Conglomerates, Conglomerate Mergers and the Federal Antitrust Laws

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The Supreme Court stated in FTC v. Procter & Gamble Co. (Clorox)\(^1\) that conglomerate mergers are “within the reach” of section 7 of the Clayton Act\(^2\) and are to be tested by the same standard applied to all types of mergers under this federal antitrust law. A “pure conglomerate merger” was defined as “one in which there are no economic relationships between the acquiring and acquired firm.”\(^3\) While the Court’s statement was dictum,\(^4\) it provides some guidance. Why then do we find contradictory anxieties? The Staff of the Cabinet Committee on Price Stability reported in January 1969 that the Clayton Act appears “inadequate to cope with the massive industrial restructuring resulting from current conglomerate merger activity.”\(^5\)

On the other hand, the President’s Task Force on Productivity and Competition, alarmed at the effectiveness with which the present antitrust laws could be enforced against mergers of large companies, advised in 1969 that “[v]igorous action [against conglomerate mergers] on the basis of our present knowledge is not defensible.”\(^6\)

Several factors contribute to this contrasting reaction. Although its use is significantly on the rise, the conglomerate merger is a rather unfamiliar

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1 386 U.S. 568 (1967).


3 386 U.S. at 577 & n.2. Unless otherwise indicated, this article employs the classifications of mergers utilized by the Bureau of Economics of the Federal Trade Commission in its statistical reports on mergers. The Bureau places each acquisition in the classification which it judges economically most significant, even though an acquisition may involve more than one relationship. A merger is horizontal when the companies involved produce one or more of the same, or closely related, products in the same geographic market. A merger is vertical when the two companies involved had a buyer-seller relationship prior to the merger. Conglomerate mergers are classified into three subcategories. A product extension merger is one where the acquiring and acquired companies are functionally related in production and/or distribution but sell products which do not compete directly with one another. A market extension merger is one where the acquiring and acquired companies manufacture the same products, but sell them in different geographic markets. The category of other conglomerates involves the consolidation of two essentially unrelated firms. See Bureau of Economics, FTC, Stat. Rep. No. 4, Large Mergers in Manufacturing and Mining 1948-1968, at 4-5 (1969) [hereinafter cited as Stat. Rep. No. 4].

4 The Court chose to treat the matter before it as “a product extension” merger not falling within the usual categories of horizontal, vertical or conglomerate.

5 Staff of Cabinet Comm. on Price Stability, Studies 86 (Jan. 1969) [hereinafter cited as Cabinet Study].

phenomenon. Economists have not yet been very successful in evaluating the possible impact of a conglomerate merger either in an individual case or in terms of the effect of the conglomerate development on the overall economy. And, succeeding Assistant Attorney Generals in charge of the Antitrust Division have held contrary views as to the applicability of the Clayton Act to pure conglomerate mergers.

The fundamental question is whether the federal antitrust laws will prove to be reliable instruments for preserving a competitive economy in the face of a merger movement quite different in character than the one which Congress examined when it last legislated in the area in 1950. It looks as though the present conglomerate movement will require vigorous, ground-breaking applications of the antitrust laws. If the long reach of law-enforcement history is examined, apprehensions concerning the future are warranted. The antitrust laws failed signally to play an effective part at critical times during the first two merger movements experienced after the Sherman Antitrust Act became law in 1890. The Attorney General, the Federal Trade Commission (FTC), the Supreme Court and Congress must share the blame for those failures. Yet, if the student regards the high degree of success which the Government has enjoyed in merger cases before the Supreme Court over the past 10 years, he has reason to be optimistic, provided the Attorney General seeks vigorously and imaginatively to regulate the merger movement. It is this possibility that apparently alarmed the Presidential Task Force in 1969.

In the short space allowed for this essay, I propose to examine some aspects of the conglomerate merger development which warrant a vigorous antitrust enforcement by the Government, and to express a few critical views of current developments.

THE CONGLOMERATE PHENOMENON

The economy is currently in the course of the third and, by far, the longest of the three major merger movements which have occurred since

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7 Potentially anticompetitive mergers may be allowed to proceed because economic theory and analytical foresight are inadequate to predict anticompetitive effects in specific cases, even though there may be good reason for believing that some classes of mergers, considered in the aggregate, are harmful to competition. 1968 PRESIDENTIAL TASK FORCE REPORT ON ANTITRUST POLICY, 115 CONG. REC. 5642, 5646 (daily ed. May 27, 1969) [hereinafter cited as NEAL TASK FORCE REPORT].

8 The present Assistant Attorney General is of the opinion that the law is applicable. McLaren, Mergers, Acquisitions and Joint Ventures, 5 TRADE REG. REP. ¶ 50, 244 (1969). His predecessor did not believe the present law reached the purer forms of conglomerate mergers. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1313, 1393-95 (1965).

9 Act of July 2, 1890, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq. (1964). The peak years of the first movement were 1898 through 1902. The second took place in the years 1926 through 1930. The third began in 1943 and has continued down to the present time. STAFF REPORT OF SELECT HOUSE COMM. ON SMALL BUSINESS, 87TH CONG., 2D SESS., Mergers and Superconcentration: Acquisition of 500 Largest Industrial and 50 Largest Merchandising Firms 9-12 (Comm. Print 1962).

1890. It began rather modestly during World War II, became more active during the 1950's and early 1960's, and accelerated rapidly during 1967, 1968 and early 1969. The Staff of the Federal Trade Commission reported a total of 4,003 mergers in 1968, an increase of 68 percent over 1967.\textsuperscript{11} Acquisitions of manufacturing and mining firms in 1968 were over 11 times as numerous as those in 1950, and almost 60 times larger in terms of assets acquired.\textsuperscript{12}

There are several features of this development, in addition to its vigor, which justify a re-examination of federal antitrust policy: the increased use of conglomerate mergers; the activities of the large conglomerates; the rise in aggregate concentration (the share of all manufacturing held by the largest firms); and the disappearance of sizeable firms as independent entities.

A. \textit{Increased Use of Conglomerate Mergers}

The hallmark of the current movement, apart from its length and size, is its conglomerate character. Conglomerate acquisitions accounted for over $11 billion of the $12.6 billion of assets acquired through large acquisitions of manufacturing and mining firms in 1968.\textsuperscript{13} They accounted for 84 percent of the number and 89 percent of the assets of all such acquisitions recorded for that year.\textsuperscript{14} Between 1964 and 1968, the number of large conglomerate acquisitions in manufacturing and mining rose from 62 to 161 per annum, an increase of over 150 percent, while the average asset size of the firms acquired increased from $29 million to $68.5 million.\textsuperscript{15}

B. \textit{Activities of the Large Conglomerates}

A striking phenomenon of the times and one which has aroused both interest and apprehension on the part of investors as well as commentators on the state of the economy, is the rise of the "conglomerate" firm, an enterprise engaged in a number of industrial activities serving more or less distinctive markets. Eleven of the 25 firms which had been the most active acquirers since 1960 were classified in a 1969 FTC \textit{Staff Study} as new conglomerates.\textsuperscript{16} "Twenty years ago, most of them were not in existence, were unheard of, were very little heard of, or were practically single product firms."\textsuperscript{17} Their merger activities are impressive. As a group, they acquired almost 500 firms with total assets amounting to some $12 billion from 1961 through 1968. Eighty percent of this total amount is accounted for by slightly over 40 acquisitions involving firms with assets of $50 million or more.\textsuperscript{18}

\textsuperscript{11} \textit{BUREAU OF ECONOMICS, FTC. STAT. REP.  NO. 3, \textit{CURRENT TRENDS IN MERGER ACTIVITY}, 1968, at 1, 8 (1969) [hereinafter cited as \textit{STAT. REP. NO. 3}].}
\textsuperscript{12} \textit{BUREAU OF ECONOMICS, FTC, \textit{ECONOMIC REPORT ON CORPORATE MERGERS}, App. Table 1-3, at 667 (1969) [hereinafter cited as \textit{FTC REPORT}].}
\textsuperscript{13} \textit{STAT. REP. NO. 3 at Table 11.}
\textsuperscript{14} \textit{Id. at Table 10.}
\textsuperscript{15} \textit{Id. at Table 11.}
\textsuperscript{16} \textit{FTC REPORT at 268, 269.}
\textsuperscript{17} \textit{Id. at 268-69.}
\textsuperscript{18} \textit{Id. at 276.}
C. Rise in Aggregate Concentration

The largest companies in the country, as a group, have been the most active acquirers of other firms since World War II. Companies with asset size of $250 million or more acquired 37 percent of the firms and 56.3 percent of all assets acquired between 1948 and 1968. Companies with asset size between $100 and $250 million acquired 24 percent by number and 21 percent of the assets over the same period.19 The 200 largest corporations expanded greatly the number of industries in which they participate.20 The largest firms have become more powerful as economic entities in the process. It has been estimated that by 1967 the hundred largest corporations held the same share of manufacturing assets as the 200 largest held in 1948.21

D. Disappearance of Sizeable Firms as Independent Entities

Since World War II, mergers have taken a heavy toll of the medium-sized companies, the very companies with the greatest capacity to compete with the largest 200 firms. During the years 1948 through 1968, there were 1,282 acquisitions of large manufacturing and mining firms with assets totaling over $52 billion. Conglomerate mergers account for 72.7 percent of these acquisitions.22 It has been estimated that if firms with assets in excess of $10 million had not been acquired by mergers over the past 20 years, there would have been at least 50 percent more companies with assets of $10 million or more operating as independent businesses in 1969,23 firms most likely to provide competition for the largest corporations.

The conglomerate merger development has not been monolithic. No two mergers are ever quite alike. Many have been mixed, with vertical or horizontal as well as conglomerate aspects. In the case of conglomerate mergers, there has been an evolution over the past few years in the nature of the acquisition actually made. Product extension mergers accounted for over 90 percent of conglomerate mergers (in terms of assets) in 1964, but less than 45 percent of such mergers in 1968.24 Market extension mergers were of little importance in either year. The remarkable evolution has occurred in the “other conglomerate” classification which accounted for about 5 percent of the large conglomerate acquisitions in 1964. Four years later, 49 percent of the large conglomerate and 43 percent of all large acquisitions were classified as “other conglomerate.”25 This last development represents a rapid exploitation of what businessmen have been advised is a regulatory gap in

19 Id. at 36.
20 CABINET STUDY at 81.
21 Id. at 82.
22 STAT. REP. No. 4 at Table 2.
23 FTC REPORT at 47.
24 In terms of assets, conglomerate acquisitions totalled $1.7 billion in 1964 as against $11.1 billion in 1968. STAT. REP. No. 3 at Table 11.
25 Id. at Tables 10 & 11.
the antitrust laws, a state of mind encouraged in some respects down to the present time by the Federal Trade Commission.\textsuperscript{26}

**THE FEDERAL ANTITRUST LAWS: UNCERTAIN MOLDERS OF CHANGE**

We are concerned with two statutes: the Sherman Act of 1890\textsuperscript{27} and section 7 of the Clayton Act of 1914, as amended in 1950 by the Celler-Kefauver Act.\textsuperscript{28}

**A. The Sherman Act**

- Section 1 of the Sherman Act makes agreements, combinations and conspiracies which restrain interstate and foreign commerce unlawful. Under section 2 of the Act monopolization and attempts to monopolize any part of interstate or foreign commerce are unlawful. The Act was intended to combat the "trusts" which, through acquisitions and predatory practices, had achieved such dominant positions in the economy that they were beyond the capacity of state governments\textsuperscript{29} to regulate under the common law.\textsuperscript{30}

Chief Justice Hughes referred to the Sherman Act in 1933 as "a charter of freedom" with "a generality and adaptability comparable to that found to be desirable in constitutional provisions."\textsuperscript{31} Had the Supreme Court taken a similar view of the Act when dealing with the sugar "trust" in 1895, the statute might have played a significant role in the merger movement which reached its peak between 1898 and 1902. Instead, the American Sugar Refining Company was allowed to increase its control of sugar refining in the United States from 65 percent to 98 percent through acquisition of three independent refiners, the Supreme Court holding in *United States v. E. C. Knight Co.*\textsuperscript{32} that the Sherman Act was inapplicable because the mergers involved production and manufacturing rather than commerce.

Many important mergers in American industrial history occurred during the paralysis of law enforcement which followed the *Knight* decision. Some

\textsuperscript{26}For example, the failure of the Federal Trade Commission to endorse positively the FTC Report prepared by its Staff and submitted to Congress in the fall of 1969.


\textsuperscript{29}The states found that they could not regulate the anticompetitive activities of the corporations which they had chartered, after such corporations became very large. When challenged under state law, management could simply transfer control activities to another corporation chartered in a friendly state.

\textsuperscript{30}Monopolies and other restraints of trade were regulated under the common law. The Sherman Act was the result of a conclusion that there was no federal common law. The assistance of the federal courts in combatting the trusts could be assured only by grant of specific statutory power. However, Congress declined to define the key terms "restraint of trade," "monopolize" and "attempts to monopolize," leaving that function to the courts, which provided content by drawing upon the resources of American and English decisions under the common law. Professor Milton Handler has perceptively observed: "The Sherman Law gave birth to no new principle." M. HANDLER, ANTITRUST IN PERSPECTIVE 3 (1957).

\textsuperscript{31}Appalachian Coals v. United States, 288 U.S. 344, 359-60 (1933).

\textsuperscript{32}156 U.S. 1 (1895).
26 corporations controlled 80 percent or more of the production in their respective fields before the wave of consolidation subsided. The stock market slump of 1903-1904 and the exhaustion of the supply of apt merger candidates are credited as principal factors in halting the merger movement, although an attempt had been made to revitalize the Sherman Act in 1903 by legislation. President Theodore Roosevelt's decision to challenge corporate mergers despite the holding in Knight led to the Supreme Court decision in 1904 that the merger of the Northern Pacific and Great Northern Railroads was in violation of the Sherman Act. The Court further redeemed a little of its Sherman Act paralysis by approving in 1911 the dissolution of the Standard Oil and American Tobacco trusts which had grown substantially in the shelter of Knight. But in the process, the Court added a gloss to the text of the Sherman Act which disabled it as a reliable tool for regulating mergers in the future. The Court held that agreements, combinations and conspiracies restraining trade were illegal under section 1 of the Sherman Act only if "unreasonable." This "rule of reason" thrust upon the Government an unmanageable burden of proof. The evisceration of the Act as an antimerger statute is highlighted by two decisions favorable to United States Steel Corporation, which had been organized in 1901 and built up by the acquisition of some 180 firms. In 1920 the Supreme Court held that the Sherman Act was not violated by mere size or by unexerted power. The fact that the Steel Company was large constituted no violation of the statute.

\[T\]he law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them. . . . It does not compel competition nor require all that is possible. . . . We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think, determines the decree.

The Government failed again in 1948 to revive the Sherman Act as a device to check anticompetitive mergers when the Supreme Court held that the record would not support a conclusion that the acquisition by the United States Steel Corporation of the assets of the largest independent steel fabricator on the west coast unreasonably lessened competition or constituted an attempt to monopolize.

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34 MUELLER, THE CELLER-KEFAUVER ACT: 16 YEARS OF ENFORCEMENT, STAFF REP. TO ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 90th CONG., 1st Sess. (1967). The Antitrust Division was organized in the Department of Justice in 1903. The Expediting Act, which became law in the same year, promised quicker review of government antitrust suits by the Supreme Court.


In determining what constitutes unreasonable restraint...we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.38

B. The Clayton Act

With the encouragement of President Wilson, Congress sought to remedy the harm done by the "rule of reason." The Clayton Act, which became law in 1914, listed several practices, including mergers, which could be enjoined where the effect may be substantially to lessen competition or tend to create a monopoly. The newly-organized Federal Trade Commission shared with the Attorney General the responsibility for enforcement. Private suits were to be a helpful adjunct.

Section 7 of the new Act applied to mergers effected through the acquisition of stock; it did not apply to assets acquisition. Businessmen exploited the gap. Where a merger of competitors effected by a stock acquisition was attacked by the Government, the Supreme Court held that the merger of assets prior to agency action and decision,39 or the dissolution of a holding company (which had acquired the stock of competing firms) and distribution of unlawfully acquired shares to its shareholders or to other corporations after a Commission complaint had been issued,40 deprived the FTC of jurisdiction. Were this not enough, no attempt was made to enforce section 7 against vertical mergers because of the opinion of the enforcement authorities that the statute applied only to horizontal mergers.41

Disabled by an inadequate statutory text, hampered by unhelpful Court decisions and hamstrung by inadequate enforcement personnel and an erroneous interpretation of the law, the Sherman Act and the Clayton Act had little impact on the second major merger movement which occurred between 1925 and 1930, when many large combinations in manufacturing and mining were organized. This period also saw the rise in size and influence of the public utility holding company and the beginnings of public discontent with their shortcomings. It subsequently required remedial legislation, as well as years of administrative proceedings and court suits, to resolve the holding company problem.

The federal antitrust laws proved ineffectual when called upon in the 1940's to cope with the present merger movement, as was seen in United States v. Columbia Steel Co.42 Congress sought to remedy the situation in

38 United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948). The Sherman Act was the basis of the suit, rather than section 7 of the Clayton Act, because the latter statute did not apply at that time to assets acquisitions.
41 This view was held to be erroneous in United States v. E. I. duPont de Nemours & Co., 553 U.S. 586 (1957).
42 334 U.S. 495 (1948); see note 38 supra and accompanying text.
1950 by enactment of the Celler-Kefauver Act amending section 7 of the Clayton Act. The new text applied to acquisitions of assets as well as stock, while the market effects criteria was broadened to apply "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which would have the specified effects of substantially lessening competition . . . or tending to create a monopoly."43

The new statute was vigorously applied by the enforcement authorities and liberally interpreted by the Supreme Court. The Government challenged over 800 mergers between 1950 and 1966, including about 10 percent of all large mergers in manufacturing and mining. Few mergers among small manufacturing and mining corporations were attacked. Over half the challenged mergers involved horizontal relationships, 26 percent involved vertical relationships and 22 percent involved conglomerates. Among the conglomerates, the Government challenged 19 percent of the geographic market extension mergers, and 2 percent of the product extension mergers. During the 16 year period, no mergers in the "other" category were brought into court.44

This activity affected the character of the merger movement and deflected its course somewhat, but it has not arrested its vitality or undone much of what has taken place. Businessmen turned away from horizontal mergers involving large firms. Mergers were curtailed sharply in several industries which, due to intense merger activity, attracted a good deal of enforcement action: steel, cement, shoes, dairy and food retailing.45 The regulated industries which thought themselves exempt, in whole or in part, from the antitrust laws were given reason to abandon that conclusion.46 And predictably, "pure" conglomerates, those in the "other" category, accelerated in number and size.

Let us examine briefly some of the conglomerate situations which have been before the Supreme Court. The case law has developed some helpful guidelines in cases involving product extension and market extension situations. In a sense, they have been carved out of the conglomerate merger class.47

1. Product Extension

In Clorox,48 Procter & Gamble (P&G) was charged with a violation of section 7 of the Clayton Act for acquiring Clorox Chemical Company, the

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44 MUeller, the Celler-Kefauver Act: 16 Years of Enforcement, supra note 34, at 7-8.
45 Id. at 14-26.
47 The Supreme Court declined to classify the product extension merger in Clorox as a conglomerate merger. The "other conglomerate" merger category might eventually be dismantled in a similar manner as the anticompetitive effects of such mergers are better understood.
leading manufacturer in the heavily concentrated household liquid bleach industry. P & G was diversifying into product lines related to its basic detergent-soap-cleanser business. At the time of acquisition P & G was not in the liquid bleach business, but it was the most likely entrant. The liquid bleach industry was already oligopolistic before the acquisition. Price competition was not as vigorous as it would have been were the industry competitive. The merger was anticompetitive, the Court held, because

1. the 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;
2. the acquisition eliminates the potential competition of the acquiring firm. P & G's existence on the edge of the industry exerted considerable influence on the market, a competitive influence extinguished by its acquisition of the principal firm in the industry.

The merger was also in violation of section 7 because it conferred on Clorox, the dominant firm in its industry, marketing and promotional competitive advantages.

2. Market Extension

The United States v. El Paso Natural Gas Co. case provides an example of a merger handled as a market extension type. Pacific Northwest Pipeline Corporation tried without success in the mid-1950's to market Canadian natural gas supplies by pipeline in California. At the time, El Paso Natural Gas Company alone served that market with pipeline supplies of natural gas from out-of-state sources. El Paso's acquisition of the shares of Pacific Northwest and the subsequent merger of the two companies with the approval of the Federal Power Commission in 1957 were held to violate section 7 of the Clayton Act, even though Pacific Northwest lacked the financial and physical ability to build a competitive pipeline to serve the California market. What mattered was that Pacific Northwest, a potential competitor, had been extinguished by the merger.

Whether one considers these and similar decisions as involving situations which are not truly conglomerate mergers, they do lay bare to the measure of prior judicial decision a large number of conglomerate mergers. Most large firms are the product of many mergers. When they are engaged in a broad variety of activities, any new acquisition must run the gauntlet of the principles enunciated in Clorox and El Paso. Some acquiring firms seem to court this risk, counting on saving the bulk of the acquisition by a later

49 Id. at 578.
settlement with the antitrust authorities under which they will divest themselves of the activity or activities which involve the most obvious contraventions of the Clayton Act. The possibility of this remedy removes in large measure the deterrent effect of section 7. On that account it ought to be indulged so rarely as to make the hope of such relief speculative.

3. Reciprocity

Once one gets beyond the pale of product extension and market extension mergers and situations where the acquired firm obtains a competitive advantage from economies of advertising and the like, and enters into the "other conglomerate" or "pure" conglomerate picture, there are fewer landmarks. One of the most vital involves reciprocal dealing which can serve to increase concentration in an industry. Firm A which is a major market for firm B's product is in a position to insist as a quid pro quo for continued purchases that B acquire its needs (of products which firm A produces) from A. This practice, with its obvious anticompetitive consequences, has served as the basis for challenging conglomerate acquisitions which adversely affect the balance of competitive power in an industry.52

FTC v. Consolidated Foods Corp.53 involved the acquisition of Gentry, Inc., manufacturer of dehydrated onion and garlic, by Consolidated, which owned food processing plants and wholesale and retail stores. Suppliers of processed foods to Consolidated were thereafter expected to purchase their requirements of dehydrated onions and garlic from Consolidated's new subsidiary. The Court held:

The "reciprocity" made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. . . . A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice.54

The Court observed that although Gentry's products were inferior, it was able to increase its 35 percent share of the onion market after the merger and to limit the decrease in its share of the garlic market. The Court went on to advise that it was not holding that all mergers, no matter how small, would violate section 7 if there is a probability of reciprocal buying. "But where, as here, the acquisition is of a company that commands a substantial share of a market, a finding of probability of reciprocal buying by the Commission, whose expertise the Congress trusts, should be honored, if there is substantial evidence to support it."55

The assumption that reciprocity is a serious economic threat to competi-

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54 Id. at 594.
55 Id. at 600.
tion has been challenged. The President's Task Force on Productivity and Competition argued that the threat is "either small or nonexistent: monopoly power in one commodity is not effectively exploited by manipulating the price of an unrelated commodity. The argument advanced against the simplistic treatment of vertical mergers—essentially that one cannot use the same monopoly power twice—also challenges the fears of reciprocity." However, it is not very persuasive when it is observed that businessmen saw sufficient economic virtue in the practice to organize special departments to exploit every opportunity for its employment. But that was before Consolidated Foods was decided.

Can an acquiring firm ward off a section 7 complaint based on a showing that a merger will create a market structure conducive to reciprocal dealing with the defense that it has neither an organized reciprocity program nor a prior history of reciprocal dealings with its suppliers, has a written policy against reciprocity, and operates under a "profit center" form of organization which is not conducive to reciprocity? The district court, in denying the Government a preliminary injunction against ITT's take-over of Grinnell Corp., indicated that such a question might be answered in the affirmative because it is not "probable" that reciprocal dealing will occur, and section 7 of the Clayton Act deals with probabilities, not possibilities. This is a conclusion difficult to accept. Confronted with the creation by merger agreement of a power to injure competition, the Court would leave it to the acquiring firm's self-restraint to avoid an actual injury to competition. Congress intended no such result. The power of reciprocal dealing is a power to exclude. Any merger agreement which will enable a firm to acquire that power and creates a tendency toward monopoly. Although directed to a quite different factual situation, it is rather appropriate here to quote one of Judge Learned Hand's statements in United States v. Aluminum Co. of America (Alcoa):

Only in case we interpret "exclusion" as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

Monopoly powers need not be exercised in order to be unlawful under section 2 of the Sherman Act. It is sufficient that there exists power to exclude

56 Stigler Task Force Report at 6476.
actual or potential competition and the purpose to exercise that power.\textsuperscript{60} Achievement of the power by agreement may be sufficient to demonstrate the necessary purpose. “[N]o monopolist monopolizes unconscious of what he is doing.”\textsuperscript{61} Congress intended that the Government’s burden of proof when enforcing section 7 of the Clayton Act against incipient monopolies be less than that required in Sherman Act cases. A merger is effected by agreement, and this should be sufficient to provide the intent or purpose to bring into being whatever potential there is in the situation to practice reciprocity. Promised self-restraint should never be permitted to legitimize a power position thus deliberately and collusively created. There is “certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before section 7 can be called into play. If the enforcement of section 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.”\textsuperscript{62}

**GRAPPLING WITH THE PURE CONGLOMERATE MERGER**

Judge Weinfeld listed the major objectives of the 1950 amendment of section 7 of the Clayton Act, based on his reading of the Senate and House Committee Reports, in *United States v. Bethlehem Steel Corp.*:\textsuperscript{63}

(1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions;
(2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy;
(3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and
(4) to avoid a Sherman Act test in deciding the effects of a merger.\textsuperscript{64}

Other objectives could be listed,\textsuperscript{65} but the above should serve to focus a discussion of the applicability of section 7 to “other conglomerate” or “pure” conglomerate mergers.\textsuperscript{66}

\textsuperscript{60} American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).
\textsuperscript{61} United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945).
\textsuperscript{62} FTC v. Procter & Gamble Co., 386 U.S. at 577.
\textsuperscript{63} 168 F. Supp. 576 (S.D.N.Y. 1958). The case involved an attempted merger of Bethlehem Steel (assets of $2,195 million) and Youngstown Sheet & Tube Company (assets of $660 million). The effect was primarily horizontal, although it had vertical aspects as well.
\textsuperscript{64} Id. at 583.
\textsuperscript{65} The Supreme Court listed seven factors discussed by Congress considered relevant to a judgment on the legality of a particular merger in Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
\textsuperscript{66} “That § 7 was intended to apply to all mergers—horizontal, vertical or conglomerate—was specifically reiterated by the House Report on the final bill.” Id. at 517 n.31.
A. Increase in the Level of Economic Concentration

There has been no general tendency for market concentration\(^67\) to increase since World War II.\(^68\) Although the Cabinet Committee Staff indicated that the existing concentration levels in many industries may be greater than necessary to achieve economies of scale in production, research and innovation, it appears that market concentration has declined in producer goods industries over the postwar years.\(^69\) This has been credited in large measure to the government's success in dissuading or dissolving large horizontal mergers since the Celler-Kefauver Act became law in 1950. However, it is contended that market concentration has increased "sharply and persistently" in consumer goods industries in recent years.

Aggregate concentration, which measures the concentration of all manufacturing assets or sales, increased more sharply in 1967 than it did in any year in modern industrial history, and 1968 exceeded 1967. One of the consequences of this is that the hundred largest corporations held the same share of manufacturing assets by 1967 that the 200 largest corporations held in 1948.\(^70\) This condition indicates that the purpose of the 1950 act "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions"\(^71\) has not been fulfilled.

The Department of Justice had trouble facing up to these facts. The Department's 1968 Merger Guidelines\(^72\) indicated concern about changes in market structure occasioned by conglomerate mergers, but not about aggregate concentration: "Within the over-all scheme of the Department's antitrust enforcement activity, the primary role of section 7 enforcement is to preserve and promote market structures conducive to competition."\(^73\) Two categories of conglomerate mergers were regarded as having sufficiently identifiable anticompetitive effects to be the subject of guidelines: mergers involving potential entrants and mergers creating a danger of reciprocal buying.\(^74\)

In June 1969, with a change of administration and new leadership, the Department developed other enforcement policies. Summarizing these policies in a speech to the bar in Savannah, Georgia,\(^75\) the Attorney General

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\(^{67}\) This term refers to the share of business held by the leading firms in the industry. It is measured by sales concentration in the manufacturer of a particular product.

\(^{68}\) See Cabinet Study at 81. The data in this study cover the period 1947-1966.

\(^{69}\) Id.

\(^{70}\) Id. at 82. These data and, consequently, the references drawn from them, have been challenged. See Rose, Bigness Is A Numbers Game, Fortune, Nov. 1969, at 113.

\(^{71}\) S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950).

\(^{72}\) Department of Justice, Merger Guidelines, 1 Trade Reg. Rep. ¶ 4430, at 6681 (1968).

\(^{73}\) Id.

\(^{74}\) Id. at 6687-88.

observed that conglomerate mergers do not necessarily increase efficiency and profits, that corporate bigness does not necessarily stimulate the most imaginative scientific research, and that the large firm is not better able to market goods. After enumerating some of the competitive dangers to be expected of conglomerate mergers, Mr. Mitchell stated:

The Department of Justice may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries.

The Department of Justice will probably oppose any merger by one of the top 200 manufacturing firms of any leading producer in any concentrated industry.

And, of course, the Department will continue to challenge mergers which may substantially lessen potential competition or develop a substantial potential for reciprocity.

The Attorney General did not say bigness is bad, but he certainly implied that it has few redeeming virtues today.

The first plank of the new policy enumerated above is based on the premise that Congress intended to stem the tide of aggregate concentration. In an effort to obtain recognition of this purpose by the courts, the Attorney General has brought suit to dissolve several mergers between large firms, e.g., the acquisition by International Telephone and Telegraph Corporation (assets of $4 billion) of the Hartford Fire Insurance Company (assets of $1.8 billion) and Grinnel Corporation (assets of $184 million); the acquisition by Ling-Temco-Vought of Jones & Laughlin Steel Corporation (assets of $1 billion); and the attempted acquisition by Northwest Industries, Inc. (assets of $1.3 billion) of the B. F. Goodrich Company (assets of about $1 billion). The Government has been unsuccessful in its efforts to enjoin these superconglomerate mergers pending completion of the antitrust suits. The district court judges have not been convinced that the Government's opposition to very large conglomerate mergers on the basis of a congressional purpose to stem the tide of concentration will be successful. The district court in United States v. Northwest Industries, Inc. declined to read section 7 as holding that "given a trend to economic concentration, the consolidation of two of the country's one hundred largest corporations constitutes a violation of section 7 without any specific demonstration of a substantial lessening of competition in any section of the country." However, the court did require the two corporations be maintained as separate functional entities pendente lite. Similarly, in United States v. International Telephone and Telegraph

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76 For similar views, see CAbINET STUDY at 67.
77 Address by Att'y Gen. Mitchell, supra note 75, at 55,509.
80 Id. at 1096.
the court held that it would require further legislation before courts could block a merger solely on the grounds of increased concentration.\(^8\)

I think it clear that Congress intended that the Celler-Kefauver Act serve to retard aggregate concentration in the economy. The Senate Report urging enactment of the legislation states: "The purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."\(^8\) The question, essentially, is whether the Supreme Court will recognize that an admitted increase in aggregate concentration resulting from the conglomerate merger of two very large corporations is an acquisition the effect of which "in any line of commerce in any section of the country" may be "substantially to lessen competition . . . or to tend to create a monopoly."\(^8\) The Court could do this by placing the burden of rebutting the inference on the defendants - which would no doubt result in the Court being swamped with great volumes of data and conflicting opinions of experts interpreting them - or it could establish what amounts to a per se rule. In view of the limited law-enforcement resources of the federal government, the desirability for an early redress of aggregations already consummated, and the greater deterrent effect of an easily understood rule, the per se course is to be preferred. Although the Department of Justice is moving belatedly, its present activities now leave it to the courts to determine whether the antitrust laws will once again be found wanting at a critical time in a major merger movement.

The conglomerates do have their advocates.\(^8\) Conglomerate merger activities are justified on various grounds, such as; improvement in efficiency, productivity and management; the revitalizing of industry; a freer, more flexible and competitive economy.\(^8\) But conglomerate mergers are certainly not self-justifying, some commentators having made a case for viewing their activities with concern. The Cabinet Staff Committee study concluded that the merger movement "appears to be propelled by special financial and

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\(^8\) Id. at 781.
\(^8\) S. REP. No. 1775, 71st Cong., 2d Sess. 3 (1950). See also H. R. REP. No. 1191, 81st Cong., 1st Sess. 3 (1949).
\(^8\) "As for conglomerate mergers, public policy ought to welcome them. The trend to conglomerates allows corporate capital or managerial skill to be applied in new markets that might otherwise languish for lack of these ingredients." Ways, Antitrust In An Era Of Radical Change, FORTUNE, March 1966, at 128, 225.
\(^8\) Professor Corwin Edwards has stated the advantages which arise from the conglomerate's financial resources more pungently:

In encounters with small enterprises it can buy scarce materials and attractive sites, inventions, and facilities; preempt the services of the most expensive technicians and executives; and acquire reserves of materials for the future. It can absorb losses that would consume the entire capital of a smaller rival . . . moment by moment the big company can outbid, outspend, or outlose the small one; and from a series of such monetary advantages it derives an advantage in attaining its large aggregate results.

speculative considerations rather than by the pursuit of efficiency through large scale business organization. Hence, public policy toward the current merger movement, more than any other factor, will determine the future of competition in the American economy.\footnote{87} This view is consistent with a trenchant observation recently made in a Fortune article: "The fact remains, however, that the process of putting conglomerates together tends to expand stock prices long before it expands the economic values on which stock prices ultimately depend. Moreover, this tendency, thanks to the efforts of latter-day empire builders, is becoming steadily more pronounced."\footnote{88}

Where is the line to be drawn on mergers opposed on grounds of concentration? The "200 largest firms" category announced by the Attorney General appears sensible. The classification is already in existence, although up to now perhaps more a source of pride and frustration rather than apprehension. Each company in the group is of a great size, and each has had a history of merger activities. Mergers between them could not be regarded as being of little consequence to the economy. With only limited resources, the Department of Justice and the Federal Trade Commission could readily police the activities of such a small group. Experience shows that businessmen turn away from certain anticompetitive activities when they become convinced that they breed antitrust suits. And although this policy might lead firms which are not on the 200 list to become more active acquirers, these firms could be pursued on an ad hoc basis when they offend other merger standards developed by the courts.

Another approach may be in order. The Government might analyze the behavior of each of the 25 largest conglomerates\footnote{89} to determine whether experience shows that assets acquired by such firms have been so managed in the past that competition has suffered substantially. Where in the usual case such evidence might warrant dissolution only of the particular merger under scrutiny, it could serve as the basis for a continuing injunction against any further acquisition by the large conglomerate until the court is persuaded that there has been a change in the controlling management (including the board of directors) which promises a pro-competitive policy in the future. The courts should not hesitate in adopting a stringent position when it is apparent from a large conglomerate's record that acquisitions have been made principally for speculative purposes and at the expense of developing the acquired assets as part of a viable, effectively managed, competitive business.

B. The Threat to Small Business

Congress intended, in enacting the Celler-Kefauver Act, to foster an environment in which small businesses could operate effectively: "The en-

\footnote{87} CABINET STUDY at 83.  
\footnote{89} Each of the 25 ranked in 1968 among Fortune's largest industrial companies. FTC REPORT at Table 5-2.
actment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy. Speaking of the earlier legislation, Judge Learned Hand observed in *Alcoa* that: "Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."

Much has been said about the virtues of small businesses and the contribution they make to competition, invention, innovation and initiative in a free enterprise economy. Yet, congressional efforts to aid small business have sometimes had an anticompetitive side. The price discrimination provisions of the Robinson-Patman Act amending section 2 of the Clayton Act have been criticized on this account. But Congress has recognized that competition might be stimulated by mergers of small firms.

When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.

Where a small business, because of size, operates a plant which does not enjoy economies of scale, a merger which would provide the capital or other means requisite to overcome the deficiency might well improve competition. But a pure conglomerate merger might not serve to promote economic efficiency or to overcome the most obvious competitive weaknesses of the acquired small business.

It seems apparent that the changes in industrial structure being effected by the conglomerate mergers affect small business in at least two ways. A particular small business might be acquired as a mode of entry into an industry in which the acquiring firm is not already active. Or the small firm may find itself competing, to its disadvantage, with a large conglomerate which has acquired one of the other firms in the industry. Where the two firms involved are small, a pure conglomerate merger would probably have no obvious anticompetitive effects.

Without interference, several large conglomerates could acquire all of the firms in a given industry without increasing market concentration.

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91 United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).
93 "In fact, during the course of the current merger movement, much of the capacity of entire industries has been absorbed by large conglomerate enterprises." *Hearings on the Status and Future of Small Business in the American Economy before the Senate*
In the process, every small business would be eliminated, each being superseded by a giant enterprise. An oligopoly would be created and the intent of Congress frustrated. New rules of noncompetition could come into play: forebearance, reciprocity, competition on nonessentials rather than on price and quality, emphasis on new legislation to protect market positions, and industry-wide labor negotiations.

At what point can and should the Government act to preserve small business in this evolving situation? Should it delay, avoiding a challenge to conglomerate activities until study and discussion conferences obtain the full measure of the problem? The White House Task Force on Productivity and Competition would apply the brakes of discretion to any active program challenging conglomerate mergers until the fears about the size and economic power of conglomerates are either "confirmed or dissipated." The latter objective is to be obtained by "an early conference on the subject." Were this course to be followed, many small businesses might cease to exist as vital competitive forces in many sectors of the economy before relief was available, a condition not easily redressed through exercise of the remedial powers of the courts.

The June 1969 policy statement of the Attorney General placed no emphasis on enforcement of the Clayton Act with the objective of preserving small business. Reference was made to mergers between large firms, and to the acquisition by a large firm of a leading producer (which may or may not be small) in a concentrated industry. What the Government might also do, for test case purposes, as a part of its program against conglomerates, is to oppose several conglomerate mergers by some of the 200 largest firms where the acquired firm is small, and where there is a history of disappearing small businesses in the industry. The Government would then be confronting the question whether the presence of small businesses as effective participants in a competitive economy is an objective Congress intended in amending section 7 in 1950 — a purpose of sufficient value to society to warrant a major interference by the Government with the acquisition efforts of the largest firms.

This approach would not eliminate the acquisition of small businesses; it would simply reduce the number of large firms combing the market for such acquisitions. And it might well retard the demise of small businesses.

94 STIGLER TASK FORCE REPORT at 6476.
95 Id.
96 "But remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." Brown Shoe Co. v. United States, 370 U.S. at 333.
97 "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).
C. Incipient Monopolization

The large resources of certain participants in some industries may, in effect, provide them with a share of the market from which they may effectively exclude all others. To that extent, they enjoy a monopoly. There is a possibility that this condition will become prevalent if the acquisition of small and medium sized firms in oligopolistic situations by large conglomerates is allowed free rein. This is one area of the antitrust law which needs development, and where the economists can be of great assistance to the courts.

It seems apparent that a firm can enjoy an unlawful monopoly when controlling less than the share of the market that Alcoa had. In United States v. Lehigh Valley Railroad, the Supreme Court found monopolization where a railroad controlling anthracite coal properties transported in excess of one-fifth of the entire annual production of anthracite in the country. Under some circumstances, it is possible that an even lower percentage of control could violate section 2 of the Sherman Act.

The burden of proof which the Government must meet in a section 7 case is certainly less stringent than that required in a Sherman Act case; the Government need only establish a reasonable probability that the merger will tend to create a monopoly. Section 7 of the Clayton Act was intended, said Judge Weinfeld in Bethlehem Steel Co., "to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions."

"Monopoly," as used in section 7, means "monopoly power" — the power to exclude or the power to control prices. Any pure conglomerate merger might prove, because of intervening developments, to be in violation of the Clayton Act when its legality is challenged years after the event. But then, since section 7 is applicable "at any time when a threat of the prohibited effects is evident," the merger will be tested in light of conditions at the time suit is brought. That such an ultimate determination might take place would probably be quite speculative at the time two small firms merge, when they have no apparent power to exclude or to fix prices. But the case may be quite different where the acquiring firm is a large conglomerate.

While it may offend all rules of economics and good management, a large conglomerate can continue to operate an acquired division that is...

98 Ninety percent of supply "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." United States v. Aluminum Co. of America, 148 F.2d at 424.
99 254 U.S. 225 (1920).
102 "Economic performance . . . is the specific function and contribution of business enterprise, and the reason for its existence." P. DRUCKER, MANAGING FOR RESULTS ix (1964).
not earning an adequate profit, possibly for a long period of time. It might
do this for one of many reasons, including prestige, tax benefits, managerial
pride (or embarrassment), expectation of a turn-about in the future, a desire
to retrieve the capital invested in the venture, or currying favor with public
authorities. But regardless of the reason, the large firm has resources to con-
tinue a manufacturing or mining venture which is not fully profitable long
after the small firm, operating under similar circumstances, would collapse.
And that potential situation is created every time a large conglomerate ac-
quires a small firm. If managerial acumen is the real contribution large
conglomerates make in acquiring smaller firms under pure conglomerate
circumstances, as has been suggested, such dislocating practices ought not
occur. The practical difficulty is that management does not always measure
up to public assurances and, where it does, there can be no assurance suc-
cessors in office will be as competent.

Not very much appears to be known about the competitive virtues of
pure conglomerates. The extent to which they promote economic efficiency
is questioned. They can and should be challenged as incipient monop-
olies where the acquiring firm is either one of the 200 largest manufactur-
ing firms in the United States, or a firm of comparable size in another
industry.

D. Avoidance of the Sherman Act Test

The Government could wait until it determines how the conglomerate
merger movement will affect competition and the economy, and then, in
the light of that certitude, seek ameliorating remedies. However, such a
course of inaction would represent a rejection of the fourth purpose of the
1950 amendment — avoidance of the Sherman Act proof of actual restraint
of trade. "A requirement of certainty and actuality of injury to competition
is incompatible with any effort to supplement the Sherman Act by reach-
ing incipient restraints." Were the Government, as a matter of policy,
to wait until an unreasonable restraint of trade arose or a monopolization
occurred before challenging a merger, section 7 of the Clayton Act would
be abandoned in favor of the ineffectual Sherman Act.

This is the result approved by Fortune, although the editors of the
publication recognize that legislation is necessary which would make clear
"that mergers — horizontal, vertical, or conglomerate — are entirely legal
unless they spring from a manifest attempt to restrain trade." Given the
low state of knowledge of the competitive consequences of particular con-
glomerate mergers and of the current merger movement as a whole, as well
as the limited resource of the Government to monitor and regulate devel-

103 See Blair, The Conglomerate Merger in Economics and Law, 46 Geo. L.J. 672,
679 (1958).
104 S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950).
105 FORTUNE, March 1966, at 129.
confidence in the self-restraint of businessmen which has not proved warranted at any time in modern history.

There is an understandable fear in leaving to the courts the power to forestall attractive merger arrangements. Judges lack "expertise." They are not economists. They are not businessmen. They lack real insight into the problems of an industry. One might assume that each of these charges is true and recognize, nonetheless, that it is the business of the courts, in criminal and in civil matters, to act on the basis of probabilities.

The role of determining when an agreement (in this case a merger) violates the law regulating restraints of trade and monopolization has been a function of the courts for at least four centuries. While often criticized, their record in this regard has been sufficiently sound to warrant Congress giving them the last word, even in most cases of regulated industries claiming exemption for anticompetitive activities under a statute or decision of an expert regulatory body. No other group has yet been found in our society to play the part better; and none appears on the horizon.

CONCLUSION

Businessmen have been acting vigorously in effecting conglomerate mergers despite a lack of clarity as to the competitive consequences of their actions and an absence of certainty as to their legality. A significant accumulation of power over the economy in the hands of a few corporations is taking place at an accelerating rate. Some would like to see the Government match this vigor with timidity. Public policy, so it is said, must move slowly in prohibiting or restricting acquisition activities by conglomerates, particularly where pure conglomerates are involved. Not enough is known of the relationship between their acquisitions, and monopoly, oligopoly and competition to warrant regulation—a condition aided by bookkeeping practices such as "pooling of interests" and blending of operating results which make it impossible for an outsider to know which activities of the conglomerate may be underwriting inadequate returns on others. However, these arguments assume that economists and legislators, given time and the requisite data, can supply answers which will provide meaningful guides to antitrust enforcement policies in conglomerate situations which we do not have today. Apart from the reality that no human discipline has yet mastered the forecasting of future events with any assurance of accuracy, there is reason to believe that the problems created by conglomerates may simply be too complex for that sort of analysis, certitude and recommendation.

In the present state of the science, economic analysis cannot handle more than a small fraction of all the variables and contingencies needed for a

107 Turner, supra note 8.
sound legal judgment on changing market structure in any particular "monopoly" case. And the analysis tends to ignore the element around which competition in fact increasingly centers—managerial brains.\textsuperscript{108}

In this state of limited knowledge, the courts have a choice. Despairing of exact knowledge, they might reject the use of "educated" guesses of economists and others as to the probable consequences of conglomerate mergers, and allow the Clayton Act to become a mute and ineffectual spectator of a massive shift in economic power in our society. Should things go wrong, Congress would then be cast in the role of a "heavy", blamed for not enacting laws capable of dealing with the situation as it developed. Or, the courts could continue to apply section 7 of the Clayton Act with the vigor which has been shown by the Supreme Court over the past decade, preventing mergers where the "probabilities" indicate an aggravation of a condition Congress sought to ameliorate, or a contradiction of a purpose the law was intended to promote. The latter course appears warranted by the legislative history of the 1950 amendment of section 7 and by recent developments in the merger movement, even though law-enforcement in the absence of exact economic knowledge may be dubbed with the pejorative label "political."

\textsuperscript{108} Ways, supra note 85, at 221.