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ANTITRUST LAW

SMALL MERGER BARRED IN CONCENTRATED INDUSTRY

Stanley Works v. FTC

Section 7 of the Clayton Act[1] prohibits mergers which "may" have substantial anticompetitive effects. This Act is by no means a precise and simplified measure to be applied to the diverse and complex considerations inherent in evaluating a merger.[2] Only those mergers exhibiting a "reasonable probability"[3] of competitive injury are proscribed.[4] While the usual and most feared anticompetitive situation is the cumulative, step-by-step concentrating trend within an industry, it is clear that Congress also saw the dangers in the single merger within an already

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1 15 U.S.C. § 18 (1970). Section 7 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* (emphasis added).

2 Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

> As might be anticipated from the wide variety of industries and the dissimilar competitive settings in which mergers arise, a seriatim analysis of the decisions yields no golden thread that foreshadows the outcome of the next case to come along. The methodology has been to weigh all facts of record and to rest the adjudication on their totality. No one item of evidence has been dispositive. Indeed, a factor that may be deemed significant in one litigation may have little probative value in another. Far from making for inconsistent application of the law, this points up the diversity of the competitive conditions that must be reckoned with.

Id. at 675 (footnotes omitted).

3 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 596 (1957). Certitude of such effects need not be proven. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 603 (S.D.N.Y. 1958).

Application of the guideline of "reasonable probability" is generally not susceptible to direct proof, therefore, inferences drawn from economic analysis are necessary. Barnes, *Competitive Mores and Legal Tests in Merger Cases: The Du Pont General Motors Decision*, 46 GEO. L.J. 564, 588 (1958).

4 Despite its concern for the concentration of industries throughout the United States, Congress has not chosen to outlaw mergers per se. Rather, an incipiency test has been established to determine which mergers are anticompetitive. When a particular market is deemed to be concentrated, the incipiency principle "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future. . . ." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963). Implicit in this scheme is the recognition that some mergers do not harm the competitive structure of the industry; in fact, some may have a beneficial influence. The prospect of merger may provide an effective escape route upon liquidation, encourage entry among those incapable of a de novo entry, and generally promote efficiency. Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 493 (1957) [hereinafter cited as Markham]. Furthermore, entry by merger may have a catalytic effect, promoting economic and competitive life where there formerly had been an inactive oligopoly. Turner, *Conglomerate Mergers and § 7 of the Clayton Act*, 78

concentrated structure.[5] In *Stanley Works v. FTC*,[6] the Second Circuit, with some difficulty, found that the acquisition of Amerock Corporation by Stanley Works "may" substantially lessen competition, and therefore affirmed the Federal Trade Commission (FTC) decision ordering divestiture.[7]

In 1966, Stanley Works, a multi-product corporation, merged with the Amerock Corporation, a firm engaged in manufacturing cabinet hardware. Since Stanley also manufactured cabinet hardware, the FTC considered this merger violative of the antitrust laws. In order to facilitate the litigation, the parties made certain stipulations. These proved to be critical in determining whether the anticompetitive effect was imbued with the requisite substantiality.[8] Pursuant to stipulation, the product market was cabinet hardware[9] and the relevant geographic

HARV. L. REV. 1313, 1317 (1965) [hereinafter cited as Turner]. *See also* Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417 (1965).

[5] *See, e.g.*, H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949); S. REP. NO. 1775, 81st Cong., 2d Sess. (1950); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955). One authority has synthesized the legislative purpose as follows:

> Both Senate and House committee reports on the proposed amendment to section 7 make it clear that the objective of the amendment was to prevent further concentration in industry. The Senate Committee on the Judiciary put it this way: "The purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions." The House Committee on the Judiciary considered the problem in greater detail. It recognized that the "level of economic concentration in the American economy is high." It alleged that "the long-term trend of concentration has been steadily upward. . . . This long-term rise in concentration is due in considerable part to the external expansion of business through mergers, acquisitions, and consolidations."

Stocking, *The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust*, 44 GEO. L.J. 1, 17 (1955) (footnotes omitted).

[6] 469 F.2d 498 (2d Cir. 1972). The complaint also alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), which outlaws unfair methods of competition and unfair or deceptive practices. Although the converse is not true, a violation of § 7 of the Clayton Act is *ipso facto* a violation of § 5 of the FTC Act. 469 F.2d at 499 n.2; *see* FTC v. Sperry Hutchinson Co., 405 U.S. 233, 246 (1972). Accordingly, the court did not consider the § 5 violation separately.

[7] 469 F.2d at 499. This appeal was taken directly to the Second Circuit Court of Appeals pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1970).

[8] The majority refused to go beyond the stipulations of markets and shares nor consider the submarket possibility. Despite strong indicia of insubstantial "cross-elasticity," *i.e.*, product interchangeability, the litigants were held to the stipulations. Nor did the court conjecture as to whether the outcome would have been different had there been residential and institutional submarkets within the cabinet hardware industry. 469 F.2d at 500 n.5. *But see* Judge Mansfield's dissent, which contended that actual competitive injury could only be determined by examining the actual competitive overlap, and that the stipulations should not be a bar to this inquiry. *Id.* at 511.

[9] 469 F.2d at 500. Cabinet hardware includes "pulls, knobs, hinges, latches, catches and similar products, including drawer slides and shelving hardware, used principally in kitchen cabinets." *Id.* The majority viewed the cabinet hardware industry as a single market composed of two related lines, institutional and residential cabinet hardware. The court characterized this division as "descriptive not analytic." *Id.* at 500 n.5.

In contradistinction, Judge Mansfield felt that the differences between residential and market was nationwide.[10] Total national sales of cabinet hardware in 1965 were $80,000,000. Stanley ranked tenth with $814,000 in sales, a 1 percent market share, while Amerock was the industry leader with over $18,000,000 in sales, or 22-24 percent of the market.[11] In addition to these stipulations, the court in *Stanley* relied on the trial examiner's factual determination that the industry was concentrated.[12]

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institutional hardware were significant enough to warrant separate consideration. He noted that residential hardware is highly stylized and requires a die-casting manufacturing process, while the institutional type is functional and is simpler to manufacture. Applying this distinction to the sales figures the dissent established that 75 percent of Stanley's sales consisted of institutional hardware, while residential hardware comprised 90 percent of Amerock's total sales. The approximate dollar volume was as follows:

	Total Sales	*Residential*	*Architectural*
Stanley	814,000	200,000	614,000
Amerock	18,218,474	18,018,474	200,000

Id. at 512 (Mansfield, J., dissenting).

10 469 F.2d at 500. Generally, it behooves the defendant to insure that the markets, both product and geographic, are drawn along very broad lines. Clearly, the larger the market under consideration, the smaller the defendant's share appears. However, while both Amerock and Stanley did sell their materials nationally, there were significant differences in the nature of their operations. Due to variance in product type, *see* note 9 *supra*, and channels of distribution, 469 F.2d at 513, Stanley, because of its relatively small position in residential hardware, would have benefitted if the court had considered a narrowly-drawn market.

11 These figures were also agreed to by stipulation, 469 F.2d at 501 n.6.

12 469 F.2d at 501. Much has been written on the criteria for a finding of concentration. In *Stanley* the ten leading firms were as follows:

	1965 Cabinet Hardware Sales in U.S.	*Total Assets*	*Approximate % of Market*
1. Amerock Corp.	$18,218,474	25,133,914	22.7
2. National Lock Company	$11,499,445	37,992,215	14.3
3. Ajax Hardware Corp.	$ 6,798,000	3,338,412	8.4
4. Knape & Vogt Mfg. Co.	$ 6,013,304	7,968,450	7.5
5. Jaybee Mfg. Corp.	$ 3,056,673	1,710,989	3.8
6. Grant Pulley & Hardware Corp.	$ 2,168,397	2,369,165	2.7
7. David Allison Co., Inc.	$ 1,500,000	1,500,000	1.8
8. Tassell Industries, Inc.	$ 1,408,600	2,483,424	1.7
9. Hyer Hardware Mfg. Corp.	$ 1,344,464	524,452	1.6
10. Stanley Hardware Division	$ 814,000	125,926,000	1.0

Id. at 501 n.7. The approximate percentages have been supplied. The instant structure would be characterized by Professors Kaysen and Turner as a tight oligopoly, *i.e.*, "a very small number (eight or fewer) firms supplying 50 percent of the market, with the largest firm having a 20 percent or higher share [Amerock had 22-24 percent], and with or without a fringe of small suppliers." C. KAYSEN & D. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 72 (1959) [hereinafter cited as ANTITRUST POLICY]. The Justice Department's Merger Guidelines characterize the cabinet hardware market, where the four leading firms have less than 75 percent of the market, as "less highly concentrated." 1 TRADE REG. REP. ¶ 4510, at 6884 (FTC 1971). Additional treatment of when concentration is deemed anticompetitive is found in antitrust decisional law. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (leading firm controlled 48.8 percent of the market; the top two sellers collectively had 64.5 percent); United States v. Von's Grocery Co., 384 U.S. 270 (1966) (in addition to

The Administrative Procedure Act (APA)[13] requires an agency to reveal to the defendant the basis of its adjudication. Furthermore, by virtue of the Supreme Court's mandate in *SEC v. Chenery Corp.*,[14] the defendant must have notice of the theory asserted and a court reviewing an administrative decision is restricted to the rationale that was employed by the agency. The petitioner in *Stanley* contended that the FTC's finding of illegality was premised *solely* on the theory of elimination of potential competition.[15] Prior to considering the merits, the

24.4 percent of the market being controlled by four firms, with the top eight controlling 40.9 percent, a rapid trend toward concentration was present); United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (tri-state beer market — eight sellers controlled 67.65 percent; national beer market — ten brewers controlled 52.6 percent; United States v. Continental Can Co., 378 U.S. 441 (1964) (metal container industry — 71 percent of the market controlled by two firms; glass container market — three firms controlled 55.4 percent); United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (two firms controlled 50 percent of the market, nine controlled 95.7 percent). Frequently, a finding of concentration depends on where attention is focused. In the instant case, the Commission stressed that the top four firms comprised 49-51 percent of the market. A further breakdown of the figures above reveals: the top two firms had approximately 37 percent, while the third and fourth firms collectively had an estimated additional 16 percent. The fifth through tenth ranking firms accounted only for a further 12.6 percent. Such a breakdown reveals not only that 65 percent of the market was controlled by less than 25 percent of the top firms, but it also highlights the further significance of the big four with approximately 51 percent, and the "big two," including Amerock, with a 37 percent share.

[13] 5 U.S.C. § 554 (1970).

[14] 332 U.S. 194 (1947).

[15] 469 F.2d at 501. The complaint had explicitly alleged both actual and potential theories of illegality. Stanley Works, [1970-1973 Transfer Binder] 3 TRADE REG. REP. ¶ 19,646, at 21,692 (FTC 1971). The Commission characterized the action as presenting a "mingling of the effects which are traditionally cognizable under the discrete categories of actual and potential competition." *Id.* at 21,697. Furthermore, the Commission concluded that "Stanley can be regarded both as an actual and potential competitor in the stipulated market. The precise label attached to its status is of little importance." *Id.* While these few statements, and the frequent mention of present concentration of the market, on their faces, stress inclusion of the theory of actual competitive injury, the thrust of the opinion is dominated by analysis of "management" determinations to enter the market through acquisition, and of the entry barriers. The Commission opinion itself summed up the examiner's findings as follows:

> [t]he examiner found that respondent's [Stanley's] acquisition of Amerock lessened competition because (1) absent the merger Stanley *would probably have entered the cabinet hardware market on its own* . . . ; (2) the elimination of Stanley as a *potential competitor had the effect of increasing the barriers to entry*. . . . ; (3) Stanley, as a *potential competitor, had an influence on the performance* of the cabinet hardware market.

Id. at 21,693 (emphasis added).

Two other contentions were advanced by Stanley. The first dealt with the reliance by the FTC on the "toe-hold theory," which considered whether Stanley could have entered the market by merging with a much smaller firm. Since the hearing examiner had not considered the "toe-hold theory" of potential competition, Stanley claimed that it would be a denial of due process for the FTC to rely on this theory in its decision. Although the Commission did find some support in the "toe-hold theory," Stanley Works, [1970-1973 Transfer Binder] 3 TRADE REG. REP. ¶ 19,646, at 21,701 (FTC 1971), the Second Circuit agreed with Stanley that the Commission's consideration was improper. However, since the court was limiting its view to actual competition, the error was not deemed prejudicial. 469 F.2d at 508 n. 24. Additionally, Stanley claimed that it was denied a fair hearing be-court acknowledged that the Commission had relied upon theories of both actual and potential competitive injury.[16] However, Judge Kaufman, writing for the majority, concluded that the record "establishes clearly" that the actual competition theory was the basis of the FTC's decision and that any doubts were "convincingly dispelled" by a careful reading of the Commission's opinion.[17] Accordingly, the court limited its review to the elements of actual competitive injury.[18]

Unfortunately, the court has taken the problem too lightly. By pointing to a few specific instances of the use of the word "actual," it was satisfied that the Commission had relied on the actual theory, and that Stanley had notice of it.[19] Despite the majority's conclusion, this was obviously not so clear and understandable either to Stanley[20] or dissenting Judge Mansfield.[21] In light of this conflict, a serious question arises as to whether the *Stanley* majority complied with the spirit of *Chenery*. Primarily, *Chenery* requires the court to decide the merits "solely by the grounds invoked by the agency."[22] Although the agency is not required to crystallize the basis of its decision, the reviewing court should not be forced to struggle through ambiguity and inconsistency to ascertain an acceptable rationale. Instead, *Chenery* qualifies the reviewing court's task by reciting this important corollary:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth *with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a*

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cause the Commission had prejudged the facts. The court found this contention to be "without merit." *Id.*

16 469 F.2d at 501.

17 *Id.* at 502-03.

18 *Id.*

19 *Id.*

20 Stanley's brief to the court was barren of argument on the theory of actual competition. In the "Introduction to its Argument," Stanley stated:

> While the Commission's analysis of the case is somewhat difficult to follow, *it is evident that the fundamental theory of illegality on which its decision is based is that the merger with Amerock eliminated Stanley as a potential significant competitor in the relevant cabinet hardware market.* The entire thrust of its opinion is directed at supporting the proposition that (a) but for the merger Stanley might have entered the market on a significant scale, either by internal development or by "toe-hold" acquisition, and (b) the elimination of Stanley as a potential entrant into that market had competitive significance.

Brief for Petitioner at 19 (emphasis added). In its reply brief, Stanley, having become aware that the Commission was proceeding on the theory of actual competitive injury, directed its argument to the de minimis nature of its merger. This argument, as the court points out, had been raised earlier, but was dropped when it appeared the Commission was limiting its grounds to the loss of a potential competitor. Reply Brief for Petitioner at 5 n.4.

21 469 F.2d at 509-10 (Mansfield, J., dissenting).

22 332 U.S. at 196.

> *court be expected to chisel that which must be precise from what the agency has left vague and indecisive.*[23]

If *Chenery* is to afford protection against unwarranted judicial affirmance of agency determinations its spirit as well as its letter should be followed. The Second Circuit found no difficulty in finding an "actual theory" in an agency opinion dominated by the potential concept, thus deeming itself to have complied with *Chenery*. It is doubtful, however, that *Chenery* was satisfied.[24]

Having disposed of the *Chenery* question, the court turned to the merits. The opinion revolved around two major concepts: (1) whether, by virtue of Stanley's 1 percent share of the market, the merger would substantially affect competition; (2) whether Stanley's entrance into the market by merger rather than on its own violated the incipiency standard of the Clayton Act.

In order to evaluate the effect on competition, Judge Kaufman focused on the degree of concentration in the industry.[25] The mere fact that an industry is concentrated, does not preclude all mergers. To establish a violation of section 7 substantial competitive injury must be shown. However, where an industry is concentrated the competitive injury is more likely to be substantial. Traditionally, courts have invalidated mergers where the industry exhibits both characteristics of

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[23] *Id.* at 196-97 (emphasis added). Simply stated, the courts cannot adopt a *post hoc* rationale for agency action. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). *Accord,* Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971). *See also* Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); Douds v. Int'l Longshoreman's Ass'n, 241 F.2d 278 (2d Cir. 1957).

[24] *See* 469 F.2d at 509-10 (Mansfield, J., dissenting). It is submitted that the incipiency standard of the Clayton Act, *see* note 3 *supra,* should bear the responsibility for this dilemma. The very fact that the incipiency standard requires "a prediction of [a merger's] impact upon competitive conditions in the future," United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963), necessitates a consideration of *potential* anticompetitive effect. Thus, even if the Commission's decision is grounded on *actual* effect, some consideration of *potential* effect is unavoidable. Moreover, the intermingling of potential and actual theories increases where the subject market is more concentrated.

[25] 469 F.2d at 504. *See* note 12 *supra.* However, concentration itself is not a violation of the Clayton Act. There still must be a finding that the particular merger challenged will probably result in an anticompetitive effect. Handler, *Some Unresolved Problems of Antitrust,* 62 COLUM. L. REV. 930 (1962).

> Although a merger reduces the number of competing companies by one, although it increases concentration *pro tanto,* although it confers an economic advantage, or even if it forecloses competitors from one outlet or source of supply while a sufficient number of others remain available — why should it be inhibited if competition is not likely to be substantially lessened in the appropriate market?

Id. at 947 (footnotes omitted). To be condemned, the concentration must exhibit anticompetitive effects. "This is a truism which is frequently overlooked." *Id.* at 951. *See also* Turner, *supra* note 4, at 1395.

oligopoly and a discernible trend toward further concentration.[26] At the time of the merger in *Stanley*, there were some fifty to fifty-five firms competing in the industry,[27] with approximately half the market share being controlled by the "big four."[28] Relying principally upon *United States v. Pabst Brewing Co.*,[29] and *United States v. Aluminum Co. of America*,[30] the court emphasized that when a market is controlled by so few sellers, the small but important competitors should be preserved. While both decisions involved a greater percentage of market share than Stanley's 1 percent, they do suggest that such a share is not assumed to be de minimis.[31] In the instant case Stanley's merger with Amerock would add 1 percent to the dominant forces and, more importantly, to the leading firm. While bare statistics are not dispositive of the question, frequently they are suggestive of the outcome. In fact, several authorities have urged that such percentage shares be presumptive of an anticompetitive effect.[32]

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26 *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546, 550-51 (1966) (national market — number of breweries decreased from 714 in 1934, to 229 in 1961; state of Wisconsin — number decreased from 77 in 1955 to 54 in 1961; in the tri-statè area — the number decreased from 104 in 1957 to 86 in 1961); United States v. Continental Can Co., 378 U.S. 441, 445 (1964) (Continental had acquired 21 metal container companies since 1913); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 331 (1963) (number of commercial banks had decreased from 108 in 1947 to 42 by the time of the suit).

27 469 F.2d at 504. Subsequent to the merger, the number of firms in the industry increased to approximately 97. *Id.* at 514. In light of the vitality this fact illustrates, and in the absence of any evidence to the contrary, it is clear that no trend toward further concentration was present in *Stanley*.

28 *See* note 12 *supra*. The four leading firms, controlling approximately 50 percent of the market were Amerock Corp., National Lock Co., Ajax Hardware Corp., and Knape & Vogt Mfg. Co.

29 384 U.S. 546 (1966). The beer industry involved was viewed in several distinct geographic markets. In the national market Pabst was tenth, and Blatz ranked eighteenth. The resulting merger produced the fifth largest national brewer with 4.49 percent. In the state of Wisconsin, Blatz was the leader and Pabst ranked fourth; the resulting merger produced 23.95 percent of the market. In the tri-state geographic market, Blatz ranked sixth, with 5.84 percent, and Pabst was seventh with 5.48 percent. The national market was marked by a rapid concentrating trend. The Court found that the merger would be anticompetitive in *all* three areas. In reaching this decision the Court held that it was immaterial whether the concentrating trend was due to mergers or not. While *Pabst* involved such a trend, it is significant to note that the percentage shares of the merging parties in all three geographic areas were smaller than the resulting share in *Stanley*.

30 377 U.S. 271 (1963). While the acquired firm's share was only 1.3 percent, the Court stressed the fact that "no more than a dozen companies could account for as much as 1%." *Id.* at 281. In *Stanley*, no more than *ten* firms could account for as much as 1 percent.

31 In *Alcoa*, the Court pointed to the legislative intent as preventing those small "accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act test against them.'" 377 U.S. at 280, *quoting* S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950). For a lucid and pointed example of the consequences of waiting for concentration to continue to the extreme, see the Appendix to Justice Douglas' concurring opinion in United States v. Pabst Brewing Co., 384 U.S. 546, 553-55 (1966).

32 While there are no presumptions per se, the government has issued these guidelines:

However, the Second Circuit did not indulge in this per se approach. Instead, the court reached the conclusion that the combination of Stanley's 1 percent with Amerock's 22-24 percent was in fact anticompetitive.[33] When a market is controlled by so few sellers, the shares of each take on added significance.[34] In *Stanley*, only nine firms could account for over a million dollars in sales. As the tenth ranking firm,

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Market Highly Concentrated

In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

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

Market Less Highly Concentrated

In a market in which the shares of the four largest firms amount to less than approximately 75%, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

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

The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration.

Justice Dep't Merger Guidelines, 1 TRADE REG. REP. ¶ 4510, at 6884. Professor Bok would prohibit any merger where the dominant firm in the industry increased its share by more than 2-3 percent. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 308-29 (1960). Another authority would prohibit any acquisition by a firm controlling 30-40 percent of the market. Darnell, *Bank Holding Companies and Competition: The First National Bancorporation Case*, 89 BANKING L.J. 291, 315 (1972). Professor Stigler suggests: "Every merger by a firm which possesses one-fifth or more of an industry's output after the merger shall be presumed to violate the statute." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955) (footnotes omitted). Professors Kaysen and Turner also suggest such a standard:

> Any acquisition of a competitor by a firm with 20 percent or more of its market is prima facie illegal. . . . Any merger of competitors who together constitute 20 percent or more of a market is prima facie illegal.

ANTITRUST POLICY, *supra* note 12, at 133. *See also* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts — From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 346-66 (1967); Markham, *supra* note 4, at 521-22. *But cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963). The Court, while not adopting or rejecting these presumptive suggestions, stated "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." *Id.* More importantly, the Court would not allow a negative inference should the percentages fall below thirty. *Id.*

[33] 469 F.2d at 508. The very fact that a 1 percent share is among the top ten in an industry of fifty firms indicates that the bulk of the market is controlled by few, and therefore the small, but significant in terms of competitive position, require closer scrutiny.

[34] 469 F.2d at 507. The court found much support for this in United States v. Aluminum Co. of America, 377 U.S. 271 (1964). Alcoa had sought to acquire Rome, a competitor having 1.3 percent of the market, ranking ninth. The Supreme Court invalidated the proposed merger concluding that a substantial lessening of competition would result. *Id.* at 280.

therefore, Stanley was the leader of the smaller firms and its merger would have a substantial effect on the competitive structure.

Judge Kaufman next turned to the decision by Stanley not to enter the market de novo but instead to seek a merger. This analysis involved two aspects, *viz.*, the effect on the level of competition and the foreclosure of future deconcentration. Belying his express intention to review solely on the theory of actual injury, Judge Kaufman lapsed into an approach which considered the elements of both actual and potential competitive injury, occasionally intertwined beyond distinction. His opinion stressed the finding that Stanley's own records revealed that Stanley viewed itself as having a significant competitive impact on the market, specifically that its entry through merger would help raise prices.[35]

Stanley's study of the merger route was precipitated by its comparatively sluggish growth in the market. It appeared that Stanley's hardware division had considered the merger advisable initially, but Amerock was not willing.[36] Thereafter, other long range alternatives were considered. These included efforts to increase new product manufacture, to further develop manpower and programs in cabinet hardware, and to continue to explore the possibility of acquisitions.[37] According to Stanley, its poor reputation, the cost of die-casting machinery, and its lack of know-how and of distributive channels made expansion inadvisable.[38] What matters principally is not whether Stanley considered itself a potential entrant, but what those in the market thought.[39] The mere anticipation of Stanley's entrance would deter

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35 One document stated that a specific advantage of the merger would be that it *"would knock out a competitor."* Stanley Works, [1970-1973 Transfer Binder] 3 TRADE REG. REP. ¶ 19,646, at 21,694 (FTC 1971). Another report expressed the view that the merger by Stanley would "contribute to a reversal in the downward trend in prices and profits." *Id.* at 21,701 n.17. Despite Stanley's claims that the memoranda involved were not reflective of "management" policies, the FTC concluded, not only that Stanley was aware of its own competitive significance, but also that Stanley possessed an anticompetitive motive in seeking the merger.

36 469 F.2d at 517-19.

37 Stanley Works, [1970-1973 Transfer Binder] 3 TRADE REG. REP. ¶ 19,646, at 21,696-700 (FTC 1971).

38 469 F.2d at 518-19. In United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 616 (S.D.N.Y. 1958), the court said of such a situation:

> It is undoubtedly easier and cheaper to acquire and develop existing plant capacity than to build entirely anew. Each defendant in urging the merger takes a dim view of its ability to undertake, on its own, a program to meet the existing and anticipated . . . [market demands]. . . . The defendants' apprehensions, which, of course, involve matters of business judgment and, in a sense, matters of preference, are not persuasive. . . .

39 *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973). "While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care." *Id.* at 548 (Marshall, J., concurring). *See also* 18 CATH. U.L. REV. 219, 222 (1968).

growth attempts by cabinet hardware producers. Accordingly, the court rejected Stanley's argument that the merger would have no impact on the market structure. Judge Kaufman concluded that to permit this merger would tip the lethargic competitive structure into rigidity and further concentrate a lifeless oligopolistic market.[40]

Even if there had been no evidence of Stanley's intention to enter the market de novo, it would have been necessary to determine whether Stanley exerted a significant pro-competitive influence by remaining in the wings. The FTC did not elaborate on this aspect of its potential competition case, but rather found that it was reasonably probable that Stanley may have entered the market sometime in the future, and consequently its loss as a potential competitor itself was sufficient to result in anticompetitive consequences.[41] The significance of the periphery factor was recently expressed by the Supreme Court in *United States v. Falstaff Brewing Corp.*[42] Therein, the Court stated that "the fact that Falstaff and its management had no intent to enter *de novo*, and would not have done so, does not *ipso facto* dispose of the potential competition issue."[43] Moreover, the concurring opinion of Justice Marshall suggests that "even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date."[44] The incipiency

40 469 F.2d at 505. *Cf.* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973). Although *Falstaff* was a potential competition case, it is significant here because the Court explicitly left open 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," although a firm merged rather than entered de novo. *Id.* at 537. Applying this rationale to *Stanley*, several conclusions can be reached. Presumably, even if no discernible harm could be found from Stanley's merger, there is still an "open question" whether it would have avoided violation of the Clayton Act.

41 Stanley Works, [1970-1973 Transfer Binder] 3 TRADE REG. REP. ¶ 19,646 (FTC 1971).

42 410 U.S. 526 (1973).

43 *Id.* at 533.

44 *Id.* at 561 (Marshall, J., concurring).

Professor Turner has suggested three minimum conditions for a finding that a firm is "at the edge":

> 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, *supra* note 4 at 1362-65. Turner suggests even a stricter test if the *only* anticompetitive effect the government asserts is the elimination of a potential entrant. In those instances he goes beyond a reasonable likelihood of entry and urges that there "be clear proof that the firm would *in fact* have entered." *Id.* at 1384 (emphasis added). *Cf.* United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971), *aff'd by an* standard requires an examination of the peripheral effects of the merger. Although this bespeaks a consideration of the lessening of potential competition, the court maintained that the basis of its decision was the lessening of actual competition. The majority did not deal with the *Chenery* problems this might raise, but justified its position by pointing to the concentration within the market. Relying on Supreme Court dictum,[45] the Second Circuit held "that the industry is sufficiently concentrated to invoke the proscriptive sanction of the Clayton Act under the circumstances of this case."[46] Thus, Stanley's loss through merger was determined to be harmful for two reasons: first, it eliminated a small, but significant competitor in a concentrated industry; secondly, it added to the share of the *dominant* firm, thereby increasing market concentration and foreclosing eventual deconcentration.

Judge Mansfield vigorously dissented. Primarily, he felt that the court's consideration of the merits of the "actual theory" was a blatant violation of *Chenery*.[47] Furthermore, in the merits of neither the actual nor potential theories could he find a substantial anticompetitive effect.[48] Emphasizing the lack of any concentrating trend and looking beyond the parties' stipulations to the actual competitive overlap, he found that the actual loss in competition was .35 percent,[49] de minimis for a violation.[50]

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equally divided Court, 410 U.S. 577 (1973) (per curiam), *discussed in* Darnell, *Bank Holding Companies and Competition: The First National Bancorporation Case*, 89 BANKING L.J. 291 (1972).

45 469 F.2d at 504. Judge Kaufman quoted the opinion of Mr. Justice White in United States v. Continental Can Co., 378 U.S. 441, 461-62 (1964):

> [W]here there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.' Brown Shoe Co. v. United States, 370 U.S. at 345, 346, 82 S. Ct. [1502] at 1535. Where 'concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.' United States v. Philadelphia National Bank, 374 U.S. 321, 365 n.42. . . .

46 469 F.2d at 504.

47 Judge Mansfield recognized that the Commission had "alluded" to the actual competition, but believed that "the real basis of its decision was its finding of foreclosure of potential competition." 469 F.2d at 510.

48 *Id.* at 509.

49 *Id.* at 513.

50 Had there been no stipulations this viewpoint might have succeeded. Judge Mansfield points out that a breakdown suggests an actual competitive overlap of $248,000, which on a nationwide scale is significantly smaller than previous decisions have found for a violation. But the parties did stipulate figures of $814,000 for Stanley, and $18,000,000 for Amerock; and they did stipulate that these were in one market. As Judge Kaufman aptly noted, "No statistical legerdemain justifies disregarding the binding stipulation that controls this case. . . ." 469 F.2d at 506. However, the dissent does suggest a line of inquiry which appears meritorious, *viz.*, what dollar figure would be a bar to a finding of substantiality? While it is true that the figure will never be viewed in a vacuum, but in relation to the competitiveness of the industry, there remains the question of how much weight

Turning to the potential competition allegation, Judge Mansfield found an even weaker argument. Although the Commission had relied heavily upon documents from Stanley as indicative of managerial intent to expand or merge into the market,[51] Judge Mansfield concluded that many of these memoranda were from the lower level officers of Stanley, and the ultimate decision against de novo entry had been made by the corporate managers.[52] Moreover, Judge Mansfield pointed out, there was not a recognizable peripheral influence being exerted by Stanley.[53] The dissent suggested that the majority had in fact seized upon the FTC's mention of actual competition because the case against Stanley on potential competition grounds was obviously inadequate.[54]

Notwithstanding the tenuous application of *Chenery* to the FTC's decision,[55] *Stanley* represents an attempt by the Second Circuit to imbue section 7 of the Clayton Act with added vitality. Relying on the concepts of substantiality and incipiency, the court held that it is no longer necessary to find a trend toward increased concentration when the market structure is already concentrated. By invalidating the merger between Stanley and Amerock the Second Circuit followed the admonition expressed by District Judge Weber in *United States v. Brown Shoe Co.*:

> We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same.[56]

In recognizing the dangers of the step by step concentration process, the Second Circuit concluded that, in a concentrated market, the industry leader may well find that "little bite" is forbidden fruit.

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should the dollar foreclosure be given. The focus of the courts and the authorities, *see* note 12 *supra*, has been traditionally on the percentage share foreclosed, but the cases frequently resort to the magnitude of the dollar volumes to bolster this. Would the Commission in *Stanley* have proceeded if at least *this* figure were not substantial? *Cf.* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (though a section 3 case, the Court found a $128,000,000 exclusive contract to be only .77 percent of the market and consequently insubstantial).

51 *See* note 35 *supra*.

52 469 F.2d at 517-19.

53 *Id.* at 519.

54 *Id.* at 510.

55 *See* notes 14-24 *supra*.

56 179 F. Supp. 721, 740 (E.D. Mo. 1959).