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Antitrust Law--"Conglomerate" Merger--Large, Diversified Manufacturer's Acquisition of Leading Producer in Oligopolistic Market Held Unlawful Under Section 7 of Clayton Act (Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967))

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RECENT DECISIONS

ANTITRUST LAW — "CONGLOMERATE" MERGER — LARGE, DIVERSIFIED MANUFACTURER'S ACQUISITION OF LEADING PRODUCER IN OLIGOPOLISTIC MARKET HELD UNLAWFUL UNDER SECTION 7 OF CLAYTON ACT. — Respondent, a large, diversified manufacturer of household products, acquired the assets of Clorox, the nation's leading producer of liquid bleach. The United States Supreme Court, affirming the Federal Trade Commission's order of divestiture, *held* that such a product-extension merger, in an already highly concentrated market, was unlawful under Section 7 of the Clayton Act. The Court's conclusion was based upon two fundamental grounds: (1) the probable anti-competitive effect created by the superior advertising and production benefits which the acquirer enjoyed, in comparison to other liquid bleach producers; and, (2) the elimination of market competition by the destruction of the acquirer as a potential competitor. *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

Section 7 of the Clayton Act, although originally enacted to apply to stock acquisitions rather than pure asset acquisitions or mergers, was amended in 1950 to include all mergers or acquisitions which substantially lessen competition.[1] Since the purpose of Congress was to combat all anti-competitive practices, it intended the amended statute to be applicable, when appropriate, to all types of mergers and acquisitions, whether vertical, horizontal or conglomerate.[2] A horizontal acquisition occurs when one company acquires the stock or assets of a competitor in the same product or service market.[3] A vertical merger occurs when the acquiring firm is an actual or potential customer or supplier of the

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[1] The appropriate provisions of section 7 are:

> 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 tend to create a monopoly.

64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958), *amending* 38 Stat. 731 (1914) (emphasis added).

[2] 2 U.S. CODE CONG. & AD. NEWS 4293 (1950).

[3] Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L. J. 672 (1958). *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

acquired firm.[4] Finally, a conglomerate merger occurs when neither a horizontal nor vertical merger is present, *i.e.*, when there is neither direct competition nor a buyer-seller relationship.[5]

Although the extended coverage of the Clayton Act had been available since 1950, it was not until *Brown Shoe Co. v. United States*[6] that the Supreme Court first established criteria for other than stock acquisitions. The facts in *Brown* were characteristic of a vertical merger between the nation's fourth largest shoe manufacturer and a retailer owning and operating the nation's largest independent chain of family shoe stores. Moreover, the merger appeared to have horizontal aspects since it involved two potentially competing shoe retailers operating in different geographic markets at the time of the merger. In declaring this horizontal-vertical merger to be unlawful under section 7, *Brown* developed practical guidelines for judicial analysis of a merger's anti-competitive effects. The Court indicated that the fundamental principle to be used in determining whether a merger tended to substantially lessen competition would be its reasonable probability rather than its certainty to create such an effect. Thus, clear-cut infringements on competition were not necessary for a section 7 violation.[7]

The Court in *Brown* also identified certain factors to be considered in determining the *probable effects* of a merger: the particular industry,[8] the size and structure of the acquiring firm,[9] the concentration within the particular industry,[10] the purpose of the merger,[11] and the opinions of competitors in the relevant markets as to the anti-competitive effect of the merger.[12] By

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[4] Blair, *supra* note 3. *See* United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

[5] It is important to note that conglomerates may range from the pure conglomerate, involving no economic relationships between the businesses of acquired and acquiring firms, to the mixed conglomerates where some aspects of horizontal or vertical mergers are present. The category also includes acquisitions of a company manufacturing a different product which is, nevertheless, related to a product or products of the acquiring company because it can be sold through the same distribution channels, or made a part of the same research and development techniques. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1315 (1965).

[6] 370 U.S. 294 (1962).

[7] *Id.* at 323. *See also* United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[8] 370 U.S. at 322.

[9] *Id.* at 344.

[10] *Id.* at 345.

[11] *Id.* at 329.

[12] *Id.* at 344. "[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.* at 322 n.38.

inference, the Court extended this probable effect theory to conglomerate mergers as well—section 7 applied "not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition. . . ."[13]

Even with such standards, however, the primary importance of *Brown* appeared weakened when applied to conglomerates because of the differing views as to the economic effect of a conglomerate merger.[14] In one attempt to develop standards for judging conglomerates, a lower federal court apparently determined the lawfulness of a conglomerate merger under section 7 by weighing the benefit accruing from the acquisition against the disadvantages of any anti-competitive effect.[15] In this case, Lever Brothers, a leading soap manufacturer, acquired the rights to a low sudsing detergent from Monsanto Chemical Company. Until the time of the merger, Lever had been unsuccessful in its attempts to market such a detergent. In deciding that there was no violation of section 7, the court found an appreciable benefit to competition due to the fact that Monsanto was preparing to drop this product from its line because of its inability to market the detergent at a profit.[16]

Further confusion arose as to the applicability of section 7 to conglomerate mergers due to the Supreme Court's hesitancy to designate seemingly conglomerate mergers as such. Rather, the Court preferred to avoid the problem by designating these mergers as vertical or horizontal wherever possible. An example of this can be found in *United States v. Aluminum Co. of America*.[17] In this case, at the time of the acquisition, the acquirer was the nation's largest producer of aluminum, while most of the acquired firm's sales were of copper products. In the field of aluminum conductors, Alcoa, the acquirer, produced 27.8 percent of the nation's supply, whereas Rome, the acquired company, produced 4.8 percent of the supply. The district court treated the merger as conglomerate but upheld its lawfulness on the ground that bigness produced by a conglomerate merger, in the absence of evidence of the abuse of power because of such size, is not in violation of section 7.[18] The Supreme Court, however, reversed, holding the merger to be horizontal despite its apparent conglomerate aspects. The Court considered the relevant market to be aluminum con-

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[13] *Id.* at 317.

[14] Address by Paul Rand Dixon, Chairman F.T.C. Before Anti-Trust Section of American Bar Association, April 14, 1966, in 5 TRADE REG. REP. ¶ 50,143.

[15] United States v. Lever Bros., 216 F. Supp. 887 (S.D.N.Y. 1963).

[16] *Id.* at 898. The court stressed that it was Lever's efficiency rather than its financial status which made the merger advantageous.

[17] 377 U.S. 271 (1964).

[18] 214 F. Supp. 501, 515 (N.D.N.Y. 1963).

ductors and held such a dramatic increase in the leading firm's share of the market to be anti-competitive and violative of section 7.[19]

Another example can be found in *United States v. Continental Can Co.*,[20] wherein a leading metal container manufacturer merged with a major producer of glass bottles. The district court, in light of the *Brown* decision, held that the merger was not a violation of section 7 because there still remained formidable competition in each respective line, *i.e.*, bottles and cans.[21] The Supreme Court, however, reversed the lower court, viewing the relevant product of the acquiring and acquired firms not to be bottles or cans but, rather, drink containers. By construing the merger to be horizontal, thereby avoiding conglomerate litigation, the Court found the increased percentage of the market obtained to have an adverse effect upon competition in violation of section 7.[22]

Reluctance to meet the issue of conglomerate mergers directly did not, however, prevent conglomerate implications from arising when other types of mergers were at issue. For example, in *Reynolds Metals Co. v. FTC*,[23] a leader in the aluminum industry acquired Arrow-Bonds Inc., a producer of aluminum "florist"[24] foil. The court, in finding this to be an unlawful vertical merger, based its decision on the wealth of Reynolds and its ability to use a price war in order to eliminate competition. It was the court's contention that a merger is anti-competitive and violative of section 7 if the newly-formed firm has the economic strength to eliminate or to attempt to eliminate competition through techniques such as price-cutting.[25] Unlike the standards of *Brown*, excluding, of course, probable cause, the *Reynolds* criteria, because of the broad language used, did not appear to be limited in application to vertical and horizontal mergers.[26]

Again, in 1964, the Supreme Court indirectly established another criterion for determining a conglomerate merger's anti-

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[19] 377 U.S. at 278.

[20] 378 U.S. 441 (1964).

[21] 217 F. Supp. 761, 765 (S.D.N.Y. 1963).

[22] 378 U.S. at 461. The Court in the *Alcoa* and *Continental Can* cases thus respectively restricted and expanded the market, leaving undetermined the difficult question of a conglomerate merger under section 7. Hrusoff, *Conglomerate Mergers, Joint Ventures, Market Extensions and Section 7 of the Clayton Act*, 69 DICK. L. REV. 113, 120 (1965).

[23] 309 F.2d 223 (D.C. Cir. 1962).

[24] The acquired firm converted raw aluminium foil into a specialized by-product (green florist foil). Thus, the supplier-supplied aspects of a vertical merger arise.

[25] 309 F.2d at 229-30.

[26] For a detailed study of the applicability of this test to conglomerates, *see* C. KAYSEN & D. TURNER, ANTITRUST POLICY 134-35 (1959).

competitive effect. In *United States v. El Paso Natural Gas Co.*,[27] the Court was confronted with what was considered to be a market-extension merger.[28] El Paso had purchased 99.8 percent of the stock of Pacific Northwest, a leading midwest pipeline corporation. Prior to the merger, the acquirer supplied more than 50 percent of all gas consumed in California, while the acquired company bought gas from several areas in and outside of the United States, excluding California. The Court, deciding that the acquisition had a sufficient tendency to substantially lessen competition in California, held the merger unlawful since it had, within the *Brown* standard, a probable anti-competitive effect. In explaining the *Brown* standard, the Court stated that the mere foreclosure of potential competition was sufficient to establish a section 7 violation.[29] Neither the existence of competition, nor its reduction was necessary to determine the merger's lawfulness.[30]

Thus, by 1965, certain basic principles had evolved concerning the lawfulness of mergers under section 7 which were applicable by implication to conglomerate mergers. The *Brown* principle of reasonable probability of anti-competitive effect had been clarified by the "bigness" and "price-cutting" tests of *Reynolds* and the "potential entrant" test of *El Paso*. With these basic formulations, the Supreme Court, for the first time, determined the legality of a true conglomerate merger under section 7.

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[27] 376 U.S. 651 (1964).

[28] A market extension is created by the integration of two firms selling similar products, but in different geographical areas. It is analogous to a horizontal merger in that the principal firm is acquiring a sister firm and is similar to a pure conglomerate in that it neither involves competing firms nor does it foreclose competition. Hrusoff, *Conglomerate Mergers, Joint Ventures, Market Extensions and Section 7 of the Clayton Act*, 69 DICK. L. REV. 113, 133 (1965).

[29] 376 U.S. 651, 658-59 (1964).

[30] In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), the same conclusion was reached concerning two firms engaged in a joint venture. Here, two large producers of chemicals and chemical products formed a joint venture to enter a highly concentrated market for the production of sodium chlorate. Both companies had considered entering individually prior to the formation of the joint venture. The district court found for the defendants on the ground that the government had failed to establish proof of both firms' intent to enter the market. The Supreme Court reversed and remanded, holding that the district court had failed to consider a "reasonable probability" that one company would enter the market while the other would remain a significant potential competitor. The Court felt that this potential entrance into such an oligopolistic market was a substantial incentive to competition among those actually engaged in the market since "'[p]otential competition . . . as a substitute for . . . [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . .'" *Id.* at 174.

In *FTC v. Consolidated Foods Corp.*,[31] Consolidated, the acquiring firm, was a diversified processer and seller of food products, while Gentry Inc., the acquired firm, was a leading manufacturer of onion and garlic salts in an oligopolistic market.[32] Although the firms, prior to merger, were not competitors, the Court held the merger unlawful under section 7. The Court reasoned that such an acquisition might have the effect of solidifying and protecting Gentry's market share because of the possible reciprocal arrangement that might flow from this merger, *i.e.*, the acquired firm's position in the market would be strengthened because of the leverage given to it by affiliation with Consolidated. Stressing reciprocity as the basis for the section 7 violation, the Court was primarily concerned about the probable pressure that might be applied on middlemen who would be forced to buy from the acquired company if they desired to continue selling to the acquirer. In construing a reciprocal arrangement not to be unlawful in and of itself,[33] the Court also emphasized the importance of the position of the acquired firm before merger. If the acquired firm, prior to merger, controlled a substantial share of the market, the probability was increased that a reciprocity agreement would have anti-competitive tendencies and be in violation of section 7.

Although failing to incorporate in its decision all of the earlier principles potentially applicable to conglomerate mergers, *Consolidated* was, nevertheless, the vitally needed starting point for conglomerate litigation in the Supreme Court. Thus, following the precedent established by *Consolidated,* and the principles developed by *Brown, Reynolds* and *El Paso*, the Supreme Court, in 1967, again brought into issue the lawfulness of a conglomerate merger under section 7.

In *FTC v. Procter & Gamble Co.*,[34] the Supreme Court was confronted with a conglomerate-type merger between Procter & Gamble and Clorox, the former acquiring the assets of Clorox

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[31] 380 U.S. 592 (1965).

[32] At the time of merger, Gentry held 32% of the relevant market and, together with its leading competitor, held approximately 90% of the market. *Id.* at 595.

[33] The essence of a reciprocity arrangement "is the willingness of each company to buy from the other, conditional upon the expectation that the other company will make reciprocal purchases. . . . [W]here such a relationship is established, it prevents the competitors of each company from selling to the other company, and affords to each company whatever increase of size and strength can be derived from an accrued place as supplier to the other." C. EDWARDS, CONGLOMERATE BIGNESS AS A SOURCE OF POWER, BUSINESS CONCENTRATION AND PRICE POLICY 332 (1955).

[34] 386 U.S. 568 (1967).

in exchange for Procter stock. At the time of merger, Clorox was the leading manufacturer in a heavily concentrated industry.[35] Liquid bleach was considered to be a distinctive product, and since all such bleach could be considered chemically identical, sale of the product was highly dependent upon advertising and other sales promotions. Procter, a large, diversified manufacturer of household products, at the time of the acquisition did not produce liquid bleach although such a product would have been a natural addition to its product line and its addition had been contemplated. Furthermore, as a large company with a tremendous volume of sales and advertising, Procter received substantial discounts from the advertising media.

The Federal Trade Commission ordered divestiture of Clorox upon the finding of a substantial anti-competitive effect of the merger on the already highly concentrated industry.[36] The Commission found that the threat posed by a new entrant in a product field frequently acted as a restraint upon the pricing power of the oligopolists. It found that the present merger destroyed this restraint and, therefore, healthy competition, because of the considerable advertising and promotional advantages that a multi-product firm such as Procter enjoyed. The Commission also emphasized the greater market power of Procter in comparison to Clorox and indicated that the combination of the "bigness" of Procter & Gamble and the well established name of Clorox would be such a deterrent to new entrants in this market that the mere ability to use this competitive advantage was violative of section 7. Finally, the Commission found the elimination of Procter as a potential entrant anti-competitive because of the fact that the acquirer, absent the merger, would have counterbalanced any attempt by Clorox to increase its own market control.[37]

On appeal, the Court of Appeals, Sixth Circuit, reversed the Commission's order of divestiture. The court believed that the

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[35] At the time of acquisition, Clorox was the leading manufacturer with 48.8% of the market. Due also to the high concentration of the industry, Clorox and Purex, its leading competitor, accounted for almost 65% of the nation's sales of liquid bleach. *Id.* at 571.

[36] Procter & Gamble Co., 3 TRADE REG. REP. (1963-65 Transfer Binder) ¶ 16,673 (FTC 1963).

[37] It is important to note that in an FTC case decided one year later, the Commission held a similar merger to be unlawful predicated upon its ruling in *Procter & Gamble*. In *General Foods Corp.*, a merger took place between General Foods and S.O.S., a manufacturer of steel wool. As a result of this merger, S.O.S. was able to take full advantage of the acquirer's advertising discounts. Because it was demonstrated that S.O.S., after the merger, was able to increase substantially its market share, the conglomerate was considered to be a section 7 violation. 3 TRADE REG. REP. (1963-65 Transfer Binder) ¶ 17,161 (FTC 1964).

Commission's contentions of illegality were based on "treacherous conjecture," mere possibility and suspicion.[38] It indicated that the oligopolistic nature of the market, with Clorox as the leader, was of little impact since the existence of two-hundred smaller producers "would not seem to indicate anything unhealthy about the market conditions." [39] The court also rejected the possibility of the acquirer using its advertising budget and volume discounts to push Clorox, finding "it difficult to base a finding of illegality on discounts in advertising."[40] Furthermore, the court dismissed the Commission's contention that Procter had been eliminated as a potential competitor, finding this to be merely conjectural since "[t]here was no evidence tending to prove that Procter ever intended to enter [the liquid bleach] field. . . ." [41]

The Supreme Court reversed the court of appeals' decision and affirmed the agency's order of divestiture. Reaffirming the position in *Brown*, Mr. Justice Douglas, writing for the majority, stated that section 7 was intended to arrest any substantial anti-competitive effects of market power at their inception.[42] Because the products and the marketing and advertising of the acquired company were complementary to those of the acquiring company, the Court categorized the merger as a *product-extension*[43] rather than a purely conglomerate merger. The Court construed the Procter merger to have two basic anti-competitive effects: first, substitution of a large, experienced corporation for a smaller, but already dominant firm and thereby reducing competition and dissuading the smaller firms from competing; and secondly, the elimination of Procter as a potential competitor.[44]

In explanation of its first contention, the Court indicated that there was every reason to believe that the smaller firms would be more cautious in their competition with Procter due to a fear of retaliation, inevitably leading to a more rigid oligopoly with Procter becoming the price leader. Moreover, entrance barriers into the liquid bleach market would be heightened since Procter, because of its size and wealth, enjoyed advantages which Clorox did not— Procter could divert a large portion of its resources to meet short-term threats of new entrants by price wars and large scale advertising campaigns. Also, because of Procter's ability to incorporate Clorox's bleach manufacturing into its experienced production and advertising techniques, the merged firm's market advantage, in an

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[38] Procter & Gamble v. FTC, 358 F.2d 74, 83 (6th Cir. 1966).
[39] *Id.* at 80.
[40] *Id.* at 81.
[41] *Id.* at 82.
[42] FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).
[43] *See supra* note 28.
[44] 386 U.S. at 578.

industry where such advertising is so vital, appeared to be almost insurmountable.[45]

In support of its second conclusion, the Court found that the existence of Procter as a potential competitor had considerable influence on the market since the market's behavioral patterns were based on the actions of competitors, both actual and potential. The apparent ability of Procter to enter the market would force the competitors to keep the price of liquid bleach at a reasonable level since a high price for bleach would increase the number of entrants, thereby decreasing the profits of already competing firms. Moreover, since the oligopolistic nature of the industry tended to be conducive only to a few financially stable competitors, the Court considered the elimination of one to have a significant influence upon market flexibility.[46]

In a concurring opinion, Mr. Justice Harlan evidenced his concern about the need for a very careful treatment of conglomerates because of the advantages as well as disadvantages inherent in them.[47] He particularly took issue with what he considered to be a *res ipsa loquitur* approach in the comparatively new field of conglomerate adjudication. It was his contention that, although the Court properly adhered to the standard of probable anti-competitive effect as it was announced in *Brown*, it made no attempt to define, for the benefit of the businessman, what was a *substantial probable anti-competitive effect.* Additionally, Mr. Justice Harlan stated that, in lieu of Procter's reluctance independently to enter the liquid bleach industry, the Court should have made a reasoned analysis as to the effect, if any, of potential competitors in the industry.[48]

In the opinion of Mr. Justice Harlan, there exist four important principles which should be utilized by the courts in determining the lawfulness of conglomerate and product-extension mergers under section 7.

> First, the decision can rest on analysis of market structure without resort to evidence of post-merger anti-competitive behavior. Second, the operation of the premerger market must be understood as the

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[45] *Id.* at 579. For a look at other FTC reports similarly concerned about advertising advantages, *see* Blake & Blum, *Network Television Rate Practice: A Case Study in the Failure of Social Control of Price Discrimination,* 74 YALE L.J. 1339 (1965).

[46] 386 U.S. at 580-81.

[47] Mr. Justice Harlan stated: "A conglomerate case, however, is not only too new to our experience to allow the formulation of simple rules but also involves 'concepts of economic power and competitive effect that are still largely unformulated.' This makes clear the need for 'full investigation and analysis, whatever the cost in delay or immediate ineffectiveness.'" *Id.* at 590.

[48] *Id.* at 585-86.

foundation of successful analysis. . . . Third, if it is reasonably probable that there will be a change in market structure which will allow the exercise of substantially greater market power, then a prima facie case has been made out under § 7. Fourth, where the case against the merger rests on the probability of increased market power, the merging companies may attempt to prove that there are countervailing economies reasonably probable which should be weighed against the adverse effects.[49]

Applying these criteria to the present merger, Mr. Justice Harlan felt that the merger was violative of section 7 in that, since the other firms looked to Clorox as a price leader, the newly acquired advertising benefits would have an adverse effect upon competitive resistance in the market. However, Mr. Justice Harlan clearly indicated his belief that advertising power alone should not be considered sufficient to find a section 7 violation.[50] Thus, he contended that, for future conglomerate litigation, the courts should determine at what point advertising ceases to be an aspect of healthy competition and becomes a weapon for anti-competitive practices.

Thus, although exact definitive standards have not been established in *Procter*, what has been decided appears to have a great effect upon future section 7 litigation. Although the decision follows the probability guidelines of *Brown*, the "potential entrant" test of *El Paso*, and the "bigness" criteria of *Reynolds*, *Procter* also establishes general criteria of its own. In relying so heavily upon the expertise and advertising advantages of Procter, the Court has, in effect, extended the "bigness" argument as it was stated in *Reynolds*. There, the Court had been concerned with wealth and size as it might have affected the merged companies' ability to cut prices in an already oligopolistic market. Here, however, the Court has emphasized "bigness" in the sense of advertising power which would enable the acquiring firm to effectively stifle competition, both actual and potential, in a market almost entirely dependent on advertising capabilities. It should be noted that since all liquid bleach is basically chemically identical and since there are no close substitutes for this product, the instant case presented an ideal situation in which to introduce this "bigness"-in-advertising argument. It is easy to visualize the potential anti-competitive effects that a large-scale advertising campaign by Procter on behalf of Clorox might have on the rest of the bleach market. Thus, in its most limited application, the "bigness" rationale of *Procter* would void mergers where the acquired product possessed the twin characteristics of liquid

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[49] *Id.* at 598-99.
[50] *Id.* at 603-04.

bleach,[51] *i.e.*, substantial identity with other products on its market with no available close substitutes and an acquirer who enjoyed many advertising benefits. The *Procter* test might also be further limited to areas in which the acquired firm was, prior to the merger, a leader in its respective field.

However, since *Procter* appears to be the first case in which the Supreme Court has attempted to establish criteria for evaluating a true conglomerate merger, the question arises as to whether the rationale of this decision will be expanded. For example, if a fact pattern arises in which a national household product manufacturer merges with a shoe manufacturer, will the *Procter* rationale support divestiture if the necessary requirements are established? It would seem that an argument based upon the "bigness" test announced in *Reynolds,* combined with potential advertising "bigness" as announced in the instant case, might be successful. Since advertising is so important in all product markets, it would appear that the benefits the shoe manufacturer would receive from the well-established national firm with substantial advertising advantages would enable it to effectively curtail competition, both actual and potential.

It would seem that it is the lack of definitiveness in the rationale that makes *Procter* supererogatory in effect. The Court undoubtedly was aware of the natural tendency today of companies to merge with others which have large advertising budgets in order to gain competitive advantage. Firms such as General Foods, Bristol-Meyers, Lever Brothers, Colgate-Palmolive, and Gillette, all of whom have acquired and are continuing to acquire new brands or products through substantial mergers,[52] will have to continue to allow for the probability of challenge. Moreover, the firms will still have to estimate the chance of an adverse legal proceeding, since the instant case does not clearly establish criteria sufficient to determine whether a conglomerate merger will be anti-competitive under section 7.

In conclusion, the decision of the instant case, to some degree, seems to be a return to the rationale that, in the anti-trust area, bigness will be closely scrutinized. The net effect of this case is that many of the large firms, rather than risk the cost of long term litigation and potential orders of divestiture, will expand internally. Moreover, due to the lack of definitive standards and the lengthy procedures that will be necessary to prove anti-competitive effects under these standards, those firms which do merge will be met with fragmentary enforcement of section 7. It would

[51] Such products might include salt, gasoline and milk.
[52] Blake & Blum, *supra* note 45, at 1372-73.

appear that clear-cut violations of section 7 by means of conglomerate merger might be more readily challenged than those situations which appear doubtful under the existing standards.

CONSTITUTIONAL LAW — WARRANTLESS ARREST AND SEARCH ON THE BASIS OF INFORMER'S COMMUNICATION — PROSECUTION'S PRE-TRIAL INVOCATION OF "INFORMER'S PRIVILEGE" HELD NOT CONSTITUTIONALLY OBJECTIONABLE PER SE. — Acting on information from a confidential informer that petitioner possessed narcotics, two Illinois policemen arrested petitioner without a warrant, and during a search of his person discovered a package of heroin. Petitioner's motion to suppress the evidence of the heroin was denied, and he was convicted of unlawful possession of narcotics. On appeal, he contended that the hearing on his motion to suppress, where probable cause for arrest was in issue, was constitutionally defective since the judge had refused to compel identification of the informer on whose "tip-off" petitioner was arrested. Rejecting petitioner's claim, the United States Supreme Court *held* that in a state pre-trial proceeding where the only issue is probable cause for arrest, or search, police officers need not be required to disclose the identity of an informer if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant. *McCray v. Illinois*, 386 U.S. 300 (1967).

The informer has long been a familiar figure in the Anglo-American legal system.[1] So valuable is his role in law enforcement that the courts have developed the "informer's privilege"[2] allowing

[1] *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951). The author comments briefly on the early English practice of approvement. The approver, a party arraigned on a charge of treason or felony, would confess his guilt, and, in order to obtain a pardon, would offer to appeal and convict other criminals (appellees). The approver would be pardoned if the appellees were found guilty, but was hanged if the appellees were acquitted.

[2] Originating in the English courts, the "informer's privilege" was first used to conceal the names of those who disclosed revenue frauds. Rex v. Akers, 170 Eng. Rep. 850 (1790). *See* Note, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206, 209 n.26 (1953).