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Preliminary Injuction Thwarting Conglomerate Merger Denied (Missouri Portland Cement Co. v. Cargill, Inc.)

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ANTITRUST LAW

PRELIMINARY INJUNCTION THWARTING CONGLOMERATE MERGER DENIED

Missouri Portland Cement Co. v. Cargill, Inc.

Section 7 of the Clayton Act[1] makes unlawful those corporate acquisitions which *may* have substantial anticompetitive consequences. By employing the word "may," Congress indicated that its concern was with "probabilities, not certainties."[2] Thus, in determining the legality of a particular merger, a court will consider the "reasonable likelihood"[3] of a lessening of competition. In the case of a conglomerate merger, however, the determination of legality may be especially difficult since the effects of the merger on competition are often not as readily identifiable as those accompanying the more traditional horizontal and vertical mergers.[4] Nevertheless, conglomerate mergers are subject to the same anticompetitive prohibitions embodied in section 7.

In *Missouri Portland Cement Co. v. Cargill, Inc.*,[5] the Second Circuit considered the propriety of a district court order preliminarily enjoining the continuation of a tender offer which threatened to result in the effectuation of an unlawful conglomerate merger. Reversing the district court's determination, the court concluded that the target

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1 15 U.S.C. § 18 (1970). Section 7, in part, provides:

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

2 Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

3 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957).

4 A conglomerate merger consists of any acquisition other than a horizontal or vertical merger. A horizontal merger occurs between two companies that are direct competitors of each other. A vertical merger is one where the acquired firm is, or might easily become, a customer or a supplier of the acquiring firm. *Hearings on Economic Concentration Before the Subcomms. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, Part 2, Mergers and Other Factors Affecting Industry Concentration,* Pursuant to S. Res. 40, 89th Cong., 1st Sess. 515-20 (1965).

Conglomerate mergers can be divided into three broad subcategories: product-extension mergers, geographic market-extension mergers, and pure conglomerate mergers. A product-extension merger involves a merger of companies which use a common distribution system for products which do not directly compete with one another. A geographic market-extension merger occurs between companies which manufacture the same products but distribute them in different geographic markets. *Id.* Mr. Justice Douglas has defined a pure conglomerate merger as one where "there are no economic relationships between" the two companies involved in the merger. FTC v. Procter & Gamble Co., 386 U.S. 568, 577 n.2 (1967).

5 498 F.2d 851 (2d Cir.), *cert. denied,* 95 S. Ct. 150 (1974).

of the merger plan, Missouri Portland Cement Co., had failed to establish the probability that its acquisition by Cargill might have substantial anticompetitive effects.[6] By so holding, the court may have introduced a new permissiveness with respect to the validity of conglomerate mergers.

In 1973, Cargill, a large diversified corporation engaged in grain trading and other bulk commodity businesses,[7] announced an offer to purchase all outstanding shares of Missouri Portland (MP), a publicly held corporation manufacturing portland cement and selling it in an area encompassing eleven states.[8] Upon acquiring control of MP through the tender offer, Cargill intended either to merge it into the parent organization, or to operate it as a subsidiary.[9] In either event, due to the unrelated nature of the companies involved, the proposed acquisition would constitute a pure conglomerate merger.[10] The management of MP resisted Cargill's takeover attempt in the district court on the grounds that both the antitrust and securities laws had been violated. The court found no improprieties in Cargill's tender offer under the securities laws,[11] but held that the contemplated merger raised "substantial and difficult antitrust questions"[12] justifying the

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6 *Id.* at 866. The case was remanded to the district court for the framing of a temporary injunction to allow the tender offer to continue pending litigation on the merits. *Id.* at 875.

7 Cargill's bulk commodities included such items as sugar, ores and metals, fertilizers, industrial chemicals, poultry products, and salt. *Id.* at 856.

8 Cargill originally contended that the eleven-state area in which MP sold its product was the correct geographic market. The district court, however, found that the acquisition would foreclose competition in four metropolitan markets: St. Louis and Kansas City, Missouri; Memphis, Tennessee; and Omaha, Nebraska. *Id.* at 856.

Although for purposes of the appeal Cargill assumed *arguendo* the correctness of the district court's definition of submarkets, this interpretation may have been faulty. For example, in United States v. Marine Bancorporation, Inc., 94 S. Ct. 2856 (1974), the Supreme Court stated that

> for purposes of § 7 "section of the country" means "relevant geographic market" and the latter concept means the area in which the relevant product is in fact marketed by the acquired firm.

Id. at 2870 n.20. Additionally, the Sixth Circuit, in United States Steel Corp. v. FTC, 426 F.2d 592, 596 (6th Cir. 1970), affirmed the findings of the FTC that the relevant geographic markets for the sale of portland cement in that case were the northeastern United States and the New York metropolitan area.

9 498 F.2d at 855.

10 *See* note 4 *supra*. Although MP contended that the proper classification was a product-extension merger, Judge Friendly disagreed. He pointed to FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), as an example of a true product-extension merger. There, Procter & Gamble, a producer of detergents, proposed to acquire Clorox, a manufacturer of bleach. The products were closely related and the competitive advantages were obvious. On the other hand, "the relationship between Cargill's bulk commodities business and the cement industry bears only the most superficial resemblance to the product affinity between Procter and Clorox." 498 F.2d at 859.

11 *See* text accompanying notes 51-55 *infra*.

12 498 F.2d at 855.

granting of preliminary injunctive relief.[13] On appeal from the order, Judge Friendly, writing for a unanimous panel,[14] applied the Second Circuit's established standard for determining whether a preliminary injunction is warranted.[15] He first conducted an inquiry into the merits of MP's antitrust allegations,[16] followed by a consideration of the equities favoring the respective parties.[17]

With respect to the merits of its action, MP asserted two antitrust theories, potential competition and entrenchment, as barring its acquisition by Cargill.[18] The potential competition doctrine provides that an acquisition may result in an antitrust violation if it eliminates potential, as opposed to actual, competition between the merging companies.[19] Thus, for example, in *United States v. Penn-Olin Chemical Co.*,[20] the Supreme Court indicated that the joint venture[21] being challenged

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13 *Id.* Section 16 of the Clayton Act provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damages is immediate, a preliminary injunction may issue . . . .

15 U.S.C. § 26 (1970).

14 The panel consisted of Judges Friendly, Waterman, and Mulligan.

15 Within the Second Circuit, a party seeking a preliminary injunction must demonstrate

> either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis in original) (citations omitted).

16 498 F.2d at 860.

17 *Id.* at 866.

18 *Id.* at 860.

19 *See* Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1241 (1968). The concern is that the acquisition might foreclose the possibility that the acquiring firm would become an additional competitor in the relevant market.

In United States v. Marine Bancorporation, Inc., 94 S. Ct. 2856 (1974), the Supreme Court stated:

> The potential competition doctrine has meaning only as applied to concentrated markets. That is, the 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 2874. The concentrated market theory is clearly applicable to the portland cement industry. In three of the four submarkets, three companies had interests of 20% or more and in the fourth market, 62% was controlled by one company with MP, its closest competitor, controlling 21%. 498 F.2d at 856.

20 378 U.S. 158 (1964), *complaint dismissed on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd by an equally divided court*, 389 U.S. 308 (1967) (per curiam).

21 Pennsalt and Olin Mathieson, both of which produced sodium chlorate, had

therein by the Government might constitute an antitrust violation if it resulted in removing a corporation from the "edge of the market," where it had been "continuously threatening to enter."[22] Applying this reasoning to the instant case, the Second Circuit rejected MP's contentions, finding no evidence to suggest that Cargill might have made a de novo entry[23] into the cement industry in the event that it failed to acquire Missouri Portland.[24] The court noted that Cargill had no permanent commitment to the cement industry.[25] Furthermore, Cargill's brief investigation of the industry was insufficient to establish the "incentive to compete" requisite for a finding of potential competition.[26]

The absence of an actual probability of de novo entry, however, is not wholly dispositive of the potential competition theory. A company which, in fact, has no plans to make a de novo entry into the relevant market may still be feared as a potential entrant by those already within the market. This concept was articulated in *United States v. Falstaff Brewing Corp.*,[27] wherein the Supreme Court remanded the case for

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formed a joint venture to market that chemical in the southeastern United States. The Supreme Court stated that essentially the same considerations apply to mergers as to joint ventures in a case involving a possible violation of § 7. 378 U.S. at 170.

22 *Id.* at 173. In *Penn-Olin*, the district court had reasoned that since the two companies would not *both* have entered the market independently, the potential competition theory was unavailable. The Supreme Court, however, found that entrance by only one of the companies would be sufficient to indicate that the proposed joint venture would violate § 7, stating:

> There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market.

Id.

23 In recently approving a market-extension merger of two banks, the Supreme Court enunciated two essential preconditions which must exist in order to apply that aspect of the potential competition doctrine concerned with the possibility of de novo entry or toehold acquisitions. First, the acquiring company must possess "feasible means" for entering the relevant market by means other than the acquisition in question. Secondly, those alternate means must "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." United States v. Marine Bancorporation, Inc., 94 S. Ct. 2856, 2875 (1974). The significance of the Court's approval of the merger in *Marine Bancorporation* is highlighted by Justice White's criticism that the Court "dramatically escalate[d] the burden of proving that a merger 'may substantially lessen competition' within the meaning of § 7." *Id.* at 2881.

24 The Second Circuit found that it would cost Cargill up to $200,000,000 to construct its own cement facilities comparable to those of MP, whereas Cargill hoped to acquire the latter through the cash tender offer for approximately $45,000,000. 498 F.2d at 864. It was even conceded by counsel for MP that Cargill could not enter the relevant markets de novo. *Id.* at 864 n.26.

25 *Id.* at 861.

26 *Id.*

27 410 U.S. 526 (1973). Falstaff, the only major beer producer in the country which did not sell in New England, acquired Narragansett Brewing Company, the largest beer

consideration of whether the acquiring company might be 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."[28] In *Missouri Portland*, however, the Second Circuit was unable to conclude that any company in the cement industry would ever regard Cargill as a potential future entrant if its present entry attempt were stymied.[29] Distinguishing *Falstaff*, the court reasoned that

> the district court's error lay in identifying, for purposes of potential competition, a company making the same commodity . . . or a closely related one sold to the same purchasers by the same means . . . with a diversifying company that had never before been regarded as a potential entrant and was not likely to remain one if its rational choice of a method of entry was barred.[30]

As a final reference to the potential competition argument, Judge Friendly considered whether Cargill might possibly have entered the market by means of "toehold" acquisitions.[31] If such were the case, Cargill's acquisition of Missouri Portland might have had anticompetitive effects by preempting Cargill's acquisition and expansion of smaller cement companies.[32] The court noted, however, that the cement plants cited by the district court as potential toehold prospects were not likely to be acquired by Cargill.[33] Either they already had substantial shares of the relevant markets, or were too far from the relevant geographic

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company in the New England market. There was evidence that Falstaff's management had consistently decided against de novo entry into the New England market.

28 *Id.* at 532-33. Professor Turner has indicated three minimum conditions that must be met before a company "at the edge" of the market will be considered a significant competitive influence:

> 1. The market concerned must be an oligopoly market: the number of actual sellers must be sufficiently small for them to be able collectively, though not necessarily collusively, to maintain prices above competitive levels.
> 2. The merging firm at the edge of the market must be recognized by those in the market as the most likely entrant or one of a very few likely entrants, with barriers to entry by new companies or by other established firms being significantly higher.
> 3. The barrier to entry by the firm in question must not be so high that the price it must expect to obtain before it would come in is above the price that would maximize the profits of the existing sellers.

Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1362-63 (1965) [hereinafter cited as Turner].

29 498 F.2d at 863.

30 *Id.*

31 A toehold acquisition occurs when a company acquires and expands a small firm with the intention of competing in a new market. Note, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. CHI. L. REV. 156, 157 (1972).

32 The FTC has sanctioned the use of toehold acquisitions since they "may be as economically desirable and beneficial to competition as internal expansion into a relevant market . . . ." Bendix Corp., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,288, at 21,445 (FTC 1970), *rev'd on other grounds*, 450 F.2d at 534 (6th Cir. 1971).

33 498 F.2d at 864.

markets involved to create a likely probability of competition therein.[34] Additionally, some of the cement plants were simply considered poor prospects for future development.[35]

The court next examined the "deep pocket" or "entrenchment" theory asserted by Missouri Portland. The entrenchment theory is founded on the probability that an oligopolist with extraordinary resources will be in a financial position to keep prices at a level just below that which would encourage others to enter the market.[36] MP argued that because of Cargill's tremendous resources, the acquisition would either raise entry barriers[37] to other potential entrants or discourage competition from smaller cement competitors who would fear some form of retaliation by the large acquiring firm. Nonetheless, the court concluded that "mere recitation of the 'deep pocket' shibboleth was not enough."[38] Many of the cement companies in the relevant markets were controlled by large corporations, including such giants as U.S. Steel and Martin-Marietta, who did not "seem likely to cower before

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34 *Id.*

35 *Id.*

36 *See* Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1671 (1967). In FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), the Supreme Court suggested how entrenchment could have substantial anticompetitive effects:

> [T]he substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing . . . .

Id. at 578.

37 Professor Backman has enumerated the following barriers to entry: capital requirements, technological requirements, control of scarce resources, transportation costs, product differentiation, patents, tariff and non-tariff barriers, and scarce technical personnel. Backman, *Conglomerate Mergers and Competition*, CONGLOMERATE MERGERS AND ACQUISITIONS: OPINION & ANALYSIS, 44 ST. JOHN'S L. REV. 90, 103-04 (spec. ed. 1970) [hereinafter cited as Backman].

The way in which entry barriers can arise has been explained in general terms as follows:

> Barriers to entry might be raised by any change in market conditions that makes entry less attractive, including an association of an existing competitor with a large corporation that gives the existing competitor the apparent ability, either because of economies or large resources, to outcompete new entrants by underpricing them or engaging in heavy advertising.

B. FOX & E. FOX, CORPORATE ACQUISITIONS AND MERGERS § 6.03, at 6-8 (1974). In testimony before the FTC, Professor Garoian indicated that entry barriers can be measured in terms of how much a firm in a given market can raise the price of its product above a competitive level without inducing an outside firm to enter the market. Scanlon, *Economics in the Courtroom: The 'Technology' of Antitrust Litigation*, 3 ANTITRUST LAW & ECON. REV. 1, 58 (1969) (quoting Professor Garoian).

In FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), the Supreme Court found that the acquisition by Procter, the nation's leading advertiser, of Clorox would tend to raise entry barriers to potential entrants. Procter's extensive use of advertising would make a new entrant "more reluctant to face the giant Procter than it would have been to face the smaller Clorox." *Id.* at 579.

38 498 F.2d at 866 n.32.

Cargill."[39] Furthermore, Missouri Portland had not shown specifically how Cargill's size alone would deter other potential entrants.[40]

Having resolved that MP had failed to establish a probability of success on the merits, Judge Friendly considered whether the hardships complained of by MP outweighed those which would accrue to Cargill if the preliminary injunction were upheld. He noted initially that MP had not demonstrated the "loss or damage"[41] which is required for an injunction to obtain. Indeed, MP's assertion of the entrenchment theory implied that MP would become stronger, not weaker, as a consequence of the acquisition.[42] The district court had nevertheless determined that MP would be harmed in several ways if Cargill's tender offer were permitted to proceed. First, there would be a disruption of employee morale during the takeover period prior to a trial on the antitrust issue. Second, long-range development would be impaired. Third, should the acquisition be found to create an antitrust violation, there would be substantial problems caused by Cargill divesting itself of Missouri Portland's shares and "unscrambling" the assets of the merged companies.[43]

The Second Circuit, however, once again determined that the district court's conclusions were not adequately supported by the evidence.[44] The argument concerning the effect on employee morale had little merit in that a basic reason for Cargill's desire to enter the cement industry by acquiring MP, rather than by de novo entry, was its own lack of expertise.[45] There was no suggestion that Cargill was planning to replace the target's key personnel with its own people.[46] With regard to the impairment of long-range development plans, Cargill had apparently concurred with MP's plans for expansion, and there was nothing in the record to indicate how these plans would be

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[39] *Id.* at 865.

[40] The fact that the acquiring firm is large does not necessarily mean that § 7 will be violated. *See* Reynolds Metals Co. v. FTC, 309 F.2d 223, 230 (D.C. Cir. 1962). In *Reynolds*, while finding a § 7 violation, the court specifically disagreed with the Commission's contention that "the mere intrusion of 'bigness' into a competitive economic community otherwise populated by commercial 'pygmies' will *per se* invoke the Clayton Act." *Id.* at 230, *citing* Brown Shoe Co. v. United States, 370 U.S. 294, 328-29 (1962). The court went on to intimate that, despite the "bigness" of the parties concerned, an acquisition, in certain economic situations, might be "necessary to *preserve* competition . . . ." *Id.* (emphasis in original).

[41] Clayton Act § 16, 15 U.S.C. § 26 (1970). *See* note 13 *supra*.

[42] 498 F.2d at 867.

[43] *Id.* at 869.

[44] *Id.*

[45] *Id.*

[46] *See* Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 697 (2d Cir. 1973), where the problem of employee morale was deemed to be significant since there were explicit indications on the part of Gulf and Western that key executives of A&P would be replaced if the tender offer were successful.

impaired by Cargill's takeover.[47] Finally, if divestiture became necessary, there did not appear to be any foreseeable difficulties in Cargill divesting itself of its shares of MP.[48] Such divestiture could be completed without causing serious harm to the latter. Moreover, the problem of unscrambling the assets could be avoided by a temporary injunction against the assets being "scrambled" in the first place.[49] Finally, in concluding that the "balance of hardships" did not tip in favor of MP, the Second Circuit added that the district court, while exaggerating the potential hardship to MP, had minimized the hardship that Cargill was likely to suffer if its tender offer were defeated.[50]

Turning to the securities law questions, the court of appeals rejected MP's allegations that Cargill had violated sections 14(d) and (e) of the Williams Act.[51] MP charged that, in announcing its tender offer, Cargill did not sufficiently reveal its future plans regarding MP, and also did not disclose the possibility that the acquisition could violate the antitrust laws.[52] Finding no evidence that Cargill had finalized any future plans for MP, the court relied upon the Fifth Circuit's holding in *Susquehanna Corp. v. Pan American Sulphur Co.*[53] that an offeror "is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably."[54] With regard to the alleged failure to disclose a possible antitrust violation, the Second Circuit concurred in the district court's ruling that

> the possibility that the acquisition would result in antitrust viola-

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47 498 F.2d at 869.

48 *Id.*

49 *Id.* In FTC v. PepsiCo., Inc., 477 F.2d 24 (2d Cir. 1973), the Second Circuit approved an alternative remedy for dealing with the "scrambling" of assets. It concluded therein that a hold-separate agreement could be entered into by the parties in lieu of the preliminary injunction. *Id.* at 31. If the district court had directed the issuance of a hold-separate order in the instant case, this would have allowed Cargill's tender offer to proceed. However, it would have required that MP's assets be held in a separate corporation, pending the outcome of the litigation of the antitrust issue.

50 498 F.2d at 869-70. It has been observed that although the grant of a preliminary injunction may only temporarily delay the offer, the effect of this delay may, in fact, be sufficient to cause the eventual failure of the offer. E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 266 (1973). Accordingly, Cargill listed several adverse consequences it would suffer because of the preliminary injunction. These can be summarized as follows: (1) A suspension of the tender offer for the long duration of the trial would be tantamount to a final judgment due to uncertainties of future market conditions. (2) Cargill would stand to lose the substantial funds it had expended for the promotion of the tender offer. (3) Unsophisticated stockholders might equate a preliminary injunction with an adjudication of guilt and consequently be unwilling to tender their shares even in the event of complete vindication of Cargill on the merits. Brief for Appellant at 77-78.

51 15 U.S.C. §§ 78n(d), (e) (1970).

52 498 F.2d at 871.

53 423 F.2d 1075 (5th Cir. 1970).

54 *Id.* at 1086.

tions, *a possibility that exists with every merger,* need not have been disclosed to Missouri Portland's shareholders.[55]

As previously noted, the Second Circuit's decision in *Missouri Portland* might be interpreted as the reflection of a permissive attitude toward conglomerate mergers. In the past, various authors have expressed the view that the potential competition and entrenchment theories have received undeserved attention as rationales for discouraging conglomerate mergers. It has been argued that the potential competition theory is based on the unrealistic assumption that any large company is a potential entrant into most markets.[56] The entrenchment theory has been attacked on the grounds that it is not supported by concrete evidence[57] and ignores significant economies attainable through conglomerate mergers which are actually procompetitive in effect.[58] The *Missouri Portland* court's refusal to uphold the prelim-

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[55] 498 F.2d at 872 n.44 (emphasis added).

In its answer, Cargill likewise counterclaimed for injunctive relief on the basis of several alleged violations by MP of the securities laws. The Second Circuit held in favor of Cargill on one of its allegations, finding that both an advertisement and letter addressed by MP to its stockholders were seriously misleading in contravention of § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1970). 498 F.2d at 874-75.

MP had made the following statement to its shareholders:

> This is Cargill's first bid. Cargill has indicated that it would like to acquire all of Missouri Portland's outstanding Common Stock. If Cargill does not get all of the Missouri Portland stock it seeks, you should ask yourself whether Cargill is likely to buy additional shares at a price higher than $30 per share—either in the open market or by raising its tender price. Cargill has reserved the right to do just this in its tender offer.

Id. at 874. This statement was found to be misleading since it implied that an increase in price during the offer might not inure to the benefit of those shareholders who had already tendered their shares to Cargill. Section 14(d)(7) of the Williams Act, 15 U.S.C. § 78n(d)(7) (1970), requires that any increase in the terms of the offer must be given to all shareholders who tendered their shares prior to the increase. Cargill's offer indicated that this provision would be complied with in the event that an increase in the offering price was made. 498 F.2d at 874.

Although finding in favor of Cargill, Judge Friendly ruled that the district court's remedy, which required MP to submit all future communications to stockholders to the district court for approval before releasing them, was too severe. *Id.* at 875. He found it more appropriate simply to issue an injunction against warnings to shareholders of the type that was found to be misleading. *Id.*

[56] *See* Backman, *supra* note 37, at 110.

[57] *See* Turner, *supra* note 28, at 1357. Professor Turner states:

> [T]here is no reason to anticipate that a change in the character of the firms, if unaccompanied by a significant decline in the *number* of sellers, would produce a less competitive situation than previously existed. Indeed, if economies of scale are involved, it is highly probable that competitive performance will be improved.

Id. (emphasis in original).

[58] Disagreement among economists as to the entrenchment theory's competitive importance "underscore[s] the unreality of positing automatic anticompetitive consequences to the [entrenchment] potential of conglomerates." Jones & Haiden, *Conglomerates: The Need for Rational Policy Making,* CONGLOMERATE MERGERS AND ACQUISITIONS: OPINION & ANALYSIS, 44 ST. JOHN'S L. REV. 243, 249 (spec. ed. 1970). The authors point out that there is a lack of

> convincing market evidence that, once into an industry, conglomerates have used

inary injunction may very well signify the Second Circuit's disenchantment with the potential competition and entrenchment theories.[59]

It is apparent that the views expressed in *Missouri Portland* have not met with complete approval. Despite the Second Circuit's decision, the Federal Trade Commission has announced the potential competition theory as the basis upon which it intends to proceed against Cargill's acquisition of MP.[60] In its complaint,[61] the FTC noted that Cargill had important resources readily adaptable to the cement industry. In addition to grain elevators which could be adapted for use as storage facilities for cement, Cargill owned barges and ships which could be easily modified for the transportation of cement. The complaint thus hints at factors considered important by the Tenth Circuit in *Kennecott Copper Corp. v. FTC*,[62] wherein it enjoined the acquisition of the Peabody Coal Company, the largest coal producer in the United States, by Kennecott, the country's largest copper producer. The *Kennecott* case was relied upon by MP, but the Second Circuit, while stating that it could not determine its significance without an opportunity for more extensive study, seemed to doubt the propriety of the decision.[63]

Mr. Justice Douglas, who unsuccessfully attempted to stay the Second Circuit's decision, felt that the *Missouri Portland* case contained facts "strikingly similar" to those in *Kennecott*.[64] He noted that the similarity existed "as regards the lack of related products but the presence of related skills."[65] Nevertheless, it can be argued that the

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> [the opportunity for entrenchment] anticompetitively in order to increase their market share, obtain further concentration, raise entry barriers, or hasten exit through intimidation of actual and potential competitors.

Id. at 250 n.17.

59 At the outset of the opinion, Judge Friendly makes the following observation:

> Where, as here, the acquisition would be neither horizontal nor vertical, there are "strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps."

498 F.2d at 854, *quoting* Turner, *supra* note 28, at 1318. Professor Turner further comments:

> Since the conglomerate acquisition, unlike the horizontal, does not remove an existing competitor, it seems less likely that the benefits of reduced competition are either a purpose or an effect of the transaction; consequently, it is more likely that the purpose and effect of the entry by acquisition is to take advantage of unrealized opportunities, such as economies, and is thus procompetitive.

Turner, *supra* note 28, at 1354.

60 Cargill, Inc., 3 TRADE REG. REP. ¶ 20,745, at 20,599 (FTC 1974).

61 Cargill, Inc., No. 9005 (F.T.C. Jan. 21, 1975).

62 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

63 498 F.2d at 860 n.14.

64 Missouri Portland Cement Co. v. Cargill, Inc., 94 S. Ct. 3210 (1974) (mem.) (Douglas, J., dissenting from the granting of the motion to vacate the stay of mandate previously entered by Justice Douglas).

65 *Id.* at 3212.

cases are distinguishable in a number of respects. Kennecott, prior to its acquisition of Peabody Coal, had acquired another coal company and had manifested an interest in entering the coal business on a national scale.[66] Moreover, Kennecott already had highly developed skills and long experience in mining.[67] Additionally, there could be observed the elements of a vertical merger since Kennecott was a substantial user of coal.[68] While Kennecott might be seen as "the most likely entrant into the coal business,"[69] Cargill was much less likely to be considered a potential entrant into the cement industry. Prior to its attempt to acquire MP, Cargill had never displayed any intent to enter the market. Furthermore, while Cargill had the vast resources common to many conglomerates, it had no skills peculiar to the needs of a cement producer.[70]

In any event, *Missouri Portland* represents an expression of judicial skepticism of the use of antitrust laws by target companies seeking preliminary injunctive relief to defeat takeover attempts.[71] More significantly, the Second Circuit may have utilized this opportunity to present its tacit approval of the conglomerate merger as a means of encouraging competition.[72] However, since the issue was presented in the context of a request for preliminary injunction, it may be unwise to rely upon *Missouri Portland* as evidencing the position the Second Circuit would adopt if the question were raised in a different procedural setting.

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66 467 F.2d at 76.

67 *Id.* at 77.

68 *Id.* at 76.

69 *Id.* at 79.

70 Significantly, a 1966 FTC staff study identified fuel suppliers and cement consumers as the most likely entrants into the cement industry. FTC, ECONOMIC REPORT ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY 88 (1966), *quoted in* Brief for Appellant at 38.

71 The skeptical tone of the court's opinion is established at the outset:

> Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.

498 F.2d at 854. Judge Friendly has noted in the past that federal courts frequently become battlefields for target corporations seeking to block outsiders' takeover attempts. In Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969), he warned that district courts must be "vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers." *Id.* at 947.

72 498 F.2d at 854. *See* note 59 *supra*.