business through pension-fund stock ownership, a trend which is also constantly accelerating. Most of the country's great insurance corporations have entered the mutual fund business, with the result that thousands of insurance agents from coast to coast have, in effect, become corporate stock salesmen. As a result, it is conceivable that in one fashion or another, the majority of Americans own corporate stock,<sup>38</sup> a level of *economic deconcentration* which would have been considered an impossible dream just a few decades ago.

My second point is that the increasing size of corporations and their economic stability is not only *not* inconsistent with national goals, but is indeed necessary. In Europe, it required a grand consortium of two

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<sup>37</sup> New York Stock Exchange estimate.

<sup>38</sup> Time Magazine estimates a total of 101 million. See TIME, Feb. 16, 1970, at 82.

countries, and practically the entire aircraft industry of both, to plan and produce an SST. In this country, a single manufacturer is expected to accomplish the task. Economic concentration is essentially a structural test. And in most cases structure has no relevance to competitive injury, which is the statutory test. Changes in structure through merger often result from changes in needs for products and services. As such, they are responsive to society; and to a great extent, modern society makes "super demands" which can only be filled by "super companies."

The "super concentration" theory has not yet met acceptance in litigation before the federal courts. In the case of *United States v. Northwest Industries, Inc.*,<sup>39</sup> which involved Northwest's proposed acquisition of B.F. Goodrich, Judge Hubert Will of the U.S. District Court for Northern Illinois stated:

The issue of concentration raises a special question, for the Government is here urging that given a trend to economic concentration, the consolidation of two of the country's one hundred largest corporations constitutes a violation of Section 7 without any specific demonstration of a substantial lessening of competition in any section of the country. We do not so read Section 7 . . . . The law as it now stands . . . makes the adverse effect on competition the test of validity and until Congress broadens the criteria, the Court must judge proposed transactions on that standard.<sup>40</sup>

Similarly, in *United States v. International Telephone & Telegraph Corp.*,<sup>41</sup> Chief Judge William H. Timbers of the U.S. District Court for Connecticut, citing the *Northwest Industries* case, stated:

A merger which has the effect of increasing economic concentration, even substantially, however does not necessarily lessen competition substantially, and evidence that a merger may increase economic concentration, without more, is not sufficient to halt a merger under Section 7 without a specific showing that it may have anticompetitive effects. . . .<sup>42</sup>

At the same time, both of the above decisions, which dealt only with petitions for preliminary injunctions, fully recognized the applicability of the antitrust laws to conglomerate mergers which substantially lessen competition. These holdings demonstrate the utility of antitrust as an effective tool in some instances, but not where the motivation and the results of a merger have nothing to do with traditional antitrust concepts. Antitrust should be utilized only against those conglomerate acquisitions that involve an injurious effect upon competition. Radical remedies are simply not warranted on the basis of existing evidence. As has been noted, competition itself has, in many instances, caused the voluntary divestiture of economically

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<sup>39</sup> 301 F. Supp. 1066 (D. Ill. 1969). The motion by the Government for a preliminary injunction prohibiting the merger was denied.

<sup>40</sup> *Id.* at 1096.

<sup>41</sup> 306 F. Supp. 766 (D. Conn. 1969).

<sup>42</sup> *Id.* at 796.

unsound acquisitions. Such performance failures have helped to decelerate the conglomerate merger trend. Similarly, authoritative financial experts have speculated that the conglomerate trend, and indeed the merger movement, may be slowed by a pending proposal of the American Institute of Certified Public Accountants in connection with the pooling of interest concept of accounting.<sup>43</sup> Undoubtedly, there are also tax and securities regulations of various types which could serve to discourage undesirable mergers. This is not to recommend any specific moves (which are, in any event, beyond the competence of one active only in antitrust), but only to point out that if undesirable consequences exist in these areas, the remedies are to be found in these areas. Antitrust should be expected to accomplish its task only where antitrust considerations are valid.

The Attorney General and Mr. McLaren have spoken of various social consequences of conglomerate mergers, presumably arguing that these justify broad antitrust intervention. Yet, antitrust enforcement officials periodically attempt to glamorize their often resented role by *pro bono publico* type press releases. Some examples are the statement by Attorney General Katzenbach a few years ago that antitrust was to be used to check inflation and the announcement by his predecessor as Attorney General, Robert Kennedy, of the intent to invoke the antitrust laws to curb the business activities of the crime syndicate. Predictably, Attorney General Mitchell has announced similar discoveries and similar intent.<sup>44</sup> It is to be hoped that the results will exceed those flowing from the efforts of previous administrations. Antitrust needs none of this press-agentry which over-promises, and in the case of the social, financial, tax and securities implications of conglomerate mergers, distinctly over-reaches. The prevention of restraint of trade requires no apology.

In addition, it should be pointed out that of the available alternatives, there is one that should be feared even more than the antitrust "overkill" implicit in the opening fanfare of the McLaren crusade. This is the anti-conglomerate legislation of the type that has been proposed by various sources. Former Antitrust Chief Donald F. Turner proposed legislation "that would prohibit companies from going beyond a certain size."<sup>45</sup> The White House Task Force on Antitrust Policy, in a report released May 21, 1969, recommended a "Concentrated Industries Act,"<sup>46</sup> establishing criteria and procedures for prevention and reduction of concentration by divestiture.

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<sup>43</sup> *Imperiled Mergers—Proposed Measurement of Corporate Goodwill May Curb Acquisitions*, Wall Street Journal, Feb. 27, 1970, at 1, col. 6.

<sup>44</sup> Address by John N. Mitchell before the American Bar Association's Antitrust Section, March 27, 1969.

<sup>45</sup> "For example, \* \* \* Congress should pass a statute that would say to the top 50 or 100 companies 'any time you make an acquisition of a certain size you must peel off assets of comparable magnitude.'" *Hearings on the Status and Future of Small Business in the American Economy Before the Senate Select Comm. on Small Business*, 91st Cong., 1st Sess. pt. 2, at 713 (1967) (Statement of Donald F. Turner).

<sup>46</sup> 1968 WHITE HOUSE TASK FORCE REPORT ON ANTITRUST, 115 CONG. REC. 5642 (daily ed. May 27, 1969).

Under the latter, the leading companies in any industry which is considered concentrated would be required to reduce their share of the market to specified guidelines. It is predictable that the result would be a virtual cartelization of affected industries, and it is difficult to imagine any arrangement that could have a more depressing effect upon product innovation and improvement.

Further, with companies limited to a specific percentage of the market, we would have a situation similar to that involved in the electrical goods cases, where the phases of the moon and other artifices were invoked by the companies as they attempted to stay within the percentage limits decreed by the cartel. A company which had achieved its fixed maximum for the year, for example, would be unable to bid, or at least unable to bid seriously, for any business which would raise its percentage above the permitted limit. The temptation to trade customers would be almost irresistible. At the same time, legislation limiting market shares in any specific industry would, as the capital of growth-minded corporations sought an outlet, (as was the case with the anti-horizontal merger campaigns) necessarily have the result of promoting conglomerate acquisitions.

Only slightly less ominous is the "super concentration" theory espoused by Antitrust Chief McLaren and the FTC Bureau of Economics Report on Mergers. If this theory is adopted by the courts, the net result would be comparable to an overall corporate size limit achievable by merger. The FTC<sup>47</sup> and the Attorney General<sup>48</sup> currently talk in terms of one of the largest 200 companies acquiring either another of the largest 200 or a large company in a concentrated industry. That would just be the start. One must recall the horizontal merger area — 62 percent of a market was held unlawful in 1962; 30 percent was held "inherently anticompetitive" in 1965; and finally, just a year later, the figure had become the wholly illogical 7.5 percent. The difficulty is that every merger, regardless of its size at the time of merger, necessarily involves what appears *at that moment* to be an increase in concentration. Thus, adoption of the super concentration rationale could lead to a new absolute rule for conglomerate acquisitions: *Any large acquisition by any large company is unlawful if the Government chooses to oppose it.*

As with the rule now applicable to horizontal mergers, this would amount to a rule not of law but of men, a situation already too characteristic of antitrust enforcement. The criterion for action under such a rule is the state of mind of whoever happens to be the enforcement chief at any given moment. There are no ascertainable legal guidelines for the conduct of business. This type of rule, instead of mandating legal rationale, tends to invite the subject firms to exercise their gambling instincts, knowing that because of staff size and legal resources, as well as the political, emotional

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<sup>47</sup> See note 16 *supra* and accompanying text.

<sup>48</sup> Address by John N. Mitchell before the Georgia State Bar Association, in 413 BNA ANTITRUST & TRADE REG. REP. X-11 (1969).



and economic attitudes of the administrators and their superiors, not all mergers which could be successfully assailed would be or could be singled out for action. The decision as to which mergers should be subjected to litigation would depend upon factors such as complaints received, availability of qualified prosecution lawyers, cost of litigation, the degree of difficulty of the economic analysis involved, and in some cases, what may, in the last analysis, amount to coin-flipping. The entire situation presents an enticing invitation for political, congressional, and influence-peddling pressures against or for a specific suit.

Intelligent approach to the antitrust problems of conglomerate mergers would be facilitated by a reevaluation of the standards now applicable to horizontal mergers. Additionally, conglomerate mergers should not be regarded either as a new antitrust problem or as a pure antitrust problem. Rather, the approach should be conducted on several fronts. First, the enforcement policy against horizontal mergers should be relaxed by giving realistic and practical recognition to the fact that most are harmless and many are beneficial to competition. The benefits should be weighed on a case-by-case basis. Economic analysis should no longer be short-circuited, as it was in the *Von's Grocery* case. This would reopen the more normal channels of development for growth-minded companies. Secondly, each case against a conglomerate merger should be evaluated on basic antitrust criteria, and the "super concentration" theory should be rejected. Thirdly, to the extent that conglomerate mergers may involve undesirable financial, securities, or tax consequences, the remedial measures should be sought in the financial, securities or tax regulation areas.

The alarmist talk about "dangerous" merger movements neglects the very important point that in those eras when mergers increase, there is usually a corresponding increase in successful new business entries; when mergers decrease, there are fewer effective entries. Most mergers have nothing to do with restraints of trade, and this is becoming more true as time goes by. Old antitrust enforcement policies were based largely on the proposition that fewer companies led to higher prices. However, no scientific evidence has ever established the validity of this point in the absence of patent protection. If anything, the opposite has been established; in those few industries where the competitors are few in number, competition has kept prices so low that new domestic competitors have found it impossible to establish a profitable entry. The myth of "monopoly prices" has become even more unreal as a result of the current diversification trend. At the present time, no area of business is sacred or immune from invasion by outside companies, and the most attractive areas of entry will be those characterized by high prices and high profits.

The primary needs today, as at any time in antitrust enforcement (particularly with respect to mergers), are faith in competition and forbearance. Since much of the current antitrust dialogue relates to the social

rather than the competitive effects of conglomerate mergers, the effort to use antitrust as a weapon against the conglomerate movement raises serious antitrust policy questions. Considering that conglomerate mergers may have the capacity for reviving tired industries, a too rigid stand could be a perversion of antitrust. Amidst all the discussion, studies and pending litigation, one primary fact has emerged; the current state of knowledge of the consequences of conglomerate mergers does not justify the adoption of any long range restrictive policies at this time.

It should be recognized that the conglomerate movement has slowed substantially. Although McLaren's crusade has contributed to this reduction, the primary causal factor has been investor disillusionment with the promises of the conglomerators. The earnings anticipated have not materialized. The investor disappointment has caused substantial stock price declines, which in turn have made the offers of the super-conglomerators unattractive to companies which might have been interested in selling. Further, it is likely that regulatory measures in the financial, securities, and tax areas will preclude the successful completion of some questionable conglomerate mergers. Finally, it is certainly predictable that antitrust efforts will continue, and reasonably predictable that existing antitrust laws will be found effective against conglomerate mergers which substantially lessen competition or tend to monopoly. The result is that at the present time no need has been established for a radical antitrust-based approach to conglomerate mergers.