

HOW TO WIN A MERGER CASE IN THE SUPREME COURT

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For over twenty years, antitrust lawyers who defend corporate mergers have been searching for a practical answer to the question "How can a merger case be won in the Supreme Court under section 7 of the Clayton Act?"¹ Happily, the first successful object lessons in this field have finally been provided in two recent United States Supreme Court decisions, *United States v. General Dynamics Corp.*,² which sustained General Dynamics' acquisition of the United Electric Coal Company, and *United States v. Marine Bancorporation, Inc.*,³

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In the interest of "full disclosure," the reader is warned that the author does not claim to be free of bias in this field since he has represented antitrust plaintiffs, *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 351 F. Supp. 1153 (D. Hawaii 1972) (representing IT&T), and defendants, *United States v. International Tel. & Tel. Corp.*, 1971 Trade Cas. 90,530 (N.D. Ill. 1971) (representing IT&T and Canteen Corp.); *United States v. International Tel. & Tel. Corp.*, 324 F. Supp. 19 (D. Conn. 1970) (representing IT&T and Grinnell Corp.); *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969) (representing IT&T and Hartford Fire Ins. Co.); *United States v. Anheuser-Busch, Inc.*, 1960 Trade Cas. 76,412 (S.D. Fla. 1960); *FTC v. United States Steel Corp.*, 5 CCH TRADE REG. REP. at 24,457 (1973) (FTC Docket No. 8655) (Certified Industries case).

1. Clayton Act § 7, 15 U.S.C. § 18 (1970), provides 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 another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

2. 415 U.S. 486 (1974).
3. 418 U.S. 602 (1974).

Several excellent analyses of these cases have already appeared. See Bock, *Rediscovering Economic Realism in Defining Competition*, CONFERENCE BD. REC., June 1974, at 6; *New Directions for Mergers* (pts. 1 & 2), BNA ANTITRUST & TRADE REG. REP. No. 676, at B-1 (Aug. 13, 1974), & No. 677, at B-1 (Aug. 20, 1974); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 251 (1974). Ms. Bock points out that the majority in *General Dynamics* downgraded the importance of the determination of the "relevant market," indicated that the question could be side-stepped entirely, and affirmed the use of postmerger market evidence. Bock, *supra* at 9; see text accompanying notes 20-24 *infra*. The BNA analysis concludes:

which sustained Marine Bancorporation's acquisition of the Washington Trust Bank of Spokane.

I. PREVIOUS CONSTRUCTION OF SECTION 7 OF THE CLAYTON ACT

Until the *General Dynamics* decision was handed down on March 19, 1974, antitrust lawyers seeking guidance on the Supreme Court's attitude towards mergers had been forced to scrutinize a long line of opinions that struck down virtually every merger that came before the Court.⁴ The fundamental test applied under section 7 to corporate acquisitions was announced by the Court in *United States v. Philadelphia National Bank*:

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

. . . .

. . . Without attempting to specify the smallest market share which would . . . be considered to threaten undue concentration, we are clear that 30% presents that threat.⁵

The *General Dynamics* and *Marine Bancorporation* decisions should be considered in light of the application of this test in the recent case

Without belaboring the obvious point that the Supreme Court's composition has changed, it is clear that the Court's analytical approach to the review of § 7 cases has become more flexible. A statistical approach in and of itself, unless overwhelming, may well fail if "other pertinent factors" can be raised which point to no lessening of competition.

. . . [I]t would be well to emphasize that the Court's view of statistical proof, post-acquisition evidence and relevant markets (as well as the "failing company" analogy) are significant departures from past cases.

New Directions for Mergers (pt. 1), *supra* at B-8 (footnotes omitted).

4. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). See also AMERICAN BAR ASS'N, ANTITRUST DEVELOPMENTS 1955-1968, at 66 (1968): "The Government has invariably opposed the defendant's [product market definition] contentions and almost invariably has prevailed."

5. 374 U.S. 321, 363-64 (1963) (footnotes omitted).

of *United States v. Falstaff Brewing Corp.*⁶ Falstaff, a major national beer producer that did not sell beer in the New England States, wanted to acquire the Narragansett Brewing Co., the largest seller of beer in New England. The district court found that Falstaff was not a significant "potential competitor" in the New England market because it would never have entered the market *de novo*.⁷ In an opinion by Justice White, in which Chief Justice Burger and Justices Douglas and Blackmun concurred,⁸ the case was remanded to the district court with instructions to consider "whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market."⁹ In plain language, the Court considered it important whether the existing beer producers in New England perceived Falstaff as a potential new entrant and thus might moderate their pricing and production decisions in order to discourage Falstaff from entering the market. Significantly, Mr. Justice White's opinion stated:

Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner.¹⁰

Perhaps members of the antitrust defense bar may be excused for having developed a cynical attitude about the Court's objectivity in ap-

6. 410 U.S. 526 (1973), *rev'g* 332 F. Supp. 970 (D.R.I. 1971).

7. 332 F. Supp. at 972.

8. Justices Brennan and Powell took no part in the decision of the case. 410 U.S. at 538.

9. *Id.* at 532-33. On remand, the Government introduced no additional evidence. The district court again dismissed the case after reconsidering the record and finding that New England beer competitors did not in fact view Falstaff as a potential competitor, that no rational beer seller in New England would have regarded Falstaff as a potential entrant, and that Falstaff was not a "potential competitor so positioned on the edge of said market that it exerted a beneficial influence on competitive conditions therein." *United States v. Falstaff Brewing Corp.*, 5 CCH TRADE REG. REP. (1974-2 Trade Cas. 98,006) ¶ 75,315, at 98,012 (D.R.I. Oct. 23, 1974).

10. 410 U.S. at 537.

plying these standards, a subject of obviously great importance in the development of efficient and economical industrial organization and allocation of capital. It seemed to antitrust defense lawyers and their businessmen-clients that there was little logical, legal, or economic consistency or realism in the Court's definitions of relevant geographic markets and product lines. It seemed that whenever the Government appealed an adverse trial court decision, the Court would ignore Federal Rule of Civil Procedure 52(a), which provides that the trial court's findings of fact should not be overturned on appeal unless they are "clearly erroneous." As Mr. Justice Stewart noted, dissenting in *United States v. Von's Grocery Co.*:

In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under § 7 The sole consistency that I can find is that in litigation under § 7, the Government always wins.¹¹

With this background, it is easy to understand why both the antitrust defense bar and the business community welcomed the Supreme Court's decisions in *General Dynamics* and *Marine Bancorporation*. They hoped that these decisions marked the end of the "knee-jerk" era in which the Court could be counted on to kick the defendant every time the Government swung the mallet.¹²

II. GENERAL DYNAMICS, MARINE BANCORPORATION, AND OTHER RECENT CASES CONSTRUING SECTION 7 OF THE CLAYTON ACT

A. *The Facts*

In the quaint jargon of antitrust law, *General Dynamics* involved a "horizontal merger," a combination of two significant coal mining companies that operated in the same geographic market areas in direct and active competition. A significant factor in the case was that the competitive viability of a natural resource enterprise such as a coal mining company is largely dependent on its existing or available control of ade-

11. 384 U.S. 270, 301 (1966).

12. In light of the twenty-year history of government victories, see note 4 *supra*, it is ironic to find Justice Douglas complaining in his *General Dynamics* dissent that "[o]n the basis of a record so devoid of findings based on correct legal standards, the judgment may not be affirmed except on a deep-seated judicial bias against § 7 of the Clayton Act." 415 U.S. at 527.

quate mineable reserves.¹³ The acquired company, United Electric Coal, had already sold or committed virtually all of its existing reserves under long term contracts and could not find additional reserves.¹⁴ This was the crucial fact in the case; from it the district court deduced two conclusions: "United Electric has neither the possibility of acquiring more nor the ability to develop . . . reserves."¹⁵

Marine Bancorporation involved a "market extension" or "potential competition" merger, a combination of two banking organizations that did not compete with each other because their operations were carried on in different sections of Washington—Seattle and Spokane.¹⁶ The critical fact in the case was that the acquiring Seattle bank could not realistically be called a potential competitor¹⁷ in the Spokane market area because state banking law prevented both de novo establishment of a branch or new bank in Spokane¹⁸ and acquisition of the only other

13. The principal contention of Justice Douglas' dissent, 415 U.S. at 511-27, was that the trial court's market findings were based on the situation at the time of the trial (1968), rather than at the time of the acquisition in question (1959), and thus erroneously reflected General Dynamics' postacquisition conduct. "While findings made as of the time of the merger could concededly be tempered to a limited degree by postacquisition events, no such findings were ever made." *Id.* at 524. This point was not raised in the trial court or in the Government's jurisdictional statement to the Supreme Court, but was raised for the first time in the Government's Supreme Court brief. Brief for Appellees at 74-75. The majority noted that at trial the Government had described evidence concerning the situation at the time of acquisition in 1959 as "irrelevant." 415 U.S. at 504 n.12.

14. *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 560 (N.D. Ill. 1972); 415 U.S. at 493.

15. 341 F. Supp. at 560.

16. 418 U.S. at 606-09.

In a companion "potential competition" bank merger case decided the same day, all Justices concurred in vacating and remanding for further consideration a trial court decision sustaining a proposed merger of two noncompeting Connecticut commercial banks. The Court held that the trial court had erred in including savings banks with commercial banks as part of the appropriate "line of commerce" and had further erred in ruling that the relevant geographic market for testing the legality of the merger was the entire state of Connecticut, rather than the more localized geographic areas in which the banks were actually engaged in business. *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974). On December 2, 1974, this case was dismissed without prejudice on the ground that the proposed consolidation of the two banks had been abandoned. 5 CCH TRADE REG. REP. ¶ 45,071, at 53,435 (D. Conn. Dec. 2, 1974).

17. The Government presented several theories of potential competition in *Marine Bancorporation*. 418 U.S. at 615-18. The Court held that the potential competition question raised in *Marine Bancorporation* was distinguishable from that raised in *Falstaff*, see notes 6-10 *supra* and accompanying text, and therefore declined to decide the question it had reserved in the latter case. 418 U.S. at 639.

18. See WASH. REV. CODE ANN. § 30.40.020 (Supp. 1973), construed in 418 U.S. at 610-12.

"independent small bank with offices located within the city boundaries of Spokane"¹⁹

B. *The Law*

In both *General Dynamics* and *Marine Bancorporation*, the Supreme Court²⁰ upheld the trial court's finding that no substantial lessening of competition occurred or was threatened within the terms of section 7 of the Clayton Act as a result of the combinations in question. Taking the opinions at face value,²¹ there are definite indications that a majority of the present members of the Court will no longer apply a *per se* or bare statistical market-share test to determine possible effects on competition of a proposed merger, but instead will focus on the economic and competitive realities of the marketplace. That is certainly the message that appears on the face of the majority opinion in *General Dynamics*:

While the statistical showing proffered by the Government in this case, the accuracy of which was not discredited by the District Court or contested by the appellees, would under this approach have sufficed to support a finding of "undue concentration" in the absence of other considerations, the question before us is whether the District Court was justified in finding that other pertinent factors affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition of United Electric. We are satisfied that the court's ultimate finding was not in error.²²

The majority opinion in *Marine Bancorporation*, however, repeatedly emphasizes that "this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments"²³ and points out that "[o]ur affirmance of the District Court's judgment in

19. 418 U.S. at 613; see WASH. REV. CODE ANN. §§ 30.04.230, .08.020(7), .40.020 (Supp. 1973), construed in 418 U.S. at 610-12.

20. Pursuant to the then-effective Expediting Act § 2, 15 U.S.C. § 29 (1970), anti-trust cases in which the United States was the complainant were appealed from the district court directly to the Supreme Court. The Expediting Act was amended on December 21, 1974, to provide for appeals to the courts of appeals unless the trial judge certifies the case directly to the Supreme Court and the Supreme Court exercises its discretion to hear the case. Pub. L. No. 93-528, § 5, 88 Stat. 1709 (1974).

21. For a discussion of the advisability of this approach, see text accompanying notes 23-24, 37-40, 48-54 *infra*.

22. 415 U.S. at 497-98.

23. 418 U.S. at 639; *id.* at 609, 627-30; see text accompanying notes 37-39 *infra*.

this case rests primarily on state statutory barriers to *de novo* entry and to expansion following entry into a new geographic market.”²⁴ Thus, *Marine Bancorporation* is hardly an invitation to businessmen to begin a mass merger movement.

The Government was reduced to contending that the Seattle bank might circumvent the state’s regulatory barriers to new entry by (1) creation and later acquisition of a new bank whose stock had been placed in the hands of friendly persons (“sponsorship”), or (2) foothold acquisition of one of the two remaining small banks in the Spokane area (one was located in a suburb and, if acquired, could not have branched into Spokane; the other was a new bank barred by state law from being sold until 1975).²⁵ The majority opinion noted that the Government pressed the latter theory with less vigor than it did the former, “which may reflect the fact that under the [foothold acquisition] approach the total number of banking organizations in Spokane would remain the same.”²⁶ The Court held, however, that, even assuming entry into the Spokane market was possible in either of these ways, the Government nevertheless failed to prove that these methods of entry “would be reasonably likely to produce any significant procompetitive benefits in the Spokane commercial banking market”²⁷ or “the long-term market-structure benefits predicted by the Government.”²⁸

Despite the obvious weakness of the Government’s factual market contentions in *Marine Bancorporation*, Justices White, Brennan, and Marshall would have granted judgment to the Government:

[I]t is sufficiently plain from the record that absent merger with [the Spokane bank], [the Seattle bank] could and would either have made a toehold entry or been instrumental in establishing a sponsored bank in Spokane. But [the Seattle bank] chose to merge with a larger bank and to deprive the market of the competition it would have offered had it entered in either of two other ways. In my opinion, this made out a sufficient prima facie case under § 7, which, absent effective rebuttal, entitled the United States to judgment.²⁹

Summarizing the prior case law, the majority opinion in *Marine Bancorporation* indicates that the potential competition doctrine may be ap-

24. 418 U.S. at 641.

25. *Id.* at 633-39.

26. *Id.* at 637 n.44.

27. *Id.* at 636.

28. *Id.* at 638.

29. *Id.* at 646 (dissenting opinion).

plicable to geographic market extension acquisitions.³⁰ To bring its case within the doctrine, the Government argued that the merger would eliminate "the prospect for long-term deconcentration of an oligopolistic market"³¹ that would be achieved if the Seattle bank entered *de novo* or through a toehold acquisition. This, of course, was the issue left open in *Falstaff*.³²

Marine Bancorporation makes it clear that the Government can carry its burden of establishing a *prima facie* case that a localized market is sufficiently "concentrated" to call for application of the potential competition doctrine simply by introducing evidence of high "concentration ratios" (e.g., evidence that the three largest Spokane banks control 92% of the city's total bank deposits). Upon the introduction of such evidence, the burden shifts to the defendants, who must produce rebuttal evidence:

On this aspect of the case, the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior [citing *General Dynamics*], did not accurately depict the economic characteristics of the Spokane market. In our view, appellees did not carry this burden *Appellees introduced no significant evidence of the absence of parallel behavior in the pricing or provision of commercial bank services in Spokane.*³³

If the defendant fails to discredit the Government's concentration statistics, the Government then has the further burden of proving the basic

30. *Id.* at 627. Proof of three factual circumstances would establish a potential competition case:

if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market.

Id. at 624-25. The Court also observed:

[T]he doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services.

Id. at 630. It is important to note, however, that the Government did not place its "principal reliance" on this variant of the doctrine. *Id.* at 625; see text accompanying note 31 *infra*. For a discussion of the relevant theories see Swennes, *Three Theories of Potential Competition Under Section 7 of the Clayton Act: Reaching the Conglomerate Merger*, 49 TUL. L. REV. 139 (1974).

31. 418 U.S. at 625.

32. See text accompanying note 10 *supra*. The question left undecided in *Falstaff* is to be distinguished from the issues resolved in prior potential competition cases. See note 30 *supra* and accompanying text.

33. 418 U.S. at 631-32 (emphasis added; footnote omitted).

preconditions of the potential competition doctrine:

- (1) "that feasible alternative methods of entry in fact existed"; and
- (2) "that the alternative means offer a *reasonable prospect of long-term structural improvement or other benefits in the target market.*"³⁴

The type of evidence the Court expects on the potential competition issue is illustrated by its comment:

The Government introduced no evidence, for example, establishing that the three small banks presently in Spokane have had any meaningful effect on the economic behavior of the large Spokane banks.³⁵

Later, in the same vein, the Court added:

If regulatory restraints [on alternative methods of entry] are not determinative, courts should consider the factors that are pertinent to any potential-competition case, including the economic feasibility and likelihood of *de novo* entry, the capabilities and expansion history of the acquiring firm, and the performance as well as the structural characteristics of the target market.³⁶

34. *Id.* at 638-39 (emphasis added). Note that earlier in the opinion the latter portion of the Government's burden of proving "preconditions" is stated in somewhat different and more expansive language: "It must be determined . . . that those means offer a *substantial likelihood* of ultimately producing *deconcentration of that market or other significant procompetitive effects.*" *Id.* at 633 (emphasis added).

35. *Id.* at 637. The Government's failure of proof on this issue was crucial because "[t]his assumed method of entry . . . would offer little realistic hope of ultimately producing deconcentration of the Spokane market." *Id.* at 636.

36. *Id.* at 642.

In the companion case, *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974), see note 16 *supra*, Justice Powell's majority opinion set forth a number of general rules and guidelines for the district courts to follow in market extension "potential competition" bank merger cases. First, the court must determine by a

localized approach . . . the geographic market in which [each bank] operates and to which the bulk of its customers may turn for alternative commercial bank services. . . . The task is important, because the definition of the respective geographic markets determines the number of alternate avenues of entry theoretically open to [the Bridgeport bank] in piercing [the New Haven bank's] area of significant competitive influence and vice versa.

. . . .

. . . [T]he burden of producing evidence on this subject is on the Government. . . . [It is] the Government's role to come forward with evidence delineating the rough approximation of localized banking markets. . . .

418 U.S. at 668-70.

Secondly, in defining geographic markets of the two banks in question, the Government cannot rely, without more, on the Office of Management and Budget's Standard Metropolitan Statistical Areas (SMSA) since "they are not sufficiently refined in terms of realistic commercial banking markets to satisfy the Government's burden." *Id.* at 670. Nor, "as the banks would have it, [may the district court] rely solely on towns as

C. Analysis

Marine Bancorporation may well turn out to be of more practical significance to practicing antitrust lawyers and their clients than *General Dynamics*. The reason is that the facts of most horizontal mergers of direct competitors will bear little resemblance to United Electric Coal's practical inability to contribute meaningfully to further competition because it could not acquire or develop mining reserves. Furthermore, the simple geographic market extension type of acquisition involved in *Marine Bancorporation* occurs in many industries and has always been of great practical importance to the efficient and normal growth of enterprises of all sizes.

On the other hand, the Court expressly limited its holding in *Marine Bancorporation* to "an industry in which new entry is extensively regulated by the State and Federal Governments"³⁷ and distinguished the relatively free market situation presented by the beer industry in the *Falstaff* case:³⁸

Unlike, for example, the beer industry, . . . entry of new competitors into the commercial banking field is "wholly a matter of governmental grace . . ." and "far from easy." . . . Beer manufacturers are free to base their decisions regarding entry and the scale of entry into a new geographic market on nonregulatory considerations, including their own financial capabilities, their long-range goals as to markets, the cost of creating new production and distribution facilities, and above all the profit prospects in the target market. . . . No comparable freedom exists for commercial banks.³⁹

In addition to this obvious limitation on the applicability of *Marine Bancorporation* to mergers in other industries, bank mergers involve unusual statutory and evidentiary factors that tend to limit their useful-

the relevant geographic markets" since

not all towns are closed to *de novo* branching by one or the other bank, and it seems fair to assume that the area of significant competitive influence of some bank offices may extend beyond town boundaries.

Id. at 671.

Finally, after delineating the localized banking markets surrounding the sites where the two banks maintain their offices, the district court must then apply the potential competition standard, evaluating "the economically and legally feasible alternative methods of entry, if any, into those areas available to one bank or the other." *Id.*

37. 418 U.S. at 639.

38. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); see notes 6-10 *supra* and accompanying text.

39. 418 U.S. at 628-29.

ness as precedents in other merger situations. First, the Bank Merger Act of 1966 provides that mergers of banks may be justified by evidence of "the convenience and needs of the community to be served"⁴⁰ even if the merger would otherwise violate section 7 of the Clayton Act. It would seem, however, that a judge's views on the "reasonable prospect of long-term structural improvement"⁴¹ or "significant procompetitive effects"⁴² as preconditions to the application of the potential competition doctrine would be influenced by evidence introduced under the "convenience and needs" defense. This evidence is often extensive, involving "increased loan limits, different types of loans, international banking services, computer services, enhanced trust services, and other benefits."⁴³ Evidence of the procompetitive effects of a merger would probably be inadmissible in a merger case involving another business, and it is difficult to assess what practical effect the evidence would have on the thought processes of a judge considering a potential competition case.

Secondly, the economic and statistical factors that are pertinent to antitrust analysis are more readily available in bank merger cases than in cases involving almost any other business, and the long line of bank merger cases has identified and refined the crucial factors to an extent unmatched in almost any other line of commerce.⁴⁴ This greatly simplifies the task of counsel in initially analyzing and ultimately preparing for trial in bank merger cases.⁴⁵

Thirdly, the banking industry is blessed with numerous expert government regulators who analyze each merger (and then commonly dis-

40. 12 U.S.C. § 1828(c)(5)(B) (1970). In *Marine Bancorporation* the Supreme Court expressly noted that it did not find it necessary to reach the issue of that specialized defense. 418 U.S. at 618 n.15. The district court, however, had "issued extensive findings of fact concerning the 'convenience and needs' defense" and had concluded that "even if the merger violated . . . the Clayton Act, it was nevertheless lawful under the Bank Merger Act of 1966." *Id.*

41. 418 U.S. at 639; see text accompanying note 34 *supra*.

42. 418 U.S. at 632-39; see text accompanying note 27 *supra*.

43. 418 U.S. at 618 n.15.

44. See cases cited *id.* at 627-28 n.30.

45. The complexity of merger cases is vividly illustrated by the majority and minority opinions in both *Marine Bancorporation* and its companion, *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974), see note 16 *supra*. Despite this important factual head start, there is still, even in the banking industry, plenty of room for disagreement and litigation on the basic economic and factual questions of determining the relevant product market and the relevant geographic market to test the probable competitive effects of the merger.

agree on its probable effects). For example, in *Marine Bancorporation* the Comptroller of the Currency approved the merger while the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System submitted negative reports on the competitive effects of the merger, primarily because of "their conclusions . . . on the degree of concentration in commercial banking in Washington as a whole."⁴⁶ Such disagreements among the government experts, and their frequent disagreements with the "far-out" theories sometimes advanced by the Justice Department's Antitrust Division, obviously make it easier for defense counsel in bank merger cases to persuade judges that the Government's arguments need not be accepted as Holy Writ.

Finally, since the banking industry has been extensively studied by economists for years, it is comparatively easy to find knowledgeable economists to help counsel prepare for trial and to testify as expert witnesses in bank merger cases.⁴⁷

It could be argued that *General Dynamics* was not a landmark Clayton Act case, but rather was a procedural or evidentiary anomaly. First, the vote was close, five to four. Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Rehnquist constituted the majority, and Justices Douglas, Brennan, White, and Marshall joined in a bitter dissent. The case may thus reflect only transitory changes in the personnel of the Court or a mere change in the number of Justices with a "deep-seated judicial bias" toward section 7, rather than a lasting change in legal standards or the quantum of evidence required to prove a violation of section 7. Despite Justice White's reference in his *Marine Bancorporation* dissent to a "new antitrust majority" on the Court,⁴⁸ it is obvious that a single change in personnel could destroy the "new antitrust majority," whether its theories are based on personalities, "judicial biases," or substantive judicial standards.

46. 418 U.S. at 613.

47. See text accompanying notes 65-68 *infra*.

An excellent example of a battle of expert economics witnesses was presented in the early case of *United States v. Crocker-Anglo Nat'l Bank*, 277 F. Supp. 133 (N.D. Cal. 1967), which was so decisively lost by the Government that no appeal was taken.

48. 418 U.S. at 642 (White, J., dissenting):

For the second time this Term, the Court's new antitrust majority has chipped away at the policies of § 7 of the Clayton Act. In *United States v. General Dynamics Corp.* . . . the majority sustained the failing-company defense in a new guise. Here, it redefines the elements of potential competition and dramatically escalates the burden of proving that a merger "may be substantial to lessen competition" within the meaning of § 7.

Secondly, only two weeks after upholding General Dynamics' acquisition of United Electric Coal, the Supreme Court denied certiorari in an important section 7 case, *Kennecott Copper Corp. v. FTC*,⁴⁹ in which the Federal Trade Commission had ruled against Kennecott's acquisition of the Peabody Coal Company. While the case can be distinguished on its facts from *General Dynamics*,⁵⁰ if the new antitrust majority had really wanted to alter substantially the construction of section 7, they surely would have voted to grant certiorari in an important case involving the same industry and many of the same issues that were present in *General Dynamics*. It is always dangerous to read much significance into a denial of certiorari, but it does seem significant that not even four Justices believed that some of the Court's time should be spent in reviewing an FTC decision that struck down a major coal industry acquisition on the rather ephemeral theory of potential competition.⁵¹ This seems particularly significant in light of the Court's discussion of the potential competition doctrine in the bank merger field in *Marine Bancorporation*.⁵²

Thirdly, *General Dynamics* may signify a change only in the deference that the Court is prepared to give to factfindings by trial courts under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). This would explain the Court's denial of certiorari in *Kennecott Copper* since the findings of fact by the FTC were all ad-

49. 416 U.S. 909, *rehearing denied*, 416 U.S. 963 (1974).

50. General Dynamics and United Electric Coal Co. were existing, direct "horizontal" competitors in the mining and sale of coal in the Middle West, although United had little future economic potential because of its inability to locate additional reserves for its method of strip mining. *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 559 (N.D. Ill. 1972). On the other hand, Peabody Coal Co. was the country's second largest coal mining company, and the FTC found that the Kennecott Copper Co. was an economically significant "potential competitor" because it already owned certain underground coal reserves and had considered mining them. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 76-77 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

51. Only Justice Stewart noted that he thought the Court should have granted certiorari. *Kennecott Copper Corp. v. FTC*, 416 U.S. 909 (1974).

52. Text accompanying notes 30-36 *supra*; see *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974), *dismissed*, 5 OCH TRADE REG. REP. ¶ 45,071 (D. Conn. Dec. 2, 1974).

In July 1974, the Supreme Court affirmed a district court decision which held that the acquisition by Phillips Petroleum Co. of the western assets of Tidewater Oil Co. violated § 7 of the Clayton Act because "[t]he anticompetitive effects of the elimination of Phillips as a possible future entrant and of the procompetitive edge effect it exerted were both substantial." *Phillips Petroleum Co. v. United States*, 94 S. Ct. 3199 (1974), *aff'g mem.* 367 F. Supp. 1226 (C.D. Cal. 1973).

verse to the merger in that case. Those findings had also survived previous judicial review by the Court of Appeals for the Tenth Circuit⁵³ under the "substantial evidence" standard set by *Universal Camera Corp. v. NLRB*⁵⁴ for review of administrative agency findings. The new antitrust majority may simply feel that it would be procedurally inappropriate and administratively burdensome for the Court to attempt to review and overturn an administrative agency's essentially factual determinations of probable economic effect. If that assumption is correct, it would be logical for the Court to vote not to hear such a case unless the decision of the reviewing court of appeals revealed either substantial errors of law in its application of appropriate antitrust legal standards or an affirmance of agency findings of fact clearly unsupported by substantial evidence.

Despite these considerations, it is likely that *General Dynamics* and *Marine Bancorporation* do, as the opinions themselves import, mark the beginning of a new era in the construction of section 7 of the Clayton Act. This conclusion is supported by the Court's disposition of *Missouri Portland Cement Co. v. Cargill, Inc.*⁵⁵ On December 19, 1973, the commodity firm of Cargill, Inc., began an attempt to acquire the Missouri Portland Cement Company through a cash tender offer that was vigorously opposed by the target company.⁵⁶ Missouri Portland immediately initiated the usual private litigation alleging violations of the federal securities laws and section 7 of the Clayton Act.⁵⁷ On antitrust grounds, the district court granted a preliminary injunction against continuing the tender offer,⁵⁸ but on June 10, 1974, the Court of Appeals for the Second Circuit reversed the grant of the injunction.⁵⁹

53. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

54. 340 U.S. 474 (1951).

55. 95 S. Ct. 150, *denying cert. to* 498 F.2d 851 (2d Cir. 1974).

56. *Missouri Portland Cement Co. v. Cargill, Inc.*, 375 F. Supp. 249, 263-66 (S.D. N.Y.), *aff'd in part and rev'd in part*, 498 F.2d 851 (2d Cir.), *stay vacated*, 94 S. Ct. 3210, *cert. denied*, 95 S. Ct. 150 (1974).

57. *Id.* at 252, 265.

58. *Id.* at 270.

59. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *stay vacated*, 94 S. Ct. 3210, *cert. denied*, 95 S. Ct. 150 (1974). Judge Friendly's opinion was trenchant:

This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act

In view of the weakness of the "entrenchment" claim, the lack of proof that

On July 12, 1974, Justice Douglas, as Circuit Justice, granted Missouri Portland's motion to stay the mandate of the court of appeals, thus reinstating the district court's injunction against the tender offer.⁶⁰ On July 25, the full Supreme Court (Justice Blackmun not participating), in a memorandum decision, granted Cargill's motion to vacate the stay granted by Justice Douglas.⁶¹ Although the Court's action may be less than a complete endorsement of the decision of the court of appeals, the striking down of Missouri Portland's apparently frivolous antitrust challenge to the tender offer may be considered further evidence that a new era has begun, in which mergers will be judged on the basis of the economic and competitive realities of the marketplace instead of theories constructed to meet the exigencies of a particular merger case.⁶²

Cargill exerted any "edge effect" on present competitive conditions, and the slim likelihood that Cargill would enter the markets here in question *de novo* or by toe-hold acquisition, we conclude that [Missouri Portland] was a long way from demonstrating the probability of success ordinarily required to warrant preliminary injunctive relief.

Id. at 854, 866 (footnote omitted).

60. See 94 S. Ct. 3210 (1974) (Douglas, J., dissenting from vacation of stay).

61. *Id.* Justice Douglas filed a caustic dissent:

What the Court does today is a shocking example of the disregard of law to please the management of huge conglomerates. . . . By careless neglect we actually decide that, what appears to be a monstrous violation of the law, may go on unremedied.

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous." The Court of Appeals considered the issue on the merits to be frivolous

. . . .
The issues . . . raise a substantial question that involves a conflict between the decisions below and another Circuit Court of Appeals [citing *Kenecott*].
. . . .

. . . .
If we fail to live under a rule of law and instead leave the field open to the uncontrolled machinations of conglomerates, Cargill will follow the infamous pattern of IT&T, uncontrolled and uncontrollable. . . . The circuits are in conflict; and the Court goes pellmell for an escape of this conglomerate from a real test under existing antitrust law.

Id. at 3210-12.

62. At least one thing is clear. Justice Douglas' dissent is a revealing glimpse into his views on the antitrust subject matter and further evidence (if any were needed) to be weighed in determining the existence of "deep-seated judicial bias" in the § 7 field. See note 12 *supra*.

A majority of the five Federal Trade Commissioners were undaunted by the actions of the Second Circuit and the Supreme Court, and, on October 31, 1974, the FTC announced its intention to issue a complaint against Cargill's acquisition of Missouri Portland Cement. FTC Chairman Engman and Commissioner Thompson voted against issuing the proposed complaint. Cargill, Inc., 3 CCH TRADE REG. REP. ¶ 20,745 (FTC Oct. 31, 1974).

III. LITIGATION TACTICS SUGGESTED BY GENERAL DYNAMICS AND MARINE BANCORPORATION

The previous sections of this Article contain the elements of an answer to the title question. Simply put, a merger case must be won in the trial court on the basic economic and market facts. Defense counsel cannot learn how to find, assemble, organize, and present the necessary evidence by reading Supreme Court opinions in this field. It is necessary instead to study the trial court opinions and findings of fact.⁶³ In some cases, the parties' trial briefs and proposed findings of fact can be helpful. Despite the above discussion of the possibly limited precedential value of *General Dynamics*, the trial court decision in that case⁶⁴ provides a first-rate object lesson in putting together a winning evidentiary case.

Defense counsel in merger cases always start with a large evidentiary advantage over government counsel simply because company personnel are experts in their field of business. The government case, on the other hand, is almost always in the hands of professional trial attorneys who have no experience in the particular business and probably little practical knowledge about it. At most, a few members of the government trial team may have been involved in an earlier case involving the same line of commerce. Essentially the same situation exists at the Federal Trade Commission.

How are victorious evidentiary presentations put together? Defense counsel will find that one of the first and most important tasks will be to persuade the defendant to devote the necessary time and effort to preparing the case, preferably by assigning one or more knowledgeable executives to work with the lawyers as a regular job assignment on developing the facts and witnesses for the case. Antitrust trial preparation is usually a monumental task. In *General Dynamics*, the trial record ultimately amounted to "more than 7,500 pages of trial transcript and deposition testimony, and more than 800 trial and deposition exhibits, containing in excess of 10,000 pages."⁶⁵

The next important step is to find a good economist to assist in trial

63. The latest example of a successful factual defense of a merger in the trial court is *United States v. Amsted Indus., Inc.*, 5 CCH TRADE REG. REP. (1974-2 Trade Cas. 97,421) ¶ 75,208 (N.D. Ill. July 19, 1974), which involved the water pressure pipe market.

64. *United States v. General Dynamics Corp.*, 341 F. Supp. 534 (N.D. Ill. 1972).

65. *Id.* at 535 n.2.

preparation and possibly to testify as an expert witness. Unfortunately, this is usually easier said than done. Economists seem to be divided into two mutually exclusive categories. The so-called macroeconomists, whose names are publicized more often by the media, study and predict general trends in the whole economy or large portions of it. None of them could serve as an expert witness in an antitrust case without undertaking an intensive study of a particular business. For most, such study is a task too time-consuming to be undertaken on short notice. The economist needed for an antitrust merger case is the "industrial organization" economist. It will be largely a matter of luck if defense counsel are able to find such a person who is already deeply involved in the study of the business in question and who has the time and inclination to direct his efforts to preparation for trial of a merger case. It will be even more remarkable if this person has the personality, talents at advocacy, and ability to withstand cross-examination that will make him useful as an expert witness at the trial.

It is not essential, however, to present expert economic testimony in order to win a merger case. Trial judges are experts at spotting fake experts, and cross-examining lawyers are good at assisting the bench in this endeavor. Consequently, it may not be prudent for an economist to attempt to become an "instant expert" on a business in order to testify at trial, although he still may be of great assistance in preparation for trial. Government trial lawyers have the same difficulty in finding expert witnesses in economics, and the Justice Department's own economists are seldom qualified experts in the particular business involved. Consequently, the Government often proceeds to trial in merger cases without any such testimony.⁶⁶

In regard to other witnesses, trial judges are greatly impressed by the bona fide expertise of the businessmen-defendants who have spent their lives working in the business. The same could be said for customers, suppliers, competitors, and trade association personnel. Their testimony is usually the heart of the defendant's case on the probable economic effects of a merger. In contrast, the Government's case is usually either statistical and theoretical, supported by admissions against interest gleaned from an exhaustive investigation of the defend-

66. This happened in *General Dynamics*. The defendants presented several bona fide industry experts and economists, while the Government produced only a "rebuttal economist" from the staff of the Federal Trade Commission. See *id.* at 545.

ant's files,⁶⁷ or based on the complaining testimony of the defendant's competitors who fear that the merger will result in increased competition for them rather than oligopoly in the marketplace.⁶⁸

In sum, antitrust merger cases must be won on the facts in the trial court. The law in this respect has not been changed by *General Dynamics* and *Marine Bancorporation*. What has changed is that the new majority of the Supreme Court now seems willing to adhere to the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) in considering appeals in antitrust merger cases.⁶⁹ This standard of appellate review will ordinarily work to the advantage of antitrust defendants who are able to litigate merger cases before the typically unbiased federal district judge, since experience shows that antitrust merger defendants commonly win on the merits at the trial court level.⁷⁰

On the other hand, this attitude toward factfindings will almost certainly work to the disadvantage of unfortunate antitrust defendants who must try their merger cases before administrative boards such as the Federal Trade Commission, which appears to be inherently biased because of its members' philosophy and sense of mission as an agency dedicated to the enforcement of section 7 of the Clayton Act.⁷¹ The

67. For example, in *Marine Bancorporation*,

[t]he Government's only hard evidence of any "wings effect" was a memorandum written in 1962 by an officer of [the Seattle bank] expressing the view that Spokane banks were likely to engage in price competition as [the Seattle bank] approached their market. Evidence of an expression of opinion by an officer of the acquiring bank, not an official of a bank operating in the target market, in a memorandum written a decade prior to the challenged merger does not establish a violation of § 7.

418 U.S. at 640.

68. See, e.g., *United States v. International Tel. & Tel. Corp.*, 1971 Trade Cas. 90,530 *passim* (N.D. Ill. 1971).

69. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974) (in direct appeal, Court must apply "clearly erroneous" standard).

70. See, e.g., *United States v. General Dynamics Corp.*, 341 F. Supp. 534 (N.D. Ill. 1972); *United States v. Falstaff Brewing Corp.*, 332 F. Supp. 970 (D.R.I. 1971); *United States v. International Tel. & Tel. Corp.*, 1971 Trade Cas. 90,530 (N.D. Ill. 1971) (ITT/Canteen); *United States v. International Tel. & Tel. Corp.*, 324 F. Supp. 19 (D. Conn. 1970) (ITT/Grinnell); *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969) (ITT/Hartford); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 306 F. Supp. 645 (D.N.J. 1969); *United States v. Von's Grocery Co.*, 233 F. Supp. 976 (S.D. Cal. 1964); *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963); *United States v. E.I. du Pont de Nemours & Co.*, 126 F. Supp. 235 (N.D. Ill. 1954) (du Pont/GM).

71. As Justice White pointed out in his dissenting opinion in *Marine Bancorporation*:

In the last analysis, one's view of this case, and the rules one devises for

purpose of the Federal Trade Commission as an antitrust enforcement agency is obviously far different from that of a federal district judge, whose goal is the evenhanded administration of justice. Thus, a major, uncontrollable element in the successful defense of a merger case may be whether it happens to be selected for investigation and challenge by the Justice Department rather than the Federal Trade Commission.

Defense counsel have always been remarkably successful in winning merger cases at the trial level in federal district courts.⁷² The Supreme Court majority opinions over the last twenty years have tended to obscure the excellent evidentiary presentations of defense counsel and their clients in these cases. Unfortunately for the defendants, the trial courts were routinely reversed by a Supreme Court majority that seemed to adopt whatever belated, expedient argument or theory the Solicitor General's office could salvage from the record evidence. The weakness of the arguments presented, however, only increases one's respect for the great ingenuity and superlative appellate advocacy exhibited by the Solicitor General's staff and the Appellate Division of the Justice Department's Antitrust Division. Even assuming the possibility of "deep-seated judicial bias," the appellate advocate must still provide the Court with persuasive analysis of the probable effects of a merger on competition and a plausible evidentiary basis in the trial record to support those theories. This might be called the final element of the answer to the question "How can a merger case be won in the Supreme Court?" Defense counsel must repeat the trial court performance on appeal.

assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business.

418 U.S. at 653.

72. See, e.g., cases cited note 70 *supra*.

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