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Expanding Enterprise: Geographical Curbs on Mergers

G. E. Hale*

Rosemary D. Hale**

INTRODUCTION

In the last decade, decisions of the Supreme Court have breathed new life into the merger provisions of the antitrust laws. Some practitioners might say they have made Section 7 of the Clayton Act into a dragon with a tongue of flame. Such attorneys envisage all capital transactions as in danger of incineration and fear that the economy may be slowed by such a restrictive interpretation of antimerger legislation.¹

In part, the decisions have merely applied more stringent rules to acquisitions traditionally vulnerable to antitrust attack. Under earlier cases, for example, a merger could stand unless it was shown that it might substantially lessen competition.² Recently, however, the Court adopted the standard that a transaction may be voided where the only conceivable injury is to potential competition.³ Since potential competition is at best a nebulous concept, the reach of antimerger litigation has vastly increased.⁴

New interpretations have also brought within the purview of Section 7 mergers once believed beyond its scope. For example, lawyers believed that the prohibitions of Section 7 extended only to transactions between competing firms. The concept was that only such a "horizontal" arrangement could have the requisite adverse effect upon competition. However, in *United States v. E. I. du Pont de Nemours & Co.*,⁵ it was held that even a "vertical" merger, such as the acquisition of a customer by a manufacturer, might fall within the statutory prohibitions. Thus the courts may affect the shape of business enterprise, restricting its growth in one or more directions.

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1. E.g., Berghoff, *The Size Barrier in Merger Law*, 27 OHIO ST. L.J. 76 (1966).

2. See, e.g., *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

3. See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

4. See Hale & Hale, *Potential Competition under Section 7: The Supreme Court's Crystal Ball*, 1964 SUP. CT. REV. 171.

5. 353 U.S. 586 (1957).

One such direction may be characterized as "dispersion," meaning the acquisition of a similar company operating in a different geographic area. Sometimes termed a market extension merger or territorial integration,⁶ the prime characteristic of dispersion is an increase in the territory served by the acquiring firm. This article examines the extent to which such a merger is subject to antitrust prohibition.

I. "DISPERSION" DEFINED

A merger in the nature of geographic dispersion describes the acquisition of a firm carrying on a similar business in a different area. For example, it has been a familiar phenomenon in the dairy industry. Spreading nationwide, firms such as National Dairy Products,⁷ Foremost, and Borden⁸ have built or bought milk processing facilities in territories not previously penetrated by them. Such mergers are by no means confined to the dairy business as similar acquisitions have occurred frequently in the refining of petroleum.⁹

Public thinking concerning such mergers has been reflected, in part, by legislation against branch banking and chain retailing.¹⁰ Anti-chain store sentiment, particularly bitter during the depression, was remarkably similar in character to earlier

6. BURNS, *THE DECLINE OF COMPETITION: A STUDY OF THE EVOLUTION OF AMERICAN INDUSTRY* 456 (1936).

7. NATIONAL DAIRY PRODUCTS CORPORATION, 1949 ANNUAL REPORT 6 (Mar. 2, 1950); PENROSE, *THE THEORY OF THE GROWTH OF THE FIRM* 119 (1959).

8. Senate Comm. on the Judiciary, *Corporate Mergers and Acquisitions*, S. REP. NO. 132, 85th Cong., 1st Sess. 39 (1957); Stigler, *Monopoly and Oligopoly by Merger*, in *READINGS IN INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 69, 77 (Heflebower & Stocking ed. 1958).

9. DE CHAZEAU & KAHN, *INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY* 348 (1959).

Among other industries recently reported to have indulged in such mergers are: prefabricated houses, steel, department stores, newspapers, drug, and household products distribution. See, e.g., Burck, *Armco: Precocious at Sixty*, *Fortune*, Nov. 1959, pp. 129, 230; Rieser, *Standard's Overstuffed Package*, *Fortune*, Sept. 1960, p. 152; Wise, *The Looting of H. L. Green*, *Fortune*, March 1960, pp. 142, 244; *Wall Street Journal*, Oct. 18, 1962, p. 7, col. 4; *Wall Street Journal*, July 24, 1962, p. 5, col. 1.

In recent years, acquisition of foreign firms has been a popular means of geographic dispersion. See, e.g., Lincoln, *How Reynolds Brought Off Its British Coup*, *Fortune*, June 1959, pp. 112, 240; *Wall Street Journal*, August 16, 1962, p. 7, col. 3.

10. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965). Antitrust prosecution has also been employed against general retailing. *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

campaigns against mail order houses and department stores.¹¹ Recently, public discussion has again tended to focus on the phenomenon in particular industries.¹²

Generally, a merger in the nature of geographic dispersion is noncompetitive in nature.¹³ Start with the assumption that A company sells no milk in Wichita. If A then buys a dairy there, the acquisition is noncompetitive with the rest of A's business, apart from potential competition. Therefore, such a merger is closely akin to a merger in the nature of diversification, and many of the same considerations are applicable.¹⁴

II. LEGAL LIMITATIONS UPON DISPERSION

Industrywide curbs upon geographic dispersion, whether by merger or otherwise, have been attempted by many state legislatures. For example, some states have levied taxes specifically designed to handicap chain retailing.¹⁵ Similarly, branch banking has been prohibited by law in at least one-third of the states and limited in others.¹⁶ On the federal level this attitude is manifested in the Public Utility Holding Company Act,¹⁷ which reduces the scale of electric and gas suppliers. In contrast, under the commerce clause and other constitutional provisions, the courts have invalidated local legislation of a protectionist char-

11. EMMET & JEUCK, *CATALOGUES AND COUNTERS*, ch. 10 (1950); Gould, *Legislative Intervention in the Conflict Between Orthodox and Direct-Selling Distribution Channels*, 8 *LAW & CONTEMP. PROB.* 318, 324 (1941); Nystrom, *Retail Trade*, 13 *ENCYC. SOC. SCI.* 346, 349 (1934). According to Gould local merchants frequently organized bonfires of mail order catalogues and indulged in other picturesque practices to limit competition.

12. For example, dairying has been the target of widespread resentment, expressed before congressional committees and elsewhere.

13. See Adelman, *Integration and Antitrust Policy*, 63 *HARV. L. REV.* 27, 28 (1949).

14. Cf. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Proctor & Gamble Co.*, 9 *CCH TRADE REG. REP. (Complaints, Orders, Stipulations)* ¶ 15245, at 20256; *id.* ¶ 15773, at 20582 (1963), *order set aside sub nom.*, *Proctor & Gamble Co. v. FTC*, 358 F.2d 74 (6th Cir. 1966).

15. See Collins, *Anti-Chain Store Legislation*, 24 *CORNELL L.Q.* 198, 206-12 (1939); Feldman, *Legislative Opposition to Chain Stores and Its Minimization*, 8 *LAW & CONTEMP. PROB.* 334, 334-39 (1941). Cf. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 533 (1933).

16. See, e.g., *Bank of Italy v. Johnson*, 200 Cal. 1, 13-14, 251 Pac. 784, 788 (1927); *ILL. REV. STAT.* ch. 16½, § 106 (1965). Restrictive legislation has driven insurance companies from several states in the past. See *WILLIAMSON & SMALLEY, NORTHWESTERN MUTUAL LIFE* 74 (1957).

17. *Public Utility Holding Company Act of 1935*, 49 Stat. 838, 15 U.S.C. § 79 (1964); cf. *National Broadcasting Co. v. United States*, 319 U.S. 190, 197 (1943).

acter. Burdensome inspection fees have been held unlawful, and regulation ostensibly designed to protect public health has not withstood judicial scrutiny when actually employed to protect local producers at the expense of interstate commerce.¹⁸

Traditionally, business' attempts to enlarge the geographic scope of its activity through mergers have been held lawful. By definition the merging parties are not competitors and, as expressly stated in *United States v. Columbia Steel Co.*,¹⁹ "no direction has appeared of a public policy that forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets of a community . . ."²⁰ More particularly, those cases holding it necessary to delimit a geographic market in determining the application of the antimerger laws indicate that an acquisition in the nature of geographic dispersion is lawful.²¹ Finally, it should be noted that in the dissolution of firms violating the Sherman Act with respect to monopolization, the courts intentionally spread out the factories of the successor units in order to assure the existence of competition at all locations.²²

Such was the state of the law when, in *Brown Shoe Co. v. United States*,²³ the Court hinted that a merger in the nature of dispersion might not only substantially lessen competition but could be found unlawful as such.²⁴ In *Brown Shoe* the Court spoke disapprovingly of the alleged advantages enjoyed by a chain of stores over independent retailers. In *United States v.*

18. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Best & Co. v. Maxwell*, 311 U.S. 454, 456-57 (1940); *Hale v. Bimco Trading Co.*, 306 U.S. 375, 378 (1939); *Walgreen Co. v. Lenane*, 363 Ill. 628, 2 N.E.2d 894 (1936); cf. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

19. 334 U.S. 495 (1948).

20. *Id.* at 526. See also *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961); *United States v. Philips Petroleum Co.*, 5 CCH TRADE REG. REP. (1966 Trade Cas.) ¶ 71872, at 83063 (S.D. Cal. Aug. 24, 1966).

21. *E.g.*, *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 168-69 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953). See *Bruner v. Citizens' Bank*, 134 Ky. 283, 120 S.W. 345 (1909). Even an initial decision before the Federal Trade Commission took the same position. *National Tea Co.*, 9 CCH TRADE REG. REP. (Complaints, Orders, Stipulations) ¶ 16376, at 21238 (1963); cf. *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *Hale & Hale, Delimiting the Geographic Market: A Problem in Merger Cases*, 61 Nw. U.L. Rev. 538, 539-40 (1966).

22. *Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 COLUM. L. REV. 615, 627 (1940).

23. 370 U.S. 294 (1962).

24. See *id.* at 344. Cf. *United States v. Bliss & Laughlin, Inc.*, 202 F. Supp. 334 (S.D. Cal. 1962), *rev'd and remanded*, 371 U.S. 70 (1962), *re-adjudicated*, 1963 Trade Cas. 77906 (S.D. Cal. 1963).

El Paso Natural Gas Co.,²⁵ however, the Court relied upon the concept of potential competition in order to find a merger into a new geographic area invalid. It reasoned that the acquired firm was a potential competitor in the acquiring firm's territory.²⁶ The Court's rationale thus implied that, absent such potential competition, a merger in the nature of dispersion would not be reached by the law.

The Federal Trade Commission, however, has flatly held that a merger in the nature of geographic dispersion infringes Section 7 of the Clayton Act.²⁷ Further, since a recent judicial pronouncement permits the application of the antimerger laws to acquisitions in the nature of diversification,²⁸ it is likely that similar results will soon be recorded with respect to dispersion.

Mention should also be made of several important Sherman Act cases involving the operation of motion picture "circuits." The operators of such chains have been held in violation of the Sherman Act, because they bargain with film distributors as a unit.²⁹ Since some of the theaters involved were located in towns

25. 376 U.S. 651 (1964).

26. *Id.* at 659-61.

27. *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

It is respondent's position that national market share data are without meaning since they do not depict changes that are occurring in the relevant local markets. We do not agree that such data are meaningless as, in our view, the national market share data do provide one index of the industrial transformation occurring in this industry. . . .

Id. at 1057.

It is obvious from our previous discussion of the competitive situation existing in the dairy industry and the advantages of diversification, that acquisitions by large firms in this industry have implications for competition regardless of the fact that they do not occur in markets in which the acquiring firms already operate. It is equally clear from the legislative history that Section 7, as amended, is intended to embrace all types of acquisitions regardless of their designations. . . .

Id. at 1083. *Inland Container Corp.*, 10 CCH TRADE REG. REP. (Complaints, Orders, Stipulations) ¶ 17012, at 22116 (1964); cf. *Scott Paper Co.*, 55 F.T.C. 2050, 2055 (1959). Several of the Trade Commission proceedings against the nationwide dairy firms have been settled by consent orders. *The Borden Co.*, 10 CCH TRADE REG. REP. (Complaints, Orders, Stipulations) ¶ 16869, at 21860 (1964); *National Dairy Prods. Co.*, 9 CCH TRADE REG. REP. (Complaints, Orders, Stipulations) ¶ 16282, at 21110 (1963). In *Borden*, the defendant was required to divest itself of eight units, and in both cases further acquisitions in the processing of milk products were forbidden for a period of ten years. In view of the number of acquisitions, it cannot be said that the foregoing settlements are drastic in character.

28. Cf. Howrey, *Merger Problems Confronting the FTC*, N.Y.S.B.A., ANTI-TRUST LAW SYMPOSIUM 41, 43, 45 (1955); Note, § 7 *Is Applicable to Bank Holding Companies*, 67 HARV. L. REV. 529, 531 (1954).

29. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116

so small that there was no local competitor, the motion picture chains were deemed to enjoy monopoly power in those "closed" towns. Their vice was using that power to bargain for films in the competitive areas. While most chain retailers probably do not enjoy quite as much market power as the theater chains in the monopoly towns, it must be apparent that competitive conditions will often vary widely through the geographic territory served by any chain of retail establishments. It would appear to follow that nearly all chain store operators violate the Sherman Act. Actually, litigation has not so indicated, and the theater cases remain largely unexploited by plaintiffs. Their rationale, however, could readily be applied to defeat any merger increasing the scope of a firm's operation.

III. THE RATIONALES OF PROHIBITING DISPERSION

To date, there has been so little litigation with respect to mergers in the nature of geographic dispersion that it is difficult to point out the grounds upon which they may be attacked. As indicated above, proprietors of chain motion picture "circuits" have been found guilty of restraining and monopolizing trade under the Sherman Act because they bargained for all of their theaters as a single package. Nothing in these opinions indicates that the decisions rest upon injury to the theaters' patrons. Instead, any injury found was inflicted upon proprietors of competing theaters. In *United States v. Griffith*,³⁰ the complaint charged that the defendants' buying power resulted in exclusive privileges—preemption in the selection of film and "clearances."³¹ In so holding, the Court concluded:

Anyone who owns and operates the single theatre in a town . . . has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. . . .

A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. . . .

The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. . . . If monopoly power

(1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1944).

30. 334 U.S. 100 (1948).

31. *Id.* at 103.

can be used to beget monopoly, the Act becomes a feeble instrument indeed. . . .³²

Further, as the Court said in *Brown Shoe*:

[I]t is competition, not competitors, which the Act protects. But one cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result. . . .³³

Not every dispersed firm will enjoy the position of the defendant in the *Griffith* case with its "monopoly towns." However, it is highly unlikely that the degree of competition faced by a firm will be equal in each area wherein it operates.³⁴ It would therefore appear that any acquisition in the nature of dispersion could be attacked on *Griffith's* rationale. What degree of monopoly the defendant need enjoy in order to call the anti-merger laws into play is not revealed by the decisions however. Presumably something more dramatic than a mere small difference in competitive conditions would be required.

The Federal Trade Commission, in attacking mergers in the nature of diversification, has argued that such acquisitions enable the defendant to achieve economies. The Commission thought that the merged firm could expand into new areas at lower cost than would be incurred if it built new facilities therein. It also found injury to potential competition and economies in the ability of the combined enterprise to employ nationwide advertising.³⁵ Here again, there is no suggestion that consumers will

32. *Id.* at 106-08. See also *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1944).

33. 370 U.S. at 344.

34. See *Beatrice Foods Co.*, 10 CCH TRADE REG. REP. (Complaints, Orders, Stipulations) ¶ 16831, at 21810 (1964). In *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962), the Commission said:

As a result of their numerous mergers these large dairy firms have become vast concerns operating across many markets and . . . meet one another as competitors in many of the same markets. . . . [M]ost of the remaining firms in this industry are relatively small independent dairies operating in one or very few markets. The relatively large size and geographically diversified character of these firms is of considerable potential significance for the character of competition we may expect among these firms. Their geographic diversification adds a significant dimension to their behavioral opportunities.

Id. at 1059. In *United States v. Philips Petroleum Co.*, 5 CCH TRADE REG. REP. (1966 Trade Cas.) ¶ 71872, at 83063 (S.D. Cal. Aug. 24, 1966), the court found that Philips was not a potential customer in California because no pipeline ran there, hence it could not compete with local refineries. Thus a preliminary injunction was denied.

35. Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). *Proctor & Gamble Co. v. FTC*, 358 F.2d 74 (6th Cir. 1966), though really

be injured by higher prices; rather, the injury is to be inflicted upon competitors whose costs are higher.

An allied suggestion is that the power of chain retailers to set styles through uniform display of products in numerous widely dispersed stores would constitute a competitive advantage.³⁶ Apparently the thought is that the retail establishments offer opportunities for influencing public opinion when they are sufficiently numerous, while a single store would lack the display facilities necessary to initiate such style changes.

Another rationale, again focusing on injury to competitors as opposed to consumers, lies in fear of creating wealthy concerns too powerful for localized competitors. Here again the Federal Trade Commission has adopted the position that through such acquisitions economic power can be achieved to outlast local concerns and drive them from the field.³⁷

Turning from economic to sociological grounds, one finds frequent complaints that the chain store, the branch bank, or the absentee-owned factory destroy values inherent in small business communities. To date, no such view appears to have been voiced in a merger case. However, Mr. Justice Cardozo, dissenting in a chain store tax case, expressed the fear that chain stores will sap the fiber of civic virtue:

The business that keeps at home affects the social organism in

a diversification or product extension merger, was governed by much the same considerations as geographic extension.

36. Cf. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1072 (1962). See generally Edwards, *Geographic Price Formulas and the Concentration of Economic Power*, 37 GEO. L.J. 135, 136-37 (1949); Senate Select Committee on Small Business, *Sixth Annual Report*, S. REP. NO. 1368, 84th Cong., 2d Sess. 67 (1956). The foregoing idea can be found at least as early as Benjamin, *The Illinois Plan for the Prevention and Suppression of Monopolies*, 73 CENT. L.J. 131-32 (1911). Cf. *Northwest Bancorporation v. Board of Governors*, 303 F.2d 832, 840, 842 (8th Cir. 1962) (bank merger prohibited because only other bank in town also part of a chain). Does this mean that the first chain is to be protected from the competition of the second?

37. *National Tea Co.*, 3 CCH TRADE REG. REP. ¶ 17463, at 22694 (1966); *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059 (1962). See also Weiss, *An Evaluation of Mergers in Six Industries*, 47 REV. ECON. & STATS. 172, 178 (1965), where the author supports the position of the FTC as follows:

[T]he development of national chains may facilitate gentlemen's agreements. U.S. Steel's acquisition of a major western plant and its construction of a major eastern plant certainly enhanced its leadership qualities. With F.O.B. mill prices and freight absorption, quasi-isolated plants might find periodic changes in base prices attractive, but with U.S. Steel in every major market, such independent local pricing decisions seem less likely.

ways that differ widely from those typical of a business that goes out into the world. It affects the social organism, but it also affects itself. With the lengthening of the chain there are new fields to be exploited. . . .³⁸

Other courts have voiced fears that chain store employees have less interest in local affairs than nontransients.³⁹ The late Senator Kefauver claimed that levels of civic welfare were higher in small local business communities than in big absentee business communities.⁴⁰ Some commentators have gone so far as to claim that education and public health are better where chain stores do not exist.⁴¹ In its extreme form the complaint against absentee ownership takes on a highly nostalgic and almost incredible character. For example, one enthusiastic observer attributed family and community disintegration, unemployment, and war to geographic dispersion of business.⁴²

In view of the scarcity of judicial direction suggesting which, if any, of the above rationales might be applied to this

38. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 581 (1933).

39. Thus, in *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938), the court wrote:

Great aggregations of wealth control much of the merchandising field of today. . . . At the same time we still have with us the independent merchants. . . . They have hitherto been considered as part of the "backbone" of every community, radiating their influence throughout the length and breadth of the state . . . upholding, the moral fibre of the communities, upon which, in the long run, the existence of the commonwealth depends. The legislature has the right, we think, to give them a fair chance in the field of competition; to give them a chance to remain a pillar of support, thus at the same time giving an opportunity for the maintenance of individualism, still of importance in our day, and which, except for such legislation, might be entirely crushed.

Id. at 351, 84 P.2d at 774. Similar language appears in *Great Atl. & Pac. Tea Co. v. Kentucky Tax Comm'n*, 278 Ky. 367, 373, 128 S.W.2d 581, 584 (1939); *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 319, 45 N.W.2d 245 (1950); 1 PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS, RECENT SOCIAL TRENDS 525 (1929). To somewhat the same effect are the decisions in *National Tea Co.*, 3 CCH TRADE REG. REP. ¶ 17463, at 22694 (1966), and *Foremost Dairies*, 60 F.T.C. 944 (1962).

40. Kefauver, *The Supreme Court and Congress Versus Monopoly*, 20 TENN. L. REV. 254, 255 (1948). Controversy continues to rage as to whether any important change has been wrought in the economy by reason of the existence of large corporations with a multitude of small stockholders. See Peterson, *Corporate Control and Capitalism*, 79 Q.J. ECON. 1 (1965).

41. BUTTERS, LINTNER & CARY, EFFECTS OF TAXATION: CORPORATE MERGERS 4, (1951); one writer has argued that the dispersed firm may overshadow local government and thus attain broad political power. EDWARDS, MAINTAINING COMPETITION: REQUISITES OF A GOVERNMENTAL POLICY 107 (1949). *Smaller War Plants Corporation*, *Small Business and Civic Welfare*, S. Doc. No. 135, 79th Cong., 2d Sess. 13, 18, 22 (1946).

42. BROWNELL, THE HUMAN COMMUNITY 62, 65, 293 (1950).

kind of merger, businesses considering such dispersion have no adequate means of testing the legality of such ventures. So sweeping are the above grounds, however, that it is difficult to envisage an acquisition which could not be reached by at least one of these rationales.⁴³

IV. CRITIQUE OF DISPERSION

Inherent in several of the above listed arguments against acquisitions leading to geographic dispersion is the complaint that they may result in price discrimination. Such is the case with the complaint that the combination permits operation at lower cost and, hence, lower prices in selected places. It is similarly true of the argument against the motion picture "circuits" because, so the theory goes, the combination of monopoly and competitive areas permits discrimination against the latter. It must be conceded that discrimination in the economic sense will almost inevitably flow from any merger in the nature of dispersion just as it does from one in the nature of diversification. The reason is simple: competitive forces vary from place to place just as they do from product to product. In some territories the dispersed firm will be able to secure a larger margin of profits than in others. Accordingly, there will be discrimination. Thus it has been concluded:

We can say more generally of a multi-plant or multi-product firm: if its price differentials do not strictly follow its cost differentials, then its price structure is a honeycomb of discrimination. Furthermore, to the extent that the cost of the respective commodities are unknown because of accounting difficulties, nondiscrimination is strictly an accident.⁴⁴

In the motion picture "circuit" cases discussed above,⁴⁵ the fact of combination added nothing to the theater operator's power to raise admission prices. Presumably, to the extent he owned theaters in areas enjoying but one such place of amusement, he would have greater upward freedom of pricing than in territories

43. Several of the forgoing rationales would be equally applicable to the acquisitions of foreign businesses.

44. Adelman, *supra* note 13, at 40-41. Professor Adelman went on to say:

[M]ulti-product production has the effect of separating the customers so that they can be charged varying prices not corresponding fully to varying costs. Geographical price discrimination rests on differences in location, and is completely analogous. "Meeting competition as you find it" is the rule in both cases, and this is simply the other side of the same phenomenon—price discrimination.

Id. at 41.

45. See text accompanying note 29 *supra*.

where patrons could choose among several rival establishments. But so far as the patrons were concerned, the fact of combination would not affect admission prices, which would be controlled by competitive conditions, relative costs, and the like. Whatever may be wrong with the situation arises from the lack of competition in the single theater towns, presumably often resulting from factors of indivisibility. Only one thesis⁴⁶ appears to support the theory that the motion picture exhibitor could add to his market power by an acquisition in the nature of dispersion.⁴⁷

Conversely, it is clear that such an acquisition may result in cost savings to the combined firm. Indeed, the merger in question would presumably never have been negotiated unless some such spreading of overhead costs were envisaged.⁴⁸ Observers have found that there are such savings in the operation of chain stores in the grocery field. In numerous other industries similar cost reduction can be achieved through nationwide promotion and distribution of goods.⁴⁹ End to end consolidation of

46. See Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62 (1960), in which the author attempts to show how a firm may benefit from vertical integration and tied sales. His theory could, presumably, be applied to the geographic enlargement of the enterprise. Economists generally seem unimpressed by Burstein, as his thesis has not been accepted in later papers. *E.g.*, Stigler, *United States v. Loew's, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152.

47. Another theory was advanced in Beatrice Foods Co., 3 CCH TRADE REG. REP. ¶ 17244, at 22317 (1965). Although in part resting on the theory that such a merger may raise barriers to entry (at 22337) and that it builds a foundation for predatory price-cutting (at 22334), the principal ground for holding the merger invalid under both § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act is found in the concept of potential competition. The Commission reasoned that Beatrice Foods Co., a nationwide dairy, was a potential competitor in the areas which it invaded by merger. Hence the acquisitions impaired that potential competition (at 22339). A somewhat similar view is expressed in Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1374 (1965).

48. Attacks upon mergers in the nature of dispersion almost necessarily imply a sharing of costs which reduces total expense. *Accord*, NATIONAL COMMISSION ON FOOD MARKETING, *FOOD FROM FARMER TO CONSUMER* 46 (1966), which said:

Dairy firms, whether national or regional, have acquired primarily plants that process and distribute fluid milk or ice cream. The aims are to raise profits by increasing efficiency and sales, to counterbalance the power of chain stores, and to spread risk over wider areas.

49. HOFFMAN, *LARGE-SCALE ORGANIZATION IN THE FOOD INDUSTRIES* 14, (TNEC Monograph No. 35, 1940). In *United States v. Third Nat'l Bank in Nashville*, 1964 Trade Cas. 79825 (M.D. Tenn. 1964), the court went so far as to say that branch competition is the hallmark of modern banking. *Id.* at 79828. Cf. Bain, *Advantages of the Large Firm*, 20 J. MARKETING 336, 344 (1956).

railroads has been urged as a means of avoiding duplication of terminals and the like.⁵⁰ Lower transport costs may be achieved through geographic dispersion of factories and stores.⁵¹ As mentioned, several advertising benefits, mostly depending on the existence of nationwide media, may be reaped by the geographically dispersed firm.⁵² For such reasons observers have thought that the mass merchandising of grocers was harmless, efficient, and nonmonopolistic.⁵³ One observer went so far as to conclude:

The mail order house and the large retail chain represent the first intelligent attack upon the wastes of distribution and the first systematic attempt to bring economy into the processes of marketing. . . . [B]igness itself is not of necessity a move into monopoly.⁵⁴

Not all the factors, however, work in favor of cost reduction. In many instances, autonomous local management may prove more efficient than distant control. Bitter experience taught Paramount Pictures the diseconomies of centralized control of more than 1,000 theaters.⁵⁵ In other words, indivisibility at the factory level works against dispersion of the plant into every sales area.⁵⁶ For such reasons local merchants, particularly when organized into "voluntary" groups,⁵⁷ have been able to compete with chain stores successfully. Here technological changes may prove of considerable importance.⁵⁸

50. *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 3, at 261 (1950).

51. See BURNS, *THE DECLINE OF COMPETITION* 256 (1936).

52. HOOVER, *THE LOCATION OF ECONOMIC ACTIVITY* 56 (1948); STOCKING & WATKINS, *MONOPOLY AND FREE ENTERPRISE* 73 (1951). An interesting example in the automobile rental field is reported in Loehwing, *Drive-Ur-Self*, 35 BARRON'S No. 36, p. 3 (Sept. 5, 1955). Note also that identical appearance of numerous chain stores has competitive advantages. See *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 98 (1935).

53. HOFFMAN, *op. cit. supra* note 49, at 157.

54. Abrahamson, *The Automobile Tire—Forms of Marketing in Combat*, in *PRICE & PRICE POLICIES* 83, 115 (Hamilton ed. 1938).

55. CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* 27 (1960); cf. Willis, *Branch Banking*, 2 ENCYC. SOC. SCI. 679, 680 (1932).

56. EDWARDS, *op. cit. supra* note 41, at 114; HOOVER, *op. cit. supra* note 52, at 48; STOCKING & WATKINS, *op. cit. supra* note 52, at 72.

57. See BRUNNER & KOLB, *RURAL SOCIAL TRENDS* 150 (1933); Engle, *Chain Store Distribution vs. Independent Wholesaling*, 14 J. MARKETING 241, 251 (1949); Oakes, *Price Differences for Identical Items in Chain, Voluntary Group, and Independent Grocery Stores*, 14 J. MARKETING 434 (1949); See generally Phillips, *An Evaluation of Large-Scale Retailing With Emphasis on the Chain Store*, 8 LAW & CONTEMP. PROB. 348 (1941).

58. E.g., Hobby, *Bottles or Cans*, 34 BARRON'S No. 42, p. 7 (Oct. 18, 1954).

It is apparent from the foregoing discussion that whatever economies may arise from a merger in the nature of dispersion will require appreciation of the whole question of the economies of location. Producers have an incentive to locate near suppliers as well as customers. Careful balancing of production economies against transport costs is required. Perishability of product may prove an important factor. Altogether, the calculus of serving the consumer cheaply is complex, and many means are employed to that end.⁵⁹ Therefore, while a presumption of cost reduction may properly be raised in any given merger, the evidence may indicate the contrary.

If indeed dispersion does permit reduction of costs, it may compel others similarly to extend the geographic limits of their enterprises. As in the case of diversification, therefore, capital requirements may be raised. To the extent that access to capital is barred by lack of information or otherwise, mergers in the nature of dispersion may thus increase barriers to entry.⁶⁰ Note, however, that entry may be made more difficult without mergers because internal growth may effectively create dispersed firms.

Probably the real objection to acquisitions leading to nationwide sales is the wealth which such transactions often place under unitary control.⁶¹ However, mere dispersion does not automatically guarantee the wealth of an acquiring firm. In some lines of endeavor, capital requirements are small and even the most dispersed and profitable firm will not necessarily be wealthy. Profitability, of course, still remains the key to wealth; the mere size of the enterprise is meaningless if it faces bankruptcy.

With the foregoing qualifications it is nevertheless plain that welding a series of similar independent stores, factories, or other

59. See Greenhut, *Size of Markets Versus Transport Costs in Industrial Location Surveys and Theory*, 8 J. INDUSTRIAL ECON. 172 (1960); See also Bowden & Cassady, *Decentralization of Retail Trade in the Metropolitan Market Area*, 5 J. MARKETING 270, 274 (1941); 1 PRESIDENT'S COMMITTEE ON RECENT SOCIAL TRENDS, RECENT SOCIAL TRENDS 457 (1929); See generally HOOVER, *op. cit. supra* note 52, ch. 2. The method of effecting sales may also be important. Door to door canvassing may eliminate the need for retail establishments. See *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783 (1936).

60. *Hearings Before the Temporary National Economic Committee*, 75th Cong., 3d Sess., pt. 1, at 114 (1938); See also BECKMAN & NOLEN, *THE CHAIN STORE PROBLEM* 225 (1938).

61. *But cf. United States v. Grinnell Corp.*, 384 U.S. 563 (1966), indicating that § 2 of the Sherman Act can be called into play even if the defendants have not achieved wealth.

enterprises into a single unit will increase the resources centralized in a single corporate entity. Once resources have been assembled they no doubt furnish an opportunity for price-cutting or other predatory practices which can injure less well-endowed competitors. The extent to which chain stores and similar firms actually exercise those powers is difficult to appraise.⁶² It is worth noting, however, that Section 2 of the Sherman Act bears directly on such predatory practices. Consequently, the public is not powerless in the face of such activity by the consolidated enterprise.

The more substantial element in the complaint against wealth and absentee control lies in the realm of sociology rather than economics. Absentee ownership is not a new problem; it has been with us for centuries.⁶³ While some of the more extravagant claims made for local control and ownership referred to above are no doubt without foundation,⁶⁴ the literature indicates a sound basis for some degree of apprehension that managers of absentee-owned establishments are less socially useful citizens than would otherwise be the case.⁶⁵ The fact that some dispersed enterprises have taken steps to ameliorate the adverse effects of absentee control suggests the reality of the problem.⁶⁶ By the same token, those steps may have mitigated the adverse effects in some reasonably sufficient measure.⁶⁷ One writer reached the following conclusions on the subject:

The answer to the charge that the chain's absentee ownership is socially undesirable must be somewhat indefinite as we have no exact test of just what is socially desirable. Yet it is important to note that many chains are taking steps to build themselves into community life. . . . [M]any chains are still far from being as good "citizens" as is desirable, but we should not overlook the fact that by no means are all independent merchants the community-minded men they are sometimes pictured.⁶⁸

62. Phillips, *supra* note 57, at 354; cf. *Great Atl. & Pac. Tea. Co. v. Kentucky Tax Comm'n*, 278 Ky. 367, 379, 128 S.W.2d 581, 587 (1939). The "recoupment" theory was exposed as falacious long ago. Adelman, *supra* note 13, at 46.

63. Knight, *Absentee Ownership*, 1 ENCYC. SOC. SCI. 376-78 (1930).

64. See notes 36-39 *supra* and accompanying text.

65. Palmer, *Economic and Social Aspects of Chain Stores*, 2 U. CINC. J. BUS. 272, 279 (1929); Schulze, *The Role of Economic Dominants in Community Power Structure*, 23 AM. SOC. REV. 3, 7 (1958).

66. Anon., *Penney's, King of the Soft Goods*, 42 Fortune, Sept. 1950, pp. 101, 104; ILLINOIS BELL TELEPHONE CO., 1950 ANNUAL REPORT 25, 27 (March 10, 1951).

67. BRUNNER & KOLB, RURAL SOCIAL TRENDS 150 (1933); NATIONAL BISCUIT CO., 1949 ANNUAL REPORT 14.

68. Phillips, *supra* note 57, at 355.

The importance of the residual impact can probably never be appraised. On the other hand, as Judge Learned Hand reminded us, Congress was not necessarily actuated by economic motives alone in enacting antitrust legislation. It is possible, he wrote, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of the few.⁶⁹

V. BENEFITS OF DISPERSION

Consonant with fears that competitors may be injured unless such mergers are curbed, it is possible that mergers designed to widen the geographic scope of a firm's operation lead to significant economies. To the extent that such is the case, competition may be intensified.⁷⁰ Examples of more vigorous competitive conditions are found in many industries, including petroleum refining. In one study, much of the competition achieved through invasion of the previously separated geographic markets of the old Standard Oil combination was attributed to mergers and acquisitions.⁷¹ One viewpoint, emphasizing the

69. *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945). In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), the following language appears with respect to monopolies in general:

It is in the power of the combination to raise it [prices], and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. . . . [I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman, the head of his establishment, small though it might be, into a mere servant or agent of a corporation . . . having no voice in shaping the business policy of the company

Id. at 324.

70. See EMMET & JEUCK, *op. cit. supra* note 11, at 168.

Unless we take full account of the notion of potential competition, an acquisition in a geographic area new to the acquiring firm does not reduce competition. As noted in the text, it may increase competition. If enterprises were forbidden to expand geographically via the acquisition route, some would no doubt build new facilities in the new area. Assuming that the managers of the enlarging firm are well informed and rational, no waste of resources would result from such building. Presumably, however, some waste would result from preventing the realization of economies to be achieved by acquisition. In other words, if a ban on dispersion is designed to protect existing firms, it will, like a protective tariff, impose some costs upon consumers.

71. DE CHAZEAU & KAHN, *op. cit. supra* note 9, at 95. An example appears in Jennings, *Remarks at Annual Meeting*, Socony-Vacuum Oil

competitive contribution of the chain merchandiser, states:

Although . . . mass distributors have attained great size and although they handle a substantial fraction of the retail trade, it cannot be said that they possess anything approaching a monopoly. . . .

Instead of monopolizing the retail trade, the mass distributor has made it more actively competitive. . . .⁷²

Another pointed to the beneficial effect thus realized in concluding:

An imperfect market, containing not a single price, but a spread of prices, can be exploited by a large buyer who can be "all over the place" at any given moment and take the better offers. The effect of such a buyer is to narrow the range of prices, lower their average, and make for a single price in the market.

. . . .

Sellers who might otherwise receive higher prices because of their customers' ignorance of lower prices elsewhere in the market are forced to meet these lower prices. . . . It is not difficult to understand sellers' and competitors' resentment at such "demoralization." But it is difficult to see why anyone concerned with the general welfare should share it.⁷³

Moreover, the courts have repeatedly recognized the possibility that monopolies may flourish in relatively small geographic regions.⁷⁴ Hence, to the extent that mergers in the nature of dis-

Company, April 26, 1945:

For several years we have had a substantial stock interest in Gilmore Oil Company, which conducted a marketing business and small refining operation on the Pacific Coast. Late in 1944 we acquired substantially all of the outstanding stock in the Gilmore Company, and in March of this year these properties were consolidated with those of the General Petroleum Corporation, our Pacific Coast subsidiary. This consolidation will materially strengthen our position on the Pacific Coast through providing a larger number of retail outlets all selling the company's branded products.

72. WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 56-57 (TNEC Monograph No. 21, 1940); BUTTERS, LINTNER & CARY, *op. cit. supra* note 41, at 20; McNair, *Monopolistic Competition in Retailing*, in *CHAIN STORES AND LEGISLATION* 245, 246 (Bloomfield ed. 1939); Palmer, *supra* note 65, at 287; cf. *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8 (1927) (dissenting opinion).

73. Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q.J. ECON. 238, 247-48 (1949); cf. *United States v. Phillips Petroleum Co.*, 3 CCH TRADE REG. REP. (1966 TRADE CAS.) ¶ 71872, at 83063 (S.D. Cal. Aug. 24, 1966).

74. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *More v. Bennett*, 140 Ill. 69, 29 N.E. 888 (1892); *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 172 La. 782, 135 So. 239 (1931). Many lessons are to be learned in this area from recent and current European experience. See Spaak & Jaeger, *The Rules of Competition Within the European Common Market*, 26 LAW & CONTEMP. PROB. 486, 486-87 (1961). See generally Thiesing, *Rules Governing*

person increase competition therein, they must be regarded as beneficial. Further, if the acquisition is prompted by the attraction of higher profit margins in the acquired firm's territory, it may serve to shift resources in that direction, since the acquiring firm often has larger financial means. To the extent that such a shift takes place, it will be socially desirable as bringing a needed supply of capital more rapidly into the area.

Finally, as in the case of diversification, there is the problem of growth. It is a familiar practice for the individual firm to grow through acquisition of similar enterprises in other territories.⁷⁵ One need only consider the example of penetration of a foreign market to realize why such growth so often takes the form of an acquisition as opposed to building new facilities. On the other hand, examples can be cited of such growth achieved without the benefit of existing facilities.⁷⁶ It is not easy to demonstrate a relationship between the growth of the firm and the growth of the economy as a whole.⁷⁷ It is nevertheless possible that restrictions on mergers in the nature of dispersion could freeze the status quo in an undesirable manner.

CONCLUSION

A merger in the nature of dispersion is unlikely to result in an impairment of competition. The only competition which can be adversely affected is the potential competition of the acquiring firm. If the merger is barred and the acquiring firm thus kept out of a geographic market, it may remain a potential entrant. However, since it cannot enter except by building new facilities, it may be a handicapped potential competitor. In any event, taking full account of potential competition seems only remotely possible. If the courts gave full play to that concept, there would almost always be so much competition in any market that no merger could work a substantial diminution thereof.

More importantly, it is entirely possible that a merger in the nature of dispersion will actually increase competition in the new territory. Beyond that it is likely, though far from certain,

Competition Within the European Regional Communities, 26 LAW & CONTEMP. PROB. 464, 471, 473 (1961).

75. See ABBOTT LABORATORIES, 1949 ANNUAL REPORT 23. Rieser, *Consolidated Foods: All Over the Lot*, Fortune, June 1960, pp. 139, 255. Cf. Weiss, *supra* note 37, at 178. But see WILLIAMSON & SMALLEY, *op. cit. supra* note 16, at 59.

76. DE CHAZEAU & KAHN, *op. cit. supra* note 9, at 97.

77. Cf. McConnell & Peterson, *Research and Development: Some Evidence for Small Firms*, 31 So. ECON. J. 356, 364 (1965).

that such a merger will result in increased efficiency. If so, consumers should benefit unless market imperfections or impurities prevent them from doing so. In that event, however, the remedy lies in the removal of those impurities or imperfections.

Territorial extension mergers, like others, may result in the creation of wealthy corporations. Firms with large financial resources may engage in predatory practices. In the past, however, that possibility has not seemed sufficiently hazardous to create barriers to mergers. For example, no limits are set upon the growth of investment trusts (mutual funds). And if predatory practices appear, present legislation is sufficient to cope with them.

The solid objections to dispersion, by merger or otherwise, are sociological in character. They are not thereby any less worthy of consideration, although they are extremely difficult to quantify. Our notions of the efficiency to be gained by a merger are crude indeed. Apart from specific places where common costs may be shared, e.g., in a joint terminal for end to end carriers, our calculation of the savings to be achieved by a merger are nebulous. That difficulty renders hazardous the prescription of any stopping point in the application of protectionist principles. Under a protective tariff, one can at least look at the price of the foreign product outside the tariff wall to see how much it is costing consumers to subsidize domestic producers. No such ready comparison can be made in the case of protection achieved by curbing domestic efficiency.

Even more difficult, however, is the attempt to quantify the sociological values which might be preserved by a policy of protectionism. And even if some dollar for dollar estimate of costs and benefits could be calculated, it is not certain that the sociological benefits could actually be achieved in the long run. Other factors, particularly technological change, might destroy them even if mergers were banned.

Thus, no calculus can be offered to demonstrate the greater weight of either side of countervailing contentions. And it is no answer to say that, when in doubt, do nothing. Inaction may have just as large an impact as action; the only thing to say for it is that it saves the expense of the action itself.

Finally, if the decision should be to permit mergers in the nature of dispersion, it does not necessarily follow that giant corporations will swallow our entire economy. Over the decades,

and without much in the way of protection, small business has shown great survival powers. The vigorous growth of "service industries" in recent years is often thought to reflect the growing importance of relatively modest enterprises. The "Mom-Pop" grocery may be gone, but the television repair man flourishes.

