



1978

## Mergers under the Burger Court: An Anti-Antitrust Bias and Its Implications

Howard R. Lurie

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

Howard R. Lurie, *Mergers under the Burger Court: An Anti-Antitrust Bias and Its Implications*, 23 Vill. L. Rev. 213 (1978).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol23/iss2/1>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

# Villanova Law Review

VOLUME 23

JANUARY, 1978

NUMBER 2

## MERGERS UNDER THE BURGER COURT: AN ANTI-ANTITRUST BIAS AND ITS IMPLICATIONS

HOWARD R. LURIE†

### I. INTRODUCTION

THE PRO-ANTITRUST BIAS OF THE WARREN COURT led Justice Stewart to state in 1966 that, in litigation arising under section 7 of the Clayton Act (section 7),<sup>1</sup> "the sole consistency that I can find is that . . . the Government always wins."<sup>2</sup> With the emergence of a new Court, however, the pro-antitrust tendency has ended and a decidedly anti-antitrust bias has appeared. Of the eleven major antitrust cases decided by the Burger Court in the course of its 1973 and 1974 terms,<sup>3</sup> five involved mergers or acquisitions challenged under section 7.<sup>4</sup> These decisions indicate the emergence of an anti-antitrust bias. This article examines the impact of the shift in judicial bias by tracing the development of the law of mergers under both the Warren and Burger Courts.

Part II begins with a discussion of the 1948 case of *United States v. Columbia Steel Co.*,<sup>5</sup> in order to present the philosophy of the Supreme Court toward mergers before the Warren Court era.

---

† Professor of Law, Villanova University School of Law; A.B., West Virginia University, 1960; J.D., University of Michigan, 1963.

1. 15 U.S.C. § 18 (1976). For the pertinent text of this section, see note 68 *infra*.

2. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). See Solomon, *Why Uncle Sam Can't Lose a Case Under Section 7 of the Clayton Act*, 53 A.B.A.J. 137, 140-41 (1967).

3. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975); *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *rehearing denied*, 423 U.S. 886 (1975); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, *rehearing denied*, 423 U.S. 884 (1975); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974); *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

4. See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). For a general history of Supreme Court merger cases between 1962 and 1974, see Note, 50 NOTRE DAME LAW 693 (1975).

5. 334 U.S. 495 (1948).

*Columbia Steel* articulated a “rule of reason”<sup>6</sup> approach to mergers and acquisitions which, as the article demonstrates, was dismantled bit by bit in case after case by the Warren Court. Adopting what was termed a “simplified test of illegality,”<sup>7</sup> the Warren Court lessened the burden of proving an unlawful merger or acquisition to a point just short of declaring that all mergers or acquisitions, except those of *de minimis* proportions were per se illegal.

The few cases that were decided during the transition period between the appointment of Warren Burger to replace Earl Warren as Chief Justice and the domination of the Court by the new antitrust majority are surveyed briefly in Part III of this article.

Part IV details the Burger Court’s dismantling of the “simplified test of illegality” of the Warren Court, and follows the resurrection of the rule of reason approach to mergers and acquisitions. No longer would a merger or acquisition be invalidated on the basis of a *predicted* anticompetitive impact; apparently, nothing short of proof of a *present* anticompetitive effect would be sufficient to meet the “lessen competition” standard of section 7.<sup>8</sup>

Also illustrated in Part IV are the reasons supporting this author’s conclusion that the Burger majority harbors an anti-antitrust bias. In the cases discussed, the article further suggests that the Court has discarded precedent and strained statutory language and legislative history in an effort to avoid finding a section 7 violation.

The implications of the Burger Court’s anti-antitrust bias are found in Part V. The author predicts the ascendancy of the rule of reason in future antitrust cases of every variety with the result that reliance upon the per se rule will be reserved only for blatant restraints of trade, such as horizontal price fixing. The author notes that the utilization of a per se rule for vertical resale restrictions<sup>9</sup> was the first casualty of the Burger Court’s return to the rule of reason approach, and finds language in the Court’s reasoning that evidences a willingness to rescind the per se rule in the area of horizontal resale restrictions as well. The article also discusses the Burger Court’s erosion of a per se rule of illegality for tying arrangements.<sup>10</sup> Finally, the likelihood of retrenchment in the areas

6. See notes 33-35 and accompanying text *infra*.

7. See text accompanying notes 124-27 *infra*.

8. See notes 252-59 & 277-89 and accompanying text *infra*.

9. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). For a discussion of this case, see notes 494-507 and accompanying text *infra*.

10. See *United States Steel Corp. v. Fortner Enterprises, Inc.*, 97 S. Ct. 861 (1977) (*Fortner II*). For a discussion of *Fortner II*, see notes 569-72 and accompanying text *infra*.

of resale price maintenance and exchange of price information among competitors is considered briefly.<sup>11</sup>

## II. THE DEVELOPMENT OF THE LAW OF MERGERS

### A. *In the Beginning: The Rule of Reason*

The modern law of mergers and acquisitions under section 7 had its genesis in the Warren Court. Nevertheless, that Court's treatment of section 7 cases may best be understood by examining the philosophy of the previous Court, which had rejected the notion that "bigness is bad."<sup>12</sup>

As originally enacted,<sup>13</sup> section 7 proscribed only corporate *stock* acquisitions where the effect of the acquisition might be "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."<sup>14</sup>

Assets acquisitions were not covered by section 7.<sup>15</sup> Thus, when the United States sought to enjoin the acquisition of Consolidated Steel Corporation by United States Steel Corporation in *United States v. Columbia Steel Co.*,<sup>16</sup> the Government alleged that sections 1 and 2 of the Sherman Act<sup>17</sup> had been violated.<sup>18</sup> The case contained both horizontal<sup>19</sup> and vertical<sup>20</sup> aspects. With respect to the horizontal issue in the case, the Government relied upon four

11. See notes 520-46 and accompanying text *infra*.

12. See generally L. D. BRANDEIS, *THE CURSE OF BIGNESS* (1934). See also text accompanying note 38 *infra*.

13. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1976)).

14. *Id.*

15. For a discussion of the subsequent amendment to § 7 to include assets acquisitions, see notes 66-69 and accompanying text *infra*.

16. 334 U.S. 495 (1948).

17. 15 U.S.C. §§ 1, 2 (1976). Section 1 of the Sherman Act currently provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1. Similarly, § 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *Id.* § 2. At the time of *Columbia Steel*, violation of these sections constituted only a misdemeanor. See 334 U.S. at 498 n.1.

18. 334 U.S. at 498.

19. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). In *Brown Shoe*, the Court stated: "An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'" *Id.* at 334.

20. See *id.* at 323. The *Brown Shoe* Court defined vertical relationships as "[e]conomic arrangements between companies standing in a supplier-customer relationship . . ." *Id.*

railroad cases<sup>21</sup> to argue that a merger between competitors such as Consolidated and the subsidiaries of U.S. Steel would unreasonably restrain trade within the meaning of section 1 of the Sherman Act by automatically eliminating competition, at least between the parties themselves.<sup>22</sup> In asserting that "control by one competitor over another violates the Sherman Act even though the percentage of business for which they compete may be small,"<sup>23</sup> the Government was, in effect, alleging that U.S. Steel's purchase of the assets of Consolidated was unlawful *per se*. As to the vertical aspect of *Columbia Steel*, the Government contended that the acquisition in question was invalid *per se* since it excluded all steel manufacturers except the acquiring company — U.S. Steel — from supplying the acquired company — Consolidated — with its steel requirements.<sup>24</sup>

The Supreme Court majority, however, was of a different philosophical bent. In a 5-4 decision,<sup>25</sup> the Court held that the acquisition violated neither section 1 nor section 2 of the Sherman Act.<sup>26</sup> The Government's argument on the unlawfulness of the vertical stage of the acquisition was rejected by the Court for two reasons. First, there was no indication that the acquisition had the effect of unreasonably restricting the ability of competitors to market steel.<sup>27</sup> Moreover, there was no evidence of a specific intent to create an unreasonable restraint in the industry.<sup>28</sup> The Court then turned to the horizontal aspect of the acquisition and noted:

The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. . . . If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining

---

21. *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Union Pac. R.R.*, 226 U.S. 61 (1912); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *see* 334 U.S. at 531 & n.27.

22. 334 U.S. at 507, 531.

23. *Id.* at 531.

24. *Id.* at 507, 519.

25. Justice Reed wrote the majority opinion, in which Chief Justice Vinson, and Justices Frankfurter, Jackson, and Burton joined, while Justice Douglas wrote a dissenting opinion, joined by Justices Black, Murphy, and Rutledge.

26. *Id.* at 508.

27. *Id.* at 526-27. The Court recognized its inability to engage in the line drawing necessary to conclude that the instant acquisition constituted a *per se* antitrust violation:

It is not for the courts to determine the course of the Nation's economic development . . . . [N]o 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 . . . . If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts.

*Id.* at 526.

28. *Id.* at 527, 531-34.

what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. *We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.*<sup>29</sup>

The Court concluded that, under the standard announced, the Government had failed to prove that the elimination of competition between Consolidated and the subsidiaries of U.S. Steel constituted an unreasonable restraint of trade.<sup>30</sup> The majority also dismissed the Government's reliance upon the four railroad cases,<sup>31</sup> stating:

We do not stop to examine those cases to determine whether we would now approve either their language or their holdings. The factual situation in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief requested by the government.<sup>32</sup>

Thus, the Court's philosophy was clear: mergers and acquisitions were not to be examined for legality by any simple formula, but by the rule of reason.<sup>33</sup> Only if, in the judgment of the Court, after an examination of all of the facts and circumstances,<sup>34</sup> the merger or acquisition was likely to restrain trade substantially would it be held to violate section 1.<sup>35</sup>

### B. *The Emerging Philosophy of "The Curse of Bigness"*

Justice Douglas' dissent in *Columbia Steel* soon replaced the majority opinion as the dominant philosophy of the Court<sup>36</sup> and the

29. *Id.* at 527-28 (footnote omitted) (emphasis added).

30. *Id.* at 529.

31. See note 21 and accompanying text *supra*.

32. 334 U.S. at 531.

33. *Id.* at 527. The "rule of reason" standard was defined by the Court as follows: "If [the] acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act." *Id.*

34. *Id.*; see text accompanying note 29 *supra*.

35. 334 U.S. at 527.

36. See notes 38-218 and accompanying text *infra*.

judicial attitude embodied in the *Columbia Steel* majority opinion remained in disfavor until the establishment of the Burger Court.<sup>37</sup> According to Justice Douglas:

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace — both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace — because of its control of prices. Control of prices in the steel industry is powerful leverage in our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression — an economy of abundance or scarcity. Size in steel should therefore be jealously watched. In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands, so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.<sup>38</sup>

In spite of its defeat in *Columbia Steel*, the next year the Government initiated a suit against another large corporation. The 1917 purchase by E.I. duPont de Nemours & Co. (duPont) of a twenty-three percent stock interest in General Motors Corporation (GM) was challenged under section 7.<sup>39</sup> The Government argued that

---

37. See notes 236-471 and accompanying text *infra*.

38. 334 U.S. at 535-36 (Douglas, J., dissenting) (footnotes omitted); see note 12 and accompanying text *supra*.

39. *United States v. E.I. duPont de Nemours & Co.*, 126 F. Supp. 235, 237, 241 (N.D. Ill. 1954), *rev'd*, 353 U.S. 586 (1957). The district court dismissed the complaint because the record, when viewed as a whole, did not demonstrate that duPont "did restrain or intended to, or had the effect of, restraining or monopolizing trade and commerce." 126 F. Supp. at 334-35. The Government then took a direct appeal to the Supreme Court under § 2 of the Expediting Act, ch. 646, § 17, 62 Stat. 989 (1948) (current version at 15 U.S.C. § 29 (1976)). See *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 588 & n.1 (1957).

the stock acquisition enabled duPont to become GM's largest supplier of automobile finishes and fabrics.<sup>40</sup> The Supreme Court did not decide *United States v. E.I. duPont de Nemours & Co.*<sup>41</sup> until 1957 when the composition of the Court was significantly different from that of 1948, when *Columbia Steel* had been decided.<sup>42</sup> Through its treatment of four major issues, the *duPont* case illustrates the seeds of a philosophy that would bring the Court, in little more than 10 years, to the very brink of adopting a per se rule for mergers and acquisitions.<sup>43</sup>

The applicability of section 7<sup>44</sup> to vertical acquisitions was the first issue which the *duPont* Court faced.<sup>45</sup> During the previous thirty-five years of litigation under the Clayton Act, the Government had not invoked section 7 against vertical acquisitions.<sup>46</sup> Moreover, the Federal Trade Commission (FTC)<sup>47</sup> had said specifically that the section did not apply to them.<sup>48</sup> The uncertainty as to the scope of section 7 resulted from its prohibition of stock acquisitions where the effect of the acquisition tended to "lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition."<sup>49</sup> Since the parties to a vertical acquisition do not compete,<sup>50</sup> the acquisition cannot lessen competition between them. Therefore, it was felt by many that section 7 was not applicable.<sup>51</sup>

However, the *duPont* Court concluded that section 7 did apply to vertical acquisitions because that section proscribed not only stock

40. *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 588-89 (1957).

41. 353 U.S. 586 (1957).

42. *Columbia Steel* was decided by Justices Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, and Burton. Only Justices Black, Frankfurter, Douglas, and Burton were still sitting when *duPont* was decided in 1957. Justices Clark, Harlan, and Whittaker took no part in the consideration of the *duPont* case. 353 U.S. at 608.

43. See, e.g., *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). For a discussion of these cases, see notes 166-93 and accompanying text *infra*.

44. Section 7 was amended between the time suit was instituted and the Supreme Court's disposition in *duPont*. For a discussion of the amendments to § 7 in 1950, see notes 66-69 and accompanying text *infra*. However, the case was decided under § 7 as it read at the time of the events leading up to the suit. See notes 39-40 and accompanying text *supra*.

45. 353 U.S. at 590.

46. See *id.*

47. Section 11(a) of the Clayton Act gives the FTC authority to enforce compliance with various sections of the antitrust laws, including § 7. 15 U.S.C. § 21(a) (1976).

48. See 353 U.S. at 590, citing FEDERAL TRADE COMM'N, REPORT ON CORPORATE MERGERS AND ACQUISITIONS, H.R. DOC. NO. 168, 84th Cong., 1st Sess. 168 (1955).

49. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1976)); see text accompanying note 14 *supra*.

50. See note 20 *supra*.

51. See 353 U.S. at 590, quoting H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).



acquisitions having the effect of lessening competition between the acquired and acquiring corporations, but also those acquisitions "where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce."<sup>52</sup> The thirty-five years of governmental failure to utilize section 7 against vertical acquisitions was dismissed with the statement that "[t]he failure of the [Federal Trade] Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the [Clayton] Act."<sup>53</sup>

The *duPont* case also raised the question of whether section 7 applied "only to the acquisition of stock and not to the holding or subsequent use of the stock."<sup>54</sup> The stock in this case had been purchased thirty years prior to the Government's suit, and it was clear that at the time of the purchase the required adverse effect could not have been established.<sup>55</sup> Thus, the defendants argued that section 7 was applicable only to the acquisition of the stock.<sup>56</sup> However, the Court held to the contrary, stating:

This argument misconceives the objective toward which § 7 is directed. The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. . . .

. . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.<sup>57</sup>

A third issue in *duPont* concerned the definition of the relevant product market within which the alleged adverse effects were to be measured.<sup>58</sup> The Court easily found that the market was to include

52. 353 U.S. at 591.

53. *Id.* at 590. It should be noted that the *duPont* Court's curt dismissal of this issue is sharply distinguishable from the Burger Court's subsequent position on the interpretation of governmental inaction in *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975). For a discussion of this point, see text accompanying notes 454-55 *infra*.

54. 353 U.S. at 596-97.

55. *Id.* at 598, citing *United States v. E.I. duPont de Nemours & Co.*, 126 F. Supp. 235, 335 (N.D. Ill. 1954); see text accompanying note 39 *supra*.

56. 353 U.S. at 596-97.

57. *Id.* at 597-98 (footnotes omitted).

58. *Id.* at 593; see text accompanying notes 85 & 86 *infra*.

the narrow area of automobile finishes and fabrics,<sup>59</sup> making the impact of the defendants' activities much greater than it would have been had the market of all finishes and fabrics been used.<sup>60</sup> According to the Court, automobile finishes and fabrics "have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce,' within the meaning of the Clayton Act."<sup>61</sup> It is interesting to note that the Court did not mention a decision it had issued involving duPont only a year earlier,<sup>62</sup> wherein the Court had refused to hold that cellophane constituted a relevant product market apart from other flexible wrapping materials.<sup>63</sup> The makeup of the Court had changed, and a new majority was making new law.

Turning to the crucial issue of whether the requisite anticompetitive effect could be found,<sup>64</sup> the new majority saw things quite differently than had the previous majority. To the *duPont* Court, the conclusion was "inescapable" that "there is a reasonable probability that the acquisition is likely to result in the condemned restraints."<sup>65</sup>

### C. *The Law of Mergers and Acquisitions Under Amended Section 7*

In 1950 Congress amended section 7.<sup>66</sup> The amendment closed the assets acquisitions loophole<sup>67</sup> for acquisitions by corporations subject to the jurisdiction of the FTC<sup>68</sup> and made it clear that the section was applicable to vertical acquisitions.<sup>69</sup> It was not until 1962, however, after Earl Warren had become the Chief Justice, that

59. 353 U.S. at 593-95; see text accompanying notes 39 & 40 *supra*.

60. See 353 U.S. at 593. The market of all fabrics and finishes had been suggested by the defendants as the relevant product market. *Id.*

61. *Id.* at 593-94 (footnote omitted).

62. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956).

63. *Id.* at 400.

64. 353 U.S. at 607.

65. *Id.* The Court went on to state: "The fire that was kindled in 1917 [the date of the stock acquisition] continues to smolder. It burned briskly to forge the ties that bind the General Motors market to duPont, and if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete." *Id.*

66. Clayton Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)).

67. See text accompanying notes 13-15 *supra*.

68. See Clayton Act, ch. 1184, 64 Stat. 1125 (1950). Section 7 as amended reads in pertinent part:

[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*

*Id.* (emphasis added).

69. See note 68 *supra*. See also text accompanying notes 45-53 *supra*.

the first challenge under the amended section 7 came before the Court. That case was *Brown Shoe Co. v. United States*,<sup>70</sup> which the Court used as a vehicle for expressing its philosophy regarding mergers. *Brown Shoe* also served as the well from which later cases would draw.<sup>71</sup>

According to the Court in *Brown Shoe*, the 1950 congressional amendment was designed to “plug the loophole”<sup>72</sup> that the original section had provided for assets acquisitions, making section 7 applicable to “the acquisition of assets no less than the acquisition of stock.”<sup>73</sup> Moreover, the Court held that the deletion of the language of the original text concerning the lessening of competition between the acquiring and acquired corporations<sup>74</sup> indicated that the amended section 7 was to apply not only to mergers between actual competitors, but also to vertical and conglomerate mergers where the effect may be a tendency to lessen competition in any line of commerce in any section of the country.<sup>75</sup> Sensing the “rising tide of economic concentration”<sup>76</sup> in American business, the Court concluded that Congress had sought to provide the authority “for arresting mergers at a time when the trend to a lessening of competition . . . was still in its incipiency.”<sup>77</sup> The Court additionally observed that Congress had recognized that some mergers might stimulate competition rather than impede it, and were, therefore, to be permitted.<sup>78</sup> Although Congress had not adopted any particular tests for measuring relevant markets or anticompetitive effects,<sup>79</sup> the Court noted that Congress had indicated that mergers should be viewed functionally in the context of their particular industries.<sup>80</sup>

70. 370 U.S. 294 (1962).

71. See, e.g., text accompanying note 127 *infra*.

72. 370 U.S. at 316.

73. *Id.*

74. See text accompanying note 14 *supra*.

75. 370 U.S. at 317 & nn.30 & 31; see note 68 *supra*.

76. 370 U.S. at 317.

77. *Id.* According to the Court:

Congress [had] rejected, as inappropriate to the problem it [had] sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the Courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.

*Id.* at 318.

78. *Id.* at 319. The Court noted:

When concern as to the [Clayton] Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.

*Id.*

79. *Id.* at 320-21.

80. *Id.* at 321-22.

Thus, for example, the Court indicated that the degree to which the industry is fragmented or concentrated should "be taken into account."<sup>81</sup> And, according to the Court, since Congress was concerned with probabilities, not certainties, mergers with a probable anticompetitive effect were to be prohibited.<sup>82</sup>

With those considerations in mind, the *Brown Shoe* Court summarized the law of mergers under the amended section 7. The Court initially noted that a merger or acquisition is unlawful only if it results in the required anticompetitive effect.<sup>83</sup> The relevant market or arena within which the impact of the merger or acquisition is to be measured must first be defined before a determination of anticompetitive effect can be made.<sup>84</sup> The relevant market has two dimensions: product (line of commerce) and geographic (section of the country).<sup>85</sup> In discussing relevant product markets, the Court stated:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.<sup>86</sup>

Thus, according to *Brown Shoe*, the impact of a merger must be examined in *each* economically significant product submarket; and, if an anticompetitive effect is found to be a reasonable probability in *any* of the markets, the merger is proscribed.<sup>87</sup>

81. *Id.* at 322. Other factors to be considered included recent trends toward domination by a powerful few, ease of access to markets and suppliers, and ease of entry into the industry by new competitors. *Id.*

82. *Id.* at 323.

83. *Id.* at 324.

84. *Id.* The Court in *Brown Shoe* stated that "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected.'" *Id.*, quoting *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

85. 370 U.S. at 324.

86. *Id.* at 325 (footnotes and citations omitted).

87. *Id.*

The Court then observed that relevant geographic markets are to be determined by essentially similar criteria.<sup>88</sup> There may thus be geographic submarkets of economic significance;<sup>89</sup> and, if the merger is likely to produce anticompetitive effects “in ‘any’ significant market, the merger — at least to that extent — is proscribed.”<sup>90</sup>

Once the relevant market has been established, the Court’s task under section 7 is to determine the probable effects of the merger.<sup>91</sup> The character of the merger itself is one factor that may indicate whether the effect proscribed by section 7 is likely to result. In *Brown Shoe*, the Court identified the evil that is likely to result from a vertical merger as the foreclosure of markets to competitors.<sup>92</sup> The Court cautioned, however, that, while the size of the market foreclosure was an important consideration, it would only be determinative where the share of the market foreclosed either approached monopoly proportions — in which case a section 7 violation clearly would occur — or was *de minimis* — in which case there would be no violation.<sup>93</sup> In cases lying between those two extremes, the Court stated that other factors, such as the purpose of the merger and the trend toward concentration in the industry, were more important.<sup>94</sup>

In a horizontal merger, the antitrust evil that is likely to result is the elimination of competition between the merging parties, and the consequent lessening of competition in the industry.<sup>95</sup> The Court, in *Brown Shoe* thus observed that a major consideration in determining the legality of such a merger is the resulting market share that the companies may control by merging.<sup>96</sup> Again, however, the Court noted that other factors, such as the trend toward concentration, should be considered in evaluating the probable effects of a merger.<sup>97</sup>

88. *Id.* at 336.

89. *Id.* at 337. The Court emphasized that “[t]he geographic market selected must . . . both ‘correspond to the commercial realities’ of the industry and be economically significant.” *Id.* at 336-37, quoting *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff’d*, 259 F.2d 524 (2d Cir. 1960). Therefore, the Court noted, a geographic market may be as large as the entire nation in some instances, and as small as a single metropolitan area in others. 370 U.S. at 337.

90. 370 U.S. at 337.

91. *Id.* at 328, 339. For a detailed discussion of the effects of the *Brown Shoe* merger on retail competition, see Peterman, *The Brown Shoe Case*, 18 J.L. & ECON. 81, 83-106 (1975).

92. 370 U.S. at 328 (emphasis added). See Peterman, *supra* note 91, at 106-17. See also note 20 *supra*.

93. 370 U.S. at 328-29.

94. *Id.* at 329-33. For a critical discussion of the Court’s findings concerning the trend toward concentration in *Brown Shoe*, see Peterman, *supra* note 91, at 117-32.

95. See 370 U.S. at 339; see note 19 *supra*.

96. *Id.* at 343; see *id.* at 347-53.

97. *Id.* at 344-46.

It should be apparent that the *Brown Shoe* Court was, in effect, establishing a set of rules under which virtually any merger that was likely to produce some adverse consequences could be proscribed. Further, determining the likelihood of adverse consequences was a matter resting solely within the judgment of the Court, thereby making judicial discretion the key determinant of a section 7 violation.

D. *The "Simplified Test of Illegality":  
A Presumption of Invalidity*

A year after deciding *Brown Shoe*, the Court, in *United States v. Philadelphia National Bank*<sup>98</sup> (*PNB*), was confronted with a challenge to a proposed merger between the second and third largest commercial banks in the Philadelphia metropolitan area.<sup>99</sup> At the outset, the Court was faced with a serious question concerning the jurisdictional scope of the amended section 7.<sup>100</sup>

According to the Court, the bank merger if viewed purely as an assets acquisition, could not be within the purview of section 7 since that section reaches only those acquisitions of corporate assets made by corporations subject to the jurisdiction of the FTC.<sup>101</sup> Under the Federal Trade Commission Act,<sup>102</sup> the FTC does not have jurisdiction over banks.<sup>103</sup> In order to bring the merger within the literal terms of section 7, the United States argued that the proposed action should be viewed as a stock acquisition.<sup>104</sup> However, determining that the arrangement actually constituted a consolidation, the Court concluded that the merger could not technically be viewed as a stock acquisition.<sup>105</sup> The banks, therefore, argued that section 7 did not

98. 374 U.S. 321 (1963).

99. *Id.* at 330. The banks proposing to merge were the Philadelphia National Bank and Girard Trust Corn Exchange Bank. *Id.*

100. *Id.* at 335-55.

101. *Id.* at 335-36; see note 68 *supra*.

102. 15 U.S.C. §§ 41-58 (1976).

103. See 374 U.S. at 336, citing 15 U.S.C. § 45(a)(6) (1970) (currently codified in 15 U.S.C. § 45(a)(2) (1976)). Subsection 5(a)(6) of the Federal Trade Commission Act provides in pertinent part: "The [Federal Trade] Commission is empowered and directed to prevent persons, partnerships, or corporations, *except banks*, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(6) (1970) (emphasis added) (currently codified in 15 U.S.C. § 45(a)(2) (1976)). The quoted portion is identical to that in effect at the time of the *PNB* suit. See Act of March 21, 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111.

104. 374 U.S. at 336-37 n.13. Corporations involved in a stock acquisition do not have to be under the jurisdiction of the FTC to come within the reach of § 7. See note 68 *supra*.

105. 374 U.S. at 337; see *id.* at 332 n.7. The Court stated that "[t]he proposed merger . . . is technically a consolidation, since the resulting bank will be a different entity from either of the constituent banks, whereas if the transaction were a merger, Girard would disappear into PNB and PNB would survive." *Id.*

apply.<sup>106</sup> The Court conceded that a bank merger did not fit into either category neatly,<sup>107</sup> but rejected the banks' assertion that section 7 was not applicable to the instant case.<sup>108</sup> The Court's holding was based upon the purposes behind the 1950 Amendments.<sup>109</sup> In discussing those purposes, the Court commented:

Congress contemplated that the 1950 Amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, *read together*, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum. So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.<sup>110</sup>

The *PNB* Court then observed that the law was settled that "immunity from the antitrust laws is not lightly implied."<sup>111</sup> Furthermore, displaying an attitude reminiscent of the *duPont* opinion,<sup>112</sup> the Court refused to be influenced by an administrative determination that the amended section 7 did not reach bank mergers.<sup>113</sup>

Overcoming the jurisdictional obstacle, the *PNB* Court then faced the problem of market definition — both product and geographic.<sup>114</sup> Banks provide a number of services, many of which are also provided by other financial institutions, such as small loan companies, savings and loan associations, and mutual savings banks. The Court, however, had "no difficulty in determining the 'line of commerce' . . . [to be that] 'cluster of products' (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'"<sup>115</sup> The Court also expressed "no difficulty" in defining the relevant

106. *Id.* at 337 n.14.

107. *Id.* at 337.

108. *Id.* at 341.

109. *Id.* at 342-43; see notes 66-69 and accompanying text *supra*.

110. 374 U.S. at 342-43 (citation omitted) (emphasis in original). The Court stated further that "[a]ny other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole in a statute designed to close a loophole." *Id.*

111. *Id.* at 348, quoting *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962).

112. See text accompanying note 53 *supra*.

113. 374 U.S. at 348 & n.24.

114. *Id.* at 355-62.

115. *Id.* at 356.

geographic market as the four-county area in which the two banks maintained offices.<sup>116</sup> The Court recognized, but considered “of little significance”<sup>117</sup> the fact that “bank offices on the perimeter of the area may be in effective competition with bank offices within.”<sup>118</sup> However, given the fact that large borrowers and depositors find it practical to do a major part of their banking business outside their home community, while small borrowers and depositors are restricted to bank offices in their immediate neighborhoods,<sup>119</sup> the Court was forced to reach “a workable compromise.”<sup>120</sup> The “compromise” consisted of

some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place [the banks] . . . in different markets, because only the smallest customers are considered.<sup>121</sup>

Despite the Court’s willingness to adopt a “compromise” market, the opinion reveals an underlying desire to select a relevant market in which a section 7 violation could be established.

Finally, having determined the relevant market, the *PNB* Court reached the ultimate question under section 7 — whether the effect of the merger “may be substantially to lessen competition” in the relevant market.<sup>122</sup> The Court initially stated:

Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended §7 was intended to arrest anticompetitive tendencies in their “incipiency.”<sup>123</sup>

116. *Id.* at 361.

117. *Id.* at 360.

118. *Id.* at 359-60 & n.37. The Court conceded: “To be sure, there is still some artificiality in deeming the four-county area the relevant ‘section of the country’ so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market.” *Id.* at 360 n.37.

119. *Id.* at 360.

120. *Id.* at 361.

121. *Id.*

122. *Id.* at 362.

123. *Id.*, citing *Brown Shoe v. United States*, 370 U.S. 294, 317, 322 (1962).



Emphasizing the business community's need to be able to "assess the legal consequences of a merger with some confidence,"<sup>124</sup> and the "danger of subverting congressional intent by permitting a too-broad economic investigation,"<sup>125</sup> the Court concluded that "in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to *simplify the test of illegality*, the courts ought to do so in the interest of sound and practical judicial administration."<sup>126</sup> As the Court explained, this simplified test amounted to a rule of presumptive illegality:

We noted in *Brown Shoe Co.* that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that *a merger which produces a firm controlling of an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.*<sup>127</sup>

Unfortunately, the Court declined to articulate a blanket rule for determining when a corporation controls an "undue percentage share" of the market, and merely held that the thirty percent market share resulting from the *PNB* merger threatened to create undue concentration.<sup>128</sup>

Of course, it should be noted that the thirty percent figure was reached only with reference to the markets constructed by the Court.<sup>129</sup> By narrowly defining the relevant product and geographic markets, the Court increased the size of the market share involved and thereby facilitated the establishment of a section 7 violation. Moreover, little attention was given to the question of what the thirty percent referred to.<sup>130</sup> Nor did the Court consider whether market shares in "commercial banking" meant the same thing as

124. 374 U.S. at 362.

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.* at 362-63 (citation omitted) (emphasis added).

128. *Id.* at 364.

129. See notes 114-21 and accompanying text *supra*.

130. See 374 U.S. at 331, 364 & n.40.

they did in manufacturing or selling. Indeed, the Court's failure to distinguish "commercial banking" from other types of commercial activity was further emphasized by its statement that "the four largest banks after the merger will foreclose 78 percent of the relevant market."<sup>131</sup> The Court never explained how a bank can foreclose a share of the market in light of the consumer's usual freedom to take his money elsewhere if dissatisfied with the service he is receiving. In addition, the Court failed to identify what or who is likely to be foreclosed.

An examination of these questions might have led to a different result in *PNB*. Moreover, these questions present the issue of the role statistics should assume in proving the requisite anticompetitive effect. Although the Court drew upon other cases to support its conclusion that the percentages showed that the merger tended to lessen competition substantially,<sup>132</sup> the Court's failure to consider the questions raised seemed to make them irrelevant as a matter of law.

The *PNB* Court's approach was clear. In a horizontal merger, a showing of a percentage market share alone would be sufficient to establish an anticompetitive effect.<sup>133</sup> Seven years later, in a dissenting opinion, Justice Harlan lamented the *PNB* approach in *United States v. Phillipsburg National Bank & Trust Co.*,<sup>134</sup> stating: "[t]he legality of every merger of two directly competing banks — no matter how small — is placed in doubt if a court, through what has become an 'antitrust numerology,' concludes that the merger 'produces a firm controlling an undue percentage share of the relevant market.'"<sup>135</sup>

#### E. *The Demise of Columbia Steel*

During 1964, the year following the *PNB* decision, the Court, in *United States v. First National Bank & Trust Co. of Lexington*,<sup>136</sup> expressly indicated its disapproval of the *Columbia Steel* philosophy by holding that the "case must be confined to its special facts."<sup>137</sup> Because of the doubt that had existed prior to the Court's *PNB*

---

131. *Id.* at 366.

132. *See id.* at 365-66.

133. *Id.* at 363-67; *see* text accompanying notes 127-28 *supra*.

134. 399 U.S. 350 (1970).

135. *Id.* at 374 (Harlan, J., dissenting) (citation omitted), *quoting* *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 673 (1964). Later, under the Burger Court, the philosophy of reliance upon market shares without any examination of their significance was rejected. *See United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). For a discussion of *General Dynamics*, *see* notes 262-96 and accompanying text *infra*.

136. 376 U.S. 665 (1964).

137. *Id.* at 672.

decision concerning the applicability of section 7 to bank mergers,<sup>138</sup> the Government had been relying upon sections 1 and 2 of the Sherman Act.<sup>139</sup> Therefore, since *Lexington* was filed prior to the *PNB* decision, the Government charged that the consolidation of First National Bank and Trust Company of Lexington, Kentucky (First National), and Security Trust Company of Lexington, (Security Trust) constituted a combination in restraint of trade in violation of section 1 and a combination and attempt to monopolize in violation of section 2.<sup>140</sup> In deciding that section 1 was violated, the Court relied upon the four railroad cases that had been rejected as authority in *Columbia Steel*,<sup>141</sup> stating: "The four railroad cases at least stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act."<sup>142</sup> The precedential value of *Columbia Steel* was thereby laid to rest.

#### F. Relevant Markets Designed for Illegality

##### 1. Product Markets

In the next few years, the Court proceeded "to simplify the test of illegality,"<sup>143</sup> in section 7 cases even further. If, under one view of the relevant market, the market shares produced by a merger were too small for a section 7 violation to be proved, the Court simply discovered a market in which the market shares were sufficiently large to render the merger unlawful.

For example, in the 1964 case of *United States v. Aluminum Co. of America*,<sup>144</sup> the Government charged that the acquisition of the Rome Cable Corporation (Rome) by the Aluminum Company of America (Alcoa) violated section 7.<sup>145</sup> The district court found that there was no violation and dismissed the complaint.<sup>146</sup> On appeal to the Supreme Court, a principal question concerned the identification of the appropriate "line of commerce" or product market.<sup>147</sup> Both companies produced wire and cable — conductor — made of

138. See notes 100-13 and accompanying text *supra*.

139. 15 U.S.C. §§ 1, 2 (1976). For the pertinent text of these sections, see note 17 *supra*.

140. 376 U.S. at 666.

141. See notes 21 & 31-32 and accompanying text *supra*.

142. 376 U.S. at 669-72 (citations omitted).

143. See text accompanying note 126 *supra*.

144. 377 U.S. 271 (1964).

145. *Id.* at 272-73.

146. *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 519 (N.D.N.Y. 1963).

147. 377 U.S. at 273.

aluminum, but only Rome produced copper wire and cable.<sup>148</sup> Aluminum wire and cable consisted of both bare and covered products.<sup>149</sup> The parties agreed that *bare* aluminum conductor was a separate line of commerce.<sup>150</sup> Alcoa possessed a 32.5 percent share of this product market, and Rome held a .3 percent share.<sup>151</sup> Thus, the acquisition of Rome would only increase Alcoa's share of the *bare* aluminum conductor market by only .3 percent — a *de minimis* anticompetitive effect for section 7 purposes. Insulated or *covered* aluminum conductor, on the other hand, did not constitute a separate line of commerce because it was in active competition with insulated copper conductor.<sup>152</sup> Therefore, the district court refused to consider *all* aluminum conductor — both bare and covered — as a relevant line of commerce, separate and distinct from its copper counterpart.<sup>153</sup> The Supreme Court explained the district court's rationale for this refusal: "[A] line of commerce cannot be composed of two parts, one of which independently qualifies as a line of commerce and one of which does not."<sup>154</sup>

If *all* conductors were considered to constitute the relevant market, as the district court considered appropriate,<sup>155</sup> Alcoa's and Rome's shares were a mere 1.8 percent and 1.4 percent respectively.<sup>156</sup> Only if *aluminum* conductor were considered to be a separate line of commerce would substantial market shares appear: 27.8 percent belonging to Alcoa and 1.3 percent to Rome.<sup>157</sup> Defining the relevant product market as all aluminum conductor would give Alcoa the greatest market share impact after the acquisition of Rome. Thus, the Court predictably concluded:

The combination of bare and insulated aluminum conductor products into one market or line of commerce seems to us proper.

---

148. *Id.* at 273-74.

149. *Id.* at 273.

150. *Id.* at 274.

151. *See id.* at 273-74.

152. 214 F. Supp. at 506, 508-09. The district court stated:

While aluminum wire and cable is sold at prices generally distinct from copper and does not have the same price sensitivity, these factors do not destroy the conclusion that covered aluminum wire and cable is in actual competition with its copper counterpart and may not be found as a line of commerce herein.

*Id.* at 509.

153. *Id.* at 510. After noting that the broad category of covered and bare copper and aluminum wire constituted a line of commerce, the district court stated that bare and covered aluminum wire "are not competitive with copper or interchangeable therewith. . . . Because a broad line of commerce may be proper does not mean that it may be broken down into all possible fragments." *Id.*

154. 377 U.S. at 275.

155. 214 F. Supp. at 510; *see note 153 supra.*

156. 214 F. Supp. at 514.

157. *Id.*

Both types are used for the purpose of conducting electricity and are sold to the same customers, electrical utilities. While the copper conductor does compete with aluminum conductor, each has developed distinctive end uses . . . .<sup>158</sup>

In a footnote, the Court justified its rejection of the line of commerce selected by the district court by asserting:

[B]are aluminum conductor and conductor generally (aluminum and copper, bare and insulated) constitute separate lines of commerce. Having concluded . . . that insulated aluminum conductor and insulated copper conductor are separable even though some interproduct competition exists, the conclusion that aluminum conductor (bare and insulated) is a line of commerce is a *logical extension of the District Court's findings*.<sup>159</sup>

Whether or not the conclusion was logical, it is apparent that the Court, in its attempt to define a relevant market in which a section 7 violation could be found, was quite willing not only to extend, but also to overturn, the lower court's findings.

That same year, in *United States v. Continental Can Co.*,<sup>160</sup> the Court placed glass containers and metal containers together in the same line of commerce to form a market of glass and metal containers,<sup>161</sup> stating: "Where the area of effective competition cuts across industry lines, so must the relevant line of commerce . . . ." <sup>162</sup> In his dissent, Justice Harlan, joined by Justice Stewart, criticized the holding:

The bizarre result of the Court's approach is that market percentages of a nonexistent market enable the Court to dispense with "elaborate proof of market structure, market behavior and probable anticompetitive effects. . . ."

. . . .  
The Court's spurious market-share analysis should not obscure the fact that the Court is, in effect, laying down a "*per se*" rule that mergers between two large companies in related industries are presumptively unlawful under § 7. . . .

. . . Hereafter, however slight (or even nonexistent) the competitive impact of a merger on any actual market, businessmen must rest uneasy lest the Court create some "market" in

---

158. 377 U.S. at 276-77 (footnote omitted).

159. *Id.* at 277 n.4 (emphasis added).

160. 378 U.S. 441 (1964).

161. *Id.* at 457.

162. *Id.*

which the merger presumptively dampens competition, out of bits and pieces of real ones.<sup>163</sup>

## 2. *Geographic Markets*

Two years after *Continental Can*, in 1966, the Court “simplified” the issue of geographic market definition. In *United States v. Pabst Brewing Co.*,<sup>164</sup> the Court noted:

The language of . . . section [7] requires merely that the Government prove the merger may have a substantial anti-competitive effect somewhere in the United States — “in *any* section” of the United States. This phrase does not call for the delineation of a “section of the country” by metes and bounds as a surveyor would lay off a plot of ground. The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event, a violation of § 7 would be proved.<sup>165</sup>

### G. *Protection of Potential Competition*

Rapidly approaching the establishment of a per se rule for mergers, the Court, in 1964, brought a new category of mergers within the reach of section 7 under a “potential competition” theory. The first case in which the Court developed this new theory was *United States v. El Paso Natural Gas Co.*<sup>166</sup> El Paso Natural Gas Company (El Paso) acquired the Pacific Northwest Pipeline Corporation (Pacific Northwest) at a time when El Paso was the sole out-of-state supplier of natural gas to California.<sup>167</sup> Prior to the acquisition, Pacific Northwest had been attempting to enter the rapidly expanding California market,<sup>168</sup> but it did not have a pipeline into California, or regulatory approval to enter the California market.<sup>169</sup> It was, therefore, merely a potential competitor, not an actual one.

163. *Id.* at 469-70, 476-77 (Harlan, J., dissenting), quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

164. 384 U.S. 546 (1966).

165. *Id.* at 549 (emphasis in original), quoting § 7 of the Clayton Act, 15 U.S.C. 318 (1976).

166. 376 U.S. 651 (1964).

167. *Id.* at 652 n.2. El Paso supplied more than 50% of the gas consumed in the state. *Id.*

168. *Id.* at 654.

169. *Id.* at 657-58. The Court recognized that “Pacific Northwest, as an independent entity, could not have obtained a contract from California distributors, could not have received the gas supplies or financing for a pipeline project to California, [and] could not have put together a project acceptable to the regulatory agencies.” *Id.*

Nonetheless, on review of the record, the Court considered that “Congress used the words [in section 7] “*may be* substantially to lessen competition,” to indicate that its concern was with probabilities, not certainties.’”<sup>170</sup> In holding that there was a section 7 violation,<sup>171</sup> the Court explained:

Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso. . . .

. . . We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso’s business attitudes within the state. We repeat that one purpose of §7 was “to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer’s alternatives disappeared through merger . . . .”

. . . .  
The effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company’s eagerness to enter that market, its resourcefulness, and so on. Pacific Northwest’s position as a competitive factor in California was not disproved by the fact that it had never sold gas there.<sup>172</sup>

Later in the same year, in *United States v. Penn-Olin Chemical Co.*,<sup>173</sup> the Court elaborated upon the “potential competition” theory. In that case, Pennsalt Chemicals Corporation (Pennsalt) and Olin Mathieson Chemical Corporation (Olin) jointly formed the Penn-Olin Chemical Company (Penn-Olin) in order to produce and sell sodium chlorate in the southeastern United States.<sup>174</sup> Prior to this time, Olin never had produced sodium chlorate.<sup>175</sup> Although Pennsalt had produced the chemical and had sold it in the southeastern United States, it maintained no processing plants in that area.<sup>176</sup> One issue before the Court, therefore, was whether the joint agreement<sup>177</sup> to build a plant in the relevant geographic area of

170. *Id.* at 658 (emphasis in original), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

171. 376 U.S. at 662.

172. *Id.* at 658-60 (emphasis in original), quoting *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 367 (1963).

173. 378 U.S. 158 (1964).

174. *Id.* at 160.

175. *Id.* at 166.

176. *Id.* at 162. Pennsalt’s sodium chlorate production plant was located in Portland, Oregon. *Id.*

177. The defendants argued that §7 applied only to those situations where the acquired company was “engaged” in commerce, and not to a newly formed corpora-

the southeastern United States would tend substantially to lessen competition within the meaning of section 7.<sup>178</sup> The district court found that "Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete . . . in that market. Each could have done so if it had wished."<sup>179</sup> The district court also determined that "the forecasts of each company indicated that a plant could be operated with profit."<sup>180</sup> However, the district court held that these considerations were not of controlling significance, except "as a factor in determining whether, as a matter of probability, *both* companies would have entered the market as individual competitors if Penn-Olin had not been formed. Only in this event would potential competition between the two companies have been foreclosed by the joint venture."<sup>181</sup>

The Supreme Court disagreed, and held that the district court's conclusion was erroneous.<sup>182</sup> Mr. Justice Clark, writing for the Court, commented:

Certainly the sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market.<sup>183</sup>

In the Court's view, potential competition was important to preserve because it could serve as a valuable substitute for actual competition and even compensate to some extent for the shortcomings of actual competition.<sup>184</sup> Thus, the Supreme Court remanded *Penn-Olin* to the

---

tion. *Id.* at 167. The Court held, however, that § 7 applied to joint ventures such as the one before it, stating: "The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition — and indeed foreclose it — as between them, both being engaged in commerce." *Id.* at 168.

178. *Id.* at 168-69.

179. *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110, 129 (D. Del. 1963).

180. *Id.*

181. *Id.* at 130 (footnote omitted) (emphasis in original).

182. 378 U.S. at 173.

183. *Id.* (emphasis in original).

184. *Id.* at 174. The Court explained its view: "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce *waiting anxiously to enter an oligopolistic market* would be a substantial incentive to competition which cannot be underestimated." *Id.* (emphasis added).



district court to determine whether, absent the joint venture, there was a reasonable probability that one of the corporations would have built a plant in the southeast market while the other would have remained a significant potential competitor.<sup>185</sup>

In *FTC v. Proctor & Gamble Co.*,<sup>186</sup> the potential competition theory was asserted as a reason to void a merger which eliminated the acquiring firm as a prospective market entrant. The FTC there charged that Proctor & Gamble (P & G) had violated section 7 by acquiring the assets of the Clorox Chemical Company.<sup>187</sup> Prior to the merger, Clorox was the leading manufacturer of household liquid bleach, while P & G produced none.<sup>188</sup> P & G had determined, however, that it was advisable for it to enter the liquid bleach industry.<sup>189</sup> Moreover, the FTC found, and the Court agreed,<sup>190</sup> that "Proctor was the most likely prospective entrant, and absent the merger would have remained on the periphery, restraining Clorox from exercising its market power. If Proctor had actually entered, Clorox's dominant position would have been eroded and the concentration of the industry reduced."<sup>191</sup> Therefore, in spite of the refusal of the Sixth Circuit to enforce the FTC's divestiture order on the ground that the finding of illegality had been based on "mere conjecture," possibility, and suspicion,<sup>192</sup> the Supreme Court reversed and remanded the case with instructions to enforce the order.<sup>193</sup>

#### H. Narrowing the "Failing Company" Defense

One of the last antitrust cases decided by the Warren Court was *Citizen Publishing Co. v. United States*,<sup>194</sup> which grew out of a joint operating agreement between the only two daily newspapers of general circulation in Tucson, Arizona — the *Star* and the *Citizen*.<sup>195</sup>

---

185. *Id.* at 175-76.

186. 386 U.S. 568 (1967).

187. *Id.* at 569.

188. *Id.* at 570, 574.

189. *Id.* at 574. In discussing P & G's decision to enter the liquid bleach market, the Court noted:

Prior to the acquisition, [P & G] . . . was in the course of diversifying into product lines related to its basic detergent-soap-cleanser business. Liquid bleach was a distinct possibility since packaged detergents — [P & G's] . . . primary product line — and liquid bleach are used complementarily in washing clothes and fabrics, and in general household cleaning.

*Id.* at 573.

190. *Id.* at 581.

191. *Id.* at 575.

192. *FTC v. Proctor & Gamble Co.*, 358 F.2d 74, 83 (6th Cir. 1966).

193. 386 U.S. at 581.

194. 394 U.S. 131 (1969).

195. *Id.* at 133-34. The agreement provided for the elimination of competition between the two newspapers by the formation of a corporation owned in equal shares

Prior to 1940, the *Star* had operated at a profit, but the *Citizen* had sustained losses.<sup>196</sup> In 1940, the owner of the two newspapers negotiated a joint operating agreement that was to run for 25 years.<sup>197</sup> Pursuant to an option in the agreement, the shareholders of the *Citizen* acquired the *Star's* stock.<sup>198</sup> The Government argued that this acquisition was illegal under section 7, and also charged that the joint operating agreement violated sections 1 and 2 of the Sherman Act.<sup>199</sup> Concluding that certain provisions of the joint operating agreement were per se unlawful, the district court granted the Government's motion for summary judgment on the allegation under section 1.<sup>200</sup> At the end of the trial on the section 2 Sherman Act and section 7 Clayton Act charges, the district court found violations of both sections,<sup>201</sup> and the Supreme Court affirmed.<sup>202</sup>

The only real defense offered by the two newspapers was the judicially created "failing company" doctrine.<sup>203</sup> This doctrine arose out of *International Shoe Co. v. Federal Trade Commission*.<sup>204</sup> The acquired company in *International Shoe* "faced the grave probability of a business failure"<sup>205</sup> because its resources were depleted and the prospect of rehabilitation was remote.<sup>206</sup> Under these circumstances, the Court held that the acquisition of such a company, when "not done with a purpose to lessen competition,"<sup>207</sup> does not substantially lessen competition within the meaning of the Clayton Act.<sup>208</sup> Seizing upon a parenthetical note in *International Shoe*

by the *Star* and the *Citizen*. *Id.* The corporation was to manage the newspapers. *Id.* at 133. Competition between the papers was to be eliminated by the corporation's imposition of price fixing, profit pooling, and market control. *Id.* at 134.

196. *Id.* at 133.

197. *Id.* In 1953 the term of the agreement was extended until 1990. *Id.*

198. *Id.* at 134-35.

199. 15 U.S.C. §§ 1, 2 (1976). For the pertinent text of these sections, see note 17 *supra*. See also 394 U.S. at 134. The government alleged that the agreement constituted an unreasonable restraint of trade under § 1 and a monopoly under § 2. *Id.*

200. *United States v. Citizen Publishing Co.*, 280 F. Supp. 978, 993-94 (D. Ariz. 1968).

201. *Id.* at 994.

202. 394 U.S. at 140.

203. *Id.* at 136. See Blum, *The Failing Company Doctrine*, 16 B.C. INDUS. & COM. L. REV. 75, 75-106 (1974); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 339 (1960); Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 GEO. L.J. 84, 96 (1960); Comment, *All the King's Horses and All the King's Men: The Failing Company Doctrine as a Conditional Defense to Section 7 of the Clayton Act*, 4 HOFSTRA L. REV. 643 (1976).

The district court in *Citizen Publishing* excluded facts tendered to prove the failing company defense as to the § 1 claim, but admitted them as to the §§ 2 and 7 charges. See 394 U.S. at 136.

204. 280 U.S. 291 (1930).

205. *Id.* at 302.

206. *Id.* at 301-02.

207. *Id.* at 302.

208. *Id.* at 302-03.

indicating that there was “no other prospective purchaser,”<sup>209</sup> the *Citizen Publishing* Court limited the “failing company” doctrine to cases in which “it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser,”<sup>210</sup> and placed the “burden of proving that the conditions of the failing company doctrine have been satisfied . . . on those who seek refuge under it.”<sup>211</sup> Once again, the Court’s holding seemed to be deliberately designed to make it as difficult as possible for merging companies to satisfy their burden of proof.

### I. *On the Brink of a Per Se Rule for Mergers*

From an examination of the cases decided by the Warren Court since *Columbia Steel*,<sup>212</sup> it becomes apparent that the Court was using section 7 in an effort to create an effective obstacle to the increasing concentration of American commerce and industry. In the twelve years that elapsed between *duPont*<sup>213</sup> and *Citizen Publishing*,<sup>214</sup> the Court made its views clear.

By repeatedly expanding the reach of section 7,<sup>215</sup> relaxing the standards for proof of illegality,<sup>216</sup> and toughening the requirements of a successful defense,<sup>217</sup> the Court clearly was exhibiting a pro-antitrust attitude or bias. However, the opinions did not always explain, with the fullness expected of the final arbiter of the law, the rationales behind some of their conclusions. The absence of explanation may have made it easier for the subsequent Burger Court to erode the law of mergers that had developed under the Warren Court.

209. *Id.* at 302; see 394 U.S. at 137.

210. 394 U.S. at 138. The Court explained its rationale for imposing this limitation on the failing company defense: “[I]f another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power.” *Id.*

211. *Id.* at 138-39 (footnote omitted). Noting the existence of numerous companies that had reorganized through bankruptcy and emerged as strong competitive companies, the Court stated that “[t]he prospects of reorganization of the *Citizen* in 1940 would have to be dim or nonexistent to make the failing company doctrine applicable to this case.” *Id.* at 138.

212. For a discussion of *Columbia Steel*, see notes 16-35 and accompanying text *supra*.

213. See notes 39-65 and accompanying text *supra*.

214. See notes 194-211 and accompanying text *supra*.

215. See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

216. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

217. See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

Nevertheless, as a practical matter, Justice Stewart's statement in 1966 that "the Government always wins"<sup>218</sup> was largely correct. By the latter part of the Warren era, it appeared that mergers and acquisitions were presumptively, if not per se, unlawful.

### III. THE TRANSITION PERIOD

In 1968, Richard M. Nixon was elected President of the United States. His first appointee to the Supreme Court was Warren E. Burger, to replace Chief Justice Earl Warren. Chief Justice Burger was sworn in on June 23, 1969, approximately three months after the *Citizen Publishing*<sup>219</sup> decision was announced. With the appointment of a new Chief Justice, a period of transition began.

In the brief period of transition, the composition of the Court changed considerably. In addition to the new Chief Justice, President Nixon appointed Justice Blackmun to replace Justice Fortas, Justice Powell to replace Justice Black, and Justice Rehnquist to replace Justice Harlan. As the new members began to take their seats on the Court and to participate in decisions, one could see the pendulum begin to swing in a different direction. The Court began a retreat from the earlier "simplified test of illegality"<sup>220</sup> and the almost per se approach toward mergers under section 7. In the course of the transition, as the new majority was forming, the Government gradually stopped winning.

Two section 7 cases decided during this period appropriately demonstrate the first stage of the change in the Court's attitude.<sup>221</sup> One of these cases was *United States v. Phillipsburg National Bank & Trust Co.*,<sup>222</sup> which involved the proposed merger between the Phillipsburg National Bank & Trust Company (PNBT) and the Second National Bank of Phillipsburg (SNB).<sup>223</sup> The banks were relatively small, but they were direct competitors, predominantly serving the residents of Phillipsburg, New Jersey.<sup>224</sup> The Court ruled that the merger had to be judged by the antitrust standards announced in *PNB*<sup>225</sup> despite the small size of the *Phillipsburg* banks in comparison with the towering size of those in *PNB*.<sup>226</sup>

218. See text accompanying note 2 *supra*.

219. For a discussion of this case, see notes 194-211 and accompanying text *supra*.

220. See text accompanying notes 126-27 *supra*.

221. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970). See also *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

222. 399 U.S. 350 (1970).

223. *Id.* at 352, 354.

224. *Id.* at 354.

225. For a discussion of *PNB*, see notes 98-135 and accompanying text *supra*.

226. 399 U.S. at 357-58. Indeed, the *Phillipsburg* Court went so far as to state:

[C]ompetitive [small] commercial banks, with their cluster of products and services, play a particularly significant role in a small community unable to

In discussing the relevant markets for the case before it, the Court firmly stated that the appropriate product market was "commercial banking"<sup>227</sup> and that the district court erred in emphasizing the competition between the two Phillipsburg banks and other types of financial institutions.<sup>228</sup> The Court next determined that the appropriate geographic market was the local area where "the proposed merger's effect would be 'direct and immediate.'"<sup>229</sup> Then, applying the "simplified test of illegality" of *PNB*,<sup>230</sup> the Court concluded that the proposed merger was "inherently likely to lessen competition substantially."<sup>231</sup>

Chief Justice Burger joined Justice Harlan in a partially dissenting opinion which focused in part upon the significance of regulatory barriers to entry into banking.<sup>232</sup> This aspect of the dissenting opinion reflected a leniency toward mergers that would soon become the prevailing attitude of the new Supreme Court majority. The dissent also questioned whether the presumption of illegality raised by percentage figures could be rebutted.<sup>233</sup> Despite the magnitude of those percentage figures, Justice Harlan suggested that the anticompetitive effects of the merger might not be significant.<sup>234</sup> Therefore, he felt that the case should be remanded to

support a large variety of alternative financial institutions. Thus, if anything, it is even more true in the small towns than in the large city that "if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ."

*Id.* at 358, quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963).

227. 399 U.S. at 360-61. It should be noted that commercial banking was also the relevant product market in *PNB*. See text accompanying note 115 *supra*.

228. 399 U.S. at 359-60. The other types of institutions examined by the district court included savings and loan associations, pension funds, mutual funds, insurance, and finance companies. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 306 F. Supp. 645, 646-51 (D.N.J. 1969).

229. 399 U.S. at 362, quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). The actual geographic market selected by the Court was the Phillipsburg-Easton area. 399 U.S. at 365. The district court had used an area that was approximately four times as large as Phillipsburg-Easton. See *id.* at 362, citing *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 306 F. Supp. 645, 652-53, 656-58 (D.N.J. 1969).

230. See text accompanying notes 126 & 27 *supra*.

231. 399 U.S. at 367. Justice Stewart took no part in the *Phillipsburg* decision, and Justice Blackmun, who had joined the Court less than three weeks earlier, did not participate in the consideration or decision of the cases.

232. *Id.* at 377-79 (Harlan, J., dissenting); see N.J. STAT. ANN. § 17:9A-19(B)(3) (West Supp. 1970).

233. 399 U.S. at 377-78 (Harlan, J., dissenting). For a discussion of the Court's reliance upon percentages to find a § 7 violation, see text accompanying note 127 *supra*.

234. 399 U.S. at 377-78 (Harlan, J., dissenting). After noting a recent change in the New Jersey statutory scheme that substantially increased the possibility of new banking entry into Phillipsburg, Justice Harlan stated:

afford the banks an opportunity to rebut the presumption of illegality.<sup>235</sup>

With the majority's decision in *United States v. Falstaff Brewing Corp.*,<sup>236</sup> it can firmly be stated that the pendulum was swinging in a different direction than it had under the Warren Court. A new majority was forming which began the retreat from the "simplified test of illegality"<sup>237</sup> and the previous per se approach to mergers under section 7. The government was not yet losing, but neither was it winning. *Falstaff* represents the turning point.

The case involved the 1965 acquisition of Narragansett Brewing Company, the largest seller of beer in New England, by Falstaff Brewing Corporation, the nation's fourth largest producer of beer.<sup>238</sup> Although Falstaff did not sell beer in New England prior to the acquisition, it desired to enter the New England market in order to achieve a national distribution.<sup>239</sup> To accomplish this goal, Falstaff made several efforts during the early 1960's to enter the market by acquisition.<sup>240</sup> When Falstaff agreed to acquire Narragansett in 1965,<sup>241</sup> the Government attacked the acquisition on the grounds

If one assumes the regulatory barriers to entry have been permanently lowered, it would seem that the competitive significance of this merger may well be considerably overstated by the percentage figures alone. . . . In a market dominated by banks of enormous absolute size, with assets of hundreds of millions and even billions of dollars, it is of course unlikely that a new entrant will quickly become a substantial competitive force. The same is not true, however, of a market in which the largest competitor is, in absolute terms, rather small.

. . . [T]he significance of the percentage figures recited in the Court's opinion can only be fully evaluated after consideration of the present entry conditions in the Phillipsburg-Easton area.

*Id.* at 378-79 (Harlan, J., dissenting). For the Court's subsequent treatment of regulatory barriers to entry, see notes 347-49 and accompanying text *infra*.

235. 399 U.S. at 382 (Harlan, J., dissenting).

236. 410 U.S. 526 (1973). See Comment, *United States v. Falstaff Brewing Corp.: An Examination of Potential Competition*, 9 WAKE FOREST L. REV. 545 (1973).

237. See text accompanying notes 126 & 27 *supra*. By the time of the Court's 1972 decision in *Ford Motor Co. v. United States*, 405 U.S. 562 (1972), Justices Powell and Rehnquist had joined the bench. The separate opinions of Justices Stewart and Blackmun and Chief Justice Burger lend further credence to the author's opinion that this period constituted a distinct transition from the Court's previously liberal attitudes concerning the Government's attempts to prohibit corporate amalgamations. See *id.* at 579-82 (Stewart, J., concurring); *id.* at 582-95 (Burger, C.J., concurring in part and dissenting in part); *id.* at 595 (Blackmun, J., concurring in part and dissenting in part).

238. 410 U.S. at 528.

239. *Id.* at 529. According to the Court, Falstaff desired to convert to national status because "[n]ational brewers possess competitive advantage since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region." *Id.*

240. *Id.*

241. *Id.*

that it precluded the competition of Falstaff, a potential entrant.<sup>242</sup> The Government further argued that the acquisition eliminated the competition that would have existed if Falstaff had entered the market *de novo*, or by a so-called "toe-hold" acquisition — an acquisition of a small firm in the market.<sup>243</sup> However, the district court held that the Government had failed to establish that the acquisition would result in a substantial lessening of competition and dismissed the complaint.<sup>244</sup>

The Supreme Court reversed,<sup>245</sup> holding that the district court erred in concluding that Falstaff "had no intent to enter the New England market except through acquisition and that it therefore could not be considered a potential competitor in that market."<sup>246</sup> According to the Court, it was a mistake of law for the district court to assume that Falstaff could not be considered as a potential competitor simply because it would never have entered the market *de novo*.<sup>247</sup> The Court also held that the district court "failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted a beneficial influence on competitive conditions in that market."<sup>248</sup>

Since it was remanding the case to the district court for an assessment of Falstaff as a potential competitor,<sup>249</sup> the Court felt that it was unnecessary to consider the Government's second argument — that section 7 bars a merger that leaves "competition in the marketplace exactly as it was, neither hurt nor helped,"<sup>250</sup> but results in less competition than would have existed had the company entered the market either *de novo* or by a "toe-hold" acquisition.<sup>251</sup>

242. *Id.*

243. *Id.* at 530. A "toe-hold" acquisition has been described as "the case of one company acquiring a very small company in another industry, presumably with the thought of expanding that small company into a more substantial force." E. W. KINTNER, *PRIMER ON THE LAW OF MERGERS* 260 (1973).

244. *United States v. Falstaff Brewing Corp.*, 332 F. Supp. 970, 972-73 (D.R.I. 1971).

245. 410 U.S. at 538.

246. *Id.* at 532.

247. *Id.*; see 332 F. Supp. at 972. The district court found as a matter of fact that "the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett." *Id.*

248. 410 U.S. at 532-33.

249. *Id.* at 537.

250. *Id.*

251. *Id.* Recognizing that there had been "traces of this view" in previous cases, the Court pointed out that it had not, in any of those opinions, "squarely faced the question, if for no other reason than because there has been no necessity to consider it." *Id.* at 537-38 (footnote omitted), citing *Ford Motor Co. v. United States*, 405 U.S. 562, 567 (1972), *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 586 (1967), and *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 173 (1964).

*Falstaff* represents a turning point, not because the Court refused to consider the Government's second argument, but because it remanded the case "for proper assessment of *Falstaff* as an on-the-fringe potential competitor."<sup>252</sup> Earlier in *PNB*,<sup>253</sup> the Court had dispensed with the requirement of concrete proof of an anticompetitive effect,<sup>254</sup> and the cases appear to be inconsistent in this respect. As had been observed in *PNB*, the type of evaluation ordered on the *Falstaff* remand necessarily required a broad economic investigation and "elaborate proof of market structure, market behavior, [and] probable anti-competitive effects."<sup>255</sup> Therefore, the Court's order on remand placed a heavy burden on the Government's shoulders.

Furthermore, as Justices Douglas and Marshall stated in their separate concurring opinions, the majority apparently was requiring an appraisal of the *present* anticompetitive effect of the acquisition, which was not only difficult of proof, but also very likely nonexistent.<sup>256</sup> Justice Marshall explained:

Since the effect of a perceived potential entrant depends upon the perception of those already in the market, it may in some cases be difficult to prove. Moreover, in a market which is already competitive, the existence of a perceived potential entrant will have no present effect at all. The entry by acquisition of such a firm may nonetheless have an anticompetitive effect by eliminating an actual potential competitor. . . . [E]ven if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at such future date.

. . . [W]here a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de novo*, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases, we have held that § 7 prohibits an entry by acquisition since such an entry eliminates the possibility of future actual competition which would occur if there were an entry *de novo*.<sup>257</sup>

252. 410 U.S. at 537.

253. See notes 98-135 and accompanying text *supra*.

254. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

255. See *id.*

256. 410 U.S. at 538-39 (Douglas, J., concurring); *id.* at 560-61 (Marshall, J., concurring).

257. *Id.* at 560-61 (Marshall, J., concurring) (footnote omitted).



From an analysis of Justice Marshall's observations, it appears that the majority was retreating to some extent from its previous efforts to "simplify the test of illegality."<sup>258</sup> Whatever may be thought of the Warren Court's efforts to liberalize the burden of proof under section 7, it must be conceded that the movement toward a per se rule for mergers enabled "businessmen [to] assess the legal consequences of a merger with some confidence [and engage in] sound business planning."<sup>259</sup> A per se rule had the advantage of shifting the judicial focus from *effect* to *conduct*.<sup>260</sup> Nevertheless, with the passing of judicial control, the tendency toward a liberal standard of proof diminished to the point of virtual extinction, and the burden upon the Government increased correspondingly.

#### IV. THE BURGER COURT ERA: A RETURN TO THE "RULE OF REASON"

##### A. *The First Retreat*: General Dynamics

The new Court wasted little time in turning things around.<sup>261</sup> In its first merger case, *United States v. General Dynamics Corp.*,<sup>262</sup> Justice Stewart's majority opinion<sup>263</sup> made it clear that the Government would no longer "always win."<sup>264</sup>

In this case, Material Service Corporation and its subsequent parent, General Dynamics Corporation, acquired the stock of United Electric Coal Companies.<sup>265</sup> Material Service was a large midwest producer of coal from deep shaft mines, and at the time of the

258. See text accompanying notes 126-27 *supra*.

259. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

260. The Court in *PNB* explained the difficulties of evaluating the *effect* of section 7 activities:

[W]hether the effect of the merger "may be substantially to lessen competition" in the relevant market . . . is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . . .

*Id.*

261. In March of 1974 the new majority consisted of Chief Justice Burger and Justices Blackmun, Powell, Stewart, and Rehnquist. Justices Douglas, Brennan, White, and Marshall became the new minority.

262. 415 U.S. 486 (1974).

263. Justice Stewart dissented in several of the earlier merger cases. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 572 (1973); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 143 (1969); *United States v. Continental Can Co.*, 378 U.S. 441, 467 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271, 281 (1964); *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 673 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 373 (1963).

264. See text accompanying note 2 *supra*. For a general discussion of the new majority and mergers, see Shenefield, *Annual Survey of Antitrust Developments — Class Actions, Mergers and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 321-45 (1975).

265. 415 U.S. at 488.

acquisition, owned all of the capital stock of the Freeman Coal Mining Corporation.<sup>266</sup> United Electric, in contrast, was a coal producer operating only in strip or open pit mines.<sup>267</sup> In 1954, Material Service began acquiring the stock of United Electric.<sup>268</sup> By 1959, Material Service had accumulated a thirty-four percent stock interest in United Electric, thereby enabling it to place Freeman's president on the Executive Committee of United Electric.<sup>269</sup> Shortly thereafter, Material Service was acquired by General Dynamics, which continued to accumulate United Electric stock.<sup>270</sup> Ultimately, United Electric became a wholly owned subsidiary of General Dynamics.<sup>271</sup> Although the Government contended that the acquisition of United Electric substantially lessened competition between Freeman and United Electric in the production and sale of coal,<sup>272</sup> the district court dismissed the complaint.<sup>273</sup>

The primary issue on appeal to the Supreme Court concerned the validity of the district court's finding that the evidence did not show that the acquisition substantially lessened competition between Freeman and United Electric in any product or geographic market.<sup>274</sup> The Government had sought to establish a section 7 violation through the use of statistics which showed that the coal industry was concentrated among a small number of large producers, that the concentration was increasing, and that the acquisition in question would contribute to the trend toward concentration.<sup>275</sup> In a remarkable example of judicial candor, Justice Stewart conceded:

In prior decisions involving horizontal mergers between competitors, this Court has found prima facie violations of § 7 of the Clayton Act from aggregate statistics of the sort relied on by the United States in this case. . . .

---

266. *Id.*

267. *Id.* at 489.

268. *Id.*

269. *Id.*

270. *Id.* at 489-90.

271. *Id.* at 490.

272. *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 555-58 (N.D. Ill. 1972).

273. *Id.* at 560. The district court rejected the Government's use of "coal" as the relevant product market, *id.* at 556, the Government's proposed geographic markets of Illinois and the Eastern Interior Coal Province, *id.* at 556-57, and the Government's findings that United Electric and Freeman were competitors, *id.* at 558-59. The appropriate product market was considered by that court to be "the energy market." *Id.* at 555. The relevant geographic markets accepted by the district court were those proposed by the defendants. *Id.* at 557. See Griffin & Kushner, *Geographic Submarkets in Bituminous Coal: Defining a Southeastern Submarket*, 21 ANTITRUST Bull. 67 (1976).

274. 415 U.S. at 492, *citing* *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 558-59 (N.D. Ill. 1972).

275. 415 U.S. at 494.

The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."<sup>276</sup>

Nevertheless, despite the Government's statistics, the Court was satisfied that the district court did not err when it found that there was no substantial lessening of competition.<sup>277</sup> The Court, relying on *Brown Shoe*,<sup>278</sup> emphasized that, while statistics were significant, they "were not conclusive indicators of anticompetitive effects."<sup>279</sup> Therefore, the Court agreed with the district court that other factors, such as the decrease in coal consumption in recent years,<sup>280</sup> the increase in coal use by the electric utility industry,<sup>281</sup> and the increase in the number of long term requirements contracts,<sup>282</sup> were to be given great weight.<sup>283</sup>

The Court proceeded to discuss another significant aspect of the coal industry:

A . . . significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal. . . . *In a market where the availability and price for coal are set by long-term contracts rather than immediate or short-term purchases and sales, reserves rather than past production are the best measure of a company's ability to compete.*<sup>284</sup>

In light of the district court's findings that United Electric's coal reserve prospects were "unpromising,"<sup>285</sup> and that United Electric

276. *Id.* at 496-97, quoting *United States v. Aluminum Co. of America*, 377 U.S. 271, 279 (1964).

277. 415 U.S. at 498.

278. For a discussion of *Brown Shoe*, see notes 70-97 and accompanying text *supra*.

279. 415 U.S. at 498; see text accompanying notes 91-97 *supra*.

280. 415 U.S. at 499.

281. *Id.*

282. *Id.* at 499-500.

283. *Id.* at 498.

284. *Id.* at 502 (emphasis added). See 27 U. FLA. L. REV. 281 (1974); 24 DRAKE L. REV. 223 (1974).

285. 341 F. Supp. at 559.

was unable to acquire additional reserves,<sup>286</sup> the Court concluded that the district court's dismissal was proper.<sup>287</sup>

The abrupt shift in the attitude of the Court is best illustrated by the pointed comment of Justice Douglas in his dissent.<sup>288</sup> He stated that "the judgment may not be affirmed except on a deep-seated judicial bias against § 7 of the Clayton Act."<sup>289</sup>

Since United Electric's reserve position had been evaluated as of the time of trial rather than the time of acquisition, the dissent criticized the majority's rejection of the past and present production statistics offered by the Government.<sup>290</sup> Justice Douglas commented: "Many of the commitments here which reduced United's available reserves occurred after the acquisition . . . ."<sup>291</sup> Indeed, it was observed that "all the district court's findings were made as of the time of the trial."<sup>292</sup> Thus, the dissent apparently endorsed the Government's argument that the district court erred in giving undue weight to post-acquisition evidence.<sup>293</sup>

In justifying its treatment of the post-acquisition evidence of United Electric's coal reserves, the majority observed:

This Court indicated in *United States v. E. I. duPont de Nemours & Co.* that a merger may be attacked *ab initio* long after its culmination if effect on competition not apparent immediately after the merger subsequently appears, since § 7 was designed to arrest the creation of monopolies "in their incipency" and "incipience" . . . denotes not the time the

---

286. *Id.* at 560. The government urged on appeal that a defense based upon depleted resources was essentially a "failing company" defense, which required a demonstration that there was no alternative method of prolonging the company's life. *Id.* at 506-07; see notes 203-11 and accompanying text *supra*. See also Comment, *Horizontal Mergers and the Resource Depletion Defense* — *United States v. General Dynamics Corp.*, 16 B.C. INDUS. & COM. L. REV. 759, 768-71 (1975); Comment, *supra* note 203, at 665-71, 676-84; 24 DRAKE L. REV. 223, 232-33 (1974).

287. 415 U.S. at 503-04.

288. *Id.* at 511-27 (Douglas, J., dissenting). Justices Brennan, White, and Marshall joined in this dissent.

289. *Id.* at 527 (Douglas, J., dissenting). *Contra*, Knapp, *General Dynamics, Mirage or Oasis?*, 26 MERCER L. REV. 557 (1975). This commentator does not view *General Dynamics* as a turning point in the line of Government successes in antitrust cases, concluding:

Because *General Dynamics* is a 5-4 affirmance of a decision dismissing a section 7 Clayton Act complaint, it cannot be regarded, as a reversal of divestiture might be, as an indication of the degree to which the Supreme Court may go in its application of section 7. . . . *General Dynamics* does not lead to the conclusion that the present Court would reach a different result if *Brown Shoe* and its successors of the 60's were to come before the Court on the same records.

*Id.* at 589.

290. 415 U.S. at 523-24 (Douglas, J., dissenting).

291. *Id.* at 524 (Douglas, J., dissenting).

292. *Id.* (emphasis in original).

293. *Id.* at 504. For a discussion of the role of post-acquisition evidence in *General Dynamics*, see 53 N.C.L. REV. 535 (1975).

stock was acquired but any time when the acquisition threatens to ripen into a prohibited effect. . . . In the context of the present case, the "time of suit" rule coupled with the limited weight given to post-merger evidence of no anticompetitive impact tends to give the Government a "heads-I-win, tails-you-lose" advantage over a § 7 defendant: post-merger evidence showing a lessening of competition may constitute an "incipiency" on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred, cannot be accorded "too much weight."<sup>294</sup>

Apparently, the majority viewed the determination of the weight to be given post-acquisition evidence solely as a question of fair play.

It is interesting to observe the use of Warren Court cases in *General Dynamics* to substantiate the Court's new direction. Just as it had relied upon *Brown Shoe* to reject the Government's statistics,<sup>295</sup> the Court used *duPont* to justify the use of post-acquisition evidence. That both of these cases reached a result entirely contrary to that of *General Dynamics* appeared irrelevant. Moreover, the *General Dynamics* Court overlooked the fact that much of the *Brown Shoe* and *duPont* opinions were devoted to the objective of section 7 — "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil."<sup>296</sup>

#### B. *A Restrictive View of Geographic Markets and Its Effect on the "Potential Competition" Doctrine*

Two cases decided on the same day at the end of the Burger Court's 1973 term provide clear examples of that Court's attitudes toward mergers. As Justice White stated in his dissenting opinion to one of those cases,<sup>297</sup> these decisions of "the Court's new antitrust majority [have] chipped away at the policies of § 7 of the Clayton Act."<sup>298</sup>

*United States v. Marine Bancorporation*,<sup>299</sup> involved a challenge to the proposed merger between the National Bank of Commerce of Seattle (NBC) and the Washington Trust Bank of Spokane (WTB).<sup>300</sup>

294. 415 U.S. at 505 n.13, quoting *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) (citations omitted). For a discussion of the *duPont* decision, see notes 39-65 and accompanying text *supra*.

295. See text accompanying notes 278 & 79 *supra*.

296. *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957); see text accompanying notes 57 & 91-97 *supra*.

297. *United States v. Marine Bancorporation*, 418 U.S. 602, 642-55 (1974) (White, J., dissenting).

298. *Id.* at 642 (White, J., dissenting).

299. 418 U.S. 602 (1974).

300. *Id.* at 605.

The home cities of the two banks were almost 300 miles apart, at opposite ends of the state.<sup>301</sup> The banks were not in direct competition to any significant degree in Spokane, nor in any other part of the State of Washington.<sup>302</sup> The Government argued that “the acquisition may substantially lessen competition in the Spokane market, in Eastern Washington, and in the State as a whole.”<sup>303</sup> Relying exclusively upon the “potential competition” theory,<sup>304</sup> the Government contended that the acquisition of WTB eliminated NBC both as an actual competitor and as a perceived potential entrant into the Spokane banking market.<sup>305</sup> The district court held against the Government on all aspects of the case,<sup>306</sup> and the Supreme Court affirmed.<sup>307</sup>

One of the issues before the Supreme Court involved the determination of the relevant geographic market.<sup>308</sup> Although the Government had stipulated prior to trial that the Spokane area was one relevant market,<sup>309</sup> it also contended that the entire state was an appropriate “section of the country.”<sup>310</sup> The Government was arguing that, even though an acquisition may have no effect in the

301. *Id.*

302. *Id.* The Court noted that neither bank maintained banking offices in the home city of the other bank. *Id.*

303. Brief for the United States at 54, *United States v. Marine Bancorporation*, 418 U.S. 602 (1974).

304. 418 U.S. at 605, 623-40; see notes 166-93 & 245-48 and accompanying text *supra*.

305. 418 U.S. at 626; see notes 329 & 330 and accompanying text *infra*. The Court described the Government's five-step argument:

First, it argues that the potential-competition doctrine applies with full force to commercial banks. Second, it submits that the Spokane commercial banking market is sufficiently concentrated to invoke that doctrine. Third, it urges us to resolve in its favor the issue left open in *Falstaff* [whether the potential competition doctrine proscribes a merger solely because it eliminates the prospect for increased competition that might result if the acquiring firm were forced to enter the market *de novo* or through a toe-hold acquisition]. Fourth, it contends that without regard to the possibility of future deconcentration of the Spokane market, that challenged merger is illegal under established doctrine because it eliminates NBC as a perceived potential entrant. Finally, it asserts that the merger will eliminate WTB's potential for growth outside Spokane.

418 U.S. at 626.

306. *United States v. Marine Bancorporation*, 1973-1 Trade Cas. (CCH) ¶ 74,496 (W.D. Wash. 1973).

307. 418 U.S. at 605-06.

308. *Id.* at 619-23. The district court defined the relevant product market as “commercial banking,” and none of the parties disputed this finding. See *id.* at 618-19, citing *United States v. Marine Bancorporation*, 1973-1 Trade Cas. (CCH) ¶ 74,496 at 94,243 (W.D. Wash. 1973).

309. 418 U.S. at 619. The district court determined that the Spokane metropolitan area was the appropriate geographic market. 1973-1 Trade Cas. (CCH) ¶ 74,496 at 94,244.

310. 418 U.S. at 620. In describing the Government's rationale, the Court explained: “[T]he Government asserts that the State is an economically differentiated region, because its boundaries delineate an area within which Washington banks are insulated from most forms of competition by out-of-state banking organizations.” *Id.*

market served by the *acquired* company, it does not follow that the acquisition will have no impact in the market served by the *acquiring* company or even in an area served by neither. The acquisition may make the acquiring company bigger, stronger, and more able to compete or dominate its market. In effect, the Government was contending that an acquisition in one geographic area may have an anticompetitive effect in another area.<sup>311</sup>

The Burger Court, however, rejected the Government's argument as contrary to precedent,<sup>312</sup> once again bringing previous Warren Court decisions back to haunt the Government. The *Marine Bancorporation* Court relied upon the former majority's narrow restrictions on the scope of geographic markets in *PNB*<sup>313</sup> and *Phillipsburg*,<sup>314</sup> to conclude:

Without exception the Court has treated "section of the country" and "relevant geographic market" as identical, and it has defined the latter concept as the *area in which the goods or services at issue are marketed to a significant degree by the acquired firm*. In cases in which the acquired firm markets its products or services on a local, regional, and national basis, the Court has acknowledged the existence of more than one relevant geographic market. But in no previous § 7 case has the Court determined the legality of a merger by measuring its effects on areas where the acquired firm is not a direct competitor. . . . We hold that *in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor*.<sup>315</sup>

This ruling is significant because it constitutes a departure from the precedent of the Warren Court. In order to identify an area within which an anticompetitive effect could be established, the Warren Court displayed a willingness to expand or contract the geographic market as necessary.<sup>316</sup> The Burger Court, on the other

311. *See id.* at 621-23.

312. *Id.* at 620-23.

313. *See* notes 116-21 and accompanying text *supra*.

314. *See* note 229 and accompanying text *supra*.

315. 418 U.S. at 620-22 (footnotes and citation omitted) (emphasis added). This holding appears to be at odds with the 1964 decision in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *see* notes 166-72 and accompanying text *supra*. Nevertheless, the *Marine Bancorporation* Court dismissed this inconsistency by stating that "*El Paso* was in reality . . . an actual-competition rather than a potential-competition case." 418 U.S. at 623.

316. *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966). In *Pabst*, the Warren Court expressed a willingness to proscribe a merger if there was "any" geographic market in which an anticompetitive effect could be shown. *Id.* at 549. For a discussion of the *Pabst* decision, *see* notes 164-65 and accompanying text *supra*.

hand, appears to prefer proof of an anticompetitive effect in a *particular* geographic market.

The language employed in *United States v. Connecticut National Bank*,<sup>317</sup> decided the same day as *Marine Bancorporation*, is illustrative of the Burger Court's position on geographic markets:

The Government repeatedly notes that it is not required to define geographic markets by "metes and bounds." To the extent that this means that such markets need not — indeed cannot — be defined with scientific precision, it is accurate. But it is nevertheless the Government's role to come forward with evidence delineating the rough approximation of localized banking markets mandated by . . . [PNB] and . . . [Phillipsburg].<sup>318</sup>

The district court in the *Connecticut National Bank* case ruled that the state as a whole was an appropriate geographic market within which to measure the alleged anticompetitive effect of a merger between two banks that were not competing directly.<sup>319</sup> The Supreme Court disagreed, however, stating:

The State cannot be the relevant geographic market . . . because . . . [the two banks] are not direct competitors . . . . The two banks do not operate statewide, nor do their customers as a general rule utilize commercial banks on that basis. . . . Although the two banks presumably market a small percentage of their loans to large customers on a statewide or broader basis, it is undoubtedly true that almost all of their business originates locally. . . .

As indicated by our opinion today in *Marine Bancorporation*, the relevant geographic market of the acquired bank is the localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank.<sup>320</sup>

Logically, the impact of most mergers should diminish statistically — by market share — as the size of the geographic area increases.<sup>321</sup> Therefore, the Government usually has sought to limit the size of the area within which the merger's impact is measured.<sup>322</sup>

317. 418 U.S. 656 (1974).

318. *Id.* at 669-70 (citations omitted), quoting *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

319. *United States v. Connecticut Nat'l Bank*, 362 F. Supp. 240, 283 (D. Conn. 1973).

320. 418 U.S. at 667 (citation omitted).

321. See E. W. KINTNER, AN ANTITRUST PRIMER 91-93 (2d ed. 1973).

322. *Id.* at 91. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-62 (1963). But see *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-38 (1962).



Where the parties to the merger are not direct competitors, however, the Government has attempted to expand the market in order to encompass both parties to the merger.<sup>323</sup> The Warren Court fostered the Government's viewpoint by permitting this practice.<sup>324</sup> The Burger Court, however, appeared to be of a different philosophical bent when it held in *Marine Bancorporation* and *Connecticut National Bank* that the rules governing direct competitor mergers and nondirect competitor cases should be different.<sup>325</sup> Where parties compete directly with one another, the elimination of competition between them as a result of a merger may be sufficient to tend to lessen competition substantially within the area where they do business; but where the parties are not actual competitors, the merger does not eliminate any competition between them.<sup>326</sup> Consequently, the Court in these two cases must necessarily be concluding, that if no competition is eliminated between the parties themselves, the merger cannot tend to lessen competition in *any* area except the one in which the acquired bank does business.

This reasoning goes to the very heart of the "potential competition" doctrine. As was indicated previously,<sup>327</sup> this doctrine recognizes that a merger between two companies, one inside and the other outside a given market, may have an anticompetitive effect within the market even though the number of actual competitors remains the same. Since the acquired and acquiring companies are not direct competitors, the anticompetitive effect, if any, must be measured *vis-à-vis* either or both of the merging companies and the other competitors in the market. The anticompetitive effect of such a merger could result from "entrenchment";<sup>328</sup> or it could result from the elimination of either an "actual"<sup>329</sup> or a "perceived potential entrant"<sup>330</sup> as a procompetitive force.

---

*Cf.* *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966) (Government urged that the nation, a three-state area, and the State of Washington were all relevant geographic markets).

323. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-38 (1962).

324. *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-62 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-38 (1962).

325. *See* text accompanying notes 315-20 *supra*.

326. *Id.*

327. *See* notes 166-93 & 245-48 and accompanying text *supra*.

328. "Entrenchment" may occur when a firm outside the market possesses such overpowering resources that when it acquires a firm within the market it can dominate its competitors. This danger is especially acute when the market is highly concentrated or shielded by high barriers to entry. *See* note 351 *infra*.

329. An "actual potential entrant" is a firm that subjectively intends to enter the market in some manner at some future time. Its entry by acquisition eliminates the possibility of its entry *de novo*, and, therefore, eliminates the procompetitive benefits that might have resulted from *de novo* entry.

330. A "perceived potential entrant" is a firm on the outer fringe of a market which is viewed by firms within the market as one likely to enter. The fact that the firm is

The Court in *Marine Bancorporation* was unwilling to interpret the potential competition doctrine this broadly. It construed the doctrine to be applicable only to concentrated markets where the dominant firms in the target market are “engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services.”<sup>331</sup> The Court agreed that the Government had adequately demonstrated that the Spokane commercial banking market was structurally concentrated.<sup>332</sup> Indeed, it acknowledged that “all banking markets in the country are likely to be concentrated,”<sup>333</sup> making them subject to the potential competition doctrine.<sup>334</sup> However, as the Court recognized, the chief factor which makes the banking market concentrated — regulatory barriers to entry — also renders demonstration of an actual anticompetitive effect difficult.<sup>335</sup>

Entry barriers protect existing firms from new competition. Since they perceive no potential competitors where there are barriers to entry, the existing firms are not likely to act procompetitively in an effort to forestall market entry. In effect, there are no “perceived potential competitors” in such a barricaded market.<sup>336</sup> Hence, the acquisition of a firm within the market by a firm outside the market cannot eliminate any procompetitive element, and, therefore, cannot substantially lessen competition.<sup>337</sup>

Such an acquisition would be unlawful only under a theory that section 7 bars a merger whose sole effect upon competition is the preclusion of the procompetitive effect that would result from *de*

not an “actual potential entrant” is irrelevant, because its competitive influence lies in its being *viewed* by those within the market as a “potential entrant.” See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559-60 (1973) (Marshall, J., concurring). In *Falstaff*, Justice Marshall stated:

From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decisions. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking a share of the relevant market. The result is a net decrease in competitive pressure.

*Id.*

331. 418 U.S. at 630. In limiting the scope of the potential competition doctrine, the Court commented: “If the target market performed as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant.” *Id.*

332. *Id.* at 632.

333. *Id.* (emphasis in original).

334. *Id.*

335. See *id.* In *Marine Bancorporation*, the Court discussed various provisions of Washington state law that restricted *de novo* entry into the banking market. *Id.* at 609-12, citing WASH. REV. CODE ANN. §§ 30.40.020, 30.08.020(7), 30.04.230 (Supp. 1973).

336. See note 330 *supra*.

337. See 418 U.S. at 639-40.

*de novo* entry or a toe-hold acquisition.<sup>338</sup> This issue, which the Court left unresolved in *Falstaff*,<sup>339</sup> constituted the Government's main argument in *Marine Bancorporation*.<sup>340</sup> Once again, the Court declined to rule on the validity of this theory on the grounds that the preconditions of the theory were not met.<sup>341</sup>

In order for the theory to operate, according to the Court, it must be determined: 1) that there is a feasible means for *de novo* or toe-hold entry into the target market; and 2) "that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."<sup>342</sup> There was considerable disagreement between the parties in *Marine Bancorporation* as to the feasibility of *de novo* or toe-hold entry into the Spokane banking market.<sup>343</sup> But nowhere did the Court hold that such entry was not possible; rather the Court said that even assuming *arguendo* that such entry were possible, it did not follow that such "entry would be reasonably likely to produce any significant procompetitive benefits"<sup>344</sup> or "long-term market-structure benefits"<sup>345</sup> in the market.

After a brief discussion the Court also dismissed the Government's argument that the acquisition eliminated NBC as a perceived potential entrant into the market.<sup>346</sup> According to the Court, since the other commercial bankers in the area knew of the state regulatory restraints against entry by NBC, "it is improbable that NBC exerts any meaningful procompetitive influence over Spokane banks by standing 'in the wings.'"<sup>347</sup>

Finally, the Court affirmed the district court's holding that there was little likelihood that absent its acquisition by NBC, WTB would have expanded outside its Spokane base and "develop[ed] into a direct competitor with large Washington banks in other areas of the

338. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973). The acquisition of a small firm is also referred to as a "foot-hold" acquisition. *Id.*; see note 243 *supra*.

339. 410 U.S. at 537; see text accompanying notes 249-51 *supra*.

340. 418 U.S. at 632-39.

341. *Id.*

342. *Id.* at 633.

343. *Id.*; see text accompanying notes 299-302 *supra*. Under Washington state law NBC could not establish a *de novo* branch in Spokane, nor could its parent holding company hold more than 25% of the stock of any other bank. See *id.* at 610-12, citing WASH. REV. CODE ANN. §§ 30.40.020, 30.04.230 (Supp. 1973). NBC could enter the Spokane market, therefore, only by acquisition of an existing bank. 418 U.S. at 633. The Government contended, however, that NBC could sponsor and then acquire a new bank or could acquire an existing bank smaller than WTB. *Id.* at 633-38.

344. 418 U.S. at 636.

345. *Id.* at 638.

346. *Id.* at 639-40; see note 305 and accompanying text *supra*.

347. 418 U.S. at 639-40.

State.”<sup>348</sup> The Court then concluded: “[I]n States where such stringent barriers exist and in the absence of a likelihood of entrenchment, the potential competition doctrine — grounded as it is on relative freedom of entry on the part of the acquiring firm — will seldom bar a geographic market extension merger by a commercial bank.”<sup>349</sup>

The acquisition of WTB by NBC would merely substitute NBC for WTB in the Spokane area, leaving the number of competitors in the market unchanged.<sup>350</sup> Absent an allegation that the merger would produce entrenchment in the Spokane market,<sup>351</sup> there could be no adverse competitive effect resulting from the merger in *Marine Bancorporation* except under the potential competition doctrine.<sup>352</sup> The Court’s decision thus turned on a question of judgment.

The Court clearly felt that the merger would not have an adverse competitive effect. The impact of a potential entrant on competition within a market is, of course, difficult to prove.<sup>353</sup> Inevitably, the more competitive the market is, the less the impact will be. As the Court conceded, only in the case of a concentrated market is there likely to be any impact at all.<sup>354</sup> Moreover, that impact can only range from no effect to a beneficial effect upon competition. It simply cannot be adverse. Thus, when a firm’s status as a potential entrant is eliminated by an acquisition within the market, there are two possible effects. At best, the acquisition has no impact on competition. This result occurs only if there was no market effect when the acquiring firm maintained the posture of a potential entrant. In this situation, one firm merely replaces another as a competitor in the market. At worst, the acquisition has an anticompetitive effect. This is the outcome if the acquiring firm exerted a procompetitive effect as a potential entrant, because its entrance into the market eliminates this beneficial impact. Moreover, assuming that a potential entrant does not exert a procompetitive effect,<sup>355</sup> the impact

348. *Id.* at 640, citing *United States v. Marine Bancorporation*, 1973-1 Trade Cas. (CCH) ¶ 74,496 at 94,246 (W.D. Wash. 1973).

349. 418 U.S. at 641.

350. *Id.* at 605.

351. See note 328 and accompanying text *supra*. The Court stated in a footnote:

We put aside cases where an acquiring firm’s market power, existing capabilities, and proposed merger partner are such that the merger would produce an enterprise likely to dominate the target market (a concept known as entrenchment). There is no allegation that the instant merger would produce entrenchment in the Spokane market.

418 U.S. at 623 n.23 (citations omitted).

352. See 418 U.S. at 605.

353. See *id.* at 632.

354. See *id.* at 624-25.

355. The Court in *Marine Bancorporation* referred to the procompetitive influence of a potential entrant as a “wings effect,” because such a firm is said to be “standing ‘in the wings.’” *Id.* at 639-40.

of a “toe-hold” acquisition can also range only from no effect to a beneficial effect. If the market is already concentrated, the strengthening of one of the weaker competitors is likely to be beneficial to some extent. Entry by a “toe-hold” acquisition is, therefore, more beneficial than entry by acquisition of a market leader.<sup>356</sup> Finally, the effect of *de novo* entry is beneficial because it clearly adds a new competitor to the market. *De novo* entry, therefore, must necessarily be more beneficial than entry by acquisition of a market leader.

Thus, when the *Marine Bancorporation* Court suggested that the Government simply had not established the preconditions for the potential competition theory,<sup>357</sup> it was really saying that the Government has not proved an adverse competitive effect. But, assuming the validity of the theory reserved in *Falstaff*,<sup>358</sup> the logical effect of the acquisition had to be adverse. As a result, the Court must have been deciding either that the theory was wrong, or that the adverse effect of the acquisition was not “substantial.” Since the Court expressly refused to rule on the merits of the theory,<sup>359</sup> it was clearly concluding that the substantiality requirement of section 7 had not been satisfied. Indeed, the Court indicated that the second precondition of the theory<sup>360</sup> had not been met when it stated that the Government had failed to demonstrate that the alternate means of entry offered a “reasonable prospect of long-term structural improvement or other benefits in the target market.”<sup>361</sup>

This conclusion in *Marine Bancorporation* amply illustrates the basic difference between the pro-antitrust philosophy of the Warren Court, and the anti-antitrust view of the Burger Court. The Warren Court accepted *economic theory* as proof of an adverse competitive effect.<sup>362</sup> The Burger Court, however, requires *clear proof* of an adverse competitive effect in each case, and it demands proof that the effect will be “substantial.” The failure to indicate the amount of substantiality required and the type of proof that is acceptable makes compliance with the Burger Court’s requirement exceedingly difficult.

---

356. The *Marine Bancorporation* Court actually seemed to feel that the acquisition of WTB by NBC was procompetitive because it would “introduce a third full-service banking organization to the Spokane market, where only two are now operating . . . .” *Id.* at 639. Arguably, however, entry into the Spokane market by NBC by another method would have been even more procompetitive, because it would have added a new competitor as well.

357. *Id.*; see text accompanying notes 338-45 *supra*.

358. See text accompanying notes 249-51 & 338-39 *supra*.

359. 418 U.S. at 639; see text accompanying note 341 *supra*.

360. See text accompanying note 342 *supra*.

361. 418 U.S. at 638-39.

362. See, e.g., *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963). For a discussion of this case, see notes 98-135 and accompanying text *supra*.

C. Section 7 Requires Proof of an Actual  
Lessening of Competition

In *Marine Bancorporation* the Government argued that NBC could have sponsored and subsequently acquired a new bank in the Spokane market as an attempt to enter that market.<sup>363</sup> Although the defendants questioned the legality of this proposal under Washington state law,<sup>364</sup> the Court at that time declined to decide the issue.<sup>365</sup> In its 1974 term, however, the Court rejected a Government antitrust challenge to such a scheme in *United States v. Citizens and Southern National Bank (C & S National)*.<sup>366</sup> In addition to the section 7 issues, the case contained significant section 1 Sherman Act aspects.<sup>367</sup>

The State of Georgia restricted city banks from opening suburban branches.<sup>368</sup> To circumvent the restrictions, the Citizens and Southern National Bank (C & S) in Atlanta formed a bank holding company, which embarked on a program of forming *de facto* branches<sup>369</sup> in the suburbs.<sup>370</sup> Under the program, five percent of the stock of the *de facto* branches was to be owned by the holding company,<sup>371</sup> and the remaining stock was to be placed in the hands of parties friendly to C & S.<sup>372</sup> The branches were permitted to use the C & S "logogram" and banking services, and were subject to close C & S supervision and governance.<sup>373</sup> When Georgia law was changed in 1970 to allow *de jure* branch banking countywide,<sup>374</sup> C & S sought to absorb the five percent branches as true branches.<sup>375</sup> The Government brought suit, alleging that the acquisitions would lessen competition in the relevant banking market in violation of section 7. The Government also charged that the relations between C & S and the five percent banks constituted unreasonable restraints of trade in violation of section 1 of the Sherman Act.<sup>376</sup> The district

---

363. 418 U.S. at 633-34.

364. *Id.* at 634; see notes 335 & 343 *supra*.

365. 418 U.S. at 635.

366. 422 U.S. 86 (1975).

367. *Id.* at 100-02.

368. *Id.* at 89.

369. A *de facto* branch bank is a bank that is legally a separate corporate entity, but is operated as, and, in many respects, functions as, a branch bank of the sponsoring bank.

370. *Id.* at 89.

371. *Id.* This amount of stock ownership represented the maximum allowed by state law. See GA. CODE ANN. § 13-207(a)(2) (1967 & Supp. 1974) (current version at GA. CODE ANN. § 13-207.1 (Supp. 1977)).

372. 422 U.S. at 89.

373. *Id.*

374. *Id.* at 94, citing GA. CODE ANN. § 13-203.1(a) (Supp. 1974). A *de jure* branch bank is a legal branch that is not incorporated separately from the parent bank.

375. 422 U.S. at 90.

376. *Id.*

court held against the Government on all issues,<sup>377</sup> and the Supreme Court affirmed.<sup>378</sup>

With respect to three of the C & S branches, the Court held that, since they had been formed prior to July 1966, without any action being taken against them by the Attorney General, they were protected by the "grandfather" provision of the Bank Holding Company Act,<sup>379</sup> which provides:

Any acquisition, merger, or consolidation of the kind described in section 1842(a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 . . . [of the Sherman Act].<sup>380</sup>

The Government raised two arguments against the use of this statutory protection. First, it contended that the grandfather provision did not apply to the instant case, because the relationship between C & S and the five percent banks was not an "acquisition, merger, or consolidation of the kind described in section 1842(a)."<sup>381</sup> Second, the Government asserted that it was not questioning the initial acquisition of the five percent stock interest in the suburban banks, but was challenging the resulting relationships that eliminated all competition between them, and C & S's subsequent acquisition of the remaining stock of the banks.<sup>382</sup>

Addressing the Government's first contention, the Court held that the formation of *de facto* branches could "fairly be characterized as an 'acquisition, merger, or consolidation of the kind described in § 1842(a),'"<sup>383</sup> even though it constitutes a "unique type of

377. United States v. Citizens & S. Nat'l Bank, 372 F. Supp. 616 (N.D. Ga. 1974).

378. 422 U.S. at 122.

379. 12 U.S.C. §§ 1841-1850 (1976).

380. *Id.* § 1849(d).

381. Brief for the United States at 47, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975); see text accompanying note 380 *supra*. Section 1842(a), 12 U.S.C. § 1842(a) (1976), requires the prior approval of the Federal Reserve Board for certain transactions by bank holding companies, including transactions tending to enlarge holding company control of independent banks. See 422 U.S. at 103 & nn.14 & 15.

382. Brief for the United States at 32, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

383. 422 U.S. at 109. The Court noted that:

[Section] 1842(a) was concerned with more than the literal "acquisition" of stock: It took broad account of the "indirect" control of boards of directors "in any manner," by bank holding companies. The grandfather provision creates immunity under § 1 of the Sherman Act, not simply under § 7 of the Clayton Act, an indication that its protection extends not merely to literal acquisitions,

transaction.”<sup>384</sup> Furthermore, noting that there had been no “increase in C & S control, nor any change in the way it has been exercised”<sup>385</sup> since the program was launched, the Court concluded that the grandfather clause shielded the shift from *de facto* to *de jure* branches from Government challenge.<sup>386</sup>

In a final effort to defeat the use of the grandfather provision, the Government alleged that, even if the transaction fell within the scope of section 1842(a), C & S had not complied with the requirements of that section.<sup>387</sup> This argument was dismissed by the Court with the simple assertion that that question was “not relevant to our inquiry.”<sup>388</sup> Thus, the Court was affording C & S the benefit of the grandfather provision, not only in the face of its doubtful applicability, but also in spite of C & S’s noncompliance with the provision.<sup>389</sup>

In what can only be described as understatement, Justice Brennan’s dissent referred to the Court’s holding on the grandfather clause as “plainly a distorted expansion . . . beyond its language and purpose.”<sup>390</sup> According to Justice Brennan, the grandfather provision had been enacted in response to the *PNB*<sup>391</sup> and *Lexington*<sup>392</sup> decisions, which interpreted section 7 and section 1 more broadly than had previous cases. Therefore, the dissent maintained that the grandfather provision merely protected those who had justifiably relied on prior interpretations from liability under those sections.<sup>393</sup> It was not designed to “provide sanctuary

---

mergers, and consolidations, but also to “restraints of trade” simultaneous with and functionally integral to such transactions.

*Id.* at 109-10 (footnote omitted).

384. *Id.* at 109.

385. *Id.* at 110.

386. *Id.* at 110-11.

387. Reply Brief for the United States at 10, *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86 (1975). Under §1842(a), it is unlawful to make any of the acquisitions covered by that section without the prior approval of the Federal Reserve Board. *See id.* C & S, however, had neither sought nor obtained the required approval. *Id.*

388. 422 U.S. at 110.

389. *See id.* at 110 n.19.

390. *Id.* at 132 (Brennan, J., dissenting).

391. For a discussion of *PNB*, see notes 98-135 and accompanying text *supra*.

392. For a discussion of this case, see notes 136-42 and accompanying text *supra*.

393. 422 U.S. at 132-40 (Brennan, J., dissenting). Justice Brennan explained:

*Philadelphia National Bank* rejected a literal interpretation of § 7 of the Clayton Act that would have limited its application to stock acquisitions by banks, an interpretation that nevertheless enjoyed some acceptance prior to the decision. Congress was concerned about the difficulty of unscrambling pre-*Philadelphia National Bank* mergers undertaken in reliance upon the literal interpretation of § 7 which the Court ultimately rejected, and accordingly immunized them from suit under that section. But a provision barring suit under § 1 of the Sherman Act was also necessary to safeguard the same mergers because of our decision in *Lexington Bank*.

*Id.* at 135 (Brennan, J., dissenting) (footnotes omitted).



for then-challenged price-fixing, market-division, or other cartel activity by banks.”<sup>394</sup> This discussion by the dissent aptly illustrates that the Burger Court majority is as ingenious as the Warren Court was in molding the language and purpose of the antitrust law to achieve the result desired.

Three of the five percent banks in *C & S National* had been formed after July 1, 1966 and were, therefore, clearly beyond the protection of the grandfather provision of the Bank Holding Company Act.<sup>395</sup> Thus, the Court was forced to determine the legality of these *de facto* branches under section 1. The Government alleged a section 1 violation because the branches did not compete with C & S even though they were legally distinct corporate entities.<sup>396</sup> It was conceded by the Court that C & S's *de facto* branches did not behave as active competitors, with respect either to each other or to C & S and its majority-owned affiliates.<sup>397</sup> The Court also granted: “Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy to affect prices.”<sup>398</sup> Recognizing that the *de facto* branches were “a direct response to Georgia’s historic restrictions on *de jure* branching,”<sup>399</sup> the Court observed that “the question . . . remains whether restraints of trade integral to this particular, unusual function are unreasonable.”<sup>400</sup> This statement alone is of enormous antitrust significance for it suggests that certain practices — such as price fixing — heretofore regarded as *per se* offenses,<sup>401</sup> are now to be examined under the rule of reason.

394. *Id.* at 134-35 (Brennan, J., dissenting).

395. *Id.* at 111. See text accompanying note 380 *supra*.

396. 422 U.S. at 112. The Government asserted that the branching arrangements “actually encompassed at least a tacit agreement to fix interest rates and service charges, so as to make the interrelationships — to that extent at least — illegal ‘per se.’” *Id.* (citations omitted).

397. *Id.* The Court noted that, if the branches had been *de jure* branches of C & S, the entire group of relationships would have been beyond attack. *Id.*

398. *Id.* at 113-14.

399. *Id.* at 116.

400. *Id.*, citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

401. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony*, the Court unequivocally stated: “[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act . . . .” *Id.* at 218.

The *C & S National* Court’s citation to *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) is interesting. See note 400 and accompanying text *supra*. In *Socony*, the Court distinguished *Chicago Board of Trade* because the arrangement there had not been “aimed at price manipulation or the control of the market prices and . . . it had ‘no appreciable effect on general market prices’ . . . .” 310 U.S. at 217.

The Court then concluded that C & S's *de facto* branching program was plainly procompetitive since it provided competition for the other suburban banks.<sup>402</sup> Therefore, the Court held: "in the face of the stringent state restrictions on branching" — which must be viewed as anticompetitive — "C & S's program of founding new *de facto* branches, and maintaining them as such, did not infringe § 1 of the Sherman Act."<sup>403</sup>

Having found no section 1 violation, the Court then allowed C & S to lift itself by its own boot straps to avoid a section 7 violation as well.<sup>44</sup> Given the lack of competition between the five percent banks and C & S before the transformation into *de jure* branches, the Court stated that it "indisputably follows that the proposed acquisitions will extinguish no present competitive conduct or relationships."<sup>405</sup> With respect to the acquisition's possible elimination of future competition, the Court simply remarked that there was no "realistic prospect that denial of these acquisitions would lead the defendant banks to compete against each other."<sup>406</sup>

Inherent in the Court's approach was the idea that, if C & S could legally have established *de jure* branches at the outset without running afoul of the Sherman or Clayton Acts, there was no reason for the Court to find an antitrust violation simply because C & S could not legally branch into the suburbs at the time it established the five percent banks.<sup>407</sup> Since the economic effect was the same, the Court apparently felt that the manner in which the branching was accomplished was not determinative. The same type of reasoning had been employed by Chief Justice Burger in his dissent in *United States v. Topco Associates, Inc.*<sup>408</sup> The Court there declared a horizontal territorial market division among members of a grocery association involving private label brands owned by the association per se unlawful.<sup>409</sup> In his dissenting opinion, Chief Justice Burger commented:

---

402. 422 U.S. at 119.

403. *Id.* at 119-20.

404. *Id.* at 120-22.

405. *Id.* at 121.

406. *Id.*

407. *See id.* at 111-12, 117-18. For example, the Court at one point utilized the following language:

C & S was absolutely restrained by state law from reaching the suburban market through the preferred process of internal expansion. *De facto* branching was the closest available substitute. . . .

To characterize these relationships as an unreasonable restraint of trade is to forget that their whole purpose and effect were to *defeat* a restraint of trade. *Id.* at 117-18 (footnotes omitted) (emphasis in original).

408. 405 U.S. 596 (1972).

409. *Id.* at 608.

The national chains market their own private-label products, and these products are available nowhere else than in the stores of those chains. The stores of any one chain, of course, do not engage in price competition with each other with respect to their chain's private-label brands, and no serious suggestion could be made that the Sherman Act requires otherwise. *I fail to see any difference* whatsoever in the economic effect of the Topco arrangement for the marketing of Topco-brand products and the methods used by the national chains in marketing their private-label brands. True, the Topco arrangement involves a "combination," while each of the national chains is a single integrated corporation. The controlling consideration, however, should be that in neither case is the policy of the Sherman Act offended for the practices in both cases work to the benefit, and not to the detriment, of the consuming public.<sup>410</sup>

The Chief Justice's inability "to see any difference" illustrates the basic problem with the reasoning of the Burger Court. That Court fails to recognize that the antitrust laws make the achievement of an objective unlawful if accomplished by a particular means. And as long as that means is used, its comparative effect is irrelevant under a per se rule. Moreover, the "difference" that Chief Justice Burger professed an inability to perceive in *Topco* is no more complicated than the difference between inheritance and larceny as a means of achieving wealth.

#### D. Section 7 Requires That Both Corporations Be Engaged in Interstate Commerce

In *United States v. American Building Maintenance Industries*,<sup>411</sup> the Supreme Court was presented, for the first time, with the question of whether the acquisition of an intrastate corporation by an interstate corporation was within the prohibition of section 7.<sup>412</sup> In an opinion written by Justice Stewart, the Court held that section 7 does *not* proscribe a corporate acquisition, regardless of its *effect* upon interstate commerce, unless both corporations operate interstate businesses.<sup>413</sup> On an examination of the language of section 7, the Court concluded that the phrase "engaged in commerce"<sup>414</sup> requires that both corporations "be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."<sup>415</sup>

410. *Id.* at 623 n.13 (Burger, C.J., dissenting) (emphasis added).

411. 422 U.S. 271 (1975).

412. *Id.* at 275. For the pertinent text of § 7, see note 68 *supra*.

413. 422 U.S. at 283.

414. See note 68 *supra*.

415. 422 U.S. at 283.

American Building Maintenance Industries (ABM Industries), the acquiring corporation, was the largest supplier of janitorial services in Southern California, as well as one of the largest suppliers of janitorial services in the country.<sup>416</sup> Both of the acquired corporations, J. E. Benton Management Corp. and Benton Maintenance Co. (Benton companies) also supplied janitorial services in Southern California.<sup>417</sup> Although the Benton companies serviced customers who were engaged in interstate commerce, that service was performed entirely within California by labor recruited solely from the local labor market in Southern California.<sup>418</sup> Some of the equipment and supplies used by the Benton companies were manufactured outside California, but they were purchased primarily — but not exclusively — from local distributors.<sup>419</sup>

On these facts, the Court concluded that the Benton companies were neither “engaged in commerce” nor engaged in the flow of interstate commerce as required under section 7.<sup>420</sup> According to the Court, “[t]o be engaged ‘in commerce’ within the meaning of section 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.”<sup>421</sup> It is important to recognize that this was a judicial interpretation of section 7 uttered for the first time in this case. Apparently, under the *American Building Maintenance* test, a corporation is subject to the prohibitions of section 7, only if a sufficient number of *transactions* cross state lines. Neither buying from or selling to a corporation engaged in commerce, nor buying an article produced in commerce satisfies this requirement, for the Benton companies did all three.<sup>422</sup> The Court’s language suggests that the result in the case might have been otherwise if the Benton companies had merely purchased their supplies directly from an out-of-state supplier.<sup>423</sup> If the Court’s reading of congressional intent was accurate, it must be questioned why Congress would have desired different results for acquisitions of companies that purchase from another state and acquisitions of companies that buy within the state. One must also marvel at the anomaly that, had the Benton companies and ABM Industries merely eliminated *price* competition among themselves by setting uniform prices, the rigorous standard of section 1 of the Sherman Act would have been violated, while the

---

416. *Id.* at 273.

417. *Id.* at 274.

418. *Id.*

419. *Id.* & 274 n.4.

420. *Id.* at 283–85.

421. *Id.* at 283.

422. See text accompanying notes 418 & 419 *supra*.

423. See text accompanying note 421 *supra*.

complete takeover of the Benton companies by ABM Industries, which eliminated *all* competition between them, did not violate the less rigorous standard of section 7.<sup>424</sup>

The Court asserted that its decision was compelled by the literal language and legislative history of the Clayton Act, and prior decisions interpreting the "in commerce" language.<sup>425</sup> It is submitted that the Court's compulsion was subjective and internal, being dictated only by a distinct anti-antitrust bias.

Justice Stewart took pains to characterize the Court's action as nothing more than a literal construction of the "in commerce" requirement of section 7.<sup>426</sup> In various portions of his opinion, he described the "in commerce" language as "explicit,"<sup>427</sup> "narrow,"<sup>428</sup> "distinct,"<sup>429</sup> "precise,"<sup>430</sup> and "express."<sup>431</sup> Although Humpty Dumpty might have applauded the Court's exercise of its power to make words stand for whatever it pleases,<sup>432</sup> even he would have acknowledged that they "have no inherently proper meanings."<sup>433</sup> Contrary to the Court's assumption, nothing in the *language* of section 7 suggests that the "commerce" language of section 7 was intended by Congress to have a meaning different from the "commerce" language of section 1 of the Sherman Act.<sup>434</sup> Contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations"<sup>435</sup> are proscribed by section 1 of the Sherman Act. Likewise, section 1 of the Clayton Act expressly defines "commerce" as "trade or commerce among the several States and with foreign nations . . ."<sup>436</sup> Nevertheless, the Court dismissed the virtually identical language of the two statutes by merely stating: "The phrase 'in commerce' does not, of course,

424. The Court apparently justified this anomalous result by noting that the commerce requirement for § 1 of the Sherman Act was very broad. 422 U.S. at 278; see text accompanying note 446 *infra*.

425. 422 U.S. at 275-83.

426. *Id.* at 282.

427. *Id.* at 275, 279.

428. *Id.* at 276.

429. *Id.*

430. *Id.* at 278.

431. *Id.*

432. See LEWIS CARROLL, THROUGH THE LOOKING GLASS. A brief dialogue from that classic may illuminate this point:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

*Id.* Ch. 6.

433. R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 13 (1965).

434. See 422 U.S. at 278.

435. 15 U.S.C. § 1 (1976); see note 17 *supra*.

436. 15 U.S.C. § 12 (1976); see note 450 *infra*.

necessarily have a uniform meaning whenever used by Congress."<sup>437</sup> This observation may undoubtedly be true; but a mere judicial pronouncement does not prove that the two sections were intended to have different meanings, especially when Congress used similar language in both.

The *American Building Maintenance* Court attempted to support its construction of the "in commerce" language of section 7 by distinguishing the reach of section 1 of the Sherman Act from that of section 7. The Court concluded that since section 1 prohibits any contract, combination, or conspiracy "in restraint of trade or commerce among the several states,"<sup>438</sup> its jurisdictional reach "is keyed directly to effects on interstate markets and the interstate flow of goods."<sup>439</sup> However, the Court determined that section 7 evidences "[n]o similar concern for the impact of intrastate conduct on interstate commerce"<sup>440</sup> because Congress imposed an "engaged in commerce" requirement for jurisdiction over a corporate acquisition.<sup>441</sup> The distinction drawn by the Court appears to be between an interstate effect and an interstate entity. The Court's interpretation of section 1 implies that the character of the entities is irrelevant if the effect is interstate; whereas its construction of section 7 suggests that the character of the effect is irrelevant so long as the entities are interstate.<sup>442</sup>

The Court further buttressed its position by comparing the language of section 1 with the precise "in commerce" phrase of section 7.<sup>443</sup> In attempting to highlight the distinction between the two sections, the Court affirmed its discussion in *Gulf Oil Corp. v. Copp Paving Co.*,<sup>444</sup> of the broad scope of section 1.<sup>445</sup> In *Copp*, the Court stated:

[C]ases have recognized that in enacting § 1 Congress "wanted to go to the utmost extent of its Constitutional power in

437. 422 U.S. at 277.

438. *Id.* at 278, quoting § 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

439. 422 U.S. at 278 (emphasis added), quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974).

440. 422 U.S. at 278.

441. *Id.*

442. See *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). The Court in *American Building Maintenance* relied heavily upon *Bunte Bros.* in its decision. See 422 U.S. at 276-77, 281. In *Bunte Bros.*, the Court construed in a similar manner the "in commerce" language of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976). See 312 U.S. at 354-55. In that case, however, the Court also said that the character of the entity and the effect were irrelevant, as long as the activity was interstate. *Id.* at 351-53.

443. 422 U.S. at 278.

444. 419 U.S. 186 (1974).

445. 422 U.S. at 278.

restraining trust and monopoly agreements . . . .” Consistently with this purpose and with the *plain thrust of the statutory language*, the Court has held that, however local its immediate object, a “contract, combination . . . or conspiracy” nonetheless may constitute a restraint within the meaning of 1 if it substantially and adversely affects interstate commerce.<sup>446</sup>

This writer finds it difficult to square the Court’s interpretation with the actual language of the two statutes, for the Court seems to be concluding that section 1 of the Sherman Act *is* coextensive with the reach of the commerce clause of the Constitution,<sup>447</sup> while section 7 *is not*. A comparison of the language of the two sections, however, defies that interpretation. If section 1 of the Sherman Act is fully coextensive with Congress’ power under the commerce clause, then section 3 of the Sherman Act,<sup>448</sup> which applies the language of section 1 to United States Territories and the District of Columbia,<sup>449</sup> is redundant.

Furthermore, the Clayton Act definition of “commerce” is as broad as the commerce specified in both sections 1 and 3 of the Sherman Act.<sup>450</sup> Therefore, if section 3 is *not* redundant, “commerce” under the Clayton Act *must* be broader in scope than that of section 1, not narrower. Even if section 3 is redundant, the Court’s discussion does not adequately explain why “commerce” under the Clayton Act is narrower than under section 1 of the Sherman Act.

The only rational justification for the *American Building Maintenance Court’s* distinction between the two statutes, therefore, must rest upon the tenuous and judicially developed distinction

446. 419 U.S. at 194-95 (emphasis added), *quoting* United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 558 (1944).

447. U.S. CONST. art. I, § 8, cl. 3.

448. 15 U.S.C. § 3 (1976).

449. *Id.* Section 3 provides in pertinent part:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

*Id.*

450. 15 U.S.C. § 12 (1976). Section 1 of the Clayton Act provides in pertinent part: “Commerce,” as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

*Id.*

between “in commerce” and “affecting commerce.”<sup>451</sup> The Court simply did not find persuasive the Government’s argument that “the legislative history of the Clayton Act . . . demonstrates that the ‘in commerce’ language of § 7 was intended to be coextensive with the reach of congressional power under the Commerce Clause.”<sup>452</sup>

The Court itself cited nothing in the legislative history of the Clayton Act prior to its 1950 amendment to show the intent of Congress to limit the reach of section 7 to less than Congress’ full power under the Commerce Clause. Indeed, the Court apparently considered the intent of the Congress that enacted the Clayton Act in 1914 to be irrelevant when it commented:

[W]hether or not Congress in enacting the Clayton Act in 1914 intended to exercise fully its power to regulate commerce, and whatever the understanding of the 63d Congress may have been as to the extent of its Commerce Clause power, the fact is that when § 7 was re-enacted in 1950, the phrase “engaged in commerce” had long since become a term of art, indicating a limited assertion of federal jurisdiction.<sup>453</sup>

The Court emphasized Congress’ 1950 amendment to section 7, which continued the “in commerce” limitation.<sup>454</sup> This action of the Congress, said the Court, could be “rationally explained *only* in terms of a legislative intent, at least in 1950, not to apply the rather *drastic* prohibitions of § 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power.”<sup>455</sup> Justice Stewart’s majority opinion in *American Building Maintenance* did not, however, reveal the possible congressional reasons for excluding the acquisition of a corporation that does not produce, buy, or sell goods or services in interstate commerce from the reach of section 7. Perhaps Congress felt a certain solicitude for small intrastate businesses, and wanted to shield them from the reach of some federal regulation; but this protective attitude cannot explain why Congress would draft a statute that would permit the acquisition of these firms by interstate businesses.

The Government in *American Building Maintenance* contended that “it would be anomalous for Congress to have strengthened the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have limited the jurisdictional scope of those

---

451. See notes 438-42 and accompanying text *supra*.

452. 422 U.S. at 277-78.

453. *Id.* at 279-80. At this point the Court once again drew upon *Bunte Bros.* for support. *Id.* at 280; see note 442 *supra*.

454. 422 U.S. at 281; see notes 66-69 and accompanying text *supra*.

455. 422 U.S. at 281 (emphasis added).



remedial provisions . . . .”<sup>456</sup> Justice Stewart, however, justified the Court’s restrictive interpretation of the reach of section 7 by noting the explicit congressional limitation of that section to corporate acquisitions.<sup>457</sup> The Court noted that although the Sherman Act reaches contracts, combinations and conspiracies by partnerships and natural persons as well as corporations, section 7 clearly does not apply to the “allegedly anticompetitive acquisition[s] of partnership assets.”<sup>458</sup> Yet, it is submitted that this limitation can be explained by the possible congressional concern with the freedom of the owners of a partnership or sole proprietorship to sell a business and retire. Or it may be that Congress did not contemplate that anything other than a corporation would be large enough to create an anticompetitive effect upon its acquisition. It is even conceivable that Congress wanted to limit the scope of the antitrust laws to those corporations within the jurisdiction of the Commerce Clause. However, the Court in *American Building Maintenance* failed to articulate its reason for concluding that Congress did not intend to prohibit anticompetitive mergers between corporations that clearly fall within the jurisdiction of the Commerce Clause.

Finally, the Court found no mandate in the remedial purpose of section 7 to construe “corporations engaged in commerce” to encompass corporations affecting commerce.<sup>459</sup> According to the Court, Congress clearly intended section 7 to reach only certain types of acquisitions, and there was no justification for disregarding these limitations.<sup>460</sup> Of course, the Court’s decisional process begged the question, for the issue was whether “corporations engaged in commerce” imposed a limitation other than on “corporations,” and not whether that limitation should have been disregarded. The Court, in effect, assumed that this language was a limitation on jurisdiction by deciding that it should not be disregarded. Were the Court unhampered by an anti-antitrust bias, it would have examined only the question of whether the remedial purpose of section 7 is consistent with the view that “engaged in commerce” is a jurisdictional limitation.

The Burger Court’s treatment of the jurisdictional issue is in sharp contrast to the Warren Court’s treatment of the same issue in *Penn-Olin*.<sup>461</sup> In deciding whether a newly formed corporation not yet conducting business was “engaged” in commerce for purposes of

456. *Id.* at 278.

457. *Id.* at 279.

458. *Id.* (footnote omitted).

459. *Id.* at 281-82.

460. *Id.* at 279; see text accompanying notes 457-58 *supra*.

461. For a discussion of *Penn-Olin*, see notes 173-85 and accompanying text *supra*.

section 7's jurisdictional reach,<sup>462</sup> the Warren Court said that "[t]he test of the section is the effect of the acquisition."<sup>463</sup> Furthermore, the Court determined that "the economic effects of an acquisition are to be measured at [the time of suit] . . . rather than at the time of acquisition."<sup>464</sup> Applying this standard to *Penn-Olin*, the Court concluded that "long prior to trial, [the corporation] was actually engaged in commerce . . . ."<sup>465</sup>

This author finds *Penn-Olin* and *American Building Maintenance* irreconcilable on the question of jurisdiction. If a corporation not yet operating a business is considered to be "engaged in commerce," it is difficult to understand why a corporation actually conducting business is not also considered to be so "engaged." In other words, if a corporation doing nothing in commerce satisfies the jurisdictional requirement, a viable, active corporation that affects commerce should also. It is possible to seize upon the Court's reasoning in *Penn-Olin* that "the fact that [the corporation] . . . was organized specifically to engage in commerce should bring it within the coverage of § 7."<sup>466</sup> Concededly, an intent to engage in commerce could serve to distinguish the two cases. However, if the acquisition of an intrastate corporation by an interstate corporation transforms the intrastate firm into an interstate subsidiary for section 7 purposes, then at the time of suit both corporations would be engaged in commerce, and the technical requirement of section 7 would be met. Moreover, if the pleadings did not originally reflect the conversion of the acquired company into an interstate corporation, an amended complaint could be filed at the time of trial even though the *Penn-Olin* Court considered it to be a useless requirement.<sup>467</sup>

If the intrastate corporation is not transformed into an interstate corporation upon its acquisition, an anomaly appears possible under the *American Building Maintenance* holding.<sup>468</sup> Section 7 would be violated if another interstate corporation acquired the *stock* of the intrastate corporation; but no violation would occur if the *assets* of the intrastate corporation were acquired. This contradictory treatment would occur because the stock of the intrastate corporation — but not the assets — becomes an asset of the parent upon acquisition.<sup>469</sup> Therefore, if the stock was later sold

---

462. 378 U.S. at 167-68.

463. *Id.* at 168.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. See notes 416-21 and accompanying text *supra*.

469. Although, in effect, the parent owns the assets of the acquired corporation — now a subsidiary — technically, the assets of the subsidiary are not the assets of the

by the interstate parent to another corporation "engaged in commerce," the acquiring corporation would be receiving an asset from a corporation "engaged also in commerce," and the section 7 requirement would be met. However, since the assets of an acquired corporation technically do not become the assets of the parent, a subsequent purchase of the assets would not satisfy the commerce requirement of section 7. This anomaly becomes even more bizarre when it is remembered that the purpose of the 1950 amendment — which, according to Justice Stewart in *American Building Maintenance* indicated a congressional intent to limit the reach of section 7<sup>470</sup> — was to treat stock and asset acquisitions alike.<sup>471</sup>

#### V. THE BURGER COURT'S TREATMENT OF OTHER ANTITRUST AREAS AND THE FUTURE

The implications of the merger cases decided during the 1973 and 1974 terms of the Burger Court are obvious. But a brief examination of other areas of antitrust law may prove to be equally illuminating. Since it is the purpose of this article to speculate on the possible impact of the anti-antitrust bias of the Burger Court, an analysis of the Court's holdings in other antitrust areas will be helpful. Clues as to what lies ahead may be found in most of the recent major antitrust decisions.

The Burger Court has shown a strong tendency to discard the "simplified test of illegality" followed by the Warren Court.<sup>472</sup> The new majority has rejected the Government's use of statistics and market shares to demonstrate a probable anticompetitive effect, requiring instead proof of a present anticompetitive impact.<sup>473</sup> This philosophical shift suggests that future antitrust cases will increasingly be decided under the rule of reason approach, rather than under the per se rule.

The conflict over which standard of illegality to use flared during the transition period in *Topco*.<sup>474</sup> Justice Marshall, speaking

parent. The *stock* of the subsidiary only is an asset of the parent. For example, if the subsidiary wishes to sell some of its assets, the subsidiary alone could pass good title, since it is the true owner of those assets.

470. See 422 U.S. at 280-81.

471. See S. REP. NO. 1775, 81st Cong., 2d Sess. 2, reprinted in [1950] U.S. CODE CONG. SERV. 4293-94. See also text accompanying notes 72-73 *supra*.

472. See text accompanying notes 27 & 126 *supra*. But see Williams, *Corporate Mergers and the Antitrust Laws*, 26 MERCER L. REV. 963 (1975). The author there contends that the Burger Court has merely altered the Government's burden of proof, and has not radically reversed the trends of the Warren Court. *Id.* at 974.

473. Accord, Williams, *supra* note 472, at 974. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-500 (1974). For a discussion of this case, see text accompanying notes 262-96 *supra*.

474. See notes 408-10 and accompanying text *supra*.

for the Court, aptly expressed the advantage of the *per se* approach: “[C]ourts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.”<sup>475</sup> He also added in a footnote:

Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.<sup>476</sup>

In his dissent in *Topco*, Chief Justice Burger argued against the promulgation of any new *per se* rules, and criticized the Court for adopting one “without regard to the impact that the condemned practices may have on competition.”<sup>477</sup> The dissent maintained “that it was Congress’ intent that a ‘rule of reason’ be applied in making such case-by-case determinations.”<sup>478</sup> Moreover, Chief Justice Burger emphasized that “the *per se* rules that have been developed . . . are complementary to, and in no way inconsistent with, the rule of reason.”<sup>479</sup> The *per se* rules are valuable, he noted, because “enforcement and predictability are enhanced and . . . unnecessary judicial investigation is avoided . . . .”<sup>480</sup> The dissent criticized the *Topco* majority for emphasizing “only the importance of predictability”<sup>481</sup> in formulating a new *per se* rule without determining whether the condemned practice had some “‘pernicious effect on competition’” and lacked “‘any redeeming virtue.’”<sup>482</sup> Suggesting that the majority should not hesitate to analyze complex economic problems under the rule of reason,<sup>483</sup> Chief Justice Burger asserted: “We can undoubtedly ease our task, but we should not abdicate [our] . . . role by formulation of *per se* rules with no

475. 405 U.S. at 609–10 (footnote omitted).

476. *Id.* at 609–10 n.10.

477. *Id.* at 620 (Burger, C.J., dissenting). The dissent felt that the majority should have been willing to assess the economic impact of the challenged practice on the record of the case. *Id.*

478. *Id.* at 621 (Burger, C.J., dissenting).

479. *Id.*

480. *Id.*

481. *Id.* at 622 (Burger, C.J., dissenting).

482. *Id.*, quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

483. 405 U.S. at 622 (Burger, C.J., dissenting).

justification other than the enhancement of predictability and the reduction of judicial investigation.”<sup>484</sup>

Establishing an antitrust violation is more difficult under a rule of reason approach than under a per se rule for two reasons. First, it shifts the focus from “conduct” to “effect.” Thus, specific evidence, which is often impossible to obtain, must be introduced to demonstrate that effect. Second, since the relevant effect is a future probable effect, it is in reality a prediction or matter of judgment. If a court possesses a philosophical bias against the antitrust laws, it is less likely to conclude that the future effect is sufficiently probable to support an antitrust violation.

Given the Burger Court’s dissatisfaction with per se rules, the Government and other antitrust plaintiffs will be required to bear a more rigorous burden of proof in the future. The Court thus far seems to be inclined to demand proof of an actual restraint of trade — the standard of section 1 of the Sherman Act — even in cases under section 7, where the language seems to require mere probabilities.<sup>485</sup>

The Burger Court’s hostility to section 7 also portends serious consequences for section 1 of the Sherman Act. If two companies can terminate all competition between themselves by merging without violating the incipency standard of section 7, it is doubtful that an agreement to eliminate only one aspect of competition will be held unlawful under the more rigorous restraint of trade standard of section 1 of the Sherman Act. In other words, based on the Court’s decisions in section 7 cases, it would be entirely logical for the Court to conclude that section 1 of the Sherman Act should not bar an agreement between two companies that could lawfully merge under section 7. Of course, it would probably represent too great a break with precedent for the Burger Court to hold that section 1 of the Sherman Act was not violated if the parties in *General Dynamics*,<sup>486</sup> *American Building Maintenance*,<sup>487</sup> or *Marine Bancorporation*<sup>488</sup> had agreed merely to fix prices rather than to merge. Nevertheless, where the challenged arrangement or agreement is not simply a blatant price-fixing scheme, the Court may well resort to the rule of

484. *Id.*

485. *See, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602 (1974). For a discussion of this point in *Marine Bancorporation*, see text accompanying note 362 *supra*.

486. For a discussion of *General Dynamics*, see notes 262-96 and accompanying text *supra*.

487. For a discussion of this case, see notes 411-71 and accompanying text *supra*.

488. For a discussion of *Marine Bancorporation*, see notes 299-362 and accompanying text *supra*.

reason standard and consider possible justifications for the challenged practices.<sup>489</sup>

The Court's treatment of the section 1 Sherman Act issues in *C & S National*<sup>490</sup> indicates that the Court may return to the rule of reason approach and examine the anticompetitive impact of certain practices that were held per se unlawful by the Warren Court. Indeed, the Court has already begun to move in this direction.

#### A. Vertical Resale Restrictions

In 1963, in *White Motor Co. v. United States*,<sup>491</sup> the Supreme Court refused to apply a per se rule to vertical resale restrictions. Consequently, the Court reversed the district court's summary judgment against a manufacturer who had imposed vertical resale restrictions on its dealers as to territory and customer selection.<sup>492</sup> Justice Douglas, writing for the majority, concluded that the Court did "not know enough of the economic and business stuff out of which these arrangements emerge to be certain" that the arrangements were unreasonable as a matter of law.<sup>493</sup>

Four years later, the Warren Court decided *United States v. Arnold, Schwinn & Co.*<sup>494</sup> The product distribution system used by Arnold, Schwinn & Company (Schwinn), the leading domestic manufacturer of bicycles, was at issue in this case.<sup>495</sup> Schwinn assigned exclusive territories to its distributors, who were instructed to sell only to authorized Schwinn retailers in their respective territories.<sup>496</sup> At trial, the Government asserted that Schwinn's territorial and customer limitations were per se unlawful under section 1 of the Sherman Act.<sup>497</sup> The district court agreed, but only as to products that Schwinn sold outright to distributors.<sup>498</sup> As to products that Schwinn conveyed to distributors on an *agency* or *consignment* basis, the district court held that the territorial and customer restrictions were lawful.<sup>499</sup> When the Government appealed this latter determination to the Supreme Court, it dropped the

---

489. See Elman, "Petrified Opinions" and Competitive Realities, 66 COLUM. L. REV. 625 (1966).

490. For a discussion of the Court's examination of the alleged price-fixing scheme under the rule of reason standard, see text accompanying notes 395-403 *supra*.

491. 372 U.S. 253 (1963).

492. *Id.* at 263.

493. *Id.*

494. 388 U.S. 365 (1967).

495. *Id.* at 368-70.

496. *Id.* at 371.

497. *United States v. Arnold, Schwinn & Co.*, 237 F. Supp. 323, 326 (N.D. Ill. 1965).

498. *Id.* at 342.

499. *Id.* at 334.

contention that the distribution limitations were a per se violation of section 1.<sup>500</sup> Instead, the Government asked the Court to use the rule of reason approach to conclude, on the basis of a voluminous record, that the limitations constituted an unreasonable restraint of trade.<sup>501</sup>

The Court, speaking through Justice Fortas, held that vertical territorial resale restrictions were per se illegal where the manufacturer *sold* his product to the distributor.<sup>502</sup> However, according to the Court:

Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is "unreasonably" restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing.<sup>503</sup>

On the record before it, the Court could not conclude "that Schwinn's franchising of retailers and its confinement of retail sales to them . . . constitute an 'unreasonable' restraint of trade."<sup>504</sup>

Justice Stewart concurred in part and dissented in part.<sup>505</sup> He criticized the majority for *sua sponte* creating a new per se rule when the issue had not been addressed to the Court,<sup>506</sup> stating:

Despite the Government's concession that the rule of reason applies to all aspects of Schwinn's distribution system, the Court nevertheless reaches out to adopt a potent per se rule. No previous antitrust decision of this Court justifies its action. Instead, it completely repudiates the only case in point, *White Motor*. . . . The Court today is unable to give any reasons why, only four years later, this precedent should be overruled. Surely, we have not in this short interim accumulated sufficient new experience or insight to justify embracing a rule automatically

500. 388 U.S. at 368.

501. *Id.*

502. *Id.* at 379. The Court explained:

Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *Such restraints are so obviously destructive of competition that their mere existence is enough.*

*Id.* (emphasis added), citing *White Motor Co. v. United States*, 372 U.S. 253 (1963), and *Dr. Miles Co. v. Park & Sons Co.*, 220 U.S. 373 (1911). The Court's citation to *White Motor Co.* seems unusual in light of the Court's refusal in that case to apply a per se rule to a similar arrangement. See text accompanying notes 491-93 *supra*. See also text accompanying note 507 *infra*.

503. 388 U.S. at 380.

504. *Id.* at 381.

505. *Id.* at 382 (Stewart, J., concurring in part and dissenting in part).

506. *Id.* at 394 (Stewart, J., concurring in part and dissenting in part).

invalidating any vertical restraints in a distribution system based on sales to wholesalers and retailers.<sup>507</sup>

In the final days of the Burger Court's 1976 term the per se rule of *Schwinn* was expressly overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>508</sup> The case raised the question of the legality of a "location clause" in a franchise agreement.<sup>509</sup>

The Ninth Circuit, sitting en banc, had distinguished *Schwinn* from the instant case on the basis of the type of vertical restraint involved.<sup>510</sup> Accordingly, the court of appeals concluded that the rule of reason rather than the per se rule of *Schwinn* should apply.<sup>511</sup> Although the Supreme Court rejected the Ninth Circuit's distinction between *Schwinn* and *Sylvania*,<sup>512</sup> it decided not to extend the *Schwinn* rule to location clauses.<sup>513</sup> Instead, the Court overruled the per se rule of *Schwinn*, stating:

[D]eparture from the rule of reason standard must be based upon demonstrable economic effect rather than — as in *Schwinn* — upon formalistic line drawing.

. . . When competitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the [Sherman] Act.<sup>514</sup>

### B. *Horizontal Resale Restrictions*

The Burger Court's acceptance of the theory that, even though vertical restrictions may reduce intrabrand competition, they

507. *Id.* at 388-89 (Stewart, J., concurring in part and dissenting in part) (footnote omitted).

508. 433 U.S. 36 (1977).

509. *Id.* at 37. *G.T.E. Sylvania, Inc. (Sylvania)* manufactured and sold television sets to a group of franchised retailers. *Id.* at 38. The Court's discussion of the location clauses at issue indicated that: "Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised." *Id.*

510. *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1000 (9th Cir. 1976) (en banc). The Supreme Court briefly described the rationale of the Ninth Circuit's distinction as follows: "Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisors in the two cases, the court concluded that Sylvania's *location* restriction had less potential for competitive harm than the [*customer*] restrictions invalidated in *Schwinn*. . . ." 433 U.S. at 41 (emphasis added), *citing* *GTE Sylvania, Inc., v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976).

511. 537 F.2d at 1000.

512. 433 U.S. at 46. The Court was "unable to find a principled basis for distinguishing *Schwinn* . . ." *Id.*; see text accompanying notes 544-46 *infra*.

513. 433 U.S. at 57.

514. *Id.* at 58-59.



inevitably promote interbrand competition led to the repudiation of the *Schwinn* per se rule in *Sylvania*.<sup>515</sup> In adopting this theory, the *Sylvania* Court concluded that such restrictions could not be said to have a “pernicious effect on competition” or to “lack . . . any redeeming virtue.”<sup>516</sup> The Burger majority therefore embraced the very rationale that the Supreme Court rejected in *Topco*<sup>517</sup> as a justification for horizontal resale restrictions. In *Sylvania*, the Court discarded the *Topco* notion of the “inability” of courts “to weigh . . . destruction of competition in one sector of the economy against promotion of competition in another . . . ;”<sup>518</sup> a notion that had prompted the Court to adopt a per se rule for horizontal resale restrictions in the first place.<sup>519</sup> No sound reason exists to explain why courts would be more capable of evaluating the effects on competition in a *Sylvania* setting than in a *Topco* setting. The question must inevitably arise, therefore: Will the per se rule of *Topco* fall next?

### C. Exchange of Price Information

In *United States v. Container Corp. of America*,<sup>520</sup> the Warren Court held that an exchange among competitors of price information concerning specific sales to identified customers was unlawful.<sup>521</sup> It is difficult to read Justice Douglas’ opinion for the Court without concluding that this activity was considered to be illegal per se.<sup>522</sup> Yet, Justice Douglas did not expressly articulate a per se rule, and Justice Fortas, in a concurring opinion, said that he did not understand the majority to so hold.<sup>523</sup> The lower courts have not considered the exchange of price information among competitors per

515. *Id.* 58.

516. *Id.*, quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

517. See notes 408-10 & 474-84 and accompanying text *supra*.

518. 405 U.S. at 609-10; see text accompanying note 475 *supra*. See also 97 S. Ct. at 2558 n.16.

519. See 405 U.S. at 609-10.

520. 393 U.S. 333 (1969).

521. *Id.* at 336-38.

522. *Id.* Justice Douglas stated:

The result of this reciprocal exchange of prices was to stabilize prices though at a downward level. Knowledge of a competitor’s price usually meant matching that price. . . . The limitation or reduction of price competition brings the case within the ban, for . . . interference with the setting of price by free market forces is unlawful *per se*. . . . The exchange of price data tends toward price uniformity. . . . *The inferences are irresistible* that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.

*Id.* at 336-37 (citations omitted) (emphasis added).

523. *Id.* at 338-39 (Fortas, J., concurring).

se illegal,<sup>524</sup> and, in light of its dislike of per se rules, the Supreme Court under Chief Justice Burger will probably not be inclined to do so either.

*United States v. United States Gypsum Co.*,<sup>525</sup> a case involving an exchange of price information, should be decided by the Court during its 1977 term. The exchanges of prices under scrutiny in *Gypsum* were made by manufacturers of gypsum board to verify price quotations made to customers.<sup>526</sup> The purpose of the exchanges was ostensibly, to enable the manufacturers to avoid price discriminations that would violate the Robinson-Patman Act amendments to section 2(a) of the Clayton Act.<sup>527</sup> The district court instructed the jury that "any purpose was irrelevant so long as the jury found that verification had a stabilizing effect on price."<sup>528</sup> On appeal to the Third Circuit, this instruction was held to be reversible error.<sup>529</sup> The court of appeals concluded that *Container Corp.* had not established a per se rule for price exchanges that rendered "purpose" irrelevant in all cases.<sup>530</sup> According to the Third Circuit, *Container Corp.* recognized that the purpose behind a price exchange could constitute a "controlling circumstance," and thereby legitimize an agreement otherwise prohibited by section 1 of the Sherman Act.<sup>531</sup>

Relying on the principle that, "when policies of the Sherman and Robinson-Patman Acts conflict, it is the Robinson-Patman Act that should give way,"<sup>532</sup> the Third Circuit in *Gypsum* fashioned its own narrow "controlling circumstances" exception, holding:<sup>533</sup>

[A]ppellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first

524. See, e.g., *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), cert. denied, 408 U.S. 928 (1972); *Wall Prod. Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971).

525. 550 F.2d 115 (3d Cir. 1977), cert. granted, 98 S. Ct. 52 (1977).

526. 550 F.2d at 120.

527. 15 U.S.C. § 13(a) (1976); see 550 F.2d at 120.

528. 550 F.2d at 120-21; see *United States v. United States Gypsum Co.*, 383 F. Supp. 462 (W.D. Pa. 1974).

529. 550 F.2d at 126-27.

530. *Id.* at 122-23.

531. *Id.* at 123, quoting *United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969). The "controlling circumstance" language had been used in *Container Corp.* to distinguish that case from *Cement Mfrs. Ass'n. v. United States*, 268 U.S. 588 (1925). See 393 U.S. at 335. The Third Circuit in *Gypsum*, concluded that *Cement Mfrs.* "approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers." 550 F.2d at 122, citing *Cement Mfrs. Ass'n. v. United States*, 268 U.S. 588 (1925).

532. 550 F.2d at 125, citing *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

533. 550 F.2d at 126.

resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.<sup>534</sup>

The fallacy in the court's reasoning is its assumption that price verification between manufacturers may be necessary to comply with the strictures of the Robinson-Patman Act. Although that statute mandates that sellers are not to discriminate in price among buyers,<sup>535</sup> a seller may discriminate in price "in good faith to meet an equally low price of a competitor" without violating the Robinson-Patman Act.<sup>536</sup> This exemption from illegality, however, is hardly a command to engage in a price-fixing conspiracy violative of the Sherman Act. Indeed, it is difficult to see how the conspirators could be discriminating in price in "good faith" in view of the very existence of their conspiracy. Arguably, a manufacturer, so eager to sell to a buyer that he secretly offers a price below his list price, would not be willing to undo his efforts to consummate the sale by giving the information to his competitor who will use that information for the sole purpose of "stealing" the sale for himself. One might even infer, therefore, that the price exchange agreement is really a conspiracy, not only to stabilize prices, but also to violate the price discrimination provisions of the Robinson-Patman Act. There appears to be no reason for the secrecy of the seller's initial discount offer to the buyer if that offer will be verified to a competitor. The lower price offer would seem to be secret only to other purchasers who pay list price, which would evidence something less than good faith on the part of the sellers.

If the Burger Court affirms the Third Circuit's holding in *Gypsum*, it will, of course, eviscerate both the Sherman and Robinson-Patman Acts. However, in view of the Court's anti-trust bias and its dissatisfaction with the per se approach, it seems likely that the Court will find some basis on which to affirm.

#### D. Resale Price Maintenance

In *Simpson v. Union Oil Co.*,<sup>537</sup> the Warren Court found unlawful an arrangement whereby an oil company set the prices at which its consignee retailers sold its gasoline to the public.<sup>538</sup>

---

534. *Id.*

535. 15 U.S.C. § 13(a) (1976).

536. *Id.* § 13(b).

537. 377 U.S. 13 (1964).

538. *Id.* at 16.

Arguably, this result was consistent with the decision of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>539</sup> in which the Supreme Court established the general rule that resale price maintenance in an outright sale situation was a per se violation of section 1 of the Sherman Act.<sup>540</sup> However, in his dissenting opinion in *Simpson*, Justice Stewart lamented the fact that, in effect, the Court was overruling an earlier decision<sup>541</sup> that had upheld this practice where there was a bona fide consignment agreement.<sup>542</sup> Although a recent district court decision has taken *Simpson* one step further by declaring resale price maintenance through the use of consignment agreements per se unlawful,<sup>543</sup> the viability of distinguishing between outright sales and consignment agreements to determine illegality in this area has yet to be considered by the Burger Court.

In *Sylvania*,<sup>544</sup> which involved location restrictions, the Court concluded "that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other."<sup>545</sup> The question, therefore, is whether the Burger Court will find a sufficient distinction between sale and consignment situations in the area of resale price maintenance to justify imposing a per se rule on the one and not on the other. Conceivably, the Court could even follow its *Sylvania* example and completely reevaluate the per se rule of *Dr. Miles*, but this would probably be too much of a departure from stare decisis even for the Burger Court.<sup>546</sup>

### E. Tying Arrangements

The antitrust area in which the Burger Court's retreat from the "simplified test of illegality" is most likely to have its greatest impact is that of tying arrangements.<sup>547</sup> Noting that such arrangements "serve hardly any purpose beyond the suppression of

539. 220 U.S. 373 (1911).

540. *Id.* at 408-09.

541. *United States v. General Elec. Co.*, 272 U.S. 476 (1926).

542. 377 U.S. at 26-28 (Stewart, J., dissenting); see *United States v. General Elec. Co.*, 272 U.S. 476, 490 (1926).

543. *United States v. General Elec. Co.*, 358 F. Supp. 731 (S.D.N.Y. 1973).

544. For a discussion of this case, see notes 508-14 and accompanying text *supra*.

545. 433 U.S. at 57.

546. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, the Court stressed that "we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Id.* at 736.

547. A tying arrangement has been defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. Illinois*, 356 U.S. 1, 5-6 (1958) (footnote omitted).

competition,'<sup>548</sup> the Supreme Court declared tying arrangements to be per se unlawful in *Northern Pacific Railway v. United States*.<sup>549</sup> The Court in *Northern Pacific* also stated that the per se rule was applicable "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."<sup>550</sup> Thus, all tying arrangements are not unlawful; they are unlawful only where the seller has so much control or dominance in the tying product market that it possesses an effective weapon with which to pressure buyers into taking the tied item.<sup>551</sup>

In an effort to find an unlawful tying arrangement, the Warren Court tended to "simplify the test" of sufficient economic power. For example, in *Northern Pacific*, the Court said that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power. . . ."<sup>552</sup> Similarly, in *United States v. Loew's Inc.*,<sup>553</sup> the Court held that "the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."<sup>554</sup> Moreover, *Loew's* determined that, if the tying product is patented or copyrighted, the "requisite economic power is presumed."<sup>555</sup> In a portent to its pronouncement the next year in *PNB* of the "simplified test of illegality" for mergers,<sup>556</sup> the *Loew's* Court added that in tie-in cases "it should seldom be necessary . . . to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market."<sup>557</sup> In *Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I)*<sup>558</sup> the Warren Court stated further:

The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the

---

548. *Id.* at 6, quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949).

549. 356 U.S. 1 (1958).

550. *Id.* at 6 (citations omitted).

551. *Id.*

552. *Id.* at 7-8.

553. 371 U.S. 38 (1962).

554. *Id.* at 45.

555. *Id.* In *Northern Pacific*, however, the Court stated that "a patent does not always confer a monopoly over a particular commodity. Often . . . the economic power resulting from patent privileges is slight." 356 U.S. at 10 n.8.

556. See notes 126-27 and accompanying text *supra*.

557. 371 U.S. at 45 n.4.

558. 394 U.S. 495 (1969).

economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some buyers in the market.<sup>559</sup>

The Court went on to assert that “the proper focus of concern is whether the seller has the power . . . to impose . . . burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.”<sup>560</sup> Clearly, the Court had made tying arrangements per se unlawful without expressly saying so, for it made them unlawful if the seller had sufficient power, and the seller had sufficient power if he could impose a tying arrangement on his buyers.

The lower courts reacted accordingly. After concluding that a trademark license and “know-how” constituted a tying product,<sup>561</sup> the Ninth Circuit in *Siegel v. Chicken Delight, Inc.*<sup>562</sup> ruled that the licensor had sufficient economic power over that tying product to hold the arrangement unlawful because “the presumption [of sufficient economic power] that exists in the case of the patent and copyright . . . [applies] equally . . . to the trademark.”<sup>563</sup> In *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*,<sup>564</sup> the Fifth Circuit held that a manufacturer’s designation of a wholesaler or rebuilder as “authorized” was of sufficient economic value to constitute a tying product in an unlawful tying arrangement.<sup>565</sup>

The impact of these lower court decisions was to move tying arrangements closer to a true per se category, where proof of the mere existence of a tying arrangement affecting a “not insubstantial” amount of interstate commerce would be sufficient to establish a violation. Such a position, if adopted, would have a significant impact not only upon franchising, but also upon the use of “know-how” licenses to sell unpatented products. For example, a company selling industrial gases might condition the license of a secret process that uses an industrial gas upon the purchase of the gas from the licensor.<sup>566</sup> Under a simplified per se test, a plaintiff-licen-

559. *Id.* at 502-03.

560. *Id.* at 504.

561. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48-49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

562. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

563. *Id.* at 50 (footnote omitted).

564. 463 F.2d 1002 (5th Cir. 1972).

565. *Id.* at 1015. See also *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir.), *cert. denied*, 397 U.S. 920 (1969).

566. There are also more subtle means of imposing a tying arrangement than by means of a blatant requirements contract. A licensor could, for example, establish a

see would not have to prove that the defendant-licensor had economic power in the "know-how" market. If likened to patents, this power could be presumed.<sup>567</sup>

The merger decisions of the Burger Court, however, clearly indicate the necessity of proving the economic impact of an anticompetitive practice.<sup>568</sup> Thus, it seems reasonable to conclude that in tying cases the Burger Court will demand proof of economic power in the tying product market. Indeed, in *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*,<sup>569</sup> the Court has already so ruled. Although both the district court and the court of appeals held that U.S. Steel possessed sufficient economic power to make the tying arrangement unlawful,<sup>570</sup> the Supreme Court reversed on the ground that the record did not justify an inference of power.<sup>571</sup>

The Burger Court's willingness in *Fortner II* to examine the record and reverse both lower courts on an issue of fact is quite revealing. Clearly, this is not a Court for whom inferences of anticompetitive effect are irresistible.<sup>572</sup>

## VI. CONCLUSION

The objective of this article has been to demonstrate the anti-antitrust bias of the Burger Court through an examination of the Court's merger decisions during its 1973 and 1974 terms. It is this author's contention that the Court's propensities in the merger field will eventually be reflected in many other antitrust areas. A review of the cases clearly demonstrates how the different philosophies of the Warren and Burger Courts have worked to produce differing results, not only in the decisions, but in the law as well.

The question of whether a given merger tends substantially to lessen competition is ultimately a judgment upon which reasonable men can differ. The statutory test calls for a prediction of the future. It asks for a judgment as to probabilities. What the Warren Court attempted to do was establish a set of guidelines that reduced the possible range within which the lower courts and the FTC could

---

royalty for the use of a secret process and then credit the licensee's royalty payments based upon gas purchases from the licensor. Or the licensor could allow the licensee a credit in the amount of the royalty to be applied toward the purchase of gas from the licensor. In either event, the licensor reaps the greater profit in the gas market rather than in the market for the secret process.

567. See text accompanying note 555 *supra*.

568. See notes 252-60 & 277-89 and accompanying text *supra*.

569. 97 S. Ct. 861 (1977); see text accompanying notes 558-60.

570. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 523 F.2d 961, 964-65 (6th Cir. 1975).

571. 97 S. Ct. at 866.

572. See *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

exercise individual judgments in individual cases. It is indisputable that the Warren Court was biased in promulgating rules that favored findings of illegality. However, it is submitted that a bias in that direction is much more in keeping with the intent of the antitrust laws. The Burger Court's rule of reason approach will inevitably frustrate the effectiveness of the antitrust laws because it allows imperfect men to decide cases subjectively, without express standards. The Warren Court gave us rules to apply; the Burger Court gives us judgments, but no rules. This lack of standards is essentially the basis for this author's disagreement with the Burger Court approach. Without rules, judges may indulge their whims and fancies. The masses, as always, will applaud the decisions that they like and condemn those that they do not. But our nation was founded upon the principle that we should have a government of laws and not of men. The author is concerned that the Burger Court has given us, if not a government, at least a Court, of men.