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SECTION 7 OF THE CLAYTON ACT: AN OVERVIEW OF JUDICIAL RESPONSES TO RECENT FEDERAL ENFORCEMENT EFFORTS

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In the past several years, the federal antimerger statute, section 7 of the Clayton Act,[1] has undergone a significant judicial reassessment. Generally, the section 7 decisions of the Burger Court and the lower courts reflect a markedly more tolerant judicial attitude toward corporate mergers[2] than was evident during the merger conscious years[3] of the Warren Court.[4] This shift in

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[1] 15 U.S.C. § 18 (1976). In pertinent part § 7 provides:

> No 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.

[2] Commenting on the first § 7 decisions of the Burger Court, one author noted:

> The new majority is proceeding on a case-by-case basis that tends to defy generally-applicable rules, that makes substantive presumptions in favor of the validity of the challenged merger, and that imposes procedural burdens in a manner that favors defendants' success. Moreover, the new majority . . . has raised the threshold of illegality perceptibly above that which was the legacy of the Warren Court.

Fox, *Antitrust, Mergers, and the Supreme Court: The Politics of Section 7 of the Clayton Act*, 26 MERCER L. REV. 389, 390-91 (1975) (footnote omitted).

[3] For a discussion of the "merger wave" of the 1960's, see P. STEINER, MERGERS 1-29 (1975).

[4] A telling statistic in this regard is that the Warren Court's twelve substantive opinions in government § 7 cases all favored the plaintiff. *See* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (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). In contrast, the present Court has decided four merger cases on their substantive merits since 1974, all in favor of the defendants. *See* United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975); United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974). Also, in United States v. Connecticut Nat'l Bank, 418 U.S. 656, 666-73 (1974), although the Court remanded for a proper delineation of relevant markets, the Court's opinion clearly rejected several of the government's key legal contentions.

judicial perspective in turn has forced the federal antitrust enforcement agencies[5] to reconsider the advisability of challenging certain kinds of mergers not long ago regarded as clearly susceptible to the proscriptions of section 7.[6]

Most significant among recent section 7 cases are those decisions dealing with the sufficiency of market share and concentration analysis as a measure of a merger's probable competitive effect in the relevant market, and with application of the potential competition doctrine. This article reviews recent judicial development in these two areas and attempts to assess their implications for section 7 enforcement.

I. Market Share and Concentration Analysis

In analyzing challenged horizontal mergers, the courts traditionally have relied heavily, if not solely, on the government's market share and concentration data to determine the legality of the merger.[7] Other quantitative evi-

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Although the term "government" in the enforcement context usually denotes the Justice Department, the term is applied throughout this article to both the Justice Department and the Federal Trade Commission.

[5] The Justice Department and the Federal Trade Commission have concurrent authority to enforce § 7—the Justice Department in the courts, 15 U.S.C. § 25 (1976), and the FTC through administrative proceedings, 15 U.S.C. § 21(a) (1976). The Sherman Act, 15 U.S.C. §§ 1-7 (1976), which also is applicable to mergers in certain instances, *see, e.g.*, United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964) (*Lexington Bank*), is enforceable by the Justice Department. 15 U.S.C. § 4 (1976). Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), which may constitute an independent basis for merger challenge, *but see* FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) (discussed in text at notes 106-24 *infra*), is enforceable by the FTC.

The Justice Department maintains Merger Guidelines which set forth generalized criteria the Department will ordinarily apply in reviewing mergers. *See* 1 Trade Reg. Rep. (CCH) ¶ 4510. The FTC has issued merger guidelines with respect to a few selected industries. *See, e.g., id.* ¶ 4520 (vertical mergers in cement industry).

[6] *See, e.g.*, Testimony of M. Pertschuk, Chairman, Federal Trade Commission, in *Hearings on Conglomerate Mergers Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 95th Congress, 2d Sess. 148 (1978); Remarks of Daniel C. Schwartz, Deputy Director, Federal Trade Commission, "The FTC's Role in the Present Competitive Environment," at 21-22, Lewis and Clark Law School Third Annual Antitrust Symposium (Feb. 24, 1978); Interview with John H. Shenefield, Assistant Attorney General, 834 Antitrust & Trade Reg. Rep. (BNA) A-1, A-4 to A-5 (Oct. 13, 1977).

In the midst of these judicial and agency reappraisals, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976), *as implemented by* 16 C.F.R. §§ 801-03 (1978), a major procedural supplement to § 7 designed to facilitate merger enforcement by requiring detailed premerger reporting to the FTC and the Antitrust Division and by establishing mandatory post-notification waiting periods prior to consummation of the merger.

[7] Illustrative of the Warren Court's reliance on government statistical presentations are United States v. Von's Grocery Co., 384 U.S. 270, 272-73 (1966); United States v. Continental Can Co., 378 U.S. 441, 458-62 (1964); United States v. Aluminum Co. of America, 377 U.S. 271, 278 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 331 (1963). In Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962), the Warren Court emphasized "that a merger had to be functionally viewed, in the context of its particular industry," and set forth various factual

dence and any qualitative justifications offered to rebut the government's statistical presentation have been disregarded. In its 1974 opinion in *United States v. General Dynamics Corp.*,[8] however, the Burger Court significantly altered this approach to merger analysis.

In *General Dynamics*, the government challenged the acquisition of United Electric Coal by Material Service and its successor, General Dynamics. In the state of Illinois, one of the two geographic market constructions proffered by the government, United Electric and Material Service ranked first in combined coal sales with 23.2 percent of the Illinois market in 1959, the year of the acquisition. In the Eastern Interior Coal Province, the government's other relevant market construction, the two firms held a combined sales share of 12.4 percent, sufficient for a second place market ranking in 1959. By 1967, when the government filed its complaint, the combined shares of the two companies in Illinois and the Province had decreased slightly to 21.8 and 10.9 percent, respectively.[9] In both of these markets, concentration had increased substantially in the ten years prior to 1967, with the top four firms in each market enhancing their aggregate share by approximately 20 percent.[10]

The district court,[11] in rejecting the government's section 7 challenge, held that the government's production market share and concentration data, while statistically accurate, were not reliable indicia of competition in the coal industry.[12] Affirming the district court's judgment,[13] the Supreme Court initially determined that the concentration levels and trend toward increased concentration approximated statistics in several earlier section 7 cases decided in the government's favor.[14] These concentration figures, coupled with the market shares of the acquiring and acquired companies, led the Court to conclude that the government had made a prima facie showing of a section 7 violation in accordance with earlier decisions of the court.[15] This prima facie case, however, was not sufficient to withstand defendants' rebuttal evidence.

Of particular importance to the Court in *General Dynamics* was the lower court's finding that competition in the industry was based primarily on the ability of coal producers to procure long-term contract commitments from major coal purchasers.[16] The Supreme Court viewed this ability, rather than

considerations of importance in this regard. *Id.* at 322. In *Philadelphia Bank* and later cases, however, the Court essentially abandoned functional analysis in favor of the structural-presumptive approach articulated in *Philadelphia Bank*. 374 U.S. at 363-72.

[8] 415 U.S. 486 (1974).

[9] *Id.* at 496.

[10] *Id.* at 494.

[11] United States v. General Dynamics Corp., 341 F. Supp. 534 (N.D. Ill. 1972).

[12] *Id.* at 560.

[13] 415 U.S. at 511.

[14] *Id.* at 494 & n.6 (citing United States v. Pabst Brewing Co., 384 U.S. 546, 551 (1966), and United States v. Von's Grocery Co., 384 U.S. 270, 281 (1966) (White, J., concurring)).

[15] 415 U.S. at 496.

[16] 341 F. Supp. at 543. Examining the coal industry in the post-World War II era in detail, the district court observed that the competitive significance of sales in the spot market had diminished substantially relative to the growing importance of the long-term coal requirements of the electric utilities, the major coal consumers. *Id.* at 538-44.

present production capability, as the true "focus of competition" in the coal industry.[17] To secure such commitments, a producer would require coal reserves in addition to those already bound to long-term contract obligations. Because of United Electric's weak position in uncommitted coal reserves and its inability to secure new reserves,[18] the lower court found, and the Supreme Court agreed, that United Electric could not continue as a significant competitor despite its substantial past and present coal production.[19] In response to the government's contention that the defendants in essence were invoking the failing company defense without meeting the stringent requirements of that doctrine,[20] the Court stated that the defendants' evidence of United Electric's weak reserves position was not an assertion of the company's impending failure, but rather constituted a refutation of the "heart of the Government's statistical prima facie case based on production figures . . . ."[21]

In short, the Court in *General Dynamics* demonstrated a new willingness to consider rebuttal evidence in determining whether the government's statistical case accurately depicts the probable effect of the challenged merger on competition. It is true, of course, that in earlier section 7 cases, such as *Brown Shoe Co. v. United States*[22] and *United States v. Philadelphia National Bank*,[23] the Warren Court recognized that defendants' evidence could rebut the government's prima facie statistical case. But it was equally clear from the Warren Court's later section 7 decisions that attempting to overcome the government's market

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[17] 415 U.S. at 501.

[18] "While United ranked fifth among Illinois coal producers in terms of annual production, it was 10th in reserve holdings, and controlled less than 1% of the reserves held by coal producers in Illinois, Indiana, and western Kentucky." *Id.* at 502 (citing 341 F. Supp. at 538).

[19] 415 U.S. at 503-04.

[20] The judicially created failing company defense, first articulated in International Shoe Co. v. FTC, 280 U.S. 291 (1930), and discussed in recent Supreme Court cases, *e.g.*, United States v. General Dynamics Corp., 415 U.S. 486, 506-07 (1974); United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555-56 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131, 136-39 (1969), provides that a merger otherwise illegal under § 7 is permissible if the acquired company is in failing condition and there are no alternative purchasers of the company less objectionable from a competitive standpoint than the acquiring firm. Because of the rigors of these standards, the failing company defense, though often asserted, has been successful in only a few cases. United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 777 & n.89 (D. Md. 1976). *See generally* Blum, *The Failing Company Doctrine*, 16 B.C. IND. & COM. L. REV. 75 (1974).

[21] 415 U.S. at 508. In theory, of course, the *General Dynamics* rebuttal defenses and the failing company defense do not reflect the same set of value considerations. In the former context, the concern is whether the government's statistical case is a reliable prediction of probable competitive effect—in short, the determination essentially is limited to competitive ramifications in the relevant market. In the latter case, the concerns focus more broadly on competitive effects and on the possible injury to shareholders, creditors, employees, and the communities where the failing company's operations are located, if the company actually fails. *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974); International Shoe Co. v. FTC, 280 U.S. 291, 302 (1930).

[22] 370 U.S. 294, 322 (1962).

[23] 374 U.S. 321, 363 (1963).

share and concentration case was almost certainly a futile exercise.[24] Thus, in shifting away from this virtually exclusive reliance on market shares, the Court in *General Dynamics* made its most pronounced departure from the line of Warren Court decisions that had established market share analysis as the conclusive determinant of a merger's probable competitive effect. Inasmuch as *General Dynamics* focused primarily on the absence of natural resources, however, its value as precedent in cases involving less readily quantifiable types of rebuttal evidence remained unclear[25] until the Court itself provided further guidance in *United States v. Marine Bancorporation, Inc.*[26] and *United States v. Citizens & Southern National Bank.*[27]

In *Marine Bancorportation*, a potential competition case,[28] the government's evidence that the top three banks held 92 percent of the relevant market was held to establish a prima facie case of market concentration.[29] In finding that the defendants had not overcome this aspect of the government's case, the Court, citing *General Dynamics*, observed that the defendants had not presented significant evidence of actual market behavior—particularly the absence of parallel pricing or other parallel marketing conduct—that might have refuted the oligopolistic market presumption established by the government's concentration ratios.[30]

The implication in *Marine Bancorporation* that *General Dynamics* could extend beyond structural evidence to encompass other evidence questioning the predictive reliability of the government's market share case was again apparent in *Citizens & Southern.*[31] The government sought to enjoin under section 7 the proposed stock acquisitions by Citizens & Southern National Bank (C&S) of several C&S-affiliated banks. Because of Georgia's restrictions on de jure branch banking, C&S had formed the affiliated banks as de facto branches, contemplating acquisition if and when the state amended its law to permit de jure branching.[32] Although C&S owned only 5 percent of the stock of each of the branch banks, several factors, such as the ownership of much of the remaining stock by parties friendly to the C&S system, the branches' use of the C&S logo, the provision of the full range of C&S services by the branches, and the close and continual supervision of the branch banks' financial and

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[24] See note 4 *supra*.

[25] *General Dynamics* arguably can be read narrowly as a market definition case in which the Court chose to focus on one category of market shares rather than that proposed by the government. *See* Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 10 n.35 (1977); Knapp, General Dynamics, *Mirage or Oasis?*, 26 MERCER L. REV. 577, 581 (1975); *but see* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 311 (1975).

[26] 418 U.S. 602 (1974).

[27] 422 U.S. 86 (1975).

[28] Although *Marine Bancorporation* is relevant to the question of the scope of *General Dynamics* generally, the more important aspects of the case center on its analysis of the potential competition doctrine. See text and notes 78-101 *infra*.

[29] 418 U.S. at 631.

[30] *Id.* at 631-32 & n.34.

[31] 422 U.S. 86 (1975).

[32] *Id.* at 89-90.

managerial operations by C&S, evidenced much closer ties between C&S and the branches.[33]

Upon amendment of Georgia law to allow de jure branching, C&S sought to acquire the branch banks. The Justice Department's suit for injunctive relief[34] maintained in part that the relationship between C&S and the branches violated section 1 of the Sherman Act. As to section 7, the government argued that the proposed acquisitions would preclude the competition that would otherwise exist between C&S and the branches but for the section 1 violations and would foreclose the possibility of future competition between C&S and the branches irrespective of whether their present interrelationship transgressed the Sherman Act.[35] After affirming the district court's finding that C&S's formation of the de facto branches and the continuation of the C&S-branch bank relationship did not infringe section 1, the Court held that the government had established a prima facie case under section 7 on the basis of market shares and concentration ratios.[36] Accordingly, the defendants were required to demonstrate that the government's statistical presentation did not accurately depict the acquisitions' probable impact on competition.[37]

The defendants' rebuttal burden was met by establishing that the absence of past and present competition was not the result of Sherman Act violations, but rather logically stemmed from C&S's own formation of the branch banks and, as originally contemplated by C&S, its extremely close bond with those banks. Therefore, it would have been unrealistic to expect that any competition would have developed among the branch banks or between them and the parent C&S.[38] This same finding also was probative with respect to the more difficult issue of possible foreclosure of future competition. While the Court acknowledged the theoretical possibility of the branch banks' future severance of ties with C&S, it saw no objective or subjective evidence to suggest a reasonable probability that this would occur, since the relationship between the branches and C&S was mutually beneficial and none of the officers, directors, or shareholders of the branch banks had shown any inclination to break the long-standing link.[39] Thus, while in *General Dynamics* the probability of a substantial lessening of competition was precluded by the acquired firm's defi-

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[33] *Id.* at 89, 92-93.

[34] United States v. Citizens & Southern Nat'l Bank, 372 F. Supp. 616 (N.D. Ga. 1974).

[35] *Id.* at 618.

[36] 422 U.S. at 120. Neither the district court nor the Supreme Court found it necessary to reach the question of geographic market definition. The Court assumed for analytical purposes the correctness of the government's various geographic market constructions. *Id.*

[37] *Id.* (citing United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974)).

[38] In its discussion of the Sherman Act claim the Court noted the "total lack of realism in suggesting that C&S might have founded new banks that would have competed vigorously with it and with each other. . . ." 422 U.S. at 119 (citation omitted).

[39] *Id.* at 121-22.

cient resources, in *Citizens and Southern* that probability was foreclosed because the acquiring and acquired entities had always legitimately functioned not as competitors, but essentially as a single integrated system.

The application of *General Dynamics* in *Marine Bancorporation* and *Citizens & Southern* left little room for a narrow reading of *General Dynamics,* and instead reflected a broad functional approach to analysis of how a merger is likely to impact on competition in the relevant market. This expanded range of factual inquiry has been evident in post-*General Dynamics* lower court decisions,[40] the most significant of which is the Seventh Circuit's decision in *United States v. International Harvester Co.*[41]

The subject of the government's challenge in *Harvester* was the 1974 acquisition by International Harvester, a leading producer of various kinds of heavy equipment, of a 39 percent interest in Steiger Tractor, a substantial producer of farm tractors. The operative agreements between Harvester and Steiger, consisting of a stock purchase and a manufacturing agreement, contemplated a stock acquisition plus a production supply arrangement whereby Steiger, using Harvester's design and Harvester-supplied components, would produce tractors, a portion of which Harvester was to purchase from Steiger.[42] In shipments of four-wheel drive farm tractors in the United States,[43] Steiger held approximately 14 percent and Harvester 8 percent of total industry shipments, ranking third and sixth, respectively.[44] The market was highly concentrated, with the top four firms accounting for 73 percent of all industry shipments.[45] Relying on this substantial market share overlap and concentration,[46] the government contended that the acquisition would eliminate competition between Harvester and Steiger and substantially increase concentration in the already concentrated four-wheel drive market.[47]

The district court's[48] examination of the defendants' operations under the stock purchase and manufacturing agreements showed that Harvester had

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[40] *E.g.*, United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977); United States v. Consolidated Foods Corp., 455 F. Supp. 142 (E.D. Pa. 1978); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976); United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975); United States v. M.P.M., Inc., 397 F. Supp. 78 (D. Colo. 1975). *See* United States v. Culbro Corp., 436 F. Supp. 746 (S.D.N.Y. 1977); United States v. Mrs. Smith's Pie Co., 1977-1 Trade Cas. ¶ 61,518 (E.D. Pa. 1977).

[41] 564 F.2d 769 (7th Cir. 1977).

[42] *Id.* at 776.

[43] The parties had stipulated the production and sale of four-wheel drive farm tractors as relevant product markets and the United States as the relevant geographic market. *Id.* at 772.

[44] *Id.* at 771.

[45] *Id.*

[46] The Merger Guidelines, *supra* note 5, specify that where the top four firms hold approximately 75% or more of the market, horizontal mergers in that market ordinarily will be challenged if the merging firms each have 4% or more of the market. As noted, Steiger and Harvester held 14% and 8%, respectively, of industry shipments of four-wheel drive farm tractors.

[47] 564 F.2d at 771.

[48] United States v. International Harvester Co., 1976-2 Trade Cas. ¶ 61,028 (N.D. Ill. 1976).

neither sought nor gained control over Steiger through the agreements,[49] and that competition between the two firms after the acquisition was "intense."[50] Additionally, the district court found that competition in the industry after the acquisition had increased through the strengthening of Harvester and Steiger individually, by the expansion of other competitors' operations, and through new market entries.[51] Clearly the most significant rebuttal evidence, however, was the weak financial position of Steiger prior to the acquisition. From 1970, the year after its incorporation, to 1973, just prior to its agreements with Harvester, Steiger suffered successive heavy losses and critical deficiencies in cash and working capital. As a result of its financial and operating problems, Steiger was unable to attract needed equity capital or secure additional credit from its lending banks, and was forced to resort to a commercial credit firm for necessary financing.[52]

In light of Steiger's financial difficulties, the district court held that the government had failed to establish that Harvester's acquisition of Steiger would lessen competition in the relevant markets.[53] The Seventh Circuit, in affirming the district court's judgment, held that under the reasoning of *General Dynamics* the defendants' rebuttal evidence overcame the government's prima facie market share case.[54] The court found that even if Steiger had remained in the market as an independent concern, it would have lacked the necessary capital to compete effectively.[55] That the lacking competitive "resources" were financial did not deter the appeals court since it found that use of production and sales data, without consideration of future availability of capital, was no more reliable an analytical measure of probable ability to compete than was use of coal production and sales data without reference to uncommitted coal reserves.[56] Moreover, as the court further observed, the inquiry generated by *General Dynamics*, as construed in subsequent decisions, was not confined to the absence of natural or monetary resources, but rather extended to encompass perhaps any evidence indicating the possible unreliability of the government's statistical case as a measure of probable competitive effect.[57]

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[49] *Id.* at 69,537.

[50] *Id.* at 69,540-41.

[51] *Id.* A slight concentration decrease and the prospects of additional new entrants were cited as manifestations of the increasing competitiveness of the four-wheel drive farm tractor market. *Id.*

[52] *Id.* at 69,531-33.

[53] *Id.* at 69,541.

[54] 564 F.2d at 780. The Seventh Circuit indicated two related ways in which a government statistical case may be inadequate. The statistics themselves may have been improperly chosen, thereby failing to focus on the essential competitive activity, or the statistics, while correctly selected, may not fully reflect market conditions. *Id.* at 773-74 & n.8. Strictly viewed, only the latter is a true rebuttal of the prima facie case; the former, which in some respects is more closely analogous to an improper definition of the relevant market, questions whether the government has actually established its prima facie case.

[55] *Id.* at 774.

[56] *Id.* at 773 n.7.

[57] *Id.* (citing United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975)).

Along with its explicit recognition of the broad range of potential defenses available under *General Dynamics, Harvester* is significant in that it clarifies the relationship between the traditional failing company defense and the possible rebuttal defenses cognizable under *General Dynamics,* without undermining the conceptual distinction between the two. The evidence presented on the issue of Steiger's inability to secure necessary capital in *Harvester* is the same type of evidence typically introduced to substantiate the first requirement of a failing company defense—specifically, that the acquired firm is failing to the point of imminent bankruptcy.[58] The defendants in *Harvester* did not rely on the failing company doctrine, but the Seventh Circuit intimated that the defendants may well have been unable to prove the requisite condition of imminent failure to the degree the courts appear to require.[59] In any event, once the court had determined that Steiger's financial condition precluded the probability of substantial anticompetitive effect, consideration of the failing company defense was obviated. Conversely, in those cases in which the weakened financial condition of the acquired firm would not necessarily rebut the prima facie proof of probable anticompetitive effect, the rationale of *General Dynamics* and *Harvester* would be inapplicable, and evidence of failing financial circumstances would be relevant only to consideration of the traditional failing company defense.

Harvester's recognition of evidence of financial weakness as establishing a defense under *General Dynamics* thus should not be read to suggest that the *Harvester* defense and the failing company defense are without significant distinction, nor that reliance on the failing company defense in the appropriate circumstances would be unnecessary or misguided.[60] Rather, as applied to those instances in which the acquired firm is beset with serious financial dif-

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[58] See note 20 *supra.*

[59] The court suggested that Steiger's improved profit picture at the close of fiscal 1973 might have precluded successful reliance on the failing company defense. 564 F.2d at 775 n.12. This finding of profitability, however, did not improve Steiger's access to needed capital, which was the crux of the defendants' rebuttal case. *Id.* It is, of course, also possible that Steiger had not made the thorough and unavailing search for an alternative purchaser as is required to establish the failing company defense. See note 20 *supra.*

[60] *See generally* Note, *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, 679 (1976). Apart from the fundamental distinction already noted in the text, it is also significant that the effect of defendants' rebuttal evidence can itself be overcome by evidence that reinforces the government's prima facie statistical case. *See generally* L. SULLIVAN, ANTITRUST 602-03 (1977). Therefore, the *General Dynamics* "defenses" properly are viewed not as establishing affirmative defenses, but rather as shifting the burden of proof. *See, e.g.,* United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120 (1975); United States v. M.P.M., Inc., 397 F. Supp. 78, 91-92 (D. Colo. 1975). By contrast, most courts have regarded the failing company defense as an affirmative, absolute defense. *See, e.g.,* United States v. M.P.M., Inc., 397 F. Supp. 78, 95 (D. Colo. 1975); *but cf.* United States Steel Corp. v. FTC, 426 F.2d 592, 606-07 (6th Cir. 1970) (noting, without deciding, question whether failing company doctrine is a complete defense).

ficulties, *Harvester* could lessen the need in many cases to satisfy the extremely stringent requirements of the failing company defense.[61]

In sum, reading *General Dynamics* in the retrospective light of subsequent Supreme Court and lower court interpretations, it seems clear that the Court's preference in *General Dynamics* for functional rather than structural analysis does not reject market shares as the primary indicia of probable competitive effect, nor does it apparently go so far as to acknowledge defendants' rebuttal arguments that increased concentration resulting from a merger will itself yield procompetitive benefits.[62] The decision and its progeny do, however, open up entirely new areas of "defense" to section 7 challenges by inviting merger defendants to offer quantitative and qualitative information pertinent to the structure and dynamics of the relevant market, and to defendants' par-

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[61] *See* Fox, *supra* note 2, at 423-24. Although conceptually the failing company defense and the *Harvester* defense are distinct, see text and notes 58-60 *supra*, the distinction may create problems in application, as the cases seem to indicate. A conclusion similar to that of *Harvester* can be found in United States v. M.P.M., Inc., 397 F. Supp. 78, 94 (D. Colo. 1975), where the court held that the deteriorating financial position of one of the merged firms was the "most significant" of several factors refuting the government's statistical case in support of its challenge to a merger of competing ready mix concrete producers. *Cf.* The Pillsbury Co., 3 TRADE REG. REP. (CCH) ¶ 21,425 (FTC 1978) (although acquired company not a "failing company," its precarious financial condition was important factor in rebutting prima facie case). The issue in *M.P.M.*, however, was somewhat clouded because the defendants were also held to have established the failing company defense.

In United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975), which involved a horizontal merger in the copper industry, the defendants argued that the substantial losses and costs of Copper Range, one of the contemplated merger partners, precluded that company's continued competitive viability in copper mining and refining. Rejecting this defense as inadequate as a matter of law, the court stated that in *General Dynamics* the acquired company was weak at the focal point of competition—specifically, access to uncommitted coal reserves. Here, however, the "focus of competition" was production of copper concentrate and copper refining capacity, and in neither of these markets was Copper Range deficient. Thus, inadequate financial resources were irrelevant, unless, of course, the defendants attempted to qualify for the failing company defense. *Id.* at 970-71. *Amax* may be viewed as an example of the situation in which a company's weakened financial condition would not qualify for the *General Dynamics* and *Harvester* defense because the firm's financial condition would not necessarily rebut the statistical evidence of the merger's probable anticompetitive impact. The court in *Amax* evidently believed that Copper Range's substantial copper assets, in the hands of the acquiring firm, would likely produce substantial anticompetitive effects, regardless of how long the acquired firm itself would have stayed afloat financially. *See also* Kaiser Aluminum & Chem. Corp., Dkt. No. 90-80 (FTC June 14, 1979).

In a recent private § 7 case, the Second Circuit avoided the question whether *General Dynamics* applies when the acquired firm is alleged to be noncompetitive solely because of financial difficulties. Resolution of the *Harvester* issue was unnecessary in light of the Second Circuit's finding that the acquired firm was highly competitive. F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 1979-1 Trade Cas. ¶ 62,573, at 77,303 (2d Cir. 1979) (preliminary injunction).

[62] *See, e.g.*, United States v. Amax, Inc., 402 F. Supp. 956, 967 n.40 (D. Conn. 1975); SULLIVAN, *supra* note 60, at 624-25. *But cf.* United States v. M.P.M., Inc., 397 F. Supp. 78, 92-93 (D. Colo. 1975) (because of pattern of consumer purchases, increased production capacity of merged firms enhanced competition).

ticular position and capabilities therein, to challenge the reliability of the government's market share and concentration analysis as a measure of probable competitive effect.[63] This significant turn from the structural-presumptive standards of the Warren Court to extensive factual inquiry on a case-by-case basis substantially escalates the burden on the government by forcing it to develop its factual case well beyond the parameters of market share analysis, at least in mergers involving an allegedly weakened or otherwise competitively vulnerable company.[64]

Apart from *General Dynamics*' rediscovery of a functional approach to merger analysis, it is appropriate to note an additional aspect of the case—its approach to market definition—which may create further difficulties for enforcement efforts. Ascertaining the relevant market is, of course, a critical threshold determination in section 7 litigation since, under the statute, analysis of probable competitive effects must refer to a defined product and geographic context. Moreover, the mode of analysis employed to assess competitive effect may differ given dissimilar market constructions inasmuch as the breadth of market definition may determine whether a merger is viewed

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[63] Also of significance, at least in mergers involving natural resource industries, is that data on reserve holdings are often difficult for the government enforcement agencies to develop. Consequently, in these instances, *General Dynamics* may further add to the government's burden in its preliminary review of the subject merger to determine whether § 7 challenge is advisable. *See FTC Urges DOE to Adopt Policy of Full Information-Sharing,* 854 ANTITRUST & TRADE REG. REP. (BNA) A-17 to A-18 (Mar. 9, 1978); *Shenefield Urges DOE to Aid in Data Collection for Antitrust Suits, id.* at A-22 to A-23.

[64] A logical result of this expanded inquiry is increased reliance on findings of fact by the trial court, a consequence clearly at issue in the majority's and dissenters' differing resolution of factual issues in *General Dynamics* itself, and in United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

Also noteworthy in *General Dynamics* was the Court's approval of the district court's reliance on post-acquisition evidence. The Court observed that the district court's use of such evidence to show the changing nature of the coal industry and the depletion of United Electric's uncommitted coal reserves was justified in that this was not the kind of evidence that would "reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions . . . ." 415 U.S. at 506. The Court also noted that the prior decisions of the Court in United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957) (establishing susceptibility of merger to § 7 challenge whenever post-acquisition evidence reveals anticompetitive probabilities), and FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (disclaiming value of post-acquisition evidence showing no anticompetitive effect), resulted in a virtual "no-lose" situation for the government on the question of the probative value of post-acquisition evidence. 415 U.S. at 505 n.13.

The approach of the *General Dynamics* Court in distinguishing between reliable and suspect post-acquisition evidence has been reflected in subsequent lower court cases. *See* United States v. International Harvester Co., 564 F.2d 769, 780 (7th Cir. 1977); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 748 n.37 (D. Md. 1976).

While *General Dynamics*' relaxed standard of acceptability of post-acquisition evidence favorable to defendants certainly may impact on government enforcement efforts, it is not significant to the critical premerger decisions of whether to proceed with the acquisition in light of antitrust risks or, from the government's standpoint, whether to seek a preliminary injunction.

as horizontal, vertical, or conglomerate.[65] In *General Dynamics,* the district court rejected the selection of coal as a relevant product market in favor of a broader "energy" market. Additionally, the court chose smaller, more numerous geographic markets over the government's statewide and industry sales region market constructions. In the Supreme Court, the disputed market definition issues were never resolved, which the Court itself recognized as a departure from the "normal" procedure of first defining the relevant markets within which probable competitive effects are measured.[66] Here, however, this usually "necessary precondition" became unnecessary in light of the Court's conclusion that the government's case could not stand in any market.[67]

The Court's avoidance of market definition in *General Dynamics* stands in marked contrast to the market definition attitude of the Warren Court, at least with respect to geographic market definition. In *United States v. Pabst Brewing Co.,*[68] the Warren Court accepted the government's statewide, regional, and nationwide geographic market constructions and at the same time explicitly relegated geographic market analysis to a distinctly secondary role.[69] The Court thus adopted a virtual presumption in favor of government geographic market definition.[70] If the same approach had been followed in *General Dynamics,* acceptance of the government's geographic market constructions would have been the predictable result. Perhaps, then, in circumventing the market definition issue in *General Dynamics,* the Court was implicitly conveying a more critical view of the government's proffered markets than was evident in *Pabst.*[71]

Whatever plausible inferences could be drawn from *General Dynamics* on the issue of market definition, the Court soon afterwards dispelled any notion

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[65] *See, e.g.,* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974). In this case, the district court chose the state of Connecticut as the relevant geographic market, but applied a potential competition–market extension analysis to the consolidation of two local banking entities in that state. In remanding the case for a proper delineation of relevant markets, the Court observed that if the state were the relevant market the subject banks would have been direct, not potential, competitors. *Id.* at 667.

The distinction between potential competition and horizontal analysis, as a practical consideration, may not have been highly significant under the Warren Court since the government there was achieving consistent success under both approaches. The distinction assumes greater importance today, however, because of the severe restrictions imposed by the Burger Court and the lower courts on the application of potential competition theory. See cases discussed at text and notes 78-153 *infra.*

[66] 415 U.S. at 510.

[67] *Id.* at 511 (citing 341 F. Supp. at 560).

[68] 384 U.S. 546 (1966).

[69] The Court stated: "Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." *Id.* at 549-50.

[70] *Pabst* has been read as dispensing with proof of geographic market definition. *See* United States v. Provident Nat'l Bank, 280 F. Supp. 1, 6 (E.D. Pa. 1968). *But see* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 621 n.20 (1974) (rejecting this interpretation of *Pabst*).

[71] *See, e.g.,* Fox, *supra* note 2, at 415 n.112; SULLIVAN, *supra* note 60, at 611-12.

of a continuation of *Pabst*'s minimum standards for acceptance of government delineations of the relevant geographic market. In *Marine Bancorporation,*[72] a case involving a geographic extension into the metropolitan Spokane banking market, the parties stipulated that Spokane was a relevant geographic market. The government, however, while conceding the state was not a relevant market, proposed that the state nonetheless was a "section of the country" under section 7, primarily on a "linked oligopoly" theory.[73] Under this theory, the subject merger arguably would trigger subsequent mergers in other local banking markets, the ultimate result of which would be a statewide network of local banking oligopolies engaging in parallel, interdependent behavior.

In rejecting this argument, the Court held that the "section of the country" criterion of section 7 was synonymous with the concept of a relevant geographic market;[74] in potential competition cases that market is, quite simply, the area wherein the acquired firm sells its goods or services.[75] The Court's geographic market definition thus disallowed the government's theory of anticompetitive impact of a market extension merger in a market in which the acquired firm does not compete. More importantly, while the Court purported to base its holding on established market definition precedent, including *Pabst* itself,[76] the Court's conclusion signals a more circumspect evaluation of proof of proper market definition than *Pabst* required.[77]

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[72] 418 U.S. 602 (1974).

[73] *Id.* at 620.

[74] *Id.* at 620 & n.18.

[75] *Id.* at 620-21. This same holding was reiterated in United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974), decided the same day as *Marine Bancorporation.* In challenging a proposed consolidation between banks operating in different localities, the government offered the same statewide linked oligopoly theory as in *Marine Bancorporation,* and also supported its statewide approach on the contention that the consolidation would have a statewide impact by eliminating one of the relatively few banks that could have expanded into other local markets throughout the state. The Court, citing *Marine Bancorporation,* found no support for either of the government's arguments. *Id.* at 672-73. Justice White's dissent, however, while not judging the linked oligopoly approach, read the government's second argument as positing the existence of relevant local markets other than those of the consolidated banks on the premise that the banks individually might have entered local markets other than each other's. *Id.* at 673-75. Justice White saw nothing in the Court's earlier cases precluding a determination that many local banking markets might have been relevant to the challenged consolidation. *Id.* at 674-75.

In RSR Corp. v. FTC, 1979-1 Trade Cas. ¶ 62,450 (9th Cir. 1979), the court held that the definition of relevant geographic market in *Marine Bancorporation* and *Connecticut Nat'l Bank* was not controlling in cases involving actual rather than potential competition. *Id.* at 76,666. The court also indicated the possible inapplicability of the market definition of *Marine Bancorporation* and *Connecticut Nat'l Bank* to mergers in which the geographic areas of competition are not determined by regulation. *Id.*

[76] 418 U.S. at 621 n.20. The Court read *Pabst* simply as finding three relevant markets. The Court did acknowledge, however, that *Pabst* contained language suggesting the absence of need for proof of geographic market areas.

[77] *See* Robinson, *Antitrust Developments: 1974,* 75 COLUM. L. REV. 243, 257-58 (1975). If this conclusion was only implicit in *Marine Bancorporation,* it was made explicit in United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974), discussed at note 75 *supra.* Accepting *Pabst*'s instruction that the government need not define geographic markets by "metes and bounds," the Court added, "[i]t is nevertheless the

II. Potential Competition

From an enforcement perspective, the most troubling section 7 decisions have come in response to government attempts to invoke the doctrine of potential competition. As it developed during the Warren Court years, this doctrine essentially held that an acquiring company's entry into a new product or geographic market by acquisition of a substantial, existing firm violated section 7 if the acquiring firm was either a probable unilateral[78] entrant (the "actual entry" effect) or was perceived by market participants as threatening to enter when competitive conditions appeared favorable (the "perceived entry" effect).[79] As an enforcement tool, the potential competition doctrine assumed increasing importance in the late 1960's and early 1970's. The Burger Court's 1974 decision in *United States v. Marine Bancorporation, Inc.*[80] and lower court interpretations of that decision, however, appear to have virtually crippled the potential competition doctrine as an effective merger enforcement mechanism.[81]

Marine Bancorporation involved a geographic market extension merger of Washington Trust Bank (WTB), the third largest bank in Spokane, Washington, with the National Bank of Commerce (NBC), Washington's second largest banking organization. WTB was not active outside of Spokane, nor was NBC operating in WTB's Spokane market. The relevant market—commercial banking in Spokane[82]—was extremely concentrated with the three largest banks accounting for about 92 percent of total deposits. WTB

Government's role to come forward with evidence delineating the rough approximation of localized banking markets . . . ." *Id.* at 669-70. The Court also found that the government's use of Standard Metropolitan Statistical Areas (SMSA) was not a proper approximation of relevant local markets.

[78] As used herein, the term "unilateral" denotes entry by internal expansion or toehold acquisition.

[79] Thus, actual entry theory concerns the acquisition's elimination of the possibility of future deconcentration resulting from unilateral entry of the acquiring firm. In contrast, the perceived entry theory, variously labelled the "edge" or "wings" theory, focuses on the acquisition's present lessening of competition through elimination of the moderating influence exerted by the acquiring company on the edge of the market on the competitive behavior of firms in the market.

While the perceived entry doctrine has been sanctioned by the courts, *see, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625 (1974), the actual entry doctrine, because it focuses entirely on the lessening of future competition, has been seriously questioned. The Supreme Court has twice expressly reserved the question whether § 7 encompasses the actual entry theory. *See id.* at 639; United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973).

[80] 418 U.S. 602 (1974).

[81] The proper role, if any, of potential competition theory in § 7 analysis has long been the subject of considerable academic comment. *See, e.g.*, Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 ABA Antitrust Section 128 (1958); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1362-86 (1965); Posner, *supra* note 25, at 313-25; Brodley, *supra* note 25; R. Bork, The Antitrust Paradox 246-62 (1978). *See generally* P. Steiner, Mergers 255-87 (1975).

[82] Although it stipulated that Spokane was a relevant geographic market, 418 U.S. at 619-20, the government proposed other geographic market constructions which the Court rejected. See text and notes 72-77 *supra*.

held 18.6 percent of total deposits in the Spokane market. The Court initially held that the potential competition doctrine applies only to oligopolistic markets,[83] a recognition that constitutes a more explicit and restrictive view of the doctrine's applicability than had been suggested by prior cases.[84] After finding the market to be highly concentrated based on the government's evidence of concentration ratios, the Court, as noted earlier,[85] relied upon *General Dynamics* by questioning whether the government's concentration ratios accurately reflected oligopolistic market conditions. Since the defendants had introduced no persuasive rebuttal evidence of nonoligopolistic market behavior, the Spokane market was an acceptable market for application of the potential competition doctrine.[86]

As to the major thrust of the government's case—the actual entry theory—the Court, as it had earlier done in *United States v. Falstaff Brewing Corp.*,[87] reserved judgment on whether elimination of a future entrant in itself was legally sufficient to condemn a merger under section 7.[88] The Court maintained, however, that for the actual entry doctrine to apply, two factual conditions must be met: (1) there must be feasible, available means of entry other than through the challenged acquisition, and (2) such alternative means of entry must offer a substantial likelihood of deconcentrating the market or producing other significant procompetitive effects.[89]

With respect to the first condition, it was undisputed that NBC had the necessary financial means and the incentive to enter the market, and the government asserted that NBC could have entered either through "sponsorship" of a new bank and subsequent acquisition of that bank,[90] or through a toehold acquisition.[91] While rejecting the sufficiency of proof demonstrating the feasibility of either of these alleged alternative means of entry, the Court assumed, for purposes of argument, that NBC conceivably could have entered

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[83] 418 U.S. at 630. *See* United States v. Hughes Tool Co., 415 F. Supp. 637, 645-46 (C.D. Cal. 1976) (four-firm concentration ratio of 51% in government's proposed relevant market, with evidence of relative ease of entry and trend toward deconcentration, precluded application of potential competition doctrine).

[84] *See* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 75-76 (10th Cir, 1972), *cert. denied*, 416 U.S. 909 (1974) (although top 4 and 8 firms controlled only 29% and 40%, respectively, of relevant market, trend toward concentration permitted application of potential competition doctrine).

[85] See text at notes 28-30 *supra*.

[86] 418 U.S. at 631-32. Of course, the degree of concentration in the relevant market serves a different function in horizontal cases, such as *General Dynamics*, and potential competition cases. As discussed earlier, in a horizontal case proof of sufficient market concentration and market shares of the merging firms establishes prima facie § 7 illegality. In a potential competition case, however, proof of sufficient concentration establishes a prima facie case on only one of several of the plaintiff's required elements of proof. See text at notes 83-86 *supra*. *See generally* Bauer, *Challenging Conglomerate Mergers under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 B.U. L. REV. 199, 207 (1978).

[87] 410 U.S. 526, 537 (1973).

[88] 418 U.S. at 639.

[89] *Id.* at 633.

[90] *Id.* at 633-34.

[91] *Id.* at 637.

WTB's market by such means.[92] Because of regulatory constraints, however, neither of these avenues satisfied the second prerequisite to application of the actual entry theory since, in the Court's view, neither offered a realistic prospect for NBC to make substantial procompetitive inroads into the relevant market.[93]

The Court quickly disposed of the government's perceived entry argument, declaring that "rational" commercial bankers in Spokane would have been aware of the regulatory barriers to unilateral entry by NBC, and thus would not have been significantly influenced in their competitive behavior by NBC's presence outside the Spokane market.[94] More important from an analytical viewpoint was the Court's statement that the government's failure to show availability of alternative means of entry likely to generate substantial procompetitive effects was "determinative" in disposing of the perceived entry issue.[95] Although less than explicit, this language suggests that the two factual conditions for considering actual entry are also prerequisites to application of the perceived entry doctrine.[96] Moreover, the Court stated that the presence of the acquirer outside the market must "in fact" have tempered the actions of market participants.[97] This instruction, when read together with the foregoing conditions, would seem to require proof that "rational" decisionmakers in the market perceived the probability of the acquiring firm's unilaterally entering the market and generating a substantial post-entry competitive threat to existing market participants, and that these participants actually altered their market behavior accordingly. On the facts of *Marine Bancorporation,* then, the absence of feasible means of entry from which substantial procompetitive inroads could be made in the target market precluded any plausible conclusion that NBC's external presence could have significantly moderated the actions of bankers in the Spokane market.

Although the majority in *Marine Bankcorporation* was careful to emphasize that it was analyzing a merger in a strictly regulated industry,[98] Justice White's dissent saw the rationale of the "new anti-trust majority"[99] as redefining the potential competition doctrine in a fashion that would apply to unregulated as well as regulated industries.[100] Specifically, Justice White recognized that

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[92] *Id.* at 636, 638.

[93] *Id.* at 636-37, 638. The Court cited the fact that a previously acquired toehold bank in Spokane had captured only 2.2% of the market in the eight-year period following its acquisition by a large bank holding company. *Id.* at 638.

[94] *Id.* at 639-40.

[95] *Id.* at 639.

[96] *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 769 n.76 (D. Md. 1976) (see text and notes 148-50 *infra*); Brodley, *supra* note 25, at 22 n.92; Note, *The Potential Competition Doctrine After* Marine Bancorporation, 63 GEO. L.J. 969, 979-80 (1975).

[97] 418 U.S. at 624-25.

[98] *Id.* at 639, 641.

[99] *Id.* at 642 (White, J., dissenting).

[100] *See also* Brodley, *supra* note 25, at 17. It is noteworthy that soon after its 1974 decision in *Marine Bancorporation*, the Court affirmed in a *per curiam* memorandum opinion a 1973 district court opinion in United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974). The Court's

Marine Bankcorporation's two conditions, taken together, would require the government to prove feasibility and likelihood of unilateral entry plus likelihood of effective competition generated by the new entrant subsequent to entry. This latter standard, in Justice White's view, could not be limited solely to cases involving regulatory constraints on entry and effective post-entry competition. Rather, the test also would logically permit defendants' arguments of economic barriers to effective competition,[101] thereby markedly increasing the burden of the government's proof in challenging mergers in unregulated as well as regulated industries.

Despite the Court's admonitions that *Marine Bancorporation* dealt with a strictly regulated industry, the broad adverse impact of the decision on enforcement efforts has been evident in subsequent lower court rejections of Antitrust Division and FTC potential competition challenges. The lower court opinions, moreover, offer further, although not necessarily congruent, views on the potential competition analysis of *Marine Bancorporation*. In two significant instances, *FTC v. Atlantic Richfield Co.*[102] and *BOC International Ltd. v. FTC,*[103] the FTC has proceeded entirely on actual entry theory,[104] thus reiterating the Commission's affirmative answer[105] to the question expressly reserved in *Falstaff* and *Marine Bancorporation*—whether section 7 applies when the only alleged anticompetitive probability is the elimination of a likely future entrant in the relevant market.

In *Atlantic Richfield,*[106] the Commission's potential competition argument was that the merger of Anaconda, a major producer of cooper ore and con-

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affirmance of the district court's decision in *Phillips*, however, cannot plausibly be read as restricting the scope of *Marine Bancorporation*. Given the abundant factual evidence supporting the district court's exhaustive analysis in *Phillips*, and considering the present Court's admonition to district courts in merger cases to develop a full factual record and analyze the relevant law, *see Marine Bancorporation*, 418 U.S. at 615 n.13, it may well have seemed anomalous for the Court to have reversed the district court's decision in *Phillips*. Although the framework for potential competition analysis differed as between *Phillips* and the subsequent redefinition of standards in *Marine Bancorporation*, the end result of either mode of analysis on the particular facts of *Phillips* may well have beeen the same.

[101] 418 U.S. at 654 & n.5 (White, J., dissenting).

[102] 549 F.2d 289 (4th Cir. 1977).

[103] 557 F.2d 24 (2d Cir. 1977).

[104] The FTC's potential competition case also relied solely (and unsuccessfully) on actual entry theory in Fruehauf Corp., Inc., 3 TRADE REG. REP. (CCH) ¶ 21,402 (FTC 1978), and Beatrice Foods Co., 86 F.T.C. 1, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,944 (1975), *aff'd sub nom.* Beatrice Foods Co. v. FTC, 540 F.2d 303 (7th Cir. 1976). The *Fruehauf* merger was held to violate § 7 on other grounds.

[105] The Commission has stated in a number of cases that elimination of a probable actual entrant is sufficient to state a § 7 claim. *See, e.g.*, The Budd Co., 86 F.T.C. 518, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,998, at 20,856 n.5 (1975); Beatrice Foods Co., 86 F.T.C. 1, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,944, at 20,790 n.6 (1975) (citing cases).

[106] 549 F.2d 289 (4th Cir. 1977). This decision was on appeal from a district court denial of the FTC's motion for a preliminary injunction pursuant to § 13(b) of the FTC Act, 15 U.S.C. § 53(b) (1976), to enjoin the acquisition pending completion of administrative proceedings before the Commission. Enacted in 1973, § 13(b) has provided the basis for preliminary injunctive relief in three merger cases, all involving

centrates and a major copper refiner,[107] with Arco, a major producer of petroleum, petroleum products, and natural gas, violated section 7 of the Clayton Act and section 5 of the FTC Act[108] by eliminating Arco as a future entrant into the concentrated copper production and refining markets.[109] At the outset, the Fourth Circuit indicated its unwillingness to consider section 5 as a separate basis for review of the Arco-Anaconda merger.[110] While acknowledging that section 5 has been viewed as supplementing the Clayton and Sherman Acts, the court noted the lack of any precedent for the proposition that a merger could be enjoined as a violation of section 5 and not section 7.[111]

As to the substantive merits of the FTC's section 7 actual entry claim, the court viewed the ambiguity of the doctrine and the absence of supporting Supreme Court precedent as sufficient in themselves to deny the preliminary injunctive relief sought.[112] Nonetheless, the court proceeded to analyze the Commission's case and deny the requested relief on substantive grounds. In so doing, the court held that the FTC had failed to provide "strict proof of any anti-competitive effect . . . ,"[113] which according to the court was the measure of proof required in a case in which the sole alleged anticompetitive probability was the elimination of a future entrant into the market.[114] The court accepted the FTC's contention that Arco was ripe for diversification and was financially able to enter the copper market unilaterally. Nevertheless, the court found that other objective factors, including the long lead time for entry and the additional technical expertise needed by Arco, ruled out the copper industry as a probable de novo diversification target for Arco.[115]

In addition to evidence of Arco's economic incentives, the FTC had introduced considerable evidence that Arco had seriously contemplated entry into the copper industry for some time, including evidence of approval by the company's board of directors of diversification into the industry without limitation as to the mode of entry.[116] In the court's estimation, this evidence showed only a "continuing interest" in entering the copper industry through

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horizontal mergers, challenged by the FTC. *See* FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976); FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978); FTC v. Lancaster Colony Corp., Inc., 434 F. Supp. 1088 (S.D.N.Y. 1977).

[107] Anaconda ranked third in copper ore and concentrates, with 8.27% of the market, and fourth in refined copper, with 9.78% of the market. 549 F.2d at 291.

[108] 15 U.S.C. § 45 (1976).

[109] 549 F.2d at 292.

[110] *Id.* at 291-92 n.1.

[111] *Id.*

[112] *Id.* at 294.

[113] *Id.* at 295.

[114] In its determination of the proper quantum of proof, the court relied heavily on Professor Turner's analysis. *See* Turner, *supra* note 81, at 1362-86. In actual entry cases Turner would require "clear proof that the firm would in fact have entered . . . ." *Id.* at 1384. The court also noted, 549 F.2d at 294, that Turner's standard of proof appears to have received passing approval in United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-24 & n.24 (1974).

[115] 549 F.2d at 296.

[116] *Id.*

the best means available.[117] Moreover, while the court recognized that Arco's lower-lèvel management had recommended grass roots entry, the court drew a "fundamental distinction" between lower-level recommendations and commitment by the company itself.[118] The court did not view the evidence as establishing any commitment by Arco's top management to de novo entry in copper. In supporting this conclusion, the court relied to some extent on subjective evidence, primarily in the form of statements made by Arco officials subsequent to the initiation of FTC administrative proceedings. Recognizing the inherently suspect nature of such statements, the court nonetheless felt they were entitled to some weight in cases where, as here, the government had failed to present objective evidence establishing the likelihood of unilateral entry.[119]

Atlantic Richfield represents a significant setback for federal merger enforcement, and for the FTC in particular. First, as noted earlier, the court, though in cursory fashion, refused to accept the use of section 5 as a possible independent basis for challenging mergers.[120] Second, without rejecting the actual entry doctrine, the court's standard of "strict" proof in actual entry cases is so difficult to meet that if followed by other courts it will preclude any realistic chance of the government's successfully challenging a merger on actual entry grounds. As the Court in *Marine Bancorporation* noted, "[u]nequivocal proof that an acquiring firm actually would have entered *de novo* but for the merger is rarely available."[121] Further, it is noteworthy in this regard that the court's analysis in *Atlantic Richfield* focused primarily on evidence relevant to *Marine Bancorporation*'s first condition—the likelihood of entry through available means other than the challenged merger.[122] Presumably, however, under the Fourth Circuit's standard if the government sustains its burden of "strict" proof on the entry issue, the courts would then require strict proof that entry would produce deconcentration or other significant procompetitive effects—the second condition articulated in *Marine Bancorpora-*

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[117] *Id.* at 296-97.

[118] *Id.* at 297 n.9.

[119] The court based its use of subjective evidence on the statement in *Falstaff* that subjective evidence "may serve as a counterweight to weak or inconclusive objective data." 549 F.2d at 298 (quoting United States v. Falstaff Brewing Corp., 410 U.S. 526, 570 (1973) (Marshall, J., concurring)).

[120] See text at notes 110-11 *supra*. *But see* Nestle Alimentana S.A., Dkt. No. 9003, Order Denying Motion to Dismiss for Lack of Jurisdiction, at 9-12 (Admin. L. J. Decision April 24, 1978); *cf.* United States v. American Bldg. Maintenance Indus., Inc., 422 U.S. 271, 279 n.7 (1975) (reiterating breadth of § 5 as supplementing Clayton Act). *See also* Interview with Alfred F. Dougherty, Jr., 848 ANTITRUST & TRADE REG. REP. (BNA) at AA-1, 2 (Jan. 26, 1978), wherein Mr. Dougherty, head of the FTC's Bureau of Competition, indicates that § 5 can be used to reach conglomerate mergers, but adds that a determinative judicial test on this point is required.

[121] 418 U.S. at 624 (footnote omitted). *See also* Turner, *supra* note 81, at 1384, indicating that "clear proof" of entry but for the merger would be "an admittedly rare case."

[122] The court's acknowledgment of the existence of other equally likely entrants, however, more appropriately falls under the second condition. *See* Brodley, *supra* note 25, at 23 n.97.

tion. As severe as the Fourth Circuit's burden of proof is on the entry condition, compounding this burden by imposing the strict proof standard[123] on the post-entry competitiveness issue would confront the enforcement agencies with an insuperable barrier.[124]

In *BOC International Ltd. v. FTC*,[125] the most recent case in which the FTC relied exclusively on actual entry theory, the Second Circuit expressed skepticism as to the validity of *Marine Bancorporation*'s second condition, and refined *Marine Bancorporation*'s first condition to specify the approximate time frame against which the likelihood of entry is to be measured. The FTC had determined in administrative proceedings[126] that the acquisition by BOC, a British company, of controlling interest in Airco, an American firm, violated section 7 by eliminating BOC as a potential actual entrant into Airco's United States market. BOC was the world's second largest producer of industrial gases, while Airco was the third largest United States industrial gas producer, with about 16 percent of a market in which the top three producers held 60 percent. The FTC's holding of illegality was based entirely on the actual entry theory, since the Commission found that the acquisition's only anticompetitive impact was its elimination of the reasonable probability that BOC would eventually enter the United States market unilaterally.[127]

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[123] It may be possible conceptually to limit the court's strict proof standard to "pure" conglomerate or diversification mergers, which is the characterization applied by the Fourth Circuit to the Arco-Anaconda combination. The Fourth Circuit noted that use of this evidentiary standard was appropriate with respect to a "conglomerate merger [which] involves no product or market extension . . . ." 549 F.2d at 295. Thus, it may be queried whether the product or market extension merger would be subjected by the Fourth Circuit to the strict proof standard.

There are, however, a number of problems with the suggested limitation. Distinctions between product extension and pure conglomerate mergers are largely matters of degree. Although entry into copper may not be viewed as a logical extension of oil, natural gas, and uranium operations, these industries are all capital intensive, high risk, mineral extraction industries, so there is certainly plausible basis for the FTC's viewing Arco's move as something less than "pure" diversification, despite the Fourth Circuit's characterization. Moreover, the Second Circuit, in rejecting the Fourth Circuit's standard in a geographic market extension case, BOC Int'l Ltd. v. FTC, 557 F.2d 24, 28 n.7 (2d Cir. 1977), see text and notes 125-36 *infra*, did not attempt to distinguish the Fourth Circuit's test as limited only to pure conglomerate mergers.

[124] As a related consideration, in weighing whether the FTC had met its heavy burden of proof, the court, as noted earlier, was willing to consider admittedly suspect subjective evidence, at least for the limited purpose of countering what the court considered weak evidence introduced by the FTC. The combined impact from an enforcement standpoint of the Fourth Circuit's standard of proof and the type of evidence relied upon by the court has led one FTC official to remark that "[t]his decision raises serious questions about the law enforcement agencies' ability to withstand an increasingly severe burden of proof, which, together with an undue reliance by the courts on subjective evidence, is forcing us to review completely potential competition merger theory." Remarks of Daniel C. Schwartz, Deputy Director, Federal Trade Commission, "The FTC's Role in the Present Competitive Environment," at 21-22, Lewis and Clark Law School Third Annual Antitrust Symposium (Feb. 24, 1978).

[125] 557 F.2d 24 (2d Cir. 1977).

[126] British Oxygen Co., 86 F.T.C. 1241, [1973-1976 TRANSFER BINDER] TRADE REG. REP. (CCH) ¶ 21,063 (1975).

[127] 557 F.2d at 26.

On appeal,[128] the Second Circuit rejected the FTC's decision.[129] The court found it unnecessary to pass on the validity of actual entry theory since it held that the Commission's legal standard of "reasonable probability of *eventual* entry"[130] was an incorrect interpretation of the entry condition of *Marine Bancorporation*. The court saw no analytical error in the use of a "reasonable probability" measure of proof, and created a split in the circuits by expressly rejecting the Fourth Circuit's "strict" proof requirement in actual entry cases.[131] The notion of "eventual" entry was unacceptable to the court, however, in that it failed to tie the claim of probable actual entry to some approximate time "at least"[132] in the reasonably "near" future. In this context, "near" could be ascertained by reference to "the entry barriers and lead time necessary for entry in the particular industry."[133] Since the FTC had failed to provide any temporal projection of BOC's probable entry other than the

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[128] Strictly speaking, the case was before the court on BOC's petition to review the FTC's divestiture order. *Id.* at 25.

[129] *Id.* at 31.

[130] *Id.* at 28.

[131] *Id.* at 28 n.7.

[132] The court noted that some, albeit unclear, authority could be cited for the proposition that probable entry must be "imminent," but the court deemed it unnecessary to address the validity of this standard. *Id.* at 29 (citing United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.22 (1974)).

[133] 557 F.2d at 29. This standard introduces yet another element of difficulty into the enforcement picture. Requiring that entry be shown as probably occurring within the "near" future, as defined by the court, necessarily means that the decision to enter be made in the very short term. *See* Brodley, *supra* note 25, at 52 n.204. Thus, while the Second Circuit bypassed the "imminence" of entry standard, see note 132 *supra*, it adopted essentially an "imminence" of decision standard. As a result, in most cases the enforcement agency will have to establish that *current* management had committed the company to unilateral entry. As has been recognized, this inevitably increases the importance of subjective evidence of present management's intention, which, from an enforcement perspective, is clearly not the most desirable type of evidence, particularly if it is to be evaluated as the Fourth Circuit did in *Atlantic Richfield*. *See Brodley, supra* note 25, at 52 n.204.

In an apparent effort to minimize the potential impact of the Second Circuit's "near future" requirement and its resultant evaluation of the importance of subjective evidence, the Commission in Fruehauf Corp., Inc., TRADE REG. REP. (CCH) ¶ 21,402 (FTC 1978), declared that proof of likelihood of actual entry in the near future should not be viewed as an essential requirement in potential competition cases. Although it held the evidence insufficient to establish Fruehauf as a probable actual entrant, the Commission took pains to advance its view that the importance under § 7 of preserving the acquirer as a potential entrant which might enter the market if existing participants raised prices to supracompetitive levels would not be recognized by a requirement that likelihood of entry be established "within some brief period of time" or that the "time of entry be specified in absolute terms rather than contingent ones . . . ." *Id.* at 21,376-77. Such projections of "contingent" time of likely entry, the Commission posited, could be based on objective evidence of likelihood of entry under appropriate market conditions. In turn, the probable occurrence of such market conditions, such as sufficient price increases by firms in the market, could also be inferred from objective evidence. Subjective evidence of management's entry intent would be minimized in importance in light of the inferences that might be drawn from objective evidence on the issue of likelihood of entry when market conditions were favorable. *Id.* at 21,377 n.33.

"wholly speculative" eventuality assertion, likelihood of entry had not been established.[134]

The FTC's failure in *BOC International* to satisfy *Marine Bancorporation*'s first condition obviated any need to analyze whether entry would precipitate deconcentration or other important procompetitive effects. In dictum, however, the court questioned the importance of this second condition of *Marine Bancorporation* because the entry of a large firm in an oligopolistic market "necessarily has significant procompetitive effects . . . ."[135] In expressing this reservation, the court appeared to be focusing on the short-term competitive reverberations that can reasonably be expected when a large, well-financed, and aggressive company breaks into a new market. In contrast, although the language and analysis in *Marine Bancorporation* provide little illumination, it appears that the Supreme Court was thinking more of longer-term structural market alterations flowing from the unilateral entry of the acquiring company.[136] If the latter interpretation is correct, the second condition of *Marine Bancorporation* stands as a significantly greater evidentiary obstacle than the Second Circuit's opinion in *BOC International* would suggest.

Whatever the merits of the Second Circuit's view of *Marine Bancorporation*'s second condition for application of the actual entry doctrine, the validity of this prerequisite has been accepted in two district court cases.[137] In neither instance, however, was the standard necessary to resolution of the po-

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The Commission in *Fruehauf* did not view its aforementioned position as necessarily inconsistent with the Second Circuit's opinion in *BOC International* since, according to the Commission, both positions cited objective evidence as determining projected entry times. *Id.* However, defining the projected time of entry requirement in terms of lead time and entry barriers, as the Second Circuit did, fixes the temporal projection on a more definite, and presumably shorter, duration time standard than the Commission's approach in *Fruehauf* would appear to require.

[134] 557 F.2d at 29. Inasmuch as the FTC's legal construction of the entry precondition was incorrect, the court did not reach the question whether, if the proper standard had been used, there was sufficient evidence in the record to support the Commission's decision. *Id.* at 28.

[135] *Id.* at 27 (citing Ford Motor Co. v. United States, 405 U.S. 562, 587 (1972) (Burger, J., concurring and dissenting)); Turner, *supra* note 81, at 1383 (new entrant will "shake things up . . . even if in the end its inroads are rather modest"); Robinson, *Antitrust Developments: 1973*, 74 COLUM. L. REV. 163, 186 (1974) (new entrant will generate "competitive motion").

[136] 418 U.S. at 636-39. "[T]he Government . . . simply did not establish the second precondition. It failed to demonstrate that the alternative means offer a reasonable prospect of long-term structural improvement or other benefits in the target market." *Id.* at 638-39. *See* Note, *The Potential Competition Doctrine After* Marine Bancorporation, 63 GEO. L.J. 969, 977-79 (1975). Much of the difficulty in applying *Marine Bancorporation*'s second condition stems from the absence of any indication in the Court's opinion of the meaning of "other significant procompetitive effects." Thus, although the second condition is cast in terms of "deconcentration *or* other significant procompetitive effects," lower courts necessarilly will focus solely or primarily on the long-term deconcentration aspect of this standard. See text and notes 141-44 *infra*; Bauer, *supra* note 86, at 216.

[137] FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976). For a discussion of *Tenneco*, see notes 144 & 153 *infra*.

tential competition allegations before the court. In *United States v. Black and Decker Manufacturing Co.*,[138] the government sought divestiture of Black and Decker's interest in the McCulloch Corporation. Black and Decker was the nation's leading producer of portable electric tools, while McCulloch was a leading firm in the highly concentrated gasoline powered chain saw market.[139] The government's complaint alleged a lessening of potential competition through elimination of Black and Decker as a likely actual entrant into the chain saw market.

Rejecting this contention, the court in *Black and Decker* held that the government had not satisfied the entry condition of *Marine Bancorporation.* While Black and Decker had a strong history of internal growth as well as the incentive to enter the gasoline powered chain saw market, other factors, particularly the company's lack of expertise in gasoline engine technology,[140] militated against the conclusion that Black and Decker had the capabilities for entry via internal expansion. Further, the court doubted the availability of toehold entry possibilities and added that even if toehold acquisition candidates had existed, they represented an improbable foundation for the deconcentration or other procompetitive effects required by *Marine Bancorporation's* second condition.[141] The court's determination on this point, much like that in *Marine Bancorporation* itself, was based on the finding that the continuing high concentration in the relevant market and the related inability of small firms or new entrants to capture a substantial market share precluded a toehold entrant's precipitating deconcentration or other procompetitive effects.[142]

The court's application of *Marine Bancorporation*'s second condition points up the difficulties inherent in this evidentiary standard. In *Black and Decker,* the court dismissed the possibility of "deconcentration or other significant procompetitive effects" essentially by finding continued high concentration and the absence of evidence of a trend toward deconcentration generated by smaller firms in the market.[143] If, then, the market historically has remained highly concentrated despite the presence of smaller firms or new entrants, significant deconcentration by de novo or toehold entry is deemed improbable. If, on the other hand, evidence of a substantial trend toward deconcentration indicates that the possibility of further deconcentration following de novo or toehold entry must be seriously considered, defendants may well argue persuasively that the market, despite still facially high concentration

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[138] 430 F. Supp. 729 (D. Md. 1976).

[139] The relevant product market was the manufacture and sale of gasoline powered chain saws; an "occasional user" submarket consisting of gasoline powered chain saws retailing for less than $200 also was found. *Id.* at 740.

[140] The court noted in this regard that no electric tool maker had ever entered the gasoline powered chain saw market by internal expansion. *Id.* at 758.

[141] *Id.* at 765-69.

[142] *Id.* at 768-69. Of course, the cited reasons for this conclusion differed since *Marine Bancorporation* focused on regulatory constraints on post-entry expansion, a factor not present in the unregulated market context of *Black and Decker.*

[143] *Id.* at 755.

ratios, is nonoligopolostic and thus inappropriate for potential competition analysis.[144]

In addition to its actual entry contentions, the government in *Black and Decker* alleged section 7 violations based on the perceived entry theory. The court's observations on *Marine Bancorporation*'s treatment of perceived entry are instructive if only to affirm explicitly what *Marine Bancorporation* had left ambiguous. The court in *Black and Decker* found that the government had failed to establish that the participants in the gasoline powered chain saw market perceived Black and Decker as a likely market entrant.[145] The evidence on the point was at best conflicting, with some major chain saw participants viewing Black and Decker's unilateral entry as likely, and others seeing no entry threat.[146] Moreover, even assuming sufficient proof of entry perceptions, both subjective and objective evidence revealed the presence of a number of other equally if not more likely entrants into the relevant market.[147] Thus, the loss of one potential entrant could not impact substantially on competition in the market if there were more than a few other perceived potential entrants.

None of this adds anything novel to established analysis of perceived entry. The *Black and Decker* court, however, also concluded that *Marine Bancorporation*'s two actual entry conditions applied as well to perceived entry theory.[148] In short, contrary to the apparent view of *United States v. Falstaff Brewing Corp.*,[149] perceptions of the acquiring firm's incentives and capabilities for entry are insufficient; the evidence must also establish perceptions by market participants that the acquiring firm's means of de novo or toehold entry offer reasonable probability of deconcentrating the target market. As suggested earlier, this reading of *Marine Bancorporation* seems a logical interpretation of the Supreme Court's language.[150] Nevertheless, *Black and Decker*'s explicit construction of the language adds a clearer judicial view of *Marine Bancorporation*'s enhanced constraints on the applicability of perceived entry theory. Considering the problem of proving entry perceptions, as *Black*

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[144] This anomaly prompted the district court in FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977), to assert in dictum that the actual entry doctrine is "self-contradictory." Although the court was not expressly referring to *Marine Bancorporation*'s second condition, the court's statement that in an oligopolistic market "it would be difficult, if not impossible, for a toehold or *de novo* entry by an outsider to threaten entrenched existing firms," *id.* at 109 n.5, quite clearly reflects the court's perception of the difficulty of proving that new entry will generate the substantial deconcentration required by *Marine Bancorporation*.

In analyzing the FTC's actual entry theory on the merits, the court held that the likelihood of entry had not been established. The court further found that the Commission had presented little or no evidence that available means of entry, if any, could reasonably produce deconcentration or other significant procompetitive effects. *Id.* at 114.

[145] 430 F. Supp at 769-73.

[146] *Id.* at 770-71.

[147] *Id.* at 771-73.

[148] *Id.* at 769 n.76.

[149] 410 U.S. 526, 533-34 (1973) (perceptions of entry intent and capabilities are determinative).

[150] See text and note 96 *supra*.

and Decker itself illustrates,[151] requiring an added showing of perceptions of the likelihood of prospects for substantial procompetitive effects[152] compounds an already onerous burden of proof.[153]

CONCLUSION

In several major respects the decisions of the Burger Court reflect a considerably more restricted view of section 7 than had been indicated by prior cases. The Court's unwillingness to accept market share data as conclusive indicia of probable competitive effect in horizontal merger cases, and, more significantly, its restructuring of potential competition analysis already have clearly hampered government enforcement efforts in the lower courts. Notwithstanding the assistance of the Hart-Scott-Rodino premerger requirements,[154] these recent case developments, coupled with the likelihood of a more rigorous review of government proof on the often critical threshold issue of market definition, portend a difficult and largely unpredictable course for government section 7 enforcement.

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[151] See text and note 146 *supra*.

[152] As a matter of proof, the requirement of *Marine Bancorporation* that the market participants "in fact" tempered their oligopolistic behavior as a result of the acquiring firm's presence on the periphery of the market may subsume the apparent requirement of proof of perceptions that entry would likely produce significant procompetitive benefits. Proof of perceptions of entry intent and capabilities, coupled with proof of significant responsive moderation of competitive behavior by firms in the market, would permit the reasonable inference that existing market participants must have perceived entry as a likely means of substantially threatening their market positions. Of course, although this view minimizes *Marine Bancorporation*'s second condition as a distinct element of proof in perceived entry cases, it obviously does not circumvent the problem of establishing that the firms in the market actually altered their behavior in response to the acquirer's perceived presence at the market's edge.

[153] The problems associated with applying the perceived entry doctrine, at least in the context of product extension cases like *Black and Decker*, were recognized in FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977). There, in addition to its actual entry allegations, see note 144 *supra*, the Commission argued that Tenneco, a leading producer of automotive exhaust system parts, and Monroe, a large producer of shock absorbers, were perceived entrants into each other's respective product markets. In addition to finding the absence of likelihood of unilateral entry and the presence of numerous other equally likely entrants, the court accurately observed that the perceived entry doctrine "rarely" has been applied in product extension cases. *Id.* at 114 n.22. This comment correctly if only implicitly recognizes that in most product extension cases proximity to the target market, and perceptions of proximity, become a more difficult matter of proof than in market extension cases.

[154] See note 6 *supra*.

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