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A DECADE OF THE CELLER-KEFAUVER ANTI-MERGER ACT

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I. Introduction

Corporations intent upon expanding via the acquisition route have had three statutory hurdles placed in their way by the Congress of the United States. As hurdles, the first two, the Sherman Act of 1890 and the Clayton Act of 1914, were failures. A judiciary which refused to give effect either to the language or intent of the acts nullified completely their usefulness as anti-merger weapons.

The third hurdle, the Celler-Kefauver Amendment to the Clayton Act, was enacted in 1950. Relatively few judicial opinions have interpreted this act, "new section 7," as it is called. It is clear, however, that it has little to fear in the way of a hostile judiciary or Federal Trade Commission. So far at least, delays which can be characterized only as incredible have been the sole serious problem for "new section 7."

Shortly before the turn of the century, a great merger movement began in the United States. Although the Sherman Act was the law of the land, effective action under it could be taken only after a monopoly had been achieved, if then. By 1914, it was clear to a majority of the Congress that, if the growing merger movement was to be checked, new legislation was needed.

As enacted into law in 1914, section 7 of the Clayton Act contained a civil prohibition against the acquisition of stock of one corporation by another where the effect of the acquisition "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."[1]

President Wilson had hoped for a law which would prohibit anti-competitive practices "in such terms as will practically eliminate uncertainty."[2] The uncertainty was eliminated by judicial interpretations very quickly, but in a way which left section 7 a worthless piece of paper. As described by Judge Weinfeld in *United States v. Bethlehem Steel Corp.*:[3]

* Member, Whiteford, Hart, Carmody and Wilson, Washington, D.C.

1. 38 Stat. 730 (1914).
2. President Wilson's Message to Congress, 51 Cong. Rec. 1978 (daily ed. Jan. 20, 1914).
3. 168 F. Supp. 576, 582 (S.D.N.Y. 1958). This decision, favorable to the Department of Justice, was not appealed by Bethlehem Steel.

> Despite the clear purpose of the original section 7 of the Clayton Act, its objectives were not fully realized. This frustration was generally attributed to a number of factors. First, the statute applied only to acquisitions of stock and did not apply to acquisitions of assets, and even as to stock acquisitions it was interpreted as not to apply where the stock was used to acquire assets. Second, it was generally assumed that original section 7 did not apply to vertical mergers. The inadequacies of the section, whatever the reasons, were further highlighted by pronounced post war merger activity which resulted in the elimination by large corporations of independent companies in industries which had traditionally been considered small business fields. Congress showed increasing concern with the sharp rise in economic concentration and with the prospect of even greater concentration in the light of the continuing merger trend. Further, the Columbia Steel case[4] brought home the limitations of the Sherman Act in merger cases. It was against this background that Congress amended section 7.

The fact that the original section 7 did not prohibit the acquisition of assets was, in itself, a mortal failing. It left the Department of Justice and the Federal Trade Commission helpless when assets, not stock, were acquired, even though the economic effect was the same in both cases.

Competition between an acquiring and acquired firm obviously ended with the consummation of the acquisition. The original section 7 test of illegality—the lessening of competition between "the corporation whose stock is so acquired and the corporation making the acquisition"—was, therefore, complied with in the case of every acquisition, if the language of the statute was to be accepted literally. What the courts did was to read into the Clayton Act the "rule of reason" test of the Sherman Act. Only a substantial lessening of competition, already achieved, seemed to be left open for attack under section 7.[5]

From the passage of the Clayton Act in 1914, until the 1957 Supreme Court decision of *United States v. E. I. du Pont de Nemours & Co.*[6] (hereinafter cited as *Du Pont-General Motors*), it was accepted as a truism of anti-trust law that section 7 did not refer to vertical mergers. When two competitors merged, it was a horizontal merger, and section 7 applied. When a supplier acquired an outlet, or when a seller acquired its source of supply, it was a vertical merger, and section 7 did not apply.

For these and other reasons, the Clayton Act was no more an effective anti-merger weapon than the Sherman Act had been.

In 1948, the Department of Justice failed, in *United States v. Co-*

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4. United States v. Columbia Steel Co., 334 U.S. 495 (1948).
5. International Shoe Co. v. FTC, 280 U.S. 291 (1930); Temple Anthracite Coal Co. v. FTC, 51 F.2d 656 (3d Cir. 1931).
6. 353 U.S. 586 (1957).

lumbia Steel Co.,[7] to prevent the acquisition of Consolidated Steel by United States Steel. In a five to four decision, the Supreme Court held that the merger did not violate the Sherman Act. The majority made much of the fact that no "intent" to monopolize had been proved. The *Columbia Steel* decision, however, had its effect. Partly because of it, and after years of urging on the part of the Federal Trade Commission, Congress in 1950 passed the Celler-Kefauver Amendment to the Clayton Act.

The amended section 7[8] reads as follows:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

The changes effected were as follows: section 7 now (1) prohibited the acquisitions of assets as well as stock; (2) eliminated the test of whether the effect of the acquisition may be substantially to lessen competition between the acquired and the acquiring corporation; (3) eliminated the test of whether the acquisition might restrain commerce in any community and substituted for it the test whether in any line of commerce in any section of the country the acquisition may substantially lessen competition, or tend to create a monopoly; and (4) clearly applied to vertical as well as horizontal mergers.

Major mergers were still taking place at a rapid rate. They would soon test the effectiveness of the Celler-Kefauver Amendment.

Amended section 7, as we have seen, had its own ground rules. The enforcing agencies had to prove a reasonable probability of adverse competitive effect, in a particular line of commerce, in at least one section of the country. The courts and Federal Trade Commission have now had slightly over ten years to develop the meaning of these three concepts: (1) adverse competitive effect, (2) line of commerce, and (3) section of the country.

7. 334 U.S. 495 (1948).
8. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

II. Section of the Country

The Senate report accompanying the 1950 amendment to section 7 contained the following language:

> Although it is, of course, impossible to define rigidly what constitutes a "section of the country", certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation.
>
> What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.[9]

Both the *Bethlehem* opinion of District Court Judge Weinfeld above, and the initial decision of the hearing examiner in the Federal Trade Commission's section 7 case of *Proctor and Gamble Co.*[10] have quoted this language of the Senate Report.

In *Bethlehem* the question of the section of the country was hotly disputed. The government maintained that the country as a whole as well as certain smaller areas within the country each constituted a section of the country within the meaning of the act. The defendant's position basically was that the country should be divided into three sections, east, west and mid-continent.

Rejecting the defendant's position as "obvious gerrymandering," Judge Weinfeld said:[11]

> In addition, the geographic market for the purposes of determining the impact of a merger can include all areas where the trade in a product is affected by, and is not independent of, the trade in that product in other areas—for example, if a change in price in one area has an effect on price in another area both areas may be included in one geographic market. Further, it must be remembered that amended section 7 is not focused solely on the amount of competition between the two companies which is eliminated by a merger. Its scope is much broader; it is aimed at any substantial lessening of competition or tendency to monopoly which may follow in the wake of a merger. Necessarily to be considered is the situation that will exist after a merger. Even in a case where two companies operate primarily in separate areas, a merger can have an adverse effect on competition in that the enhanced strength of the merged company may give it such an undue advantage in each area that competition may be substantially lessened. In fact the defendants in this

9. S. Rep. No. 1775, 81st Cong., 2d Sess. 5,6 (1950).
10. No. 6901, FTC, June 15, 1961 (commission order to cease and desist). See Trade Reg. Rep. ¶ 15245.
11. 168 F. Supp. at 599-600.

case argue that it is by virtue of its size and presence in all areas that United States Steel exercises price leadership in the steel industry.

The court concluded that the proposed merger of Bethlehem and Youngstown should be analyzed against the nation-wide market for steel, as well as against "the smaller geographic areas where the impact may be felt."

It is true that in most of the decisions construing amended section 7, some effort has been made to show why the "section of the country" chosen should somehow be considered an entity. In *American Crystal Sugar Co. v. Cuban-American Sugar Co.*,[12] for example, the Second Circuit decided upon a ten-state area as the "section of the country." The court explained:[13]

> We think, however, that the relevance of the ten-state market was, on the whole, sufficiently supported by evidence and findings. To the south of this area were located the cane refineries of Louisiana including that of Colonial; inside its northern perimeter and along its northwesterly border were the factories of beet processors, including most of the plaintiff's factories. In this area, about two-thirds of all the sugar sold was supplied by seven producers, three of whom were beet producers, viz., The Great Western Sugar Co., The Amalgamated Sugar Co., and the plaintiff, and four of whom were cane refineries, viz., California and Hawaiian Sugar Refining Corp. (C & H), American Sugar Refinery Co., (American), and National Sugar Refining Co. (National), and Colonial.

Additional factors discussed by the court were the available cheap river transportation and short railroad hauls in the area, the market shares in the section of the acquiring and acquired firms, the percentage of the two firms' total sales which took place in the area, and the fact that the merger, if consummated, would rank the defendant second in volume of sales in the ten-state area.

In *Crown Zellerbach, Corp.*, the Federal Trade Commission did the Second Circuit one better and chose an eleven-state area as the appropriate section of the country.[14]

> Relative to respondent's contention as to the section of the country, we are satisfied that in this instance the Eleven Western States, as found by the hearing examiner, is an appropriate section. This area constitutes the greater natural market for the western producers of the relevant product and it is the market in which both Crown and Saint Helens made the majority of their sales of this product.

Query: If the acquisition of St. Helens by Crown Zellerbach had

12. 259 F.2d 524 (2d Cir. 1958).
13. *Id.* at 528.
14. 54 F.T.C. 769, 801 (1957). The Court of Appeals for the Ninth Circuit rejected the eleven-state area, selecting a three-state area instead, but affirmed the Commission's order. Crown Zellerbach Corp. v. FTC, (9th Cir. 1961).

not adversely affected competition in the chosen eleven-state area, but probably would have such an effect somewhere outside the "market in which both Crown and Saint Helens made the majority of their sales," would the Commission have dismissed the complaint? I think it is quite obvious that such would not have been the case. As a practical matter, the test is going to be, as Judge Weinfeld pointed out in *Bethlehem*, the geographic areas where the impact may be felt.

In other words, the attorneys of the Anti-Trust Division and Federal Trade Commission study the impact of the merger to see if the adverse competitive effect will result anywhere. That "anywhere" then becomes the "section of the country," irrespective of whether the "section" is a city, as in *United States v. Brown Shoe Co.*;[15] a "contiguous geographical area embracing the south shore area of Lake Erie in the states of New York, Pennsylvania and Ohio," as in *Erie Sand & Gravel Co.*;[16] a metropolitan area, as in *United States v. Maryland & Va. Milk Producers Ass'n*;[17] or the whole country, as in *A. G. Spaulding Bros.*[18]

On November 1, 1956, former FTC Chairman John W. Gwynne said in a speech before the American Management Association in New York:

> Apparently the limits of a section of the country in any particular case is not to be determined by geographical boundaries, but rather by the realities of competition. Generally speaking, it is an area of effective competition—a trade area. In determining its extent, consideration should be given to many factors—the character of the product, its practical transportability, its perishability, relation to competitors outside the area, and many others.

In *Bethlehem*, Judge Weinfeld held that even where the merging companies "operate primarily in separate areas," the merger may be illegal. This is hardly limiting section of the country to "an area of effective competition." Furthermore, as we shall see, the merger of two companies who never competed anywhere may be challenged under section 7 in today's anti-trust climate.

15. 179 F. Supp. 721 (E.D. Mo. 1959), *prob. juris. noted*, 363 U.S. 825 (1960).
16. No. 6670, FTC, Oct. 26, 1959 (order to cease and desist). The court of appeals reversed the Commission. Erie Sand & Gravel Co. v. FTC, 291 F.2d 279, 282 (3d Cir. 1961). In so doing, the court pointed out that the Commission on appeal had embraced a different section of the country than it had in its opinion. Before the court the Commission, in effect, drew semicircles around docks from which lake sand was unloaded. Had the Commission stood by its earlier ruling of a 12-mile strip along the south shore of the lake, the effect upon competition would have been much less in view of the Third Circuit's holding that lake and pit sand constituted one line of commerce. The case was remanded to the Commission.
17. 362 U.S. 458 (1960).
18. No. 6478, FTC, March 30, 1960 (commission order to cease and desist).

Likewise, in the opinion of the Federal Trade Commission in *A. G. Spaulding*, the Commission quoting from *Bethlehem* said:

> Section 7 is intended to protect buyers as well as competing sellers. Therefore, section of the country must be determined with respect to both buyers and sellers. The determination must be made on the basis of not only where the companies have in the past made sales, but also on the basis of where potentially they could make sales and where buyers would reasonably turn to them as alternative substantial sources of supply.[19]

III. URBAN AND RURAL

In the Commission's final *Pillsbury Mills, Inc.* decision,[20] a new concept was superimposed on "section of the country." Two economically significant sub-divisions of the southeast—a rural market and an urban market—were held to be the pertinent sections of the country. The opinion pointed out that some of the major companies selling family flour in the southeast concentrated on the rural trade and sold relatively little in metropolitan areas.

In a 1960 speech, former commissioner Edward Tait summed it up accurately, I believe:

> The appropriate locale may be where the acquirer or acquired do business, but Section 7 is also "broad enough to cope with a substantial lessening of competition in any other section of the country, as well." The market determination normally is made on the basis of both the actual and potential sales areas of the merging corporations.

On February 27, 1961, the Supreme Court decided *Tampa Electric Co. v. Nashville Coal Co.*[21] Nashville Coal Company had tried to free itself of its obligation under a contract with Tampa Electric on the ground that the contract was an exclusive dealing contract which violated section 3 of the Clayton Act.[22] The section of the country involved was a crucial factor. The Court noted that the courts below had been satisfied with inquiring only as to competition within peninsular Florida. The plaintiff had contended that the coal tonnage covered by the contract must be weighed against either the total consumption of coal in (1) peninsular Florida; (2) all of Florida; (3) the bituminous coal act area, comprising peninsular Florida and the Georgia "finger"; or at most (4) all of Florida and Georgia. "If the latter area were considered the relevant market, Tampa Electric's proposed requirement would be 18% of the tonnage sold therein."

The Court commented:

> We are persuaded that on the record in this case, neither peninsular

19. *Id.* at 8.
20. No. 6000, FTC, Dec. 16, 1960 (final order of divestiture).
21. 365 U.S. 320 (1961).
22. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

> Florida, nor the entire State of Florida, nor Florida and Georgia combined constituted the relevant market of effective competition. We do not believe that the pie will slice so thinly. By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida, and the producers were "eager" to sell more coal in those States. While the relevant competitive market is not ordinarily susceptible to a "metes and bounds" definition, it is of course the area in which respondents and the other 700 producers effectively compete. The record shows that, like the respondents, they sold bituminous coal "suitable for [Tampa's] requirements," mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximate total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market. Of the latter amount some 78,716,000 tons were sold to electric utilities. We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States. We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years. In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954.[23]

While the Court rejected the Florida area as the appropriate section of the country, it was saying, in effect, that the contract in question could not have had the proscribed effect anywhere. Even granted that "by far the bulk of the overwhelming tonnage marketed from the same purchasing area as serves Tampa is sold outside of Georgia and Florida," if the exclusive dealing contract had, for some reason, a sufficiently adverse effect in Florida and Georgia, then I believe the Supreme Court would have found a violation; Florida and Georgia would have been an acceptable "section of the country."

As the law of new section 7 has developed, the section of the country has not been determined by any pre-existing criteria. The question rather has been, "Will the merger have a substantial effect upon competition anywhere, be it city, state, nation or arbitrary area?" If the answer is yes, the "anywhere" is the section of the country. In the *Union Carbide Corp.* initial decision, the hearing examiner said:

> The words "section of the country" obviously refer to the geographical area in which a line of commerce moves in trade. In the present case, we are fortunate in having no conflict between counsel as to the meaning of the phrase "section of the country," because all counsel recognize that respondent's products are bought and sold throughout the United States. *Accordingly, we may look anywhere in the United States for the effects*

23. 365 U.S. at 332.

of the acquisition upon the relevant line of commerce.[24]

But is it necessary for respondents' products to be bought and sold throughout the United States for the Commission to "look anywhere in the United States for the effects of the acquisition?" I think not. The present state of the law can be summed up, I believe, this way. Find the forbidden effect. Where you find it, there is your section of the country.

IV. Line of Commerce

The prohibited competitive effect, which may take place in any section of the country, must take place in at least one line of commerce. What constitutes a line of commerce is one of the thornier problems connected with section 7.

In *Du Pont-General Motors,* a case decided under old section 7 but widely followed in subsequent cases brought under the amended act, the question of the line of commerce involved was crucial. The defendant maintained that section 7 was not violated by reason of Du Pont's holding of General Motors stock because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses.

The Court rejected all "finishes and fabrics" as the relevant lines of commerce, stating:

> Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected. The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automobile finishes and fabrics.[25]

Just the year before, in *United States v. E. I. du Pont de Nemours & Co.* (hereinafter cited as *Du Pont-Cellophane*), the Supreme Court had held:

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. These tests are constant. That market is composed of products

24. No. 6826, FTC, Feb. 27, 1961, at 7 (initial order to cease and desist). (Emphasis added.)
25. 353 U.S. at 593-95.

> that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows.[26]

Since the "interchangeability" test of *Du Pont-Cellophane* is inconsistent with the "peculiar characteristics" test of *Du Pont-General Motors,* much has been written and spoken concerning the relationship of the two cases. One view is that the "interchangeability" test of *Du Pont-Cellophane* is the proper test for a Sherman Act proceeding where, for some reason, the line of commerce should be broader, but that the *Du Pont-General Motors* test of "peculiar characteristics" is proper for a Clayton Act case. I believe a more realistic view is one that stresses the change in personnel on the Court between the two decisions. Justice Reed wrote the majority opinion in *Du Pont-Cellophane* for Justices Burton, Minton, Frankfurter and himself. Justices Warren, Black and Douglas dissented. Justices Harlan and Clark took no part in the discussion. The following year, in *Du Pont-General Motors,* Justice Brennan wrote the opinion for the majority, and was joined by the dissenters of the *Cellophane* case —Warren, Black and Douglas. *Cellophane* majority Justices Burton and Frankfurter dissented. Justices Clark, Harlan and Whittaker abstained.

Obviously, it is fairly simple to find "peculiar characteristics" wherever you want to find them. Actual court and Federal Trade Commission decisions subsequent to *Du Pont-General Motors* shed little light on the standards against which a line of commerce is to be judged. In fact, at least one Clayton Act opinion reverted to the "interchangeability test" where the government's case was aided by so doing. The Second Circuit, in *American Crystal Sugar Co.,* mentioned above, found beet and cane sugar to be interchangeable, and that both kind of sugar, together, constituted one line of commerce.

In *United States v. Columbia Pictures Corp.,*[27] the United States District Court for the Southern District of New York also embraced interchangeability. The government's position was that the line of commerce was limited to the distribution of feature films to television stations. The court thought otherwise, saying:

> All competition must be considered, including competition faced by the product in question from other products.
>
> The tests enunciated by the authorities are consistent. Effectively, the test "reasonable interchangeability for the purposes for which (the products) are produced—price, use and qualities considered," and the test

26. 351 U.S. 377, 404 (1956).
27. 1960 Trade Cas. ¶ 69766 (S.D.N.Y. 1960).

> "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct . . . to make them a 'line of commerce' within the meaning of the Clayton Act" are but different verbalizations of the same criterion. . . .
>
> Inter-product competition has always been recognized where it has been found to exist in effective degree. Where it is not found in effective degree, the products are not competing and, therefore, cannot be included in the same market. Their failure to compete, one with the other, may be due to lack of suitability and interchangeability for the same uses, differences in characteristics and, uses, or even because of psychological or other factors.[28]

Because feature films were "interchangeable," the court found that they did not have sufficient peculiar characteristics to constitute a line of commerce.

In *Erie Sand & Gravel,* the Court of Appeals for the Third Circuit also seemed to fall back on functional interchangeability:

> In its findings the Commission restricted the "line of commerce" considered and regulated to lake sand. However, the record is clear that pit or bank sand also is used satisfactorily and on a large scale for the making of concrete, including concrete which meets the high specifications of the federal government for building sand, although it may require preliminary washing not needed by lake sand. At more than twenty places in the record there is positive testimony that bank or pit sand has proved interchangeable with lake sand as a high-grade building material. It is particularly significant that the record shows that in the building of the Ohio and Pennsylvania Turnpikes and the New York Thruway both types of sand met government specifications and were used interchangeably. The Erie County, Pennsylvania, Thruway was built entirely with pit and bank sand in 1957 and 1958. On the basis of such evidence the brief of the government on this appeal concedes that in 1956 at least 1,800,000 tons of pit and bank sand meeting government specifications were sold, principally for concrete making, within twenty-five miles of the southern shore of Lake Erie. *In these circumstances, the functional interchangeability of pit and bank sand with lake sand was overwhelmingly established.*[29]

This reasoning of course is cut from the same cloth as that of the court in *American Crystal Sugar Co.* It is not, strictly speaking, functional interchangeability in the sense of *Du Pont-Cellophane.* If lake sand and bank sand are identical, and only the *location* or processing is different, functional interchangeability may not be present at all. There was some evidence, however, that lake sand was of a higher, uniform quality than pit sand.

In an opinion widely criticized by the Federal Trade Commission staff as indecisive and confusing,[30] the Commission in its first *Brillo*

28. *Id.* ¶ 77007-08.
29. 291 F.2d 279, 281 (3d Cir. 1961). (Emphasis added.)
30. The author was on the trial staff of the FTC at the time, and this assertion is based upon his own personal experience.

Manufacturing Co.[31] opinion seemed to be unable to make up its mind as to what constituted a line of commerce. It rejected the test of the hearing examiner, saying:

> We think the hearing examiner in concluding as a matter of law that industrial steel wool was the relevant market erred in basing his determinations solely on the fact that those were the wares being produced by the acquired and acquiring companies. The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them sufficiently distinct from others to make them a "line of commerce" within the meaning of the Act. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibility of other things bearing on the question of whether or not they may be distinguished competitively from other wares.

The opinion then went on to say, however:

> As noted above, the issue as to the bounds of the relevant market in Section 7 proceedings is one of fact. Thus, the respondent's right to present evidence showing that products other than steel wool are included within the area of effective competition, and, therefore, are a part of the relevant line of commerce is fully protected.[32]

Certainly steel wool has characteristics peculiar enough to distinguish it from sandpaper, for example. The language quoted above, however, seems to leave open the possibility of including sandpaper, or some other abrasive, within the same line of commerce as steel wool. A product which "effectively competes" with another product may be said to be "reasonable interchangeable" with it. This test is not the same as the "peculiar characteristics" test of the Supreme Court in *Du Pont-General Motors.*

In distinguishing between classes of paper in its *Crown Zellerbach*[33] decision, the Commission commented on the fact that there was evidence of price variations as between such categories of paper or paper board. This difference in price was one of the factors considered by the Commission in choosing a narrow line of commerce, instead of all papers. The Second Circuit in *American Crystal Sugar,* on the other hand, did not regard price difference as a "proper element" in determining line of commerce.

In two amended section 7 decisions, a district court and the Federal

31. 54 F.T.C. 1905 (1958).
32. *Id.* at 1906.
33. 54 F.T.C. 769 (1957).

Trade Commission had their cake and ate it too.

Judge Weinfeld, in *United States v. Bethlehem Steel* said he was persuaded that the peculiar characteristics and uses standard was "sound." He added:

> Since there are no effective substitutes which compete with the various lines of commerce as found by the Court, it is not necessary to discuss the defendants' contention that the reasonable interchangeability test of the Cellophane case is applicable here. . . . This does not, however, mean that interchangeability can be ignored—a high degree of interchangeability may under certain circumstances make it more or less the same product.[34]

Judge Weinfeld then held the relevant lines of commerce to be (1) hot rolled sheets, (2) cold rolled sheets, (3) hot rolled bars, (4) buttweld pipe, (5) electric weld pipe, (6) seamless pipe, (7) oil field equipment, (8) oil field equipment and supplies, (9) tin plate, (10) track spikes, (11) the iron and steel industry as a whole. He concluded that there was a reasonable probability that the merger of Bethlehem and Youngstown would, in violation of section 7, substantially lessen competition and tend to create a monopoly in each of these eleven lines of commerce in some section of the country.

In arriving at his line of commerce, Judge Weinfeld selected the whole as well as some of the component parts.

In *A. G. Spaulding & Bros.*,[35] the Federal Trade Commission did the same thing. The athletic goods industry as a whole was labeled a line of commerce, as were individual items, such as baseballs, footballs, badminton rackets, and others. In fact, there was a further breakdown, and expensive baseballs were held to be a separate line of commerce from cheap baseballs; expensive basketballs, a separate line of commerce from cheap basketballs.

The Commission opinion stated:

> One of the most significant points in the entire record is that Spaulding and Rawlings were engaged primarily in the production and sale of athletic goods in the higher-priced, higher-quality line. It is, therefore, within this higher quality line of the various product lines that an appraisal of the competitive effect of the merger should properly be made. The manufacture and sale of the low price line of athletic goods involves an entirely different market and may be completely disregarded in making this appraisal.[36]

Why did the court in *Bethlehem* and the Commission in *Spaulding* find it necessary to add the industry as a whole to the more narrow lines of commerce, such as cold rolled steel and expensive baseballs?

34. 168 F. Supp. 576, 593 & n.36 (S.D.N.Y. 1958).
35. No. 6478, FTC, March 30, 1960 (commission order to cease and desist).
36. *Id.* at 11.

I believe that the word "concentration" supplies the answer. If a merger results in measurable concentration in an industry, in today's anti-trust climate it will be challenged. If a fair-sized firm disappears from an industry because of an acquisition, a complaint will almost surely follow. In *Spaulding,* for example, a large sporting goods manufacturer was acquired. Its absence from competition would be felt throughout the entire country. While the Commission might deny, as it did in *Brillo,* that this alone is enough to support a section 7 order, I think it will be a long time before the acquisition of a firm the size of Rawlings will be unchallenged. The effect of the acquisition on expensive baseballs, or cold rolled steel, may be stressed in the opinion. The disappearance of a fair-sized competitor from the industry as a whole, I submit, is a factor to which great weight is given in today's practical anti-trust world. If that is present, lines of commerce in which competition may be adversely affected will be found.[37]

V. COMPETITIVE EFFECT

The crux of the section 7 case is the presence, or absence, of the reasonable probability that competition will be substantially (and adversely) affected as a result of the merger or acquisition. If there is a reasonable probability that competition will be substantially lessened, or a tendency to monopoly created, then the acquisition is unlawful.

The translation of this rather vague statutory standard into more concrete criteria has understandably been a difficult task for the courts and the Federal Trade Commission. Economist Irston Barnes has spotlighted one of the difficulties: "A merger case is essentially an economic problem tried in a legal form according to legal rules before judges who are generally unschooled in the technical aspects of the economics of competition."[38]

37. What constitutes a line of commerce is also discussed in FTC opinions involving Pillsbury Mills, Docket No. 6000; Proctor and Gamble, Docket No. 6901; Reynolds Metals, Docket No. 7009; and Union Carbide, Docket No. 6826. The Ninth Circuit in *FTC v. Crown Zellerbach Corp.* (unreported at present) gave the following as its concept of a line of commerce:

> "We know of no rule which would require that the Commission include in its designated relevant product market every item sold by St. Helens regardless of its size or importance. All that the Commission was required to do was to ascertain and find a product line which was sufficiently inclusive to be meaningful in terms of trade rules. . . . In the statutory phrase 'in any line of commerce,' the word entitled to emphasis is 'any.' *Any* line of commerce does not mean the same as the entire line of commerce, or all lines of commerce engaged in or touched upon by the acquired concern. The line of commerce need not even be a large part of the business of any of the corporations involved."

38. Speech Before the Federal Bar Association, Sept. 26, 1958.

VI. Types of Mergers

When competitors merge, the result is a horizontal acquisition. When a customer merges with his supplier, the result is a vertical acquisition. When two completely different companies, such as Proctor and Gamble and Clorox merge, the jargon of anti-trust baptizes it as a conglomerate merger. Any of the three types may be challenged under the Clayton Act, if the forbidden adverse effect upon competition seems to be lurking in either the present or the future.

In *Du Pont-General Motors,* The Supreme Court stated the law in quite general terms:

> We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. Thus, although du Pont and General Motors are not competitors, a violation of the section has occurred if, as a result of the acquisition, there was at the time of suit a reasonable likelihood of a monopoly of any line of commerce.[39] The market affected must be substantial. *Standard Fashion Co. v. Magrane-Houston* Co., 258 U.S. 346, 357. Moreover, in order to establish a violation of § 7 the Government must prove a likelihood that competition may be "foreclosed in a substantial share of . . . [that market]." Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General Motors' share of that market is fully established in the evidence.[40]

This language is not much help in the way of a yardstick. General Motors was obviously Number One in the giant automobile industry. Du Pont was its major supplier of automobile paints and finishes (a line of commerce). Du Pont's acquisition of a controlling interest in General Motors, therefore, created a reasonable probability that competitors of Du Pont would be foreclosed from selling paints and finishes to General Motors. "The inference is overwhelming that Du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit."[41] The acquisition, therefore, was struck down.

The *Du Pont-General Motors* decision caused considerable concern for many reasons. One was the pronouncement that an action under section 7 would lie anytime, even decades after the merger. Whenever the Department of Justice felt that a merger might, in the future, have an adverse affect upon competition, it could file a complaint, even if the merger had been completed many years before.

39. 353 U.S. 586, 592 (1957).
40. *Id.* at 595.
41. *Id.* at 605.

In view of the fogginess of the concept, "substantially to lessen competition," it is little wonder that *Du Pont-General Motors*'s evergreen theory of susceptibility to suit under section 7 caused worried comment from those whose present position in the business world was built on mergers.

So far, at least, there has been no general attack on middle-age mergers.

VII. EASE OF ENTRY

In *American Crystal Sugar Co.,* mentioned above, the Second Circuit laid considerable stress on "ease of entry" into the market, or at least on "history of entry" into the market. The court went along with the district court.

> [T]he evidence indicates that no new sugar refineries can be anticipated. In the last thirty years, no new firms have entered the industry. . . . On the whole, we think the attack on these findings at most suggests that they were possibly somewhat extreme and that it does not seriously disturb the conclusion that the sugar industry, due largely to the quota system under the National Sugar Act, is peculiarly inhospitable to incursions from outside entrepreneurs.[42]

There is no question but that "ease of entry" and its related concept "concentration in the market" are two factors which will be studied closely by the courts and the Federal Trade Commission in any merger case. "Market concentration in the sanitary paper products industry is high," the Commission commented in *Scott Paper Co.,*[43] and ordered divestiture. In its opinion on the second interlocutory appeal in *Brillo,* the Commission chastised a hearing examiner for ignoring "the great and perhaps conclusive weight to be given to these very same considerations [*i.e.,* Brillo's share of the market] when viewed in connection with an already existing heavy industry concentration . . . ."[44]

In *Erie Sand & Gravel,* mentioned above, the concentration found by the Commission was quite pronounced:

> There are, in addition, other significant factors. The merger eliminated a major competitor. Where formerly there has been several suppliers in port cities, such as Dunkirk, New York; Sandusky, Ohio; and Erie, Pennsylvania; now there is one. Respondent also has acquired possession or leases to most of the available docks in the market area. It is now the only producer which supplies sand at all ports from Buffalo, New York to Sandusky, Ohio.
>
> The facts of record further reveal that there is little likelihood of

42. 259 F.2d 524, 530 (2d Cir. 1958).
43. No. 6559, FTC, Dec. 1, 1960, at 10 (final order of divestiture).
44. No. 6557, FTC, at 3.

> greater competition in the future. Kelley Island Company, incident to the terms of the acquisition, is prohibited from re-entry into the relevant market for ten years. Other competitors of respondent are small operators with limited means. They do not have docks or other facilities which might enable them to effectively challenge the respondent's now dominant position. It is evident that the effect of the acquisition by respondent of the assets of Sandusky Division may be substantially to lessen competition or to tend to create a monopoly in the market as defined above.[45]

The Supreme Court, in *United States v. Maryland & Va. Milk Producers Ass'n*,[46] found that the district court's findings that the acquisition of Embassy Dairy by the Association would "eliminate the largest purchaser of non-Association milk in the area" and increase the Association's control of the Washington market, were supported by the record. The Supreme Court concluded that these findings, and others, properly led to the conclusion that the acquisition of Embassy Dairy by the co-op tended to create a monopoly or substantially lessen competition and was, therefore, a violation of section 7.

Concentration was likewise stressed in the Commission's decisions in *Pillsbury* ("A further factor in the concentration trend is the almost complete lack of new entries in the family flour business in the Southeast"),[47] and in *Spaulding* ("Three firms instead of four now control approximately 50% of the market for all athletic goods and considerably more than 50% of the market for higher quality products").[48]

Certainly one of the most intelligent and experienced of anti-trust lawyers is the present Director of the Bureau of Anti-Restrictive Practices of the Federal Trade Commission, Joseph E. Sheehy. Speaking on September 26, 1958, before the Federal Bar Association, he quoted the following language from *Georgetown Law Journal*:

> A substantial lessening of competition or a tendency toward monopoly arises either from a reduction in competitive opportunities or a reduction in the incentives to compete. Since the antimerger law must generally be applied prospectively, the economic analysis of mergers must be focused primarily on changes in the competitive structure of industry and markets, evaluated in the light of the competitive behavior of the relevant industry and market, and perhaps of other competitively similar industries and markets.[49]

Mr. Sheehy went on:

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45. No. 6670, FTC, Oct. 26, 1959, at 6-7.
46. 362 U.S. 458 (1960).
47. No. 6000, FTC, Dec. 16, 1960, at 16.
48. No. 6478, FTC, March 30, 1960, at 13.
49. Barnes, *Competitive Mores and Legal Tests in Merger Cases: The Du Pont-General Motors Decision*, 46 Geo. L.J. 564, 629 (1958).

> In my opinion, in a market where there are only four or five significant producers and one acquires another, a showing of the relevant standing of the companies before and after the acquisition should be enough to establish a prima facie case. The productive capacity, actual production or sales of these companies could be obtained and compared with total industry figures where usable figures were available. If the results show that four companies held 90% of the market in about equal proportions and that the remaining 10% was held by a dozen others, it would seem that nobody could contend that a merger of any two of the top four would not create a presumption of a substantial lessening of competition. There would be no need for a more detailed analysis, no call for consideration of other factors or characteristics. In my opinion, at least, this would present such an undue reduction in the number of competing enterprises as to bring it within the language used in the reports of the Congressional committees.

If there is concentration within a line of commerce, the Commission and courts will pounce upon that fact. *Scott Paper* sums it up: "One of the major purposes of amended section 7 was to ward off anti-competitive effects of increases in the level of economic concentration resulting from corporate mergers and acquisitions."[50]

Logically, lack of concentration should weigh heavily on the side of the lawfulness of the merger.

VIII. LOSS OF A COMPETITOR

The removal of a "vigorous" competitor from a line of commerce is another factor the Commission and courts have looked to in finding violation of section 7. The concept is similar to concentration, but if a vigorous competitor is removed via acquisition, it will be held against the merger whether the particular industry involved is concentrated or not.

In *Bethlehem* the court stated:

> There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supply, or results in the establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete. The proposed merger between Bethlehem and Youngstown would have each of these proscribed effects. The substantiality of these effects is beyond question.[51]

In its final decision in *Pillsbury*, the Commission pointed out that Ballard, a firm acquired by Pillsbury, was one of the few regional companies in the Southeast in a position to compete effectively with large nationwide distributors such as Pillsbury and General Mills.

50. No. 6559, FTC, Dec. 1, 1960, at 10.
51. 168 F. Supp. 576, 603 (S.D.N.Y. 1958). (Citations omitted.)

Especially was this true, the Commission found, in the urban centers where premium brands dominated the sales. It was "clear," therefore, to the Commission, that the acquisition of Ballard removed an important and effective competitor from the southeastern market.

"Of particular significance," the Commission said in its opinion which ordered Spaulding to divest itself of Rawlings, was the fact that immediately prior to the merger Rawlings was experiencing a period of rapid growth and expansion. "The immediate effect of the acquisition, therefore, was the elimination of a substantial competitive factor in the production and sale of athletic goods, leaving the general line concerns, Wilson and MacGregor, as the only firms having the capacity to compete on equal terms with Spaulding."[52]

And in the Federal Trade Commission proceeding against Scott Paper, the Commission found that although none of the three acquired companies marketed products similar to Scott trade products, all three were potential competitors of Scott in the production and sale of finished sanitary paper products.

IX. Market Share

Other factors are considered, such as the probable effect of the merger on price. ("Respondent's and Ballard's prices differed on different locations prior to the acquisition. Afterward, the prices of the two brands became identical.)"[53] So, too, the history of acquisitions by the acquiring firm has been mentioned in opinions.[54] Both the courts and the Commission, however, have given most of their attention to the concept of "market share." What was the share of the relevant market, or line of commerce, which the acquiring firm had prior to the acquisition? What was the share of the relevant market which the acquired firm had prior to the acquisition? What is the share of the relevant market which the acquiring, or new, firm has now that the merger has taken place? Does this new, combined market share indicate a reasonable probability of a substantial lessening of competition or a tendency to monopoly? These are some of the most important questions the courts and the Federal Trade Commission ask.

The question of market share arises primarily in connection with the horizontal merger. In vertical and conglomerate mergers, the merging concerns are not manufacturing or selling the same items at the same level. If they were, the merger would be horizontal. A Commission hearing examiner has held in a conglomerate merger case, however, that the market share of the acquired firm would probably

52. No. 6478, FTC, March 30, 1960 (commission order to cease and desist).
53. No. 6000, FTC, Dec. 16, 1960 (final order of divestiture).
54. See, *e.g.*, Union Carbide, No. 6826, FTC, Feb. 27, 1961 (initial order to cease and desist).

be increased, to the detriment of competition, because of the money the acquiring firm would probably spend on advertising the products of the acquired firm.[55] Indeed, this theory was the principle basis for the issuance of the complaint. This reasoning of the Commission would apply with equal force to vertical mergers.

The Federal Trade Commission twice has emphatically stated that increased market share alone, apparently no matter how large, will not support a finding that section 7 of the Clayton Act has been violated. In the opinion deciding the 1953 interlocutory appeal in *Pillsbury,* then Chairman Edward F. Howrey said:

> Competition cannot be directly measured; no single set of standards can be applied to the whole range of American industries. No single characteristic of an acquisition would of itself be sufficient to determine its effect on competition. For this reason it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected.[56]

Mr. Howrey added:

> As we understand it, the Federal Trade Commission has a greater task than this in administering the broad provisions of Section 7 of the Clayton Act. There must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences.[57]

At the time of this decision, many Commission attorneys predicted that it would kill amended section 7. Orders of divestiture in subsequent cases proved that section 7 survived. The *Pillsbury* case itself, however, is still rolling on some eight years later, mostly because Pillsbury was allowed to present an "examination of all relevant factors" all over the country for a number of years.

Chairman Howrey left the Commission, but the principles of the Pillsbury decision on the interlocutory appeal were later affirmed in *Brillo.*

In his initial decision of October 15, 1957, the hearing examiner in *Brillo* stated as follows:

> The record herein shows that in 1954, the year preceding the acquisition, Brillo's share of the national household market amounted to 45.3%, S.O.S.'s share of that market amounted to 50.9%, whereas Williams' share of the household market amounted to 3/10 of 1%. If the acquisition of a company which has 8/10 of 1% of the market is so insubstantial that it could not possibly lessen competition, it follows that an acquisition involving 1/3 of 1% of the market is so insubstantial that it could not

55. Proctor & Gamble. Co., No. 6901, FTC, July 11, 1961 (initial order to cease and desist).
56. 50 F.T.C. 555, 564 (1953).
57. *Id.* at 565.

possibly lessen competition. Since it cannot, it cannot be found to be a violation of Section 7.[58]

The $\frac{9}{10}$ of 1% was a reference to the decision of the Supreme Court in *FTC v. Western Meat Co.*[59]

With respect to the industrial steel wool market, the record in *Brillo* shows that Brillo was the number one producer with 29.1% of the market and Williams was the number four producer with 18.2% of the market. Hearing Examiner Robert Piper stated, in effect, that these figures made out a per se violation:

> The legislative history, the various decisions under the Clayton Act involving the same statutory standard for evaluating effect, and *Du Pont-General Motors,* the most recent decision of the Supreme Court involving Section 7, as well as inherent logic demonstrate that an acquisition which involves a substantial share of the relevant market must of necessity have a reasonable probability of substantially lessening competition in that market.[60]

On the first interlocutory appeal in *Brillo,* the Commission, with Commissioner Secrest writing the opinion, rejected this reasoning of the hearing examiner:

> We do not concur in the holding that a significant increase in a producer's already substantial share of the market necessarily demonstrates likelihood of statutorily forbidden effects in every distributional situation. This is not to say that the dimensions of the market segment being eliminated from competition between merging corporations may not in some evidentiary situations support inferences of substantial anticompetitive effects. Nevertheless, informed determinations as to actual or probable competitive effects *can only be based on an analysis of all facts of record* pertaining to the relevant market. In addition to the facts concerning market shares, likewise important is such evidence as was received herein pertaining to the general competitive situation, number of competitors and degree of concentration prevailing in the industry. Hence, it was error for the hearing examiner to find as a matter of law that the record showing of substantiality of the market shares involved in the acquisition established a violation of section 7.[61]

The court in *Columbia Pictures,* mentioned above, agreed with the Commission in its view of the importance to be given "market share," saying: "Statistics dealing with only rank and percentages do not by themselves suffice to describe whether the vigor of competition has been affected."[62]

The Commission in *Brillo* also rejected Hearing Examiner Piper's

58. No. 6557, FTC, at 15.
59. 272 U.S. 554 (1926).
60. No. 6557, FTC, at 14.
61. 54 F.T.C. 1905, 1907 (1958). (Emphasis added.)
62. 1960 *Trade Cas.* ¶ 69,766, at 77,018.

dismissal of the line of commerce involving household steel wool:

> In 1954, the year preceding the acquisition, the share of the household market for steel wool held by the acquired corporation comprised 3/10 of 1 percent. In such year, the hearing examiner noted, the respondent's share of that market was 45.3 percent, which was exceeded only by one other manufacturer. Because no area of substantial competition had previously existed between the acquired and acquiring companies in the household line of commerce, he concluded that no substantial lessening of competition could result from the acquisition. The facts emphasized by the courts in the decisions cited by the hearing examiner in support of his holding differ materially from those apparently presented in this proceeding. Hence, those decisions construing section 7 prior to its amendment are not deemed controlling to decision here. . . . For the reasons set forth above, we think the ruling granting the motion to dismiss as to the household line of commerce for steel wool is based on an improper standard. That the household market share of the acquired corporation had been less than 1 percent was a circumstance as to which due cognizance was to be taken. It was error, however, for the hearing examiner to deem such fact exclusively controlling as a matter of law and to fail to accord due consideration to other relevant market information of record, including post-acquisition production and marketing data.[63]

On remand, hearing examiner Piper stated that there was no evidence to show a violation of section 7 other than the substantial market share involved with respect to industrial steel wool. He accordingly dismissed the complaint. On interlocutory appeal, he was again reversed by the Commission in an opinion dated March 25, 1960, written by Commissioner Kern. This opinion stated:

> It seems to us that the hearing examiner's first ruling upon the motion which, upon appeal, we reversed and remanded, was unduly preoccupied with pursuing the so-called quantative substantiality doctrine—in this case to a point unjustified by exisiting judicial precedents interpreting the requirements of Section 7 of the Clayton Act—and thereby gave overwhelming consideration to market shares to the complete exclusion of all other relevant economic factors. However, the hearing examiner in the initial decision now before us on appeal, with an ambivalence that we deem unjustified by our remand direction, seems repelled by that which he once embraced. He now ignores the great and *perhaps conclusive weight* to be given to these very same considerations when viewed in connection with an already existing heavy industry concentration and other relevant record facts.[64]

On this appeal, the Commission also said the following factors should be considered in a section 7 case: the difficulty of new entries; the disparity in resources and sales volume between Brillo and

63. 54 F.T.C. 1905, 1907-08 (1958).
64. No. 6557, FTC, at 2-3. (Emphasis added.)

other producers, excluding S.O.S.; the merger's effect on price; the fact that the acquiring firm was a "price leader"; the fact that there had been progressive losses of market shares in the industrial line of commerce by the smaller producers for several years preceding the acquisition and concomitant gains by Brillo; and the great disparities in financial resources which theretofore existed between respondent and all but one of the other producers were widened by the acquisition, the increased productive capacity in the acquiring firm, and the tendency to industry concentration.

The opinion concluded:

> Bearing in mind that aggravation of an existing oligopoly framework comes within the statutory concept of "tend to create a monopoly," *United States v. Bethlehem Steel Corp.*, . . . the foregoing market facts reasonably support the inference that respondent's acquisition has operated to intensify the market concentration which theretofore existed in the household field. It, therefore, is not controlling that the share held by Williams was a fraction of one percent. The Act also encompasses minute acquisitions which tend to monopoly.[65]

The view of the Commission that greatly increased market share to a predominant degree is not enough by itself to show a violation, but is "perhaps conclusive," will do little to clarify the law of section 7. *Query*: If General Motors and Ford merged, would the Commission have to spend years, as it did in *Pillsbury*, receiving evidence as to matters other than market share?

The Court of Appeals for the Ninth Circuit has recently taken a different approach. In *Crown Zellerbach* the court was critical of the "all relevant factors" approach of *Pillsbury* and *Brillo*, stating:

> Crown, with its leadership in production and sales of the product line papers, its great disparity in size as compared with other competitors in the area, and its position as a price leader in the market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance. It significantly added to its concentration of power. To borrow a phrase from *Universal Camera v. Labor Board*, 340 U.S. 474, 487, Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the absorbing concern, is to be prohibited for the reason that such increased opportunity for dominance will probably lessen competition or tend to create a monopoly. It is its tendency to concentration of power that condemns this merger. This alone justified the Commission's finding that the reasonable probable result of the acquisition would be substantially to lessen competition and tend to create a monopoly.[66]

In *Bethlehem*, market share of the proposed, combined firm was

65. No. 6557, FTC, at 9-10.
66. This case, decided in 1961, is unreported at present.

emphasized by the court in prohibiting the consummation of the merger, but many other factors were considered. Even where very large market shares were involved, as in *Crown Zellerbach,* other factors were looked into by the Commission even if the Ninth Circuit felt later that it was unnecessary.

> Respondent produced 51.5 percent and St. Helens 11.0 percent of the relevant product in the West in 1953, for a total of 62.5 percent of the western production. This clearly constituted a predominant share of the market considering its relative isolation. One immediate result of the acquisition was to remove from the Western supplier market an important, fully integrated competitor having its own timber reserves, pulp manufacturing and converting facilities and fully developed sales outlets to the trade. Another immediate result was to increase significantly the size of respondent in the relevant line of commerce in which it already had a commanding lead.
>
> Respondent, a company which produced in the West in 1953, 56.2 percent of all the paper produced in the area and 27.3 percent of the paper and paperboard production combined, was by far the leading producer in the relevant line of papers with 51.5 percent of the total. . . .
>
> Clearly, with the elimination of St. Helens, western jobbers generally have been severely restricted as to sources from which the relevant papers may be purchased. It likewise appears that many converters which formerly could look to St. Helens for purchases of the relevant papers must now depend upon Crown as a primary source of supply, a company which is a major competitor since Crown converts a substantial share of its production.[67]

In *Erie Sand & Gravel,* the Commission found the combined market share to be even greater.

> Respondent's sales, when added to those of the Sandusky Division amounted to 86.8% of all lake sand sold in the relevant market in 1953, and 83.7% of such sales in 1954. Respondent and the Sandusky Division, combined, sold 91.8% of all domestic lake sand sold in the relevant market in 1954. Two other domestic suppliers shared the remainder between them in 1954, with sales of approximately 4.9% and 3.3% respectively. Thus, respondent, through the merger, had showed dominance in the relevant market.[68]

In most merger cases, evidence as to market share will not be sufficient to support a finding of a violation of section 7. It will not be enough by itself to be "perhaps conclusive." Factors such as affect on price; competition; number and strength of remaining competitors; ability of the new, merged firm to compete with larger competitors; and others should be considered. Where, however, the increased mar-

67. 54 F.T.C. 1905, 1907-08 (1958).
68. No. 6670, FTC, Oct. 26, 1959 (commission order to cease and desist), later reversed and remanded by the Court of Appeals for the Third Circuit, 291 F.2d 279 (1961).

ket share of the two merging firms places it head and shoulders above all its competitors, certainly a prima facie case has been made out and the respondent should be held to considerably less than five or six years in defending the action by showing other "relevant factors."

X. Vertical Mergers

When a customer acquires a source of supply, such as a manufacturer or producer, the merger is christened "backward vertical." When a producer or manufacturer acquires a sales outlet, a "forward vertical" merger results. The tests of illegality are still the reasonable probability (1) of a substantial lessening of competition and (2) of a tendency to monopoly, but the criteria are different. "Market share" is modified to "share of the market foreclosed," on the theory that a parent will buy from its subsidiary or affiliated company to the exclusion of competitors. The proposed Bethlehem-Youngstown merger, blocked by a United States district court, provides us with a clear example.

Rope wire is used in the manufacture of wire rope. Bethlehem Steel manufactured both rope wire and wire rope. Judge Weinfeld found that Youngstown, which did not manufacture wire rope, was an important and substantial supplier of rope wire to independent, non-integrated fabricators of wire rope. These independent companies, who had been buying rope wire from Youngstown, which was not a competitor of theirs in the sale of wire rope, would now be faced with the combined Bethlehem-Youngstown organization and Bethlehem was a competitor of theirs in the sale of wire rope.

> Thus, were Youngstown to be acquired by Bethlehem there would be removed from the market one of the only six companies in the United States which are the most desirable noncompetitive sources of supply of rope wire for the nonintegrated independent wire rope fabricators. . . . As to the other facet of the vertical effect of the proposed merger, since Bethlehem is a producer of wire rope, the reasonable probability is that Bethlehem would supply its own requirements so that Youngstown would no longer be a market for the independent fabricators.[69]

The Federal Trade Commission proceeding against Gulf Oil Corporation, for its acquisition of Warren Petroleum, presented a somewhat similar situation.[70] The acquisition of Warren by Gulf was primarily vertical because Gulf, a producer, had acquired Warren, primarily a marketer. Warren had been a major supplier of liquified petroleum gas to independent dealers who had competed with Gulf's "Gulftane" dealers in certain sections of the country where Warren

69. 168 F. Supp. 576, 613 (S.D.N.Y. 1958).
70. No. 6689, FTC, Jan. 5, 1960 (consent order to cease and desist).

did not market at retail. These independent dealers had bought their LP gas from Warren which was not their competitor. After the acquisition of Warren by Gulf, Warren had become their competitor.

Also, Warren did not sell fuel oil. Gulf, of course, does. Therefore, two competing fuels, LP gas and fuel oil, were both controlled by Gulf, whereas before the merger, Warren's LP gas was a competitor of Gulf's fuel oil as well as its LP gas.

A strictly vertical aspect of the Gulf-Warren merger was that Warren had bought most of the LP gas which it marketed, although it did produce some. Prior to the merger, any producer could sell its LP gas to Warren. Following the merger, there can be but little doubt that Gulf would occupy a favored position as a supplier to Warren, and Warren a favored position as a customer of Gulf. When LP gas was in great volume, as it sometimes is, Gulf could unload on Warren, to the possible detriment of Gulf's competitors. When LP gas was scarce, as it sometimes is, Warren could get a supply from Gulf, to the possible detriment of Warren's competitors, who would not be able to buy from Gulf.

The difference between Gulf-Warren and Bethlehem-Youngstown was in the outcome. The Department of Justice successfully blocked the latter merger, but the Federal Trade Commission entered into a consent settlement which allowed the Gulf-Warren merger to stand.

The *Du Pont-General Motors* case was vertical in nature, in that a supplier owned a controlling interest in a customer. As the court framed the issue:

> The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of the suit, of the creation of a monopoly of a line of commerce.[71]

The Court concluded that the inference was "overwhelming" that Du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.

If one restricts oneself to the law and the decisions, it is difficult to generalize about the adverse competitive effect necessary to make out a violation of section 7 in a vertical merger case. In the practical realm, under the present Justice Department and Federal Trade Commission, when a *big* customer merges with a *big* supplier, I believe a challenge under section 7 will follow irrespective of other factors to which lip service is paid.

71. 353 U.S. at 588.

XI. CONGLOMERATE MERGERS

The principal case involving a conglomerate merger, so far, is the challenge by the Federal Trade Commission to the acquisition of Clorox by Proctor and Gamble.[72] When Proctor and Gamble acquired Clorox, it neither manufactured nor marketed a bleach such as Clorox. There was, therefore, no question of combined market shares. There was also no question of a market foreclosure, because Clorox had not been a customer of Proctor and Gamble or of Proctor and Gamble's competitors. The merger was clearly "conglomerate."

The position of the hearing examiner in *Proctor & Gamble,* unfortunately for Proctor and Gamble, had been put very succinctly in a press release issued by Proctor and Gamble at the time of the merger. It said: "Taking over the Clorox business, however, could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well."

The initial decision in *Proctor & Gamble* was concerned largely with the amount and types of advertising and promotional work which Proctor and Gamble could bring to bear to push a product. The examiner discussed the time that Proctor and Gamble, through advertising and promotional events, managed to keep Purex out of the Erie, Pennsylvania, market to any great extent. An indirect result of this was that Purex acquired the John Duhl Products Company, thereby increasing concentration in liquid bleach.

The examiner found that (1) the effect of the acquisition of Clorox by Proctor and Gamble may be to supress the competition of not only Purex but also other small competitors; (2) the addition of Clorox to the Proctor and Gamble line of soaps, detergents and cleansers would add merchandising strength and support to Clorox which was not available to the Clorox Chemical Company; and (3) industry-wide concentration of the production and sale of household liquid bleach may be increased.

Examiner Haycraft stated:

> To determine whether this acquisition is in violation of Section 7 of the Clayton Act, as amended, attention must given to that industry in which the acquired corporation was engaged, and an attempt made to evaluate the impact on competition in that industry growing out of the acquisition. In order to do that, it is necessary to take into consideration the size and experience of the acquiring corporation in the conduct of its business prior to the acquisition, the manufacture and sale of products sold by it over the past few years, and then to make an evaluation of what the normal result probably will be when a corporation such as Proctor and Gamble, the acquiring corporation, enters into the other

72. No. 6901, FTC, June 15, 1961.

> industry, and utilizes the same methods of operation that it utilized in its prior fields of endeavor.[73]

The examiner then commented, again, on the fact that Proctor and Gamble was a financially powerful and aggressive commercial organization which depends on advertising and sales promotion practices.

The hearing examiner concluded that the result of the acquisition of Clorox by Proctor and Gamble probably would be the substantial lessening of competition between respondent and Clorox and the smaller manufacturers and distributors of household liquid bleach in the United States. He added that there was as a result of the acquisition a definite tendency to create a monopoly in the respondent Proctor and Gamble in the household bleach industry.

The Commission, with only three of the five commissioners sitting, reversed and remanded the Proctor and Gamble decision on June 15, 1961. In so doing, it set forth what it felt the tests of illegality should be in the case of a conglomerate merger:

> The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the above-mentioned "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make for a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate.[74]

The Commission remanded the case because it felt that the record did not contain enough information. The hearing examiner was ordered to receive evidence relating to the competitive situation as it presently exists in the liquid bleach industry:

> This evidence should relate to events occurring subsequent to November, 1958, and should include market share data in each of the geographical regions specified on Page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent.[75]

By looking at post-merger data, the Commission probably is adopting a short-lived test. An acquiring company can, and often does leave everything as it was for some time after an acquisition. It is clear, I think, that at the moment, no one, including the five com-

73. *Id.* at 50.
74. No. 6901, FTC, June 15, 1961.
75. *Ibid.*

missioners, knows what the tests of illegality are in connection with a conglomerate merger. These will no doubt be developed on a case-by-case basis, but in the meantime there are paltry few sign posts to guide the parties contemplating a conglomerate merger.

The acquisition of Arrow Brands, Inc. by Reynolds Metals Co. was a vertical merger.[76] In holding that the merger violated section 7 of the Clayton Act, the Commission relied upon the same reasoning as Hearing Examiner Haycraft in *Proctor & Gamble,* which as we have seen, was a conglomerate merger. In its opinion, the Commission said:

> There were about eight companies engaged in this line of enterprise. A number of these have been named above. Prior to the acquisition, all were of a roughly equivalent competitive status, if looked at on a grand scale. In other words, no company was very big and all were relatively small. Some had advantages not shared by all, but they each had about the same competitive capabilities. Also, they were active and aggressive competitors. Prices were lower than those which prevailed in the aluminum foil market as a whole. Success depended on competitive prices, personal relationships, creative designing, the providing of services, and other things. . . .
>
> After the acquisition, the balance of power in this all-competitive arena shifted dramatically to Arrow Brands, Inc.[77]

The opinion commented on the fact that Arrow had "drastically reduced" its prices following the acquisition. There was evidence that following the acquisition, Arrow sold at a loss. Testimony of competitors that they could not survive under this type of competition was related. The Commission commented:

> The significance in the situation is that Arrow would lower its prices and maintain them at low levels for an extended period, which it could not have done before the merger. The acquisition gave it market power which was so dramatically demonstrated.[78]

Apparently, the Commission agreed in *Reynolds Metals* with the hearing examiner in *Proctor & Gamble* that when a large company with money and know-how moves into a market in which there are no companies as large, or with as much know-how, section 7 has been violated. Its decision in *Proctor & Gamble,* however, casts doubt on *Reynolds Metals* as a precedent. It will be interesting to see the basis of the Commission's final opinion in *Proctor & Gamble.*

XII. SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission has held that it can attack mergers and acquisitions under section 5 of the Federal Trade Commission

76. No. 7009, FTC, Jan. 12, 1960 (commission order to cease and desist).
77. *Id.* at 9.
78. *Id.* at 11.

Act[79] as well as section 7 of the Clayton Act.

In the initial decision in *Foremost Dairies, Inc.*,[80] it was pointed out by the hearing examiner that the complaint had alleged that the constant and systematic eliminations of actual and potential competitors by Foremost were all to the prejudice and injury of the public and constituted unfair methods of competition and unfair acts and practices within the intent and meaning of section 5 of the Federal Trade Commission Act.

Early in the proceedings, the hearing examiner struck from the complaint the section 5 allegations on the ground that the Commission had no jurisdiction over the acquisitions under section 5 of the Federal Trade Commission Act. On interlocutory appeal, the Commission reversed the examiner, stating:

> The Commission being of the opinion that the hearing examiner was in error in this respect, and that facts indicating the violation of Section 7 of the Clayton Act, as amended, may also indicate a violation of Section 5 of the Federal Trade Commission Act, and, further, that practices not technically within the scope of a specific section of the Clayton Act may, nevertheless, constitute a violation of Section 5 of the Federal Trade Commission Act; and, The Commission being of the further opinion that in electing to charge a respondent in this case with violation both of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, the Commission acted in the exercise of its administrative discretion and that in so doing, it made a decision on which the hearing examiner has no authority to sit in judgment.[81]

At the close of the case supporting the complaint, the hearing examiner stated that he would take evidence with respect to the section 5 charge, but would not rule on it. He would leave that up to the Commission. Another reversal followed an interlocutory appeal, the Commission stating: "The Section 5 charge presents questions of law and fact which the Commission prefers to determine upon a complete record. This includes as to such charges any proper defense of the acquisition concerned which the respondent may wish to offer."[82]

The examiner had ruled that he was not going to require the respondent to defend the section 5 charges and it was this ruling which was reversed.

In his initial decision, Examiner Haycraft again dismissed the section 5 charges. He restated his earlier thesis:

79. 38 Stat. 719 (1914), 15 U.S.C. § 45 (1958). Section 5 of the Federal Trade Commission Act states, in relevant part: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."
80. No. 6495, FTC, Dec. 16, 1960 (initial order to cease and desist).
81. *Id.* at 3.
82. *Id.* at 6.

> It seems to me that when Congress amended Section 7 and gave us additional authority, that it was intended to confine our activities to that Section. We have been turned back every time we have attempted to use Section 5 as a substitute for Section 7 or as a complement to it, or a supplement to it, and I think it is a waste of time and effort.[83]

When Gulf Oil Corporation bought a large number of convertible debentures of Union Oil Company a few years ago, it was rumored that the Commission was going to attack the purchase under section 5 of the Federal Trade Commission Act. The order to be issued, presumably, would be, "Do not convert the debentures. Do not exercise any control over Union." The Commission's power to do this was not tested, as it did not issue a complaint in the Gulf-Union transaction, and the matter is now believed to have been turned over to the Department of Justice.

XIII. RELIEF

The relief generally sought by the Department of Justice and Federal Trade Commission today in section 7 cases is divestiture of the acquired stock or assets. Sometimes, the order entered against the offending acquirers seeks to accomplish things in addition to divestiture.

In Docket 6820, for example, the Federal Trade Commission ordered divestiture, but Automatic Canteen was also ordered for a period of ten years to:

> [C]ease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, by merger, consolidation, purchase of physical assets, or acquisition of stock or other share capital, any interest in any corporation engaged in the business of manufacturing vending machines whose product has competed or competes to any extent with any vending machine manufactured or assembled by respondent, its subsidiaries or affiliates.[84]

The Commission now almost always insists upon the divestiture of acquired assets "as a going concern."

In the Commission's final order in *Pillsbury Mills,* Chairman Kintner stated, with respect to the order to restore a going concern:

> This order is similar in many respects to orders previously entered by the Commission on other Section 7 cases. *Crown-Zellerbach Corporation,* 54 FTC 569, (1957); *Reynolds Metals Company,* Docket 7009 (January 21, 1960); *A. G. Spaulding Bros, Inc.,* Docket 6478, (March 30, 1960); We believe that an order requiring the restoration of the acquired firms as

83. *Id.* at 78. Examiner Haycraft quoted from, and relied upon FTC v. Eastman Kodak Co., 274 U.S. 619 (1927).

84. This order was contained in a consent decree. Automatic Canteen Co. of America, 54 F.T.C. 1831, 1842 (1958).

competitors is fully within the Commission's authority and is justified here. Piecemeal divestiture will not correct the harm which has been rendered competition.[85]

In *Erie Sand & Gravel,* the Commission stated:

> The Commission has the power to issue an order which requires the divestiture of an acquired property, where there is a violation of Section 7 "in the manner and within the time fixed by said order." (15 U.S.C. 21). This is adequate authority to require divestiture of the acquired property as a going, competing concern, rather than on a piecemeal basis. In this case, the removal of an important competitor severely restricts the sources of supply for lake sand purchases. To permit piecemeal sale of the property would not correct the harm that has been rendered to competition. *Crown-Zellerbach Corporation.* See also *Federal Trade Commission v. Western Meat Company, et al.* 272 U.S. 554, 559 (1926). There, in upholding the Commission's order, the Court stated that the words of the statute must be read in the light of its general purpose and applied with a view to effectuate such purposes and that the "[p]reservation of established competition was the great end which the legislature sought to secure."[86]

In *International Paper Co.,*[87] the Commission ordered partial divestiture by means of a voting trust which had ten years in which to sell the acquired property. There were also many other provisions in the nature of mandatory injunctions.

In *Reynolds Metals Company* the Commission ordered divestiture of the acquired Arrow Brands, Inc., together with a new plant built after the acquisition of Arrow. Reynolds was ordered to restore Arrow to at least the same competitive standing it formerly had in the Florist Foil industry at or around the time of the acquisition.

In *Gulf Oil,*[88] Gulf was allowed to keep substantially all the assets it acquired in its acquisition of Warren Petroleum, but was ordered for a period of 10 years to make available a large percentage of its liquified petroleum gas to independent distributors and dealers. Ironically, the Commission's order in *Gulf* will be a dead letter in less time, 10 years, than it will have taken the Commission and courts to terminate the proceedings in *Pillsbury.*

A different twist in *Gulf* was a list of 23 firms to which Gulf could not sell the limited number of assets which it was ordered to divest under the terms of the consent decree.

Irston R. Barnes, speaking before the Federal Bar Association on September 26, 1958, said:

> To be effective, the order must restore the acquired firm as a going

85. No. 6000, FTC, Dec. 16, 1960, at 26.
86. No. 6670, FTC, Oct. 26, 1959, at 8.
87. 53 F.T.C. 1192, 1199 (1957).
88. No. 6689, FTC, Jan. 5, 1960 (consent order to cease and desist).

> concern and as an effective competitor. The divested company must be adequately staffed, provided with a reasonable capitalization and adequate working capital, and given the means quickly to regain its competitive position in the market. An order which requires less fails to restore the competition which was destroyed by the acquisition.

There is little question but that from the standpoint of the Commission and the Department of Justice these words of Dr. Barnes reflect the ideal. The ideal has not been achieved because of the single greatest failure of section 7 enforcement—the long period of time which elapses between the beginning of the government's investigation and final court review.

XIV. A Decade of Delay

In a concurring opinion to the 1953 interlocutory appeal in *Pillsbury,* Commissioner Mead said:

> The Commission was established so that the public would get prompt informed action when there is a reasonable probability that a trade act or practice will injure competition. Prompt informed action is particularly necessary in cases of mergers which may be finally found to be illegal. The passage of time may make much more difficult the task of unscrambling the assets of the merged companies and restoring competition to its original form.[89]

These words of Commissioner Mead were succinct and accurate, but hardly profound. If a company disappears from the market for several years, it is difficult for it to resume its place in the competitive scheme of things. A brand name which is a big seller in 1951 can hardly expect to drop from sound and sight for ten years, and then suddenly return with its customer appeal untarnished. Viewed in this light, the Department of Justice, Federal Trade Commission and courts all have sorry records.

In 1951, Pillsbury acquired Ballard. In 1952, it acquired Duff. Following an interlocutory appeal in 1953, in which the Commission held that all "relevant factors" should be brought to light, years of hearings took place. The Commission did not decide the case until December 12, 1960, nine years after the acquisition of Ballard. Appeals to the court remain in the future. The case still has not been decided by a court of appeals.

In July 1955, the Brillo Company acquired Williams. There have been since then two interlocutory appeals by the Commission, discussed above at some length, but final action, much less final court action, remains over the horizon.[90]

89. 50 F.T.C. 555, 575 (1953).
90. As this is written in mid-summer 1961.

It was in June of 1953 that Crown Zellerbach acquired St. Helens Paper Company. A Federal Trade Commission complaint followed on February 15, 1954. Over three years later, an initial decision of the hearing examiner was handed down. The Commission followed with its decision exactly 10 months later, on December 26, 1957. An appeal to the Ninth Circuit followed, and that Court of Appeals did not decide the case until June 5, 1961, three and one-half years after the decision of the Commission. In fairness to the Ninth Circuit, it should be added that the record before it was voluminous, but three and a half years is a long time.

As bad as are the records of *Pillsbury* and *Crown-Zellerbach*, the Department of Justice case against Du Pont for its acquisition of General Motors stock takes first prize. The complaint in that case was issued in 1949. By skipping the court of appeals and going directly to the Supreme Court, a decision in the case was finally reached on June 3, 1957. Arguments over the proper relief, however, were still bouncing from court to court well into the summer of 1961.

It is easy to call this situation disgraceful, and to cast blame in all directions. It is much more difficult to offer affirmative proposals which would seem to offer some hope in the so far losing battle with section 7 delay.

Federal Trade Commission delays have resulted from several factors. One of the main causes, I believe, has been the fact that counsel supporting the complaint often were not ready to proceed with hearings at the time the complaint was issued. Investigation by trial counsel took place following the issuance of the complaint, and, indeed, often took place while hearings were in progress. The main reason for this procedure was that counsel supporting the complaint had not had a hand in the initial investigation, and often found that investigation inadequate as a basis for conducting hearings.

The recent re-organization at the Federal Trade Commission attempts to remedy this situation. Trial attorneys will do their own investigating, or at least participate in it. The new rules also call for continuous hearings, rather than hearings at intervals. If this rule is followed, delay will be drastically reduced.

Whether continuous hearings in complicated merger cases will conflict with due process is a question which will almost certainly find its way to the appellate courts.

The Federal Trade Commission has traditionally and violently opposed discovery procedures. One reason given in justification for this position was that its hearings were at intervals, giving everyone opportunity to prepare. Continuous hearings as called for in the new rules presuppose wide discovery. The new rules allow much wider discovery than previously, and this will doubtlessly greatly aid in reducing delay.

The courts, too, are attacking the problem of delay. In March of 1960, the Judicial Conference of the United States adopted the *Handbook of Recommended Procedures for the Trial of Protracted Cases.*[91] The *Handbook* concerns itself almost entirely with anti-trust cases. It is too lengthy to go into here, but its emphasis on effective discovery should also result in less delay.

It is good that the Federal Trade Commission and courts are working at the problem of delay. Unless the situation is radically improved, without infringing upon the rights of respondents, delay may enervate new section 7 just as effectively as judicial construction did the old.

91. 25 F.R.D. 351 (1960).