

## ENTRENCHMENT CHALLENGES TO CONGLOMERATE MERGERS

In 1950<sup>1</sup> Congress enacted the Celler-Kefauver Act<sup>2</sup> as an amendment to section 7 of the Clayton Act,<sup>3</sup> the basic merger provision of the antitrust laws.<sup>4</sup> The purpose of the amendment was to plug loopholes in the original act<sup>5</sup> and thus fortify the merger law. A review of the

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1. Prior to 1950, § 7 of the Clayton Act read, 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.

Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1976)).

2. Celler-Kefauver Act of December 29, 1950, ch. 1184, 64 Stat. 1125 (amending ch. 323, § 7, 38 Stat. 730 (1914)).

3. Section 7 now reads, in pertinent part:

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 one or more corporations engaged 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.

15 U.S.C. § 18 (1976).

4. Mergers are also susceptible to challenge under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The last time a merger was challenged under § 1, however, was in 1948. *See United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

5. To effectuate that purpose Congress made several significant alterations in the wording of the section. For a general, but comprehensive, discussion of the changes in wording of § 7 of the Clayton Act, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962). *See generally* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 233-38 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-74 (1961). Prior to the amendment, § 7 applied only to a firm's acquisition of the stock of another firm. *See, e.g.*, *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587, 595 (1934); *FTC v. Western Meat Co.*, 272 U.S. 554, 557-60 (1926); *United States v. Celanese Corp.*, 91 F. Supp. 14, 17 (S.D.N.Y. 1950). *See generally* *Brown Shoe Co. v. United States*, 370 U.S. 294, 312-13 (1962). The amendment included the acquisition of assets within the reach of the Clayton Act. *See Proposed Amendments to Section 7 of the Clayton Act: Hearings on H.R. 515 Before Subcomm. 2 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 4 (1949). *See also* *Brown Shoe Co. v. United States*, 370 U.S. 294, 312-13 (1962); Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1236 (1968). Prior to 1950, § 7 read, "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," and consequently applied only to horizontal mergers. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 2 (1949). *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 313 (1962); *General Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). *Contra*, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590-93 (1957).

legislative history of the Celler-Kefauver Act reveals that Congress was deeply concerned about increased market concentration.<sup>6</sup> Congress feared that an increase in concentration was producing radical changes in the structure of American industry,<sup>7</sup> by eliminating small business and local control.<sup>8</sup> Congress viewed mergers as the primary means by which business concentration increased<sup>9</sup> and thus chose the regulation of mergers as the vehicle for curbing increased concentration<sup>10</sup> and re-

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Congress deleted this language to extend § 7 beyond horizontal mergers to reach vertical and conglomerate mergers as well. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949). See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962); *General Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); Hood, *Potential Competition*, 21 ANTITRUST BULL. 485, 486 (1976). *Contra*, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590-93 (1957).

Congress altered § 7 to read, "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949). See *Brown Shoe Co. v. United States*, 370 U.S. 294, 318-23 (1962); *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967); Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672, 700 (1958). Congress intended that the vagueness of this clause should provide the courts with ample latitude to effectuate the purpose of the amendment, that is, to thwart further concentration of American industries. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949). See *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962); *Stanley Works v. FTC*, 469 F.2d 498, 503 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 519 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). See generally Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 289 (1967); Hood, *supra*, at 485.

6. S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1949); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949).

7. S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1949); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949). See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

8. 96 CONG. REC. 16444, 16448, 16450, 16452, 16503 (1950); 95 CONG. REC. 11486, 11489, 11494-95, 11498 (1949). See, e.g., *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 & n.29 (1962); *Stanley Works v. FTC*, 469 F.2d 498, 507 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973). See generally Brodley, *supra* note 5, at 289; Hood, *supra* note 5, at 485.

Congressional concern over the effect of conglomerate mergers on local control and small business continues to this day. See *Conglomerate Mergers, Their Effect on Small Business and Local Communities: Hearings Before the Subcomm. on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Comm. on Small Business*, 96th Cong., 2d Sess. (1980).

9. A House Report provides ample evidence of the congressional view on mergers.

That the current merger movement has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time.

H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949).

10. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18, 343-44 (1962); *Stanley Works*

viving the possibility of deconcentration.<sup>11</sup>

Conglomerate mergers,<sup>12</sup> that is mergers between economically unre-

v. FTC, 469 F.2d 498, 503 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); General Foods Corp. v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

11. See *United States v. Continental Can Co.*, 378 U.S. 441, 461-62 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 279 (1964); *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 365 n.42 (1963). See generally Campbell & Shepherd, *Leading-Firm Conglomerate Mergers*, 13 ANTITRUST BULL. 1361, 1378 (1968).

12. A conglomerate merger is typically defined as any acquisition that is neither horizontal nor vertical. Blair, *supra* note 5, at 672; Davidow, *supra* note 5, at 1232; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1314-15 (1965). But see Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 n.1 (1955) (indefiniteness of the terms "horizontal" and "vertical").

The courts have defined a horizontal merger as "one between two actual competitors in the same market," *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964); *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 323, 364 (1963).

The courts also have provided a definition of vertical merger.

A vertical merger usually involves an acquisition in a market where the acquiring firm has been a buyer or a seller, and where a customer-supplier relationship has existed between the acquired and acquiring companies prior to the merger. Typically by a vertical merger a manufacturer will integrate its manufacturing processes forward.

*United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590-93 (1957); *United States Steel Corp. v. FTC*, 426 F.2d 592, 593 (6th Cir. 1970).

Courts have distinguished three basic types of acquisitions within the broad category of conglomerate mergers: the product extension merger, the geographic extension merger, and the pure conglomerate merger. See *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). See generally F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 124 (2d ed. 1980); Goldberg, *The Effect of Conglomerate Mergers on Competition*, 16 J.L. & ECON. 137, 137-38 (1973).

A product extension merger occurs when a conglomerate acquires a firm that produces a product functionally related to a product produced by the conglomerate. See *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). In *Black & Decker* the court stated: "A product extension merger . . . is undertaken by the acquiring company to expand its product line into a complementary product area." *Id.* See, e.g., *FTC v. Procter & Gamble*, 386 U.S. 568, 577-78 (1966); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 548 (N.D. Ill. 1968). A geographic extension merger occurs when a conglomerate acquires a firm producing the same product as the conglomerate, but distributes it in a different geographic market. See F. SCHERER, *supra*, at 124; Goldberg, *supra*, at 137-38. In *Black & Decker* the court defined a geographic extension merger as "a firm's acquisition of a company in its product line doing business in a geographic area not previously entered by the acquiring firm." *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 606-07 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 528 (1973).

In the pure conglomerate merger, the acquiring and acquired firms' products and markets are completely unrelated. See Turner, *supra*, at 1315. In *Black & Decker* the court stated that "[a]

lated firms,<sup>13</sup> were relatively novel occurrences when Congress enacted the Celler-Kefauver Act.<sup>14</sup> Although Congress intended that the amended section 7 apply to conglomerate mergers,<sup>15</sup> knowledge of the potential anticompetitive effects of these mergers was lacking.<sup>16</sup> Without more information on conglomerate mergers, Congress was unable to prescribe a precise standard by which the courts could determine whether a particular merger might substantially lessen competition.<sup>17</sup>

Conglomerate mergers subsequently presented difficult antitrust problems for the courts.<sup>18</sup> The anticompetitive effects of a conglomerate merger, unlike horizontal<sup>19</sup> and vertical<sup>20</sup> mergers, are not readily

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pure conglomerate merger, perhaps rarer than the other two types, occurs between companies that do not interrelate economically." *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976). *See, e.g.*, *FTC v. Procter & Gamble*, 386 U.S. 568, 577 (1966); *United States v. ITT (Grinnell)*, 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971); *United States v. Northwest Indus.*, 301 F. Supp. 1066 (N.D. Ill. 1969). *See generally* F. SCHERER, *supra*, at 124; Note, *Conglomerates and Section 7: Is Size Enough?*, 70 COLUM. L. REV. 337 (1970). Section 7 of the Clayton Act reaches all three types of conglomerate mergers. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 2 (1949). *See* *FTC v. Procter & Gamble*, 386 U.S. 568, 577 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 n.31 (1962); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 509-10 n.7 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *General Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). *See generally* Hood, *supra* note 5, at 486; Turner, *supra*, at 1315 & n.6.

13. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 74 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 734 n.5 (D. Md. 1976).

14. *See* *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581-82 (1966) (Harlan, J., concurring). Since enactment of the Celler-Kefauver Act, however, the number of conglomerate mergers has increased while the number of horizontal and vertical mergers has decreased dramatically. *See* F. SCHERER, *supra* note 12, at 558. *See also* note 22 *infra*.

15. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949). *See* *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581-82 (1966) (Harlan, J., concurring).

16. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581-82 (1966) (Harlan, J., concurring).

17. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 321 & n.36 (1962). *See generally* Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 B.U.L. REV. 199, 228 (1978). *See also* Handler & Robinson, *supra* note 5.

18. *See* *FTC v. Procter & Gamble*, 386 U.S. 568, 582 (1966) (Harlan, J., concurring); *General Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

19. A horizontal merger removes a competitor from the market, thus concentrating the market. For example, assume that the market of all manufacturers of widgets is composed of ten firms. If one of those firms merges with another firm in that market, then only nine firms remain as competitors in the market. Thereafter the market shares are divided among nine firms instead of the original ten. 2 C. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 527a, p. 376 (1978). *See, e.g.*, *Freuhauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979).

20. A vertical merger may foreclose competitors from purchasing from or selling to the vertically integrated firms, thus removing those transactions from the arena of competition. For example, assume that production of widgets is dependent on a steady supply of a raw material, widlium. Assume also that only three firms produce widlium, all of which are independent. If

apparent.<sup>21</sup> Recent merger activity<sup>22</sup> has spurred increased interest in the negative competitive impact of conglomerate mergers. Under section 7 of the Clayton Act, three grounds are available to challenge the legality of a conglomerate merger:<sup>23</sup> potential competition,<sup>24</sup> reciprocity,<sup>25</sup> and entrenchment.<sup>26</sup> In numerous instances, potential competi-

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Able Manufacturing, a manufacturer of widgets, acquires Baker Corp., a producer of widlium, then the acquisition may stifle competition in two ways. If thereafter Able buys widlium only from Baker, then the other widlium producers are foreclosed from competing with Baker for Able's widlium orders. If thereafter Baker sells widlium only to Able, then the other widget manufacturers are foreclosed from competing with Able for Baker's widlium supply. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962); *Freuhauf Corp. v. FTC*, 603 F.2d 345, 352 & n.9 (2d Cir. 1979).

21. *General Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). *See generally* Turner, *supra* note 12.

22. *See* G. BENSTON, CONGLOMERATE MERGERS 5-7 (1980). Benston traced the course of merger activity from 1895 to 1977 and found that there were three distinct merger waves prior to the early 1970s: the 1899 to 1901 wave, the 1919 to 1930 wave, and the late 1960s wave that peaked in 1968. *See also* F. SCHERER, *supra* note 12, at 119-27. After the 1968 peak, merger activity dropped dramatically. *Id.* at 120.

The total number of completed mergers and acquisitions rose from 1,207 in 1977 to 1,279 in 1978, but dropped to 1,214 in 1979. FEDERAL TRADE COMMISSION, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 25 (1981). The number of merger announcements rose to 1,889 in 1980 and 2,395 in 1981. [1982 Transfer Binder] 42 ANTITRUST & TRADE REG. REP. 154 (BNA). The total number of large conglomerate acquisitions rose from 76 in 1978 to 87 in 1979. FEDERAL TRADE COMMISSION, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 109 (1981). The number of mergers valued at over \$100 million increased from 94 in 1980 to 113 in 1981. [1982 Transfer Binder] 42 ANTITRUST & TRADE REG. REP. 154 (BNA). The number of mergers valued at over \$1 billion surged upward from 4 in 1980 to 12 in 1981. *Id.* The 1981 statistics include the largest acquisition in United States history: du Pont's \$7.5 billion acquisition of Conoco. *Id.*

23. *See generally* *Merger Guidelines of Department of Justice*, [1968-1] TRADE REG. REP. (CCH) ¶ 4,510 at 6887-89.

24. Potential competition is defined as

the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market.

*United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32 (1972). *See* *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *FTC v. Procter & Gamble*, 386 U.S. 568 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973); *United States v. Standard Oil Co. (N.J.)*, 253 F. Supp. 196 (D.N.J. 1966). *See generally* G. BENSTON, *supra* note 22; Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1 (1977); Hood, *supra* note 5; Turner, *supra* note 12, at 1362-64; Comment, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. CHI. L. REV. 156 (1972).

25. In *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F. Supp. 413 (N.D.N.Y. 1981), the court provided a definition of reciprocity:

tion<sup>27</sup> and reciprocity<sup>28</sup> have served as the sole or major reason for invalidating a merger. In the past, entrenchment played merely a supporting role in merger proceedings.<sup>29</sup> The federal courts have rarely invalidated a merger on entrenchment grounds alone.<sup>30</sup> Recently, however, the Federal Trade Commission (FTC) has given entrenchment a more prominent role in conglomerate merger challenges<sup>31</sup> and in one case persuaded the Administrative Law Judge (ALJ) to invalidate a merger solely on entrenchment grounds.<sup>32</sup>

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The term reciprocity refers to a seller's practice of utilizing the volume or potential volume of its purchases to induce others to buy its goods or services. Its counterpart, reciprocity effect, refers to the tendency of a company selling or desiring to sell to another company to channel its purchases to that company.

*Id.* at 434. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965); *Southern Concrete Co. v. United States*, 535 F.2d 313, 317 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 694 (2d Cir. 1973); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 518-19 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *C. Leonardt Improvement Co. v. Southdown, Inc.*, 313 F. Supp. 1146, 1149 (C.D. Cal. 1970); *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066, 1088 (N.D. Ill. 1969); *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 57-59 (S.D.N.Y. 1966).

Most commentators have severely criticized reciprocity as a valid ground for nullifying a merger. See *Hale & Hale, Reciprocity Under the Antitrust Laws: A Comment*, 113 U. PA. L. REV. 69 (1964); *Hausman, Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964); *Turner, supra* note 12; *Whitney, Mergers, Conglomerates, and Oligopolies: A Widening of Antitrust Targets*, 21 RUTGERS L. REV. 187 (1967). But see *Harsha, The Conglomerate Merger and Reciprocity—Condemned by Conjecture?*, 9 ANTITRUST BULL. 201 (1964).

26. See notes 36-86 *infra* and accompanying text.

27. See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968).

28. See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965); *Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 694 (2d Cir. 1973); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 518-19 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

29. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1966) (acquisition invalidated on both entrenchment and potential competition grounds); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972) (acquisition invalidated on entrenchment, potential, and actual competition grounds), *cert. denied*, 416 U.S. 909 (1974); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969) (acquisition invalidated on both entrenchment and potential competition grounds), *cert. denied*, 396 U.S. 1009 (1970); *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965) (same); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968) (acquisition invalidated on entrenchment, potential, and actual competition grounds). See generally *Bauer, supra* note 17, at 227-28.

30. See *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

31. See, e.g., *Heublein, Inc.*, 3 TRADE REG. REP. (CCH) ¶ 21,763 (Docket 8904, Commission order issued October 7, 1980); *In re Beatrice Foods Co.*, No. 9112 (FTC Nov. 21, 1980); *In re Tenneco Inc.*, No. 9097 (FTC May 27, 1980).

32. *In re Beatrice Foods Co.*, No. 9112 (FTC Nov. 21, 1980).

The validity of voiding a conglomerate merger on entrenchment grounds alone is questionable. Both courts<sup>33</sup> and commentators<sup>34</sup> have attacked the alleged anticompetitive effects of entrenchment as empirically groundless. An allegedly entrenching merger may indeed have procompetitive effects, such as deconcentrating the market.<sup>35</sup>

This Note examines entrenchment analysis to determine whether it alone is sufficient to invalidate a conglomerate merger. This Note will first define entrenchment and discuss entrenchment's allegedly anticompetitive effects. Then the development of the judiciary's entrenchment analysis is traced. Finally, this Note critiques the judicial analysis and concludes that an allegedly entrenching merger rarely, if ever, produces any anticompetitive effects.

## I. ENTRENCHMENT

Entrenchment occurs when a conglomerate<sup>36</sup> enters an oligopolistic market<sup>37</sup> by acquiring a firm that holds a significant position in the

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33. See, e.g., *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.) ("more metaphorical than real"), cert. denied, 419 U.S. 883 (1974).

34. Posner, *Conglomerate Mergers and Antitrust Policy: An Introduction*, 44 ST. JOHN'S L. REV. 529, 531 (spec. ed. 1970) (no logical or empirical foundation).

35. See G. BENSTON, *supra* note 22, at 51; C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 128 (1959); Campbell & Shepherd, *supra* note 11, at 1371; Note, *supra* note 12, at 348.

36. A conglomerate is any firm that is extensively diversified, such that it has holdings in a variety of markets. See generally Goldberg, *supra* note 12, at 139. There are no clear guidelines for determining when a firm is sufficiently diversified to warrant the name "conglomerate." A firm can diversify by two methods: internal expansion or acquisition. *Id.* at 139. Diversification by internal expansion is called "de novo" entry into a market. Conglomerate diversification by acquisition is called a "conglomerate merger" unless the conglomerate acquires a direct competitor (the horizontal merger) or it acquires a firm that either buys from or sells to the conglomerate (the vertical merger). See note 12 *supra*. If the conglomerate acquires a firm that has a very small share of the target market, the acquisition is a "toehold" acquisition. See generally Comment, *supra* note 24.

37. An oligopolistic market is a highly concentrated market with the few largest sellers having a significant market share. See C. KAYSER & D. TURNER, *supra* note 35, at 27; Whitney, *supra* note 25, at 247-48. Kaysen and Turner have proposed guidelines for determining when a market is highly concentrated. An atomistic structure or market is an industry in which there are no large firms and no firm with a large share of the market. A loose oligopoly is a market in which the market share of less than twenty firms totals 75% or more, with no one firm having a market share greater than 15%. A tight oligopoly is a market in which the market share of less than eight firms totals 50% or more, with the largest firm having a market share of not less than 20%. A dominant firm or partial monopoly is a market in which one firm has a market share of at least 50%, with no other firm having a significant share of the market. C. KAYSER & D. TURNER, *supra* note 35, at 72. The Merger Guidelines of the Department of Justice provide a graduated scale of the market

target market.<sup>38</sup> A number of factors have emerged as fundamental to identifying entrenchment.<sup>39</sup> The acquiring firm is necessarily a large firm or "giant" with considerable economic power.<sup>40</sup> The acquired firm is a substantial, but not necessarily the dominant factor in a target market<sup>41</sup> that is highly concentrated or oligopolistic.<sup>42</sup> The target market, either because it is highly concentrated or because of the nature of the goods produced, exhibits high barriers to entry.<sup>43</sup> The merger must

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shares of the acquiring and acquired firms for determining when the Department will ordinarily challenge an acquisition of a firm in a concentrated market. A market is "highly concentrated" when the market shares of the four largest firms total 75% or more. The Department will challenge an acquisition when the merging firms have the following market percentages:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15%	1% or more

A market is "less highly concentrated" when the market shares of the four largest firms total less than 75%. The Department will then challenge an acquisition when the merging firms have the following market percentages:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

Merger Guidelines of Department of Justice, [1968-1] TRADE REG. REP. (CCH) ¶ 4510, at 6884.

38. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); E. KINTNER, PRIMER ON THE LAW OF MERGERS 441 (1973); Bauer, *supra* note 17, at 226; Campbell & Shepherd, *supra* note 11, at 1363; Davidow, *supra* note 5, at 1253.

39. See generally Bauer, *supra* note 17, at 226-29.

40. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). See generally E. KINTNER, *supra* note 38, at 441; Bauer, *supra* note 17, at 226; Campbell & Shepherd, *supra* note 11, at 1363; Davidow, *supra* note 5, at 1253.

41. See *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983 (S.D.N.Y. 1973); *United States v. ITT (Grinnell)*, 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). See generally E. KINTNER, *supra* note 38, at 255; Campbell & Shepherd, *supra* note 11, at 1363; Davidow, *supra* note 5, at 1253; Sloviter, *The October 1973 Term Merger Cases: Whither Clayton 7?*, 48 TEMPLE L.Q. 861, 888-89 (1975).

42. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 571 (1967); *Kennecott Cooper Corp. v. FTC*, 467 F.2d 67, 70 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *General Foods Corp. v. FTC*, 386 F.2d 936, 945 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). See generally E. KINTNER, *supra* note 38, at 255; Campbell & Shepherd, *supra* note 11, at 1363; Davidow, *supra* note 5, at 1253. See also note 37 *supra*.

43. A barrier to entry is defined as:

something equivalent to the "state of potential competition" from possible new sellers. Let us view it moreover as evaluated roughly by the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without at-

provide opportunities for the acquiring firm to transfer substantial competitive advantages to the acquired firm.<sup>44</sup> Most entrenchment cases consequently entail an element of synergy<sup>45</sup> between the acquired and acquiring firm's product lines, marketing procedures, or manufacturing techniques.<sup>46</sup> Finally, the merger must entrench, that is, rigidify or increase, market concentration.<sup>47</sup>

Under entrenchment analysis, the allegedly entrenching merger gives rise to identifiable anticompetitive effects in the target market.<sup>48</sup> These

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*tracting new firms to enter the industry.* As such, the "condition of entry" is then primarily a structural condition, determining in any industry the intra-industry adjustments which will and will not induce entry. Its reference to market conduct is primarily to potential rather than actual conduct, since basically it describes only the circumstances in which the potentiality of competition from new firms will or will not become actual.

J BAIN, BARRIERS TO NEW COMPETITION 3 (1962) (emphasis in original). See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 77 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974). See generally J. BAIN, *supra*, at 11-19; Sloviter, *supra* note 41, at 889.

44. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 866 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 77 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 774 (D. Md. 1976). See generally Davidow, *supra* note 5, at 1257.

45. Simply stated, synergy occurs when the two firms are able to operate more efficiently and profitably together than apart. From the business standpoint, synergy occurs when the whole of two firms is greater than the sum of its parts. Synergy might result from the complementary nature of the firms' businesses, the ability of the resulting firm to create efficiencies through centralizing operations such as purchasing, the improvement of managerial techniques through utilization of newly available personnel and skills, and from a variety of other factors.

*Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. at 67 (1979) (prepared statement of John H. Shenefield, Assistant Attorney General, Antitrust Division). See generally Bauer, *supra* note 17, at 227.

46. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967); *General Foods Corp. v. FTC*, 386 F.2d 936, 945 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 774 (D. Md. 1976); *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 644-45 (C.D. Cal. 1976); *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 991 (S.D.N.Y. 1973); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 554-56 (N.D. Ill. 1968); *In re Sterling Drug Inc.*, 80 FTC 579, 604-05 (1972). See generally S. LEE & R. COLMAN, HANDBOOK OF MERGERS, ACQUISITIONS AND BUYOUTS 150 (1981); Bauer, *supra* note 17, at 227.

47. See generally *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976). See also E. KINTNER, *supra* note 38, at 225, 441; Davidow, *supra* note 5, at 1253, 1258.

48. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 78-79 (10th Cir. 1972),

anticompetitive effects are largely predicated on the central characteristic of entrenchment—the conjunction of a conglomerate and an oligopolistic market,<sup>49</sup> each of which individually is the potential source for significant anticompetitive effects.

The conglomerate's "bigness" may allow the firm to incur lower costs.<sup>50</sup> The conglomerate, because of its diversification, can spread selling costs over a number of goods, thus reducing unit costs across its entire range of products.<sup>51</sup> Large firms, having better access to financial institutions and capital markets, can obtain credit at more favorable rates and thus save in capital costs.<sup>52</sup> The large conglomerate may achieve economies of scale<sup>53</sup> in distribution, research, management, or other functions and thereby lower costs.<sup>54</sup> When a firm is successful in reducing expenses, smaller competitors, who are unable to match these reductions, may suffer losses, lose market power, and eventually leave the market.<sup>55</sup>

The conglomerate, also because of its diversified enterprises, can engage in predatory pricing<sup>56</sup> by subsidizing losses incurred in one prod-

*cert. denied*, 416 U.S. 909 (1974); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 774 (D. Md. 1976).

49. *See United States v. Swift & Co.*, 286 U.S. 106, 115-19 (1932).

50. *See id.* at 118. *See generally* Blair, *supra* note 5, at 685; Davidow, *supra* note 5, at 1285; Edwards, *supra* note 12, at 334-36; Whitney, *supra* note 25, at 235-36.

51. *See* Blair, *supra* note 5, at 680-81; Brodley, *supra* note 5, at 361. *See generally* Edwards, *supra* note 12.

52. *See* Brodley, *supra* note 5, at 361; Edwards, *supra* note 12, at 348; Turner, *supra* note 12, at 1338.

53. In defining economies of scale, one commentator has stated:

As the plant (generally defined as an aggregate of productive facilities at a single location) becomes larger up to some point, the firm operating it is able to obtain lower costs per production techniques that involve (a) the specialization of labor to specific narrow tasks; (b) the use of specialized machinery and other capital equipment, including units of equipment which are available in only very large minimal sizes; and (c) the specialization of management and supervising personnel to narrow and detailed tasks. Exploitation of all these opportunities as the plant becomes bigger will result in lower unit costs.

J. BAIN, *INDUSTRIAL ORGANIZATION* 166 (2d ed. 1968). *See generally* P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 30-32 (1970); C. PRATTEN, *ECONOMICS OF SCALE IN MANUFACTURING INDUSTRIES* 3-5 (1971); E. ROBINSON, *THE STRUCTURE OF COMPETITIVE INDUSTRY* (4th ed. 1958); SCHERER, *supra* note 12, at 81-118 (2d ed. 1980).

54. *See* Asch, *Industrial Concentration, Efficiency and Antitrust Reform*, 22 *ANTITRUST BULL.* 129, 130 (1977); Turner, *supra* note 12, at 1317, 1322; Note, *supra* note 12, at 347.

55. *See* Turner, *supra* note 12, at 1322.

56. *See United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 87 (7th Cir. 1949). *See generally* A. BURNS, *THE DECLINE OF COMPETITION* 451 (1936); Blair, *supra* note 5, at 686; Turner *supra* note 1 at 1322-23. *See also* notes 13 & 14 *supra* and accompanying text.

uct line with profits from another.<sup>57</sup> The conglomerate can thus deliberately undercut competitors' prices, driving those competitors who cannot meet the lower prices out of the market.<sup>58</sup>

The conglomerate's bigness may have an adverse psychological impact on competition.<sup>59</sup> Smaller competitors in the market may compete less vigorously out of fear of retaliation by the conglomerate.<sup>60</sup> Firms with a desire to enter a particular market may refrain from entering so as to avoid competition with a giant.<sup>61</sup>

In comparison with the market influence exerted by conglomerates, oligopolistic markets give rise to very different anticompetitive effects. The foundation of the fear of oligopolistic markets is the assumption that a decrease in the number of competitors is accompanied by a decrease in competition.<sup>62</sup> The firms in an oligopolistic market, recognizing that profits are higher when the firms cooperate than when they compete,<sup>63</sup> grow into a state of mutual interdependence.<sup>64</sup> The larger firms may either tacitly or expressly set prices for the entire industry and thus completely eliminate competition.<sup>65</sup> If the market were less

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57. See generally Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 44 (1949); Blair, *supra* note 5, at 686.

58. See *United States v. American Tobacco Co.*, 221 U.S. 106, 181-82 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 43 (1910). See generally R. BORK, *THE ANTITRUST PARADOX* 144-159 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

59. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 575 (1967). See generally Blair, *supra* note 5, at 683-84; Edwards, *supra* note 12, at 336; Turner, *supra* note 12, at 1322-23; Whitney, *supra* note 25, at 236.

60. See generally Bok, *supra* note 5, at 275; Brodley, *supra* note 5, at 350-51.

61. See *General Foods Corp. v. FTC*, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). See generally Turner, *supra* note 12, at 1322-23, 1345.

62. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 172 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964). See generally Adams, *Antitrust and Oligopoly: A New Law is Needed*, 9 ANTITRUST L. & ECON. REV. 49, 49 (No. 2 1977); Brodley, *supra* note 5, at 291; Hood, *supra* note 5, at 485.

63. See generally F. SCHERER, *supra* note 12, at 151-56, 168.

64. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 172 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964). The Court in *Alcoa* succinctly described this aspect of oligopolistic market behavior. "As that condition (oligopoly) develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964). See generally C. KAYSER & D. TURNER, *supra* note 35, at 27; Adams, *supra* note 62, at 49; Whitney, *supra* note 25, at 247-48.

65. See, e.g., *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). See generally J. BAIN, *INDUSTRIAL ORGANIZATION* 437-52 (2d ed. 1968); Bok, *supra* note 5, at 242-43; Brodley, *supra* note 5, at 289-90; Hall & Weiss, *Corporate*

concentrated, all firms would presumably engage in competitive pricing.<sup>66</sup>

In addition to those anticompetitive effects associated with conglomerates and oligopolistic markets, entrenching conglomerate mergers potentially involve other anticompetitive effects.<sup>67</sup> The acquiring conglomerate may have a "deep pocket," that is, substantial financial resources<sup>68</sup> which enables it to bestow competitive advantages onto the acquired firm.<sup>69</sup> These deep pocket advantages are not limited to cheaper capital and credit,<sup>70</sup> but rather encompass derivative advantages such as advertising discounts and research.<sup>71</sup> The acquiring firm

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Profits & Size of Firms (unpublished manuscript) (cited in Hall, *The Cases in Antitrust: Reconsidered*, 10 ANTITRUST BULL. 897, 900 (1965)).

66. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 176 (1964). Courts originally adjudicated oligopoly pricing cases under the Sherman Act, which was completely ineffective in dissuading price collusion. See, e.g., *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). See generally Brodley, *supra* note 5, at 293-97; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 657-84 (1962).

Since 1962, courts have dealt with oligopolies under Section 7 of the Clayton Act. See, e.g., *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); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

67. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 78-79 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 774 (D. Md. 1976).

68. See *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 535-36 n.18 (3d Cir. 1969) (Aldisert, J., dissenting), *cert. denied*, 396 U.S. 1009 (1970); *Reynolds Metal Co. v. FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962); *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 1000 (S.D.N.Y. 1973); *United States v. ITT (Grinnell)*, 324 F. Supp. 19, 38 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). See generally Bauer, *supra* note 17, at 226; Blair, *supra* note 5, at 693; Campbell & Shepherd, *supra* note 11, at 1367-68; Whitney, *supra* note 25, at 233; Note, *supra* note 12, at 350.

69. See generally Campbell & Shepherd, *supra* note 11, at 1367; Davidow, *supra* note 5, at 1253.

70. See note 52 *supra* and accompanying text.

71. See *FTC v. Procter & Gamble*, 386 U.S. 568 (1966); *Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969) (Aldisert, J., dissenting), *cert. denied*, 396 U.S. 1009 (1970); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963); *United States v. ITT (Grinnell)*, 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). See generally Bauer, *supra* note 17, at 227-28; Campbell & Shepherd, *supra* note 11, at 1367.

may also transfer its marketing and management skills to the acquired firm.<sup>72</sup>

Under entrenchment analysis, the acquired firm's new competitive advantages have a significant impact on the structure of the target market. The entrenching merger heightens both psychological and actual barriers to entry.<sup>73</sup> Potential competitors may choose alternatives to entering a market that requires competition with a giant.<sup>74</sup> The acquired firm's competitive advantages in advertising, promotion, marketing, and technological innovation may stifle any incentive to enter.<sup>75</sup> Finally, the conglomerate's presence may "chill" price competition<sup>76</sup> and eliminate actual competitors' inducement to compete.<sup>77</sup> These effects tend to increase market concentration<sup>78</sup> by inducing smaller competitors to join forces in order to remain competitive<sup>79</sup> or by forcing smaller competitors out of the market altogether.<sup>80</sup>

Although neither Congress nor the courts have adopted a per se rule against entrenchment,<sup>81</sup> any merger involving a dominant firm in an

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72. See *United States v. ITT (Grinnell)*, 324 F. Supp. 19, 24 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). Cf. *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 645 (C.D. Cal. 1976) (skills transferred by acquiring corporation of no benefit to acquired corporation). See generally Bauer, *supra* note 17, at 227-28.

73. See *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 991 (S.D.N.Y. 1973); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 563 (N.D. Ill. 1968). See generally E. KINTNER, *supra* note 38, at 254.

74. See *General Foods Corp. v. FTC*, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). See generally Means, *Conglomerates and Concentration*, 25 U. MIAMI L. REV. 1, 29 (1970); Turner, *supra* note 12, at 1356.

75. See *Emhart Corp. v. United Shoe Mach. Corp.*, 527 F.2d 177, 182 (1st Cir. 1975). See generally Bauer, *supra* note 17, at 227.

76. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1966). See generally Blair, *supra* note 5, at 689-90; Davidow, *supra* note 5, at 1256-57; Turner, *supra* note 12, at 1358.

77. See *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). See generally Blair, *supra* note 17, at 692-93; Campbell & Shepherd, *supra* note 11, at 1371.

78. See *General Foods Corp. v. FTC*, 386 F.2d 936, 945 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). See generally Davidow, *supra* note 5, at 1253.

79. See *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 991 (S.D.N.Y. 1973).

80. See generally Turner, *supra* note 12, at 1322.

81. See *Emhart Corp. v. United Shoe Mach. Corp.*, 527 F.2d 177, 181 (1st Cir. 1975).

Congress' decision not to ban outright mergers or diversification is consistent with the Supreme Court's rejection of per se rules with respect to the validity of mergers. See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 (1974).

oligopolistic market is suspect.<sup>82</sup> Successful use of entrenchment analysis to invalidate a merger requires more than a mere showing of an increase in economic concentration<sup>83</sup> or that the acquiring firm has a deep pocket.<sup>84</sup> Entrenchment analysis also does not invalidate mere improvements in the acquired firm's efficiency.<sup>85</sup> Under section 7, the merger must produce a reasonable probability of producing specific anticompetitive effects.<sup>86</sup>

## II. JUDICIAL TREATMENT OF ENTRENCHMENT

Although the Supreme Court recognized the possible anticompetitive effects of entrenchment as early as 1931,<sup>87</sup> in *Ekco Products v. FTC*<sup>88</sup>

82. See *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *Stanley Works v. FTC*, 469 F.2d 498, 504 (2d Cir. 1972).

83. See *United States v. ITT (Grinnell)*, 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971); *United States v. Northwest Indus.*, 301 F. Supp. 1066 (N.D. Ill. 1969). See generally Note, *supra* note 12, at 338.

84. See *Emhart Corp. v. United Shoe Mach. Corp.*, 527 F.2d 177, 181 (1st Cir. 1975); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108, 140 (E.D. Penn. 1978).

85. See *Emhart Corp. v. United Shoe Mach. Corp.*, 527 F.2d 177, 182 (1st Cir. 1975). See generally Turner, *supra* note 12, at 1322-29.

86. See *Emhart Corp. v. United Shoe Mach. Corp.*, 527 F.2d 177, 181 (1st Cir. 1975); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 552 (N.D. Ill. 1968). See generally Davidow, *supra* note 5, at 1257. See also Whitney, *supra* note 25; Note, *Section 7 of the Clayton Act: Its Application to the Conglomerate Merger*, 13 WM. & MARY L. REV. 623 (1972).

The merger need not actually restrain competition in the target market. The wording of § 7 indicates that the merger need only produce an effect that "may be substantially to lessen competition, or to tend to create a monopoly." *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967) (emphasis in original), *cert. denied*, 391 U.S. 919 (1968). Inclusion of the words "may be" indicates that Congress intended § 7 to reach mergers and acquisitions in their incipiency. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962); *Stanley Works v. FTC*, 469 F.2d 498, 503 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 1003 (S.D.N.Y. 1973). In *United States v. Crowell, Collier & MacMillan, Inc.* the court stated, however, that "it (§ 7) cannot be called into play to thwart a non-existent danger." *Id.* Therefore, a merger or acquisition that has a reasonable probability of producing anticompetitive effects, not a remote possibility or a complete certainty, is illegal under the Clayton Act. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594-95 (1965); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979); *BOC Int'l Ltd. v. FTC*, 557 F.2d 24, 28 (2d Cir. 1977); *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *Ekco Prods. Co. v. FTC*, 347 F.2d 745, 752 (7th Cir. 1965); *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 824-25 (9th Cir. 1961); *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 1003 (S.D.N.Y. 1973); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969).

87. *United States v. Swift & Co.*, 286 U.S. 106, 115-19 (1932). In *Swift* the Court refused to modify a consent decree prohibiting five leading meat packers from suppressing competition by

the Seventh Circuit Court of Appeals established the conceptual foundation of entrenchment analysis.<sup>89</sup> In 1954, Ekco, one of the nation's leading producers of household kitchen equipment,<sup>90</sup> acquired McClintock, a producer of meat handling equipment.<sup>91</sup> Prior to the acquisition, McClintock was the dominant firm in two lines of products:<sup>92</sup> commercial meat handling platters and pans and commercial meat-handling carts and racks. Four years after Ekco acquired McClintock, McClintock acquired Blackman,<sup>93</sup> the only other major producer of both product lines.<sup>94</sup> The court found that access to Ekco's financial resources was a necessary condition of McClintock's acquisition of Blackman.<sup>95</sup> On the basis of an increase in market concentration after

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concerted action and various vertical acquisitions. Although the defendants had entered the consent decree pursuant to an action brought under the Sherman Act, the Supreme Court, in reviewing the consent decree, focused on the possibility of a "giant" engaging in predatory practices in an oligopolistic market and thus sowed the seed from which entrenchment analysis has grown. *Id.*

88. 347 F.2d 745 (7th Cir. 1965).

89. In *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963), decided two years before *Ekco*, the Third Circuit Court of Appeals was concerned with Ingersoll-Rand's contemplated acquisition of three companies holding major positions in the underground coal mining equipment manufacturing market. *Id.* at 518. The court stated: "The record demonstrates abundantly that the acquisitions which Ingersoll-Rand proposes to make will place under its control companies which have accounted for and will account for a very substantial share of the total industry output in three significant lines of commerce." *Id.* at 524. The court held, however, that the acquisitions would violate § 7 because of the potential for reciprocity. *Id.* *Ingersoll-Rand*, consequently, is not a significant contribution to the formulation of entrenchment analysis.

90. 347 F.2d 745, 748 (7th Cir. 1965). Ekco manufactured kitchen tools, tinware, cutlery, commercial baking pans, and large aluminum meat boxes. *Id.*

91. *Id.* at 746. In characterizing the meat handling equipment market, the court stated that, "it seems established that there are no high barriers to entry into the commercial meat-handling equipment business. Necessary capital requirements are not large, raw materials are in ample supply and distribution outlets are readily available." *Id.* at 750.

92. The court found that McClintock held a "virtual monopoly" in the commercial meat-handling platters, pans, and lugs market and was the "nation's largest producer" in the commercial meat-handling carts and racks market. *Id.* at 748. The court did not, however, provide market share data for either line of products for the period prior to the acquisition of McClintock.

93. *Id.* at 747. Because Ekco had previously purchased McClintock, its acquisition of Blackman, which produced the same products as McClintock, was a horizontal merger. The court found that the Ekco/McClintock acquisition of Blackman was per se illegal. *Id.* at 751.

94. *Id.* at 747. In 1958, just before its acquisition by Ekco/McClintock, Blackman held a 10.4% share of the commercial meat-handling, platters, pans, and lugs market. *Id.* at 749. At that same time, Blackman held a 9.3% share of the commercial meat-handling carts and racks market. *Id.* at 750.

95. *Id.* at 752. The court stated that, "McClintock had little cash and was subject to a highly restrictive loan agreement at the time Blackman was purchased. Thus, it appears unlikely that McClintock would have purchased Blackman but for Ekco's financial resources." *Id.*

the acquisition of Blackman,<sup>96</sup> the court held that Ekco's acquisition of McClintock had entrenched the market.<sup>97</sup> The court, however, did not elaborate on its entrenchment analysis.

In 1967, the Supreme Court laid down the fundamentals of entrenchment analysis in *FTC v. Procter & Gamble*,<sup>98</sup> the single most important entrenchment case.<sup>99</sup> In 1957 Procter & Gamble, a large diversified manufacturer of household products,<sup>100</sup> principally soaps, detergents, and cleaners, acquired Clorox, a manufacturer of liquid bleach.<sup>101</sup> Clorox accounted for nearly forty-nine percent of liquid bleach sales, a dominant position in a highly concentrated market.<sup>102</sup> The two firms used the same distribution channels and the same type of massive advertising, thus exhibiting a synergistic relationship.<sup>103</sup>

The Court held that the acquisition manifested potential for substantial anticompetitive effects and ordered divestiture.<sup>104</sup> The Court identified the major anticompetitive effect as the contraction of the competitive structure of the market by the raising of entrance barriers

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96. In 1958, the year of its acquisition of Blackman, Ekco/McClintock held a 76.1% share of the commercial meat-handling platters, pans, and lugs market, *id.* at 749, and an 81.9% share of the commercial meat-handling carts and racks market. *Id.* at 750.

The court's market share data indicate, however, that Ekco/McClintock's market share dropped dramatically in the years between Ekco's acquisition of McClintock and the acquisition of Blackman. In 1955, the year after Ekco's acquisition of McClintock, Ekco/McClintock held a 93% share of the platters, pans, and lugs market. By 1958, however, its share of that market had dropped to 76.1%. *Id.* at 749. In the carts and racks market, Ekco/McClintock held a 98.3% share in 1955 and an 81.9% share in 1958. *Id.* at 750. Ekco/McClintock lost sales because of vigorous competition from Blackman, a relatively new entrant, and another competitor. *Id.* Ekco/McClintock's sales did not rise until it had purchased Blackman.

97. *Id.* The court concluded: "This shows to our satisfaction the reasonable probability that Ekco's purchase of McClintock may serve to entrench and preserve McClintock's monopoly." *Id.*

98. 386 U.S. 568 (1967).

99. See generally E. KINTNER, *supra* note 38, at 225; Goldberg, *supra* note 12, at 140; Hood, *supra* note 5, at 497; Whitney, *supra* note 25, at 237-40.

100. 386 U.S. 568, 572-73 (1966). In 1957, the year of the merger, Procter & Gamble held just over 54% of packaged detergent sales. Procter & Gamble and two other manufacturers, Colgate-Palmolive and Lever Brothers, together held 80% of the market. Procter & Gamble's profits in 1957 were \$57,000,000 on \$1,100,000,000 in sales. Its assets were over \$500,000,000. *Id.*

101. *Id.* at 571.

102. *Id.* In 1957, Clorox and its nearest competitor, Purex, held 65% of the liquid bleach sales. These two, together with four other competitors, held almost 80% of the market. Clorox had annual sales of \$40,000,000 and assets of \$12,000,000. *Id.*

103. *Id.* at 577. In 1957, Procter & Gamble spent more than \$80,000,000 on advertising and \$47,000,000 on sales promotion. *Id.* at 573. In the same year, Clorox spent \$3,700,000 on advertising and \$1,700,000 on sales promotion. *Id.* at 572.

104. *Id.* at 580-81.

and the discouraging of competitive efforts by smaller competitors.<sup>105</sup> The merger also eliminated Procter & Gamble as a potential competitor.<sup>106</sup>

The Court referred to Procter & Gamble's huge advertising budget as seminal to the growth of entrance barriers.<sup>107</sup> Because all liquid bleaches are virtually identical,<sup>108</sup> advertising was the sole means of producing product differentiation in the consumer's mind and thus was intimately linked to product sales.<sup>109</sup> The merger would enable Procter & Gamble to transfer its advertising expertise and budget to Clorox,<sup>110</sup> leading to a market share increase for Clorox.<sup>111</sup>

The Court also found that smaller competitors would fear retaliation

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105. *Id.* at 578.

106. *Id.* at 580-81. For a definition of potential competition, see note 24 *supra*.

107. *Id.* at 579. The Court stated:

The acquisition may also have the tendency of raising the barriers to new entry. The major competitive weapon in the successful marketing of bleach is advertising. Clorox was limited in this area by its relatively small budget and its inability to obtain substantial discounts. By contrast, Procter's budget was much larger; and although it would not devote its entire budget to advertising Clorox, it could divert a large portion to meet the short-term threat of a new entrant. Procter would be able to use its volume discounts to advantage in advertising Clorox. Thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox.

*Id.*

108. *Id.* at 572.

109. *Id. Accord*, General Foods Corp. v. FTC, 386 F.2d 936, 939 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); United States v. Crowell, Collier & MacMillan, Inc., 361 F. Supp. 983, 991-92 (S.D.N.Y. 1973); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 552 (N.D. Ill. 1968). See generally Blair, *supra* note 5, at 686-87; Turner, *supra* note 12, at 1332, 1336-37; Whitney, *supra* note 25, at 251.

110. 386 U.S. at 579 (1966). The merger would also allow Clorox to take advantage of Procter & Gamble's large advertising budget to purchase bulk advertising discounts. *Id.*

111. *Id.* Subsequently Purex instituted a treble-damage action against Procter & Gamble and Clorox, alleging that Procter & Gamble's acquisition and retention of Clorox had caused \$500 million of harm to Purex. Purex Corp. v. Procter & Gamble Co., 419 F. Supp. 931, 933 (C.D. Cal. 1976), *vacated and remanded*, 596 F.2d 881 (9th Cir. 1979). The court held that during the period that Procter & Gamble had held Clorox, the merged companies had not engaged in anticompetitive practices and denied the award. *Id.* at 934. The court found that Procter & Gamble did not bestow competitive advantages in the form of advertising expertise and budget on Clorox. *Id.* at 936, 940-41. Focusing on Purex's entry into the Erie, Pennsylvania market, the court found that Purex spent over \$3.00 in advertising per case of liquid bleach sold, in contrast to its normal expenditure of less than 6¢ per case, and garnered 30% of that market. Clorox was spending 90¢ per case in that same market. *Id.* at 940. The court stated: "Procter did not dip into its 'deep pockets' for the benefit of Clorox. Sales promotions were financed strictly out of proceeds from the sales of liquid bleach, just as they had been prior to the merger." *Id.* at 934. Although Purex's market share went down from 43.7% in 1958 to 37% in 1967, its profits on bleach rose from \$1.7 million in 1958 to \$2.7 million in 1965. *Id.* at 943.

by Procter & Gamble if they competed aggressively.<sup>112</sup> Because of its large cash reserves and income from other operations, Procter & Gamble could cut prices, absorb the losses, and force competitors out of the market.<sup>113</sup> Procter & Gamble's size would, in addition, intimidate present and future potential competitors.<sup>114</sup> The Court concluded that these probable effects showed that the merger would entrench the market.<sup>115</sup>

In *General Foods Corp. v. FTC*<sup>116</sup> the Third Circuit Court of Appeals held that entrenchment alone was sufficient to invalidate a merger.<sup>117</sup> In 1957 General Foods, one of the nation's largest producers of packaged foods,<sup>118</sup> acquired S.O.S., one of the nation's largest manufacturers of steel wool pads.<sup>119</sup> The steel wool pad market was highly concentrated, with S.O.S. and its principal competitor, Brillo, holding approximately ninety-eight percent of the market.<sup>120</sup> The court found

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112. 386 U.S. at 578. The Court stated that, "[t]here is every reason to assume that the smaller firms would become more cautious in competing due to their fear of retaliation by Procter." *Id.* But see note 111 *supra*.

113. *Id.* at 579 n.3. But see note 111 *supra*. See generally Bauer, *supra* note 17, at 227. In *Purex Corp. v. Procter & Gamble Co.*, 419 F. Supp. 931 (C.D. Cal. 1976), *vacated and remanded*, 596 F.2d 881 (9th Cir. 1979), the district court found that Clorox had not engaged in any activities during its retention by Procter & Gamble that it had not engaged in prior to the acquisition. *Id.* at 934-36.

114. 386 U.S. at 579. In *Purex Corp. v. Procter & Gamble Co.*, 419 F. Supp. 931 (C.D. Cal. 1976), *vacated and remanded*, 596 F.2d 881 (9th Cir. 1979), the court found that Purex had not acted out of fear of retaliation by Clorox in any managerial decisions. *Id.* at 945-48. Rather, the court attributed Purex's inferior market position to the decisions of its management. *Id.* at 943-45. The court also noted that in its sales forecast for 1960, Purex predicted "an upsurge of private label brands" as a major competitive force. *Id.* at 946.

115. 386 U.S. at 578. The Court concluded that "[i]t is probable that Procter would become the price leader and that oligopoly would become more rigid." *Id.*

116. 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). See generally 19 SYRACUSE L. REV. 1028 (1968); 37 U. CIN. L. REV. 430 (1968).

117. 386 F.2d 936, 946 (3d Cir. 1967). The court held that "[a]s in *Clorox*, the degree of market power enjoyed by G.F. [General Foods] . . . made it likely that the market would become an even more rigid oligopoly." *Id.*

118. *Id.* at 937. The court found that all of General Foods' products were "low priced high-turnover household consumer commodities," *id.*, which would have a synergistic interaction with steel wool pads in terms of advertising, distribution, and the ultimate purchaser, the housewife. *Id.* at 944.

119. *Id.* at 938.

120. *Id.* at 939. S.O.S.'s and Brillo's market shares fluctuated dramatically between 1955 and 1962. In 1955, S.O.S. held 52.8% and Brillo 45.7% of the market. In 1957, the year of the merger, S.O.S. held 51% and Brillo 47.6% of the market. This trend continued after the merger. By 1959 S.O.S. held only 49.4% of the market. In 1960, however, S.O.S.'s share surged upward, reaching 56% in 1962. *Id.* See also 19 SYRACUSE L. REV. 1028, 1028 n.3 (1968).

that steel wool pads, like liquid bleach,<sup>121</sup> require advertising to induce product differentiation and, consequently, stimulate sales.<sup>122</sup> The court emphasized that General Foods, because of its high advertising budget,<sup>123</sup> could transfer competitive advantages in the form of advertising and marketing promotions to S.O.S.<sup>124</sup> Finding in addition that the merger would upset the pre-merger competitive balance between S.O.S. and Brillo,<sup>125</sup> heighten actual<sup>126</sup> and psychological barriers to entry,<sup>127</sup> and dampen Brillo's incentive to compete,<sup>128</sup> the court affirmed an FTC order of divestiture.<sup>129</sup>

In *United States v. Wilson Sporting Goods Co.*<sup>130</sup> the government asked a district court to enjoin a proposed acquisition of Nissen Corpo-

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121. See text accompanying notes 108 & 109 *supra*.

122. 386 F.2d at 945.

123. In 1957, General Foods spent \$69 million for advertising and promotions for all products. In 1958, General Foods' advertising expenditures jumped to \$87 million. By 1961, General Foods was the nation's third largest advertiser. *Id.* at 938.

124. *Id.* After acquiring S.O.S., General Foods substantially altered S.O.S.'s advertising and marketing techniques. *Id.* Prior to its acquisition, S.O.S. had averaged spending \$1.25 million yearly on advertising. After the acquisition, S.O.S. averaged \$2.25 million yearly. The increase was largely due to expenditures for advertising slots on expensive evening television shows. *Id.* at 938 n.6. But see Peterman, *The Clorox Case and the Television Rate Structures*, 11 J.L. & ECON. 321 (1968). Peterman studied the television rate structures for the years applicable to the Procter & Gamble/Clorox acquisition, the same years pertinent to the General Foods/S.O.S. acquisition, and found that the rate structures did not favor large firms. *Id.* at 396. S.O.S. consequently spent more on advertising, an act not inconsistent with a declining market share, but it did not thereby achieve greater access to advertising discounts.

125. 386 F.2d at 945. The court did not present any market share data for the years subsequent to 1962. In 1963 Purex Corporation, a diversified manufacturer of household consumer products with total sales of \$127 million in 1963, acquired Brillo. *Id.* at 939 n.9.

126. *Id.* at 945. The steel wool pad market exhibited extremely high barriers to entry prior to General Foods acquisition of S.O.S. The machinery necessary to manufacture steel wool pads was very complicated and not generally available. *Id.* at 937. The household steel wool pad market was composed of several regional markets, all characterized by either S.O.S. or Brillo having a monopoly share in that region. *Id.* at 938 n.5. Shipping costs for the pads were very high, manageable only by a very large firm. *Id.*

127. *Id.* at 946. The court stated that "the entry of such a large, well-financed, aggressive competitor would necessarily hamper whatever effect potential competition had in the pre-merger market. This result follows because the threat of entrance into a given market by potential competitors is reduced to the extent that entry barriers are raised." *Id.*

128. *Id.* The court observed, however, that Brillo brought out a new package design and increased its advertising expenditures, even though its market share declined. *Id.* at 939 n.8. The court also noted without elaborating that General Foods' market power would enable it to engage in retaliatory acts against aggressive competitors. *Id.* at 946.

129. *Id.* at 937 & 947.

130. 288 F. Supp. 543 (N.D. Ill. 1968). See generally 18 CATH. U.L. REV. 219 (1968).

ration, the leading manufacturer of gymnastic equipment,<sup>131</sup> by Wilson Sporting Goods Company, the largest manufacturer of a broad line of sporting goods and equipment.<sup>132</sup> Although expanding rapidly,<sup>133</sup> the market for gymnastic equipment,<sup>134</sup> in which Nissen held a thirty-two percent share,<sup>135</sup> was highly concentrated.<sup>136</sup> The court issued a preliminary injunction blocking the merger<sup>137</sup> on both entrenchment<sup>138</sup> and potential competition<sup>139</sup> grounds.

In analyzing the possibility of entrenchment in the target market, the court focused on the potential competitive advantages to Nissen from having access to Wilson's huge distribution system of 10,000 dealers.<sup>140</sup> Nissen, in contrast, relied primarily on an eight man sales force.<sup>141</sup> Wilson's dealers were dependent on Wilson for credit, assistance in

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131. 288 F. Supp. at 545.

132. *Id.* at 546. Wilson manufactured over 8,000 different items, most of them sporting goods, and most of which it manufactured itself. *Id.*

133. *Id.* at 546. From 1965 to 1967, sales of gymnastic equipment grew from just under \$8 million to slightly under \$13 million, an increase of over 60%. *Id.* at 546 n.4.

134. Barriers to entry in the gymnastic equipment market were not high. The initial capital investment necessary to enter was quite low. Required machinery was readily available and the technology was not complex. *Id.* at 553-54. Many new companies had entered in the period just before the proposed acquisition of Nissen. *Id.* at 553 & 554 n.21.

135. *Id.* at 546. Nissen's market share, however, fell from 38% in 1965 to 32% in 1967. *Id.*

136. *Id.* The gymnastic equipment market was composed of 23 manufacturers. The top four firms accounted for over 60% of the market and the top nine firms for over 97%. *Id.* The court observed that the market share data did not present a realistic portrait of the market. Only four firms, including Nissen, were able to make equipment that met Olympic and National Collegiate Athletic Association (NCAA) standards. Only equipment that met the Olympic or NCAA strict specifications was used at sanctioned meets. *Id.* at 546-47. The court noted that its market share data, was a composite of both Olympic and non-Olympic equipment and did not accurately depict sales of Olympic equipment. *Id.* at 547. The court observed also that many of the smaller competitors did not manufacture a full line of gymnastic equipment, which cast doubt on the accuracy of the data. *Id.*

137. *Id.* at 570.

138. *Id.* at 559.

139. *Id.* at 562-63.

140. *Id.* at 554. The number of dealers used by Wilson represented approximately 90% of all sporting goods dealers. *Id.* Wilson also employed a 250 man sales force. *Id.* at 554-55.

141. *Id.* at 547. The sales force presold equipment to the customer, usually a coach or athletic director, who then placed the order through a dealer. Nissen distributed its products through 38 exclusive dealerships, 17 of whom also sold Wilson products. Nissen received less than half of its orders "picked up" by its exclusive dealerships, most of which also handled Wilson products. The dealers received a 15% markup for their efforts. Nissen's competitors usually offered a 50% markup to dealers, largely because their products were lower priced in comparison with Nissen's products. *Id.* at 547.

The court also noted that customers did not purchase gymnastic equipment on the basis of

bidding for large contracts,<sup>142</sup> billing, and service.<sup>143</sup> A dealer that had a particular school as a regular customer would recommend Nissen products to gain favor with Wilson.<sup>144</sup> As to non-institutional buyers, Wilson's dealers could either initiate the sale or relay information about a prospective buyer to Nissen's sales force.<sup>145</sup>

The court did not find an adverse psychological impact on actual competition,<sup>146</sup> but found instead that the merger would produce a psychological impact on potential competition.<sup>147</sup> Large broad-line sporting good manufacturers,<sup>148</sup> other than Wilson, would respond to the acquisition of Nissen by also acquiring a firm in the market.<sup>149</sup> These subsequent acquisitions would increase concentration in the market by substituting large diversified firms for small single market companies.<sup>150</sup> A series of large firms buying into the market would also deter small firms from entering and hinder their survival.<sup>151</sup>

In *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*,<sup>152</sup> the Third Circuit Court of Appeals focused on the competitive

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emotion and, consequently, advertising was a minor factor in sales. Customers were sophisticated consumers who purchased equipment on the basis of quality. *Id.* at 552.

Wilson represented to the court and Nissen's shareholders that it would maintain Nissen as a separate subsidiary and retain Nissen's pre-merger sales operations. *Id.* at 547. The court observed that should Nissen's market share continue to decline, *see* note 134 *supra*, the possibility of integrating Nissen was not foreclosed. *Id.* at 556.

142. *Id.* at 554.

143. *Id.* at 555.

144. *Id.*

145. *Id.* at 556.

146. *Id.* at 556-57. The court observed that Nissen by itself possessed the financial capability to cut prices should it continue to lose sales. The court noted that Nissen's acquisition by Wilson would not add much to Nissen's ability to engage in predatory price cutting. The court stated that "we are now entering upon such wholly speculative ground that it has passed the bounds of utility." *Id.* at 557. The court also recognized the equal likelihood that smaller competitors would increase their competitive efforts in the face of the merger. *Id.*

147. *Id.* at 557-58.

148. The court identified Rawlings, Spalding, and MacGregor as the major broad-line manufacturer potential entrants, all of whom had expressed interest in the gymnastic equipment market. *Id.*

149. *Id.*

150. *Id.* at 558.

151. *Id.* at 557-58. Medalist, a relatively small broad-line sporting goods manufacturer, had planned to enter the market prior to learning of the Wilson/Nissen merger. Medalist's plans did not change because of the planned acquisition. *Id.* at 557.

152. 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). Allis-Chalmers asked the trial court to restrain White from acquiring any more of Allis-Chalmers' stock. The trial court denied the preliminary injunctions on the ground that Allis-Chalmers had failed to show a substantial likelihood that on the merits Allis-Chalmers would prove itself to be a potential entrant to

impact of an association between Allis-Chalmers and Blaw-Knox if White acquired Allis-Chalmers.<sup>153</sup> Blaw-Knox, a subsidiary of White, was the third largest manufacturer of metal rolling mills with twenty percent of the market.<sup>154</sup> The metal rolling mills market was highly concentrated, with the top four firms controlling eighty percent of the market.<sup>155</sup> Allis-Chalmers, although not a manufacturer of metal rolling mills, manufactured electrical drive and control systems for metal rolling mills.<sup>156</sup> Allis-Chalmers was the third largest manufacturer of control systems in a market in which the top three firms held ninety percent of the market share.<sup>157</sup>

The court found that the association of Allis-Chalmers and Blaw-Knox would make them the only company capable of delivering a complete metal rolling mill, designed, produced, and installed by a single entity.<sup>158</sup> The court observed that no other manufacturers of metal rolling mills also manufactured control systems.<sup>159</sup> The normal practice in the industry was for the purchaser of the mill to buy a control system either directly from the system manufacturer or through the mill manufacturer.<sup>160</sup> The court held that the association of Allis-Chalmers and Blaw-Knox raised significant potential for entrenchment and enjoined the merger of Allis-Chalmers and White.<sup>161</sup>

In *Kennecott Copper Corp. v. FTC*<sup>162</sup> the Tenth Circuit Court of Appeals was primarily concerned with the effect of a proposed merger on

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the metal rolling mill market. 294 F. Supp. 1263, 1266-67 (D. Del. 1969). The Third Circuit Court of Appeals overturned the trial court's decision on the likelihood of success on the merits. 414 F.2d 506, 525-26 (3d Cir. 1969). *But see id.* at 527-31 (Aldisert, J., dissenting) (overturning trial court decision to deny preliminary injunction improper exercise of appellate court powers).

153. 414 F.2d 506, 517-18 (3d Cir. 1969). *See generally* 58 GEO. L.J. 609 (1970).

154. *Id.* at 517. *But see id.* at 517 n.18.

155. *Id.* at 517. *But see id.* at 517 n.18.

156. *Id.* at 518.

157. *Id.* The top two manufacturers of control systems, General Electric and Westinghouse, controlled over 80% of the market. Allis-Chalmers ran a very distant third. *Id.*

158. *Id.*

159. *Id.* at 517.

160. *Id.* at 517-18.

161. *Id.* at 518. The court found also that the acquisition would produce a substantial likelihood of reciprocal dealings. *Id.* at 518-19.

Judge Aldisert vigorously dissented from the majority's application of entrenchment analysis to the facts of the case. He found that the evidence did not support a finding that Allis-Chalmers would enjoy any more competitive advantages than present manufacturers. *Id.* at 537. He stated that "[u]pon this emaciated skeleton of facts, the cloak of anti-competitive effects just does not fit." *Id.*

162. 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

potential competition.<sup>163</sup> The court also found, however, that a merger between Kennecott, the leading copper producer in the United States,<sup>164</sup> and Peabody Coal Company, the largest coal producer and distributor in the nation,<sup>165</sup> would have an entrenching effect on the coal industry.<sup>166</sup> The court found that the coal industry exhibited high barriers to entry, primarily because of the industry's increasing dependence on long-term supply contracts with electric utilities.<sup>167</sup> The coal producing market, although not an oligopoly, was growing more concentrated.<sup>168</sup>

Kennecott's large cash reserves or deep pocket<sup>169</sup> was the major factor in the court's entrenchment analysis.<sup>170</sup> Access to this cash reserve would allow Peabody to purchase the large coal reserves essential to meeting the demands of electric utilities.<sup>171</sup> Kennecott's acquisition of

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163. *Id.* at 74-78. The court found that Kennecott was the most likely entrant into the coal producing market and consequently exerted a substantial influence on competition in the market. *Id.* at 79.

164. *Id.* at 71. Kennecott's desire to enter the coal producing market stemmed from the diminishing vitality of the copper producing industry. Kennecott's copper reserves were shrinking, as were the sources within the United States. Kennecott concluded that its future in copper productions was limited and began liquidation. *Id.*

165. *Id.* at 72 & 81 app. I. In both 1966 and 1967, Peabody accounted for approximately 10% of the total domestic coal production. *Id.*

Peabody agreed to the acquisition for three reasons: (1) the decrease in the price of Kennecott's shares, (2) an increase in governmental interest in limiting the sulfur content of coal to a level below that of the coal Kennecott produced, and (3) investments in nuclear power by Kennecott's two major customers whose sales accounted for 40% of Kennecott's total production. *Id.* at 84-85 app. II.

166. *Id.* at 78-79.

167. *Id.* at 73-74. Other barriers to entry were the "experience, know-how and equipment" necessary to meet the long term supply contracts, increased competition from oil companies for coal reserves, *id.* at 74, and the 10 to 15 year lag time before a company entering the market could achieve a stable position. *Id.* at 77. The court also found that "the coal industry had become so complex and specialized even before the instant merger that it was virtually impossible for a company with fewer resources than Kennecott to start a coal company by the acquisition of reserves and equipment." *Id.*

168. *Id.* at 72-73. Prior to 1950, the coal industry was in decline. In 1959, however, the coal industry rebounded, largely because of increased coal consumption. In 1947 the 68 companies with an annual production of more than one million tons accounted for 48% of total production. Their share of the market grew to 70% by 1967. In 1954 the top four firms had a 15.8% share of the market. In 1967 the top four firms had increased their share to 29.2%; a growth rate of 160.5%. Similarly, the top eight firms increased their market share from 23.6% in 1954 to 39.7% in 1967. *Id.* at 73.

169. See notes 68-71 *supra* and accompanying text.

170. 467 F.2d at 78.

171. *Id.*

Peabody would thus stabilize Peabody's position in the industry and negate any possibility of future deconcentration of the coal producing market.<sup>172</sup>

In cases subsequent to *Kennecott*, the federal courts have exhibited increasing reluctance to nullify conglomerate mergers on entrenchment grounds alone.<sup>173</sup> In *United States v. Black & Decker Manufacturing*

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172. *Id.* Of the top coal producing firms, most were wholly owned subsidiaries of giant companies like U.S. Steel, Standard Oil of Ohio, Gulf Oil, and General Dynamics. *Id.* at 81-82 app. I. The court did not answer Kennecott's assertion that the existence of these firms in the market stabilized competitive conditions. *Id.* at 74.

173. In the years between *Kennecott* and *Black & Decker*, the federal courts had several opportunities to apply entrenchment analysis to conglomerate mergers. In no case did a court find that the merger would entrench the market.

In *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974), the court examined a proposed acquisition of Missouri Portland Cement Co., a major midwest producer of portland cement, by Cargill, Inc., a huge bulk commodities trader. *Id.* at 855-56. Missouri Portland held 28% of the St. Louis market in portland cement, 30% of the Kansas City market, 30% of the Memphis market, 21% of the Omaha market, 9% of the Chicago market, 10% of the Louisville market, and 15% of the Nashville market. *Id.* at 856. The court found that there was no synergistic interaction between the two companies' "products, customers, or marketing techniques." *Id.* at 862. Missouri Portland urged that Cargill's deep pocket would raise entrance barriers and discourage competition by small competitors in the portland cement market. *Id.* at 865. The court found that many of the companies in the market were owned and controlled by giants, such as U.S. Steel, who would not shrink before Cargill's financial strength. *Id.* The court concluded that "[i]n the cement industry . . . the 'deep pocket' claim seems more metaphorical than real." *Id.*

In *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975), the court dissolved a preliminary injunction preventing Emhart, a large diversified corporation, from carrying out a tender offer for USM, a major shoe machinery manufacturer. *Id.* at 178-79. USM had 42% of the United States market, reduced from 85% by court decree. *See United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954). USM argued that its acquisition by Emhart would allow a transfer of Emhart's technological capabilities to USM, leading to a violation of either the Sherman Act or the decree. 527 F.2d at 180-82. The court held that the entrenchment doctrine does not deprive the merging companies of mere improvements in efficiency. The court viewed entrenchment as primarily designed to prevent "artificial competitive advantages, such as those derived from certain promotional and marketing techniques . . ." *Id.* at 182.

In *United States v. Hughes Tool Co.*, 415 F. Supp. 637 (C.D. Cal. 1970), the court applied entrenchment analysis to the proposed acquisition of Byron Jackson, Inc., a division of Borg-Warner that manufactured drilling equipment for oil and gas wells, by Hughes Tool Co., the leading manufacturer of rotary drill bits. *Id.* at 638-39. Byron Jackson had 20% of the market in "specialized surface rotary drilling products used in handling pipe and in the drilling completion, production and workover of oil and gas wells." *Id.* at 642. The court found that the market was deconcentrating. From 1970 to 1974 the combined market share of the top four firms dropped from 63% to 52%. Byron Jackson's market share dropped from 29% to 20% during the same period of time. *Id.* at 643. The court held that the acquisition would not have an entrenching effect on the market because the two firms' manufacturing processes and marketing channels offered no potential for synergetic interaction. *Id.* at 645. Hughes consequently could not bestow competitive advantages on Byron Jackson. *Id.*

*Co.*<sup>174</sup> a federal district court considered both potential competition<sup>175</sup> and entrenchment<sup>176</sup> challenges to a conglomerate merger and found that neither theory showed the merger would have an anticompetitive effect on the target market.<sup>177</sup> Black & Decker, a leading manufacturer of portable electric power tools,<sup>178</sup> acquired McCulloch Corporation, one of the largest manufacturers of gasoline-powered chain saws.<sup>179</sup> In 1972, the year before the merger, the gasoline-powered chain saw market<sup>180</sup> was highly concentrated, with the top two firms holding a combined market share of fifty-four percent.<sup>181</sup>

The court focused initially on the two firms' product lines and found that they presented little opportunity for synergistic interaction in technologies, brand name recognition, or marketing and manufacturing systems.<sup>182</sup> A lack of synergistic interaction indicated that Black & Decker could not bestow competitive advantages on McCulloch.<sup>183</sup> The court viewed the absence of synergy as a factor that substantially

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174. 430 F. Supp. 729 (D. Md. 1976).

175. *Id.* at 743-73.

176. *Id.* at 773-76.

177. *Id.* at 782-83.

178. *Id.* at 735. The market shares for both Black & Decker and McCulloch for their respective product lines were designated as confidential data by the court and omitted from the record. *Id.* at 733 n.1 & 735-36. In 1972 Black & Decker was 372nd in sales and 206th in net income of the top 500 industrials. *Id.* at 735. In 1973 Black & Decker had net earnings of \$33 million on sales of \$427 million. Its assets in 1972 were \$273 million. *Id.*

179. *Id.* at 736. In 1972 McCulloch had net sales of \$60 million and net assets of between \$64 million and \$65 million. However, during that same year, McCulloch showed an operating loss of nearly \$1.4 million. *Id.*

180. The court found that the relevant product market was the manufacture and sale of gas-powered chain saws. The court also found that a significant submarket existed for gas-powered chain saws selling for less than \$200. *Id.* at 740.

181. *Id.* at 748. The top four firms had a combined market share of 77% and the top eight firms had 93%. *Id.* From 1970 to 1974 the combined market share of the top two firms dropped from 54.6% to 48.4%. The combined market share of the top four firms grew from 71.9% to 75.1% during that same period. The combined market share of the top eight firms for that same period dropped slightly from 92.9% to 92%. *Id.*

182. *Id.* at 774. The court found that the technologies involved in manufacturing Black & Decker's products, which were predominantly electrically driven, were not complementary to those involved in producing McCulloch's product, which was gas driven. Furthermore, McCulloch marketed its products in rural areas, while Black & Decker marketed in urban areas. *Id.* Because of the disparity in markets, the only area of possible brand name recognition was in the occasional user gasoline-powered chain saw market. *Id.* at 774-75.

183. *Id.* at 776. The court concluded that "Black & Decker does not appear capable of conferring decisive competitive advantages that could result in McCulloch dominating gas chain saw markets." *Id.*

lessened the probability that the merger would entrench the market.<sup>184</sup>

The court also discussed the role of advertising in chain saw sales and concluded it was of limited utility.<sup>185</sup> The court found that gas-powered chain saws, unlike the chemically identical bleaches in *Procter & Gamble*,<sup>186</sup> were not dependent on advertising for product differentiation.<sup>187</sup> Manufacturers produced a wide variety of chain saws, which met a broad range of consumer needs.<sup>188</sup> A transfer of Black & Decker's advertising and promotional expertise on McCulloch would thus not entrench the market in gas-powered chain saws.<sup>189</sup>

The court finally considered the strength and vitality of other competitors in the target market and concluded that the merger would not lessen competition.<sup>190</sup> Many of the other competitors were equal to Black & Decker in financial strength.<sup>191</sup> Those competitors consequently had little reason to fear predatory acts or domination by Black & Decker.<sup>192</sup>

More recently,<sup>193</sup> a federal district court in *Carrier Corp. v. United*

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184. *Id.* at 774. See *General Foods Corp. v. FTC*, 386 F.2d 936, 944-46 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *United States v. Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 992-93 (S.D.N.Y. 1973); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 544-56, 564-65 (N.D. Ill. 1968).

185. 430 F. Supp. 729, 775 (D. Md. 1976).

186. See notes 107-11 *supra* and accompanying text.

187. 430 F. Supp. 729, 775 (D. Md. 1976). The court noted the distinction by observing that "unlike liquid bleaches which were chemically indistinguishable and therefore relied exclusively on advertising for product differentiation, gas powered chain saws offer a variety of different features tailored to heterogeneous types of purchasers and requirements." *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 775-76.

191. *Id.* Many of McCulloch's competitors were subsidiaries or divisions of large corporations such as Sears & Roebuck, Gulf & Western, and Emerson Electric Company. *Id.*

192. *Id.* at 775.

193. In the period between *Black & Decker* and *Carrier* the federal courts had several occasions to consider entrenchment claims. In *Babcock & Wilcox Co. v. United Technologies Corp.*, 435 F. Supp. 1249 (N.D. Ohio 1977), the court considered a proposed acquisition of Babcock & Wilcox, a manufacturer of steam generating equipment, by United Technologies, a huge diversified firm. *Id.* at 1253. The court addressed the merger's potential entrenching effects in six markets: (1) the utility fossil fuel boiler market, (2) the utility nuclear steam system market, (3) the commercial fossil fuel steam propulsion market, (4) the commercial nuclear steam propulsion market, (5) the naval fossil fuel steam propulsion market, and (6) the naval nuclear steam propulsion market. *Id.* at 1287. The court's primary concern was United's ability to transfer its extensive research and development expertise to Babcock & Wilcox. The court found that a transfer of research and development would not materially aid Babcock & Wilcox's market power. In the utility fossil fuel steam boiler market, the court found that the possibility of anticompetitive effects arising from the transfer was entirely speculative. Babcock & Wilcox was not a dominant

*Technologies Corp.*<sup>194</sup> refused to find that Carrier's access to United's technological capabilities would entrench the target market.<sup>195</sup> United, a very large manufacturer of highly diversified products,<sup>196</sup> sought to acquire Carrier, the largest manufacturer of heating and air conditioning systems.<sup>197</sup> The court concentrated on the merger's potential anticompetitive effects in four distinct submarkets<sup>198</sup> of the heating and air conditioning systems market: (1) unitary systems,<sup>199</sup> (2) applied

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power in either the utility nuclear steam system market or the naval fossil fuel steam propulsion market and, consequently, the probability of entrenchment was nonexistent. Babcock & Wilcox was a dominant force in the commercial fossil fuel steam propulsion market, but consumers in that market were increasingly turning to diesel-fueled boilers. The commercial nuclear steam propulsion market was insignificant because of the prohibitive start-up costs. Babcock & Wilcox was a major force in the naval nuclear steam propulsion market, but United's research and development would add nothing to Babcock & Wilson's competitive posture. *Id.* The court found also that the entrance of a giant like United would not have a chilling effect on competition in the market because consumers in the market were highly sophisticated. *Id.* at 1287-88. This consumer sophistication mitigated the possibility of unreasonable domination by one competitor. *Id.*

In *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977), the court examined a proposed acquisition of Anaconda Co., a major copper and aluminum ore processor, by Atlantic Richfield Co. (Arco), a giant producer of petroleum and petroleum products. *Id.* at 291. In 1977 Arco was the fifteenth largest in sales and revenues and thirteenth largest in assets of all publicly-held corporations in the nation. *Id.* Anaconda, with an 8.27% share, was the third largest producer in the market of copper ore. The two top companies in that market held a combined market share of 30%. Anaconda ranked fourth in the refined copper market with a 9.78% share. The top three firms held a combined market share of 60%. *Id.* The court held without discussion that the merger would not entrench Anaconda because it was not a top competitor in either market. *Id.* at 298 n.12.

194. [1978-2] TRADE CAS. (CCH) ¶ 62,393 (N.D.N.Y.).

195. *Id.* at 76,366-68.

196. *Id.* at 76,361. Among United's many products were jet engines, electrical control systems, elevators, energy management systems, industrial compressors, and industrial gas turbines.

197. *Id.*

198. Submarkets are the distinct product lines within a more general product market. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court provided the classic definition of a submarket:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

*Id.* at 325. See also *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957).

The court in *Carrier* also considered the submarket for industrial gas turbines. [1978-2] TRADE CAS. (CCH) ¶ 62,393 at 76,367 (N.D.N.Y.). The court was concerned with the potential entrenchment of United, and not Carrier, in the turbine market. *Id.* at 76,368.

199. [1978-2] TRADE CAS. (CCH) ¶ 62,393 at 76,361. The court accepted, *id.* at 76,302, the

systems,<sup>200</sup> (3) compressors,<sup>201</sup> and (4) waste heat recovery systems.<sup>202</sup>

In the unitary and applied systems markets, the major development was "smart" electronic controls.<sup>203</sup> United, through its affiliate Essex, manufactured control systems but was not a leader in that market.<sup>204</sup> Carrier, although the leader in research and development in heating and air conditioning systems<sup>205</sup> had not developed an electronic control system.<sup>206</sup> The court found that Carrier's association with Essex would not have a substantial impact on the unitary and applied systems markets.<sup>207</sup> Any benefits that Carrier would derive were available to Carrier's competitors through joint ventures with control systems manufacturers.<sup>208</sup>

In the compressor market, Carrier, through its Elliot division, produced twenty percent of the large industrial compressors and a small number of the industrial axial compressors.<sup>209</sup> United manufactured axial compressors for jet aircraft but had never considered entering the industrial axial compressor market.<sup>210</sup> The court found that the technology involved in producing aircraft axials was significantly different from that for industrial compressors.<sup>211</sup> United consequently could not transfer a competitive advantage to Carrier in the compressor

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definitions of unitary systems urged by United, that is, "systems consisting of various components contained in a metal package or envelope, assembled at the manufacturing plant for installation in a structure." *Id.*

200. *Id.* at 76,362. Applied systems were heating or air conditioning systems put together and installed at a site under construction. *Id.*

201. *Id.* at 76,366.

202. *Id.* at 76,368. As defined by the court, "[a] waste heat recovery system places a turbine in the path of the exhaust stream of a catalytic cracker thereby converting otherwise wasted energy into rotating power." *Id.*

203. *Id.* at 76,363.

204. *Id.* The leading firms were Minneapolis Honeywell and Johnson Controls. General Electric, ITT, Westinghouse, and Singer all had the capability of producing control systems. *Id.*

205. *Id.* Carrier spent \$30 million on research and development in 1977, three times the expenditure of its nearest competitor. *Id.*

206. *Id.* Carrier, however, had controls capability through its Spectral division. *Id.*

207. *Id.* at 76,366.

208. *Id.* at 76,364. The court found that Carrier and its nearest competitor, Trane, were reluctant to enter into such joint-ventures because it would expose valuable information. The court stated that nondisclosure agreements would adequately protect the information. *Id.*

209. *Id.* at 76,366. The major competitors in the compressor market, other than Carrier, were Ingersoll-Rand, Cooper Industries, Allis-Chalmers, De La Val, and the Dresser Division of Clark Industries. *Id.*

210. *Id.*

211. *Id.*

market.<sup>212</sup>

As to waste heat recovery systems, the court found that United's technological expertise was potentially useful to Carrier.<sup>213</sup> Carrier, through its Elliot division, manufactured turbines specifically for waste heat recovery systems.<sup>214</sup> United did not make turbines for that purpose, but did produce aircraft turbines.<sup>215</sup> Even though United's technology was potentially useful to Carrier, the court ultimately determined that this expertise was readily available from other sources.<sup>216</sup>

Despite the federal courts' current reluctance to rely on entrenchment analysis, the FTC has continued to challenge acquisitions on entrenchment grounds.<sup>217</sup> Recently, in *In re Beatrice Foods Co.*,<sup>218</sup> an

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212. *Id.* at 76,367.

213. *Id.* at 76,368.

214. *Id.*

215. *Id.*

216. *Id.* The court found that United's technological expertise in materials, coating, and cooling, which were available elsewhere, might benefit Carrier. *Id.*

217. See *In re Beatrice Foods Co.*, No. 9112 (FTC Nov. 21, 1980); *In re Heublein, Inc.*, 96 F.T.C. 385 (1980); *In re Tenneco Inc.*, 96 F.T.C. 346 (1980).

In *In re Heublein, Inc.*, 96 F.T.C. 385 (1980), the Commission overturned an ALJ's finding that Heublein's acquisition of United Vintners, Inc. would entrench United in the market of all wines. *Id.* at 574. In 1968 Heublein was the fifth largest manufacturer and marketer of alcoholic beverages, mostly beer and distilled spirits. *Id.* at 574-75. Heublein was sixteenth in wine sales, with 79% of the market. In that same year, United was the second largest producer and marketer of wines with a 17.9% share of the market. *Id.* at 576. United and its chief competitor, Gallo, held a combined market share of 41.9%. *Id.* at 575. The ALJ held that the merger would entrench the wine market because Heublein had conferred market advantages on United in three ways: (1) access to cheaper financing and capital, (2) access to advertising efficiencies, and (3) possible leveraging of United's products by tying them to Heublein's popular liquor products. *Id.* at 553-56.

The Commission found that although Heublein had provided new capital, arranged financing, and provided a loan for United, it had not done so at a lower cost than United had before the acquisition. Furthermore, most of United's competitors were owned by financially strong conglomerates or large distillers, such as Joseph E. Seagrams & Sons, Inc. and Coca-Cola Bottling Co. Their presence in the alcoholic beverage market watered down any competitive advantage to United. *Id.* at 594-95.

As to advertising efficiencies, the Commission ruled that they were of little benefit in the wine industry. Wines varied significantly in price and quality. Advertising, consequently, was not necessary for sales promotion in the market. *Id.* at 595-96.

In addition, the Commission found that a possibility of leveraging was insufficient to prove anticompetitive effect. Leveraging of products by tying them to popular brands was always possible in a product extension merger. A tying arrangement was also illegal under § 3 of the Clayton Act and § 1 of the Sherman Act. *Id.* at 596-99.

218. No. 9112 (FTC Nov. 21, 1980).

ALJ ordered divestiture of a company exclusively because of the entrenching effects of the acquisition.

Beatrice Foods Company, the nation's leading processor of diversified food products,<sup>219</sup> acquired Tropicana Products, Inc., the leading processor<sup>220</sup> of chilled orange juice.<sup>221</sup> The chilled orange juice market,<sup>222</sup> although rapidly expanding,<sup>223</sup> was highly concentrated with the top four firms holding sixty percent of the market.<sup>224</sup> Beatrice had a very small share of the market<sup>225</sup> through its extensive holding of dairy

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219. *Id.* at 6-7.

220. *Id.* at 7. In 1978, the year of the merger, Tropicana held the top position in the chilled orange juice market with almost 30% of the market in gallons sold and nearly 31% of the market in dollars. In that year, Tropicana's major competitors were Minute Maid, a division of the Coca-Cola Bottling Co., with 15.5% of the market in gallons sold and 15.4% in dollars, Kraft, with 10.5% in gallons and 11.5% in dollars, and H.P. Hood, with 4.4% in gallons and 4.0% in dollars. *Id.* at 24.

221. The Commission defined chilled orange juice as "chilled single strength orange juice made: (1) by squeezing fresh oranges, (2) by adding water to FCOJ [frozen concentrate orange juice], or (3) by thawing frozen single strength orange juice." *Id.* at 5.

222. The ALJ found that the chilled orange juice market constituted a separate market from frozen concentrate orange juice and canned single strength orange juice. *Id.* at 9. The ALJ found also that the chilled orange juice market was composed of two submarkets: the retail or grocery store market and the institutional customer market, *id.* at 10, and limited his analysis to the retail chilled orange juice market. *Id.* at 11. The ALJ excluded home delivery from the retail chilled orange juice market.

During the proceeding before the ALJ, the FTC asked a federal district court for a preliminary injunction restraining consummation of the merger. The district court denied the injunction, see *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1228 app. (D.C. Cir. 1978), and the Court of Appeals for the District of Columbia affirmed. *Id.* at 1230 app. The FTC filed a motion for a rehearing en banc that the Court of Appeals granted and remanded to the district court for further findings of fact. *Id.* at 1231 app. The Court of Appeals then denied the rehearing en banc after receiving the district court's findings. *Id.* at 1233 app., 1226. The district court divided the orange juice market into three submarkets: (1) ready to serve juice, (2) ready to serve and institutional frozen juice, and (3) ready to serve and all frozen juice. *Id.* at 1233 app. (Appendix to Joint Statement of Judges MacKinnon And Robb). The district court found that a major portion of Beatrice's distribution consisted of home delivery. *Id.*

223. No. 9112 at 13 (FTC Nov. 21, 1980).

224. *Id.* at 24. The catalyst of the trend toward increased concentration was Minute Maid. *Id.* at 61. Minute Maid, with the backing of its parent Coca-Cola, entered the market in 1970 and captured a 19.4% share of the market by 1979. *Id.* at 55. The vehicle for Minute Maid's rapid expansion was co-packing agreements with dairies. Pursuant to those agreements, Minute Maid shipped frozen concentrated orange juice to a dairy, which reconstituted the concentrate and then distributed it locally. *Id.* at 51-52. The benefit to Minute Maid was increased cost savings. *Id.*

225. *Id.* at 41. The ALJ used the market statistics provided by the FTC. The district court and court of appeals rejected those statistics because they involved double counting by the FTC. 587 F.2d at 1234 app. (Appendix To Joint Statement of Judges Mac Kinnon and Robb). By either the ALJ's measure (.39%) or the district court's (less than .5%), *id.*, Beatrice Foods' share was extremely small.

plants<sup>226</sup> that reconstituted frozen concentrated orange juice and delivered it to grocery stores.<sup>227</sup>

The ALJ found that the merger would allow Tropicana access to Beatrice's extensive processing and distribution system<sup>228</sup> and thus confer a substantial competitive advantage on Tropicana.<sup>229</sup> Although Tropicana distributed nationally, its largest sales were in the East and Southeast, close to its Florida processing plant.<sup>230</sup> The prohibitive cost of transporting juice to other areas of the country<sup>231</sup> had prevented Tropicana from gaining a significant market share anywhere but the eastern states.<sup>232</sup> With access to Beatrice's processing and distribution system, Tropicana could tap the western market and consequently further contract the national market.<sup>233</sup> The anticompetitive effects that would result were sufficient for the ALJ to invalidate the acquisition.<sup>234</sup>

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226. *Id.* at 7. In 1978 Beatrice was the nation's leading milk processor and distributor. *Id.* The district court found that Beatrice did not operate any dairies in Tropicana's major sales areas. 587 F.2d at 1232 app. (Appendix To Joint Statement of Judges MacKinnon and Robb).

227. No. 9112 at 7 (FTC Nov. 21, 1980).

228. The ALJ had included nearly all distribution systems within his definition of the retail chilled orange juice market. *Id.* at 16. Tropicana, according to the ALJ, distributed chilled orange juice to chain store warehouses, wholesale warehouses, and dairies. The ALJ found that Beatrice distributed chilled orange juice to wholesale distributors, independent grocery stores, and individual stores in a chain store line, *id.* at 17-18, but left out Beatrice Foods' substantial home delivery sales. *Id.* The district court found that Beatrice distributed chilled orange juice to homes, restaurants, institutional customers, and small local independent groceries. 587 F.2d at 1232. It found further that Beatrice did not distribute to the chain store warehouses and wholesale warehouses that were customers of Tropicana. *Id.*

229. No. 9112 at 66-67 (FTC Nov. 21, 1980).

230. *Id.* at 27-28.

231. The ALJ found that most dairies did not distribute beyond a 150 mile radius. Distribution to warehouses, however, increased the sales radius to 500 miles. *Id.* at 49. The greatest shipping costs were for chilled orange juice in glass containers which were slowly disappearing from the market. *Id.* at 51.

232. *Id.* at 53.

233. *Id.* at 66-67. The ALJ found that but for the merger Tropicana would have built a reconstituting plant in California. *Id.* at 66. Because Beatrice Foods already had dairies in California and the Midwest, Tropicana would distribute through them instead of through its own plant. *Id.* at 66-67. The district court found, however, that "[c]onsistent with the long standing practice of Beatrice, Tropicana will be operated as a completely separate and virtually autonomous subsidiary of Beatrice. . . ." 587 F.2d at 1234 app. (Appendix To Joint Statement of Judges MacKinnon and Robb). The district court also found that there would not "be any change in Tropicana's method of operation in the processing and sale of orange juice." *Id.*

234. No. 9112 at 65-66 (FTC Nov. 21, 1980).

### III. A CRITIQUE OF JUDICIAL ENTRENCHMENT ANALYSIS

The disparity between the federal courts' recent reluctance to approve and the FTC's eagerness to pursue entrenchment challenges indicates that a critical review of precedent is necessary. Analysis reveals that reliance on precedent that supports entrenchment theory as an independent basis for invalidating a conglomerate merger is misplaced.

In *Ekco*<sup>235</sup> the court held that the acquisition of McClintock entrenched the target markets because Ekco's financial resources allowed McClintock to merge horizontally with Blackman.<sup>236</sup> After Ekco's acquisition of McClintock, however, McClintock's market share decreased dramatically because of vigorous competition from Blackman.<sup>237</sup> McClintock's market share increased only after its acquisition of Blackman.<sup>238</sup> The catalyst for increased concentration in the markets was McClintock's acquisition of Blackman and not Ekco's acquisition of McClintock.<sup>239</sup> The court found that McClintock's acquisition of Blackman, which was related to the Ekco/McClintock merger only by Ekco's deep pocket, was per se illegal.<sup>240</sup> The thrust of the court's decision thus was that Ekco's acquisition of McClintock allowed McClintock to engage in essentially unrelated per se illegal acts. In that context, the court was unjustified in finding that Ekco's acquisition of McClintock entrenched the target markets.

In *Procter & Gamble*,<sup>241</sup> the Supreme Court held that the acquisition of Clorox would entrench the liquid bleach market primarily because Procter & Gamble could provide Clorox with a competitive advantage in advertising.<sup>242</sup> Television advertising rate structures at that time, however, did not favor large firms.<sup>243</sup> Furthermore, Purex, Clorox's only major competitor, possessed the financial resources to meet or exceed Clorox's advertising expenditures.<sup>244</sup>

In addition, the Supreme Court observed that Clorox, with Procter &

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235. *Ekco Products v. FTC*, 347 F.2d 745 (7th Cir. 1965). See notes 88-97 *supra* and accompanying text.

236. See text accompanying notes 95-97 *supra*.

237. See note 96 *supra*.

238. *Id.*

239. See text accompanying notes 96-97 *supra*.

240. See note 93 *supra*.

241. See notes 98-115 *supra* and accompanying text.

242. See text accompanying notes 107-111 *supra*.

243. See note 124 *supra*.

244. *Id.*

Gamble's financial backing, could chill competition by engaging in predatory pricing.<sup>245</sup> In a subsequent action in which Purex sued Procter & Gamble for damages arising from the merger,<sup>246</sup> the court found that Procter & Gamble had not used its deep pocket to Clorox's advantage.<sup>247</sup> Clorox did not engage in any acts, anticompetitive or otherwise, after the merger that it had not undertaken prior to the merger.<sup>248</sup> Purex, in addition, was not intimidated and continued to compete aggressively, as shown by its increased sales<sup>249</sup> and entry into new geographic markets.<sup>250</sup>

In *General Foods*<sup>251</sup> the court held that S.O.S.'s access to General Foods' advertising budget,<sup>252</sup> plus General Foods' sheer size, would upset the pre-merger competitive balance between S.O.S. and Brillo and entrench the metal soap pad market.<sup>253</sup> S.O.S. increased its market share with advertising aid from General Foods, but this increase followed five years of steady decline.<sup>254</sup> An increase in advertising expenditures was not inconsistent with a market share decrease.<sup>255</sup> The additional expenditures went primarily for prime time television advertisements.<sup>256</sup> Television rate structures did not favor large firms<sup>257</sup> and consequently S.O.S. did not buy anything that it could not purchase prior to the merger.

The merger may have initially upset the competitive balance with Brillo. Subsequent to the merger, but prior to the court's decision, however, Purex acquired Brillo.<sup>258</sup> Purex was a large firm that actively competed against giants in other markets.<sup>259</sup> A Purex-backed Brillo would have little fear of competing against General Foods.

In *Wilson*,<sup>260</sup> the decisive factor in the court's entrenchment analysis

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245. See text accompanying notes 112-15 *supra*.

246. See note 111 *supra*.

247. *Id.*

248. See note 113 *supra*.

249. See note 111 *supra*.

250. See note 111 *supra*.

251. See notes 116-29 *supra* and accompanying text.

252. See text accompanying notes 123-24 *supra*.

253. See text accompanying notes 125-29 *supra*.

254. See note 120 *supra*.

255. See note 124 *supra*.

256. *Id.*

257. *Id.*

258. See note 125 *supra*.

259. See notes 111 & 128 *supra*.

260. See notes 130-51 *supra* and accompanying text.

was that Nissen would have access to Wilson's extensive distribution system.<sup>261</sup> Nissen, however, relied primarily on a small sales force that presold Nissen equipment to consumers.<sup>262</sup> The discriminating purchasers of gymnastic equipment were impervious to advertising and the uninformed sales pitches of distributors dealing in hundreds of sports products.<sup>263</sup> In the Nissen system, distributors acted largely as conduits for the equipment.<sup>264</sup> Furthermore, Wilson had represented both to Nissen's shareholders and to the court that Wilson's and Nissen's distribution systems would remain separate.<sup>265</sup>

The *Wilson* court found also that the merger would prompt other large manufacturers to enter the market, driving out smaller competitors and thus alter the market structure.<sup>266</sup> The market for gymnastic equipment, marked by low barriers to entry,<sup>267</sup> was rapidly expanding.<sup>268</sup> Increased sales attracted many new entrants<sup>269</sup> and continued to do so in the face of the Wilson/Nissen merger.<sup>270</sup> Moreover, the other major manufacturers had all expressed interest in entering prior to learning of Wilson's proposed acquisition of Nissen.<sup>271</sup>

In *Allis-Chalmers*,<sup>272</sup> the court found that the association of Blaw-Knox, White's subsidiary, and Allis-Chalmers would turn them into the only firm that could deliver a metal rolling mill complete with a control system.<sup>273</sup> The court held that this competitive advantage would entrench the market.<sup>274</sup> Blaw-Knox, however, was only the third largest manufacturer of rolling mills.<sup>275</sup> The top two firms in the control systems market held an eighty percent share.<sup>276</sup> Allis-Chalmers was a distant third.<sup>277</sup> If the merger enhanced Allis-Chalmers' market

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261. See text accompanying notes 140-45 *supra*.

262. See note 141 *supra* and accompanying text.

263. *Id.*

264. *Id.*

265. *Id.*

266. See text accompanying notes 147-51 *supra*.

267. See note 134 *supra*.

268. See note 133 *supra*.

269. See note 134 *supra*.

270. See note 151 *supra*.

271. See note 148 *supra*.

272. See notes 152-61 *supra* and accompanying text.

273. See text accompanying notes 158-60 *supra*.

274. See text accompanying note 161 *supra*.

275. See text accompanying note 154 *supra*.

276. See note 157 *supra*.

277. *Id.*

position, then it may have induced increased competition in the control systems market. Allis-Chalmers' competitive advantage may have shaken the top two firms from their dominant position. The merger that was invalidated as anticompetitive thus may have actually produced a procompetitive effect.<sup>278</sup>

In *Kennecott*,<sup>279</sup> the court found that Kennecott could confer its deep pocket on Peabody, allowing Peabody to purchase coal reserves, and consequently entrench the coal producing market.<sup>280</sup> The coal producing market, however, was highly competitive.<sup>281</sup> Although the top eight firms had increased their combined market share, the market, with increased coal consumption, was expanding.<sup>282</sup> Large oil companies actively competed with the coal producers for coal reserves.<sup>283</sup> Furthermore, most of Peabody's competitors were wholly owned subsidiaries of huge corporations.<sup>284</sup> Peabody's competitors consequently had access to deep pocket advantages similar to those bestowed on Peabody.

In *Black & Decker*<sup>285</sup> and *Carrier*,<sup>286</sup> the courts confronted classic entrenchment situations. Both cases involved a large firm acquiring a major competitor in a concentrated market.<sup>287</sup> Both courts went beyond surface considerations to appraise realistically the potential for entrenchment. The key factor for both courts was the lack of synergy between the acquired and acquiring firm's product lines.<sup>288</sup> Both courts also assessed the nature of competition, types of consumers, and the strength of competitors in the markets.<sup>289</sup> Both courts took a broad, comprehensive view of the markets and refused to hold that the mergers would entrench the markets.

In *Beatrice Foods*<sup>290</sup> the ALJ found that Beatrice Foods' processing and distribution system would add substantially to Tropicana's market

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278. See generally Campbell & Shepherd, *supra* note 11, at 1371.

279. See notes 162-72 *supra* and accompanying text.

280. See text accompanying notes 169-72 *supra*.

281. See note 168 *supra*.

282. *Id.*

283. See note 167 *supra*.

284. See note 172 *supra*.

285. See notes 174-92 *supra* and accompanying text.

286. See notes 194-216 *supra* and accompanying text.

287. See notes 178-81 & 196-97 *supra* and accompanying text.

288. See notes 182-84, 209-12 & 215-16 *supra* and accompanying text.

289. See notes 185-92 & 204-15 *supra* and accompanying text.

290. See notes 219-33 *supra* and accompanying text.

power and entrench the chilled orange juice market.<sup>291</sup> A federal district court, which refused to enjoin the merger pending the ALJ decision,<sup>292</sup> found that Beatrice and Tropicana operated in different geographic markets<sup>293</sup> and distributed to different types of customers.<sup>294</sup> If Beatrice operated Tropicana as an autonomous subsidiary, as the district court found was the intended plan,<sup>295</sup> access to Beatrice's distribution system would not benefit Tropicana.

Furthermore, Tropicana faced stiff competition from Minute Maid, a subsidiary of Coca Cola. Minute Maid had entered the market in 1970 and increased its market share to nearly twenty percent by 1979.<sup>296</sup> With Coca Cola's backing, Minute Maid possessed the potential to meet any competitive challenge Tropicana might offer.

#### IV. ANALYSIS OF ENTRENCHMENT THEORY

Critical review of the precedent reveals that the judiciary has taken two very different approaches to entrenchment analysis. In *Black & Decker* and *Carrier*, the courts performed a thorough assessment of all pertinent facts. The courts from *Procter & Gamble* through *Kennecott* and the ALJ in *Beatrice Foods* relied on the assumptions underlying entrenchment theory and neglected to analyze actual competitive conditions in the target markets. For entrenchment theory to survive as an independent basis for invalidating conglomerate mergers, it must rest on a firm empirical foundation.<sup>297</sup>

Entrenchment theory assumes that a conglomerate's acquisition of a dominant firm in an oligopolistic market yields predominantly anticompetitive effects.<sup>298</sup> The acquiring conglomerate supposedly confers competitive advantages on the acquired firm that entrench the acquired firm<sup>299</sup> in its market position.<sup>300</sup> The entrenching acquisition

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291. See text accompanying notes 228-33 *supra*.

292. See note 222 *supra*.

293. See note 226 *supra*.

294. See note 233 *supra*.

295. *Id.*

296. See note 224 *supra*.

297. See notes 33 & 34 *supra*.

298. See *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *Stanley Works v. FTC*, 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

299. See note 44 *supra* and accompanying text.

300. See note 47 *supra* and accompanying text.

allegedly raises entrance barriers,<sup>301</sup> paralyzes competition,<sup>302</sup> and provides opportunities for predatory pricing.<sup>303</sup>

The economies of scale that result from such a merger can, however, actually produce competitive advantages.<sup>304</sup> Low capital costs, an extensive distribution system, and high levels of technological innovation are nothing more than efficiencies inherent in the conglomerate's size.<sup>305</sup> With respect to capital costs, for example, the difference is significant only if the discrepancy in firm size is large.<sup>306</sup> The realization of these advantages by a large conglomerate can stimulate competitors to seek their own means of reducing costs.<sup>307</sup> Once one firm achieves economies of scale, only the efficient firms are likely to remain in the market.<sup>308</sup> Economies of scale create lower costs that not only accrue to management and shareholders but also benefit consumers in the form of reduced prices.<sup>309</sup> If the judicial entrenchment theory promotes inefficiency by impeding economies of scale, it contravenes the underlying policy of the antitrust laws, which is to advance competition.<sup>310</sup>

A conglomerate's acquisition of a firm in a highly concentrated market will potentially raise barriers to entry only if the acquired firm becomes the dominant force in the market.<sup>311</sup> If the conglomerate acquires any firm but the leading firm, then the acquisition may act to introduce a new competitive force to the market.<sup>312</sup> The acquired firm may then threaten to increase its market share at the expense of the leading firm.<sup>313</sup> The acquisition may thus increase competition.<sup>314</sup>

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301. See notes 59-61 *supra* and accompanying text.

302. See notes 76 & 77 *supra* and accompanying text.

303. See notes 56-58 *supra* and accompanying text.

304. See Brodley, *supra* note 5, at 362. See also notes 53-55 *supra* and accompanying text.

305. See Note, *supra* note 12, at 347.

306. See Turner, *supra* note 12, at 1338.

307. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 584 (1967) (Harlan, J., concurring); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 557 (N.D. Ill. 1968). See generally G. BENSTON, *supra* note 22, at 51; Turner, *supra* note 12, at 1355; Note, *supra* note 12, at 348.

308. See generally Edwards, *supra* note 12, at 350.

309. See Note, *supra* note 12, at 347.

310. On the policy underlying the antimergers provisions of the antitrust laws, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). See also Turner, *supra* note 12, at 1326.

311. See *United States v. ITT (Grinnell)*, 324 F. Supp. 19, 24 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). See generally C. KAYSER & D. TURNER, *supra* note 35, at 128; Sloviter, *supra* note 41, at 888-89.

312. See Campbell & Shepherd, *supra* note 11, at 1371.

313. See generally Blair, *supra* note 5, at 693.

Even acquisition of the leading firm does not necessarily stifle competition or raise barriers to entry.<sup>315</sup> Courts have recognized the probability that a conglomerate's merger with the dominant firm may stimulate competition.<sup>316</sup> Smaller competitors may increase their efforts to maintain a competitive position in the industry, particularly if they have actively competed in the past.<sup>317</sup> If the smaller firms have sufficient financial power, then they may not fear the acquiring firm's influence.<sup>318</sup>

Predatory pricing in the conglomerate merger context is unlikely to occur for several reasons.<sup>319</sup> One formidable disincentive is that predatory pricing is illegal under both the Robinson-Patman Act<sup>320</sup> and section 2 of the Sherman Act.<sup>321</sup> Presumably, a conglomerate's management will not risk treble damage liability and criminal prosecution.<sup>322</sup> In addition, a firm exercising sound business judgment will not willingly sustain an immediate and possibly substantial loss when later recovery of those losses is dependent upon a larger market share that may never materialize.<sup>323</sup> Unless entrance barriers to the market are very high, other firms will enter the market, attracted by the conglomerate's profits, and stifle recoupment.<sup>324</sup> Thus, the conglomerate price cutter may never recover his losses. Moreover, to invalidate an allegedly entrenching conglomerate merger because it may foster predatory pricing is illogical because both *de novo*<sup>325</sup> entry and toehold acquisi-

314. See generally Turner, *supra* note 12, at 1357.

315. See generally G. BENSTON, *supra* note 22, at 51; Turner, *supra* note 12, at 1328.

316. See FTC v. Procter & Gamble Co., 386 U.S. 568, 584 (1967) (Harlan, J., concurring). *Accord*, United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 557 (N.D. Ill. 1968).

317. See Turner, *supra* note 12, at 1352-53.

318. See Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 865-66 & n.32 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 775 (D. Md. 1976); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 557 (N.D. Ill. 1968); *In re Sterling Drug, Inc.*, 80 FTC 477, 605-06 (1972). See generally Turner, *supra* note 12, at 1356-67.

319. See generally Elzinga, *Predatory Pricing: The Care of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970); Goldberg, *supra* note 12; McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Zerbe, *The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly*, 12 J.L. & ECON. 339 (1969). See also notes 56-58 *supra* and accompanying text.

320. 15 U.S.C. § 13 (1976). See generally Davidow, *supra* note 5, at 1256.

321. 15 U.S.C. § 2 (1976).

322. 15 U.S.C. §§ 13 & 15 (1976). See Davidow, *supra* note 5, at 1256.

323. See Davidow, *supra* note 5, at 1256; Turner, *supra* note 12, at 1341-42.

324. See Turner, *supra* note 12, at 1341-42.

325. See note 36 *supra*.

tion<sup>326</sup> provide the same pricing opportunities.<sup>327</sup>

A conglomerate's entry into an oligopolistic market may bear procompetitive benefits. The interdependence of firms in an oligopolistic market leads to inefficiency.<sup>328</sup> The conglomerate's entry will cause these firms to develop more economical procedures.<sup>329</sup> If the competitors in an oligopolistic market continue to compete vigorously after the conglomerate's entry, then they act as agents to preserve competition and promote deconcentration.<sup>330</sup> Mere increases in concentration caused by a conglomerate's entry are consequently insufficient to show anticompetitive impact.<sup>331</sup>

The alleged anticompetitive effects of the entrenching merger are more often attacks on corporate bigness than realistic assessments of market impact. Commentators fear that corporate bigness is the source of substantial competitive advantages.<sup>332</sup> The courts, however, have not adopted a per se rule against large corporate size.<sup>333</sup> An assault on size fails to consider the probability of the conglomerate's entry producing procompetitive effects.<sup>334</sup> A conglomerate merger may yield advances in technology and lower costs, forcing smaller firms to compete more

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326. *Id.*

327. *See* Note, *supra* note 86, at 634.

328. *See* Turner, *supra* note 12, at 1317.

329. *Id.*

330. *See generally* Note, *supra* note 12, at 338.

331. *See, e.g.,* United States v. ITT (Grinnell), 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971); United States v. Northwest Indus., 301 F. Supp. 1066 (N.D. Ill. 1969). *See generally* Note, *supra* note 12, at 338.

332. *See* Edwards, *supra* note 12, at 347-37 (1955).

333. *See* Missouri Portland Cement Co. v. Cargill, Inc. 498 F.2d 851, 865 n.32 (2d Cir.), *cert. denied*, 419 U.S. 883 (1979); Reynolds Metals Co. v. FTC, 309 F.2d 223, 230 (D.C. Cir. 1962); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 315, 319-20 (N.D. Ill. 1965). In some cases the court's analysis of alleged anticompetitive effects is so cursory that it verges on a per se bigness test. *See* United States Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970); General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); Ekco Prods., Co. v. FTC, 347 F.2d 745 (7th Cir. 1965). *See generally* Sichel, *The Procter & Gamble-Clorox Decision and the Economics of Conglomerate Mergers*, 12 ANTITRUST BULL. 1081 (1967).

334. *See* Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc., 414 F.2d 506, 538 (3d Cir. 1969) (Aldisert, J., dissenting), *cert. denied*, 396 U.S. 1009 (1970); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 557 (N.D. Ill. 1968); United States v. FMC Corp., 218 F. Supp. 817, 821 (N.D. Cal), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963).

In *Allis-Chalmers*, the dissent summed up the "bigness is bad" theory:

This hypothesis is nothing more than a restatement of a "Brandeisian bias in favor of human sized institutions," a nostalgic attempt to equate bigness with badness. But Congress has not written this theory into its anti-trust legislation; nor should any court attempt to legislate such a doctrine into it. So long as the legislative proscription of antitrust activities turns on factors beyond the mere "possibilities" of anti-competitive

aggressively.<sup>335</sup> If firms in the market have competed aggressively prior to the merger, then they will continue to do so afterwards.<sup>336</sup>

## V. CONCLUSION

Continued reliance on entrenchment analysis in conglomerate merger cases is highly questionable. The decisions supporting entrenchment analysis fail to provide a comprehensive review of all competitive factors in the target market. The courts that provide a comprehensive review fail to find entrenchment. A conglomerate's acquisition of a dominant firm in an oligopolistic market does not necessarily lead to increased concentration in the market. The conglomerate rarely bestows competitive advantages on the acquired firm that entrenches the market. Review of the fundamental presumptions of entrenchment analysis indicates that entrenchment theory bears little resemblance to actual market conditions. An entrenchment challenge by itself is consequently insufficient to invalidate a conglomerate merger.

*Cristofer Esty Lord*

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effects, the courts must be diligent not to substitute the Brandeisian bias for sound analysis.

The characterization of a company as a "large conglomerate" should not impose a presumption of anti-competitive guilt. Section 7 of the Clayton Act nowhere so provides. It is the company's activities—not its firm and size—which the Congress has sought to regulate.

Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc., 414 F.2d 506, 538 (3d Cir. 1969) (Aldisert, J., dissenting), *cert. denied*, 396 U.S. 1009 (1970) (footnote omitted). See generally Sichel, *supra* note 333, at 1083; Turner, *supra* note 12, at 1317 & 1328; Note, *supra* note 86, at 635.

Courts and commentators have suggested that it is Congress' job to legislate against corporate bigness. See *United States v. ITT (Grinnell)*, 324 F. Supp. 19, 54 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971); *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066, 1096 (N.D. Ill. 1969). See generally Sloviter, *supra* note 41, at 890-91.

335. See Turner, *supra* note 12, at 1352-53. *But cf. Asch, supra* note 54, at 131-32 (empirical evidence inconclusive as to whether inventiveness increases with size).

336. In *Stanley Works*, the dissent stated that "size does not carry any competitive advantages in this industry, where small companies thrive and have increased in number". *Stanley Works v. FTC*, 469 F.2d 498, 511 (2d Cir. 1972) (Mansfield, J., dissenting), *cert. denied*, 412 U.S. 928 (1973).