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Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?

Joseph P. Bauer†

HYPOTHETICAL NEWS ITEM: The Exxon Corporation and the International Business Machines Corporation jointly announced yesterday an agreement to merge the two companies. Exxon, the nation's largest producer-refiner-distributor of petroleum products, had 1982 gross operating revenues of \$108 billion and has total assets of \$64 billion. IBM, the nation's largest manufacturer of computers and office equipment, had 1982 gross income of \$33 billion and has total assets of \$34 billion. In order to minimize the loss of any actual or potential competition between the firms, the two companies will divest themselves of some minor operations; this will include the spin-off by Exxon of its faltering office machines subsidiary. A spokesman for the Department of Justice stated that while that agency was planning to review the proposed merger, the transaction seemed to raise few concerns under the Department's Merger Guidelines announced in June, 1982.

Wall Street Journal, Sept. 1, 198—, at 1, col. 2.

INTRODUCTION

In the first half of the twentieth century, the most common type of merger among American businesses was horizontal—the acquisition by one company of one or more of its direct competitors. More recently, however, non-horizontal acquisitions have tended to predominate.¹ These transactions have taken the form both of vertical mergers, i.e., the acquisition by a company of either its supplier or its customer, and of conglomerate mergers,² i.e., the acquisition by a company neither in

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1. See *infra* note 51.

2. Conglomerate mergers can be further divided into three categories: product extension mergers, in which a producer of one product or service acquires the producer of a closely related product or service; geographic or market extension mergers, in which a producer in one market acquires a similar company in an adjacent market; and “pure” conglomerate mergers, in which there is neither relationship between the parties.

direct competition with, nor a supplier to or buyer from, the acquired company.

The merger decisions in the courts have reflected this trend. While most pre-1965 Clayton Act section 7 cases involved horizontal acquisitions,³ in the late 1960's and early 1970's much merger jurisprudence was devoted to the analysis and treatment of non-horizontal mergers.⁴

The past two decades have also witnessed substantial scholarly interest in the development of various theories for testing the effect on competition, and hence the legality, of these non-horizontal acquisitions. Particular attention has been focused on conglomerate mergers.⁵ Furthermore, the Department of Justice and the Federal Trade Commission have increased the attention and enforcement efforts given to these kinds of transactions.

The growing concern about conglomerate mergers was reflected in part in the Guidelines promulgated by the Department of Justice in 1968,⁶ which detailed the kinds of acquisitions that might be the subject of governmental challenge. In the intervening fourteen years, however, challenges to most conglomerate mergers received relatively hostile

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

4. See, e.g., *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) (geographic extension merger); *Ford Motor Co. v. United States*, 405 U.S. 562 (1972) (vertical merger); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (product extension merger).

5. See, e.g., 5 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 1100-1152 (1980); R. POSNER & F. EASTERBROOK, *ANTITRUST* 921-42 (2d ed. 1981); P. STEINER, *MERGERS* 15-29, 218-317 (1975); Areeda & Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Inter-industry Competition as Grounds for Condemnation*, 127 U. PA. L. REV. 1082 (1979); Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 B.U.L. REV. 199 (1978); Berger & Peterson, *Conglomerate Mergers and Criteria for Defining Potential Entrants*, 15 ANTITRUST BULL. 489 (1970); Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672 (1958); Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973); Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1 (1977); Bryan, *Conglomerate Mergers: Proposed Guidelines*, 11 HARV. J. ON LEGIS. 31 (1973); Carstensen & Qvestal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841 (1978); Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); 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 (1975); Mantell, *Conglomerate Mergers, Allocative Efficiency, and Section 7 of the Clayton Act*, 56 TEX. L. REV. 207 (1978); Markovits, *Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws*, 1975 WIS. L. REV. 658; Mueller, *The Effects of Conglomerate Mergers: A Survey of the Empirical Evidence*, 1 J. BANKING & FIN. 315 (1977); Standridge & Santopietro, *Regulating the Pure Conglomerate Merger: Important Legislative Task or Useless Exercise?*, 30 SYRACUSE L. REV. 607 (1979); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965); Note, *Conglomerate Mergers and the Theory of Reciprocity*, 22 STAN. L. REV. 812 (1970). See also W. Boucher, *The Process of Conglomerate Mergers* (1980) (study prepared for Bureau of Competition, FTC).

6. U.S. Dep't of Justice, *Merger Guidelines—1968* (May 30, 1968), reprinted in 2 TRADE REG. REP. (CCH) ¶ 4510 (Aug. 9, 1982) [hereinafter cited as 1968 Guidelines].

treatment from the courts.⁷ Many scholars criticized the soundness of the theories used to challenge these transactions and suggested that most such acquisitions will not in fact adversely affect competition.⁸ In 1982, largely in reaction to these developments, the Department of Justice promulgated new Merger Guidelines,⁹ indicating that it will not challenge non-horizontal mergers, unless the transactions are likely to have an adverse impact on actual or potential competition. The practical result of this policy is that most such acquisitions will be allowed.

This development was predictable, since the Assistant Attorney General heading the Antitrust Division, William Baxter, had on several occasions stated that most non-horizontal restraints have insufficient adverse effects on competition to merit Justice Department attention.¹⁰

7. In the period 1964 through 1977, there were eleven successful judicial challenges to conglomerate mergers; not a single one of these occurred after 1974. On the other hand, during the same period, there were twenty-two unsuccessful attacks on conglomerate mergers; significantly, twelve of these took place between 1974 and 1977. These cases are listed in Bauer, *supra* note 5, at 200 nn.8-9.

More recently, the continued failure of court challenges against conglomerate mergers has been dramatic. Since 1978, the defendants have prevailed in virtually all acquisitions in which there was judicial scrutiny of the transaction. *See, e.g.*, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982) (product extension); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980) (product extension); *Equifax, Inc. v. FTC*, 618 F.2d 63 (9th Cir. 1980) (product extension); *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975) (product extension and "pure" conglomerate); *Crouse-Hinds Co. v. InterNorth, Inc.*, 518 F. Supp. 416 (N.D.N.Y. 1980) (product extension; potential for reciprocity); *Raybestos-Manhattan, Inc., v. Hi-Shear Indus.*, 503 F. Supp. 1122 (E.D.N.Y. 1980) (product extension); *Lektro-Vend Corp. v. Vendo Corp.*, 500 F. Supp. 332 (N.D. Ill. 1980), *aff'd*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) (product extension); *United States v. First Nat'l State Bancorp.*, 499 F. Supp. 793 (D.N.J. 1980) (geographic extension); *Southwest Miss. Bank v. FDIC*, 499 F. Supp. 1 (S.D. Miss. 1979) (geographic extension); *FTC v. Exxon Corp.*, 1979-2 Trade Cas. (CCH) ¶ 62,972 (D.D.C. 1979) (product extension), *rev'd in part on other grounds*, 636 F.2d 1336 (D.C. Cir. 1980); *FTC v. Beatrice Foods Co.*, 1978-2 Trade Cas. (CCH) ¶ 62,148 (D.D.C.), *aff'd*, 587 F.2d 1225 (D.C. Cir. 1978) (geographic extension); *Carrier Corp. v. United Technologies Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y.), *aff'd*, 1978-2 Trade Cas. (CCH) ¶ 62,405 (2d Cir. 1978) (product extension and "pure" conglomerate); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108 (E.D. Pa. 1978) (product extension).

In this same period, plaintiffs' judicial successes have been far more limited. In *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1768 (1982), the court upheld the setting aside of a joint venture that involved a new product line for both venturers, in part because of the elimination of potential competition. And, in *Mercantile Tex. Corp. v. Board of Governors of Fed. Reserve Sys.*, 638 F.2d 1255 (5th Cir. 1981), the court, while rejecting the Board's finding of a § 7 violation, remanded the case for examination of alternative possible impairments of potential competition. *Accord Republic of Tex. Corp. v. Board of Governors of Fed. Reserve Sys.*, 649 F.2d 1026 (5th Cir. 1981).

8. *See supra* note 5.

9. U.S. Dep't of Justice, Merger Guidelines, 47 Fed. Reg. 28,493 (1982), reprinted in 71 CALIF. L. REV. 649 (1983) [hereinafter cited without cross-reference as Guidelines].

10. Assistant Attorney General Baxter has indicated on a number of occasions his belief that most vertical restraints either have a neutral impact on competition or may even have procompetitive effects. For example, notwithstanding the fact that vertical price fixing has been condemned by the United States Supreme Court as long ago as 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-09 (1911), and as recently as 1980, *California Retail Liquor Dealers*

Thus, it is hardly surprising that the new Guidelines focused principally on horizontal mergers, and disapprove non-horizontal mergers only to the extent that they may diminish horizontal competition.

This Article argues that the Department of Justice's recently articulated enforcement intentions with respect to conglomerate mergers are inconsistent with the case law applying section 7 of the Clayton Act to these transactions and also represent unsound policy. Part I will review the conglomerate merger jurisprudence of the past two decades—looking at the theories that have been used to challenge them, at the important judicial decisions interpreting and applying those theories, and at the Guidelines adopted by the Department of Justice in 1968 to codify these developments. It will then briefly discuss certain developments regarding conglomerate mergers in the past half-dozen years—the judicial rejection of most challenges to these transactions, scholarly attacks on the underlying theories, and the enormous expansion of the number and size of conglomerate mergers taking place. Part II will then examine the new Merger Guidelines. The way in which the new Guidelines treat conglomerate mergers will be compared with the case law standards and with the 1968 Guidelines. Based on a broad view of the goals of the antitrust laws, this Article will then assert that the Guidelines take far too narrow an approach to the scrutiny of conglomerate mergers. The Article will conclude with some recommendations for future conglomerate merger law enforcement.

I

THEORIES, CASES AND THE 1968 GUIDELINES

A. Conglomerate Merger Theories

By definition, conglomerate mergers involve the bringing together of two entities that were neither previously in a direct competitive relationship nor in a buyer-supplier relationship. Thus, the kinds of an-

Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980) and 1982, *Rice v. Norman Williams Co.*, 102 S. Ct. 3294, 3299 (1982) (dictum), Baxter stated that: "Freedom of contract between different levels in the manufacturing and distribution process should be interfered with only where it does or is likely to cause horizontal problems." Panel Discussion, *Interview with William F. Baxter*, 50 ANTITRUST L.J. 151, 154 (1981). More recently, Baxter stated his belief that absent horizontal effects, mergers never have anticompetitive effects: "[M]ergers are rarely, if ever—I guess I would be prepared to say never—troublesome because of their vertical or conglomerate features." Panel Discussion, *Interview with William F. Baxter*, 51 ANTITRUST L.J. 23, 25 (1982).

See also Justice Department's New Merger Guidelines May be Ready by Winter, Baxter Indicates, [July-Sept.] ANTITRUST & TRADE REG. REP. (BNA) No. 1027, at A-4 (Aug. 13, 1981) ("[C]onglomerate mergers . . . [are] permissible if there are no horizontal consequences"); *Antitrust Chief Suggests Price-fixing Law Won't Be Enforced in Some Circumstances*, Wall St. J., Sept. 10, 1982, at 4, cols. 2-3 ("The Justice Department's antitrust chief [Baxter] indicated that in some circumstances he won't enforce a law that prohibits manufacturers from fixing the prices that retailers may charge for the manufacturer's products.").

ticompetitive effects associated with horizontal and vertical mergers—including the elimination of direct competition between the companies, the creation of a larger entity that may impede the ability of other companies to compete, the potential facilitation of express collusion among competitors or of reluctance to engage in vigorous competition, the creation of higher entry barriers that inhibit the potential for new competitors, or the foreclosure of existing competitors—are less likely to occur with conglomerate mergers.¹¹ Since section 7 of the Clayton Act does not create a *per se* prohibition of mergers, but instead forbids only those acquisitions that have a reasonable probability of causing a substantial lessening of competition,¹² potential adverse effects of conglomerate mergers other than anticompetitive effects have had to be identified to justify their condemnation.

Competition is far more than merely the struggle between two firms to make a sale. Competition is both a process and a dynamic characteristic of the market, whereby firms strive for higher sales and profits, lower costs, and improved product and service quality. The antitrust laws, including the merger laws, are designed to encourage and facilitate that kind of competition. The fostering of competition may require both the prohibition of certain kinds of conduct and the enhancement of certain structural conditions.

Competition is most likely to be impeded when the market in question is characterized by the presence of only a few competitors, each with a substantial market share, who engage in less than vigorous price competition, at least partly out of a recognition of their mutual interdependence. Horizontal mergers are most likely to lessen competition when the market only has a few important competitors, when the merger will thus diminish the number of existing competitors, when the merger will create a new entity with enhanced market power, and when the market structure will thus be more likely to allow competitors to act cooperatively or collusively.¹³

Four theories—the potential competition, entrenchment, reciprocity, and bigness is badness theories—suggest that conglomerate mergers

11. Some of these effects may indeed occur with conglomerate mergers. Thus, for example, the entrenchment theory postulates that the substitution of a substantially larger firm for an existing smaller firm in a concentrated market will diminish the vigor of competition in the market and will make entry by outsiders more difficult and hence less likely. *See infra* note 31 and accompanying text.

12. Specifically, § 7 of the Clayton Act, 15 U.S.C. § 18 (Supp. IV 1980), makes certain stock or asset acquisitions unlawful “where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

13. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963). Although this clearly remains the law today, there is increasing questioning of the positive correlation between higher market concentration and the diminution of competition. *See infra* note 66.

may have some of these anticompetitive effects and therefore should in some instances be prohibited under the Clayton Act.

1. *Potential Competition Theory*

When a market is operating less than fully competitively, the existence of companies on the fringe of the market may have two important procompetitive effects. First, the "actual potential entrant" doctrine posits that a company on the fringes could at some time enter the market on its own, thereby adding to the number of market forces, contributing to the vigor of competition, and diminishing the market share of existing companies.¹⁴ Second, the "perceived potential entrant" doctrine posits that the company, even while on the fringes of the market, may have some effect on existing companies. These companies might act differently (and one might hope more competitively) because of their perception of the company on the fringes and their resultant desire to forestall its independent entry.¹⁵ Therefore, some judicial decisions have upheld challenges to certain conglomerate mergers because of the resulting loss of potential competition.¹⁶

2. *Entrenchment Theory*

Anticompetitive effects may also flow from the acquisition of a company by a firm of significantly greater size and strength. Such an acquisition may "entrench" the smaller target company, making competition by its competitors more difficult, raising barriers to entry, and making it less likely that other companies will enter the target's market. This anticompetitive effect may occur because the acquiring company has greater access to capital or to certain scarce material and personnel resources than the smaller company's competitors. The merged firm may achieve certain economies—raising money, purchasing inputs, or marketing and advertising its goods—and can offer its product at lower prices than can smaller firms. The larger firm may gain strength

14. The loss of the potential for future deconcentration of the market is known as the "actual potential entrant" doctrine or theory for challenging such mergers. This theory has never received express approval from the Supreme Court; *see infra* notes 26-27 and accompanying text.

15. The loss of a company yielding present procompetitive effects from its presence on the fringes of a market is known as the "perceived potential entrant" doctrine or theory for challenging such mergers. This theory has been approved by the Supreme Court, although the Court rejected its application to the facts of the two cases in which it was raised; *see infra* notes 26-27, 58 and accompanying text.

The entry by merger of a perceived potential entrant does remove a company that was already having some procompetitive effect on existing competitors. To this extent, this is similar to one of the effects that horizontal merger jurisprudence identifies as a basis for successful challenges to such transactions.

16. *See, e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

through diversification and thus be better able to withstand cyclical trends in one of its markets. Its size may give it the resources and the willingness to withstand temporary losses in certain markets (the so-called "deep pocket"). The larger company may engage or threaten to engage in predatory pricing or other unfair or predatory practices. Or, the substitution of a large firm may simply change the psychology in the acquired firm's market, causing the other small companies either to compete less vigorously or to seek entry into defensive mergers with other large firms.

3. *Reciprocity Theory*

The acquisition of certain companies through conglomerate merger may also enhance the likelihood of reciprocal business dealings, as one party to the merger encourages its customers to purchase their supplies from the other partner to the merger. Because of the buying power of the acquiring company, its suppliers may feel obliged to purchase from the new component of the resulting conglomerate out of fear that it may instead purchase from their competitors. Although this pressure may be express, implied, or merely inferred, it nonetheless can distort buying decisions by raising considerations other than the price or quality of the goods or services sold.

4. *Bigness Is Badness Theory*

Finally, it has been suggested that certain mergers are undesirable simply if they unite two already extremely large companies, on the ground that concentration of the American economy in an ever-decreasing number of ever-increasingly large entities is politically, socially, and economically undesirable. This theory will be explored later in this Article.¹⁷

B. *Judicial Application of the Theories*

Except for the proposition that certain mergers should be condemned because of size alone (bigness is badness), each of the above theories has been considered and analyzed by the Supreme Court.¹⁸

17. See *infra* notes 80-88 and accompanying text.

18. In the late 1960's and early 1970's, a few cases were brought by the Department of Justice, challenging large-scale conglomerate acquisitions based solely on the size of the transactions. *United States v. ITT*, 1971 Trade Cas. (CCH) ¶ 73,667 (N.D. Ill. 1971) (consent judgment ordering divestiture of Canteen Corp.); *United States v. ITT*, 1971 Trade Cas. (CCH) ¶ 73,666 (D. Conn. 1971) (consent judgment ordering divestiture of the Hartford Fire Ins. Co.), *modified on other grounds*, 1977-2 Trade Cas. (CCH) ¶ 61,614 (1977); *United States v. ITT*, 1971 Trade Cas. (CCH) ¶ 73,665 (D. Conn. 1971) (consent judgment ordering divestiture of Grinnell Corp.); *United States v. Ling-Temco-Vought, Inc.*, 1970 Trade Cas. (CCH) ¶ 73,105 (W.D. Pa.) (consent judgment ordering divestiture of Braniff Airlines), *adopted*, 315 F. Supp. 1301 (W.D. Pa.), *supple-*

The potential competition theory was first raised, although not fully explicated, in two 1964 Supreme Court decisions, *United States v. El Paso Natural Gas Co.*¹⁹ and *United States v. Penn-Olin Chemical Co.*²⁰ In both cases, the Court recognized that a firm on the fringes of a concentrated market could have significant procompetitive effects, and that its entry by acquisition or joint venture could deprive the market both of this fringe effect and of the possibility of later independent entry.

The Court did not fully consider the potential competition doctrine until about a decade later, in *United States v. Falstaff Brewing Corp.*²¹ and *United States v. Marine Bancorporation.*²² During the intervening ten years, however, there had been considerable questioning of the expansive application of the Clayton Act to conglomerate mergers.²³ Further, the makeup of the Court became less government-oriented.²⁴ The *Falstaff* and *Marine Bancorporation* decisions reflected these developments by recognizing but refusing to apply the potential competition theory to the facts of the particular challenged transactions. Although a few earlier Supreme Court cases intimated that the Clayton Act applied even when the only effect of the merger was the elimination of a firm on the fringes whose independent entry would

mented on other grounds, 1970 Trade Cas. (CCH) ¶ 73,228 (W.D. Pa.). All these actions were settled by consent decree, however, and so there was no adjudication of the merits of the "bigness is badness" theory. See also *United States v. Northwest Indus.*, 301 F. Supp. 1066 (N.D. Ill. 1969) (hold separate order issued).

Since then, two further actions have been brought under the related "deep pocket" theory, which draws both on the entrenchment doctrine and also on the condemnation of mergers based on the size of the transaction. One, *United States v. United Technologies Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y. 1978), *aff'd*, 1978-2 Trade Cas. (CCH) ¶ 62,405 (2d Cir. 1978), resulted in a victory for the defendants. In the other case, *United States v. Occidental Petroleum Corp.*, Nos. Civ. C-3-78-241/242/268/288 (S.D. Ohio 1978), the parties, in part because of pressure from various federal and state enforcement agencies, dropped their merger plans before the conclusion of the litigation.

19. 376 U.S. 651 (1964) (acquisition of likely future actual competitor).

20. 378 U.S. 158 (1964) (joint venture).

21. 410 U.S. 526 (1973) (geographic extension merger).

22. 418 U.S. 602 (1974) (geographic extension merger).

23. See *supra* note 5.

24. During the period 1969-71, four Supreme Court Justices (Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist) were appointed by President Nixon. All four have tended to take a "pro-defendant" stand in antitrust cases. They replaced Chief Justice Warren and Justices Fortas, Black, and Harlan. The first three of these members of the Court tended to take far more of a "pro-government" attitude in most antitrust actions.

The Court's change in attitude is also reflected in its decisions. In 1966, Justice Stewart made the comment that "the sole consistency 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). Later, in 1974 and 1975 alone, the Government lost four merger cases in the Supreme Court. *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

have contributed to the deconcentration of the market and hence to the vigor of competition,²⁵ the Court in *Falstaff* expressly declined to reach this question.²⁶ In *Marine Bancorporation*, the Court again refused to resolve this question,²⁷ and also imposed a number of severe prerequisites on the use of the perceived potential entrant branch of the potential competition doctrine.²⁸ Many commentators have suggested that this development spells the virtual doom of the potential competition doctrine,²⁹ and the lack of plaintiffs' success in challenging such mergers in the past eight years has confirmed this conclusion.³⁰

The other theories for challenging conglomerate mergers, the entrenchment and reciprocity theories, have also been recognized by the Supreme Court. The Court in *FTC v. Procter & Gamble Co.*³¹ upheld a challenge to an acquisition that would have merged the nation's largest

25. See *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The significance of these cases for the potential competition doctrine was discussed in Justice Douglas' and Justice Marshall's opinions in *Falstaff*. See 410 U.S. at 538-44 (Douglas, J., concurring in part); *id.* at 558-62 (Marshall, J., concurring in result).

Doubts about the ability of § 7 to reach mergers that only eliminate an actual potential entrant can be traced to an article by Dean Rahl. Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 A.B.A. SEC. ANTITRUST L. 128, 142-43 (1958). There, he noted that § 7 applies only to a transaction the result of which is substantially to lessen competition; since the injury asserted under the actual potential entrant doctrine is only the elimination of the possibility of future alternative entry that would have decreased concentration and hence contributed to enhanced competition, he argued that such a transaction would not violate § 7. However, most commentators believe that § 7 should apply whenever the level of competition as a result of the merger is substantially less than the competition that would have prevailed in the absence of the merger. These commentators agree that the Rahl approach takes too narrow a view of the statute; they assert that § 7 only requires a comparison between the level of competition prevailing in the absence of the merger and the level after the merger. If the latter is substantially less than the former, the merger falls within § 7. See, e.g., 5 P. AREEDA & D. TURNER, *supra* note 5, ¶ 1118; Fox, *Toehold Acquisitions, Potential Toehold Acquisitions, and Section 7 of the Clayton Act*, 42 ANTITRUST L.J. 573, 579 (1973); Robinson, *Antitrust Developments: 1973*, 74 COLUM. L. REV. 163, 183 n.139 (1974); Turner, *supra* note 5, at 1379-80.

26. 410 U.S. at 537.

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

27. 418 U.S. at 639.

28. See *infra* note 60 and accompanying text.

29. See, e.g., *Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 65-66 (1979) (statement of John H. Shenefield); Brodley, *Limiting Conglomerate Mergers: The Need for Legislation*, 40 OHIO ST. L.J. 867, 867-69 (1979); Hellman, "Entrenchment" Under Section 7 of the Clayton Act: An Approach for Analyzing Conglomerate Mergers, 13 LOY. U. CHI. L.J. 225, 236 (1982); *Government May Abandon Fight to Stem Conglomerate Takeovers*, WALL ST. J., Nov. 24, 1980, at 33, col. 4.

30. See *supra* note 7.

31. 386 U.S. 568 (1967).

manufacturer of household products, having assets roughly forty times those of the target company, with the largest manufacturer of liquid bleach, having about one-half of that market. The Court concluded that this merger would have substantial disruptive effects and would lessen the likelihood of future enhanced competition in the bleach market. In *FTC v. Consolidated Foods Corp.*,³² the Court set aside an acquisition that would have substantially increased the likelihood that the acquiring company would be able to influence its suppliers to purchase their raw materials from the acquired company.³³

C. The 1968 Guidelines

After the 1960's Supreme Court decisions, such as *Procter & Gamble* and *Consolidated Foods*, all of which upheld the Department of Justice's or the FTC's challenges to various mergers, the Department in 1968 promulgated Guidelines reflecting its enforcement intentions under section 7.³⁴ The 1968 Guidelines were issued during a period of increased merger activity. The Department probably hoped that the mere statement of an intention to challenge certain kinds of acquisitions would deter acquisitive conduct. Furthermore, in certain respects, the 1968 Guidelines went beyond the then-existing state of the law. The Department hoped that they would be followed by various courts and would thus lead to the adoption of even broader judicial standards for the enforcement of section 7.

In its 1968 Guidelines, the Department was primarily concerned with those conglomerate mergers that involved the loss of a potential entrant or that created the danger of some significant reciprocal dealing.³⁵ These Guidelines pointed out that the possible entrenchment of a firm in an already concentrated market might also raise significant antitrust concerns.³⁶ While the Department admitted its lack of experience with entrenchment theory and stated its unwillingness to specify the kinds of mergers that might trigger a decision to challenge the transactions, it also demonstrated its concern for this potential anticompetitive effect.³⁷

The Guidelines proved to be far less effective than might have been hoped. Very few courts cited them, much less adopted them.³⁸ The merger decisions of the 1970's reflected a far more tolerant attitude

32. 380 U.S. 592 (1965).

33. See *supra* note 18.

34. See *supra* note 6.

35. 1968 Guidelines, *supra* note 6, paras. 17-19, 2 TRADE REG. REP. (CCH) at 6887-88.

36. *Id.* para. 20, 2 TRADE REG. REP. (CCH) at 6888-89.

37. *Id.*

38. Some courts have noted the existence of the Merger Guidelines, without expressing approval or disapproval with respect to the particular transaction. *E.g.*, *F. & M. Schaefer Corp. v. C.*

to corporate acquisitions, especially conglomerate mergers. Both the earlier decisions and the theories upon which they rested were the subject of considerable criticism. Attorney General William French Smith was undoubtedly correct when, in promulgating the new Merger Guidelines in 1982, he stated that "new economic thinking and new judicial attitudes have rendered the 1968 Guidelines largely obsolete in important respects."³⁹

Nevertheless, much of the 1968 Guidelines continues to make sense. They do not reflect the present state of the Department's enforcement attitudes. They do reflect, however, the legislative intent of the drafters of the Celler-Kefauver Act. The Guidelines also delineate the broad contours of sound merger jurisprudence.⁴⁰

D. Conglomerate Mergers over the Past Ten Years

The Supreme Court decisions mentioned in the previous Section recognized the applicability of the three major theories for challenging conglomerate mergers. The majority of these cases actually upheld the setting aside of the acquisition in question based on these doctrines. Nevertheless, the lower federal courts have been unwilling recently to invoke section 7 to invalidate most conglomerate mergers.⁴¹ The scope and length of this Article do not lend themselves to an extended review of these decisions. It is clear, however, that the courts have been skeptical of, and even hostile to, challenges to mergers under section 7. This development in turn has contributed to a reluctance on the part of the enforcement agencies to challenge a number of acquisitions⁴² that

Schmidt & Sons, Inc., 597 F.2d 814, 817 n.5 (2d Cir. 1979); United States Steel Corp. v. FTC, 426 F.2d 592, 606 n.32 (6th Cir. 1970).

Other courts discussed the 1968 Merger Guidelines, but then found the transaction nonetheless lawful, or cited the Guidelines as a basis for concluding that the merger was one the Justice Department would not have or ought not to have challenged. *See, e.g.*, Fruehauf Corp. v. FTC, 603 F.2d 345, 353-54 (2d Cir. 1979) ("[T]he guidelines do not establish the illegality of a merger which does fit the criteria used by the Justice Department. . . . The guidelines, therefore, simply reflect the considered view of the Justice Department as to which mergers are most likely to create a reasonable probability of substantially lessening competition and which may therefore warrant the institution of legal action. . . . [T]he Commission still bears the burden of showing the likelihood that the future effect of [the merger] 'may be substantially to lessen competition.'" (citation omitted)); FTC v. PepsiCo, Inc., 477 F.2d 24, 27 n.5 (2d Cir. 1973).

Finally, some courts relied on the Merger Guidelines as one basis for their decisions of the illegality of the transaction. *E.g.*, Stanley Works v. FTC, 469 F.2d 498, 504 n.13 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 524 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 325 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

39. *Attorney General's Statement*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at S-11 (June 17, 1982).

40. *See infra* note 87 and accompanying text.

41. *See supra* note 7.

42. Without undertaking detailed factual inquiries regarding relevant markets, market

might well have been condemned by the Warren Court. Thus, the past few years have seen a substantial reduction in the number of government-initiated Clayton Act section 7 cases.⁴³

There are several reasons for these developments. First, the Supreme Court has imposed several preconditions to the use of these doctrines⁴⁴ that in many mergers are satisfied neither by the markets of the target companies nor by the nature of the merger partners. Since the doctrines involve complicated economic principles, they impose a substantial evidentiary burden on enforcement agencies. Because these theories do not lend themselves to efficient judicial use, courts have increasingly found that this burden of proof has not been met.⁴⁵ Sec-

shares, relationships between products or geographic areas, the resources and intentions of the parties and their competitors, barriers to entry, and a whole host of other factors, it is extremely difficult to identify transactions that might have been held unlawful. *But see How Justice Encourages The Mania for Mergers*, Bus. Wk. Nov. 30, 1981, at 53 ("The proposed \$5.1 billion takeover by Mobil Corp. of Marathon Oil Co. is the kind of corporate deal that just would not have been floated before Ronald Reagan became President, legal advisers to the nation's biggest companies agree."). In any event, a number of transactions in the past few years are at least suggestive of the relevant factors considered in the cases condemned in the 1960's. Among these are the acquisition in September, 1981, of a 65% share of Texasgulf, which was engaged in the production of a variety of natural resources, by Elf Aquitaine, an oil and gas producer, for \$2.74 billion; the acquisition in June, 1981, by Standard Oil of Ohio, an oil and gas producer, of Kennecott, a producer of copper and other metal products, for \$1.76 billion; the acquisition in June, 1981, by American Express Co., a provider of financial services, of Shearson Loeb Rhodes, a securities investment firm, for \$988 million; and the merger in July, 1981, of Nabisco and Standard Brands, producers of food products with combined 1980 sales of \$5.6 billion, to become the nation's fifth largest food concern. *See Deals of the Year*, FORTUNE, Jan. 25, 1982, at 36, 37-38; *Yin and Yang*, FORTUNE, May 18, 1981, at 15. Similarly, in 1980, the Interstate Commerce Commission approved, and the Department of Justice did not challenge, the merger of two adjacent railroad companies, the Chessie System and Seaboard Coast Line Industries, in a transaction valued at \$1.7 billion, which resulted in the creation of the largest railroad in the U.S. in terms of assets and revenues. *See Wall St. J.*, Sept. 25, 1980, at 6, col. 1. *See also infra* note 51.

43. This trend is evidenced by the substantial drop in the number of complaints filed by the Department of Justice under § 7 of the Clayton Act. In the seven-year period encompassing the fiscal years (FY) 1968 through 1974, there were an average of 19 such complaints filed per year (ranging from a high of 26 in FY 1969 and 24 in FY 1971 to a low of 13 in FY 1974). In the nearly eight-year period from July 1974 through March 1982, the average level fell to less than 6.5 complaints per year (ranging from a high of 11 in FY 1979 to a low of 3 in FY 1975; for the most recent period, there were 4 complaints in FY 1981 and 3 complaints filed in the period of October 1981 through March 1982). Telephone interview with Representative of Legal Procedure Unit of Antitrust Division of Department of Justice (Sept. 14, 1982).

44. As I have noted elsewhere, however, the particular requirements are probably more stringent than the theory would require. *See Bauer, supra* note 5; *see also* Panel Discussion, *Emerging Issues With Respect to Merger Enforcement Standards*, 48 ANTITRUST L.J. 1639, 1641-44, 1656-58 (1979) (Bauer statement). Of greater significance is that the lower courts have applied even these strict rules more rigidly than the Supreme Court's decisions require.

This latter fact, coupled with the proliferation of evidence offered by both sides, which then compounds problems of proof, has been the chief cause of the defendants' victories in most recent merger cases.

45. This is well illustrated by the most recent potential competition decision, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982). The Commission had challenged a product extension merger—the acquisition by Teuneco, then the nation's fifteenth largest industrial corporation and the lead-

ond, the doctrines are supported by little empirical evidence to prove that the postulated effects will actually occur in the real world. Third, the doctrines are essentially inapplicable to "pure" conglomerate mergers⁴⁶—transactions that are occurring with increasing frequency.⁴⁷

The past half-dozen years have also seen two other important independent developments. First, there has been continuing criticism of the previously described theories in the academic and business literature.⁴⁸ These comments have run the gamut from assertions that conglomerate mergers almost never hurt competition to arguments that ease of mergers is required to rid certain companies of inefficient management⁴⁹ and to arguments that American companies should be allowed to grow bigger and stronger, in part through acquisitions, in order to compete more effectively against foreign or multinational corporations.⁵⁰ Second, in part because of diminished enforcement of sec-

ing seller of automobile mufflers and other exhaust systems products, of Monroe, the nation's leading seller of automotive shock absorbers. The court conceded that the shock absorber market was highly concentrated—the four largest firms had over 90% of the market, and the two largest firms by themselves had over 77% of the market. Yet, the court rejected all of the Commission's factual determinations that the other conditions of the potential competition doctrine were satisfied, *see infra* notes 60-62 and accompanying text, instead finding the FTC's conclusions unsupported by "substantial evidence"; therefore, the Commission's order requiring the divestiture of Monroe by Tenneco was set aside.

The evidentiary burdens imposed by the Court's rule in *Marine Bancorp.*, and the advantages of a simplified structural analysis based on presumptions of competitive injury, are detailed in Brodley, *supra* note 5.

46. As already noted, one alternative for challenging mergers that do not involve the loss of a potential entrant is the entrenchment doctrine, *see supra* note 31 and accompanying text and *infra* note 78. Yet, this doctrine applies only when the acquiring firm is significantly larger than the acquired firm—a Goliath among Davids. However, many of the transactions taking place at present involve two unrelated corporate behemoths. It may well be necessary to amend the Clayton Act before such mergers can be reached. *See infra* note 80 and accompanying text.

47. *See infra* note 51.

48. *See, e.g., Attacking the Test That Curbs So Many Mergers*, BUS. WK., Nov. 16, 1981, at 151 (market share, not market concentration, is key factor in determining profitability; enforcement focus on industry structure inappropriate); Kiechel, *Don't Stop the Mating Game*, FORTUNE, Aug. 24, 1981, at 71 ("merger critics haven't yet marshaled a persuasive case for drastic change in the treatment of business combinations").

49. This particular rationale is severely undercut by evidence of actual acquisitive activity. In fact, virtually all acquisitions are of thriving, growing entities by other successful companies. Most businesses do not want to buy trouble; instead, they seek diversification, acquisition of undervalued companies, or access to resources and technology. Indeed, in *Tenneco*, the court dismissed the Commission's argument that the defendant could have entered the market other than by acquisition of the largest company in the field, finding incredible "the Commission's assertion that Tenneco would have acquired a weak and deteriorating firm with a poorly accepted product and run-down equipment . . ." 689 F.2d at 354-55.

50. Although conglomerate mergers may yield certain efficiencies, it is unclear whether most of these represent mere income transfers to the combined firm, or whether these are true reductions in cost and savings of societal resources. *See* 5 P. AREEDA & D. TURNER, *supra* note 5, ¶¶ 1102-1109.

See also Baker & Grimm, *S. 600—An Unnecessary and Dangerous Foray Into Classic Populism*, 40 OHIO ST. L.J. 847, 857-60 (1979); Von Kalinowski & Starr, *Congress and the Conglomerate*

tion 7 of the Clayton Act, the wave of corporate acquisitions, particularly of the conglomerate nature, is rising to alltime highs, both in dollar size and in the number of large mergers.⁵¹

II

THE 1982 MERGER GUIDELINES

A. General Comments

The 1982 Department of Justice Guidelines' treatment of conglomerate mergers is subject to criticism both for what the Guidelines

Merger Phenomenon: The Introduction of Antitrust Proposals to Address Non-Antitrust Concerns, 17 HARV. J. ON LEGIS. 209, 233-40 (1980).

51. A leading merger consultant, W.T. Grimm & Co., reported that there were 2395 merger announcements in 1981, the highest number since the 2891 recorded in 1974. More significantly, the size of these transactions has grown to record levels. The total value of transactions in 1981 was \$82.6 billion, far exceeding the previous record amount of \$44.3 billion set in 1980. Finally, Grimm noted that the number of "mega-deals" was increasing substantially; there were 12 mergers valued at more than \$1 billion each in 1981, up from only four such transactions in 1980. The year 1981 was also marked by the single largest corporate acquisition in U.S. history—the \$7.5 billion takeover by du Pont Co. of Couoco, Inc. *Mergers Climbed 27%, Prices Rose Nearly 20% in 1981, Surveys Find*, Wall St. J., Jan. 13, 1982, at 3, cols. 5-6.

It is also obvious that the merger trend is increasingly characterized by conglomerate mergers, and even within this category the trend is towards the "pure" conglomerate merger. The FTC reported that between 1948 and 1972, 15.1% of all large acquisitions (defined as the acquired firm having assets of at least \$10 million) involving manufacturing and mining companies were horizontal, while 73.6% were conglomerate (of which only 23.0% were "pure" conglomerate mergers); breaking out the more recent period 1963-72 from this twenty-five year span, only 9.4% of these acquisitions were horizontal, while 81.0% were conglomerate (of which 27.0% were "pure" conglomerate). 1973 FTC STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 148 (table 16). By contrast, the FTC figures for the latest year available (1979) show that these large horizontal acquisitions accounted for only 5.2% of such large firm mergers, while conglomerate mergers accounted for 89.7%, of which 45.4% were of the "pure" conglomerate variety. 1979 FTC STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 109 (table 19). In fairness, it should be pointed out that this development has not been linear. Thus, in 1978, 19.8% of all mergers were horizontal, and "only" 68.5% were conglomerate (although the "pure" conglomerate mergers still accounted for 35.1% of the total). *Id.*

This trend of huge conglomerate mergers continued in late 1981 and into 1982. Among the more noteworthy transactions were the acquisition by U.S. Steel Corp. of Marathon Oil Co. for approximately \$6.2 billion, *see* N.Y. Times, Jan. 7, 1982, at A-1, col. 5; the acquisition by Baldwin-United Corp., a broad-based financial services company, of MGIC Investment Corp., the nation's largest private insurer of home mortgages, for about \$1.2 billion, *see* Wall St. J., Dec. 15, 1981, at 2, col. 2; the offers and counteroffers involving Bendix Corp., Martin Marietta Corp., Allied Corp. and United Technologies Corp., which finally resulted in the acquisition by Allied of Bendix in a transaction valued at \$1.9 billion, *see* Wall St. J., Sept. 23, 1982, at 3, col. 1; and the acquisition by the Coca-Cola Co. of Columbia Pictures for about \$820 million in cash and stock, *see The Reel Thing*, TIME, Feb. 1, 1982, at 59. A continuation of these types of transactions seems likely. *See Metz, Another Wave of Takeovers Seems Likely, Prompted by Bendix Deal, Declining Rates*, Wall St. J., Oct. 5, 1982, at 37, col. 4.

See also Mergers and Economic Concentration: Hearings Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 17 (1979) (statement of William S. Comanor) ("Where conglomerate mergers accounted for only about 3 percent of acquired assets in the period from 1948 to 1955, they were approximately half of all such assets in 1976 and 1977.").

state and for what they omit. To begin with, however, several general comments about the Guidelines are in order. First, they reflect a particular view of the goals of the antitrust laws that does not command universal approval. I view it as unfortunate that the new Guidelines look purely to the short-term economic consequences of the transaction, and dismiss as unimportant any social or political impact of a merger—including the loss or transfer of jobs and the increase in political influence, or the general effect of mergers on the corporate landscape. Second, they recognize, and implicitly sympathize with, the judicial hostility to merger enforcement over the past ten years. Third, they further evidence the limited governmental interest in vigorous antitrust enforcement. Fourth, to the extent that the present law should be changed, the new Guidelines would have to be characterized as negative or retrogressive.⁵² This characterization is manifested both by the fact that the new Guidelines erect even higher barriers for the successful prosecution of merger actions than those mandated in judicial decisions, and by the apparent complete discarding of certain theories—entrenchment and reciprocity—that have yielded at least limited judicial success.

B. The Guidelines and Conglomerate Mergers

1. Introduction

The statements in the Guidelines that discuss which transactions may be challenged indicate a lack of interest in preventing conglomerate mergers. The first two sections of the Guidelines deal with market definition and horizontal mergers. In the third section, the Department signals its proposed treatment of non-horizontal mergers. In the section heading itself the Department indicates that its sole concern is with the “horizontal effect from non-horizontal mergers.”⁵³ The Guidelines then discuss at some length the situations in which the entry by merger of a potential entrant may so diminish horizontal competition that the Department will probably challenge the acquisition. Even these situations, however, are defined too narrowly. Unlike the 1968 Guidelines, which perhaps went beyond the existing limits of the case law, the new Guidelines underdefine unlawful acquisitions so that certain acquisitions that might have the necessary adverse effect on potential competition to merit condemnation, as defined in the cases and much of the

52. Perhaps this is only evidence that the pinch feels differently when the shoe is on the other foot. As noted above, *see supra* text accompanying note 34, the 1968 Guidelines went beyond the existing law, in the hope that the courts would follow the Antitrust Division's direction; this was fine for those of us who took an expansive view of § 7. Now that the Antitrust Division wants to lead the courts in the other direction, this Article argues that this change is undesirable.

53. Guidelines § IV, 47 Fed. Reg. at 28,499, 71 CALIF. L. REV. at 660.

literature, will nonetheless go unchallenged.⁵⁴

The Guidelines are also grossly defective for their acts of omission. By indicating that conglomerate mergers will be challenged only when certain potential entrants enter certain markets by merger with certain targets, the Guidelines signal an utter disregard for the other potential effects of conglomerate mergers, i.e., entrenchment of the acquired company, facilitation of reciprocal dealing, and the creation of enormous corporate entities.⁵⁵ Despite the outpouring of criticism of the likelihood of these potential effects, the evidence is still at least ambiguous whether many conglomerate mergers do not indeed result in these anticompetitive effects.

The Guidelines also ignore for no good reason the relationship of the parties to a conglomerate merger. The Guidelines take the position that once a merger is characterized as non-horizontal, the relationship of the parties is irrelevant. They state that "[u]nder traditional usage, such a [non-horizontal] merger could be characterized as either 'vertical' or 'conglomerate,' but the label adds nothing to the analysis."⁵⁶ This position incorrectly presumes, however, that only horizontal competition is relevant. The Guidelines fail to distinguish an acquisition by a company of a firm in a related product or geographic market from a merger where the parties' enterprises are quite unrelated. Similarly, they do not differentiate mergers of parties of various sizes and scales, other than to the extent that size relates to the diminution of potential competition (and hence horizontal effects from the relationship).

2. *Potential Competition*

While the Guidelines in the area of potential competition promise some favorable developments for conglomerate merger enforcement, the conditions that will trigger enforcement action under the Guidelines are overly restrictive. The Guidelines properly recognize the actual potential entrant doctrine as a sufficient anticompetitive effect to satisfy section 7,⁵⁷ although the Supreme Court has twice refused to

54. The Department's view of conglomerate mergers is perhaps best summarized by the almost condescending statement in the introduction to its discussion of non-horizontal mergers: "Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous." *Id.*

55. Exclusive reliance on the potential competition doctrine effectively means that all "pure" conglomerate mergers will be untouched by Justice Department challenge, since almost by definition, if the acquiring company was not operating in a geographic or product market adjacent to that of the acquired company, it either would not be deemed a potential entrant, or alternatively, many other companies would also be deemed potential entrants.

56. Guidelines § IV n.39, 47 Fed. Reg. at 28,499 n.39, 71 CALIF. L. REV. at 660 n.39.

57. "By eliminating the possibility of entry by the acquiring firm in a more procompetitive manner, the merger could result in a lost opportunity for improvement in market performance

decide this question.⁵⁸ At the same time, the Department will for the most part collapse the actual and the perceived potential entrant doctrines,⁵⁹ recognizing that a firm that actually would have entered the market would in most cases have been perceived by existing firms as a potential entrant, and conversely, that a firm that is perceived by existing firms as a potential entrant would probably enter the market in the future. After collapsing the two doctrines, however, the Department has combined certain prerequisites from each doctrine to make successful application of the potential competition doctrine more difficult than most courts have required under the original doctrines as they have been analyzed separately.

In the *Marine Bancorporation* discussion of the perceived potential entrant doctrine, the Supreme Court stated that a merger would be unlawful [1] if the target market is substantially concentrated, [2] if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and [3] if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market.⁶⁰

Later in the same opinion, the Court stated that before a conglomerate merger could be condemned under the actual potential entrant doctrine, the plaintiff would have to show, in addition to the concentrated nature of the target market,⁶¹ that [1] the potential entrant had "available feasible means for entering the [target] market other than by [the challenged acquisition]; and [2] that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."⁶²

The Department in the new Guidelines has wisely abandoned insistence on element [3] of the perceived potential entrant doctrine, in part because proof that a company on the fringes actually affected the target market is virtually impossible and in part because the effect on the target market may be inferred from evidence about the performance of the target market.⁶³ In addition, the new Guidelines do not mention element [2] of the actual potential entrant doctrine. This

resulting from the addition of a significant competitor." *Id.* § IV(A)(1)(a), 47 Fed. Reg. at 28,499, 71 CALIF. L. REV. at 660.

58. *See supra* notes 26-27.

59. Guidelines § IV(A)(2), 47 Fed. Reg. at 28,499, 71 CALIF. L. REV. at 660-61.

60. 418 U.S. at 624-25.

61. A concentrated market is a prerequisite to both branches of the potential competition doctrine. "The potential-competition doctrine has meaning only as applied to concentrated markets." *Id.* at 630.

62. *Id.* at 633.

63. *See, e.g., Tenneco*, 689 F.2d at 358 (rejecting Commission's finding that acquiring company had tempering effect on target company's competitors).

abandonment of element [2], while deserving applause, is nevertheless somewhat questionable. Proving that an independent entry into a concentrated market will indeed lead to some deconcentration and increased competition is highly speculative and therefore extremely difficult. Because such a deconcentration was not proved, the *Marine Bancorporation* Court refused to consider, much less apply, this doctrine.⁶⁴ It would have been helpful to learn why the Department will not weigh this factor in its decision to challenge a conglomerate acquisition. Of greater importance, however, is the fact that, after ignoring these two prerequisites, the Guidelines erect new and higher barriers to the use of the potential competition doctrine.

One barrier to use is that the test for concentration adopted by the Guidelines is too rigid. The Department quite properly insists that the target market be concentrated before the potential competition doctrine can be applied.⁶⁵ But the Guidelines do not rely on four-firm or eight-firm market shares to define concentration, as all the cases and most of the previous literature have done.⁶⁶ Rather, applying the Herfindahl-

64. 418 U.S. at 638-39.

65. *But see* Carter, *Actual Potential Entry Under Section 7 of the Clayton Act*, 66 VA. L. REV. 1485, 1494-97 & n.39 (1980) (only a weak positive correlation between oligopolistic structure and absence of vigorous competition).

66. In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), which involved a horizontal acquisition, the Court described the concentration in the relevant markets and the result thereon of the merger by using extensive tables showing the shares of the market held by the two, four, and ten largest producers prior to and after the merger in question. *Id.* at 494-95. The Court also examined a number of its prior decisions on a similar basis, as a prelude to its conclusion that the industry in question was not concentrated and that the merger was unlikely to lead to significant increases in concentration. *Id.* nn.5-7.

In conglomerate mergers cases, the Court has relied specifically on market shares to define the existence of concentration. Thus, in *United States v. Marine Bancorp.*, 418 U.S. 602, 631 (1974), the Court stated, "we conclude that by introducing evidence of concentration ratios of the magnitude of those present here [three firm market share of 92%] the Government established a prima facie case that the Spokane market was a candidate for the potential-competition doctrine." *See also* *United States v. United States Gypsum Co.*, 438 U.S. 422, 426 (1978) ("the gypsum board industry is highly concentrated, with . . . [t]he eight largest companies account[ing] for some 94% of the national sales") (Sherman Act § 1; interseller price verification); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 527-28 (1973) (noting increase in market share of four and eight largest companies in market); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 749-50 & n.40 (D. Md. 1976) (listing industry concentration ratios in principal conglomerate merger cases).

Although there is some disagreement as to the market shares that will suffice for a conclusion that the industry is concentrated, virtually all commentators rely to a large extent on the shares of the largest firms. Thus, in two seminal works, Professor Bain concluded that a four-firm concentration ratio of 50% to 65% constituted "high-moderate" concentration, J. BAIN, *INDUSTRIAL ORGANIZATION* 128 (1959), while Professors Kaysen and Turner viewed 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).

Recent analysis of the existence and significance of market concentration is somewhat more divided. Among the literature emphasizing the importance of high concentration ratios, *see, e.g.*,

Hirschman Index (HHI), which has received judicial recognition in only a single merger case,⁶⁷ the Guidelines define "concentrated" far more rigidly than either the cases or logic requires. We are told that, in most situations, the acquired firm's market will not be deemed concentrated unless the HHI is above 1800. Although scholars disagree considerably about what constitutes a "concentrated" market share and distribution,⁶⁸ this high index barrier of 1800 would, for example, normally exclude consideration (absent the special conditions specified elsewhere in the Guidelines) of a merger where the four largest firms have market shares of 20% each⁶⁹ and the other firms have shares of less than 5%, since there the HHI would be less than 1700.

In *Marine Bancorporation*, the Court noted that concentration ratios might overstate the absence of competition in certain markets, and that the defendant ought to be allowed to introduce proof of actual market dynamics.⁷⁰ Instead of focusing on this issue, the Guidelines suggest a different aspect of the target firm's market that would counsel against challenges to a conglomerate-type acquisition merger even of a firm in a concentrated market: relatively low barriers to entry. The Department apparently feels that if entry into the target market is relatively easy—and here it deserves emphasis that the actual height of barriers to entry is quite difficult to assess—even the acquisition of a firm in a concentrated market by one of the few potential entrants is incon-

5 P. AREEDA & D. TURNER, *supra* note 5, §§ 1119a-1119b (presumption that target market is noncompetitive "when the leading four (or fewer) firms control at least 75 percent of a clearly defined market (or 65 percent where the eight-firm concentration ratio is at least 90 percent)," while recognizing "the inadequacies of simple concentration ratios"); Brodley, *supra* note 5, at 77 n.318 ("[h]igh concentration [to be used as factor for establishing presumptive illegality of merger] would be defined as a four-firm concentration ratio of 60% or an eight-firm ratio of 75%") (relying on 1968 Guidelines, *supra* note 6, para. 18, 2 TRADE REG. REP. (CCH) at 6887-88).

Other scholars, both legal and economic, have suggested either that traditional measures of concentration may be inadequate, or, more significantly, that market structure is an inadequate measure of market performance. See, e.g., R. POSNER, ANTITRUST LAW 55 & n.26 (1976) (Herfindahl Index is better indicator of market concentration than four- or eight-firm ratios); Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L.J. 826, 827 (1977) ("where concentration rules, costs and price are lower than they would be if the market had been prevented from becoming concentrated") (emphasis in original); Kaplan, *Potential Competition and Section 7 of the Clayton Act*, 25 ANTITRUST BULL. 297, 305 (1980) ("recent economic evidence casts significant doubt on the validity of market structure-performance hypothesis").

67. *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 323 n.15 (N.D. Ohio) (alternative to four-firm or eight-firm market shares as measure of concentration), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982). Cf. *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 748 n.38 (D. Md. 1976) (rejecting and criticizing HHI, and noting that it has never received judicial approval).

68. See *supra* note 66.

69. Under the traditional approach, this would be characterized as a four-firm market share of 80%—a level deemed "highly concentrated" by virtually every non-HHI standard described in the literature.

70. 418 U.S. at 631.

sequential. Since other firms might enter—although there is likely to be no evidence that they indeed would—the enforcement agency would not challenge the merger. There seems to be no consideration of the fact that once the acquisition takes place, entry by the other firms may become less feasible and less likely, or of the fact that the acquisition may disturb the target firm's market even if other entries might take place sometime in the future.⁷¹

Second, the Department raises another barrier to the use of the potential competition doctrine to challenge conglomerate mergers: the Guidelines require that the acquiring firm must be one of only a few potential entrants. The Guidelines state that once the number of potential entrants, including the defendant, rises to four or more, the loss of the defendant on the fringe of the market is competitively unimportant. One difficulty with this statement is that the Guidelines give no indication of how the Department will determine whether anybody—the defendant or the other firms—is indeed a potential entrant in the first place.⁷² Given the enormous difficulty of attempting to prove this fact,⁷³ it is disturbing, although perhaps not surprising, that the Department avoided this problem. The Guidelines' reliance on the existence of other potential entrants is certainly less useful without the means to identify those potential entrants.

This point aside, there is support under the perceived potential entrant doctrine for this particular limitation in the Guidelines. If one's concern is for the preservation of firms on the fringe of the market, whose presence there has a psychological effect on existing firms seeking to deter such entry, three outsiders will probably do the job almost as well as four.

One can not be quite so sanguine, however, about the loss of such a firm under the *actual* potential entrant theory, which is concerned with the loss of a firm whose independent entry would have added another market force and hence would have helped eventually to deconcentrate the market. Even if three other firms remain on the fringes, the very transaction in question results in the loss of the one firm whose action indicates the greatest present intent to enter the market in some form or another. Leaving the transaction unchallenged, as the Guidelines would advise, means that the vigor of competition in the target market would remain relatively low. To the extent that this loss of

71. See generally 5 P. AREEDA & D. TURNER, *supra* note 5, ¶ 1119f (only limited use should be made of evidence of low barriers to entry into concentrated market).

72. Some regard for a definition of a "potential entrant" is necessary, since *Marine Bancorp.* expressly makes the existence of such a condition a part of both the perceived potential entrant and actual potential entrant doctrines. See *supra* notes 60 & 62 and accompanying text.

73. See 5 P. AREEDA & D. TURNER, *supra* note 5, ¶ 1123a, at 121. ("The practical difficulties of identifying and ranking potential entrants are enormous.")

competition is accepted as a sufficient adverse effect under section 7, such an acquisition ought to be challenged.⁷⁴

Finally, the Guidelines would exempt so-called "toehold" acquisitions, i.e., the entry not by independent creation of a new entity (*de novo* entry), but by the purchase of a relatively small existing firm with the intention of increasing that company's market share. Admittedly, such an acquisition will often be procompetitive, especially if the acquiring firm's resources enable the smaller target company better to compete against its larger and more powerful competitors. However, the definition of a toehold firm in the Guidelines is quite indefinite. The Guidelines indicate that a challenge is unlikely when the acquired firm has less than 5% of the market, and becomes more likely—if the other factors previously discussed also exist—as the target company's share approaches 20%. At this higher end of the spectrum, most observers would no longer classify this as a "toehold" acquisition.⁷⁵ In most cases, *de novo* entry would be far preferable to the acquisition of, and thus the substitution of a larger firm for, a company with more than about 10% of the market.

74. As noted, this is the question left open by *Falstaff* and *Marine Bancorp*. See *supra* notes 26-27 and accompanying text.

75. There are only three decisions that consider the market share of an acquired company sufficient to render the transaction a mere "toehold" acquisition. In *Bendix Corp.*, 77 F.T.C. 731, 809-10 (1970), *rev'd on other grounds*, 450 F.2d 534 (6th Cir. 1971), the Commission challenged the acquisition of a company with a 12.4% share of one market and a 17.2% share of another, more narrowly defined market. Although the Commission held the acquisition unlawful under § 7, it suggested in dictum that an acquisition of another company, which had a market share of only 9.5%, would have been lawful. *Id.* at 821, 825. In another decision, *Budd Co.*, 86 F.T.C. 518 (1975), the Commission initially challenged, but then dismissed the complaint against, a merger between the respondent and another company that held between 6% and 8% of the relevant market; in its decision, the Commission announced a "10% rule," stating that acquisitions of companies with a lesser market share would be subject to a rebuttable presumption of legality. *Id.* at 582. In the third decision, *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974), the court rejected the proffered toehold defense, even though the acquired company had only a 7% share of the relevant market, in light of the fact that there was no showing that the acquiring company proposed to use the "toehold" as a small base from which to expand its operations. 367 F. Supp. at 1258.

The 1968 Department of Justice Guidelines suggested that the toehold defense would be found inapplicable where the eight largest firms had a market share exceeding 75%, and where the acquired firm was one of the four largest and had a market share of at least 10%. 1968 Guidelines, *supra* note 6, para. 18, 2 TRADE REG. REP. (CCH) at 6887-88. An earlier FTC staff report would have defined toehold companies as those with "market shares of under five percent in industries with a four-firm concentration ratio over 60%." FTC, CONGLOMERATE MERGER PERFORMANCE: AN EMPIRICAL ANALYSIS OF NINE CORPORATIONS 132 (1972) (staff report). Professor Brodley suggested a more discriminating test. He proposed a 5% threshold with respect to geographic extension mergers, and a 10% threshold for product extension mergers. Brodley, *supra* note 5, at 81-82.

See generally, Comment, *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); 89 HARV. L. REV. 800 (1976).

3. *Neglected Effects of Conglomerate Mergers*

Perhaps the most disappointing aspect of the Guidelines is their exclusive focus on the loss of horizontal-type competition as the basis for challenging conglomerate mergers. As the Supreme Court has recognized on several occasions, conglomerate mergers may have anticompetitive effects other than the elimination of potential competition.⁷⁶ There is much debate in the literature⁷⁷ about the conditions under which the substitution of a large firm for an existing smaller firm in a noncompetitive market will entrench that firm. Such an entrenchment would make the market even less competitive and would reduce the likelihood of future deconcentration. Most commentators agree that such situations might occur. The Guidelines, however, fail to recognize these anticompetitive effects.⁷⁸ Thus, it seems that the Department will never challenge an acquisition on such grounds. Similarly, although commentators disagree as to the situations in which reciprocity is likely to take place—and disagree as well on the seriousness of the anticompetitive effect of such conduct⁷⁹—there seems to be agreement that some conglomerate acquisitions may greatly increase the likelihood that such reciprocal practices will occur and therefore interfere with competition. Once again, however, the Department seems utterly unconcerned about such practices.

In addition, there is considerable debate on the question whether the merger of two large firms ought ever to be challenged solely because of the size of the resultant entity.⁸⁰ The issues raised in these

76. See *supra* notes 31-33 and accompanying text.

77. For literature focusing particularly on the entrenchment theory for challenging conglomerate mergers, see, e.g., 5 P. AREEDA & D. TURNER, *supra* note 5, ¶¶ 1134-1139; Elman, *Clorox and Conglomerate Mergers*, 36 ANTITRUST L.J. 23 (1967); Hellman, *supra* note 29 (proposing expanded use of entrenchment theory); Note, *Entrenchment Challenges to Conglomerate Mergers*, 60 WASH. U.L.Q. 537 (1982) (rejecting entrenchment analysis).

78. In addition to the *Procter & Gamble* case, see *supra* note 31 and accompanying text, the entrenchment doctrine has been accepted by several lower courts as a ground for setting aside a proposed conglomerate acquisition. See, e.g., *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). The doctrine was examined but then rejected under the particular facts in a number of cases, including *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976); *United States v. Hughes Tool Co.*, 415 F. Supp. 637 (C.D. Cal. 1976); *United States v. Crowell, Collier & Macmillan, Inc.*, 361 F. Supp. 983 (S.D.N.Y. 1973).

79. See, e.g., Hale & Hale, *Reciprocity Under the Antitrust Laws: A Comment*, 113 U. PA. L. REV. 69 (1964); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 51-63 (1972); Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L. REV. 1363 (1980); Note, *Reciprocity as a Basis for Challenging Conglomerate Mergers Under the Clayton Act*, 12 LOY. U. CHI. L.J. 481 (1981).

80. Perhaps the most significant example of such legislation was S. 600, *reprinted in Hearings Before the Subcomm. on Antitrust, Monopoly, and Business of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 641 (1979). This bill would have made absolutely unlawful any merger between two companies with sales or assets in excess of \$2 billion. It would also have made

debates encompass both the proper goals of the antitrust laws and the interpretation of section 7 of the Clayton Act. It would not be terribly fruitful to quote a legion of authorities for the proposition that the goal of the antitrust laws in general, and specifically the antimerger provision of the Clayton Act section 7, is not solely the promotion of economic efficiency.⁸¹ Properly understood, however, commentators present a false dichotomy when they suggest either that the antitrust laws ought to promote political and social goals,⁸² or that they ought to be governed only by consideration of the shortrun maximization of consumer welfare. Rather, consideration of the former values is in part grounded in a concern for the long-term adverse effect on allocative efficiency that would result from the enhanced macro-concentration of the American economy. Thus, these objectives are inconsistent, if at all, only in the short run.

unlawful a merger between any company with over \$350 million in sales or assets, and any other company similarly exceeding the \$350 million threshold or that had at least 20% of the market in a \$100 million market; this second prohibition contained, however, both an efficiency defense and an alternative permitting the company to spin off assets of comparable value to those of the acquired company.

Other significant legislative proposals include S. 1246, reprinted in *Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 821 (1979), which would have prohibited certain large acquisitions by approximately the 16 largest American oil companies; and the draft act in the *Report of the White House Task Force on Antitrust Policy*, 115 Cong. Rec. 13,890, 13,899 (1968), which 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 10% market share in an industry characterized by \$100 million in sales and a four-firm concentration ratio of 50% or more.

For comments on this type of approach to control of large size conglomerate acquisitions, see, e.g., Baker & Grimm, *supra* note 50 (criticizing legislation); Brodley, *supra* note 29 (supporting legislation); *Energy Antimonopoly Act of 1979: Hearings on S. 1246 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 810-20 (1979) (statement of Joseph Bauer) (supporting legislation).

81. For a cross section of opinion on the goals of the antitrust laws, see, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428-29 (2d Cir. 1945) (Hand, J.); 1 P. AREEDA & D. TURNER, *supra* note 5, ¶¶ 103-113c (1978); R. BORK, *THE ANTITRUST PARADOX* 50-89 (1978); C. KAYSER & D. TURNER, *supra* note 66, at 44-99; R. POSNER, *supra* note 66, at 8-35; L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 1-13 (1977); *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Scherer, Book Review, 86 YALE L.J. 974 (1977).

In interesting contrast to the purely economic focus of the present administration, Baxter's predecessor as Assistant Attorney General, John Shenefield, argued that economic efficiency ought not be the only test of the legality of a conglomerate merger, and that social concerns on occasion might tip the balance in favor of bringing a challenge to such transactions. *Shenefield Criticizes Economic Efficiency As Sole Measure of Antitrust Law Violations*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 850, at A-14 (Feb. 9, 1978).

82. These political and social goals include the quasi-economic objective of the preservation in or restitution to the market place of the decentralization of manufacturing, servicing, and sales units.

Despite this proposed harmonization of these two concerns, the priority given to one of these two broad goals will in large measure determine one's attitude towards certain conglomerate mergers. The champion of the shortrun economic efficiency approach to antitrust will have no trouble with most, if not all, such transactions.⁸³ The theories for challenging them are admittedly questionable and unproven on purely economic grounds. On the other hand, the exponent of the broader view of antitrust recognizes that many conglomerate mergers carry the potential for serious disruption of the business landscape, and that this has serious implications of an antitrust nature. Given this ambiguous evidence, an advocate of this second position will adopt the presumption that most large conglomerate acquisitions should be disallowed.⁸⁴

The significance of this observation is twofold. First, unless one shares certain values regarding the role of the antitrust laws, this Article, which decries the laissez-faire attitude reflected in the Merger Guidelines, will most likely be quite unpersuasive. Second, the appropriate functions of the antitrust laws⁸⁵ tend to color the views of judges

83. See Attorney General William French Smith's statement in *Big Doubts About Big Deals*, Time, Aug. 3, 1981, at 44, 45: "Bigness in business is not necessarily badness. Efficient firms should not be hobbled under the guise of antitrust enforcement."

84. Another approach is to recognize that while the evidence of the asserted anticompetitive impact of conglomerate mergers is ambiguous, there is also little evidence that they achieve the economic efficiencies or other benefits claimed by the champions of expansive merger jurisprudence. Mueller, *The Effects of Conglomerate Mergers: A Survey of the Empirical Evidence*, 1 J. BANKING & FIN. 315, 344 (1977) ("[T]he empirical literature . . . draws a surprisingly consistent picture. . . . [T]he mergers [studied] . . . have on average not generated extra profits for the acquiring firms, have not resulted in increased economic efficiency.").

Indeed, conglomerate acquisitions may turn out to be misguided and inefficient. Thus, the Federal Trade Commission initially challenged the acquisition by Exxon Corp., the nation's largest oil company, of Reliance Electric Co., a producer of, among other products, a motor believed to incorporate significant technological advances. Exxon Corp., No. 9130 (FTC complaint filed July 28, 1979). The Commission's complaint was dropped in 1982, see [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1076, at 292 (Aug. 5, 1982), after it became clear that Reliance's product was commercially infeasible, and after Exxon had lost hundreds of millions of dollars on the project. Similarly, the acquisition by Black & Decker Mfg. Co., a producer of electric tools, of McCulloch Corp., a producer of gasoline chain saws, was consummated only after an unsuccessful challenge mounted by the Antitrust Division. *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976). Yet, only six years later, Black & Decker decided to sell its McCulloch division, because that investment turned out to be highly unsuccessful; Black & Decker incurred an aftertax charge of \$93.7 million on the intended sale. See Wall St. J., Oct. 22, 1982, at 4, col. 1.

Because from an overall perspective, the claimed benefits of conglomerate mergers seem to be nonexistent, little would be lost even under a strictly economic view of antitrust by foreclosing a far larger number of these transactions. And, a fortiori, considerations of a political and social nature militate even more strongly in tipping the balance against these economically ambiguous undertakings.

85. It is clear that the authors of the 1982 Merger Guidelines believe that antitrust has a narrow mission, the promotion of consumer welfare. Whether the courts will pay any greater deference to these views than they gave to the 1968 Guidelines, see *supra* note 38 and accompanying text, remains to be seen.

who must interpret and apply the Clayton Act, and of members of Congress who must decide whether additional legislation is necessary.

I am convinced that the antitrust laws are designed to achieve more than merely the promotion of immediate consumer welfare and shortrun economic efficiency. Concern for social and political goals can be good for the economy as well. Therefore, the narrow focus solely on the maximization of horizontal competition, reflected in the new Merger Guidelines, is inappropriate.⁸⁶

While legislative debates so often point in different directions and can be cited for directly opposite principles, there is no question that the drafters of the Celler-Kefauver Act were concerned with the then-growing tide of mergers and the trend in the country towards concentration of productive resources in a decreasing number of hands.⁸⁷ This phenomenon is continuing today.⁸⁸ A proper construction of section 7 would show that the statute is suited for the task of dealing with most, if not all, of the acquisitions that contribute to this trend. The

86. Ironically, by threatening to challenge only horizontal mergers and those non-horizontal mergers with horizontal effects, the Guidelines condone those kinds of mergers that are least likely to produce enhanced efficiency. Where the companies are unrelated, there will be relatively few of the economies of scale or other benefits that flow from many horizontal-type mergers. The Department would no doubt respond that the asserted lack of wisdom of any proposed acquisition is none of the government's business. *But see supra* note 84 (evidence that certain mergers have proved economically unwise).

87. Most fairminded observers would probably concede that this was a significant concern of members of Congress and others in the late 1940's. The extent to which the concern was principally because of the economic impact of such a merger trend or whether the political and social concerns were equally substantial, and the extent to which these concerns were actually embodied in the language of the statute, are admittedly far more open to debate.

The leading judicial analysis of the legislative history of the Celler-Kefauver Act is found in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). There, the Supreme Court pointed out that [t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy Statistics . . . were cited as evidence of the danger to the American economy in unchecked corporate expansion through mergers Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

Id. at 315-16 (footnote omitted). Later, the Court stated that "a keystone in the erection of a barrier to what Congress saw was [sic] the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition . . . was still in its incipency." *Id.* at 317.

88. Different data all support this conclusion. One study indicated that 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 share was 60.3%. Penn, *Aggregate Concentration: A Statistical Note*, 21 ANTITRUST BULL. 91, 92-93 (1976). Another report indicated that the percentage of assets held by the 200 largest firms ranked by Fortune magazine was 53.1% in 1955 and 62.4% in 1977; that same report indicated that the 50 largest corporations accounted for 20.8% of all corporate assets in 1968 and 23.1% in 1974, a rise of over 11% in only six years. *Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 63 (1979) (statement of John H. Shenefield).

Department of Justice's rejection of any consideration of these concerns is unfortunate.

CONCLUSION

In my view, the new Guidelines will permit many more mergers than is warranted by sound public policy. Given this perception, what steps are appropriate?

First, the present antimerger law, section 7 of the Clayton Act, is fully capable of reaching more conglomerate mergers than the Guidelines suggest that the Department of Justice will challenge. One means of applying the statute—or of testing its reach—is the encouragement of additional private litigation. Over 95% of all civil antitrust suits are brought by the private bar.⁸⁹ While most of these have been for treble damages for alleged violations of the Sherman Act, private litigants may also complain about transactions injuring them that violate section 7 of the Clayton Act.⁹⁰

89. For the most recent period, fiscal year 1981-82, the Government initiated only 29 civil actions, while there were 1037 antitrust complaints filed by private plaintiffs, or over 97% of all cases. Even when the Government's 82 criminal actions are included in this total, the private bar accounted for over 90% of all antitrust litigation. Data for previous years indicate similar results. Thus, for FY 1980-81, the private bar accounted for 95.5% of the civil actions and 90% of all actions; in FY 1979-80, 97.3% of the civil actions and 94.9% of all actions; and in FY 1978-79, 96.1% of the civil actions and 94.1% of all actions. 1981 AD. OFF. U.S. CTS. ANN. REP. 216 (table 23); Telephone interview with Joseph Spaniol, Deputy Director of Administrative Office of U.S. Courts (Sept. 13, 1982) (Report and Interview contain raw numbers; percentages calculated by author).

90. Although it is clear that a plaintiff may recover treble damages if it is injured in its business or trade because of an unlawful merger, *see* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (judgment for defendant because plaintiff did not show the requisite type of injury), there is still an open question whether a court may order divestiture as a remedy in a private action brought under Clayton Act § 16, 15 U.S.C. § 27 (1976). Many courts have held that divestiture is unavailable in a private action. *See, e.g.*, *Calnetics Corp. v. Volkswagen of Am.*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *ITT v. GTE*, 518 F.2d 913, 920-25 (9th Cir. 1975); *American Commercial Barge Line Co. v. Eastern Gas & Fuel Assocs.*, 204 F. Supp. 451, 453 (S.D. Ohio 1962).

Other courts have, however, held divestiture available in private antitrust actions. *See, e.g.*, *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016, 1024-25 (S.D.N.Y. 1979); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 797-98 (S.D. Tex. 1971) (*dictum*), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *Bay Guardian Co. v. Chronicle Publishing Co.*, 340 F. Supp. 76, 81-82 (N.D. Cal. 1972); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965).

Yet other courts have noted that this remains an open question, without then resolving the issue. *See, e.g.*, *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 496 (7th Cir.), *cert. denied*, 103 S. Ct. 257 (1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296 n.55 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *NBO Indus. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

See generally, ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT POLICY AND LAW (1977); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 TEX. L.

Second, pressure must be exerted on the antitrust enforcement agencies—the Federal Trade Commission as well as the Department of Justice⁹¹—to encourage them to take a broader view of merger law enforcement. It is unfortunate that the present administration wants to limit past decisions rather than to expand present law. The public as well as academic and professional commentators must continue to argue that this represents unsound policy.

Third, remedial legislation may well be necessary. Although several attempts have been made in the past few years to expand or amend section 7 to reach certain types of large firm mergers, these have proven unsuccessful.⁹² This failure may be the result of economic factors, including the present recession; of political concerns, including recent turns towards deregulation and a greater laissez-faire attitude towards business activity; of fears that limits on large firm mergers might handicap the ability of American firms to compete with foreign conglomerates; or simply from legislative inertia. The combination of increased conglomerate merger activity and government enforcement inactivity⁹³ may induce new legislation, making clear what Celler-Kefauver seems

REV. 54 (1969); Casenote, *Divestiture Is Not an Available Remedy in Private Actions Under Section 16 of the Clayton Act*, 25 CATH. U.L. REV. 167 (1975); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964).

In the event of increased private litigation to challenge conglomerate mergers, there is some possibility that the Justice Department might intervene on the side of the *defendants*, arguing that the transaction ought to be upheld. See *Baxter Informs House Judiciary Committee of Impending Participation in Vertical Cases*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1054, at 470 (Mar. 4, 1982) (statement by Baxter that Justice Dep't may intervene in private actions to secure judicial reversal of per se rule on vertical price fixing). See also Panel Discussion, *Interview with William F. Baxter*, 51 ANTITRUST L.J. 23, 31-33 (1982).

91. The Federal Trade Commission has a coequal responsibility with the Department of Justice to enforce § 7 of the Clayton Act. The Commission participated in the discussions that led to the 1982 Guidelines, but did not endorse them. At the time of the issuance of the Guidelines, the Commission issued a statement concerning horizontal mergers, see FTC, Statement Concerning Horizontal Mergers (June 14, 1982), reprinted in TRADE REG. REP. (CCH) No. 546, at 71 (June 16, 1982) (special supplement to 2 TRADE REG. REP. (CCH) ¶ 4225 (Aug. 9, 1982)). This Statement contains no mention of non-horizontal mergers. Thus, the present intentions of the Commission with respect to conglomerate mergers are unclear.

92. See *supra* note 72.

93. Recent events suggest that some conglomerate undertakings may be motivated by executive egos or a simple desire to grow for growth's sake, rather than because mergers yield economic benefits. Furthermore, such transactions drain both capital markets of funds that might be used more directly for investment and increased productivity, and the executives themselves of time that might be used for company management rather than undertaking, or fending off, acquisitions. In the wake of the offers and counteroffers in September, 1982, involving Bendix Corp., Martin Marietta Corp., Allied Corp. and United Technologies Corp., many high-placed business executives have begun questioning whether the conglomerate wave may not be getting out of hand. See, e.g., *Four-Way Takeover Fight Amuses Some Spectators, Disturbs Others*, Wall St. J., Sept. 24, 1982, at 37, cols. 4-6; *Editorial: Pac-Man Economics*, Wall St. J., Sept. 27, 1982, at 22, col. 1 ("[s]omething seems amiss when highly talented executives . . . are committing their brains and company resources to corporate cannibalism").

to have left unclear: that certain conglomerate mergers are undesirable even if the adverse competitive effects are not dramatic or immediately apparent.

The combination in the Merger Guidelines of the adoption of rigorous prerequisites to the application of the potential competition doctrine and the neglect of other theories such as entrenchment and reciprocity is doubly troubling. First, the Guidelines signify an acceptance of the regrettable trend in the courts in the past decade, limiting the situations in which conglomerate mergers will be deemed unlawful. Second, and perhaps more significant, they forebode a continuation of that trend in the present decade.

Any reversal of the present treatment of conglomerate mergers will have to come through some combination of legislative reform and judicial reorientation. The Congress is most likely to act when presented with strong leadership from the executive branch or when faced with seemingly outrageous judicial decisions. The likelihood of either of these is clearly diminished, however, by the administration's adoption of narrow economic considerations as the sole predicate for antitrust decisionmaking, particularly manifested by the Justice Department's present unwillingness to challenge most kinds of non-horizontal mergers. Change from the judiciary also becomes unlikely, as the enforcement agencies decline to bring cases that could allow the courts to resuscitate section 7 in the direction contemplated by the Congress that passed the Celler-Kefauver Act. In the meantime, critics of this attitude must resort to continued efforts to point out the necessity for a broader view of the impact of conglomerate mergers on society, and encouragement of the private bar to bring actions under sections 4 and 16 of the Clayton Act against certain conglomerate mergers; they must take up the cudgel, now that the government has dropped it.