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Kentucky Law Journal

Volume 52 | Issue 3 Article 5

1964

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Recommended Citation

Hale, G. E. and Hale, Rosemary D. (1964) "Failing Firms and the Merger Provisions of the Antitrust Laws," *Kentucky Law Journal*: Vol. 52 : Iss. 3 , Article 5.
Available at: https://uknowledge.uky.edu/klj/vol52/iss3/5

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Failing Firms and the Merger Provisions of the Antitrust Laws

By G. E. HALE* AND ROSEMARY D. HALE**

Stringent tests are now applied in enforcing the prohibitions against business mergers incorporated in the federal antitrust laws.[1] Almost any acquisition is open to successful challenge in the courts. In the language of a recent important decision:

> Certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in their incipiency. Courts have recognized the necessity to act toward a violation as it begins, rather than wait until it has become a *fait accompli*.[2]

In addition, the prohibitions have recently been extended to "vertical"[3] and perhaps "conglomerate" mergers as well as those involving competing companies. Hence the number of permissible purchasers of a going concern has been vastly reduced.

In these circumstances it is important to clarify exceptions to the prohibition. One such exception—and possibly the only important one—has long been recognized.[4] It states that merger

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1 A bibliography of writings about the prohibitions of § 7 of the Clayton Act and § 1 of the Sherman Act may be found in Oppenheim, Cases on Federal Antitrust Laws 543 (2d ed. 1959). The statutes are found in 15 U.S.C.A. §§ 1, 18.

2 United States v. Brown Shoe Co., 179 F. Supp. 721, 737 (E.D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962). Note also United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957). The history of the 1950 amendments to § 7 is reviewed in note, Section 7 of the Clayton Act: a Legislative History, 52 Colum. L. Rev. 765 (1952). But cf. Att'y Gen. Nat'l. Comm. Antitrust Rep. 124-5 (1955); United States v. Republic Steel, 11 F. Supp. 117, 118-9 (N.D. Ohio 1935).

3 Reynolds Metals Co. v. Federal Trade Comm'n, 309 F.2d 233 (D.C. Cir. 1962).

4 International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291 (1930); Beegle v. Thompson, 138 F.2d 875, 880-1 (7th Cir. 1943), *cert. denied* 322 U.S. 743 (1944); Attorney General's National Committee, *supra* note 2, at 123; Note, *Horizontal Mergers and the "Failing Firm" Defense*, 45 Va. L. Rev. 421, 423 (1959); Wiley, The *"Failing Company"*, 41 B.U.L. Rev. 495, 497-9 (1961). Adverse decisions are reported in Farm Journal, Inc., 53 F.T.C. 26, 48 (1956); Hamilton Watch Co. v. Benrus, 206 F.2d 738, 741 (2d Cir.), *affirming* 114 F. Supp. 307 (D. Conn. 1953).

is permissible when the acquired firm is failing. This exception was the subject of a recent decision by the United States Supreme Court. While perhaps narrowly interpreted, the exception does not appear yet to have been repudiated.[5]

In legal terminology, the rationale of the exception is simple. The statutory prohibition reads against mergers which may lessen competition. A firm about to fail affords no competition; hence its acquisition cannot violate the antitrust laws. Such a rationale does not, however, provide much guidance either to the desirability of the exception or its scope. Perhaps it would be preferable to let the failing firm fail. In any event, there is ample room for argument as to what constitutes a failing condition.

Bankruptcy; pro and con

Mere mention of the word "bankruptcy" causes many a lawyer to shudder.[6] It is easy to envisage customers, creditors and employees caught in a catastrophe. Judicial liquidation evokes a picture of drastic shrinkages in values. Costs of administration appear high[7] and probable diversion of assets to other uses may involve shocking losses.[8]

The Attorney General did not seek to enjoin the Nash-Hudson merger out of which grew American Motors. Thus the facilities of both firms remained within the automobile industry and that result, both in theory and practice, has enhanced competition in that area.[9] If one or both firms had been allowed to fall into bankruptcy their assets might or might not have found continued employment in the manufacture of cars. Quite conceiv-

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[5] United States v. Diebold, 369 U.S. 654 (1962).

[6] United States v. Columbia Pictures, 169 F. Supp. 888, 896 (S.D. N.Y. 1959); Riehm & Billyou, *A Comment on the Proposed Notice of Legislation*, 2 Antitrust Bull. 195, 197-8 (1956); Attorney General's National Committee, *supra* note 2 at 124-5; Bok; *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 344-5 (1960); Weston, The Role of Mergers in the Growth of Large Firms, 75 (1953); House Comm. on the Judiciary, *The Merger Movement in the Textile Industry*, 84th Cong., 1st Sess. 33 (1955).

[7] Judicial Conference of the United States, Annual Report of the Proceeding 28-9, 312 (1959); Laughran, *Costs of Bankruptcy Administration*, 32 Ref. J. 49, 50 (1958). In the Matter of Dominick Falduto, no. 58B 4914 (N.D. Ill. 1960), is possibly a typical case of bankruptcy in the small business field. The files thereof show that expenses of administration exceeded 20% of the available assets; only 5.2198% of the claims of unsecured creditors were paid.

[8] In economic terms, bankruptcy procedure involves "frictions" which may prove extremely costly.

[9] Kottke, *Mergers of Large Manufacturing Companies*, 41 Rev. Economics 430 (1959).

ably their factories and tools might have been converted to the production of farm implements or some other commodity. Thus the desirability of the bankruptcy route may depend on whether it is considered desirable to shrink the capacity of an industry.[10]

There is a good deal to be said—and during depressed times it is often said—for the retirement of "excess" capacity. Machines are idle in many industries today; steel is only one of many commodities which could be produced in far greater quantities with existing plants. One could argue endlessly as to the cause of such conditions. It is more difficult to urge that the courts should recognize an exception to the antitrust laws which has the effect of discouraging the re-allocation of idle resources into productive service. Block the merger and let the facilities drop out of an industry which is equipped to manufacture more than can be sold. Let Nash and Hudson, in other words, go on the auction block. Let their factories start turning out lawn mowers, helicopters or some other product which new managers believe the public is willing to buy. In that way factories can be made to hum again; tools can be put to use in building products which consumers really want.

It will be urged on the other hand that maintenance of capacity within an industry is desirable in order to provide continued downward pressure upon prices. This is the traditional thrust of antitrust. "Excess" capacity in an industry should not be recognized; let producers reduce their prices, and the "excess" will disappear. Whether prices can, in fact, be so reduced and idle resources thus eliminated depends, of course, upon the slope of the demand curve. That slope will vary from industry to industry and, unfortunately, will always prove difficult of measurement. Antitrust, nevertheless, has never worried about demand; it has always clung to faith in more competition. Merged competition is regarded as better than less capacity. So here, paradoxically, in the failing company exemption, competition is to be enhanced by not enforcing the Clayton Act; merger is to be permitted in order to keep capacity within an industry.

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[10] It is claimed that mobility among the largest business enterprises has been reduced in recent years. Collins & Preston, *The Size Structure of the Largest Industrial Firms*, 51 Am. Econ. Rev. 986, 1001 (1961). If so, measures designed to promote exit from the industrial scene may be desirable.

It is not necessary to rely on the doctrine of counter-vailing power. By permitting Nash and Hudson to merge, General Motors was subjected to greater competitive pressure.[11] We may pass the point that the doctrine of counter-vailing power has received a cool reception from the courts;[12] it is immaterial that Bethlehem's bid to acquire Youngstown so as to offer more vigorous rivalry to "the corporation" was rejected.[13] For the exception, paradoxically, we repeat, flows inescapably from the principal purport of Section 7.

Tests of "failing"

What we conclude about the merits of bankruptcy as a treatment for idle capacity may bear directly on the test to be applied to ascertain whether a firm is in the "failing" category. Here the recent Diebold decision is illuminating. In the trial court the acquired firm was found to be "hopelessly insolvent"; accordingly, the Attorney General's action was dismissed on motion for summary judgement.[14] In the Supreme Court, however, the Attorney General prevailed, the judgment being reversed and the cause sent back for trial.[15] It thus appears that the equity test is not the measure of the "failing company" exception. Mere inability to meet obligations does not call the exception into play; presumably there must be a showing that there is no possibility of meeting obligations, even in the long run.[16]

If short term inability to pay bills does not bring the exception into play, a fortiori a decision upon the part of the acquired firm

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[11] Thus in United States v. Republic Steel Co., 11 F. Supp. 117, 124 (N.D. Ohio 1935) the court wrote:

> The elimination in such cases of the competition between the merging corporations is, in reality, a step in the strengthening of competition between the units vitalized thereby and the general industry. Therefore, instead of probability of injury to the public resulting from consummation of such merger the interest of the public will be enhanced.

See Bromley, *Mergers and Acquisitions*, 11 A.B.A. Antitrust Section Rep. 12, 16 (1957); Penrose, The Theory of the Growth of the Firm 239 (1959); Bright, The Electric Lamp Industry, 94 (1949).

[12] American Crystal Sugar v. Cuban-American Co., 152 F. Supp. 387, 399-400 (S.D. N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

[13] United States v. Bethlehem Steel Co., 163 F. Supp. 576, 607, 610, 615 (S.D. N.Y. 1958).

[14] United States v. Diebold, 197 F. Supp. 902, 905-7 (S.D. Ohio 1961).

[15] United States v. Diebold, 369 U.S. 654, 655 (1962). *Cf.* United States v. Maryland & Virginia Milk Assn., 167 F. Supp. 799, 808 (D.D.C. 1958); *rev'd.*, 362 U.S. 458 (1960); Pressed Steel Car Co., 16 F. Supp. 329, 339 (W.D. Pa. 1936).

[16] *Cf.* Wiley, *The "Failing Company"*, 41 B.U.L. Rev. 495, 504 (1961).

to liquidate or to seek financial aid does not take a merger out of the prohibitions of the antitrust laws.[17] The Attorney General, indeed, has taken the position that the acquired firm must have made unsuccessful efforts to borrow before it will be deemed "failing."[18] On top of that, he insists that it make a bona fide effort to sell out to someone other than the acquiring firm. The latter requirement is troublesome in that no standards are set for such a sale to another; *i.e.*, at what price must such a sale be attempted?[19] Beyond that, in view of decisions that even mergers in the nature of vertical integration and diversification fall within antitrust prohibitions, it is hard to envisage the identity of the presumably immune acquiring firm.

One could take the opposite position and argue that the exception should be available to rescue failures in their "incipiency." A firm may remain in business indefinitely although it fails to cover total costs. By foregoing profits and permitting its property to depreciate, it may remain active for years.[20] Failure to cover average costs is a more serious matter. Barring a shift in demand or costs, the end is just a matter of time. Such circumstances have not usually brought the exception into play,[21] although one older case may be cited in support of recognizing "incipient" failure.[22]

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[17] Erie Sand & Gravel Co. v. Federal Trade Comm'n 291 F.2d 279, 280 (3d Cir. 1961); Crown Zellerbach Corp. v. Federal Trade Comm'n 296 F.2d 800, 805-6 (9th Cir. 1961); Aluminum Co. of America v. Federal Trade Comm'n, 284 F.2d 401 (3d Cir. 1922), *cert. denied*, 261 U.S. 716 (1923).

[18] Wiley, *The "Failing Company,"* 41 B.U.L. Rev. 507 (1961).

[19] *Id.* at 509; Friedman, *Corporate Mergers & Acquisitions*, S. Rep. No. 132, Senate Committee on Judiciary, 85th Cong., 1st Sess. 41 (1957); Handler, *Fifteenth Annual Review*, 17 The Record 411, 429 (1962). In United States v. Diebold, 197 F. Supp. 902, 907 (S.D. Ohio 1961), *Reversed* 369 U.S. 654 (1962), the trial court, in applying the exception, laid some stress on the fact that a competitor was the only person who had made a bona fide offer to acquire the failing firm. In Erie Sand & Gravel Co. v. Federal Trade Commission, 291 F.2d 279, 280 (3d Cir. 1961) the court pointed to the fact that there were other bidders for the assets of the acquired company and hence refused to apply the exception.

[20] *Cf.* Farm Journal, Inc., 53 F.T.C. 26, 48 (1956).

[21] Crown Zellerbach Corp. v. Federal Trade Comm'n 54 F.T.C. 769, *aff'd*, 296 F.2d 800 (9th Cir. 1961); Aluminum Co. of America v. Federal Trade Comm'n 284 F.2d 401, 408 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923); Wiley, The *"Failing Company,"* 41 B.U.L. Rev. 421, 502-8 (1961); Note, *Horizontal Mergers and the "Failing Firm" Defense*, 45 Va. L. Rev. 421, 424 (1959).

[22] United States v. Republic Steel Co., 11 F. Supp. 117, 119 (N.D. Ohio 1935). Apparently the only decision dealing with an unprofitable division of an otherwise thriving corporation is Farm Journal, Inc. 53 F.T.C. 26 (1956), wherein the exception was held inapplicable. For a view favoring such "incipiency" see

(Continued on next page)

Analysis of tests

Can we learn anything by searching for the cause of the failing firm's trouble? If so, what causes are likely to be found? Examination of cases would, no doubt, yield varied answers. In some instances management has faltered, grown old and tired of the treadmill. In others, changes of consumer taste, wrongly analyzed by management, have wrought havoc. In still others, reliance placed on antiquated production methods may be responsible. Myriad factors can operate to bring an enterprise into a precarious predicament.

Those we have mentioned fall into the category of "imperfections." Predictions have been erroneous. Why? Perhaps they were founded on inadequate information. Possibly the matter lay outside human ken and someone simply guessed wrong. Ignorance is the grand "imperfection." Others fall under the headings of indivisibility, irrationality and immobility. All are "frictions" preventing the free flow of resources to their most efficient use.[23]

Suppose that we can identify the cause of a firm's imminent failure. We can diagnose the difficulty, give it a name, and thus see the direction which the enterprise should have taken. Assume, for example, that the firm to be acquired has been brought to the brink by a mistaken labor policy. Burdensome contracts have been assumed; a heavy weight of "feather-bedding" must be carried.

(Footnote continued from preceding page)
Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 326 (1960). The author went on to say at p. 344:

> It may well be . . . that many mergers which would normally be prohibited should be freely allowed where there is a substantial likelihood that the acquired firm cannot survive independently, even though its failure cannot reliably be described as probable.

See references to legislative history pointing in the same direction in Note, *Horizontal Mergers and the "Failing Firm" Defense,* 45 Va. L. Rev. 421, 424 (1959). *Cf.* United States v. Republic Steel Corp., 11 F. Supp. 117, 118-9 (N.D. Ohio 1935); Federal Trade Commission, Corporate Mergers and Acquisitions 78-9 (1955); Carr, Alcoa: an American Enterprise 92, 101, 112 (1952); Emmett & Jeuck, Catalogues & Counters 443-5 (1950).

[23] As to economies of scale consult Hale & Hale, Market Power § 3.13 (1958); Loehwing, *Through the Wringer* 35 Barron's no. 28, July 11, 1955, p. 5; *Cf.* Penrose, The Theory of the Growth of the Firm 18, 71, 92, 261 (N.Y. 1959); McKie, Tin cans and tin plate 297 (Harv. U. Press 1959); Floyd, *Asset Size and Yields on Invested Assets for U.S. Life Insurance Companies,* 1 Q. Rev. Economics & Business 87 (1961). A case of cost reduction is recounted in *Merger Benefits Grow at National–U.S. Radiator,* 39 Barron's no. 13, Mar. 30, 1959, p. 34. Consult Markham, *Merger Policy,* 43 Va. L. Rev. 489, 494 (1957).

In addition to "imperfections," we must take account of "indivisibility." Many industries are characterized by economies of scale. Such indivisibility takes many forms. There is a minimum efficient size for a steel mill or a hospital. The case of the railroad is pointed: there cannot be less than one single track right of way from *A* to *B*. In its early years an industry may attract many new entrants. As time goes by, factors of indivisibility, tangible or otherwise, may appear; marginal firms will falter, and the once rapidly expanding industry start to contract.[24]

Having thus identified the ailment, are we in a better position to prescribe application of the "failing company" exception to section 7 of the Clayton Act? The answer is affirmative. If the court can readily diagnose the problem, so can an outsider. The outsider need not be a competitor. If all that ailed Nash was a labor "bind," presumably funds could be raised from informed investors, a new corporation organized to acquire the plant, and the business resumed without the onerous labor contracts. Again and again one sees existing enterprises looking for new fields in which they may put their resources to work more profitably. A vast machinery of investment bankers and securities exchanges is also available to tap savings destined for risk ventures. If, then, the cause of the failing firm's difficulties can readily be identified, there would appear to be no need to let a competitor acquire its facilities in contravention of established policy.

If, on the other hand, the disease is not readily diagnosed, preservation of the enterprise may demand operation of the exemption. And in many instances, we submit, the origin of the prospective failure may be obscure. Multiple causes may have been at work. To weigh them and determine which one might have been important—and which of minor consequences—may readily surpass judicial ingenuity. Obscurity often surrounds such questions.

At this point we return to the Attorney General's insistence that the failing firm be offered to third parties before it is merged

[24] *Cf.* American Crystal Sugar Co. v. Cuban-American Co., 152 F. Supp. 387, 396 (S.D. N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D. N.Y. 1958), motion for SJ denied 157 F. Supp. 877 (S.D. N.Y. 1958). *But cf.* United States v. Republic Steel Corp., 11 F. Supp. 117, 124 (N.D. Ohio 1935).

into a competitor. If the diseased enterprise is made available to prospective investors and none shows an interest in its acquisition, the court may well draw an inference that the malady has many causes, is not readily diagnosed, and even less easily cured. Lack of investor interest is important evidence of the serious character of the ailment and of the difficulties involved in overcoming it. It does not necessarily follow that the court cannot apply the exemption absent such a showing. Other evidence may be amply persuasive and it is not always advisable to place a going concern on the auction block. Employee morale, for example, may suffer if it becomes known that the enterprise is "up for grabs."

We have been speaking primarily of "imperfections." If the problem is diagnosed as one of indivisibility, the answer is simple. For if merger is blocked, one (or, possibly, both) firm(s) must leave the industry. Hence proof of important economies of scale, subject to the foregoing observations with respect to the preservation of competition as opposed to the liquidation of "excess" capacity, should call the exemption into play. The mere possibility that factors of indivisibility will eventually force firms from an industry has not, obviously, brought the exception into play. In other antitrust cases, however, the courts have not overlooked such factors.[25]

We have mentioned "imperfections" and indivisibilities which may have crippled the failing firm. There is another possibility: demand for its product may have changed. The enterprise may have been managed with infinite wisdom, but if consumers won't buy its product, financial trouble may be expected. We are speaking, for example, of the buggy maker. What should a court do with such a case?

In some instances the plight of the buggy maker can actually be ascribed to an imperfection. If its management had been

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[25] Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 142 (D. Mass. 1960) *modified* 284 F.2d 582 (1st Cir. 1960) *cert. denied,* 365 U.S. 890 (1961); United States v. Standard Oil Co., 47 F.2d 288, 309 (E.D. Mo. 1931); Handler, *A Study of the construction and enforcement of the federal antitrust laws,* T NE C Mnno. no. 38, 76th Cong., 3rd Sess. 55-6 (1941); Bowman, *Incipiency, Mergers and the Size Question,* 1 Antitrust Bull. 533, 540 (1956); Hale & Hale, Market Power § 3.13 (1958); Givens, *Affirmative Benefits of Industrial Mergers and Section 7 of the Clayton Act,* 36 Ind. L.J. 51, 58 (1960); House Comm. on the Judiciary, *The Merger Movement in the Textile Industry,* 84th Cong., 1st Sess. 16 (1955), (wave of mergers in textile industry touched off by depression therein; "too many" mills).

truly alert, the company would have shifted to the production of automobiles. In such circumstances, the tests outlined above are applicable.

There are, however, genuine cases of "dying industries." The operator of an anthracite mine may not readily convert his plant into the production of a more promising product. And, no matter how well managed, such a property may be attractive to few investors. If, therefore, it can be shown that there has been a genuine shift in the demand curve for the firm's product, plus such degree of financial difficulty as may be thought necessary, the exemption may, again, be called into play, and without the necessity of showing that investors are not interested. If demand has really changed, the capacity may no longer be required to serve consumers. Presumably, however, the managers can perceive that fact and retire the more costly production facilities in due course.

It is true that the several firms in a "dying industry" will each be subject to "imperfections" in varying degrees. Some will be well managed and enjoy a prospect of longer survival. Others, for reasons which we have set out, will be due for quicker death. That fact, however, does not alter the test we have proposed. If demand has changed adversely, and if financial difficulties can be established, no further showing is required to call the exemption into play.

Growth

In "underdeveloped" and "mature" nations alike there is much talk today of encouraging economic growth. In many areas backward nations seek a "take-off." Here politicians promise to "get the country moving again." If indivisibility permeates the economy, perhaps mergers should be encouraged rather than prohibited; possibly the "failing firm" exception is in need of great expansion rather than its present restriction. Perhaps mergers should be allowed whenever there are economies of scale. In support of such a view there is some evidence that mergers are more prevalent in growing than shrinking industries.[26] And if an exception is needed to cushion the rigors of industrial death,

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[26] Nelson, *Merger Movements in American Industry*, Nat'l Bureau of Econ. Research 43, 78 (1959). *Cf.* Penrose, The Theory of the Growth of the Firm 18, 68, 162-3 (N.Y. 1959).

why should it not be equally available to nourish the difficult process of growth?[27]

All that can be said on that subject is that it challenges the fundamental concepts of antitrust policy. We are committed to the idea that indivisibility excuses monopoly only in the public utility field. If an enterprise is to avoid profit control, it can receive no assistance by reducing competitive pressures. In the free sector of the economy we insist upon competition.[28]

Other factors

It has been suggested that the failing firm exception should be more narrowly construed as the magnitude of the acquired company increases.[29] Here no doubt concern is felt lest the acquisition actually affect competition, even if ruin is the alternative for the acquired firm. Absolute size (wealth) is perhaps vaguely related to the peril of failure; the small, struggling firm may be more likely to go under than the large, well established company.[30] The exception thus is likely to be called into play when the acquiring concern is large. It follows that the acquired business will often be small. If, therefore, the exception is properly recognized at all, it is difficult to understand why its application should be limited to situations wherein the acquiring firm is relatively or absolutely small. To do so amounts almost to an elimination of the exception.

What is to be said, per contra, of the factor of entry? Lack of barriers in the industry may logically lead to the conclusion that no merger threatens competition. Potential competition may

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[27] Wiley, *The "Failing Company,"* 41 B.U.L. Rev. 495, 508 (1961) (in two cases need for expansion of acquiring company noted in consideration of exception). Certainly the form of the arrangement for growth should not be controlling. Carr, Alcoa: an American Enterprise 92, 103 (1952). Note also that some acquisitions are "bargains." Harris, *H. K. Porter's Interesting Growth Product,* 52 Fortune no. 3, 114, 116 (1955); Rieser, *Consolidated Foods,* 61 Fortune no. 6, 139, 255 (1960); Penrose, The Theory of the Growth of the Firm 18, 160 (1959).

[28] United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 616-7 (S.D. N.Y. 1958).

[29] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 343 (1960); *cf.* Dewey, Monopoly in Economics and Law 224 (1959).

[30] Kaplan, *The Influence of Size of Firms,* 40 Proc. American Economics Ass'n 74, 75 (1950); Ferguson, *The Relationship of Business Size to Stability: an Empirical Approach,* 9 J. of Ind. Econ. 43, 57 (1960).

suffice for welfare purposes, and the courts have shown considerable awareness of that fact.[31] It does not follow that ease of entry should enlarge the scope of the failing firm exception. Economies of scale may be in operation; marginal firms may be faced with failure; yet entry may be easy and consumers thus amply protected against the toll of monopoly. Picture, for example, the individual grocer of a generation ago. There is no greater scope for the exemption; either we prefer the bankruptcy route or the gentler mechanism of the exception; conditions of entry are irrelevant.[32]

Conclusions

Offhand one might assume that a narrow reading of the exception would best promote a maximum amount of competition. In the short run that may be true. Over the long term, however, as suggested above, forcing firms into bankruptcy is apt to result in their exit from the industry. In that event competition will be reduced. Hence the highly restrictive suggestion of the Diebold decision cannot be counted upon as a long run bulwark against monopoly.

It does not follow that the statutory prohibitions should be nullified in recognizing every "incipient" failure. Analysis of the type set forth above should permit a discriminating application of the exemption. It is true that the suggested tests are not automatic; they present a framework for the sifting of evidence and a rationale for decision; they do not decide cases. Much room

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31 United States v. Columbia Pictures, Inc., 189 F. Supp. 153, 200 (S.D. N.Y. 1960); Moody & Waters v. Case-Moody Pie Corp., 354 Ill. 82, 89, 187 N.E. 813 (1933). *Cf.* American Crystal Sugar v. Cuban-American Co., 259 F.2d 524, 530-1 (2d Cir. 1958); Hale & Hale, Market Power §§ 2.26, 3.12 (1958); Rahl, *Applicability of the Clayton Act to Potential Competition,* 12 A.B.A. Antitrust Section Rep. 128 (1958); Bowman, *Incipiency, Mergers and the Size Question,* 1 Antitrust Bull. 533, 539 (1956). The fact that a firm in an industry in failing *may* suggest that entry is easy. Note the case recounted in 1 Whitney, Antitrust Policies; American Experience in Twenty Industries 41-2 (1958).

32 Apparently no decision has dealt explicitly with the situation in which the acquiring firm (rather than the acquired) was failing. *Cf.* Farm Journal, Inc. 53 F.T.C. 26 (1956). Such a situation is not inconceivable and the same considerations would seem to apply as when the acquired firm is in difficulties. An interesting variant appears in Columbia Gas & Electric Co. v. United States, 151 F.2d 461, 470 (6th Cir. 1945), *Petition for Modification Denied,* 153 F.2d 101 (1946), *cert. denied,* 329 U.S. 737 (1946). There bonds were purchased with the apparent intent of throwing the obligor into bankruptcy and thus gaining control of its business.

is left for judging but less, perhaps, than when a court must decide whether a defendant in a tort case has acted with due care for the safety of others.

It may be thought that different considerations should apply to mergers in the nature of integration or diversification. Here the fear is not that competition may be reduced but, on the contrary, that it may become too intense. The merged firm, with enlarged assets and greater absolute size (wealth), may simply be able to outslug others in its field(s). Application of the exception would also result, as indicated above, in a form of protectionism: that is, the existing plant of the industry would be maintained. Hence recognition of the exception may not be important except to the extent that it raises the awesome question: who should be protected from whom?