CASE COMMENTS

FINANCIAL WEAKNESS IS RELEVANT BUT INCONCLUSIVE AS DEFENSE TO CLAYTON ACT VIOLATIONS

Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981)

In *Kaiser Aluminum & Chemical Corp. v. FTC*[1] the Seventh Circuit Court of Appeals curbed expansion of the test for determining violations of section 7 of the Clayton Act[2] by holding that the financial weakness of the acquired company is insufficient, absent other relevant nonstatistical evidence,[3] to rebut a prima facie section 7 violation based on market concentration statistics.[4]

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1. 652 F.2d 1324 (7th Cir. 1981).

2. Clayton Act § 7, 15 U.S.C. § 18 (1976) provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

3. For discussion and examples of nonstatistical evidence to rebut the Government's prima facie case, see notes 30 & 59 *infra* and accompanying text. *See also* note 61 *infra*.

4. Before measuring the anticompetitive effects of a merger, a court should define the relevant market. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957); United States v. Tracinda Inv. Corp., 477 F.Supp. 1093, 1103 (C.D. Cal. 1979). *Accord,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963). The relevant market is comprised of both product and geographic markets. "The product market identifies what line of commerce will be affected by a merger. . . . The geographic market establishes where a merger will affect competition." Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 HARV. L. REV. 491, 493-94 (1978). *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶522, 525a. For discussion of guidelines for determining product and geographic markets, see generally Brown Shoe Co. v. United States, 370 U.S. 294, 325-28 (1962); *In re* American Gen. Ins. Co., 89 F.T.C. 557, 600-01 (1977); UNITED STATES DEP'T OF JUSTICE, MERGER GUIDELINES, 1 TRADE REG. REP. ¶4510, at 6882-83 (1968); ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 64-70 (1975); 2 P. AREEDA & D. TURNER, *supra*, at ¶¶517-28; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 12 (1977); Raab, *Delineating the Relevant Market From Census Industry Classifications,* 22 ANTITRUST BULL. 621 (1977); Stein & Brett, *Market Definition and Market Power in Antitrust Cases—An Empirical Primer on When, Why and How,* 24 N.Y.L. SCH. L. REV. 639 (1979); Note, *Potential Production: A Supply Side Approach for Relevant Product Market Definitions,* 48 FORDHAM L. REV. 1199 (1979); Note, *The Role of Supply Substitutability in Defining the Relevant Product Market,* 65 VA. L. REV. 129 (1979).

After establishing the relevant market, a court reviews statistics on the percentage, or concentration, of the market that would be controlled by the defendant company after the acquisition. To

Kaiser, a leading producer of refractories,[5] acquired two refractory plants and related assets from one of its competitors, the Lavino Division (Lavino) of International Minerals & Chemical Corporation. Lavino was having difficulty recovering from the 1970 steel industry slump. Prior to the acquisition, Lavino reduced production and ceased expansion. The Federal Trade Commission (FTC) found[6] that Kaiser's acquisition of Lavino could substantially lessen competition[7] in the refractories market[8] in violation of section 7 of the Clayton Act.[9] Kaiser sought review of the FTC's cease and desist order,[10] claiming

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arrive at the defendant's market power, the court compares the acquiring firm's market concentration with that of the firm's competitors. The court may find a prima facie § 7 violation if the statistics accurately show that the defendant would acquire a high level of market power from the merger. *See, e.g.,* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); United States v. Blue Bell, Inc., 395 F. Supp. 538 (M.D. Tenn. 1975); *In re* Jim Walker Corp., 90 F.T.C. 671 (1977).

One court stated that "the greater degree of market concentration, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1231 (C.D. Cal. 1973), *aff'd mem.,* 418 U.S. 906 (1974) (citing United States v. Aluminum Co. of Am., 377 U.S. 271, 280 (1964)).

5. Refractories are materials that line industrial furnaces and kilns and are resistant to intense heat. Basic refractories, produced by both Kaiser and Lavino, come in preformed shapes (bricks) and unformed material (specialties). Industries use specialties to seal or repair basic bricks. Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d at 1329 (7th Cir. 1981); *In re* Kaiser Aluminum & Chem. Corp., 93 F.T.C. 764, 773, 829-30 (1979).

6. *In re* Kaiser Aluminum & Chem. Corp., 93 F.T.C. at 773, 829-30.

7. Clayton Act § 7, 15 U.S.C. § 18 (1976). The F.T.C. concluded that the acquisition: (1) eliminated actual competition between Kaiser and Lavino in the refractories industry, (2) substantially increased concentration in the refractories industry, (3) made entry into the refractories industry more difficult, and (4) strengthened Kaiser's position in the refractories industry. *In re* Kaiser Aluminum & Chem. Corp., 93 F.T.C. at 823-24.

8. The FTC defined the geographic market as the entire United States and the product market as basic refractories. The Commission divided the product market of basic refractories into two submarkets: basic bricks, composed of conventional bricks for open-hearth furnaces and BOF bricks, and basic specialties. 93 F.T.C. at 824, 833-36. *See generally* notes 4-5 *supra*. For the response of Kaiser and the Seventh Circuit to the F.T.C.'s market definitions, see note 11 *infra*.

9. 93 F.T.C. at 855. The Commission also found a violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976). The Commission found it unnecessary to consider separately the § 5 violation because "any violation of § 7 is a violation of § 5." *Id.* at 824 n.41 (citing FTC v. Brown Shoe Co., 384 U.S. 316, 321-22 (1966)).

10. To rebut a prima facie § 7 violation, the FTC's *Kaiser* test required that a defendant show:

> (a) that one merging firm's market share (in this case, Lavino's) could not be imparted to the other merging firm, so that any increase in concentration will not likely persist over time, (b) that the merging firms had no control over the circumstances that weak-

that the merger posed no threat to competition[11] because of Lavino's weakened condition.[12] On review, the Seventh Circuit Court of Appeals overruled the FTC decision and *held*: The financial stability of an acquired firm is a relevant but not primary consideration in rebutting a prima facie section 7 violation of the Clayton Act.[13]

The Clayton Act, enacted in 1914 in reaction to the common practice of acquiring the stock of competitors, outlawed anticompetitive mergers.[14] The plain language of the Act established the standard for section 7 violations, making stock acquisitions illegal when the future effect might substantially lessen competition.[15] Congress amended the

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ened the position of the merging firm whose market shares will be discounted and (c) that neither firm could remedy the position of the weakened firm.

93 F.T.C. at 848.

11. Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d at 1333. Kaiser claimed also that the Commission erred in defining the product market. *Id.* at 1331. *See* note 8 *supra*. Although the Seventh Circuit Court of Appeals discounted the basis for Kaiser's contention, the court held that the FTC had incorrectly defined the product market. Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d at 1332. Discussion of the relevant market issue of *Kaiser* is beyond the scope of this Comment.

12. *See* notes 54-59 *infra* and accompanying text.

13. 652 F.2d at 1341.

14. A Senate Committee reported to the full Senate on the purpose of the Clayton Act as follows:

> [The Clayton Act], in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which . . . are not covered by the [Sherman Act] or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.

S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914). *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 275, 277 (1966); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 597 (1957); Poller v. Columbia Broadcasting Sys., Inc., 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds,* 368 U.S. 464 (1962); United States v. United Shoe Mach. Co., 264 F. 138, 162 (E.D. Mo. 1920). *See generally* FTC ANN. REP. 16 (1948); H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949); STAFF OF HOUSE SELECT COMM. ON SMALL BUSINESS, 87TH CONG., MERGERS AND SUPERCONCENTRATION 16 (Comm. Print 1962) [hereinafter cited as MERGERS AND SUPERCONCENTRATION]; S. REP. No. 1775, 81st Cong., 2d Sess. 4, *reprinted in* [1950] U.S. CODE CONG. SERV. 4293, 4293-99; W. THORNTON, COMBINATIONS IN RESTRAINT OF TRADE pt. II (1928); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 255 (1960); Carter, *The Clayton Act, Original Section 7: Re-Examination and Reappraisal,* 8 ANTITRUST BULL. 187 (1963).

15. The original draft of § 7 of the Clayton Act stated in pertinent part:

> [N]o corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such 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.

Act in 1950[16] to broaden the scope of section 7 violations.[17] The 1950 amendment reached both asset[18] and stock[19] acquisitions. Congress retained the language "where . . . the effect . . . may be to substantially lessen competition,"[20] reflecting the legislative intent to invalidate mergers in which an anticompetitive effect[21] is reasonably probable.[22]

Ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1976)). For comparison with the current version see note 2 *supra*.

16. The 1926-1930 and post-World War II merger movements left the American economy with a high level of economic concentration. Fearing the trend would continue and leave most of America's business to only a few corporations, Congress amended § 7 of the Clayton Act to check the growth of concentration. *See* United States v. General Dynamics Corp., 415 U.S. 486, 496 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 557-58 (1972); Ford Motor Co. v. United States, 405 U.S. 562, 569 n.5 (1972); United States v. Von's Grocery Co., 384 U.S. 270, 276 (1966); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170-71 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 337-41 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962); Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 509-10 (3d Cir. 1969); FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1095 (S.D.N.Y. 1977); United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1231-32 (C.D. Cal. 1973). *See generally* FTC ANN. REP. 16-20 (1948); H.R. REP. No. 1191, *supra* note 14, at 2-5; MERGERS AND SUPERCONCENTRATION, *supra* note 14, at 1-20; S. REP. No. 1775, *supra* note 14, at 4; Bok, *supra* note 14, at 228-38; Comment, *"Substantiality to Lessen Competition. . .": Current Problems of Horizontal Mergers,* 68 YALE L.J. 1627, 1627-30 (1959).

17. *See* note 2 *supra*. *See also* notes 23-24 *infra*.

18. *See generally* FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 88 (1955).

19. *See generally id.* at 85. To evade violations under the 1914 Clayton Act, corporations merged by purchasing the physical assets, rather than the stock, of their competitors. Neither the Justice Department nor the FTC could enforce the original § 7 against such acquisitions. *See, e.g.,* Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); FTC v. Western Meat Co., 272 U.S. 554 (1926); United States v. Celanese Corp. of Am., 91 F. Supp. 14 (S.D.N.Y. 1950). *See also* United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 281 (1974); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 337-39 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962); 95 CONG. REC. 11485 (1949); FTC ANN. REP. 16-18 (1948); H.R. REP. No. 1191, *supra* note 14, at 4-5; NATIONAL COMM. TO STUDY THE ANTITRUST LAWS, OFF. ATT'Y GEN., ANTITRUST LAWS 115-18 (1955); MERGERS AND SUPERCONCENTRATION, *supra* note 14, at 18-19; Note, *All the King's Horses and All the King's Men: The Failing Company Doctrine as a Conditional Defense to Section 7 of the Clayton Act,* 4 HOFSTRA L. REV. 643, 673 (1976).

20. Clayton Act § 7, 15 U.S.C. § 18 (1976).

21. Congress recognized that not all mergers threaten competition. H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-8 (1949). *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 600 (1965); Brown Shoe Co. v. United States, 370 U.S. 294, 319, 331, 334-35 (1962); International Shoe Co. v. FTC, 280 U.S. 291, 302-03 (1930); American Press Ass'n v. United States, 245 F. 91, 93-94 (7th Cir. 1917); Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 HARV. L. REV. 491, 506-08 (1978). *See also* note 50 *infra*.

22. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 539 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592, 594-95 (1965); United States v. Aluminum Co. of Am., 377 U.S. 271, 280 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 658 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (quoting S. REP. No. 1775,

The language "in any line of commerce in any section of the country" provides for a section 7 violation even if the acquisition causes a lessening of competition[23] in a geographic or product market not normally affected by the business of the merging firms.[24]

In *Brown Shoe Co. v. United States*,[25] the first major postamendment decision,[26] the United States Supreme Court expanded the test for the application[27] of section 7.[28] The Supreme Court found that market concentration statistics were primary but inconclusive indicators of

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81st Cong., 2d Sess. 6 (1950)); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 598 (1957); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-57 (1922); Luria Bros. & Co. v. FTC, 389 F.2d 847, 863-64 (3d Cir. 1968); United States v. Black & Decker Mfg. Co., 430 F Supp. 729, 742 (D. Md. 1976); United States v. Amax, 402 F.Supp. 956, 960 (D. Conn. 1975); United States v. Phillips Petroleum Co., 367 F.Supp. 1226, 1232 (C.D. Cal. 1973), *aff'd mem.*, 418 U S. 906 (1974); *In re* Liggett & Meyers, Inc., 87 F.T.C. 1074, 1165 (1976); S. REP. No. 1775, *supra* note 14, at 6; Note, *The Failing Company Doctrine Since* General Dynamics: *More Than Excess Baggage*, 47 FORDHAM L. REV. 872, 886 (1979). *Cf.* Bok, *supra* note 14, at 254-55 (defendants cannot be given benefit of every substantial doubt even when legislative history stated that Government must show "reasonable probability" that anticompetitive effects will occur). *See also* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977).

23. Congress deleted the language "between the corporation whose stock is so acquired and the corporation making the acquisition." *Compare* note 2 *supra with* note 15 *supra*. With the deletion, the legislators intended to make all mergers—not just horizontal mergers—susceptible to § 7. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 557 n.12 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957); S. REP. No. 1775, *supra* note 14, at 4.

24. In its report to accompany the proposed 1950 amendment, the Senate provided that:

> [A]lthough the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.

S REP. No. 1775, *supra* note 22, at 7-8. Several cases demonstrate limits on expanding the scope of affected markets. *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966); United States v. Continental Can Co., 378 U.S. 441, 456-57 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 (1964); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35 (1961); Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949); L.G. Balfour Co. v. FTC, 442 F.2d 1, 14 (7th Cir. 1971); *In re* American Gen. Ins. Co., 89 F.T.C. 557, 600-01 (1977); Equifax v. FTC, [1980-2] Trade Cas. (CCH) ¶ 63,312 (9th Cir.).

25. 370 U.S. 294 (1962).

26. *See also* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957); United States v. Schenley Indus., Inc., [1957] Trade Cas. (CCH) ¶ 68,664 (D. Del); United States v. General Shoe Corp., [1956] Trade Cas. (CCH) ¶ 68,271 (M.D. Tenn.); United States v. Hilton Hotels Corp., [1956] Trade Cas. (CCH) ¶ 68,253 (N.D. Ill.); United States v. Minute Maid, [1955] Trade Cas. (CCH) ¶ 68,131 (S.D. Fla.).

27. The Court commented:

> Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged. Nor did it adopt a definition of the word "substantially," whether in quantita-

probable future anticompetitive effects.[29] The Court stated that the structure, history, and probable future of the relevant market were also relevant considerations in determining whether a section 7 violation had occurred.[30] The *Brown Shoe* Court cautioned courts not to expand the inquiry into peripheral economic facts.[31]

One year later the Supreme Court simplified the test for examining mergers in *United States v. Philadelphia National Bank*.[32] Because the merger of two banks would have resulted in one bank controlling more than thirty percent of the city's banking business, the Court found it unnecessary to make a broad economic inquiry.[33] The Court held that a merger creating such an "undue percentage share"[34] was inherently

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tive terms of sales or assets or market shares or in designated qualitative terms by which a merger's effects on competition were to be measured.

370 U.S. at 320-21. For further discussion see *id.* at 321 n.36; United States v. Amax, Inc., 402 F. Supp. 956, 961 & n.16 (D. Conn. 1975).

28. 370 U.S. at 316-23.

29. 370 U.S. at 322. Several lower courts have relied on the *Brown Shoe* test. *See, e.g.,* Northwest Power Prod., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90 (5th Cir. 1978); United States v. International Harvester, 564 F.2d 769, 773-74 (7th Cir. 1978); Columbia Broadcasting Sys., Inc. v. FTC, 414 F.2d 974, 980-81 (7th Cir. 1969); FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1094 (S.D.N.Y. 1977); *In re* American Gen. Ins. Co., 89 F.T.C. 557, 601-02 (1977). *See also* Hayes v. Soloman, 597 F.2d 958, 985 (5th Cir. 1979). *See generally* Barnes, *The Primacy of Competition and the* Brown Shoe *Decision,* 51 GEO. L.J. 706 (1963); Jones, *The New Thrust of the Antimerger Act: The Brown Shoe Decision,* 38 NOTRE DAME LAW. 229 (1963); Peterman, *The* Brown Shoe *Case,* 18 J.L. & ECON. 81 (1975); Subcommittee on Section 7 of the Clayton Act, ABA Section of Antitrust Law, *Implications of Brown Shoe for Merger Law and Enforcement,* 8 ANTITRUST BULL. 225 (1963); Comment, *More Ado About Mergers:* Brown Shoe Co. v. United States, 4 B.C. INDUS. & COM. L. REV. 159 (1962); 27 ALBANY L. REV. 54 (1963).

30. 370 U.S. at 322 n.38. Before determining a § 7 violation, the Court weighed the following against the concentration statistics: easy access to suppliers by buyers, foreclosure by suppliers and buyers, and difficulty or ease of entering the market. *Id.* at 322.

31. *Id.* at 340-41. The Court warned against making already complex antitrust litigation more confusing. *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 313 (1949).

32. 374 U.S. 321 (1963).

33. The Court explained the applicability of its new test: "Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration." *Id.* at 363. The Court purported to retain the *Brown Shoe* test when the size of the acquisition was not inherently suspect and required further economic data to find or rebut a § 7 violation. *Id.* at 355. *See generally The Supreme Court, 1962 Term,* 77 HARV. L. REV. 79, 159-63 (1963). *See also* 13 DE PAUL L. REV. 137 (1963); 1964 DUKE L.J. 139.

34. Courts have not defined what percent of the market is "undue." *See* note 33 *supra* and accompanying text.

The Court examined the legislative intent for the 1950 amendment of § 7 and found that Congress avoided the use of quantitative tests. Congess did, however, condone past court interpretations of the same language used in other sections of the Clayton Act. H.R. REP. NO. 1191, *supra* note 14, at 8. Two months prior to the House report, the Supreme Court used a quantitative test

suspect of negatively affecting competition[35] and in violation of the Clayton Act.[36] The Court restated the *Brown Shoe* concept of rebuttable market statistics,[37] but the practical effect of the decision severely minimized examination of nonstatistical data.[38] For more than ten years the United States Government won every merger case reaching the Supreme Court.[39] Armed with the quantitative test of *Philadelphia National Bank*, the Court's emphasis shifted to a stricter reliance on

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in finding a § 3 violation in Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949). Although the House report did not remark on the *Standard Oil* decision, Congress' general approval of court interpretations of the test provided support for finding a prima facie § 7 violation based on a high percentage of market shares. *Cf.* Tampa Elec. v. Nashville Coal Co., 365 U.S. 320 (1961) (no § 3 violation where defendant had only one percent of total market).

35. 374 U.S. at 363. *See, e.g.,* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (prior to acquisition the merging firms accounted for 60% and 28% of the relevant market); United States v. Continental Can Co., 378 U.S. 441 (1964) (merger would have increased the acquiring firm's market share to 25% and reduced the number of competitors). *Cf.* United States v. Von's Grocery Co., 384 U.S. 270 (1966) (merger of two already powerful companies found illegal even though combined companies would have had only 7.5% of market); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964) (though adding only 1.3% to the acquiring firm's market share, the acquisition would likely result in anticompetitive effects within the relevant market). *But cf.* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954) (court gave some weight to the 75% market concentration the companies would have had but found the merger illegal on other grounds).

36. 374 U.S. at 366.

37. *Id.* at 355. The Court stated its intention to adhere to the test it established in *Brown Shoe*: "We analyzed the test in detail in *Brown Shoe Co. v. United States* . . . , and found that analysis need not be repeated or extended here, for the instant case presents only a straightforward problem of application to particular facts." *Id.* (citations omitted). *See In re* Pillsbury Co., 93 F.T.C. 966, 1033-34 (1979).

38. The Court accepted the statistics as support for a prima facie violation "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363. The defendants presented no evidence to rebut the percentages. *Id.* at 366. *See* note 33 *supra*.

Some commentators overlook the Court's willingness to consider nonstatistical evidence and interpret *Philadelphia Nat'l Bank* as completely rejecting the *Brown Shoe* test. *See, e.g.,* 24 DRAKE L. REV. 223 (1974). *But see* Note, *supra* note 22, at 875. *See also* United States v. M.P.M., Inc., 397 F. Supp. 78, 91-92 (D. Colo. 1975); *In re* American Gen. Ins. Co., 89 F.T.C. 557, 603-04 (1977).

39. *See* Ford Motor Co. v. United States, 405 U.S. 562 (1970); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962). In United States v. General Dynamics Corp., 415 U.S. 486 (1974), the Gov-

market statistics.[40]

A new judicial approach to section 7 cases emerged in *United States v. General Dynamics Corp.*[41] in which the Supreme Court reestablished the *Brown Shoe*[42] rebuttable presumption of illegality.[43] The *General Dynamics* Court focused on determining what effect on competition, if any, would result from the merger.[44] Although the merged coal companies in question controlled twenty-three percent of the market,[45] the Court asserted that the statistics were significant[46] but inconclusive indicators of future anticompetitive effects. The Court reviewed the district court's research on coal market operations[47] and found that the industry almost exclusively involved committing coal reserves under long-term contracts.[48] Because the acquired company had contracted away all its coal reserves and additional mineable strip reserves were

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ernment lost its first § 7 merger case since *Brown Shoe*. *See* notes 41-53 *infra* and accompanying text.

In response to the majority's assertion that its ruling in *United States v. Von's Grocery Co.* was consistent with its prior § 7 decisions, Justice Stewart stated in his dissent: "The sole consistency that I find is that in litigation under § 7, the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

40. *See generally* Chaffetz, *What's Left of Mergers?,* 23 BUS. LAW 599 (1968); Hale & Hale, *In Aggravation of Merger,* 43 IND. L.J. 365 (1968); Hampton, *The Merger Movement in Historic Perspective: A Lawyer's View,* 25 BUS. LAW. 653 (1970); Loevinger, *How To Succeed in Business Without Being Tried—The Potentiality of Antitrust Prosecution,* 12 ARIZ. L. REV. 443 (1970); Wilder & Wilder, *Target Company Defensive Tactics Under Section 7 of the Clayton Act,* 4 CONN. L. REV. 352 (1971).

41. 415 U.S. 486 (1974).

42. The *Philadelphia Nat'l Bank* Court neither abolished nor actively applied the *Brown Shoe* test. *See* note 38 *supra* and accompanying text. *See also* note 29 *supra* and accompanying text.

43. *See In re* American Gen. Ins. Co., 89 F.T.C. 557, 603-04 (1977); *In re* Liggett & Meyers, Inc., 87 F.T.C. 1074, 1170-71 (1976).

44. 415 U.S. at 505-06.

45. *Id.* at 494-96.

46. *Compare* notes 44-45 *supra* and accompanying text *with* notes 33-35 *supra* and accompanying text.

47. The district court concluded: (1) the decline in the number of coal producers occurred because of change in the demand for coal rather than the acquisition of small coal producers; (2) the merging firms were complimentary: one company strip mined and the other deep mined; (3) the merged companies directly competed for only one customer; and (4) the acquired firm's uncommitted coal reserves were too low to compete for future contracts, indicating that the Government's statistics inaccurately reflected future anticompetitive effects. United States v. General Dynamics Corp., 341 F. Supp. 534, 558-59 (N.D. Ill. 1972).

48. The utility industry is the primary market for coal producers. An inconsistency in coal supply can disrupt the costly operation of utility plants. Utilities, therefore, commonly arrange for long-term contracts for most of their fuel needs. *Id.* at 543.

unavailable,[49] the Court concluded that the company could neither continue to compete in the coal market nor pose a threat to competition. The Court rejected the Government's assertion that reliance on depleted resources was essentially a failing company defense[50] which required strict application.[51] The Court found that the failing company

49. *Id.*

50. Congress preserved the failing company defense when passing the 1950 amendment to the Clayton Act. The failing company defense, created by the Supreme Court in International Shoe Co. v. FTC, 280 U.S. 291 (1930), is the only defense to § 7 not within the terms of the statute. The Senate report on the proposed 1950 amendment quoted the Supreme Court:

> [In a case of] a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchasers) . . . does not substantially . . . lessen competition or restrain commerce within the intent of the Clayton Act.

S. REP. NO. 1775, *supra* note 14, at 7 (quoting International Shoe v. FTC, 280 U.S. 291, 302 (1930)).

In 1950 when Congress increased the effectiveness of § 7, it also increased the importance of the failing company defense. Defendants frequently turned to the defense in an attempt to justify mergers. *See, e.g.,* United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979); F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814 (2d Cir. 1979); Granader v. Public Bank, 417 F.2d 75 (6th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976); United States v. M.P.M., Inc., 397 F. Supp. 78 (D. Colo. 1975); *In re* Pillsbury Co., 93 F.T.C. 966 (1979); *In re* Reichhold Chem., Inc., 91 F.T.C. 246 (1978), *aff'd mem.,* 5 TRADE REG. REP. (CCH) ¶ 21, 566 (4th Cir. 1979). *See generally Hearings on the Failing Company Defense Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Judiciary Comm.,* 96th Cong., 1st Sess. (1979) [hereinafter cited as *Failing Company Hearings*]; H.R. REP. NO. 1191, *supra* note 14, at 6-8; S. REP. NO. 1775, *supra* note 14, at 7; Blum, *The Failing Company Doctrine,* 16 B.C. IND. & COM. L. REV. 75 (1975); Bok, *supra* note 14; Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth,* 49 GEO. L.J. 84 (1960); Dooley, *Failing Company Doctrine: Recent Developments,* 47 TEX. L. REV. 1437 (1969); Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws,* 52 KY. L.J. 597 (1964); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act,* 61 COLUM L. REV. 629 (1961); Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act,* 35 FORDHAM L. REV. 425 (1967); McDavid, *Failing Companies and the Antitrust Laws,* 14 U. MICH. J. L. REF. 229 (1981); Note, *supra* note 22; Note, *supra* note 21; Note, *supra* note 19; Comment, *Federal Antitrust Law—Mergers—An Updating of the "Failing Company" Doctrine in the Amended Section 7 Setting,* 61 MICH. L. REV. 566 (1963); Note, *Horizontal Mergers and the "Failing Firm" Defense Under Section 7 of the Clayton Act: A Caveat,* 45 VA. L. REV. 421 (1959); Comment, *supra* note 16; 65 CORNELL L. REV. 438 (1980).

51. The Court provided: "A company invoking the defense has the burden of showing that its 'resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure . . . ,' and further that it tried and failed to merge with a company other than the acquiring one." 415 U.S. at 507 (citations omitted).

Courts have retained the *International Shoe* test for determining the applicability of the failing company defense. *See* note 50 *supra.*

defense was irrelevant[52] because the acquisition was not illegal.[53]

After *General Dynamics*, courts began to examine business realities and retreat from substantial reliance on market statistics.[54] Some courts broadly construed the *General Dynamics* decision and interpreted the Supreme Court's consideration of the acquired company's inability to compete as a weak company defense.[55] In *United States v. International Harvester Co.*[56] the Seventh Circuit Court of Appeals approved a merger in which the acquired firm had insufficient financial resources[57] to remain a viable competitor.[58] Relying on *General Dynamics* for support, the Seventh Circuit held that the district court was correct in considering, along with other nonstatistical factors, evidence of the acquired company's competitive weakness.[59]

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52. *See* 415 U.S. at 508-09.

53. *Id.* at 501, 508. *See* notes 47-49 *supra* and accompanying text. *See generally* Moyer, *United States v. General Dynamics Corp: An Interpretation*, 20 ANTITRUST BULL. 1 (1975); Note, *supra* note 21.

54. Some courts held that the defendant had the burden to go forward in presenting nonstatistical evidence after the Government established its prima facie case. *See, e.g.,* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974); United States v. Amax, Inc., 402 F. Supp. 956, 970 n.53 (D. Conn. 1975); United States v. M.P.M., Inc., 397 F. Supp. 78, 92 (D. Colo. 1975).

55. *See, e.g.,* FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979); F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814 (2d Cir. 1979); United States v. Consolidated Foods Corp., 455 F. Supp. 108 (E.D. Pa. 1978). *See generally* 65 CORNELL L. REV. 438 (1980).

One commentator stated that "the criticisms of attempts to expand the *General Dynamics* defense are well-founded. The Supreme Court did not intend to create a new defense or to modify the failing company doctrine. It merely held that the courts must realistically evaluate competitive strength." McDavid, *supra* note 50, at 247.

56. 564 F.2d 769 (7th Cir. 1977).

57. *Id.* at 774. The court compared insufficient financial resources to insufficient coal reserves. *Id.* at 773. For a critical analysis of the comparison, see 65 CORNELL L. REV. 438, 447 (1980).

58. Commentators have widely criticized the *International Harvester* decision. John Shenefied, Assistant Attorney General, Antitrust Division, stated in the Failing Company Hearings:

> [T]he *International Harvester* rationale: that is the notion that financial weakness short of failing company status can serve as a judicially cognizable defense, is incorrect and inconsistent with the requirements of the *General Dynamics* holding . . . . [W]hile in a close case, financial weakness may be among other factors we would consider . . . , the Antitrust Division is unlikely to be particularly receptive to the argument that "financial weakness" is a defense to an otherwise illegal merger.

Failing Company Hearings, supra note 50, at 33-34.

See generally McDavid, *supra* note 50, at 246-47; Note, *supra* note 22, at 873, 885; Note, *supra* note 21, at 511; 65 CORNELL L. REV. 438, 477 (1980).

59. 564 F.2d at 773. The court stated "the *prima facie* case presented by the Government was rebutted by persuasive evidence, including [the acquired firm's] weakened financial condition . . . ." *Id.* at 774. Before validating the merger, the Court of Appeals listed and approved the use of nonstatistical evidence examined by the district court. Those factors were: the acquired com-

In *Kaiser Aluminum & Chemical Corp. v. FTC*[60] the Court of Appeals for the Seventh Circuit concluded that although market concentration statistics can stand alone to establish a prima facie section 7 violation, a defendant may introduce nonstatistical evidence[61] to expose the inaccuracy of the statistics as indicators of a merger's future impact on competition.[62] Judge Baker, writing for the court, analyzed the history and legislative background of section 7[63] and concluded that Congress intended the courts to actively enforce the Clayton Act by choking off anticompetitive mergers before injuries to the market occurred.[64] Judge Baker examined the test for section 7 as applied by the Supreme Court in *Brown Shoe*,[65] *Philadelphia National Bank*,[66] and *General Dynamics*,[67] and found that the basis for determining section 7 violations was market concentration statistics.[68] The court required accuracy[69] and relevancy[70] of the statistics. The court stated that a defendant may always offer nonstatistical evidence[71] to rebut the Government's prima

pany's financial weakness, the number and power of market competitors, the actual independence of acquired firm and its improved status as a competitor after acquisition, the increasing level of competition in the relevant market, and ease of entry into the market. *Id.* at 777-79.

60. 652 F.2d 1324 (7th Cir. 1981).

61. The court noted that the trier of fact must weigh the statistical with the nonstatistical evidence to determine whether the merger will negatively affect competition. Judge Baker commented that the trier of fact may consider "ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition." *Id.* at 1341. For nonstatistical factors considered by other courts, see notes 30 & 59 *supra* and accompanying text.

62. 652 F.2d at 1341.

63. *Id.* at 1333.

64. *Id.* at 1333, n.6.

65. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). For the court's discussion of *Brown Shoe*, see 652 F.2d at 1333-34. For discussion of the *Brown Shoe* test, see notes 25-31 *supra* and accompanying text.

66. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). For the court's discussion of *Philadephia Nat'l Bank*, see 652 F.2d at 1334. For discussion of the *Philadelphia Nat'l Bank* test, see notes 32-40 *supra* and accompanying text.

67. United States v. General Dynamics Corp., 415 U.S. 486 (1974). For the court's discussion of *General Dynamics*, see 652 F.2d at 1335-38. For discussion of the *General Dynamics* test, see notes 41-53 *supra* and accompanying text.

68. 652 F.2d at 1341. Judge Baker stated that "[m]arket concentration statistics continue to be the primary index for measuring market power . . . ." *Id.*

69. *Id.* at 1341. *See* United States v. General Dynamics Corp., 415 U.S. 486 (1974).

70. 652 F.2d at 1341.

71. *Id.* The court stated: "Nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences may be offered to rebut the prima facie case made out by the statistics." *Id. See also* notes 30, 59 & 61 *supra* and accompanying text.

facie case because the objective is to find an accurate measure of future competition in the relevant market.[72]

In rejecting the defendant's assertion of a weak company defense,[73] Judge Baker identified the Seventh Circuit's decision in *International Harvester* as the source of confusion concerning the availability of such a defense to alleged section 7 violators.[74] He admitted that the *International Harvester* court had considered the acquired firm's financial condition but stressed the court's attention to other factors as well.[75] According to Judge Baker, *International Harvester* illustrated that a defense based solely on financial weakness was insufficient to justify a merger.[76] The *Kaiser* Court stated that an acquisition of a weak company by a strong company deters competitors and potential entrants from procuring the weak company's customers.[77] Furthermore, a weak company defense would expand the failing company doctrine,[78] contradicting limitations strictly enforced by the United States Supreme Court.[79] Judge Baker stated that any characterizations of *International Harvester* as adopting a weak company defense were clearly in error.[80]

By defining the limits of the test for section 7 violations of the Clay-

72. 652 F.2d at 1341. Judge Baker criticized the FTC's interpretation and application of *General Dynamics* and concluded that the Commission should have applied the established rule of attacking the accuracy of the statistics instead of attempting to develop further testing criteria from the facts of *General Dyanmics*. *Id.* at 1339-40. For the FTC's testing criteria, see note 10 *supra*.

The court listed the Commission's errors as follows: (1) *General Dynamics* does not require an affirmative defense, only that the defendant come forward with evidence to rebut the prima facie case; (2) *General Dynamics* does not require the defendant to show that the merger will cause a persistent increase in its market power because only a negligible market share was transferred in that case; (3) showing that the acquiring firm did not cause the acquired firm's weakened state is irrelevant because § 7 is concerned only with future prospects; and (4) no situation would ever arise to meet the Commission's test that neither firm could remedy the weak firm's position because no firm would ever acquire another firm that would always remain weak. 652 F.2d at 1340. *See In re* Kaiser Aluminum & Chemical Corp., 93 F.T.C. 764, 847-48 (1979).

73. Kaiser asserted that *General Dynamics* created a weak company defense. 652 F.2d at 1338.

74. *Id.* at 1338.

75. *Id.* at 1338-39. *See* United States v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977).

76. 652 F.2d at 1339. *See* note 59 *supra* and accompanying text.

77. 652 F.2d at 1339.

78. *Id.*

79. United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Greater Buffalo Press, 402 U.S. 549 (1971); Citizens Publishing Co. v. United States, 394 U.S. 131 (1969).

80. 652 F.2d at 1339. *See* note 58 *supra*.

ton Act,[81] the *Kaiser* decision effectuated congressional intent[82] and presented workable guidelines for the courts. The underlying premise of section 7 is the prevention of mergers that threaten the competitive process.[83] Because section 7 prohibits acquisitions that "probably" will cause anticompetitive effects,[84] courts need methods for predicting the outcome of mergers. The Seventh Circuit properly adopted the use of market concentration statistics as the primary index for determining the future market power of merging firms.[85]

The *Kaiser* decision conforms to the spirit of section 7 as inferred from Congress' two expressed exceptions to the Act. First, the plain language of the statute[86] allows mergers that probably will not cause anticompetitive effects.[87] *Kaiser* ensures a defendant's right to acquire another company by allowing rebuttal of statistical evidence to show that the merger will not threaten competition.[88] Rebuttal evidence also checks the accuracy and relevance of the market statistics.[89] Second, the legislative history of section 7 illustrates Congress' intention to provide a failing company defense.[90] *Kaiser* leaves that defense intact by not only allowing rebuttal evidence of a company's depleted status but also refusing to expand it into a weak company defense.[91] Allowing a company to justify a merger on the basis of its weakened condition would undercut the purpose of the statute. Merger with a strong company, in most instances, will revitalize a weak company, leaving one less market competitor and one even stronger market power.[92] Such a result would be contrary to the congressional intent of protecting competition.[93]

Although the *International Harvester* court properly considered

81. *See* notes 60-80 *supra* and accompanying text.

82. *See* note 14 *supra* and accompanying text.

83. *Id.*

84. *See* notes 21-22 *supra* and accompanying text.

85. *See* notes 4 & 34 *supra* and accompanying text. For discussion of the use of market statistics in other § 7 cases, see notes 29-38, 46-47 & 54 *supra* and accompanying text.

86. *See* note 2 *supra*.

87. *See* notes 21-22 *supra* and accompanying text.

88. *See* notes 21 & 61-62 *supra* and accompanying text.

89. *See* note 71 *supra* and accompanying text.

90. *See* notes 50-51 *supra* and accompanying text.

91. *See* notes 73-80 *supra* and accompanying text.

92. *See* notes 58 & 76-79 *supra* and accompanying text.

93. *See* note 14 *supra* and accompanying text.

many relevant factors before finding no section 7 violation,[94] its consideration of the acquired company's weakened financial state was irreconcilable with the legal principles established by the Supreme Court in *General Dynamics*. The *International Harvester* court failed to distinguish between revivable and unrevivable weakened companies.[95] *General Dynamics*, however, allowed consideration of the weak company factor only in the second instance.[96] *Kaiser* did not address the manner in which the *International Harvester* court handled the weak company factor beyond stating that it had considered other factors along with weakness.[97]

Kaiser's repression of a weak company defense is commendable. Although *Kaiser* did not expand the failing company defense, it did extend the Supreme Court's decision in *General Dynamics* by approving *International Harvester's* consideration of a weak company claim where revitalization of the weak company is possible.[98] The decision would be more significant had the Seventh Circuit drawn a distinction between the two cases and defined the limits, if any, for considering financial weakness. Courts then would have a more complete guideline for determining invalid mergers.

L.S.

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94. *See* notes 59 & 75-76 *supra* and accompanying text.

95. 564 F.2d at 773-74. For criticism of the court's omission, see 65 CORNELL L. REV. 438, 477 (1980).

96. *See* note 47-49 *supra* and accompanying text.

97. *See* notes 73-79 *supra* and accompanying text.

98. *See id. See also* notes 49 & 56-59 *supra* and accompanying text.