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ARTICLES

IN AGGRAVATION OF MERGER

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STATEMENT OF THE PROBLEM

In litigation under the anti-merger laws, courts look first to market definitions. They establish the relevant product and geographic markets and there normally follows a calculation of market shares. If the acquiring firm already has a fifteen percent share and, by the merger, would increase that share to twenty percent, the court may well find the transaction unlawful. Thus when the market share achieved by merger appears excessive, that fact alone may determine the result of anti-merger litigation.¹

Computation of the market shares, however, may not be conclusive. A defendant, for example, may tender defenses unrelated to the market share issue. While the number and character of those defenses may be narrowly circumscribed, they still maintain at least a formal existence. If, for example, the acquired enterprise falls into the category of a failing firm, the merger may be valid despite a calculation of excessive market shares. True, the test of failing condition is stringent; there nevertheless exists at least the possibility of establishing facts which will operate in mitigation of merger.²

Similarly, a plaintiff may tender evidence in aggravation of merger. Thus if the calculation of market shares proves inconclusive, the plaintiff may rely on other factors and persuade the court that the acquisition should be enjoined. In this paper we consider the nature of such "other" factors.³ We seek to learn to what extent the courts have taken account of them and to attempt to evaluate the relevance of evidence relating to matters other than market shares.

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1. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

2. Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws*, 52 Ky. L.J. 597 (1964).

3. The subjects of "concentration" and "reciprocity" are omitted from the present paper. As to the latter, the authors' views are set forth in Hale & Hale, *Reciprocity Under the Antitrust Laws: A Comment*, 113 U. PA. L. REV. 69 (1964).

AGGRAVATION FACTOR

Intent

In litigation under section 7 of the Clayton Act, as we shall see, good intentions may be irrelevant. No matter how pure the motives of the acquiring firm, its merger may nevertheless be deemed unlawful. If, however, plaintiff can adduce evidence of an intent to eliminate competition through the acquisition, it will almost surely be admissible in aggravation of the market share calculation.

Many of the older cases testing the validity of industrial combinations arose under the Sherman Act. That statute, in section 2, forbids monopolization, attempts to monopolize, and conspiracies to monopolize. Intent has always been regarded as relevant in litigation thereunder. In one of the older cases, for example, the court wrote :

[t]here is no limit in this country to the extent to which a business may grow, and the acquisition of property in the present case, standing alone, would not be deemed an illegal monopoly; but when such acquisitions are accompanied by an intent to monopolize and restrain interstate trade by an arbitrary use of the power resulting from a large business to eliminate a weaker competitor, then they no doubt come within the meaning of the statute.⁴

The Sherman Act cases have also condemned combinations characterized as a "calculated purchase for control."⁵ However vague that phrase may be deemed, the word "calculated" clearly implies that the intent of the acquiring firm is taken into account. Such a "calculated purchase" is often contrasted—unfavorably—with "normal industrial development."⁶

While section 7 of the Clayton Act was surely designed to operate to bar certain mergers even in the absence of evidence of wrongful intent such evidence is relevant in a proceeding under that section :

4. *United States v. Eastman Kodak Co.*, 226 F. 62, 80 (W.D.N.Y. 1915), *decree granted*, 230 F. 522 (W.D.N.Y. 1916), *appeal dismissed*, 255 U.S. 578 (1921).

5. *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947); *United States v. Reading Co.*, 253 U.S. 26, 57 (1920); *American Tobacco Co. v. United States*, 147 F.2d 93, 111 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); *In re American Fuel & Power Co.*, 122 F.2d 223, 228 (6th Cir. 1941).

6. *Standard Oil Co. v. United States*, 221 U.S. 1, 73, 75 (1911); *Dunbar v. American Tel. & Tel. Co.*, 238 Ill. 456, 483, 486, 87 N.E. 521, 532, 533 (1909). See M. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS* 487 (TNEC Monograph No. 38, 1941); R. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY* 103, 105 (1959). Intent is particularly important when an attempt to monopolize is alleged, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-32 (1948).

[w]hile the Government is not required to establish the defendant's motive or intent in entering into this transaction, evidence of motive or intent is admissible as it may possibly cast an illuminating light on what actually transpired.⁷

So, when an acquisition was found to have been actuated by a desire to remove a price cutting "thorn" from the sides of the acquiring firm's customers, it was condemned.⁸ Thus despite the absence of a necessity therefor, it is not uncommon to find mention of wrongful intent in opinions holding acquisitions unlawful under the Clayton Act.⁹

We have suggested that intent may be more relevant in anti-merger suits under the Sherman Act than in those founded upon section 7 of the Clayton Act. Indeed, failure to demonstrate wrongful intent has proved fatal to a plaintiff's case under the 1890 legislation. When persuaded that the defendant acted without intent to monopolize, the courts were apt as late as 1931 to refer to the acquisition as motivated by "sound business reasons" and to condone it.¹⁰ That is the ancient distinction between the "good trust" and the "bad trust."¹¹

No such line has been drawn in litigation under the Clayton Act. Conceived as "structural" in character, that legislation is called into play without proof of malevolent purpose. Thus in the famous *United States v. E. I. duPont de Nemours & Co.* case the Court wrote: "[i]t is not requisite to the proof of a violation of §7 to show that restraint or monopoly was intended."¹² It follows that proof of good intentions should be rejected. In some instances, however, the courts—probably inadvertently—have hinted that the rule is not inflexible.¹³

7. *United States v. Maryland & Va. Milk Prod. Ass'n*, 167 F. Supp. 799, 804 (D.D.C. 1958), *aff'd*, 362 U.S. 458 (1960).

8. *Id.* at 805.

9. *Ekco Prod. Co. v. FTC*, 347 F.2d 745, 750 (7th Cir. 1965); *Western Meat Co. v. FTC*, 1 F.2d 95, 99 (9th Cir. 1924), *modified*, 4 F.2d 223 (9th Cir. 1925), *modified*, 272 U.S. 554 (1926); *United States v. General Dynamics Corp.*, 246 F. Supp. 156, 161 (S.D.N.Y. 1965), *clarified*, 258 F. Supp. 36 (S.D.N.Y. 1966); *United States v. Aluminum Co. of America*, 233 F. Supp. 718, 727 (E.D. Mo. 1964), *aff'd*, 382 U.S. 12 (1965); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV L. REV. 226, 324 (1960).

10. *United States v. Standard Oil Co.*, 47 F.2d 288, 310-11 (E.D. Mo. 1931); *accord*, *United States v. Columbia Steel Co.*, 334 U.S. 495, 533 (1948); *cf.* *United States v. American Can Co.*, 230 F. 859, 861 (D. Md.), *decree considered*, 234 F. 1019 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921). A different view appears to have been expressed in *United States v. First National Bank*, 208 F. Supp. 457 (E.D. Ky. 1962), *rev'd*, 376 U.S. 665, 669 (1964).

11. A. KALES, *CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE*, § 92 (1918).

12. 353 U.S. 586, 607 (1957), *rev'g* 126 F. Supp. 27 (N.D. Ill. 1954). *Accord*, *Aluminum Co. of America v. FTC*, 284 F. 401, 408 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923).

13. *United States v. Continental Oil Co.*, 1965 Trade Cas. 81,537 (D.N.M. 1965), *vacated*, 387 U.S. 424 (1967). *Cf.* *Transamerica Corp. v. Parrington*, 115 Cal. App. 2d

What kind of evidence is admissible to demonstrate intent in anti-merger litigation? In some instances the mere fact of acquisition has suggested a wrongful intent. Buying up rival firms, it was hinted in the old *Standard Oil of New Jersey v. United States* case, gave rise to a presumption of intent to monopolize.¹⁴ The opinions which refer to a "calculated purchase for control"¹⁵ may rest on the same concept: that the fact of acquisition demonstrates the malevolence of the acquirer. In the same manner, courts which speak of a merger as fulfilling a "normal business purpose" seem to base the loose characterization upon the fact of acquisition. Such reasoning is difficult to follow. It is true, of course, that the acquiring firm has demonstrated an intent to make an acquisition. But this does not necessarily indicate that the firm has evidenced an appetite for monopolization. The books are full of instances in which mergers have been actuated, at least in part, by other factors such as the reaping of promoters' profits, minimization of taxes, etc.¹⁶ By naming other facts suggesting wrongful intent, some courts have indicated that the fact of acquisition itself should not be taken as evidence of wrongful motive. The fact, for example, that a premium price was paid for the acquired stock has been noted as evidence pointing to an improper intent.¹⁷

346, 252 P.2d 385 (1953); *Pennsylvania R.R. v. ICC*, 66 F.2d 37, 40 (3d Cir. 1933), *aff'd per curiam*, 291 U.S. 651 (1934); *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 516 (N.D.N.Y. 1963), *rev'd*, 377 U.S. 271 (1964).

14. 221 U.S. 1, 75 (1911), *aff'g* 173 F. 177 (E.D. Mo. 1909). *Accord*, *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 433 (1908). Possibly the mergers create a presumption of intent to dominate and control industry. *United States v. Great Lakes Towing Co.*, 208 F. 733, 742 (N.D. Ohio 1913), *decree granted*, 217 F. 656 (N.D. Ohio 1914).

15. *United States v. Reading Co.*, 253 U.S. 26, 57 (1920). *Cf.* *United States v. Great Lakes Towing Co.*, 208 F. 733, 742-43 (N.D. Ohio 1913), *decree granted*, 217 F. 656 (N.D. Ohio 1914).

16. *United States v. American Can Co.*, 230 F. 859, 866 (D. Md.), *decree granted*, 234 F. 1019 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921); Butters, *Taxation, Incentives and Financial Capacity*, in H. LEVIN, *BUSINESS ORGANIZATION AND PUBLIC POLICY: A BOOK OF READINGS* 187, 194 (1958); CHEATHAM, *THE GEORGIA-PACIFIC STORY* 16-17 (1966); Hamill, *Bert Gamble*, *FORTUNE*, Oct. 1960, at 180; E. MARKHAM, *SURVEY OF THE EVIDENCE AND FINDINGS ON MERGERS IN BUSINESS CONCENTRATION AND PRICE POLICY* 141 (Stigler ed. 1955). Note the interesting empirical test suggested in Stigler, *The Dominant Firm and the Inverted Umbrella*, 8 *J. LAW & ECON.* 167 (1965).

17. *United States v. Standard Oil Co.*, 253 F. Supp. 196 (D.N.J. 1966); *People v. American Ice Co.*, 135 App. Div. 180, 120 N.Y.S. 41 (Sup. Ct. 1909), *aff'd mem.* 140 App. Div. 912, 125 N.Y.S. 1136 (Sup. Ct. 1910). One might think that the courts would pay some attention to whether the acquiring firm or the acquired enterprise took the initiative in negotiating the acquisition. The authorities, however, tend to disregard that fact. *Columbia Gas & Elec. Corp. v. United States*, 151 F.2d 461 (6th Cir. 1945), *modification denied*, 153 F.2d 101 (6th Cir. 1946), *cert. denied*, 329 U.S. 737 (1946); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 447 (N.D. Cal. 1967); *Farm Journal, Inc.*, 53 F.T.C. 26, 32 (1956). Note the interesting example of a merger motivated by family considerations set forth in *FEDERAL TRADE COMMISSION, CORPORATE MERGERS AND ACQUISITIONS* 75 (May 1955).

Should the courts take account of intent in litigation under the anti-merger laws? In recent years emphasis has been placed on the "structural" aspect of mergers. Legality has been made heavily dependent upon market shares; "behavior" and "performance" have been given relatively minor weight. If the "structure" achieved by the merger seemed to threaten competition, then illegality followed without much further inquiry.¹⁸ In that atmosphere little reason appears for inquiry into motives.

The argument in favor of considering intent points to weaknesses in the "structure" concept. "Structure" depends almost entirely upon a calculation of market shares. That calculation, in turn, is founded upon product and geographic market definitions. Contrary to common impression, those definitions are far from precise. In a single decision, for example, we are advised that the commodity in question should be defined as containers made both of tinfoil and glass but not plastics and other materials. Judges have exchanged sharp views on the interchangeability of aluminum and copper cables. Even greater doubts have been expressed with respect to the propriety of some definitions of geographic markets. In such circumstances it surely would be odd to exclude evidence which might cast light upon the ultimate issues.¹⁹

Beware what follows. If our reason for admitting evidence of intent is our fear that the "structure" test is weak, it follows that good intentions are just as relevant as bad. "Sound business reasons," whatever they may be, are just as probative as a "calculated purchase for control." There is no logical reason, in short, to consider the acquiring firm's wicked motives unless its benevolent designs are likewise deemed material.

There remains the interesting situation in which motive is clearly malevolent but no impairment of competition can be envisaged. Here the parallel is to a charge of attempted assault and battery when the weapon is a feather duster. A defendant may have every intention of destroying his price-cutting competitor and removing him from the market place. Unless, however, he has some means of doing so, the intent alone would not seem to amount to a violation of the law. In other words, even under Clayton Act tests, there must be some impact upon competition or prospect thereof before the combination may be deemed unlawful.

Unless the "structure" test rests on a foundation of unquestioned firmness, intent should be relevant in anti-merger litigation. Both "good" and "bad" motives should be considered. And the weight accorded that evidence should vary inversely with the strength of the "structure" test

18. *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957), *rev'd* 126 F. Supp. 27 (N.D. Ill. 1954); Barnes, *The Primacy of Competition and the Brown Shoe Decision*, 51 GEO. L. J. 706, 739 (1963).

19. *United States v. Maryland & Va. Milk Prod. Ass'n*, 167 F. Supp. 799, 804

in that suit. If the parties do not question the market definitions and if no difficulties arise in calculating market shares, intent may be nearly disregarded and vice versa.

Idle Capacity

In a good many cases the courts have mentioned the holding of idle capacity as a reason for condemning a merger. In the older cases a typical pattern started with the combination of competing concerns followed by the shutting down of one or more of the acquired plants. The fact that the combined concern thus deliberately removed a portion of the supply of goods which would otherwise have been available was held relevant in passing upon the validity of the merger.²⁰ Idle capacity following the acquisition is thus taken in aggravation of merger.

In many instances the courts are, no doubt, on sound ground. The conduct of the defendants suggests an effort to shift the supply schedule and, hence, to raise prices.²¹ Evidence of excess capacity is not, however, unequivocal. Several valid explanations could be tendered to show why a plant was not worked to capacity following an acquisition. Ignorance of market conditions might be one—instances can be cited in which failure to operate at capacity appears to arise out of misinformation.²² Mismanagement may lead to financial stringency, preventing full operation of

(D.D.C. 1958), *aff'd*, 362 U.S. 458 (1960).

20. *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916); *United States v. American Tobacco Co.*, 164 F. 700 (S.D.N.Y. 1908), *rev'd*, 221 U.S. 106, 157 (1911); *Love v. Kozy Theater Co.*, 193 Ky. 336, 236 S.W. 243 (1922). *But cf.* *Sandidge v. Rogers*, 167 F. Supp. 553 (S.D. Ind. 1958). Note the order of reasoning in *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 124 (N.D. Ohio 1935). In that case it was said that the enormous excess capacity in the industry as a whole prevented the plaintiff from showing a purpose of lessening competition through the merger.

21. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1298 (1948); ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, FINAL REPORT, § VII C/2 (1955). *Cf.* R. HARROD, *ECONOMIC ESSAYS* 152 (1952).

22. A famous example occurred when Theodore Roosevelt and Gifford Pinchot mistakenly announced that reserves of timberland in the United States were almost exhausted. They made that statement in a campaign against waste and in favor of conservation. Lumber companies and speculators took the statement at face value and bid up the price of timber. As a result there was vast "over-production" and "ruinous competition" resulting in numerous bankruptcies. *Bunyan in Broadcloth: The House of Weyerhaeuser*, *FORTUNE*, Apr. 1934, at 174, 176. Another example is recounted in *International Power & Paper*, *FORTUNE*, May 1930, at 69. Note the views of a long-time student of the antitrust laws:

Excess capacity tends to be treated by theory as a monopolistic symptom, but in antitrust cases it may or may not be so treated, depending on circumstances. And businessmen tend to the view that competition does not begin until they have difficulty disposing of capacity output and becomes more severe as excess capacity gets larger.

Clark, *Competition: Static Models and Dynamic Aspects*, 45 PROC. AM. ECON. ASS'N 450, 453 (1955).

equipment. Also, a shift in the demand curve, or an anticipated shift, could cause similar results. A good deal may depend upon the elasticity of demand for the product. Hence the mere fact that the acquiring firm has not worked at maximum capacity levels should not alone be conclusive in adjudicating the validity of a merger.²³ Unless explained, however, it does seem worthy of consideration.

Courts have taken particular note of the dismantling of acquired plants.²⁴ Evidence that the combination deliberately destroyed part of its own capacity to produce is scarcely susceptible of any except adverse inferences.²⁵ It is, by definition, a long run phenomenon and cannot be dismissed as the product of unexpected short term factors. No doubt explanations could be found; they should, however, be convincing.

Existence of idle capacity prior to the acquisition appears not to have been the subject of judicial comment. If both the acquiring and acquired firm are operating at less than full capacity, that fact might support a suspicion that the merger was intended as part of a move toward "rationalization" of the industry. If, on the other hand, one of the firms had an idle plant and the other needed additional capacity (as evidenced, perhaps, by the receipt of more orders than it could fill), an entirely different inference must be drawn.

Is it relevant that, before or after the merger, the parties to the merger have been working at capacity? As in the case of intent, a two way street seems indicated. If there has been no idle capacity that fact would appear relevant so long as we bear in mind that, as indicated above, many other factors may account for the absence of excess plant. A shift in the demand curve, for example, may account for full production just as a shift in the opposite direction may explain the existence of idle facilities.

Pricing

In litigation challenging the legality of industrial combinations, it has been traditional to consider "abuses." Predatory price cutting has

23. Clark, *The Concept of "Workable" or "Effective" Competition* 6 (Jan. 5, 1954) (Tentative draft submitted to Attorney General's National Comm. to Study the Anti-trust Laws); 1955 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 332-33.

24. *United States v. American Can Co.*, 230 F. 859, 875 (D. Md.), *decree granted*, 234 F. 1019 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921); *United States v. Eastman Kodak Co.*, 226 F. 62, 69 (W.D.N.Y. 1915), *decree granted*, 230 F. 522 (W.D.N.Y. 1916), *appeal dismissed*, 255 U.S. 578 (1921); *United States v. American Tobacco Co.*, 164 F. 700 (C.C.S.D.N.Y. 1908), *rev'd*, 221 U.S. 106, 163, 166, 183 (1911); *United States v. Grinnell Corp.*, 236 F. Supp. 244, 254 (D.R.I. 1964), *modified*, 384 U.S. 563 (1966); *Distilling & Cattle Feeding Co. v. People ex rel Moloney*, 156 Ill. 448, 465, 41 N.E. 188 (1895).

25. H. WILLIAMSON, *WINCHESTER: THE GUN THAT WON THE WEST* 58 (1952); A. NEVINS, *STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST* 256, 285 (1953).

constituted the classic form of "abuse." If, after its formation, the combination indulges in price cutting, particularly temporary price reductions localized as to area or product, courts have seized upon that conduct as an additional reason for invalidating the acquisition. A combination found guilty of such behavior is the traditional "bad trust."²⁶

Interestingly enough, raising prices may be equally detrimental to the validity of the merger. If the acquisition was made, for example, to eliminate a price cutting competitor, it may well be unlawful.²⁷ And the fact that the acquiring firm subsequently raised prices has often been noted as a factor adverse to the validity of the acquisition.²⁸

It follows that a merger will be somewhat less subject to challenge if the firm's prices remain unchanged. Presumably the period during which pricing is relevant to the validity of a merger extends to the time when upward or downward price fluctuations are attributable to other causes. We shall consider below the desirability of taking pricing and other "abuses" into account in litigation under the anti-merger laws.

Misbehavior Generally

Price changes are by no means the only type of conduct considered by the courts in anti-merger litigation.²⁹ Often covenants not to compete are mentioned in opinions invalidating mergers. Such covenants are frequently secured by the acquiring firm from the natural persons associated with the acquired firm and, of course, a considerable body of law has developed with respect to their validity apart from the anti-merger laws.³⁰ In recent years the practice of "reciprocity" has been

26. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), *modifying* 173 F. 177 (C.C.E.D. Mo. 1909); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962); *Highland Supply Corp. v. Reynolds Metals Co.*, 245 F. Supp. 510 (E.D. Mo. 1965). *Cf. Procter and Gamble Co. v. FTC*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967); *Sandidge v. Rogers*, 167 F. Supp. 553, 559 (S.D. Ind. 1958). *See* A. KALES, *CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE* § 49 (1918); M. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS* 51 (TNEC Monograph No. 38, 1941).

27. *United States v. Maryland & Va. Milk Prod. Ass'n*, 167 F. Supp. 799, 805-06 (D.D.C. 1958), *modified*, 362 U.S. 458 (1960). (One of defendant's motives in the acquisition of a dairy was elimination of price-cutting which had hurt its customers.)

28. *Farm Journal, Inc.* 53 F.T.C. 26, 33, 42 (1956); *Harding v. American Glucose Co.*, 182 Ill. 551, 640, 55 N.E. 577, 620 (1899); *Hadley v. Standard Oil Co.*, 218 Mo. 1, 336, 116 S.W. 902, 1042 (1909), *aff'd*, 224 U.S. 270 (1912). Query whether price leadership might be given similar effect. *Crown Zellerbach Corp.*, 54 F.T.C. 769, 788 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961). The mere fact that the defendants made profits hardly seems relevant. *But see United States v. Great Lakes Towing Co.*, 208 F. 733, 744 (N.D. Ohio 1913), *decree granted*, 217 F. 656 (N.D. Ohio 1914).

29. Use of violence might well be taken into account. *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers', Local 753*, 371 Ill. 377, 389, 21 N.E.2d 308, 314 (1939), *aff'd*, 312 U.S. 257 (1941).

30. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *Shawnee*

deemed a factor in aggravation of merger.³¹ Since reciprocity was not previously deemed unlawful, such decisions suggest the possibility that a host of practices might be deemed "abuses" for purposes of anti-merger litigation. A long term contract, for example, not otherwise objectionable, might be deemed an "abuse" on the ground that third parties could not compete for the business while it remained in effect.³²

As was noted in connection with the matter of intent, the anti-merger laws today and particularly section 7 of the Clayton Act focus on industrial structure. The notion is that monopoly (and, perhaps, oligopoly) should be prevented. We do not look to see whether or not there have been predatory practices; power to move prices up (or down) is presumed from the structure resulting from the acquisition. Thus there will be no need to determine whether the combination constitutes a "good trust" or a "bad trust." The "good" or "bad" performance of the firm after the acquisition is, in this view, irrelevant.³³ It would follow that evidence of pricing and other "abuses" should not be received.

There are other reasons for deeming the conduct of the firm irrelevant. "Bad" performance does not necessarily indicate that monopoly has been achieved. True, in many instances, some degree of monopoly power may afford a "base" for the indulgence of predatory practices. A firm cannot engage in pricing below cost, for example, unless it enjoys reserves. Those reserves may be created by the existence of some degree of monopoly power. They may, however, also be derived purely from wealth; the enterprise diversified into many product lines may enjoy aggregate cash resources to finance forays designed to drive rivals from the field without holding monopoly power in any single market.³⁴ Again, at

Compress Co. v. Anderson, 209 U.S. 423, 433 (1908); United States v. Great Lakes Towing Co., 208 F. 733, 745 (N.D. Ohio 1913), *decree granted*, 217 F. 656 (N.D. Ohio 1914); Armour & Co., 4 F.T.C. 457, 463 (1922).

31. FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. General Dynamics Corp., 246 F. Supp. 156, 163-64 (S.D.N.Y. 1965), 258 F. Supp. 36 (S.D.N.Y. 1966) (reciprocity). *But cf.* United States v. FMC Corp., 218 F. Supp. 817, 819 (N.D. Cal. 1963), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963).

32. In Crown Zellerbach Corp., 54 F.T.C. 769, 788 (1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961), the rationing of paper to its customers by the defendant was noted with disapproval. It was also pointed out that the size of minimum orders had been increased after the acquisition. *Id.* at 794. An attempt to purchase prior to a merger has been noted adversely. Inland Container Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,012, at 22,118 (FTC 1964). What effect would be given a contract providing that one firm could inspect another's books of account? United States v. Columbia Pictures Corp., 169 F. Supp. 888, 892 (S.D.N.Y. 1959). Heavy advertising expenditures might also be deemed relevant. On that subject note the recent investigation reported in Else, *The Incidence of Advertising in Manufacturing Industries*, 18 OXFORD ECON. PAPERS 88 (1966).

33. Rostow, *Market Organization and Stabilization Policy*, in INCOME STABILIZATION FOR A DEVELOPING ECONOMY 511 (Millikan ed. 1954).

34. If the merged firm engages in price-fixing after the acquisition, it might indicate either that alone it did not enjoy monopoly power or that the merger had so

the other extreme, the small businessman with neither wealth nor monopoly power may be able to engage in questionable practices, such as fraud.

A further argument against entertaining evidence of "abuses" rests on the ambiguous nature of the alleged misconduct. It is odd, to say the least, that both reducing and raising prices should be deemed factors reflecting adversely on the validity of a merger. Some observers think they can identify predatory price cutting; without going into the entire literature of pricing, it is easy to point to reasons why price reductions should not taint mergers.³⁵ Again, higher prices can often be explained by factors extraneous to the merger.³⁶ In one view, the restrictive covenant is a sinister device; in another, it merely assures delivery of the good will purchased by the acquiring firm.

Looking in the opposite direction are the same arguments which are adduced to support consideration of intent in merger cases. "Structure," it is said, is a shaky edifice upon which to support findings of injury to competition. Market definitions may be so arbitrary as to deprive the entire concept of firm foundations.³⁷ Again, if intent is relevant in a merger proceeding, behavior may shed considerable light upon motive. The recently amalgamated firm which turns on its competition with a combination of price cutting and fraud may demonstrate an appetite for monopoly which, if not conclusive, can scarcely be overlooked. Again, while mergers do not necessarily confer monopoly power and monopoly power is not a prerequisite for the commission of acts of misbehavior, there may be a relationship between the two.³⁸ It is not urged that conduct be made the test of legality but that it not be disregarded.

Up to this point we have been speaking of conduct following the acquisition. All the decided cases refer to price cutting or other misbehavior following formation of the combination. Are the same considerations applicable to pre-merger conduct? A leading economist has urged that such conduct is relevant because the acquiring firm's behavior prior

reduced numbers in the industry to the point where price-fixing became feasible. Cf. Williamson, *A Dynamic Theory of Interfirm Behavior*, 79 Q.J. ECON. 579, 601 (1965).

35. 1955 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 331; Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1281 (1949); Telser, *Abusive Trade Practices: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 488 (1965). Should holding prices down to discourage entry constitute aggravation of a merger?

36. There may, for example, have been shifts in demand.

37. C. GRIFFIN, AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS, ch. VII (1951); Adelman, *Business Size and Public Policy*, 24 J. BUS. 269, 273 (1951); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1280 (1949).

38. *United States v. General Dynamics Corp.*, 246 F. Supp. 156, 163-64 (S.D.N.Y. 1965), *clarified*, 258 F. Supp. 36 (S.D.N.Y. 1966) (reciprocity).

to the acquisition may shed light on its intent.³⁹ It indicates even less than post-merger behavior, however, as to whether or not the merger itself resulted in the acquisition of some degree of monopoly power. Its relevance would therefore usually appear remote.

We have considered whether "bad" conduct, before or after the acquisition, should be deemed relevant in adjudicating the validity of the merger. There remains the relevance of good conduct. Here the courts have been divided. In some instances the fact that the amalgamated firm has eliminated fraud and financial irresponsibility in an industry has been deemed immaterial.⁴⁰ In other instances courts have given weight to evidence of good conduct. One of the factors which saved the United States Steel Corporation from dissolution, for example, was the price stability which its formation brought to the industry. Wide price fluctuations, with accompanying speculation, apparently were eliminated by the combination. Today a court might take a jaundiced view of such evidence but at least the lower tribunal was impressed thereby in 1915.⁴¹ And it is not inconceivable that a court today might be impressed by similar evidence if it related, for instance, to prices paid to sugar beet growers.

Should evidence of good conduct be admissible? If one admits testimony concerning "bad" behavior because he is fearful of relying solely on the "structure" test, it follows that "good" behavior should be equally relevant. At the same time, the courts should be fully aware of the hazards inherent in that procedure: characterizing conduct as "good" or "bad" takes us into the realm of morals. Here our society shows great bewilderment. Sanctimonious talk about serving two masters decorates an opinion holding that a remote conflict of interest situation avoids a contract favoring private rather than public production of electric power.⁴² But the same judges find no difficulty in approving a system of soliciting legal retainers denounced by the dissenting opinion as a patent violation of the cardinal ethics of the legal profession.⁴³ With

39. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 180 (1955).

40. *United States v. Great Lakes Towing Co.*, 208 F. 733, 740, 743-44 (N.D. Ohio 1913), *decree granted*, 217 F. 656 (N.D. Ohio 1914). Cases, however, can be cited to the contrary. *United States v. Penick & Ford, Ltd.*, 242 F. Supp. 518, 525 (D.N.J. 1965); *United States v. American Can Co.*, 230 F. 859, 893 (D. Md.), *decree granted*, 234 F. 1019 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

41. *United States v. United States Steel Corp.*, 223 F. 55, 90, 91, 96 (D.N.J. 1915); *aff'd*, 251 U.S. 417 (1920).

42. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961).

43. *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 10 (1964) (dissenting opinion). Cf. *In re Cohn*, 10 Ill. 2d 186, 190, 139 N.E.2d 301, 305 (1957). Note the complaint that legal concepts have been manipulated by courts to achieve predetermined results. *United States v. Aluminum Co. of America*, 377 U.S. 271, 284-87 (1964).

such enigmatic notions of what is "good" and "bad," courts may well hesitate to give much weight in anti-merger litigation either to misbehavior or the lack of it.

Prior Acquisitions

On the assumption that there may be such a thing as a lawful merger and that such a thing would not necessarily amount either to good or bad conduct, we have reserved the question of prior acquisitions. That question is: does the fact that the acquiring firm has made earlier purchases of enterprises weigh against it in considering the present acquisition?

To this question the courts have shown no hesitation in tendering an affirmative answer. In case after case, the courts have ticked off prior acquisitions upon the part of the defendant as a reason for holding the instant merger invalid. In the opinion holding that Continental can wrongfully acquired Hazel Atlas Glass, for example, the Court recited Continental's previous mergers with twenty-one can makers, fourteen manufacturers of paper containers, and four producers of glass closures.⁴⁴ Similar recitations appear in many other opinions.⁴⁵ Sherman Act cases, as well as those brought under section 7 of the Clayton Act, take a similar stance⁴⁶ and the Federal Trade Commission has likewise joined the parade.⁴⁷

Occasionally a court notes prior acquisitions and shrugs them off as irrelevant or, conceivably, as favorable to the defendant on the theory that failure to challenge them constituted acquiescence by the enforcement agencies.⁴⁸ It is worth remarking, however, that several of the lower court opinions questioning the relevance of prior acquisitions

44. *United States v. Continental Can Co.*, 378 U.S. 441, 445-46 (1964).

45. *Brown Shoe Co. v. United States*, 370 U.S. 294, 302 (1962); *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 600 (1957); *Aluminum Co. of America v. FTC*, 284 F. 401, 406 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923), *petition for amendment of decree denied*, 299 F. 361 (3d Cir. 1924); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 443-44 (N.D. Cal. 1967); *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 136 (N.D. Cal. 1966); *United States v. Manufacturer's Hanover Trust Co.*, 240 F. Supp. 867, 943-44 (S.D.N.Y. 1965); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 586 (S.D.N.Y. 1958), *motion for summary judgment denied*, 157 F. Supp. 877 (S.D.N.Y. 1958).

46. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 312 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

47. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1082 (1962); *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1391 (1960); *Scott Paper Co.*, 57 F.T.C. 1415, 1441 (1960), *rev'd*, 301 F.2d 579 (3d Cir. 1962).

48. *United States v. FMC Corp.*, 218 F. Supp. 817, 818, 821 (N.D. Cal. 1963), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963); *United States v. Ling-Temco Electronics, Inc.*, 1961 Trade Cas. 78,646 (N.D. Tex. 1961). *Cf. Spencer v. Texas*, 385 U.S. 554 (1967) (introduction of evidence in criminal trial of prior convictions when relevant to habitual criminal count of indictment is not denial of due process); *Ekco Prod. Co. v. FTC*, 347 F.2d 745, 746 (7th Cir. 1965).

were reversed on appeal.⁴⁹

The situation in which a series of acquisitions is attacked in a single suit must be distinguished. If the prior acquisition is itself attacked in the complaint, its relevance is clear.⁵⁰ A delicate line drawing problem may arise in such a case, as the court said in the *United States v. Jerrold Electronics Corp.* opinion: “[t]he court is faced with the proposition of deciding when the defendant has gone too far where each acquisition lessens competition almost immeasurably. Yet at some point the cumulative effect of these acquisitions will reach prohibited proportions.”⁵¹ The basic problems in a case challenging a series of acquisitions, however, are no different from those arising out of a single merger. The court may be forced to examine each transaction but the law applicable to each is the same. If each acquisition has added to the defendant’s market share, the stopping point is simply that percentage point which the law would disallow if a single merger had taken place.

We return to the situation in which only one acquisition is challenged and the plaintiff seeks to introduce evidence as to prior acquisitions. Such evidence, of course, is admissible to the extent necessary to calculate the defendant’s current market share. But does it have further relevance? Possibly earlier acquisitions may shed light on the defendant’s intent and, as suggested above, intent may be relevant. Unlike misbehavior, however, there is nothing inherently illegal or immoral about a prior acquisition. Indeed, to the extent that it remains unchallenged, there may be some presumption that it is lawful. It is therefore difficult to understand upon what rationale the courts have so enthusiastically entertained evidence with respect to earlier merger activity.⁵²

Much the same considerations are applicable to acquisitions following the challenged transaction. One should take account of them in calculating market shares, and possibly they would be relevant on the issue of intent.⁵³ The failure to challenge the later acquisitions—by supple-

49. *United States v. Continental Can Co.*, 217 F. Supp. 761, 784 (S.D.N.Y. 1963), *rev’d*, 378 U.S. 441 (1964); *United States v. Philadelphia Nat’l Bank*, 201 F. Supp. 348, 368 (E.D. Pa. 1962), *rev’d*, 374 U.S. 321 (1963).

50. *United States v. New England Fish Exchange*, 258 F. 732, 751 (D. Mass. 1919), *modification of decree denied*, 292 F. 511 (D. Mass. 1923); *United States v. American Tobacco Co.*, 164 F. 700 (C.C.S.D.N.Y. 1908), *rev’d*, 221 U.S. 106, 157-60 (1911).

51. 187 F. Supp. 545, 566 (E.D. Pa. 1960), *aff’d per curiam*, 365 U.S. 567 (1961).

52. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 338 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 667-68 (1961).

53. *Cf. Bender v. Hearst Corp.*, 263 F.2d 360 (2d Cir. 1959), *aff’g* 152 F. Supp. 569, 578 (D. Conn. 1957). Can subsequent acquisitions demonstrate the existence of market power arising from the challenged acquisition? Conceivably, but market power is not usually a prerequisite to mergers.

mental complaint if necessary—is even more conspicuous than in the case of prior mergers. Since the parties are already in court, there is little excuse for the plaintiff not to question subsequent transactions. Failure to do so must give rise to something like a presumption of validity.

If it is permissible to introduce evidence of prior mergers in aggravation of the present offense, can the defendant rely on the absence of such earlier acquisitions? There is a hint in one case that it can.⁵⁴ If so, it would likewise appear permissible to prove that the defendant had divested itself voluntarily of various portions of its business in prior years. Such sales are by no means rare. It is said, for example, that the four largest meat packers, in the six years 1947-1964, acquired fifty-eight facilities and simultaneously disposed of fifty-six plants.⁵⁵ Do the voluntary divestitures offset the prior acquisitions? Nothing in the authorities suggests the answer to that question. If one follows the courts, however, in admitting evidence of prior acquisitions, testimony with respect to voluntary dispositions seems equally relevant, which is not to say that it is entitled to much weight.

Barriers to Entry

It is well established that a monopoly cannot exploit the consumer if entry into the market is sufficiently easy. Accordingly, a good argument can be made that there is no need for anti-merger litigation in easy-entry industries.⁵⁶ Does it follow that the existence of barriers to entry should be taken into account as an adverse factor in determining

54. *United States v. Third Nat'l Bank*, 260 F. Supp. 869 (M.D. Tenn. 1964).

55. NATIONAL COMMISSION ON FOOD MARKETING, LIVESTOCK AND MEAT INDUSTRY, TECHNICAL STUDY, no. 1, at 25 (1966). Note the following excerpts from a Federal Trade Commission study:

The General Foods Corp.'s aggressive acquisition policy appears to be matched by an equally active divestment policy based on continuing survey of the rates of return on its capital investments. In a statement made by a spokesman for the corporation in November 1953, it was pointed out that the firm's pattern for development required that it achieve growth through profitability rather than merely through increased sales, and that it is interested in acquiring other companies with long profit margins rather than those with large sales and short profits. In this connection, in the corporation's 1953 annual report it is pointed out that as a business grows and acquires new product lines, its character constantly undergoes change, and that the company must examine itself periodically to make sure that each operation continues to contribute its share to the company's profitability and growth. It is pointed out further, that, as a result of such a study during the previous year, General Foods decided to dispose of several businesses whose rates of earnings on the funds invested were below the level considered adequate for growth. It withdrew from the salt, tomato condiment, and shrimp businesses by selling the assets and goodwill of its Diamond-Crystal-Colonial Salt operation, Snider condiment business, and General Seafoods shrimp operations.

FTC, CORPORATE MERGERS AND ACQUISITIONS 74-75 (May 1955).

56. Goyden, *Public Control of Mergers*, 28 MODERN L. REV. 654, 664 (1965).

the legality of an acquisition?

There appears to be little authority bearing directly on this question, although it would seem rational to answer the question in the affirmative. It is usually thought that barriers to entry impose burdens on consumers.⁵⁷ Accordingly, their impact should be offset by insisting on small market shares in an industry protected by such barriers.

A different question is raised by the allegation that the challenged merger has, itself, increased barriers to entry. The Federal Trade Commission took that position in the *General Foods Corp.* case.⁵⁸ According to the Commission, General Foods' acquisition of a firm in the steel wool pad business heightened the "factual and psychological barriers to entry to that market."⁵⁹ The Commission took a similar position in the *FTC v. Procter & Gamble Co.* case and the United States Supreme Court, in approving the Commission's order, specifically adverted to increased difficulty of entry as a reason for finding the merger unlawful.⁶⁰

It is conceivable that such a merger might demonstrate the existence of economies of scale. General Foods, for example, might achieve cost savings by distributing a multitude of products to retail stores. Once such efficiency has been demonstrated, outsiders will be reluctant to enter into the manufacture of steel wool pads unless they are prepared simultaneously to market other products which are bought by retailers. It is also conceivable that a would-be developer of a better steel wool pad might be deterred by the knowledge that General Foods is in that business and has ample resources to devote to research and development. Finally, a would-be entrant will know that General Foods can afford to engage in predatory practices. However, none of the foregoing rationales is particularly persuasive. If General Foods has raised barriers to entry by its acquisition, the challenged transaction, by the same reasoning, has increased competition in that market. If so, that evidence would appear equally admissible in mitigation of the merger.

Let us return to the situation in which it is alleged merely that entry into the industry generally is difficult (as opposed to an allegation that it has been made more difficult by the acquisition). Then the problem is one of proof. Everyone knows that any child may open a lemonade stand and that even our wealthiest citizens would hesitate to launch a new venture in the manufacture of automobiles. In between lies a host of

57. Mann, *Seller Concentration, Barriers to Entry and Rates of Return*, 48 REV. ECON. & STAT. 296, 300 (1966). Cf. Peltzman, *Entry in Commercial Banking*, 8 J. LAW & ECON. 11, 42 (1965); Plott, *Occupational Self-Regulation: A Case Study of the Oklahoma Dry Cleaners*, 8 J. LAW & ECON. 195, 312-14 (1965).

58. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,465, at 22,719 (FTC 1966).

59. *Id.* at 22,728.

60. 386 U.S. 568, 579 (1967).

situations, varying perhaps abruptly from one product to a somewhat similar one⁶¹ and difficult to assess. It is sometimes urged that steep financial requirements impose barriers to entry. No doubt there is some truth in that assertion. Note, however, how freely money flows into the Communications Satellite Corporation.⁶² One is led to suspect that factors of information, prestige, and the like are more important than money.

Triggering Other Mergers

We have considered the question whether or not prior acquisitions by the same defendant should be considered in anti-merger litigation. We now consider the validity of the allegation that the challenged merger will lead to similar activity on the part of persons not before the court. The argument is that, if the attacked transaction is approved, the decision will "trigger" similar moves by non-parties to the suit.

The subject is not academic for the courts have readily accepted the notion that the possibility of "triggering" should be considered a factor adverse to the validity of a merger. In the *United States v. Continental Can Co.* case the United States Supreme Court wrote:

[a] merger between the second and sixth largest competitors in a gigantic line of commerce is significant not only for its intrinsic effect on competition but also for its tendency to endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages. . . .⁶³

Other courts have expressed similar views.⁶⁴

It is not easy to discover a rationale in support of such decisions. If a merger creates an entity large enough to trigger other mergers, it seems possible that it should be ruled unlawful on the simple ground that the acquired firm has too big a market share. In other words, if a merger

61. NATIONAL COMMISSION ON FOOD MARKETING, LIVESTOCK AND MEAT INDUSTRY, TECHNICAL STUDY, NO. 1, at 11 (1966). Among the factors said to have improved ease of entry into the meat packing industry are improved trucks and roads permitting the erection of slaughter houses near farms where wage rates are lower. *Id.* 17.

62. Note the interesting empirical evidence presented in Fliegel & Kivlin, *Attributes of Innovations as Factors in Diffusion*, 72 AM. J. Soc. 235, 242 (1966). It is frequently said that the existence of patents may make entry difficult. On the other hand, it is often easy to invent around the claims of a patent.

63. 378 U.S. 441, 464 (1964).

64. *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 447 (N.D. Cal. 1967); *United States v. Chrysler Corp.*, 232 F. Supp. 651, 657 (D.N.J. 1964); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958), *motion for summary judgment denied*, 157 F. Supp. 877 (S.D.N.Y. 1958); General Foods Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,465, at 22,719 (FTC 1966); *Foremost Dairies, Inc.*, 62 F.T.C. 1344 (1963); FTC, ECONOMIC REPORT ON MERGERS & VERTICAL INTEGRATION IN THE CEMENT INDUSTRY, STAFF REPORT TO THE FTC 14 (1966).

brings into existence countervailing power, it is because it has created some degree of monopoly power. If that is true, however, why have not the other parties already merged? Can they only do so when shown how by someone in their own industry? A more likely explanation is that suggested above with respect to an acquisition creating barriers to entry. Factors of indivisibility are present; their existence may only be established by a successful merger. When other firms see that General Foods has achieved economies by distributing steel wool pads along with its other products to retailers, they may likewise start marketing the pads. Economies of scale may have existed for some period of time; it may take a successful merger to demonstrate that they are real.

Different considerations may be applicable to vertical mergers. It is often thought that when a firm acquires a customer or a supplier, its rivals will, defensively, be encouraged to do likewise. If U.S. Steel acquires a plant in which its ingot may be fabricated into pipe, then Bethlehem may rush to buy a similar facility. Otherwise, it is urged, Bethlehem will soon find itself "foreclosed" from selling ingot for fabrication into pipe. Despite the fact that it is possible to cite instances in which such triggering appears to have taken place,⁶⁵ it will be seen that the rationale depends upon the basic concept that vertical integration can endanger competition. And while that concept is thoroughly accepted by the courts,⁶⁶ it presents difficulties too complex for elaboration here.

Suppose that a second merger has actually taken place. Is this not proof that the first merger might "trigger" others? Perhaps, but it is entirely possible that the second merger might have been induced by extraneous factors.⁶⁷ Technological change may have been the stimulus to both mergers. What appears to be triggering may simply constitute leading the parade.

Altogether, it is difficult to accept the notion that the possibility of triggering is a separate ground for objecting to a merger. If the challenged merger creates too large a market share, it should be illegal on that ground alone. If it does not but somehow induces another merger, then the second merger, not the first, should presumably be attacked because the concept of triggering is based on the premise that the subsequent merger, if not unlawful, is at least questionable. As in the case of prior mergers by the acquiring firm, the possibility that non-parties may make similar moves seems remote from the principal issues.

65. Union Carbide Corp., 59 F.T.C. 614, 652 (1961). Cf. *United States v. Continental Can Co.*, 217 F. Supp. 761, 789-90 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964).

66. *See, e.g.*, *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Cal. 1967).

67. Cf. *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964).

CONCLUSIONS

What we hope to have demonstrated is that the relevance of evidence offered in aggravation of mergers should be carefully scrutinized. Some types of testimony are clearly material to the goals of anti-merger legislation. Others appear extraneous. A good deal may depend upon one's faith in the "structure" test of injury to competition. Those who believe firmly that the process of counting heads suffices to indicate the existence of a degree of monopoly power will be content to disregard most of the evidence usually offered to indicate that a merger is worse than the market shares indicate.

On the other hand, those with little faith in "structure" will insist upon looking at factors suggesting the character of the defendant's "performance." If we concede any relevance at all to "performance," it is difficult to justify exclusion of the evidence. There then remains only the question of how much weight should be accorded to it.