1978

Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation

Joseph P. Bauer
Notre Dame Law School, jbauer@nd.edu

CHALLENGING CONGLOMERATE MERGERS UNDER SECTION 7 OF THE CLAYTON ACT: TODAY'S LAW AND TOMORROW'S LEGISLATION

JOSEPH P. BAUER*

I. INTRODUCTION

Federal antitrust enforcement has undergone a radical transformation in the past decade. From 1953 to 1969—the span of the Warren Court—the Department of Justice and the Federal Trade Commission built a formidable record in the antitrust field, winning virtually every case taken to the Supreme Court.[1] This trend continued at a reduced pace into the first years of the Burger Court but then reversed significantly;[2] since the 1973 Term, the government has lost more antitrust cases than it has won.[3] The change in enforcement patterns has been most noticeable in the area of merger law.[4] The United States was successful in all merger cases not involving regulated industries decided by full opinion of the Supreme Court between 1950 and the Court's 1972 Term.[5] Since 1974, however,

* Associate Professor of Law, Notre Dame Law School. A.B., University of Pennsylvania, 1966; J.D., Harvard Law School, 1969. Portions of an earlier version of this article appeared in a memorandum prepared by the author for the Federal Trade Commission in August 1977. The views expressed here, however, are solely those of the author and do not represent the views of the Commission or its staff. The author would like to express his thanks to Edward DeVivo and John Ruhl, members of the Notre Dame Law School Class of 1978, for their assistance in the preparation of this article.

[1] In the sixteen terms of the Warren Court, defendants were successful in only three of 48 cases initiated by the Department of Justice and ultimately decided by full opinion of the Supreme Court. In addition, of the 21 cases initiated by the Federal Trade Commission and decided by full opinion, only two were won by defendants. *See* Kauper, The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism, 67 Mich. L. Rev. 325, 337 & n.48 (1968); McGee, The Burger Court Looks at the Antitrust Laws: A New Approach?, 2 Barrister 21, 27 (Winter 1975) (updating statistics from Kauper article).

[2] From 1969 to 1972, the Department of Justice prevailed in nine of eleven cases in which a full opinion was written. The Federal Trade Commission was successful in the only case that it brought during this period. *See* McGee, *supra* note 1, at 27.

[3] An examination of the *United States Reports* indicates that the Department of Justice prevailed in three of eight cases decided by full opinion in the 1973 through 1977 Terms. The Federal Trade Commission was not involved in any such cases in the Supreme Court during this period.

Private plaintiffs have been similarly unsuccessful; during the 1976 Term, for example, the Court rejected the antitrust claims of such plaintiffs in all five cases decided by full opinion. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (plaintiff prevailed on other grounds); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); U.S. Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). *See also* Vendo Co. v. Lektro-Vend Corp., 434 U.S. 881 (1977) (federal injunction against enforcement of state antitrust judgment denied under the Federal Anti-Injunction Act, 28 U.S.C. § 2283 (1970)).

[4] In accordance with the language of section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), "merger" as used in this article includes both partial and total acquisition of the stock or assets of one corporation by another, either for cash or securities.

[5] Sloviter, The October 1973 Term Merger Cases: Whither Clayton § 7?, 48 Temp. L.Q. 861, 861; *see id.* at 912-16 (table of relevant decisions). The approach of the Warren Court to merger law is reflected in Justice Stewart's comment in a 1966 decision: "The sole consistency

four of the five antitrust enforcement cases lost by the government in the Supreme Court have involved mergers.[6] Similarly, there has been a noticeable trend favoring defendants in conglomerate merger cases[7] in the federal courts at all levels. Overall, there have been eleven successful challenges to conglomerate mergers since 1964; significantly, none of these occurred after 1974.[8] Moreover, twelve of twenty-two unsuccessful conglomerate merger attacks took place between 1974 and 1977.[9]

that I can find is that in litigation under § 7, the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[6] The unsuccessful merger challenges were United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975); and United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975). The other unsuccessful government action, United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975), involved price fixing.

The shift in the Court's attitude first became evident in United States v. ICC, 396 U.S. 491 (1970), in which the merger of several railroads was upheld after regulatory approval despite Justice Department protest. The full extent of the change was clear by 1974; Justice Stewart authored the majority opinion in United States v. General Dynamics Corp., 415 U.S. 486 (1974), and Justice Douglas, usually in the majority in antitrust cases of the 1950s and 1960s, was in the dissent, *see id.* at 527 (Douglas, J., dissenting).

[7] The term "conglomerate merger" was originally used to identify mergers between two companies in completely unrelated fields of business. It is more commonly considered, however, to include all mergers other than those that are principally horizontal or vertical. A horizontal merger is one involving companies competing in the same product and geographic markets; a vertical merger involves the combination of companies in an actual or potential buyer-seller relationship.

The term "conglomerate merger" encompasses geographic extension, product extension and "pure" conglomerate mergers. A geographic extension merger is one in which the acquiring and acquired firms share the same product market but operate in different areas. A product extension merger involves companies in the same geographic market but different, if still related, product lines. Mergers falling into neither of these two categories are classified as "pure" conglomerate mergers. *See generally* P. Areeda, Antitrust Analysis 657 (1974).

[8] **Conglomerate Merger Cases—Successful Challenges**

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (geographic extension)
United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) (joint venture) (geographic extension as to Pennsalt, product extension as to Olin-Mathieson)
Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965) (product extension)
United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.) (geographic extension), *aff'd per curiam,* 385 U.S. 37 (1966)
FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (product extension)
General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967) (product extension), *cert. denied,* 391 U.S. 919 (1968)
United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968) (product extension)
Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc., 414 F.2d 506 (3d Cir. 1969) (product extension), *cert. denied,* 396 U.S. 1009 (1970)
FTC v. Bendix Corp., 77 F.T.C. 731 (1970) (product extension), *rev'd on other grounds,* 450 F.2d 534 (6th Cir. 1971)
Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972) (product extension), *cert. denied,* 416 U.S. 909 (1974)
United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973) (geographic extension), *aff'd mem.,* 418 U.S. 906 (1974)

[9] **Conglomerate Merger Cases—Unsuccessful Challenges**

United States v. Penn-Olin Chemical Co., 246 F. Supp. 917 (D. Del. 1965), *aff'd by equally divided Court,* 389 U.S. 308 (1967) (joint venture)

The magnitude of this shift, the confusion that has characterized the case law accompanying it, and the increasing prominence of conglomerate mergers as a means to corporate expansion[10] form the basis for this

United States v. Crocker-Anglo National Bank, 277 F. Supp. 133 (N.D. Cal. 1967) (geographic extension)
United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969) (geographic extension), *aff'd sub nom.*, Bartlett v. United States, 401 U.S. 986 (1971)
United States v. Northwest Industries, Inc., 301 F. Supp. 1066 (N.D. Ill. 1969) (denial of preliminary injunction) (mixed conglomerate)
United States v. International Telephone & Telegraph Corp., 324 F. Supp. 19 (D. Conn. 1970) (judgment for defendant) (product extension, Grinnell Corp.), *consent judgment entered,* [1971] Trade Cas. ¶ 73,665 (D. Conn. 1971)
United States v. International Telephone & Telegraph Corp., 306 F. Supp. 766 (D. Conn. 1969) (denial of preliminary injunction) (product extension, Hartford Fire Ins. Co.), *consent judgment entered,* [1971] Trade Cas. ¶ 73,666 (D. Conn. 1971)
United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970) (conditional consent judgment) (product extension), *final consent judgment entered,* [1970] Trade Cas. ¶ 73,105 (W.D. Pa. 1970)
United States v. International Telephone & Telegraph Corp., [1971] Trade Cas. ¶ 73,619 (N.D. Ill. 1971) (denial of preliminary injunction) (product extension) (Canteen Corp.), *consent judgment entered,* [1971] Trade Cas. ¶ 73,667 (N.D. Ill. 1971)
In re Sterling Drug Co., 80 F.T.C. 477, 579 (1972) (product extension)
United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983 (S.D.N.Y. 1973) (product extension)
In re General Mills, Inc., 83 F.T.C. 696, 729 (1973) (product extension)
Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.) (product extension), *cert. denied,* 419 U.S. 883 (1974)
United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) (geographic extension)
United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974) (geographic extension), *judgment for defendant on remand from* 410 U.S.
In re Beatrice Foods Co., 86 F.T.C. 1, 54 (1975) (divestiture order as to one of two acquisitions) (product extension), *aff'd sub nom.* Beatrice Foods Co. v. FTC, 540 F.2d 303 (7th Cir. 1970)
In re Budd Co., 86 F.T.C. 518, 569 (1975) (product extension)
United States v. Hughes Tool Co., 415 F. Supp. 637 (C.D. Cal. 1976) (product extension)
United States v. Black & Decker Manufacturing Co., 430 F. Supp. 729 (D. Md. 1976) (product extension)
FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) (denial of preliminary injunction) (product extension)
BOC International Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977) (geographic extension)
FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977) (denial of preliminary injunction) (product extension), *request for stay denied,* [1977-1] Trade Cas. ¶ 61,470 (D.C. Cir. 1977)
Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249 (N.D. Ohio 1977) (product extension)

Horizontal and Vertical Merger Cases—Successful Challenges with Significant Potential Competition Analysis

Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962) (vertical merger)
United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963) (horizontal and product extension mergers)
United States v. Continental Can Co., 378 U.S. 441 (1964) (horizontal merger)
United States v. Standard Oil Co. (New Jersey), 253 F. Supp. 196 (D.N.J. 1966) (vertical merger)
United States Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970) (vertical merger)
Ford Motor Co. v. United States, 405 U.S. 562 (1972) (vertical merger)
Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972) (horizontal merger), *cert. denied,* 412 U.S. 928 (1973)
United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975) (horizontal merger)

[10] The number of large horizontal and vertical mergers that are taking place has declined, perhaps because judicial standards for these kinds of acquisitions are better defined, and

article. The primary source for regulation of mergers under the antitrust laws is section 7 of the Clayton Act,[11] which proscribes those corporate acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[12] Although section 7 clearly applies to all types of mergers,[13] the construction given it by the Supreme Court in recent years has rendered it particularly ineffective for control of conglomerate mergers. In attempting to adapt section 7 to the regulation of such mergers, the government has relied upon two theoretical approaches. The approach most frequently relied upon in practice, and the principal subject of recent Supreme Court attention, focuses upon the potential competitive consequences of loss of the acquiring company either as an actual future entrant into the acquired company's market or as an entity perceived by competitors as a potential entrant into that market. A second, less popular, theory looks to the direct anticompetitive effects of entry by the acquiring firm into the acquired company's market.

This article will detail the two government approaches and analyze the limitations placed upon their application by recent decisions of the Supreme Court. At the same time, the article will also consider a third approach—rejected by the courts as outside the scope of the Clayton Act but nonetheless essential to any analysis of present and future antitrust enforcement—which emphasizes noneconomic factors, looking beyond competitive impact to the social and political implications of the concentration of corporate assets in the hands of a few dozen or hundred firms. Analysis of these three approaches will highlight the extent of the Supreme Court's shift in attitude toward merger enforcement,[14] a shift that

---

companies are increasingly turning to mergers with less related companies. The FTC reported that, in 1975, of the 59 acquisitions of manufacturing and mining companies with $10 million or more in assets, only four were horizontal mergers and only three were vertical; the other 52 were conglomerate. Of 77 such acquisitions in 1976, 12 were horizontal, 4 vertical and 61 conglomerate. The significance of these statistics becomes even more evident if the assets of the acquired firms are also considered. In 1975, conglomerate mergers accounted for 94.6% of the assets of all firms acquired through merger and in 1976 for 87.2% of the assets of such firms. By comparison, for the period 1948 through 1975, conglomerate mergers accounted for 74.9% of the assets of all acquired firms involved in large scale mergers. FTC Statistical Report on Mergers and Acquisitions, tables 18, 19 (Nov. 1977) (based upon preliminary 1976 statistics). There appears to be a continuing trend toward large scale mergers, spurred both by the apparent advantages of such acquisitions as a means of corporate expansion and by the desires of foreign investors for the security of United States assets. *See* Winter, Conservative Firms Bent on Profit Growth Join the Merger Chase, Wall St. J., Apr. 11, 1978, at 1, col. 6.

[11] 15 U.S.C. §§ 12-27, 44 (1970), *as amended,* (Supp. V 1975), *as amended,* Act of Sept. 30, 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383.

[12] *Id.* § 18 (1970), *as amended,* Act of Sept. 30, 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383.

[13] *See, e.g.,* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974); United States v. Continental Can Co., 378 U.S. 441, 447, 458 (1964).

[14] This shift may reflect changes in the Court's personnel. During the period 1969-1971, four Supreme Court Justices (Chief Justice Burger, Justice Blackmun, Justice Powell and Justice Rehnquist) were appointed by President Nixon. President Nixon had stated earlier that he intended to appoint "strict constructionists" to the Supreme Court. *See, e.g.,* N.Y. Times, Oct. 4, 1968, at 50, col. 2.

Alternatively, the Court's attitude toward merger enforcement might be attributed to the marks an enormous change in direction for regulation of corporate economic activity and calls for reevaluation of the Clayton Act itself. The article will conclude with consideration of the necessary elements—political and social as well as economic—of such a reevaluation and with specific suggestions for legislative reform.

II. Potential Competition Doctrine

Under the Clayton Act, the legality of a corporate acquisition is determined primarily with reference to competitive effect. Yet there are significant qualitative differences between the evaluation of this effect in conglomerate merger cases and in other situations. In horizontal and vertical mergers, the focus for determination of competitive effect is logically upon actual competition within the target market. When the merging companies are competitors, a court can look to the lessening of competition that results from removal of one of two formerly effective market participants; when the companies are in a buyer-seller relationship prior to merger, the court can attempt to predict the anticompetitive effects of loss of sales between the merging companies and their former customers and suppliers. In the case of a conglomerate merger, however, the merging companies are, by definition, neither present competitors nor parties to an actual or potential buyer-seller relationship. Because conglomerate merger cases thus present problems in attempting to demonstrate successfully the increase in concentration in a particular market, or the direct foreclosure of competitive opportunity that forms the basis for challenges to other types of corporate acquisitions, the potential competition theory has developed.[15] Under this theory, a court looks to the competitive market situation that might have developed at some future

---

impersonal influence of time upon the force and direction of legislative enactments. *See* notes 178-80 and accompanying text *infra*.

[15] *See generally* FTC v. Procter & Gamble Co., 386 U.S. 568, 586-90 (1967) (Harlan, J., concurring); Blair, The Conglomerate Merger in Economics and Law, 46 Geo. L.J. 672, 673-74 (1958).

The two earliest cases dealing with potential competition were United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), and United States v. Continental Can Co., 378 U.S. 441 (1964). In the *El Paso* case, a large regional supplier of natural gas acquired a company that had sought, unsuccessfully, to expand into the defendant's territory. The Court, in making its finding of a section 7 violation, analyzed the transaction as a geographic market extension merger; some later commentators have suggested that this case should have been treated as a horizontal merger, since the acquisition under scrutiny involved foreclosure of actual, if only incipient, competition between the two companies. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 & n.24 (1974).

Continental Can involved an acquisition by the nation's second largest metal can manufacturer of the third largest glass container manufacturer. Rather than analyzing this as a product extension merger, the Court held that it was an unlawful horizontal merger between the second and sixth largest companies in the "can-glass market." *See* United States v. Continental Can Co., 378 U.S. 441, 444 n.2 (1964) (discussion of relevant concept of "industry").

Two other conglomerate merger cases that contributed significantly to developing the principles still under consideration today are United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (joint ventures), and FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (product extension mergers).

date in the absence of merger. In practice, this doctrine involves two related approaches to the evaluation of proposed acquisitions: the actual potential entrant theory and the perceived potential entrant theory.

A. *Actual Potential Entrant Theory*

Courts invoking the *actual potential entrant theory* are concerned with the loss of probable future entry into the acquired company's market by the acquiring company by means other than the merger in question. Such alternative entry can occur either through internal expansion—de novo entry—or through acquisition of a smaller, less significant competitor already within the market—toehold entry.[16] The theory assumes that alternative entry into an oligopolistic, and thus less than fully competitive, target market would have introduced an additional factor into the market, with resulting direct and indirect economic benefits: competition would be improved, production capacity increased, prices lowered and the range of available goods and services expanded. Moreover, an increase in the number of competitors within the target market would presumably help to inhibit the development and maintenance of collusive pricing schemes.

The dominant case interpreting the actual potential entrant doctrine as a basis for proscription of conglomerate mergers is *United States v. Marine Bancorporation, Inc.*,[17] in which the United States challenged a proposed merger between two large banks in the State of Washington.[18] The government in *Marine Bancorporation* relied principally upon the assertion that the acquiring bank could have entered the acquired bank's market through the more procompetitive means of toehold acquisition or internal expansion;[19] the defendants challenged both the viability of the actual potential entrant doctrine in general and the government's specific assertion that alternative means of entry were available to the acquiring bank. Although recognizing that it had not previously faced this particular form of potential competition theory,[20] the Supreme Court announced three

[16] A possibility yet to be considered as an alternative form of entry would be entry by joint venture. In an industry in which entry requires high capital formation or sophisticated technology, a joint venture might be more reasonable and likely than single firm de novo entry. Joint ventures also hold out the benefit of a new market force with potential for deconcentration. *But cf.* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964) (section 7 reaches joint ventures; consideration must be given to elimination of potential competition at the market fringe and to foreclosure of possible competition between the joint venturers).

[17] 418 U.S. 602 (1974).

[18] The proposed merger involved an attempt by the second largest bank in Seattle to acquire the third largest bank in Spokane. Such a transaction, in which the acquiring and acquired companies are in the same product market, is commonly referred to as a geographic extension merger. *See* note 7 *supra.*

[19] The government also presented a secondary claim based upon perceived potential entrant doctrine. *See* notes 97-120 and accompanying text *infra.*

[20] 418 U.S. at 625 & n.28. The Court had expressly reserved consideration of the actual potential entrant doctrine in an earlier geographic extension merger case, *see* United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973). *See also* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 172-74 (1964) (discussion of application of actual potential entrant doctrine to joint venture challenged under section 7).

conditions essential to application of the actual potential entrant doctrine: (1) the target market must be concentrated;[21] (2) an alternative method for entry must exist and be available to the acquiring firm;[22] and (3) the alternative method of entry must offer a reasonable prospect for long-term structural improvement or other competitive benefit to the target market.[23] Because the second and third of these conditions were not met in *Marine Bancorporation,* the Court declined to apply the doctrine and, accordingly, approved the merger.

1. Concentrated or Oligopolistic Market

The application of the actual potential entrant doctrine presupposes that the acquired company's market prior to merger is less than fully competitive. In a truly competitive market, the entry of an actual potential entrant, whether through the challenged merger or other means, could have no significant effect upon competition. Normally a correlation exists between intensity of competition and level of concentration in a particular market, and concentration levels have historically served as indicators of market competition for purposes of the Clayton Act.[24] Thus, in actual potential entrant cases, a preliminary burden is placed upon the government to prove that the target market is concentrated.[25] Concentration is determined with reference to the number of firms operating within the target market and the total market shares of the dominant firms within that market.[26]

There are, of course, limits to exclusive reliance upon concentration as the measure of a market's competitive level. Little agreement exists with respect to the degree of concentration that will permit the inference of

---

[21] *See* 418 U.S. at 630.

[22] *See id.* at 633, 638.

[23] *See id.* at 638-39.

[24] *See* United States v. General Dynamics Corp., 415 U.S. 486, 496-98 (1973) (horizontal merger); Brown Shoe Co. v. United States, 370 U.S. 294, 318 & n.38, 343-45 & n.72 (1962). Note that, strictly speaking, the type of market concentration relevant to potential competition doctrine is comparable to the concentration used to evaluate the competitive impact of horizontal mergers, as contrasted with the test of market foreclosure relevant to evaluation of vertical mergers. *See id.* at 323-24.

[25] United States v. Marine Bancorporation, Inc., 418 U.S. at 630.

> The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant. The present procompetitive effects that a perceived potential entrant may produce in an oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

Id. at 630-31. As this passage makes clear, the concentration requirement is equally applicable to both perceived and actual potential entrant doctrines. *See* text accompanying note 101-02 *infra.*

[26] *See, e.g.,* United States v. General Dynamics Corp., 415 U.S. 486, 494-96 (1974); United States v. Von's Grocery Co., 384 U.S. 270, 273 & n.3 (1966).

oligopolistic conduct necessary to justify application of the potential entrant doctrine.[27] Furthermore, proof of concentration may, in some situations, be made through evidence that a particular market, not yet significantly concentrated, is tending toward concentration.[28] Such considerations suggest that courts should consider other factors relevant to competition, such as artificial and natural barriers to entry into a particular geographic or product market. For example, a lower level of concentration might be sufficient to indicate an oligopoly when there are special restraints upon entry into a market by new competitors. Similarly, evidence of market performance might, in some situations, serve to override structural indicators of concentration.

According to the Court in *Marine Bancorporation,* proof of market concentration establishes only a prima facie case for a noncompetitive market and thus for application of potential competition theory; after such proof is presented, the burden shifts to the defendant to present evidence that concentration ratios do not accurately reflect the competitive state of the target market.[29] In discussing the prima facie nature of the government's proof of concentration, the Court referred to an earlier horizontal merger case, *United States v. General Dynamics Corp.,*[30] in which a defendant successfully rebutted the government's showing that the coal industry was concentrated. In *General Dynamics,* the government had relied upon levels of past production to determine concentration, but the defendant was

[27] Most courts and writers seem to agree that an industry is concentrated if the market share of the four largest firms is between 50% and 70%. Professor Bain concluded that a four-firm concentration ratio of 50% to 65% constitutes "high-moderate" concentration. J. Bain, Industrial Organization 128 (1959). Professors Kaysen and Turner view an industry as a tight oligopoly when the eight (or fewer) largest firms supply 50% of the market, if the largest firm supplies 20% or more. C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 72 (1959). The Department of Justice's Merger Guidelines view an industry as "highly concentrated" if the four largest firms account for 75% of the industry's market share. United States Dep't of Justice, Merger Guideline No. 5 (1965), *reprinted in* 1 Trade Reg. Rep. (CCH) ¶ 4510 (1975). *But cf.* Kirkpatrick & Mahinka, The Supreme Court and the "New Economic Realism" of Section 7 of the Clayton Act, 30 Sw. L.J. 821, 832-35 (1976) (criticizing the almost exclusive reliance given to concentration levels as indicators of vigorous competition and suggesting tests other than four-firm market percentage as basis for determination of concentration).

For a listing of the industry concentration ratios in the principal conglomerate merger cases, see United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 749-50 & n.40 (D. Md. 1976), and Dunfee & Stern, Potential Competition Theory as an Anti-Merger Tool Under Section 7 of the Clayton Act: A Decision Model, 69 Nw. U.L. Rev. 821, 826-27 (1975).

[28] In Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974), the Federal Trade Commission challenged the acquisition by Kennecott, the nation's largest copper producer, of Peabody Coal, one of the two leading American coal producers. The Commission was successful in persuading the court to permit application of the potential competition doctrine. This was done on the basis of evidence that the market shares of the largest coal producers had been increasing since World War II, despite contrary evidence that the current share of Peabody Coal was only 10% and of the four largest producers only 29%. *See id.* at 76. *See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 595 (1967) (Harlan, J., concurring).

[29] 418 U.S. at 631. The Court specifically noted that neither party in *Marine Bancorporation* "undertook any significant study of the performance, as compared to the structure, of the commercial banking market in Spokane." *Id.*

[30] 415 U.S. 486 (1974).

able to show that, because of depletion of coal reserves, predictions of present and future production more accurately reflected the actual state of the industry.[31] It should be noted, however, that concentration serves very different purposes in horizontal and conglomerate merger cases. In a horizontal merger case, such as *General Dynamics*, proof that the combined market share of the merging companies will exceed a certain level after merger creates a rebuttable presumption that the merger will tend to lessen competition in violation of section 7.[32] By contrast, in a conglomerate merger case, proof that the market shares of those companies already operating within the target market exceed a certain level indicates only that the target market is less than competitive prior to merger and thus establishes one of several necessary preconditions to application of the potential competition doctrine. Consequently, despite the Court's passing reference to the *General Dynamics* case in *Marine Bancorporation*, it is not clear how the defense established in that case could be transferred to a case involving a conglomerate merger.[33]

2. Alternative Entry Both Feasible and Likely

The second precondition imposed in *Marine Bancorporation*[34]—proof of the availability of feasible and likely means of alternative entry[35]—has posed a more substantial obstacle to successful application of the actual potential entrant doctrine by the government.[36] Four factors predominate in evaluation of this requirement by the courts: (a) the extent of the acquiring firm's incentives for entry; (b) the firm's ability to enter the market, either de novo or through acquisition of a toehold competitor; (c) the temporal immediacy of entry; and (d) the evidence demonstrating the probability of alternative entry.

(a) *Incentives for Entry.* Any determination whether, in the absence of merger, a particular company would have acquired a smaller competitor or entered a market de novo involves a considerable degree of speculation. The proposed merger itself gives contradictory evidence: it indicates some interest in the product and geographic market of the acquired firm, but, at the same time, suggests that the acquiring company has considered

[31] *See id.* at 501-04.

[32] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-65 (1963).

[33] For example, it could be argued that the phenomenon of "limit pricing" underlying the perceived potential entrant doctrine, *see* text accompanying notes 97-99 *infra*, depends directly upon a certain level of market concentration in a way that proof of the anticompetitive effect of a horizontal merger does not.

[34] *See* 418 U.S. at 633.

[35] Unless otherwise specified, references to "alternative entry" in the following discussion include both toehold and de novo entry.

[36] *See* BOC Int'l Ltd. v. FTC, 557 F.2d 24, 28-30 (2d Cir. 1977) (failure to prove substantial likelihood of entry by alternative means); *accord*, FTC v. Atlantic Richfield Co., 549 F.2d 289, 294-98 (4th Cir. 1977) (denial of preliminary injunction); FTC v. Tenneco, Inc., 433 F. Supp. 105, 114 (D.D.C.) (denial of preliminary injunction), *request for stay pending appeal denied per curiam*, 1977-1 Trade Cas. ¶ 61,470 (D.C. Cir. 1977).

and rejected competitively preferable alternatives.[37] Both the nature of the target market and the characteristics of the acquiring company are relevant to determination of the company's actual motivation. With respect to the target market, potential for high profits,[38] the need for immediate entry—either to foreclose future expansion of the acquired company into the acquiring company's own market[39] or to avoid difficulties with its own expansion at a later date[40]—and the prestige value of expansion into the acquired company's market[41] are all possible criteria. Investigation into the acquiring company's characteristics might include consideration of evidence of surplus capital available for investment[42] and the acquiring company's possible need, because of its product line, for expansion into new geographic areas in order to profit from national advertising strategies.[43] Also relevant, if expansion is into a related product area, is whether the proposed merger would enable the acquiring company to offer its existing customers a more complete product line or to reach a broader class of customers.[44] More general considerations might include unused production capacity, economies of scale, compatible technology, and overlapping production or marketing procedures in either the acquiring company itself or in the target market.[45]

(b) *Ability to Enter by Alternative Means.* Application of the actual potential entrant theory presupposes that the acquiring company has the capacity, as well as the incentive, to attempt alternative entry. This capacity will vary with the nature of the two companies and their respective markets, with the nature of the proposed merger—geographic or product extension—and with the type of alternative entry available—de novo or toehold.

In the case of de novo alternative entry, a defendant's primary objective is to demonstrate the potential obstacles to successful development of a new market competitor. Sophisticated technological requirements or the need for specific patents may substantially limit or effectively foreclose

---

[37] *But see* United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 184 (N.D. Cal. 1967) (proof of entry or desire to enter by merger not itself evidence of ability or desire to enter de novo). *See generally* Berger & Peterson, Conglomerate Mergers and Criteria for Defining Potential Entrants, 15 Antitrust Bull. 489, 495-96 (1970).

[38] *See, e.g.,* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 743 (D. Md. 1976); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 561 (N.D. Ill. 1968).

[39] *See, e.g.,* United States v. El Paso Natural Gas Co., 376 U.S. 651, 654 (1964); United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129, 147 (N.D. Cal.), *aff'd per curiam,* 385 U.S. 37 (1966).

[40] *See, e.g.,* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 166-67 (1964).

[41] *See, e.g.,* United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1245-46 (C.D. Cal. 1973), *aff'd per curiam,* 418 U.S. 906 (1974).

[42] *See, e.g.,* FTC v. Atlantic Richfield Co., 549 F.2d 289, 295 (4th Cir. 1977); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 71 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974).

[43] *See, e.g.,* United States v. Falstaff Brewing Corp., 410 U.S. 526, 529 (1973).

[44] *See, e.g.,* Ekco Prods. Co. v. FTC, 347 F.2d 745, 753 (7th Cir. 1965); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 547, 561 (N.D. Ill. 1968).

[45] *See, e.g.,* United States v. Falstaff Brewing Corp., 410 U.S. 526, 529 (1973); FTC v. Tenneco, Inc., 433 F. Supp. 105, 111-12 (D.D.C. 1977); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 758-63 (D. Md. 1976).

entry into particular fields.[46] In some situations, similar results may be achieved by direct legal barriers imposed by regulatory or licensing authorities.[47] The existing operation of significant economies of scale in production or distribution may require that a new firm take substantial business from existing competitors, with commensurate effect upon initial capitalization costs and the projected rate of return for the acquiring company.[48] An historical pattern of large promotional and advertising expenditures[49] or of high consumer loyalty[50] may greatly increase the difficulties of establishing significant market penetration, as may particular marketing and distribution requirements, such as the need for an extensive and established system of distributor-customers.[51]

The government must show that such alternative entry is in fact feasible despite possible market obstacles. The financial strength of the acquiring company is obviously the single most significant countervailing consideration.[52] Also relevant, however, are the company's technological expertise, its existing distributional network and advertising program, and the compatibility of its product line or geographical position with that of the acquired firm and its market. The relative importance of these factors will vary with the characteristics of the target market and acquiring company and with the method of proposed entry. Technological expertise may not

---

[46] *Compare* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (no special patents or technical data required for entry into bleach market), *with* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 758-62 (D. Md. 1976) (otherwise qualified entrant lacked necessary technical expertise for de novo entry).

[47] *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). Justice White observed that the majority's theory regarding legal barriers to alternative entry into the banking industry could be equally applied to economic barriers. *Id.* at 654 n.5 (White, J., dissenting).

[48] *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 553-54 (1973) (Marshall, J., concurring); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 166-67 (1964); FTC v. Atlantic Richfield Co., 549 F.2d 289, 295 (4th Cir. 1977).

[49] *Compare* FTC v. Procter & Gamble Co., 386 U.S. 568, 572, 579 (1967) (liquid bleach advertising a factor); General Foods Corp. v. FTC, 386 F.2d 936, 938, 945 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968) (scouring pad advertising a factor), *with* United States v. Hughes Tool Co., 415 F. Supp. 637, 644 (C.D. Cal. 1976) (advertising a factor in sale of consumer goods, but not in sale of industrial tools, which are distinguishable on the basis of quality and performance).

[50] *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 571 (1972) (Autolite's reputation important in automotive aftermarket); United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983, 999, 1004 (S.D.N.Y. 1973) (publishing company not a viable potential entrant into musical field, in which established reputation is all important).

[51] *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 552 n.7 (1973) (Marshall, J., concurring) (established distribution system critical in beer industry); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 763-65 (D. Md. 1976) (existing distribution and service network for power tools would aid entry into gasoline-powered chain saw market).

[52] If an acquiring company has sufficient assets to purchase a major market competitor, it will also have sufficient assets to acquire a toehold firm and, assuming the absence of special market barriers, to establish a de novo entrant. Thus, the acquiring firm's resources are primarily relevant to determination of its ability to overcome the obstacles to successful development of a new major competitor from an initial toehold or de novo position. *See, e.g.*, Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974) (example of acquiring company with enormous capital surplus attempting entry into high technology coal industry).

present a significant obstacle to a company with massive resources; in other situations, the lack of such expertise may be so important as to override the almost uniquely appropriate marketing and distributional abilities of the acquiring company.[53]

Normally, it should be easier to demonstrate de novo entry capability if the proposed merger is into an adjacent geographic area rather than into a related product market. An acquiring company already operating in a particular product market may possess advantageous access to data concerning operational costs and profitability, as well as the technological and administrative skills required for successful marketing and distribution of the product over an expanded market area. Similarly, an established reputation in an industry may provide easier access to expansion capital and aid in formation of a distributional network. The nature of a particular product may also provide economic incentives for an expanded market, through benefits of increased prestige, improved advertising and marketing capabilities, and better allocation of risk.[54] The pattern of expansion followed by the acquiring company in the past may provide some general indication of both the company's ability to attempt particular types of market entry and its willingness to do so.[55]

When the alternative entry asserted to be available is by toehold—the acquisition and subsequent expansion of a smaller market competitor—the courts must initially make an attempt to identify suitable takeover candidates within the target market.[56] Few criteria have been articulated for the identification of such companies; existing precedents display a predominantly case by case approach. Market share is clearly critical, although little consensus exists as to the maximum permissible share for a "toehold" position. In *The Bendix Corporation*,[57] the Federal Trade Commission challenged the acquisition by Bendix, a large, diversified manufacturer of components for the aerospace and automotive industries, of Fram, the third largest manufacturer of automotive and aircraft filters. In its decision requiring Bendix to divest itself of Fram—which held 12.5% of one filter market and 17.2% of another, narrower filter market—the

---

[53] *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976); *cf.* United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 561 (N.D. Ill. 1968) (absence of any special technological barriers to entry into gymnastic equipment market by producer of sporting goods).

[54] *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 529 (1973) (pressure on regional brewer to compete nationally).

[55] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 552 (1973) (Marshall, J., concurring); FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). *Compare* United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1239-42 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974) (past history of expansion, acquiring firm held potential entrant), *with* United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1070 (S.D.N.Y. 1969), *aff'd mem. sub nom.* Bartlett v. United States, 401 U.S. 986 (1971) (lack of past history significant in finding that acquiring company not a likely potential entrant).

[56] *See generally* Note, *The Budd Co.*: The Toehold Defense to a Section 7 Attack, 71 Nw. U.L. Rev. 264 (1976); Note, Toehold Acquisitions and the Potential Competition Doctrine, 40 U. Chi. L. Rev. 156 (1972).

[57] 77 F.T.C. 731 (1970), *rev'd on other grounds*, 450 F.2d 534 (6th Cir. 1971).

Commission suggested in dicta that acquisition by Bendix of the Wix Company, which held only 9.5% of its own filter market, would have been permissible as a toehold alternative.[58] In a later decision, *The Budd Company*,[59] the Commission initially sought to prohibit a proposed merger between Budd, one of the nation's largest independent automotive suppliers, and Gindy Corporation, which, as the fourth largest manufacturer of van trailers, held between six and eight percent of the trailer market. In later dismissing the complaint, the Commission announced a "ten percent rule," stating that companies such as Gindy that had market shares less than ten percent would presumptively be treated as toehold candidates.[60] The Commission in *Budd*, however, was careful to point out that the rule created only a rebuttable presumption; in taking this position, the Commission relied upon *United States v. Phillips Petroleum Co.*,[61] in which a toehold defense was rejected even though the acquired company held only seven percent of the California retail gasoline market. The Commission distinguished *Phillips* on the ground that the acquiring company in that case had not, as required under toehold theory, either needed or made use of the acquired company "as a small base from which to expand its operations."[62]

Other factors relevant to determination of toehold status include industry concentration level[63] and market definition[64] as well as any evidence of the past history of the toehold company as a growing or aggressive competitor. To a large extent, the factors for evaluation of toehold entry will obviously parallel those for de novo entry. In *United States v. Black &*

---

[58] *Id.* at 819-24.

[59] 86 F.T.C. 518 (1975), *noted in* 89 Harv. L. Rev. 800 (1976).

[60] *Id.* at 582. The *Budd* rule also required that the market be characterized by the presence of four or fewer firms holding 60% of the market. A slightly different ten percent rule, under which four firms must control a 75% market share, is endorsed in Department of Justice, Merger Guidelines ¶ 18 (1975), *reprinted in* 1 Trade Reg. Rep. (CCH) ¶ 4510 (1975). An earlier Federal Trade Commission staff report defines toehold companies as those with "market shares of under five percent in industries with a four-firm concentration ratio over 60%." Federal Trade Commission, Staff Report, Conglomerate Merger Performance: An Empirical Analysis of Nine Corporations 132 (Nov. 1972).

[61] 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd per curiam,* 418 U.S. 906 (1974).

[62] The Budd Co., 86 F.T.C. at 582 n.8 (quoting United States v. Phillips Petroleum Co., 367 F. Supp. at 1258).

[63] Note the difference in required concentration levels between the *Budd* case and the Justice Department's guidelines. *See* Department of Justice, *supra* note 60. It is obviously important to distinguish a situation in which an acquired firm has 10% of the market and the two largest firms have 45% and 40% market shares, from one in which the acquired firm also has a 10% share but the two largest firms have 20% and 15%. In the former situation it is more likely that the acquisition would be procompetitive; the considerably smaller firm might need additional capital or other resources to be an effective competitor.

[64] Market definition is critical to calculation of market share. In *Budd*, the defendant and the government disagreed sharply over whether the market should be measured by cross-elasticity of production or cross-elasticity of demand and calculated the acquired company's market share as 8.4% and 16% respectively. The Commission, contrary to the usual procedure in horizontal merger cases, relied primarily upon the cross-elasticity of production approach and thus the 8.4% market share figure. *See* 86 F.T.C. at 571-72 & n.2; *see* 89 Harv. L. Rev. 800, 807-12 (1976).

Decker Manufacturing Co.,[65] for example, the district court accepted the defendant's argument that several proposed toehold alternatives should be rejected as lacking technological and manufacturing skills necessary to the defendant's success in a new product market.[66] In some situations, however, the criteria for the two types of entry will differ; in the sale of musical instruments, for example, an established reputation may be critical to effective competition, thus making de novo entry extremely difficult but not necessarily foreclosing toehold entry through acquisition of a small but prestigious firm.[67] In addition, identification of toehold candidates involves problems of definition not present in evaluation of de novo entry. It is not yet clear whether subsidiaries of other conglomerates or small firms actively resisting takeover should be included within the scope of inquiry for "available" toehold companies. Similarly, the courts have not established whether an acquiring firm must make good faith offers to *all* available toehold candidates prior to entry by large scale acquisition.

To some extent, recent decisions appear to have misplaced the proper focus of inquiry under the toehold alternative approach. Clearly, the inquiry should not be whether the challenged acquisition is the defendant's preferred method of entry, but rather whether the acquiring company could reasonably be expected to proceed by toehold in the absence of merger. If a reasonable basis exists for believing that toehold entry would have been attempted, a court should prohibit the proposed merger. The courts should consider the available smaller company not merely as a merger partner equivalent to full scale market entry, but as one carrying sufficient independent benefits to justify its treatment as a preferable alternative.

(c) *Immediacy of Alternative Entry*. In *BOC International Ltd. v. FTC*,[68] the Second Circuit faced the question of how immediate an available avenue of entry need be to qualify as a feasible alternative under the actual potential entrant doctrine.[69] In the *BOC* case, the world's second largest producer of industrial gases acquired Airco, the third largest American industrial gases producer. Because of BOC's position in the world market, and because BOC had not previously produced or sold industrial gases

---

[65] 430 F. Supp. 729 (D. Md. 1976).

[66] *Id.* at 766-67 & n.69.

[67] *See* United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983, 988 (S.D.N.Y. 1973).

[68] 557 F.2d 24 (2d Cir. 1977).

[69] In *Marine Bancorporation*, the defendants had argued that one proposed toehold candidate could not have been acquired, because of state banking law requirements, until four years after the date of the challenged merger, and that this firm was thus not "available" for alternative entry. *See* 418 U.S. at 638. The Supreme Court found it unnecessary to give this claim serious consideration because the Court concluded that the candidate, even if in fact available, could not have created the kind of long-term structural benefits to the target market required for application of the actual potential entrant doctrine. *See id.* at 638-39; text accompanying notes 83-84 *infra*. Because of the time consumed in the various appeals, acquisition of the toehold candidate would have been possible under state law one year after the Supreme Court decision in *Marine Bancorporation*.

within the United States, the Federal Trade Commission argued that the company qualified as an actual potential entrant into the concentrated American gas market. The Commission based its position upon a finding that "there was a 'reasonable probability' that BOC would have *eventually* entered the U.S. industrial gases market by internal expansion, or its equivalent, but for the acquisition of Airco."[70] The court of appeals, however, found such a standard legally insufficient under section 7 of the Clayton Act and refused to enjoin the merger.[71] Instead, the court held that the Commission must prove not only that the acquiring company had the incentive and capability for alternative entry, but also that the alternative route was one that the company would have followed in the reasonably foreseeable future.[72]

Although it made no attempt to identify a reasonable period of time for alternative entry, the *BOC* court considered the Commission's reliance upon "eventual" entry at some unspecified future date "wholly speculative" and obviously insufficient.[73] Whatever guidelines are eventually established in practice, a standard such as that applied in *BOC* of requiring a relatively immediate probability of entry will add another significant obstacle to application of the actual potential entrant doctrine.[74] It is clear that determination of a "reasonable probability" of the "substantial lessening of competition" involves elements of prediction and speculation. Far less clear, however, is the magnitude of the additional burden imposed by combining with the speculative projection of future events, inherent in all potential competition theory, an additional requirement of proof that the projected event will occur in the "immediate" future.

(d) *Subjective Versus Objective Evidence.* Closely intertwined with consideration of capability and incentive for alternative entry is the question of what type of evidence is acceptable for measurement of the probability of alternative entry. In making this determination, courts can look either to the actual motivation of the acquiring company's corporate officers or to objective evidence, that is, to facts indicating what a reasonable corporate

---

[70] *In re* British Oxygen Co., 86 F.T.C. 1241, 1360 (1975), *quoted in* BOC Int'l Ltd. v. FTC, 557 F.2d at 28 (emphasis added).

[71] BOC Int'l Ltd. v. FTC, 557 F.2d at 28-29.

[72] *Id.* at 29.

[73] *Id.* Compare the immediate alternative entry requirement imposed in *BOC* with the approach in United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597-98 (1957) (vertical merger), in which the Supreme Court permitted the government to bring suit to challenge the acquisition of a 23% share of General Motors stock by du Pont even though the claimed competitive injuries that formed the basis for the government's case had occurred more than 30 years after the acquisition was consummated.

> Prior cases under § 7 were brought at or near the time of acquisition. . . . None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action at any time when a threat of the prohibited effects is evident.

Id. at 598 (citations omitted).

[74] This problem could be alleviated in cases involving the FTC if the Commission developed a practice of including in its complaint concrete statements regarding the number of years within which entry is to be expected. It could be argued that it was the Commission's failure to be more definite in the *BOC* case that invited reversal by the Second Circuit.

executive would do in light of relevant economic and business considerations. In 1973, four members of the Supreme Court apparently were prepared to place heavy emphasis on subjective evidentiary factors. In *United States v. Falstaff Brewing Corp.*,[75] a plurality of the Court accepted the district court's reliance upon testimony of corporate officers as a basis for determination that Falstaff would not have entered the New England beer market de novo.[76] As an additional barrier to regulation of conglomerate mergers, such an approach is distressing. Strictly adopted, it would require plaintiffs to offer evidence that the management of an acquiring company in fact gave serious consideration to alternative forms of entry as realistic options in the absence of merger.[77] There are, however, often enormous and highly visible advantages to merger with a large firm, including established market position, reduced risk and developed technological skills. In contrast, toehold or de novo entry may entail a weak or nonexistent distributional network, limited financial resources, technological barriers and, ultimately, unpredictable potential for growth.[78] The obvious nature of the advantages of merger with a large, established firm makes it improbable that an acquiring corporation would have been

---

[75] 410 U.S. 526 (1973).

[76] *See id.* at 532-33 (plurality opinion) (White, J.). The four members of the Court who accepted the district court's finding with respect to de novo entry remanded for consideration of the applicability of perceived potential entrant doctrine, *id.*, and two other Justices concurred in the result. *Id.* at 538 (Douglas, J., concurring); *id.* at 545 (Marshall, J., concurring).

Compare the reliance on more comprehensive objective evidence in United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1238-39 (C.D. Cal. 1973) (concluding, after examination of objective factors, that the acquiring company would have entered by alternate means), *aff'd mem.*, 418 U.S. 906 (1974), and United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 772 (D. Md. 1976) (concluding, after examination of objective factors, that the acquiring company would not have entered by alternate means).

[77] The demand for definite evidence that top management considered toehold entry a sound alternative to the acquisition under attack may have reached its zenith in FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977). The FTC challenged the acquisition by Arco, a major petroleum refiner-distributor, of The Anaconda Company, the nation's third largest copper refiner. The Commission argued that Arco could have, and would have, entered the copper industry de novo if the merger were set aside. Despite evidence of Arco's interest and capacity to enter the copper mining industry and documents by lower level managerial personnel recommending entry by various means, the circuit court held the evidence insufficient to characterize Arco as an actual potential entrant:

> While the proof thus shows a continuing interest on the part of Arco in the copper industry and continuing studies as to the best means of entry, *it fails to show a significant commitment at the decisional level* that Arco was seriously considering original entry into the copper markets or entry by toehold acquisition.

Id. at 296-97 (emphasis added). In a footnote, the court added: "We think there is a fundamental distinction between suggestions and ideas advanced by lower-level management that grass roots entry into copper was advisable and a commitment by the company to that type of diversification." *Id.* at 296 n.9.

[78] "It takes years to build a new business, and we want to get there a little quicker than that." . . ."In some fields you probably couldn't start a new business from scratch because there are too many competitors already out there."

> Furthermore, with stock prices depressed, "it is cheaper to buy existing assets than to build a new plant—it's as simple as that. . . . And your chances of success are higher." . . . "With new product development, there is a risk that you don't have in an acquisition with a proven product."

Winter, *supra* note 10, at 1, col. 6 (comments of corporate officers).

favorably persuaded by a full scale investigation of available methods of alternative entry made prior to merger. Moreover, the possibilities for manipulation and manufacture of evidence under the subjective approach are manifest.[79] As Justice Marshall indicated in his concurring opinion in *Falstaff*, such evidence, although of some value in actual potential entrant cases, is inherently suspect as biased and self-serving.[80] Given the circumstances, it is hardly surprising that an acquiring company would offer evidence that it had in fact considered and rejected alternatives to large firm merger.[81]

3. Alternative Entry Likely to Lead to Eventual Deconcentration

Proof that entry by the challenged merger would produce immediate anticompetitive effects within the target market is not required under the actual potential entrant doctrine.[82] Instead, the merger is prohibited because it forecloses an alternative form of entry that, if allowed, would itself help to deconcentrate the particular market and thus improve competition. Although the Supreme Court acknowledged in *Marine Bancorpo-*

---

[79] *See* Davidow, Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act, 68 Colum. L. Rev. 1231, 1245-46 (1968) (role of corporate attorneys in manipulation of evidence); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1383 (1965).

[80] United States v. Falstaff Brewing Corp., 410 U.S. at 564-66 (Marshall, J., concurring).

> A defendant in a § 7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered *de novo* if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering *de novo*—a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.
>
> Moreover, in a case where the objective evidence strongly favors entry *de novo*, a firm which asks us to believe that it does not intend to enter *de novo* by implication asks us to believe that it does not intend to act in its own economic self-interest. But corporations are, after all, profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits.

Id. at 568 (footnote omitted). Justice Marshall provided an example of the extent to which a company's protestations that it would never have entered the market de novo indeed are self-serving and unreliable: "When the Government challenged Bethlehem Steel's acquisition of Youngstown Steel in a § 7 proceeding [in the 1950s], Bethlehem vigorously argued that it would never enter the Midwestern steel market *de novo*. But when the merger was disallowed . . . Bethlehem nonetheless elected to make a *de novo* entry." *Id.* at 568 n.20 (citation omitted).

A further example is provided by a study that indicated that, after thirteen banks had been denied approval for proposed mergers by the New York State regulatory authorities, ten of those banks later entered the target market de novo. Kohn & Carlo, Potential Competition: Unfounded Faith or Pragmatic Foresight? (N.Y. St. Banking Dep't, March 1970). *But see* Rhoades & Yeats, An Evaluation of Recent Evidence Advanced in Support of the Potential Competition Doctrine, 19 Antitrust Bull. 543 (1974) (challenging significance of Kohn & Carlo data).

[81] *See* Swennes, Three Theories of Potential Competition Under Section 7 of the Clayton Act: Reaching the Conglomerate Merger, 49 Tul. L. Rev. 139, 153 (1974) (preference for objective evidence); Note, The Potential Competition Doctrine After *Marine Bancorporation*, 63 Geo. L.J. 969, 987 (1975) (criticizing *Falstaff* approach); Note, United States v. Falstaff Brewing Corporation: Potential Competition Re-examined, 72 Mich. L. Rev. 837, 854-57 (1974) (noting shortcomings of both subjective and objective evidence).

[82] However, such proof, if in fact available, can form the basis of a section 7 conglomerate merger challenge. *See* text accompanying note 123 *infra*.

ration that, in theory, the test of alternative entry is whether the proposed alternative "would be likely to produce deconcentration of the [target] market over the long run *or other procompetitive effects,*"[83] the Court in practice looked to the long-term benefits of eventual deconcentration as a virtually exclusive measure of procompetitive effect. The defendant, a large Seattle bank, had attempted to enter the Spokane banking market through acquisition of the third largest bank in that city. In challenging the acquisition, the government argued, under the actual potential entrant doctrine, that the defendant could have entered the market through a toehold acquisition or internal expansion. Because of severe restrictions imposed upon branch banking in Washington, however, neither a new bank nor an existing bank acquired by the defendant would have been permitted to establish additional branches in the foreseeable future. The defendant thus argued that it would have been impossible for a company entering the Spokane market by de novo or toehold means to expand its market share to a level sufficient to produce a procompetitive influence on the market. The Supreme Court, looking only to the reasonable probability of eventual deconcentration, agreed with the defendant's approach and thus rejected the government's challenge.[84]

In so doing, the Court foreclosed consideration of other relevant forms of procompetitive effect peculiar to de novo and toehold entry. As the Court acknowledged,[85] a generalized insistence upon significant deconcentration as the only permissible indicator of procompetitive effect would have been inconsistent with past decisions involving other industries.[86] However, the Supreme Court justified the result reached in *Marine Bancorporation* by reference to the presence of extensive regulatory control in the Washington banking industry.[87] Such a line of reasoning, based solely upon the limitations on branch banking in the Spokane market, ignores the potential for procompetitive influence of even small additional participants in a highly concentrated market. As a new entrant into such a market increases its production capacity and begins to compete aggressively for a larger market share, the result will be at least a short-term increase in supply and decrease in price. The company may offer an expanded or improved range of services or develop more effective marketing techniques, forcing existing competitors to adjust their practices correspondingly. At the same time, the mere increase in the number of

---

[83] 418 U.S. at 633 (emphasis added).

[84] *See id.* at 636-38.

[85] *See id.* at 637 & n.43 (citing United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973), and FTC v. Procter & Gamble Co., 386 U.S. 568 (1967)).

[86] *See* United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (Court held illegal merger involving acquisition of company with 1.3% market share in market 76% of which was held by five companies and 95.7% by nine companies; important to maintain independent and innovative "maverick" in aluminum conductor industry). "As [oligopoly] develops the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." *Id.* at 280.

[87] *See* 418 U.S. at 637-39.

firms operating within the market may make effective horizontal collusion more difficult to establish.[88]

The failure of the Court in *Marine Bancorporation* to consider alternative forms of procompetitive effect obviously makes successful application of the actual potential entrant doctrine more difficult. Rarely can it be said with any certainty that a particular de novo or toehold acquisition will result in a major new market competitor. More typically, the new entrant will have staked out, after a few years, a small market position from which it exercises a limited, but nonetheless significant, influence on competition. In the face of such realities, complete dismissal of the limited competitive effects of small competitors can result only in ultimate rejection of the actual potential entrant doctrine.[89]

4. Prospects for Application of the Actual Potential Entrant Doctrine

Although accepted by several lower courts[90] and by the majority of legal commentators,[91] the actual potential entrant doctrine has not yet been embraced by the Supreme Court. In both *Marine Bancorporation* and the earlier *Falstaff* decision, the Court expressly declined to consider whether the doctrine could ever provide an independent and exclusive basis for invalidation of a merger.[92] In accordance with the language of section 7

---

[88] *See* Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 184 (1974); Turner, *supra* note 79, at 1383-84.

> [T]he problem of proving that the new entrant would have been a substantial competitive factor can be overstated. It is highly likely that a new entrant in the kind of industry we are talking about—a tight oligopoly industry—will shake things up a great deal in the process of trying to acquire a substantial market share, even if in the end its inroads are rather modest. It is at least arguable that the probability of a substantial lessening of competition for a period of time is enough for section 7 to be invoked, even though the eventual impact is more problematical.

Id. at 1383 (Footnote omitted) (argument made in context of comparison between de novo entry and entry by merger with established large firm, but effects presumably equally likely in case of toehold entry by major acquiring firm).

[89] This will obviously be particularly true in the area of bank mergers. *See* Horsley, *Marine Bancorporation, Connecticut National Bank* and Potential Competition: A Critique, 55 B.U.L. Rev. 3, 17 (1975).

[90] Kennecott Copper Corp. v. FTC, 467 F.2d 67, 74-79 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); Ekco Prods. Co. v. FTC, 347 F.2d 745, 752-53 (7th Cir. 1965); United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1234 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 562-63 (N.D. Ill. 1968); United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd mem.*, 385 U.S. 37 (1966).

[91] *See, e.g.*, Fox, Toehold Acquisitions, Potential Toehold Acquisitions, and Section 7 of the Clayton Act, 42 Antitrust L.J. 573, 579 (1973); Robinson, *supra* note 88, at 183 n.139 (1974); Turner, *supra* note 79, at 1379-80; Note, *supra* note 81, 63 Geo. L.J. at 972 n.13. *But see* Rahl, Applicability of the Clayton Act to Potential Competition, 12 ABA Antitrust Section 128, 143 (1958).

[92] Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de*

of the Clayton Act, which refers to acquisitions that serve "substantially to lessen competition,"[93] courts have traditionally tested the legality of mergers by reference to the merger's own potential for *anti*competitive impact upon a particular market.[94] In contrast, the actual potential entrant doctrine is concerned with the loss of the potentially *pro*competitive impact of entry other than by merger. Application of the doctrine thus raises a conceptual issue regarding the meaning of "lessening" competition under the Clayton Act. Although a strict interpretation of the term might suggest the incompatibility of the Act's language and the actual potential entrant doctrine, such a conclusion would be inconsistent with the intent and spirit of section 7, which was amended in 1950 at least in part to ensure coverage of conglomerate mergers.[95] The statute requires a comparison between the level of competition prevailing in the absence of merger and the level after merger. If the latter is "substantially less" than the former in a particular case, the merger should be proscribed. A present change of market structure—the merger—that forecloses future market improvement in the form of alternative entry can indeed be said to have "lessened" competition.[96]

---

novo or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner.

United States v. Falstaff Brewing Corp., 410 U.S. at 537; *accord,* United States v. Marine Bancorporation, Inc., 418 U.S. at 625 & n.28 (quoting *Falstaff*).

[93] 15 U.S.C. § 18 (1970), *as amended,* Act of Sept. 30, 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383.

[94] *See* text accompanying note 15 *supra.*

[95] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317 & n.31 (1962) (citing H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949)).

[96] One means of avoiding the statutory construction problem would involve asserting that conglomerate mergers may "tend to create a monopoly" even if they do not technically "lessen competition" within the meaning of section 7, 15 U.S.C. § 18 (1970), *as amended,* Pub. L. No. 94-435, § 201, 90 Stat. 1383 (1976). An argument could be made that "monopoly" under section 7 is not synonymous with "monopoly" under the Sherman Act, *id.* § 2, but rather refers to market conditions that have the economic characteristics of a monopoly. To the extent that a merger contributes to the perpetuation of an oligopoly, it results in the same type of effects, such as higher prices and restricted supplies, that occur when one or more market competitors participate in a monopoly.

Another approach would involve reliance upon section 5 of the Federal Trade Commission Act, *id.* § 45(a)(2), which makes unlawful "unfair methods of competition." On a number of occasions, the Supreme Court has held that this provision reaches antitrust violations at their incipient stages, thus proscribing conduct that is not itself violative of the Sherman or Clayton Acts. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 320-22 (1966); FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394-95 (1953); Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941).

The Federal Trade Commission usually brings merger cases under both sections 5 and 7 and has not argued that section 5 extends to situations not covered by section 7. In future cases, however, the Commission might argue that mergers that foreclose the possibility of future improvements to competition are, at a minimum, "unfair methods of competition" under section 5. *Cf.* FTC Opinion & Order, *In re* Perpetual Fed. Sav. & Loan Ass'n, 846 Antitrust & Trade Reg. Rep. (BNA) F-1 (No. 9083, Dec. 6, 1977) (interlocking directorates attacked solely under § 5, no Clayton Act § 8 claim). Two judicial opinions, however, have questioned whether section 5 would add any scope to an FTC merger challenge. *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 601 (1965) (Harlan, J., concurring) (implication that § 5 less expansive in coverage than § 7); FTC v. Atlantic Richfield Co., 549 F.2d 289, 291 n.1 (4th Cir. 1977) (no authority for claim that merger could violate § 5 in absence of violation of § 7).

B. *Perceived Potential Entrant Theory*

Actual potential entrant theory concentrates upon the loss of potential market enhancement, as yet unrealized, that might have occurred at the time of some future de novo or toehold market entry. *Perceived potential entrant theory* looks instead to benefits already being conferred upon the acquired firm's market prior to the challenged merger. According to this theory, the mere presence of the acquiring firm at the edge of an oligopolistic target market will cause competitors within that market to adjust their production and marketing strategies so as to discourage the acquirer from attempting de novo or toehold entry, if those competitors perceive such entry as a realistic threat.[97] With an eye toward the potential entrant, market participants may engage in "limit pricing"[98]—the practice of maintaining market prices just below an entry-triggering level.[99] Similar results may also be achieved through more subtle defensive tactics, such as product and service improvement or expansion of production capacity, intended to serve as both psychological and economic deterrents to entry.

If a section 5 approach were feasible, the FTC might also be able to proceed through rulemaking. At least one court has held that the Commission can promulgate substantive rules to define "unfair methods of competition." National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974). *Compare* Magnuson-Moss Act § 202(a)(1), 15 U.S.C. § 57a(a)(1) (Supp. V 1975) (specifically giving FTC the authority to promulgate substantive rules defining "unfair or deceptive acts or practices"), *with* Magnuson-Moss Act § 202(a)(2), 15 U.S.C. § 57a(a)(2) (Supp. V 1975) (leaving unchanged whatever authority the FTC might have had under the original 1914 Act to promulgate rules defining "unfair methods of competition"). To the extent that the FTC does have this rulemaking authority, it might promulgate rules declaring, for example, mergers of companies of greater than a certain size to be violations of section 5 of the FTC Act. *See also* 858 Antitrust & Trade Reg. Rep. (BNA) at A-9 (Apr. 6, 1978) (speech of A. Dougherty, Dir., FTC Bureau of Competition).

[97] *See* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173-74 (1964) (application of perceived potential entrant theory to proposed joint venture): "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

The Supreme Court expressly approved application of the perceived potential entrant theory to conglomerate mergers in United States v. Falstaff Brewing Corp., 410 U.S. at 532-36. Although the theory is usually discussed in terms of a perceived threat of de novo entry, it would be equally applicable with respect to toehold entry by a fringe firm with substantial resources; after takeover, the fringe firm could challenge existing firms by its drive to expand the toehold's share of the market.

[98] *See generally* J. Bain, Barriers to New Competition (1956); Dunfee & Stern, *supra* note 27, at 835-43; Markovits, Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws, 1975 Wis. L. Rev. 658; Note, *supra* note 56, 40 U. Chi. L. Rev. at 167-75.

[99] The entry-triggering determinant is the price level that the potential entrant believes will prevail in the target market after entry, and not the price level prevailing prior to entry. Thus, limit pricing will be attempted only in those situations in which existing competitors expect the potential entrant to accept the limit price as reflective of actual post-entry prices. *See* Note, *supra* note 81, 72 Mich. L. Rev. at 848-49. A more realistic enforcement approach, however, might involve challenging mergers into markets in which present market participants have been seeking a "limit return." In such markets, entry has presumably been triggered by the fringe firm's perception of supra-normal industry profits and its expectation that such profits would continue to prevail even after entry.

The procompetitive influence of these tactics is obviously lost if a perceived potential entrant in fact enters the target market through merger with an established market competitor. Thus, entry by the perceived entrant is prohibited because the firm, merely by virtue of its position at the edge of the market, has a positive effect upon competition within the market.[100] As under the actual potential entrant theory, however, the acquired company's market must be concentrated and thus less than fully competitive:[101] the presence of one or more potential entrants can have no effect upon competition at the edge of a market in which goods and services are already being provided at optimum levels.[102] Furthermore, courts construing the perceived potential entrant theory have imposed three other requirements: (1) that companies within the target market actually perceive the acquiring firm as a potential entrant; (2) that they moderate their conduct in response to that perception; and (3) that the acquiring firm be one of a limited number of potential entrants.

1. Requirement That the Acquiring Company Be Perceived as an Entrant

The requirement that firms within the target market actually perceive an acquirer as a potential entrant illustrates the conceptual difficulties that accompany application of the perceived potential entrant theory. Ideally, the criteria for identification of potential entrants should coincide under both branches of the potential competition doctrine: those companies that are *perceived* as likely entrants by market participants should also be *actual* potential entrants. In practice, however, both potential entrants and target market competitors are under the control of fallible managers of varying business acumen, with resulting divergence between market perceptions and actual business practice.

One possible basis for identification of perceived potential entrants would be the type of subjective evidence that received implicit approval for actual potential entrant theory in *Falstaff*.[103] In briefly summarizing

---

[100] "Potential competition . . . as a substitute for . . . [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . . Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets."

United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964) (quoting Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21, at 7-8 (1940)).

There may be some situations in which a company is more valuable as a threat at the market fringe than as an actual market competitor. *See* Ford Motor Co. v. United States, 405 U.S. 562, 567-68 (1972) (quoting district court findings). *But see* Dunfee & Stern, *supra* note 27, at 862 (discussion of situations in which perceived entrant on market fringe might have anticompetitive influence).

[101] *See* United States v. Marine Bancorporation, Inc., 418 U.S. at 624-25; text accompanying note 25 *supra*.

[102] *See* FTC v. Procter & Gamble Co., 386 U.S. at 593-94 (Harlan, J., concurring) (limit pricing not relevant so long as competition is itself sufficient to keep market prices below entry-triggering levels).

[103] *See* text accompanying note 76 *supra*.

the requirements for application of the perceived potential entrant theory, Justice White stated in *Falstaff* that evidence of the actual intentions of the acquiring firm is not "irrelevant or . . . to be looked upon with suspicion," but it is also "not necessarily the last word" with respect to proof of perceived potential entrant status.[104] Justice Marshall was more critical, however, asserting in his concurring opinion that the use of such evidence is even less justifiable as a basis for identification of perceived entrants than actual entrants:

> The perceived potential entrant exerts a procompetitive effect because companies in the market *perceive* it as a potential entrant. The companies in the market may entertain this perception whether the perceived potential entrant is *in fact* a potential entrant or not. Thus, a firm on the fringe of the market may exert a procompetitive effect even if it has no intention of entering the market, so long as it seems to those within the market that it may have such an intention. It follows that subjective testimony by the managers of the perceived potential entrants is irrelevant.[105]

The actual perceptions of the officers of companies operating within the target market regarding the probable intentions of the acquiring firm are, although similarly "subjective," obviously *relevant* to perceived potential entrant status.[106] However, serious doubts as to the *reliability* of such evidence suggest that it would be unsuitable as a substantial independent basis for application of the perceived potential entrant theory. Testimony from market firms may reflect the same self-serving qualities that characterized the evidence of the acquiring firm's officers; the phenomenon of limit pricing that underlies the perceived potential entrant theory itself presupposes the desire of market competitors to discourage entry by the acquiring firm.[107] Moreover, the unreliability inherent in all testimony of

---

[104] United States v. Falstaff Brewing Corp., 410 U.S. at 535-36. The district court on remand in *Falstaff* construed Justice White's opinion to authorize a two-part test, involving both subjective and objective evidence. *See* United States v. Falstaff Brewing Corp., 383 F. Supp. 1020, 1023 (D.R.I. 1974) (judgment for defendant on remand). In United States v. Phillips Petroleum Co., 367 F. Supp. at 1235-37, the court read language in *Falstaff* to favor objective evidence over the subjective testimony of the officers of the acquiring firm. *Cf.* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964) (joint venture) ("[p]otential competition [in a perceived potential entrant case] cannot be put to a subjective test").

[105] United States v. Falstaff Brewing Corp., 410 U.S. at 564 (Marshall, J., concurring) (footnotes omitted).

[106] *See id.* at 534 n.13 (White, J.) ("[t]he Government did not produce *direct evidence* of how members of the New England market reacted to potential competition from Falstaff") (emphasis added).

[107] *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 860 n.13 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974) (denial of preliminary injunction) (court dismissed testimony of market competitors in brief footnote); *accord,* FTC v. Tenneco, Inc., 433 F. Supp. 105, 112 n.18 (D.D.C. 1977). *But see* United States v. Black & Decker Mfg. Co., 430 F. Supp. at 770-71 (extensive use of evidence of subjective perception of market participants).

Although even more suspect as evidence, testimony of the surprise of officers of the friendly merger target upon discovery of the acquiring company's intentions was found acceptable in at least one instance. *See* Sterling Drug, Inc., 80 F.T.C. 477, 603 (1972). *See also* United States v. Falstaff Brewing Corp., 383 F. Supp. 1020, 1023 (D.R.I. 1974) (remand) (assertion by motivation can only be compounded in a survey of the subjective perceptions of the numerous competitors operating within the target market.[108]

To the extent that they do behave rationally, market participants presumably base their perceptions regarding the risk of entry by additional competitors upon analysis of incentives to entry, market barriers and available toehold candidates. Justice White suggested in *Falstaff* that the perceptions of participants be measured by an independent judicial evaluation of such factors to determine whether they would influence a rational—rather than specific—firm within the target market to perceive the acquiring firm as a potential entrant.[109] This "rational businessperson" test makes possible reliance upon the same objective economic and business considerations already before a court in those cases involving claims under both the actual and perceived potential entrant theories and addresses Justice Marshall's expressed concerns about the use of subjective evidence; moreover, this test has already been applied in several lower court decisions.[110]

Market perceptions might also be measured by analysis of price and profit levels within the target market. Evidence that these levels were lower than normally expected in an apparently oligopolistic market would suggest the presence of limit pricing.[111] In effect, such an approach would accept evidence of market *response*—limit pricing—as inferential proof of market *perception* of the acquirer or similar firms as potential entrants. However, determination of "normal" price and profit levels would be difficult at best, and subnormal levels might merely indicate that a particular industry is already competitive, despite its concentrated structure.

---

former officers of merger target that the acquiring firm had been perceived as "no threat"); United States v. Phillips Petroleum Co., 367 F. Supp. at 1238-39; *cf.* text accompanying notes 75-81 *supra* (use of subjective evidence in actual potential entrant cases).

[108] The potential for inconsistency in subjective market perception evidence is clearly illustrated in *Black & Decker*, in which the opposing parties were able to assemble credible testimony from industry sources supporting both sides of the market perception issue. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. at 770-71.

[109] The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

United States v. Falstaff Brewing Corp., 410 U.S. at 533-34 (footnotes omitted).

[110] *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. at 769-73 (court relies upon both subjective market perceptions and objective economic factors); *accord*, United States v. Falstaff Brewing Corp., 383 F. Supp. 1020, 1023-24 (D.R.I. 1974) (remand); United States v. Phillips Petroleum Co., 367 F. Supp. at 1255-56.

[111] *Cf.* R. Posner, Antitrust Law: An Economic Perspective 69-70 (1976) (discussion of evidence of abnormally high industry profits as indicator of horizontal price fixing).

2. Market Response as a Separate Requirement

At least one lower court has required proof of market response to the company perceived at the market fringe as a separate and additional precondition to application of the perceived potential entrant theory.[112] Such a requirement ignores the significant difficulties inherent in direct proof of market behavior—difficulties that have been reflected in the dominant role of concentration as a surrogate in merger evaluation for proof of the predicted effect.[113] As indicated above, the specific response evidence required under the perceived potential entrant theory—for example, proof of "reasonable" prices and "appropriate" profit levels—may be extremely difficult to establish. Furthermore, little agreement exists as to whether the conduct hypothesized under this theory actually occurs in practice, with the result that evidence of market response may not be available.[114] The absence of such evidence may be insignificant to evaluation of market perceptions; however, because direct evidence of such

---

[112] *See* United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974) (burden on government to prove that probable result of perception of defendant as potential entrant would be substantially to lessen competition). *But see* United States v. Black & Decker Mfg. Co., 430 F. Supp. at 773 (government need not introduce evidence of actual market response); United States v. Phillips Petroleum Co., 367 F. Supp. at 1257.

The Supreme Court, in *Marine Bancorporation,* seems to have considered proof of market response to represent a separate precondition for application of the perceived potential entrant doctrine:

> In developing and applying [this theory], the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market *in fact tempered oligopolistic behavior on the part of the existing participants in that market.*

418 U.S. at 624-25 (emphasis added). However, the precise question whether proof of market response constitutes a separate precondition was not reached in the *Marine Bancorporation* case, because the Court ultimately concluded that the market participants could not have even perceived the defendant as a potential entrant into the Spokane market. *See id.* at 639-40. The Court's approach to proof of competitive effect in past cases at least leaves open the possibility that limit pricing behavior could be inferred from proof of market perceptions and concentration ratios in an appropriate case. *See* United States v. Falstaff Brewing Corp., 410 U.S. at 534 n.13 ("[t]he Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law") (citing, *inter alia,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964), and Brown Shoe Co. v. United States, 370 U.S. 294 (1962)).

[113] *See, e.g.,* United States v. General Dynamics Corp., 415 U.S. 486, 496-97 (1973) (horizontal merger) (proof of concentration by industry production data); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 176 (1964) (joint venture) (discussion of difficulties inherent in proof of precise competitive effect of elimination of a potential entrant); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963) (horizontal merger) ("relative economic data . . . both complex and elusive").

[114] Professor Markovits has argued that limit pricing seldom, if ever, occurs in practice. *See* Markovits, *supra* note 98, at 666-90; *accord,* Dunfee & Stern, *supra* note 27, at 837-39, 851. *See also* Berger & Peterson, *supra* note 37, at 495 ("conditions under which a recognized potential entrant merger will reduce competition [are] rarely, if ever, met"). *But see* F. Scherer, Industrial Market Structure and Economic Performance 215, 225 (1970) (reaching contrary conclusions).

perceptions remains available, it suggests that a strict additional requirement of proof of market influence would in most cases entirely defeat application of the perceived potential entrant theory.

3. Limited Number of Perceived Entrants

It is presumed under the perceived potential entrant theory that the loss of a single potential entrant through merger will not significantly reduce the procompetitive influence of a large number of similar entrants poised at the edge of the target market.[115] However, in most situations, it is unlikely that an acquirer will be identifiable as the only perceived potential entrant or even as one of a small group of such entrants.

Geographical factors may place constraints upon the class of available entrants. In *United States v. Falstaff Brewing Corp.*,[116] for example, the defendant was the fourth largest brewer in the United States, the largest regional brewer in a product line in which there was an evident trend toward nationwide production, and the regional brewer whose established operations were closest to the New England market. In certain types of product extension mergers, the unique relationship between the acquiring company's resources and the characteristics of a particular product market may be similarly indicative of the limited number of available entrants. In *FTC v. Procter & Gamble Co.*,[117] the acquirer was the nation's largest advertiser and one of a limited number of firms engaged in the sale of household cleaning products on a large scale; the Court upheld application of the perceived potential entrant theory to a merger between the acquirer and the largest producer of liquid bleach, a product that was itself heavily advertised and sold through the acquirer's existing marketing channels to its established class of customers.[118]

More generally, however, it may be difficult, if not impossible, to establish that the defendant was one of a limited number of potential entrants. In those situations in which the exact number of perceived entrants is subject to serious dispute, the plaintiff may be forced into the potentially untenable position of arguing both that entry by the defendant is plausible and likely and, at the same time, that the target market is not so desirable as to attract a significant number of other potential entrants. Such a problem is particularly likely to develop in cases involving pure conglomerate mergers, in which the sole basis for entry is the attractiveness of investment in a particular product or geographic area.[119] This

[115] *See, e.g.*, FTC v. Tenneco, Inc., 433 F. Supp. 105, 112-13 (D.D.C. 1977) (court recognizes requirement that defendant be one of a limited number of firms); *accord*, United States v. Black & Decker Mfg. Co., 430 F. Supp. at 772.

[116] *See* 410 U.S. 526, 528 (1973). *But see* United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974) (on remand, defendant held not to be perceived potential entrant).

[117] 386 U.S. 568 (1967).

[118] *See id.* at 580.

[119] The difficulties inherent in identification of an isolated perceived potential entrant, even in a merger case involving arguably "related" product lines, are illustrated in FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977) (preliminary injunction denied). Tenneco, a

suggests that, whatever its conceptual shortcomings, the perceived potential entrant theory will have practical significance only in those few cases in which special geographic or economic conditions point directly to specific potential entrants.[120]

C. *Prospects for the Future of Potential Competition Doctrine*

Both branches of the potential competition doctrine have clearly lost their effectiveness in recent years. Despite the popularity of the *actual* potential entrant theory with lower courts and commentators, its acceptance by the present Supreme Court seems doubtful, even assuming that all necessary preconditions for its application could be met in practice. The *perceived* potential entrant theory, although accepted and applied by the Court, rests upon an economic theory that remains undemonstrated and is perhaps undemonstrable in practice; thus, this branch of potential competition doctrine will presumably also remain, for the immediate future, a weapon of limited utility. As defense counsel gain experience with both theories and as courts refine their economic analyses, the level of preventive legal counseling will continue to rise, placing ever higher evidentiary burdens upon the government in its enforcement attempts. Moreover, the *Marine Bancorporation* decision itself has cast a substantial shadow over antitrust litigation, with the less than surprising result that defendants have prevailed in all conglomerate merger cases since 1974.[121] *Marine Bancorporation*—and the perhaps illegitimate use made of its rea-

---

large conglomerate, was a leading manufacturer of automobile exhaust systems; its Walker Division accounted for almost one third of national muffler sales. The Federal Trade Commission challenged Tenneco's acquisition of Monroe, which sold 35-40% of all shock absorbers in the United States. Although it was conceded that Tenneco's exhaust system line made it a likely de novo or toehold entrant into Monroe's field, the court rejected the Commission's request for a preliminary injunction. The court reasoned that, because there were numerous other manufacturers of different automotive equipment who were equally likely potential entrants, the loss of one perceived entrant such as Tenneco could have only minimal competitive effect.

Tenneco can be contrasted with *Phillips Petroleum,* which involved a geographic extension merger. The acquiring company, Phillips, one of the ten largest petroleum refiners in the United States, had no gasoline stations on the West Coast. Phillips attempted to acquire Tidewater, one of the larger gasoline sellers in California. Because Phillips was one of only a few large petroleum companies not already operating on a nationwide basis, and because there were marketing and advertising benefits from such a method of operation, the court considered it highly probable both that Phillips would in fact enter by alternative means should the proposed large-firm merger be prohibited and that market participants would perceive Phillips as likely to attempt such entry. *See* United States v. Phillips Petroleum Co., 367 F. Supp. at 1254.

[120] Professor Turner has suggested that application of the perceived potential entrant theory should be limited to those situations in which the acquiring company is either the most likely entrant or one of two or three most likely entrants into a particular market. He argues that the theory should not be applied in cases involving more than three perceived entrants, because in such cases "the existence of a significant adverse competitive effect is too speculative and remote to deserve treatment, in and of itself, as a decisive factor against a merger." Turner, *supra* note 79, at 1365.

[121] *See* note 9 *supra.*

soning in such later lower court decisions as *BOC*[122]—illustrates the fragility, in the face of judicial opposition, of any legal doctrine whose effectiveness depends upon inherently speculative economic predictions. Success in challenging conglomerate mergers will thus require increased reliance upon alternative approaches, changed judicial attitudes and, ultimately, legislative reform.

III. Present Direct Injury to Competition

As has been discussed, potential competition doctrine focuses upon the benefits to the target market of either perceived or actual potential for entry by the acquiring firm in the absence of the proposed merger. As an alternative approach, courts have also looked to the potential of the proposed merger for direct anticompetitive injury to the acquired firm's market. The recognized anticompetitive effects have taken two forms—entrenchment and reciprocity. Entrenchment involves the negative competitive impact of displacement within the target market of the acquired firm by an acquiring firm of substantially greater economic power.[123] Reciprocity is the practice, by customers of the acquiring and acquired firms, of doing business with one division of the merged entity in order to obtain the business of another division of the same entity in return.

A. *Entrenchment*

The single most important factor to identification of entrenchment is the size of the acquiring firm in relation to the target market.[124] *FTC v. Procter & Gamble Co.*[125] provides the best illustration of possible market domination by an acquiring firm. Procter & Gamble, a large national manufacturer of low cost, high turnover household products and the largest advertiser in the United States, had assets worth more than $500 million; Clorox, the largest manufacturer of liquid bleach, held almost fifty percent of the national bleach market but had only twelve million dollars in assets.[126] In successfully challenging Procter & Gamble's at-

---

[122] BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977); *see* text accompanying notes 69-74 *supra*.

[123] The possibilities for such effects have been an acknowledged element in antitrust enforcement for more than 45 years. *See* United States v. Swift & Co., 286 U.S. 106, 115-19 (1932) (Court cites possible predatory practices in denying oligopolist-defendants' request for modification of a consent decree under which defendants agreed to refrain from certain types of conglomerate mergers).

[124] On the basis that entrenchment effects are a rare phenomenon in practice, Professor Turner has argued that they should be controlled only through an analysis of relative firm size. He would prohibit mergers on an entrenchment basis only in those cases in which the acquired firm's market was a "small-firm loose oligopoly" and the acquiring firm was "disproportionately large," meaning that it had "roughly fifteen or more times the assets of the largest firm selling in the market in which the acquisition is made." Turner, *supra* note 79, at 1360.

[125] 386 U.S. 568 (1967). *See generally* Elman, *Clorox* and Conglomerate Mergers, 6 ABA Antitrust L.J. 23 (1967).

[126] *See id.* at 570-73. Procter & Gamble's yearly advertising budget was more than twice Clorox' annual sales. *See id.* at 571, 573. Note that Clorox and one other firm accounted for almost 65% of national bleach sales; when combined with the relative assets of Clorox and

tempted acquisition of Clorox, the FTC argued that the acquirer's massive financial resources would permit it to dominate, both economically and psychologically, the liquid bleach market. According to this "deep pocket" theory,[127] cash reserves, easier or less expensive access to outside capital, and income from other operations would give Procter & Gamble a grossly disproportionate capacity to accept the reduced profits or short-term losses necessary for initiation and survival of market price wars. At the same time, the size of the new market entity would act to intimidate present competitors from active competition and to discourage new market entry for fear of retaliation.[128] The cumulative effect of such considerations, according to the Court in *Procter & Gamble,* would be substantially to raise market entry barriers and further to encourage long-term market concentration.[129]

Similar effects might also result from "synergistic" interaction between the acquiring and acquired firms and their respective product lines.[130] In *Procter & Gamble,* this interaction was closely related to the economic strength of the acquiring firm: Procter & Gamble, enormously influential in the advertising and distribution of household products, moved into a product line that depended upon the same method of distribution, the same retailers and the same high level of advertising required for its existing products; as a result, it could take advantage of volume advertising discounts and elaborate promotional schemes.[131] Similarly, an acquir-

---

Procter & Gamble, this would be sufficient to bring the *Procter & Gamble* case within Professor Turner's test for entrenchment. *See* note 124 *supra.*

[127] *See, e.g.,* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 78 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974).

[128] The mere fear of retaliation, even without any actual predatory acts by the acquiring firm, will have limiting effects upon market competition. *See generally* Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 705-09 (1975). *Cf.* Reynolds Metals Co. v. FTC, 309 F.2d 223, 229-30 (D.C. Cir. 1962) (discussion of anticompetitive influence of Reynolds, the world's largest producer of aluminum foil, with annual sales of more than $400 million, over the market of an aluminum floral wrap company acquired by Reynolds; acquired company had $500,000 in sales and 30% of the floral wrap market).

[129] *See* FTC v. Procter & Gamble Co., 386 U.S. at 575-79; General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968) (entry of major corporation into highly concentrated steel wool pad market will substantially raise entry barriers). The increase in entry barriers present in the *Procter & Gamble* and *General Foods* cases is itself a form of adverse impact on *potential competition,* because it limits the ability of additional firms to enter the target market and thus reduces the likelihood of eventual deconcentration. It may also lead directly to higher market prices, as would occur if the entrenching firm was also eliminated as a perceived potential entrant. *See* FTC v. Procter & Gamble, 386 U.S. at 593-97 (Harlan, J., concurring).

[130] *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. at 774 (entrenchment claim rejected on merits) (test of entrenchment is by "degree of synergy between the acquired and acquiring [firms]"); United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973) (entrenchment claim rejected on merits) (entrenchment requires "factual bases and economic theory as applied to such facts indicating synergy [between the companies]").

[131] *See* FTC v. Procter & Gamble Co., 386 U.S. at 575 (summary of FTC findings); *accord,* General Foods Corp. v. FTC, 386 F.2d 936, 945 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968). *Cf.* United States v. Hughes Tool Co., 415 F. Supp. 637, 644-45 (C.D. Cal. 1976)

ing firm may possess research, marketing, or management skills valuable to development and promotion of a particular product. In other situations, considerations wholly divorced from financial strength—such as reputation, customer loyalty and ownership of particular trademarks—might provide the substituting firm with a decided competitive edge over other market participants.[132]

Despite the proliferation of possible criteria for identification of entrenchment, however, the lower courts have essentially failed in their attempts to make principled extensions of the analysis developed in *Procter & Gamble.* As a result, entrenchment has remained at best a supporting basis for prohibition of conglomerate mergers. In some cases involving factors other than relative economic power, the examination of entrenchment effects appears to be based upon an analysis so indefinite as to approach random speculation.[133] Even in *Kennecott Copper Corp. v. FTC,*[134] which involved the more traditional "deep pocket" approach, the court failed to attempt any search for rival firms that, although smaller than the acquirer, might have sufficient financial strength to resist intimidation by a dominant firm.[135] To some extent, these problems may reflect difficulties inherent in applying to the common run of conglomerate merger cases a theory developed in the almost unique factual setting of the *Procter*

(specialized, limited production nature of acquired company's tool business limits possible impact on sales and distribution of large firm takeover).

[132] *See, e.g.,* United States v. Hughes Tool Co., 415 F. Supp. 637, 645 (C.D. Cal. 1976) (acquired firm had its own established reputation, thus unlikely to benefit from takeover by another larger and established firm).

Some of these factors may make effective competition with the entrenched firm more difficult for reasons totally unrelated to price, quality, or efficiency. Others, however, may involve legitimate economies of scale, or benefits of more effective management or marketing. Such factors, in spite of their potential for predation or market dominance, are accepted as desirable by-products of the superior competitive position of the acquiring firm. This apparent inconsistency reflects the tension that exists under the Clayton Act, and under the antitrust laws in general, between necessities of enforcement and a competitive ideal. *See* FTC v. Procter & Gamble Co., 386 U.S. at 579-80 (majority opinion) (volume advertising discounts not acceptable defense to claim of negative effect on competition under section 7); *id.* at 603-04 (Harlan, J., concurring) (proof of mere dollar savings not proof of actual economies). "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." *Id.* at 580 (majority opinion) (citing Brown Shoe Co. v. United States, 370 U.S. 294 (1962)). To some extent, the disparity between possible economies in particular cases and the criteria for control of mergers could also reflect the tension between the competitive ideal and a concern with protection of smaller business entities. *See* section IV *infra.*

[133] *See, e.g.,* Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 518 (3d Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970) (two-paragraph entrenchment discussion; passing reference to *Procter & Gamble* as "perhaps the leading case").

[134] 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974); *see* note 28 *supra.*

[135] *See* Comment, 86 Harv. L. Rev. 772, 783 (1973) (citing Turner, *supra* note 79, at 1360); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 77-79 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974). *Cf.* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 865 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974) (denial of preliminary injunction) (smaller competitors who have already had to live among large market firms unlikely to "cower" at the prospect of market entry by additional large firm).

& Gamble case.[136] In addition, considerable disagreement exists among economists and antitrust attorneys over whether the competitive behavior hypothesized for acquiring firms and their competitors under entrenchment theory occurs under actual market conditions.[137] Nevertheless, in view of the recent judicial hostility to the potential competition doctrine, a return to reliance on entrenchment may suggest a useful method of challenging some conglomerate mergers. An attempt to develop consistent criteria for identifying entrenchment effects is critical to the successful invocation of a method of merger challenge that depends upon proof of potential for direct market injury.[138]

B. *Reciprocity*

In some conglomerate merger cases, the combined purchasing power of the acquiring and acquired firms serves to encourage business dealings between these companies and their suppliers. For example, if the acquired company has been selling its goods in a market in which the acquiring company makes substantial purchases, the acquiring company's suppliers may consider it desirable, with or without explicit encouragement from the merged firm, to direct their own purchasing needs to the acquired company.[139] The potential for anticompetitive impact implicit in such reciprocal dealings parallels that of market foreclosure in vertical merger cases.[140] The predominant concern in those cases is that the permanent linkage of previously independent customers and suppliers

---

[136] *Procter & Gamble* makes clear that the likelihood of entrenchment effects increases if the acquired company's product is a high turnover, low-priced, mass-marketed commodity, the sale of which relies heavily on pre-selling by advertising. *See also* United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 552 (N.D. Ill. 1968).

[137] *See generally* FTC v. Procter & Gamble Co., 386 U.S. at 588-89 (Harlan, J., concurring); Hearings on Economic Concentration, Part 8, Before the Subcommittee on Antitrust and Monopoly Legislation of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970) (statements of Willard Mueller, Richard Arnould, J. Fred Weston, Donald F. Turner, Richard McLaren and Caspar Weinberger); Koller, The Myth of Predatory Pricing: An Empirical Study, 4 Antitrust L. & Econ. Rev. 105 (1971). *Compare* Blair, *supra* note 15 (entrenchment effects constitute significant problem), *with* Posner, Conglomerate Mergers and Antitrust Policy: An Introduction, 44 St. John's L. Rev. 529 (spec. ed. 1970) (entrenchment effects rarely present serious problem), *and* Turner, *supra* note 79, at 1379-86 (same).

[138] Admittedly, many of the adverse effects described by the entrenchment doctrine would also take place if the defendant were to enter de novo or by a toehold entry instead of by the challenged large scale entry. Nonetheless, requiring those alternate forms of entry is still preferable from the vantage point of increasing competition. First, if those alternatives were followed, the target firm would still remain as a significant competitor. Second, the defendant would contribute an additional firm to the market, with the short-term (and possibly long-term) benefits of deconcentration. Finally, even if the still-independent target company would have difficulty competing against the giant eventually, requiring an alternate form of entry alters the time frame. During the few years that a large acquirer needs to build up market shares, existing and potential competitors can make adjustments, even including defensive acquisitions.

[139] This description of reciprocity places the acquired firm "upstream" and the acquiring firm "downstream" in the manufacturing and distribution chain. Of course, similar effects would occur if the relative positions were reversed.

[140] *See* United States v. General Dynamics Corp., 258 F. Supp. 36, 56-58 (S.D.N.Y. 1966).

will limit the market opportunities available to other competitors.[141] To the extent that reciprocity results in allocation of market resources through the leverage of control over other business rather than through free competition, it has a similarly destructive effect upon the market.

Express reciprocity agreements have been prohibited since the 1930s as "unfair methods of competition" under section 5 of the Federal Trade Commission Act.[142] Only in 1965, however, did the Supreme Court establish that the *potential* for reciprocal dealings implicit in certain market structures could constitute a sufficient basis for proscription of a merger under the Clayton Act. In *FTC v. Consolidated Foods Corp.*,[143] the Federal Trade Commission challenged the acquisition of Gentry, a manufacturer of dehydrated onions and garlic, by Consolidated, a wholesaler making substantial purchases of foods containing these products. The Commission argued that, after consummation of the Consolidated-Gentry merger, Consolidated would be in a position to influence its suppliers to purchase and use Gentry's products rather than those of Gentry's competitors. In approving the Commission's order setting aside the merger, the Supreme Court held that it was unnecessary for the Commission to make an affirmative showing that Gentry had in fact required suppliers to deal with Gentry. Rather, the Court considered it sufficient that Gentry accounted for a substantial share of a concentrated market in which Consolidated was a major purchaser, thus raising a significant possibility that Consolidated's suppliers might feel obligated to direct their business toward Gentry.[144]

The size and purchasing power of the acquired and acquiring firms[145] and the oligopolistic characteristics of the acquired company's market[146]

---

[141] *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972) (vertical merger).

[142] *See* California Packing Corp., 25 F.T.C. 379 (1937); Mechanical Mfg. Co., 16 F.T.C. 67 (1932); Waugh Equipment Co., 15 F.T.C. 232 (1931).

[143] 380 U.S. 592 (1965).

[144] *Id.* at 597, 600; *see* Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506 (3d Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970); United States v. White Consol. Indus., Inc., 323 F. Supp. 1397 (N.D. Ohio 1971); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966).

[145] The Court did not establish relevant size and market share factors in the *Consolidated Foods* case. Prior to merger, Gentry had about 32% of the total sales of dehydrated garlic and onion; several years after the merger, this had risen to about 35%. *See* 380 U.S. at 595. In United States v. General Dynamics Corp., 258 F. Supp. 36, 63-65 (S.D.N.Y. 1966), a figure of 35-40% of total market sales by the acquired firm was considered sufficient to create a potential for reciprocity. In Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 518-19 (3d Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970), the court considered the potential for reciprocity to have been established because the acquiring company, White, through its Blaw-Knox Division, accounted for about 20% of market sales in an industry in which the *acquired* firm made substantial purchases.

[146] *See, e.g.*, United States v. Pennick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965) (request for preliminary injunction denied) (absence of tight oligopoly). The marketing procedures of the acquired and acquiring firms may also be relevant. *Compare* United States v. White Consol. Indus., Inc., 323 F. Supp. 1397, 1398-99 (N.D. Ohio 1971) (merger may have reciprocity consequences even if acquiring firm does not encourage reciprocal practices), *with* United States v. Northwest Indus., Inc., 301 F. Supp. 1066, 1091 (N.D. Ill. 1969) (claim of corporate officers that purchasers not likely to continue reciprocal practices after realization of the acquired firm's policy against such practices).

form the basis for establishing a potential for reciprocal dealings and thus for prohibition of a merger under section 7. The fact that the merging firms do not, after merger, take advantage of this potential will not necessarily validate the merger. The Supreme Court in *Consolidated Foods* placed little reliance upon evidence offered by the defendant to show that Gentry's market share had either remained stable or decreased slightly after merger. As the Court asserted, such evidence could merely indicate that the acquired firm's product was inferior to others available in the market and that reciprocal dealings were serving artificially to sustain Gentry's market share in the face of contrary competitive pressures.[147]

It has been suggested that "reciprocity is as inevitable a result of widespread conglomerate structure as price rigidity is a consequence of oligopoly structure" and that the proper remedy for both problems is direct control of conglomeration itself through application of potential competition theory.[148] As demonstrated in an earlier section of this article, however, there are serious limitations upon any attempt to apply potential competition theory. Moreover, principal reliance upon potential competition instead of reciprocity ignores the specific advantage of the Supreme Court's approach to reciprocity. Because the potential for reciprocity is based upon proof of a suspect market structure, it offers a simple and mechanical method for isolation of anticompetitive mergers. This avoids the problems of detection and proof of anticompetitive effect that are present under both potential competition theory—which attempts to head off the trend toward concentration—and post-merger standards set forth in provisions of the Federal Trade Commission and Sherman Acts, intended to limit certain forms of large-firm conduct. The shortcomings of these other two approaches are likely to be particularly acute with respect to those mergers having a large potential for reciprocal dealings for two reasons: the likelihood of such practices will probably increase as merging firms become larger and more diversified; and the practices are as likely to result from unilateral actions on the part of suppliers and purchasers as from any conspiratorial activity between these suppliers and purchasers and the merging firms, making detection and successful pros-

---

[147] *See* FTC v. Consolidated Foods Corp., 380 U.S. at 598-600. There was some evidence presented in *Consolidated Foods* that Gentry's products had historically been considered inferior to those of its competitors. *Id.* at 599-600.

[148] Blake, Conglomerate Mergers and the Antitrust Laws, 73 Colum. L. Rev. 555, 569 (1973). Enforcement agencies have been unwilling to rely upon either reciprocity or entrenchment in conglomerate merger challenges. Owen Johnson, former director of the Federal Trade Commission's Bureau of Competition, recently stated that these doctrines were inappropriate for attacking conglomerate mergers and should be replaced by a program of primary, if not total, reliance upon the actual potential entrant doctrine. Mr. Johnson argued that, if either reciprocity or entrenchment were undesirable as business practices, they could more effectively be controlled by direct action under the Sherman or Federal Trade Commission Acts after merger; the mere possibility that such practices might occur was in itself an insufficient basis for disallowance of a merger. *See* Clayton Act Amendment: Hearing on H.R. 6001 Before the Subcommittee on Monopolies and Commercial Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 5-6 (1977) (statement of Owen M. Johnson, Jr.).

ecution under the Sherman Act difficult and unlikely. Renewed reliance by the antitrust enforcement agencies on reciprocity is commended in appropriate cases.

IV. Reforming Section 7 of the Clayton Act

A. *The Background for Change*

The antitrust laws distinguish between those forms of economic activity that are inherently anticompetitive and those that, although subject to abuse, are capable of societal benefit if properly regulated.[149] Thus, price fixing among market competitors is illegal per se;[150] on the other hand, mergers are proscribed only to the extent that they tend "substantially to lessen competition."[151] Although mergers have substantial potential anticompetitive effects, they may also allow the attainment of many desirable objectives. Mergers provide one—and, in some cases, the only—effective method for transfer of an ongoing corporate entity; accordingly, they serve to preserve the liquidity of corporate assets and to encourage investment.[152] Corporate acquisitions in the form of merger may also permit the infusion of new capital and fresh management into ailing business[153] and, even in situations involving successful operations, may promote important economic efficiencies. A horizontal merger may allow two companies to operate from a single plant or distributional network with resulting economies of scale and with reduced costs of production and marketing; furthermore, it may enable smaller companies, through combination, to compete more effectively against larger rivals.[154] Vertical mergers may produce similar savings in costs of production and distribution and may have additional competitive advantages in the form of

---

[149] [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), *quoted in* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

[150] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price-fixing agreement unlawful per se under the Sherman Act); *accord*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[151] 15 U.S.C. § 18 (1970).

> [A]t the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers.... Taken as a whole, the legislative history [of the Celler-Kefauver Act] illuminates congressional . . . desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Brown Shoe Co. v. United States, 370 U.S. 294, 319-20 (1962).

[152] *See* Turner, *supra* note 79, at 1317. An absolute prohibition on sales of ongoing corporate enterprises would act as a serious disincentive to investment; many people invest in a business based on the expectation of selling the enterprise at a later date as a profit-making organization.

[153] *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 588 (1967) (Harlan, J., concurring); *see* Bryan, Conglomerate Mergers: Proposed Guidelines, 11 Harv. J. Legis. 31, 38-40 (1973). *See generally* Turner, *supra* note 79, at 1317-18.

[154] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).

greater market control, because the upstream company gains an assured outlet taking at a predictable rate and the downstream company an assured source of supply.

Precisely because existing antitrust legislation is reasonably effective in controlling abuse, some vertical and horizontal mergers can be permitted, thus allowing their societal benefits to be realized at minimal competitive risk.[155] As previously discussed, however, this existing legislation—fashioned principally with an eye toward the problems of horizontal and vertical acquisitions—is inadequate to the task of controlling large-firm conglomerate mergers. These mergers offer more limited benefits to society and possess their own special potential for economic abuse. Consequently, the successful regulation of such mergers will require, at a minimum, a more specifically tailored statutory framework and perhaps an entirely different theoretical approach as well.

The companies involved in conglomerate mergers operate in different markets—product or geographic—prior to merger. Therefore, many of the opportunities for effecting economies after merger that were present in horizontal and vertical merger cases are no longer available. In pure conglomerate merger cases, little may be gained beyond a reduction in high level personnel[156] and, possibly, greater access to sources of outside capital;[157] the net result may actually be a less efficient operating entity.[158] In return, the target market loses the competitive benefits of a potential new market entrant—perceived or actual—and gains increased risks of entrenchment and reciprocity.

At least as significant as these economic considerations, however, are the pervasive social and political effects of the corporate concentration that is fostered by widespread conglomeration. As large firms have grown larger and as the percentage of national sales and production held by these firms has increased, the result has been more than a gain in economic power. Economic power has in turn given these companies commensurate potential for influence over social and political aspects of society, and corporate management has in recent years actively implemented this potential both openly through legitimate lobbying and

---

[155] At least some mergers will have procompetitive effects. For example, if a company makes a toehold acquisition, it will have to compete vigorously to attain a significant market share and will force existing companies to adjust their prices and improve their goods or services. The larger, acquiring firm will inject new capacity and new competitive forces into the industry which the smaller company could not offer. The merger will, in short, "shake up the industry," at least for a few years. Robinson, *supra* note 88, at 184 (quoting Turner, *supra* note 79, at 1384).

[156] *See* United States v. Falstaff Brewing Corp., 410 U.S. at 541-42 (Douglas, J., concurring) (example of reduction in personnel).

[157] Possible additional benefits, which large firm conglomerate mergers share with other types of corporate acquisitions, might include better risk allocation, protection from price fluctuation through diversification, and possible tax advantages. *See* Bryan, *supra* note 152, at 40-41; *cf. note 132 supra* (possible advertising economies not recognized as sufficient basis for approval of merger).

[158] *See* Blair, *supra* note 15, at 679-83 (conglomerate companies may suffer from certain economic inefficiencies not characteristic of smaller, undiversified firms).

advertising efforts[159] and clandestinely through bribes and kickback schemes.[160] These same companies control thousands of jobs, with corresponding influence over the lives of their employees.[161] In short, concentration of wealth has led to concentration of social and political influence.[162]

Under ideal conditions, the relative allocation of political and social power would perhaps not be made through the antitrust laws.[163] In practice, however, the conclusion that these laws embody political and social aspirations as well as economic goals cannot be escaped and should not be avoided. The Sherman Act, a product of the Populist Era, was as much a reaction to fear about the loss of personal opportunities and the growth of urbanization as it was a response to the specific economic ills that flowed from the Oil, Tobacco and Sugar Trusts.[164] The legislative history of the antimerger provisions of the 1914 Clayton and 1950 Celler-Kefauver Acts similarly reflects concern with both the economic and political ramifications of corporate acquisitions.[165] The decisions of the Supreme Court have themselves consistently indicated an awareness

---

[159] Mobil Oil Corporation, for example, decided in 1973 to reduce substantially advertising of consumer products in favor of a program of "advocacy advertising." The corporation now spends in excess of $20 million per year promoting its views on national energy policy, environmental questions and general economic issues. *See* Ross, Public Relations Isn't Kid-Glove Stuff at Mobil, Fortune, Sept. 1976, at 106-10; Schmertz, Mobil's Motives, Wall St. J., Apr. 10, 1978, at 22, col. 3.

[160] *See, e.g.*, Wall St. J., Sept. 28, 1977, at 48, col. 2 (SEC charges Exxon with $56.5 million of overseas payoffs); N.Y. Times, May 27, 1977, § 3, at 1, col. 4 (estimate by Lockheed Corporation of at least $38 million paid by its employees in bribes and other questionable payments); *id.*, Jan. 14, 1976, at 1, col. 2 (resignation of chief executive officer of Gulf Oil after disclosure of illegal payments).

[161] *See* R. Nader & M. Green, The Nader Report: Corporate Power in America 11 (1973) ("[e]very large corporation should be thought of as a political system, that is, [as] an entity whose leaders exercise power, influence and control over other human beings") (quoting Professor Robert A. Dahl). *See also* United States v. Falstaff Brewing Corp., 410 U.S. at 543 (Douglas, J., concurring) (discussion of negative social influence of large-firm merger); Wall St. J., June 6, 1977, at 2, col. 2 (plans for layoffs and plant closings in steel industry due to competition from imported steel); N.Y. Times, Nov. 10, 1974, at 69, col. 1 (4000 plants employing 200,000 people closed in Michigan from 1967 to 1973 with severest impact in cities with large automobile plants).

[162] *See generally* R. Nader & M. Green, *supra* note 161. "The political power of corporations does not depend upon bribes and illegal pressure tactics. It results from the use of legal tools only available to concentrations of financial power." *Id.* at 25 (quoting former Senator Fred R. Harris).

[163] *See, e.g.*, Blake & Jones, In Defense of Antitrust, 65 Colum. L. Rev. 377, 381-84 (1965) (minimal political interference and maximum individual economic liberty should be dual goals of effective antitrust policy); Bork, Contrasts in Antitrust Theory: I, 65 Colum. L. Rev. 401, 410-15 (1965).

[164] *See generally* W. Letwin, Law and Economic Policy in America (1965); H. Thorelli, The Federal Antitrust Policy (1955); Blake, *supra* note 148, at 574-79; Blake & Jones, *supra* note 163, at 381-84.

> [I]t seems probable that [the drafters of the Sherman Act] also desired to protect equal opportunity and equal access for small business for noneconomic reasons: concentration of resources in the hands of a few was viewed as a social and political catastrophe as well.

C. Kaysen & D. Turner, *supra* note 27, at 19.

[165] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).

that the antitrust laws serve political as well as economic purposes,[166] advancing goals that may at times even require higher prices and less economic efficiency.

An antitrust economic policy favoring smaller businesses in preference to multi-billion dollar conglomerates is, furthermore, not inconsistent with economic efficiency goals. Some have argued that consideration of these political objectives is improper, because preservation of the assumedly inefficient small companies must be at the expense of the consumer, who will pay higher prices reflecting the higher costs of small businesses operating at less than full economies of scale.[167] However, it is equally plausible that encouraging additional centers of economic decisionmaking will both spur innovation and make more difficult express or tacit collusion, with a resultant lowering of prices and increase in volume of production—the very goal of scholars taking a purely economic approach to antitrust.

Despite both the acknowledged existence of these broader considerations and the continued pronouncements about the evils of increased concentration, antitrust regulation has remained solidly grounded upon economic principles—with erratic results.[168] In the late 1960s, the Department of Justice brought a series of challenges to pure conglomerate mergers based solely upon firm size. Although some resulted in divestiture under consent decrees,[169] none of the challenges was successful in producing the desired judicial determination that a pure conglomerate merger, without proof of anticompetitive effect, could be held unlawful.[170] The problem of industrial

[166] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610-12 (1972) (scheme for horizontal allocation of territories to minimize competition found to violate Sherman Act; Justice Marshall questions political propriety of decision about competition being made by group unresponsive to public); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 7 (1958) (tying arrangement found to violate Sherman Act); Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949) (exclusive dealings contract); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (price-fixing). *See also* United States v. Aluminum Co., 148 F.2d 416, 429 (2d Cir. 1945) ("[t]hroughout the history of these [antitrust] statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other") (cited with approval in United States v. Von's Grocery Co., 384 U.S. 270, 275 n.7 (1966)).

[167] *See, e.g.*, R. Posner, *supra* note 111, at 20.

[168] *See* Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1, 33-34 (1977) (principal shortcoming of potential competition doctrine is its failure to take account of noneconomic goals of antitrust).

[169] *See* United States v. International Tel. & Tel. Corp., [1971] Trade Cas. ¶ 73,667 (N.D. Ill. 1971) (consent judgment ordering divestiture of Canteen Corp.); United States v. International Tel. & Tel. Corp., [1971] Trade Cas. ¶ 73,666 (D. Conn. 1971) (consent judgment ordering divestiture of Hartford Fire Ins. Co.); United States v. International Tel. & Tel. Corp., [1971] Trade Cas. ¶ 73,665 (D. Conn. 1971) (consent judgment ordering divestiture of Grinnell Corp.); United States v. Ling-Temco-Vought, Inc., [1970] Trade Cas. ¶ 73,105 (W.D. Pa. 1970) (consent judgment ordering divestiture of Braniff Airlines). *See also* United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969) (hold separate order issued).

[170] A merger which has the effect of increasing economic concentration, even substantially, however, does not necessarily lessen competition substantially; and evidence that a merger may increase economic concentration, without more, is not sufficient to halt a merger under Section 7 without a specific showing that it may have anti-competitive effects.

concentration has grown steadily more acute since passage of the Celler-Kefauver Act. In twenty-five years, the level of concentration has increased twenty-five percent: in 1948, the share of the nation's manufacturing assets accounted for by the 200 largest corporations was 48.2%; by 1958, this share had climbed to 56.5%; and in 1973, the last year for which data are available, the share was 60.3%.[171] Clearly, this trend cannot be attributed solely to an increase in large firm mergers,[172] but it does reflect a failure of the present antitrust laws to achieve their intended goals and thus suggests the need for a new approach.[173]

B. *Specific Proposals*

In dealing with conglomerate mergers, enforcement agencies should obviously give continued consideration to refinement of the weapons available under the existing statutory structure. This might include increased reliance upon entrenchment and reciprocity, concentration upon the more winnable geographic extension merger cases,[174] and emphasis upon challenging conglomerate mergers involving very large corporate entities, regardless of the relationship between the particular firms involved.[175] Renewed attempts could also be made to induce judicial creation of presumptions or other devices favorable to merger control.[176] One basis for encour-

---

United States v. International Tel. & Tel. Co., 306 F. Supp. 766, 796 (D. Conn. 1969) (citation omitted).

[171] Penn, Aggregate Concentration: A Statistical Note, 21 Antitrust Bull. 91, 92-93 (1976). Professor Scherer has estimated that the percentage of total manufacturing assets controlled by the 100 largest American firms climbed from 36.5% in 1924 to 50% in 1967. F. Scherer, Industrial Market Structure and Economic Performance 43, fig. 3.1 (1970).

[172] *See* Address by Professor F. Scherer, ABA Section on Antitrust Law Annual Meeting (Aug. 10, 1977) (unpublished text at 10) (comparative study of major firms in the United States and West Germany revealed some correlation between tough anti-merger enforcement and reduced rate of corporate concentration). *Cf.* Report of the President's Task Force on Antitrust Policy, 115 Cong. Rec. 13,890, 13,894 (1969) [hereinafter cited as Report] (mergers have contributed "somewhat" to concentration trend, but not "solely responsible" and possibly only minor factor). *See also* Blake, *supra* note 148, at 556 n.10.

[173] *See generally* Blake, *supra* note 148 (antimerger enforcement seriously hampered by undue emphasis upon economic analysis; economic approach in part fostered by the language of section 7 of the Clayton Act). *Cf.* Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 323 (1975) (enforcement problems in part result of failure of courts to develop coherent theoretical basis for antitrust law).

[174] In product extension mergers challenged under the perceived potential entrant doctrine, it is less likely that the defendant will meet the requirement that it be one of only a few significant firms on the fringes. It is more probable that the defendant in a geographic extension merger case will have these unique characteristics, since the relevant market may well have been defined as an industry with a limited number of competitors, and the inquiry will only be which of those firms will most likely expand into an adjacent territory.

[175] *See* text accompanying notes 169-70 *supra.*

[176] The Supreme Court has already recognized the propriety of relying on presumptions when dealing with *horizontal* mergers. Once the combined market share of the merging firms exceeds a certain level, the burden of proof shifts to the defendants to show the absence of a reasonable probability of injury to competition.

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain areas, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a

agement in this area is the likely expansion of the federal judiciary in the next few years,[177] hopefully staffed with judges who are more favorably disposed toward vigorous antitrust enforcement. However, any hopes for a judicial turn-around in the lower courts must be tempered by an awareness of the continued hostility of the current Supreme Court toward activist application of the antitrust laws.

Moreover, the recent trend toward weaker enforcement of section 7 reflects not only the changed composition of the Supreme Court, but also a gradual dilution of prosecutorial effectiveness over the years. In 1948, the Supreme Court affirmed, by a 5-4 vote, a lower court determination that the acquisition of one of the largest steel fabricators on the West Coast by a subsidiary of U.S. Steel Company—the nation's largest steel producer—did not violate the Sherman Act.[178] Adverse reaction to that decision provided the final impetus for congressional revision of section 7 of the Clayton Act.[179] The resulting legislation—the Celler-Kefauver Act of 1950[180]—and

---

firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

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

Relying upon this case, Professor Blake has argued for a judicially created presumption of illegality for conglomerate mergers over a certain size. Blake, *supra* note 148, at 591. *See also* Thomas, Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy, 36 Fordham L. Rev. 461 (1968); Note, Conglomerates and Section 7: Is Size Enough?, 70 Colum. L. Rev. 337, 355-58 (1970).

The Justice Department might draft and attempt to persuade the courts to apply specific conglomerate merger guidelines similar to the general guidelines promulgated by the Department in 1968. *See* Department of Justice, Proposed Merger Guidelines (1968), *reprinted in* 1 Trade Reg. Rep. (CCH) ¶ 4510 (1975). For a discussion of other possible litigation strategies under existing laws, see note 96 *supra*.

[177] Both the Senate and House have recently passed bills that would create additional district and circuit court judgeships. *See* S.11, 95th Cong., 1st Sess. (1977) (passed by voice vote May 24, 1977); H.R. 7843, 95th Cong., 1st Sess. (1977) (passed by voice vote Feb. 7, 1978). The two bills are now being considered in joint conference. *See* [1977-78-1] Cong. Index (CCH) ¶ 21,001.

[178] United States v. Columbia Steel Co., 334 U.S. 495 (1948). The transaction involved the acquisition of the *assets* of the acquired company and thus was challenged under section 1 of the Sherman Act, because the Clayton Act at that time applied only to the acquisition of the *securities* of another company.

In his dissent to *Columbia Steel*, Justice Douglas made a forceful statement of the social dangers inherent in the concentration of corporate resources:

> We have here the problem of bigness. . . . [S]ize can become a menace—both industrial and social. . . . The philosophy of the Sherman Act is that [centralized economic power] should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

Id. at 535-36 (Douglas, J., dissenting).

[179] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315-23 (1962).

The dominant theme pervading congressional consideration of the 1950 amendments the congressional concern for strict antimerger enforcement that it embodied formed, for over two decades, the basis of pro-government decisions in the Supreme Court. After nearly thirty years, however, the strength of even a strong congressional mandate must eventually weaken, and courts may legitimately question continued attempts to rely upon this mandate as a basis for innovative change without evidence of renewed congressional concern.

Given both the posture of the Supreme Court and the passage of time, a new and clear statement of congressional concern with the dangers of corporate concentration would provide the basis for a move toward innovation in the lower courts and, ultimately, for changes at the Supreme Court level. As did the Celler-Kefauver Act in the 1950s and 1960s, such a statement could establish a climate appropriate to renewed judicial activism in merger law. At the same time, however, the problems of conglomerate mergers should be addressed by specific modifications of the language of section 7 of the Clayton Act.[181] An amended statute should clearly delineate—as the current statute does not—the standard of proof required to establish injury to competition under section 7; the inherently speculative nature of all potential competition doctrine requires that the government be held to a lesser standard than the substantial probability and specificity of injury standards implicitly imposed by the courts in recent cases.[182] The statute should answer the question reserved in *Falstaff* and *Marine Bancorporation*[183] by expressly providing that "lessening competition" under section 7 includes the loss of future improvement to competition relevant under the actual potential entrant doctrine as well as the loss of present competition relevant under conven-

---

was a fear of what was considered to be a rising tide of economic concentration in the American economy.

. . . .

Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

Id. at 315-18 (footnote omitted).

[180] Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1970)).

[181] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), illustrates the dangers inherent in reliance upon clear evidence of legislative intent, without detailed statutory specifications, when faced with the current judicial climate. At issue was the right of indirect purchasers to sue for damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), *as amended*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383. The majority in *Illinois Brick* did not consider the available legislative history dispositive, 431 U.S. at 733 n.14; Justice Brennan in dissent stated that he found it "difficult to see how Congress could have expressed itself more clearly." *Id.* at 758.

[182] Section 7 of the Clayton Act outlaws mergers in which the effect "*may be* substantially to lessen competition" (emphasis added). This has been interpreted to mean that the merger must have a "reasonable probability" of injury. Alternate standards—either of mere possibility or of certainty—were rejected. Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962).

By contrast, the Robinson-Patman Act, 15 U.S.C. § 13 (1970), requires merely a showing of a "reasonable possibility" that the discriminatory prices will adversely affect competition. FTC v. Morton Salt Co., 334 U.S. 37, 47 (1948). It might be appropriate to use the same language for an amended section 7.

[183] *See* note 92 *supra*.

tional theory. A more radical step would involve expansion of the perceived potential entrant doctrine through removal of the preconditions[184] that the perceived entrant be one of only a limited number of firms situated at the edge of the target market and that actual proof of market response be established. Removal of these conditions would effectively require entry by alternative means into all markets in which perception of possible entrants is, on the basis of the objective evidence available to market participants, a significant competitive factor.[185]

A reasonable point of departure for development of a broader merger statute based upon this second approach would be the study conducted in the late 1960s by President Johnson's Task Force on Antitrust Policy. This group published a final report (the "Neal Report"),[186] which contained a draft merger act that would have outlawed any merger between a "large firm"—a company with sales in excess of $500 million or assets in excess of $250 million—and a "leading firm"—a company with more than a ten percent market share in an industry characterized by $100 million in sales and a four-firm concentration ratio of fifty percent or more.[187] Such a statute would have had the effect of proscribing many mergers that have recently been approved under section 7. For example, all four conglomerate mergers unsuccessfully challenged in the courts in 1977 would have been found unlawful under the task force's proposed statute.[188] The

---

[184] *See* text accompanying notes 112-20 *supra*.

[185] Such an approach involves tacit acknowledgment that the perceived potential entrant theory does not depend upon whether limit pricing actually occurs in practice.

[186] Report, *supra* note 172. This report is often identified by reference to the chairman of the task force, Professor (later Dean) Phil C. Neal of the University of Chicago Law School.

[187] *Id.* at 13,899. Section 2(d) of the Report's proposed merger act provides that "[t]he term 'market' shall mean a relevant economic market, appropriately defined with reference to geographic area . . . and product or service. . . ." Although the standards and definition might appear to lend themselves to mechanical application, problems of market definition are among the most difficult aspects of merger analysis and are likely to present problems here. Consider, for example, the dispute among FTC commissioners over the proper market definition in The Budd Co., *see* 86 F.T.C. 518, 568 n.2 (Dixon, C., dissenting), discussed earlier in this article. *See* note 64 *supra*.

Some years before the Neal Report was developed, Professors Kaysen and Turner advanced a proposal that large firms making acquisitions above a certain size be required to spin off assets of equal size. *See* C. Kaysen & D. Turner, *supra* note 27, ch. 4; Davidow, *supra* note 79, at 1282-83.

[188] In FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977), Arco—the nation's thirteenth largest publicly held corporation, engaged primarily in the production and sale of petroleum and petroleum products—acquired The Anaconda Company, the nation's third largest producer of copper ore and concentrates. Under the Neal Report's draft merger act, both Arco and Anaconda would be defined as "large firms." In 1975, Arco had assets of $7.364 billion, while Anaconda's assets were $2.007 billion. FTC Complaint at 2. Anaconda was also a "leading firm"; the FTC alleged that Anaconda had an 11.1% market share in copper mine production in an industry in which the top four firms accounted for 59%. *Id.* at 4. Total 1972 sales were $1.588 billion. U.S. Bureau of the Census, Census of Mineral Industries, Subject, Industry and Area Statistics, at 10B-5 (1976). The circuit court put Anaconda's market share at 8.27%. 549 F.2d at 291. Similarly, the Commission alleged that Anaconda's market share of refined copper was 10.1% in a market in which the four largest firms had 72% of the market. FTC Complaint at 4. Total 1972 industry sales were $2.77 billion. U.S. Bureau of the Census, Census of Manufactures, Industry Series: Smelting and Refining of Nonferrous Metals and Alloys, at 33C-14 (1975). The circuit court put Anaconda's share here at

statute would similarly have permitted enforcement agencies to prevent some mergers that, under present statutory standards, the agencies have not even attempted to challenge.[189]

9.78%. 549 F.2d at 291. In any event, although Arco's withdrawal from the uranium market allowed the Fourth Circuit to discount any horizontal merger concerns in that market, under the Neal Report's proposed act, it would have been dispositive that Anaconda accounted for 17.8% of the uranium oxide market, in which four firm concentration was 60%. FTC Complaint at 5. Total industry sales in 1972 were $133 million. Rand McNally Co., Corporate Profiles for Executives and Investors (1976).

In BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977), BOC, the acquiring company, had total sales of $766 million; Airco had sales of $583 million. Brief for FTC at 10. *See* text accompanying notes 68-72 *supra*. Airco was also a "leading firm," with a 16% share of the industrial gases market, in which the three largest firms had 60% of the market. *Id.* Total 1972 industry sales were $679 million. U.S. Bureau of the Census, Census of Manufactures, 1972 Industry Series: Industrial Inorganic Chemicals, at 28A-11 (1975).

In FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977), *request for stay denied*, [1977-1] Trade Cas. ¶ 61,470 (D.C. Cir. 1977), Tenneco, the acquiring company, was a "large firm," with assets in 1975 of $6.5 billion. FTC Complaint at 5. Monroe was a "leading firm," with 32% of domestic replacement shock absorber sales in an industry in which the four largest companies accounted for at least 83% of the market. *Id.* at 6, 8. Total industry sales in 1972 were $105 million. U.S. Bureau of the Census, Census of Manufactures, Industry Series: Motor Vehicle and Equipment, at 37A-19 (1974).

In Babcock & Wilcox Co. v. United Technologies, 435 F. Supp. 1249 (N.D. Ohio 1977), Babcock & Wilcox, which is engaged primarily in the manufacture of steam generating equipment, sought to enjoin a tender offer to its shareholders by United Technologies (UT), a conglomerate engaged in the manufacture of aircraft and rocket engines and turbines. Both companies would be defined as "large firms" and "leading firms." United Technologies had total 1976 sales of $5.166 billion. In 1973, it accounted for 40% of the sales in the aircraft engine industry, which had total sales of $3.64 billion and a four firm concentration ratio of 77%. U.S. Bureau of the Census, Census of Manufactures, Vol. I, Subject and Special Statistics, at SR2-41 (1976); United Aircraft [predecessor of UT] Annual Report 1973, at 12 (1974). Babcock & Wilcox had total 1976 sales of $1.691 billion. It accounted for 42% of sales of steam generating equipment; 1972 total industry sales were $2.189 billion, and the four largest firms accounted for over 90% of that market. Babcock & Wilcox Annual Report (1974); U.S. Bureau of the Census, Census of Manufactures, Vol. I, Subject and Special Statistics, at SR2-33 (1976).

[189] In 1974 and 1975, the Justice Department decided not to challenge two huge mergers, after making determinations that there was an insufficient basis on which to proceed in each case.

One merger—believed to be the largest combination, in terms of assets paid, in American corporate history—involved the acquisition by General Electric Company of Utah International, Inc. GE had sales in 1974 of over $13.4 billion, and assets of $9.4 billion. Utah International had gross revenues in 1974 of over $500 million and assets of over $900 million. The transaction, which was a stock-for-stock transfer, involved an exchange of $1.92 billion in GE stock. *See* 744 Antitrust & Trade Reg. Rep. (BNA), at A-4 (Dec. 23, 1975); Wall St. J., Oct. 4, 1976, at 14, col. 4; General Electric Co. Annual Report (1974); Utah Int'l, Inc. Annual Report (1974).

The other merger involved the acquisition by Mobil Oil Corp., at that time the third largest American oil company with 1974 sales of $20.3 billion and assets of $14 billion, of Marcor, the parent of Montgomery Ward, the nation's fourth largest nonfood retailer, with 1974 sales of $4.6 billion and assets of $3.1 billion. This acquisition was a cash-for-assets transaction, in which Mobil paid over $800 million for the controlling Marcor shares. 676 Antitrust & Trade Reg. Rep. (BNA), at A-20 (Aug. 13, 1974); Wall St. J., Aug. 20, 1976, at 26, col. 2; Mobil Annual Report (1974); Marcor Fiscal Report (Jan. 31, 1975); Forbes, May 15, 1975, at 129.

The late Senator Philip Hart, chairman of the Senate Antitrust Subcommittee in 1975, wrote to the then head of the Antitrust Division, Thomas Kauper, that, if the Justice Department felt that it was unable to challenge the Mobil-Marcor transaction, the Subcommittee might want to renew its interest in new legislation to deal with such large acquisitions. 711 Antitrust & Trade Reg. Rep. (BNA), at A-13 (Apr. 29, 1975).

In 1968, when the Neal Report was issued, its proposed merger act would have defined as "large firms" only 265 companies in *Fortune's* listing of the 500 largest industrial corporations;[190] the same threshold levels today would include approximately 480 companies.[191] To the extent that this expansion is due to inflationary factors, doubling the thresholds of the Neal Report would be roughly compensatory:[192] the resulting standard would impose serious limitations upon the ability of almost 300 of the Fortune 500 companies to expand by major firm acquisition;[193] these companies would be limited to de novo or toehold acquisitions in almost every concentrated industry. Obviously, however, the number of companies subject to these limitations would continue to increase with inflation. Thus, a more appropriate solution would be an expanding threshold level tied to a measurable constant such as the wholesale finished goods index or the consumer price index.

The negative economic or social implications that may accompany some large-firm conglomerate mergers do not necessitate, as suggested by the Neal Report's draft act, proscription of *all* such mergers. That approach was Draconian, absolutely foreclosing any analysis of the overall impact of these transactions. Instead, the current judicial presumption in favor of permitting mergers should be reversed; the burden of persuasion should be placed from the start upon the parties to the transaction to justify affirmatively any large-firm conglomerate merger that exceeds statutory size and market share thresholds.[194] The burden imposed would be satisfied in one of two ways: the parties would be required to prove either that the merger under scrutiny does not in fact have a negative impact on competition, or that the merger, if it would have been considered to have such a negative impact under currently applied judicial standards, is otherwise justified by considerations of public interest;[195] examples would

[190] *See* Fortune, June 15, 1968, at 186-204.

[191] A total of 473 American industrial corporations have assets in excess of $250 million. An additional eleven companies not meeting the asset threshold nonetheless have sales in excess of $500 million. Fortune, May 1977, at 364-89; *id.* June 1977, at 204-30.

There are dozens of retailing, service, or public utility companies fitting these threshold sizes not included in this *Fortune* magazine listing. For example, every one of the fifty largest American retailing companies had sales in excess of $500 million, and every one of the fifty largest utility companies had assets of over $1 billion. 1976 Fortune Directory 64-68.

[192] The wholesale finished goods index rose from 100 in 1967 to 193.0 in May 1978. The consumer price index rose from 104.2 in 1968 to 191.3 in April 1978. (Base Year = 1967 = 100.) Statistical Abstract of the U.S., tables 705, 708 (1976); Wall St. J., June 5, 1978, at 3, col. 1; *id.*, June 1, 1978, at 3, col. 1.

[193] The 1977 listing contains 285 companies with assets in excess of $500 million, plus eleven other companies with fewer assets, but with sales in excess of $1 billion. Fortune, May 1977, at 364-89. Once again, there are dozens of sales and service companies not included in this *Fortune* listing.

[194] *See* Brodley, *supra* note 168, at 63-88 (structural-presumptive approach).

[195] A presumption based upon proof of countervailing public interest would be comparable to the provision of the Bank Merger Act of 1966, adopted by Congress in response to the Supreme Court's decision in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). The act provides that

> [t]he responsible agency shall not approve . . . any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or

be real efficiencies in manufacturing, marketing, or allocation of capital.

At a minimum, increased size and market share suggest a greater probability of adverse effects upon competition.[196] To this extent the proposed statute is consistent with conventional antitrust theory. Moreover, traditional economic considerations would continue to apply exclusively in merger cases not involving presumption-triggering levels and would remain relevant to mergers exceeding those levels.[197] However, it should be recognized that, under the proposed statute, concerns not merely about the supposed economic effects of corporate concentration, but also political and social concerns about that concentration, would ultimately provide the justification for imposition of a higher standard of judicial scrutiny upon large-firm mergers.[198]

This presumption-triggering threshold approach could easily be coupled with existing statutory provisions that require firms to give notice of proposed transactions to the antitrust agencies and to observe a waiting period after such notice before consummation of a merger.[199] Should the parties decide to proceed with the merger after the expiration of this period, however, the presumption in the courts under the amended statute would be against approval of the merger, with a burden upon the defendants to persuade the courts otherwise. The existence of such a

> to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction . . . [are] meeting the convenience and needs of the community to be served.

12 U.S.C. § 1828(c)(5)(B) (1970). *See* United States v. Marine Bancorporation, Inc., 418 U.S. at 618 n.15 (lower court determination of convenience and needs discussed and approved).

Presumably, there will be some situations in which the challenged merger has positive competitive benefits and minimal potential for adverse social and political impact. Assume, for example, a four-firm oligopoly characterized by three firms with 30% market shares and one firm with a 10% share. Although acquisition of the smaller firm by a large firm from outside the market would be presumptively unlawful under the proposed standards, that presumption could conceivably be overcome and the merger permitted upon a showing of the acquisition's procompetitive impact. The entry of the large firm could stimulate more vigorous competition among existing competitors and might permit introduction of economies or marketing and manufacturing innovations unavailable to the smaller firm prior to merger.

[196] *See, e.g.,* Preston, A Probabilistic Approach to Conglomerate Mergers, 44 St. John's L. Rev. 341 (spec. ed. 1970).

[197] The presumption, in requiring affirmative proof that a merger meeting the proposed act's size and market share levels does not lessen competition, would place companies meeting these levels in a position similar to that facing companies under present section 7 after the government makes its prima facie case of market concentration. *See* note 60 *supra.*

[198] Obviously, the proposed statute would apply to all large-firm mergers—horizontal and vertical as well as conglomerate.

[199] Title II of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (amending 15 U.S.C. § 18 (1970)), added a premerger notification provision to the Clayton Act. Section 7A now requires that large firms—those with total assets or annual net sales in excess of $100 million—notify the Federal Trade Commission and the Antitrust Division of the Department of Justice of certain planned acquisitions of the securities or assets of firms having annual sales or assets in excess of $10 million. The statute also imposes a waiting period of 30 days before the merger may be consummated; this time may be extended upon application to the courts by the antitrust agencies. The waiting period is designed to allow the agencies to get more information for deciding whether to challenge the proposed acquisition and is not intended as a substitute for a preliminary injunction.

presumption would necessarily require courts to grant a preliminary injunction pending disposition of any merger challenge upon proof by the government that statutory thresholds had been met.[200] In order to reduce possible concerns about political bias in enforcement of these stricter antimerger provisions and to ensure adequate public notice of enforcement standards, the amended statute should also require the agencies to supply "no action" letters in those merger cases in which they decide not to attempt a challenge after statutory notice. These statements, which would set forth an evaluation of the probable impact of the merger and the reasons for nonaction, could parallel existing settlement statement provisions under the Clayton Act.[201]

An additional advantage to these changes would be the creation of a more realistic deterrent to questionable acquisitions.[202] Both the complexity of existing enforcement mechanisms and the uncertainty that accompanies their application have significantly reduced the threat of antitrust action as a concern of corporate officers in merger planning. In many situations, the government does not even attempt to enjoin or to set aside a merger under the existing statutory framework precisely because this framework is heavily weighted toward success by a defendant on the merits. Even if a merger should be successfully challenged and ultimately set aside, the defendant still reaps the temporary and frequently considerable benefits of access to the assets and profits of the acquired firm, and, in all likelihood, the defendant will be neither fined nor subjected to treble damage liability.[203] In effect, virtually no disincentives exist to attempted acquisitions under existing antitrust laws. A modified per se approach, founded upon a rebuttable presumption of illegality against

---

[200] Section 4 of the Sherman Act, 15 U.S.C. § 4 (1970), gives government attorneys the authority to institute proceedings to enjoin violations of the antitrust laws. This provision has been construed to include obtaining preliminary injunctions against proposed acquisitions. *See, e.g.*, United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963). The Justice Department must show a reasonable probability of eventual success on the merits to be entitled to injunctive relief. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 545, 567-70 (N.D. Ill. 1968).

The Trans-Alaskan Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 592, amended section 13 of the FTC Act, 15 U.S.C. § 53 (Supp. V 1975), to give the Commission authority to obtain a temporary restraining order against violations of the laws administered by the Commission, including Clayton Act § 7, 15 U.S.C. § 18 (1970), *as amended,* Act of Sept. 30, 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383. It is to be granted by a court only after "weighing the equities and considering the Commission's likelihood of ultimate success." *See generally* FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976); FTC v. Lancaster Colony Corp., [1977-2] Trade Cas. ¶ 61,562 (S.D.N.Y. 1977).

[201] *See* 15 U.S.C. §§ 16(b)-(g) (Supp. V 1975) (requirement that Antitrust Division prepare competitive impact statement when submitting proposed consent judgment to a court); *cf. id.* § 45(m)(1)(C)(3) (similar requirement under section 5 of the FTC Act).

[202] *See* Blake, *supra* note 148, at 558.

[203] Although private treble damage actions can be brought under section 7 of the Clayton Act, *see, e.g.*, Carlson Cos., Inc. v. Sperry & Hutchinson Co., 507 F.2d 959 (8th Cir. 1974), the Supreme Court has recently imposed requirements that the plaintiff in such an action show both that the injury was causally linked to the company's presence in a market in violation of section 7 and that the injury reflected the anticompetitive effect of either the violation itself or acts made possible by it. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

large-firm mergers, could remedy this situation by serving as a realistic deterrent while supplying businessmen with fair warning of the bounds of permissible behavior.

The reforms proposed in this article would go far toward remedying the defects in existing conglomerate merger enforcement mechanisms. The resulting changes, however, would place even greater burdens on the judicial system than those imposed by current antitrust litigation and would thus add renewed vigor to demands for a separate system of antitrust courts. As part of one of the major elements of his Industrial Reorganization Act, the late Senator Philip Hart proposed, throughout the early 1970s, creation of an Industrial Reorganization Court to adjudicate the legality of monopolies in certain concentrated industries.[204] This proposal should be revived and a special court created with exclusive jurisdiction over claims under the Sherman, Clayton and Federal Trade Commission Acts.[205] Although such a court could be staffed by presently sitting federal judges assigned on a rotating basis, permanent assignments would assure continuity within the court and would allow the judges to develop greater experience and expertise in dealing with the special problems of antitrust litigation. One alternative would be to have this court designated as a special "circuit court," taking appeals from all antitrust cases decided in the federal district courts. A preferable measure would involve making the special antitrust court a trial level court with limited appeal to the courts of appeals and to the Supreme Court. Such a measure would eliminate the delay inherent in having cases first decided by a trial judge with relatively limited experience in antitrust matters, then reviewed by the experienced antitrust court and, ultimately, by the Supreme Court.[206]

[204] Under the proposal, the Industrial Reorganization Court would have been staffed by 15 judges, with direct appeal only to the Supreme Court. The Industrial Reorganization Act would also have created a new commission with responsibility for studying certain concentrated industries and for developing reorganization plans for those industries characterized by monopoly or oligopoly. *See* S.1959, 94th Cong., 1st Sess. (1975); S.1167, 93d Cong., 2d Sess. (1974); S.3822, 92d Cong., 2d Sess. (1972).

Former FTC Commissioner Philip Elman proposed creation of a special Trade Court with jurisdiction over both agency complaints and private actions brought by injured competitors and consumers. *See* Elman, The Regulatory Process: A Personal View, 39 ABA Antitrust L.J. 901, 909 (1970).

[205] The advantages of such a special court with special judges for dealing with a complex statute is already recognized in the existence of the federal tax court. The jurisdiction of the tax court, however, is not exclusive with respect to all types of tax claims.

[206] The Expediting Act, ch. 544, § 2, 32 Stat. 823 (1903) (current version at 15 U.S.C. § 29 (Supp. V 1975)), authorized direct appeals by the government from district courts to the Supreme Court in certain antitrust cases. The Court complained, in several opinions, that this process deprived it of the benefit of preliminary review by an intermediate court, which might indeed have avoided any need for Supreme Court review. Tidewater Oil Co. v. United States, 409 U.S. 151, 169 (1972); Ford Motor Co. v. United States, 405 U.S. 562, 595 n.5 (1972) (Burger, C.J., concurring in part and dissenting in part); United States v. Borden Co., 370 U.S. 460, 477 n.[*] (1962) (Harlan, J., dissenting). As a result, Congress virtually repealed the Expediting Act in 1974, limiting direct appeals to situations in which the district court judge certifies the need for immediate Supreme Court consideration. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1709 (amending 15 U.S.C. § 29 (1970)).

V. Conclusion

Conglomerate mergers are of considerable and increasing significance to antitrust enforcement as well as to the American economy. Corporate planners are opting for conglomerate acquisitions over horizontal or vertical merger alternatives with greater frequency, and the absolute size of the resulting combinations is rising. Section 7 of the Clayton Act, couched as it is in economic terms, is not sufficient to the task of controlling this major trend. Potential competition doctrine, which offers a means for adapting section 7 to the specific problems of conglomeration, has received an increasingly hostile reception in the courts. Because the alternative weapons of entrenchment and reciprocity carry their own theoretical defects, they too have met with disfavor from both the courts and enforcement agencies. All attempts at merger challenge under section 7 have been hampered by that statute's requirement of proof of competitive injury and by the unwillingness of the Supreme Court to sustain challenges in the absence of direct and immediate proof of that injury.

There is a clear need for legislative reform of section 7, both to remedy the specific problems of conglomeration and to confront directly the social and political implications of increasing corporate concentration. Any proposal for legislative change, however, must end with a sober acknowledgment that the prospects for reform in the immediate future are poor. In the nine years since publication of the report of the President's Task Force on Antitrust Policy, no legislation similar to its draft merger act has even reached the floor of either house of Congress. Although Senator Hart's Industrial Reorganization Act was the subject of Senate hearings, it ultimately suffered a similar fate, despite repeated attempts to move it out of committee. Given this political reality, the enforcement agencies must focus their resources upon an extended program of vigorous challenges to conglomerate mergers, even if there is serious doubt as to the eventual success of these prosecutions. Such action will serve as a source of continuing pressure on the courts and as a reminder to Congress of the need for legislative change. Even "unwinnable" cases, if brought against corporate giants, will raise public and congressional awareness regarding both the progress of corporate concentration and the present impotence of section 7 in dealing with conglomerate mergers.

The changes proposed in the text would meet the Supreme Court's expressed concerns while adding an experienced and specialized trial court to aid in coping with the complexities of antitrust litigation. The success of these proposals would ultimately depend, however, upon the imposition of severe restrictions upon appeal from decisions of the antitrust trial court. Delay is a constant element of antitrust litigation, and every level of appeal under the current system adds at least a year to the time required for ultimate disposition of a case. In the present IBM monopolization litigation, for example, the government launched its precomplaint investigation in 1966, filed a complaint in 1969 and went to trial in 1975. It is estimated that the trial may take six years and the process of appeal and formulation of any ultimate order as much as five more years. *See* 786 Antitrust & Trade Reg. Rep. (BNA), at AA-10 (Oct. 26, 1976). The government's suit against Alcoa's aluminum monopoly during the late 1930s and early 1940s took eight years from commencement of suit to final appeal. *See* United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

Boston University Law Review

VOLUME 58 | MARCH 1978 | NUMBER 2