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NOTES

PRESENT GUIDELINES FOR CONGLOMERATE MERGERS

"THE LAW MUST BE STABLE,
BUT IT MUST NOT STAND STILL."

Dean Roscoe Pound

On April 11, 1967, the United States Supreme Court extended the foundations of anti-trust legislation into the field of conglomerate mergers. This transitional decision followed logically from prior decisions. A case used transitionally to expand the law generally has overtones and shadows of both the area from which it endeavors to move and the area which it intends to reach eventually. The case of *Federal Trade Commission v. Procter and Gamble Co.*[1] fits the above description.

The Supreme Court stated that "this merger may most appropriately be described as a 'product extension merger' ".[2] A product extension merger may, however, exist in the horizontal, vertical, or conglomerate merger. The *Procter and Gamble* decision had sufficient evidence to suggest that it was a conglomerate merger.

The reasoning followed by the Supreme Court was not based upon Procter's involvement in any specific acts considered illegal in anti-trust law, nor was the combination of Clorox and Procter considered illegal *per se*. The Court relied instead upon the contention that the "acquisition may substantially lessen competition or create a monopoly in the production of household liquid bleaches."[3] Herein lies the ground upon which the Supreme Court exercised its judicial discretion. Judicial discretion in such cases has not generally lacked evidence on which to base its reason-

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1. 1. 386 U.S. 568 (1967).
2. Federal Trade Commission v. Procter and Gamble Co., 386 U.S. 568, 570 (1967).
3. *Id.*

ing, but inconsistent results have been reached from reliance on similar evidence.

Few lawyers, economists, or businessmen require that a rigid standard be set to determine whether or not diversification mergers are illegal. Since over seventy per cent of the total U. S. mergers in the last six years have been of the conglomerate type,[4] it would be convenient for the interested parties to have some type of guidelines to rely upon. This would give the parties some bases to make merger plans.

HISTORY AND DEFINITION

Efforts to control corporate combinations, prior to the federal government's attempts, are found in the common law and state statutory law. The relevant part of the common law is the rule against agreements in restraint of trade and the *ultra vires* principle.[5] State statutory law tended to be ineffective in general. By the late nineteenth century only a minority of the states had provisions against restraint of trade.[6]

After the Standard Oil Trust, in 1879, many other trusts followed and, since they were of the interstate variety, the states found it difficult to cope with the problems they presented.[7] It was in response to the ineffectiveness of state controls that the Federal Government entered the anti-trust field. The Sherman Anti-trust Act, passed in 1890, used general language to prohibit restraint of trade by trusts.[8] This general language limited its effectiveness until 1894 when the language was given more definite content.[9]

Twenty-four years later, in 1914, the Clayton Anti-trust Act was passed to supplement the still inadequate Sherman Act. This Act prohibited such practices as price discrimination, tying contracts, interlocking directorates, and the acquisition of stockholdings tending to lessen competition.[10] Section Seven of the Clayton Act is important to the present-day conglomerate merger. The pertinent portion of the original section read as follows:

That no corporation engaged in commerce shall acquire,

4. Reily, *Conglomerate Mergers—An Argument For Action*, 61 NW. U. L. REV. 522, 529 (1966-1967).

5. *"Ultra vires"* Central Railroad Company v. Collins, 40 Ga. 583 (1869), Richardson v. Buhl, 277 Mich. 632, 43 N.W. 1102 (1889) (rule against agreements in restraint of trade), Thomas v. Railroad Co., 101 U.S. 71 (1879).

6. BUREAU OF CORPORATIONS, U.S. DEPT. OF COMMERCE. TRUST LAWS AND UNFAIR COMPETITION, (1916).

7. It is not within the scope of this note to include the problems which individual states have faced in regard to antitrust regulation. For a brief discussion see C. FITE, and R. REESE, AN ECONOMIC HISTORY OF THE UNITED STATES, (1959) 367-368.

8. 15 U.S.C. § 1 (1964).

9. United States v. E. C. Knight Company, 156 U.S. 1 (1894).

10. 15 U.S.C. §§ 13, 14, 18, 19 (1964).

> directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired, and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[11]

This section remained unchanged until 1950 when it was amended to read as follows:

> That 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 in commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[12]

One of the changes made by the 1950 amendment was the specifying of the Federal Trade Commission's jurisdiction. Another change in Section Seven concerns the removal of the words, "or tend to create a monopoly of any line of commerce," from the original Act and the insertion of the words, "or tend to create a monopoly," in the amended version. Before the amendment of Section Seven of the Clayton Act in 1950, it had generally been supposed that the statute applied only to horizontal mergers.[13] However, one of the main purposes of the amendment of Section Seven was to make the law clearly applicable "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal."[14] A perhaps more important purpose of the change in Section Seven was the Congressional intent to make "legislation extend to acquisitions which were not forbidden by the Sherman Act.[15] Particular stock acquisitions substantially reduced competition and it was this "assets loophole" that Congress attempted to close by amending Section Seven.[16]

It was the 1950 amendment that allowed the United States Supreme Court to use its discretion to determine what conditions "may substantially lessen competition or tend to create a monopoly." The Court used discretion in anti-trust decisions prior to

11. 15 U.S.C. § 18, (1964).
12. 15 U.S.C. § 18, 1964).
13. H.R. REP. Doc. No. 169, 84th Cong., 1st Sess. 168 (1955).
14. H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949).
15. S. REP. No. 1775 81st Cong., 2nd Sess. (1950) 4.
16. H.R. REP. No. 1191 *supra* note 14 at 1.

1950 but the more liberal wording in the 1950 amendment permits a significantly greater degree of discretion. Early anti-trust legislation was designed to eliminate certain economically-harmful acts, such as price fixing. Later, as the Courts recognized the inherent undesirability of monopoly power, it gradually formulated a standard which extended the scope of anti-trust prohibitions.[17] At present there are fairly clear guidelines for horizontal and vertical mergers. If a businessman wishes to improve his company's economic position by a diversification merger, however, he will have no clear guidelines to follow. Because of the fuzzy area of decisions in conglomerate mergers, the merging company can only estimate the degree to which a particaul merger will lessen potential competition or tend to create a monopoly. In many cases the only way to determine what the Courts will decide, is to merge. The company many obtain a premerger opinion from the Federal Trade Commission but even this will not protect the company.[18]

The present concern is caused by the importance that this type of merger plays in today's economy. The conglomerate merger has been relatively free from litigation, but because of the recent decision in *Procter and Gamble*, businessmen are looking for a standard or guideline upon which they can base their future merger plans. This problem is even more serious for those companies which are oligopolistic in nature. The oligopolistic industry has a few dominant firms and any acquisition, in a related area, can potentially lessen competition or tend to create a monopoly. For this reason the oligopolistic firms have a special need for judicial guidelines to refer to when they consider what areas they may diversify into.

The conglomerate merger has been defined as "all other" than horizontal and vertical mergers.[19] This then eliminates from the conglomerate merger definition those mergers which are between companies performing similar functions in the production or sale of comparable goods or services and those mergers which are between companies standing in a supplier-customer relationship.[20] The most accepted definition of the conglomerate merger is a merger "between companies that do not compete directly nor stand in a buyer-seller relationship."[21] Another suggested definition is that the conglomerate merger is nothing definite but merely a method by which Congress could " . . . encompass a category

17. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts. From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 287 (1967).
18. 16 C.F.R. § 1.53 (Supp. 1967).
19. Blair, *The Conglomerate Merger In Economics and Law*, 46 GEO. L. J. 672 (1958).
20. Brown Shoe Co. v. United States 370 U.S. 323 (1961).
21. Turner, *Conglomerate Merger and Section Seven of the Clayton Act*, 78 HARV. L. REV. 1313, 1314-1315 (1965).

of mergers other than the traditional horizontal and vertical mergers."[22] This last formulation may be the most appropriate in view of the growth of anti-trust litigation. The definitional question is complicated by the fact that in *Procter and Gamble* the Supreme Court accepts a definition of the conglomerate merger which is different from any of the foregoing. The Court defines the conglomerate merger as " . . . one in which there is no economic relationships between the acquiring and acquired firm."[23] This, however, is a pure economic theory that, if narrowly applied, would exclude many mergers now considered conglomerate.

Even though the Supreme Court called *Procter and Gamble* a product-extension case, the facts show that the case could be included within the category of conglomerate mergers. Clorox and Procter did not stand in a buyer-seller relationship, nor did the two companies compete directly with one another. The case does not, however, come within the pure-theory definition of the Court.

There is disagreement within the Federal Trade Commission as well as within the federal courts as to what aspects of the merger are to be restricted. Embodied in the contention that the merger does not sufficiently prohibit competition is the unresolved issue of what evidence is to be used to determine the potentiality of restricting competition.

The initial decision against Procter was issued by a hearing examiner who found that the "acquisition violated Section Seven of the Clayton Act and ordered divesture."[24] The Commission, however, remanded the decision with an order to consider post-merger evidence.[25] This order was complied with, but when the Commission heard the reargument it concluded, based on the Section Seven language, that any decision must be based on the entire record and not the post-merger evidence alone.[26] Based upon this conclusion, the Commission upheld the second initial hearing with only minor changes.[27]

The United States Court of Appeals for the Sixth Circuit set aside and remanded the decision of the Federal Trade Commission's second hearing.[28] The Appeals Court had difficulty with the results obtained within the Federal Trade Commission.

The Appeals Court, although referring to the questions of bigness, potential competition, and competitive effects, felt that the primary evidence used to reverse the Federal Trade Commission

22. W. ALBERTS and J. SEGALL, THE CORPORATE MERGER (1966) 85.
23. 386 U.S. at 577 n2.
24. Trade Cas. (CCH) 82, 178 [1966] (6th Cir. 1966).
25. *Id.* at 82, 179.
26. *Id.*
27. *Id.*
28. Procter and Gamble v. Federal Trade Commission 358 F.2d 74, 75 (6th Cir. 1966).

decision was the post-acquisition evidence. [29] The Appeals Court believed that the post-acquisition evidence showed that there were neither anti-competitive effects nor any significant changes in the market.[30]

The final decision concerning the Procter and Clorox merger was reversal of the Court of Appeals and enforcement of the Commission's order. The Supreme Court concluded that post-merger evidence could not be considered because the words "may lessen potential competition" are not equivalent to "will lessen competition". To show that a merger "may lessen potential competition", only the possibility must be established. Actual reduction in competition shown or rebutted by post-merger evidence is irrelevant. Other support for the conclusion, that the merger may lessen potential competition, was drawn more from anti-trust policy than from a strict interpretation of facts. The Court took into account the following in making their decision: The problem of determining the relevant markets and possible anti-competitive effects; the necessity of restraining any anti-competitive effects at their incipiency; and whether or not the issue of economics can be raised as a defense.

Justice Harlan, concurring in *Procter and Gamble*, attempted to give the businessman and lawyer some guidelines for determining the legality of a prospective merger.[31] This attempt is useful, but at most it can only suggest what the Court may decide in the future.

Even though the Supreme Court used broad language in holding the merger illegal, it will probably rely upon this reasoning when faced with the next conglomerate merger. Because of this reliance, certain guidelines which the Court set out will become important as justifications for holding future mergers legal or illegal.

ECONOMIC EVIDENCE USED IN MERGER GUIDELINES

Judicial determination, in anti-trust decisions, generally depends upon the available economic evidence and how it is applied. *Procter and Gamble* stated that the following economic evidence was important.

Suggested Guidelines in *F.T.C. V. Procter and Gamble*:

1. Relevant Markets.
2. Anti-competitive Effects.

29. *Id.* at 82, 83.
30. *Id.* at 80, 83.
31. 386 U.S. at 581-583, *passim* (concurring opinion).

3. Restraining Anticompetitive Mergers at Incipiency.
4. Inability of Raising Economies as a Defense.

The above standards are not new to anti-trust litigation nor do they vary from those used in horizontal or vertical mergers. The explanation for this continuity in the guidelines is that the Court is applying tested standards to a new group of mergers.

The Supreme Court, in order to determine whether or not anticompetitive conditions exist, looked to what product and geographicial markets are involved. The Court stated in *Procter and Gamble* that the relevant line of commerce was based on the nature of the product.[32] Their reasoning was based upon the concept of the distinctiveness of the product.[33] However, this reasoning was distinguished by the Supreme Court when it stated that "a product would not be a market merely because it differs from other products; instead the Court called for an appraisal of the 'cross elasticity' of demand in the trade."[34] The Court further stated that

> [T]he market which one must study to determine when a producer has monopoly power will vary with the part of commerce in consideration. The tests are constant. The market is composed of products that have interchangeability for the purposes for which they are produced. Price, use and quality are considered.[35]

DuPont can be distinguished but nevertheless the Court is left with two alternatives to choose from. What would determine whether or not the product was distinctive enough to be a relevant market by itself? Would the products have to be pyhsically alike, would they necessarily have to have the same final use, or would the ability of one to find a near substitute be sufficient to remove the label of distinctiveness? All three distinctions listed have been offered as exceptions to the rule of distinctiveness.[36]

Another aspect of the relevant market test which the Supreme Court is concerned with is the geographical market. In *Procter and Gamble* the geographical market was " . . . the nation and a series of regional markets."[37] This was justifiable because Clorox dominated the national liquid bleach market.[38]

32. *Id.* at 571.
33. *Id.*
34. United States v. Du Pont and Co., 351 U.S. 377, 394 (1956).
35. *Id.* at 404.
36. United States v. Continental Can Co., 378 U.S. 441, 453 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962); United States v. E. I. Du Pont de Nemours and Co., 353 U.S. 586, 593-594 (1957).
37. 386 U.S. at 571.
38. *Id.*

The question of what is a relevant geographical market has been approached in several ways. In *United States v. Pabsts Brewing Co.* the Court said a geographical market was " . . . any section of the United States . . . " that experienced a substantial anti-competitive effect because of a particular merger.[39]

The *Pabsts* decision was supported by another recent case in which the Supreme Court stated that a geographical market is that market the company in question operates in.[40]

An alternative to this approach was taken by the Supreme Court in *United States v. Philadelphia National Bank* when it stated that the inquiry to the relevant market was not

> where the parties to the merger do business, or even where they compete, but where, within the area of competition overlap, the effect of the merger on competition will be direct and immediate.[41]

The Court has also said that "the geographical market selected must therefore both 'correspond to the commercial realities' of the industry and be economically significant."[42]

The Court's guideline concerning relevant markets in *Procter and Gamble* is broadly stated and when there is an attempt to find a more rigid standard, it is complicated by the many variations which the Court allows. Even if one allows for the distinctions in the cases, there is little left upon which the prospective merger may rely.

Another aspect which the Supreme Court used as a guideline in the *Proctor and Gamble* case was that there was a probability of lessening potential competition. This particular guideline allows the Court a good deal of discretion in deciding if potential competition is lessened. This guideline is primarily a standard in regard to market structure.

The Supreme Court in *Procter and Gamble* contended that the anti-competitive aspects caused by the merger were the following:

> (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.[43]

39. United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966).
40. United States v. Grinnel Corp., 384 U.S. 563, 575 (1966).
41. United States v. Philadelphia National Bank, 374 U.S. 311, 357 (1962).
42. Brown Shoe Co. v. United States, 370 U.S. 294, 336-7 (1961).
43. 386 U.S. at 578.

(2) the acquisition eliminates the potential competition of the acquiring firm.[44]

The United States Supreme Court pointed out that the liquid bleach market was oligopolistic with Clorox enjoying the dominant position and that if Procter were allowed to enter the market, the entry by acquisition would very likely be in monopolistic proportions.[45] The Court, depending upon the Federal Trade Commission, stated that if Procter were allowed into the field of liquid bleach there would be a great disparity in size among the firms in the relevant market.[46] This disparity, it was asserted, would greatly change the competitive structure of the liquid bleach market as well as the other markets that Procter was involved in.[47] Clorox could be used to expand retail markets. For instance, Clorox bleach could be used " . . . as a tying product, loss leader or cross-coupon offering, in connection with efforts to promote other Procter products."[48] The Court maintained that one of the advantages gained by Procter, because of the disparity in size, would be that the many regional producers would not compete nearly as aggressively because of fear of retaliation.[49]

Along with promotional benefits there was the added advantage of Procter maintaining its own sales staff.[50] The Procter salesmen promote only one brand and devote a good deal of attention to maintaining and displaying their products. The independent broker does not generally have this interest in any one of the many products he promotes. Finally, Procter may be able to gain extra shelf space by offering the merchant a better resale profit margin. This type of promotion can only be carried out by a financially-sound company. It must have sufficient reserves on which it can rely if necessary. Procter was this type of company.

The item most obviously related to disparity among the numerous firms was advertising. The Supreme Court used advertising to demonstrate how the disparity in size was advantageous to Procter. The Court pointed out that Procter could devote its entire advertising budget to defend Clorox from a new company attempting to enter the liquid bleach market.[51] Another advantage Clorox would receive was that it would receive broader consumer ex-

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44. *Id.*
45. *Id.*
46. The Procter and Gamble Company, No. 6901 (FTC, Nov. 26, 1963) 57.
47. *Id.* at 59.
48. *Id.*
49. 386 U.S. at 578.
50. The Procter and Gamble Company, No. 6901 (FTC, Nov. 26, 1963) 46.
51. 386 U.S. at 579.

posure.[52] Finally, Clorox would receive the reduction given Procter for its mass advertising, such as:

> The maximum annual volume discounts available to the largest advertisers amount to twenty-five to thirty per cent for network television advertising and somewhat smaller but still substantial percentages, for magazine, newspaper, and radio advertising. In addition, the discount rates available for local "spot" television advertising favor the large advertiser.[53]

These discounts were not obtainable by Clorox as an independent producer of liquid bleach.

The final aspect of disparity in size was the ability of Procter to engage in predatory pricing and/or price leadership.[54] The Court was vague in this regard, but the Commission contended that Procter could, although not intentionally, have unfair and destructive advantage because of its pricing policy.[55] Procter may be able to maximize its profit by selling Clorox at a lower price than that which other liquid bleach manufacturers could profitably sell.

> A concern that produces many products and operates across many markets need not require a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of each of its products as has been presupposed in our traditional scheme.[56]

Another influence, caused by price leadership, is the tendency of selling at prices higher than those obtainable under a competitive system. This is usually caused by the failure of the small competitor to aggressively compete with its bigger rival.

The second anti-competitive aspect of the Procter-Clorox merger was the elimination of potential competitors who acquired the firm.[57] In this case Procter was considered the most likely entrant into the liquid bleach line of commerce. The basis for this reasoning was that Procter was looking for areas of diversififcation; Procter was financially capable of entering into this area; the marketing process was similar to Procter's; the same customers were to be reached; equipment for production was available; and the necessary manufacturing information was available.[58] The

52. The Procter and Gamble Company, No. 6901, (FTC, Nov. 26, 1963) 44-5.
53. *Id.* at 44.
54. 386 U.S. at 578.
55. The Procter and Gamble Company, No. 6901, (FTC, Nov. 26, 1963) 48.
56. *Id.* at 48-9.
57. 386 U.S. at 578.
58. *Id.* at 580.

Court concluded, contrary to Procter's opinion, that because it was relatively easy for Procter to enter the market, the other firms were cautious in their pricing policies.[59] This seemed to indicate that if profits were too lucrative, Procter would then enter the market.

The Court concluded, from the potential anti-competitive effects, the merger would raise new barriers to competition in the liquid bleach market.[60] With Procter in the market the smaller firms would face the increased advertising and financial power of Procter. Another area which faced a greater barrier was the area of other possible entrants. Because of Procter's commanding position, any entrant would have to compete with the large resources of Procter if it wanted a portion of the market.[61]

The previous anti-competitive effects are restricted to the case discussed. Because, however, the Court took a broad approach for holding such a merger illegal, the reasons presented should at least have value as factors to which future mergers will be compared.

The broad reasoning allows a wide latitude for the exercise of the court's discretion. It is this discretion which causes the variation in decisions and, as a result, confusion in the merger field.

Another guideline discussed in *Procter and Gamble* was the interpretation of Section Seven of the Clayton Act. The Court maintained that the Section " . . . was intended to arrest the anti-competitive effects in their incipiency."[62]

In another case the Supreme Court stated Section Seven was to apply to all mergers "whose effect may tend to lessen competition in any line of commerce in any section of the country."[63] The Court continued by saying that Congress was attempting to stem the tide of continuing economic concentration.[64] In at least two instances the Supreme Court declared that Section Seven dealt with probable anti-competitive effects and not with certainty.[65] *United States v. Philadelphia National Bank* also supported this reasoning.[66] When the Court uses this interpretation, the post-acquisition evidence is of little value for the merging companies to help justify their merger.

The final guideline arrived at in this case was the uselessness

59. *Id.* at 581.
60. *Id.* at 579.
61. *Id.*
62. *Id.* at 577.
63. Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1961).
64. *Id.*
65. *Id.* at 323, United States v. Penn-Olin Co., 378 U.S. 158, 173 (1963).
66. United States v. Philadelphia National Bank, 374 U.S. 321, 367 (1962).

of the merging company to supply evidence of possible economies to justify any proposed merger. The Court has decided that economies could result, depending on the facts of the case, if particular mergers were allowed, however, the Court in this case decided to protect competition instead.[67] In making this decision the Court relied on its reasoning in *Brown Shoe Co. v. United States* when it stated that decentralization was more important than resulting economies.[68]

The Court in *Procter and Gamble* did not make its reasoning specific and therefore the Federal Trade Commission's decision has some value. The Commission suggests that some economies could be raised as a defense if they promoted competition.[69] The acquisition of a failing company by a solvent company could promote competition. The merger of two small plants might also create economies in production and distribution which would increase competition. Finally, when all economic evidence is compiled and reviewed, the Court can either decide upon the economic evidence alone, or it may balance the economic evidence against other interests. While the comparison is made, it is the result of the exercise of judicial discretion.

One issue which the Court has generally used is that of market concentration. Because of the growth of economic concentration, the courts have made an attempt to arrive at some form of equality regarding competition and concentration. Early in anti-trust litigation, a preference developed for " . . . a system of small producers, each dependent for his success upon his own skill and character."[70] All the anti-trust policies had this preference fused into their goals. Because of the preference, the Courts cannot rely fully upon economic evidence but must balance such evidence with numerous political and social considerations. It is in this position that the Court's interpretation becomes important in measuring what considerations will be the determining factors controlling future mergers.

CONCLUSION

Procter and Gamble issued several possible guidelines which future entrants to conglomerate mergers must consider before making a final judgment on diversification plans. The primary question concerning all those interested in this merger is what value do the present guidelines have? The prior discussion demon-

67. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1961).
68. *Id.*
69. The Procter and Gamble Company, No. 6901, (FTC, Nov. 26, 1963) 64-5.
70. Bock and Bowman, *The Crisis In Antitrust*, 65 COLUM. L. REV. 363, 369 (1965).

strates the lack of constant rules or standards for the conglomerate merger.

This particular form of merger is especially conducive to problems of interpretation since it is a relatively unlitigated area. This causes problems of definition and explanation. Judges must attempt to define what areas the conglomerate merger will encompass. It is also the duty of the Courts to explain how various policies apply to different cases. At the present time this is important because the Court has not settled upon definite guidelines. This lack of guidelines causes the extreme holdings in merger decisions. The area of relevant markets is a particularly clear example of this divergence.

The lack of continuity in the decisions seems to be derived from the fact that the judges are unsure of this new area. Reasoning applied in one fashion to one case may not be applicable to a similar but distinguishable set of circumstances. It cannot be said that all the decisions which deviate from one another are wrong, but they do lend themselves to a good degree of inconsistency within the conglomerate picture. Once the Court has had the opportunity of deciding several cases in a particular area there will be a definite set of guidelines to follow. Until then, early generalizations as to conglomerate guidelines will be misleading.

Judicial discretion is most obvious when confronted with a case that puts economic evidence at odds with social policy. As mentioned in the discussion above, there is a desire to save competition. Recent merger decisions have attempted to apply this to balancing the economic evidence presented. The result of this desire seems to have been that courts will attempt to restrict concentration from destroying the small competitor. The courts have yet to articulate what degree of concentration will be allowed. From the available evidence, what degree of concentration will be allowed will depend upon the market structure within the industry where the merger is attempted. Since the courts tend to be in a transition it would be safe to assume that judicial discretion will continue to be used in future merger decisions.

If a conglomerate merger is still desired certain factors should be considered. The corporation should, if it has a strong market position, stay away from related market areas, unless the acquisition will constitute a minor portion of the new market and even this will depend upon market conditions.[71] If the corporation is

71. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

large, relative to the competitors in the new industry, any involvement could be grounds for creating anti-competitive effects.

The confusion in the new area of litigation is expected and until guidelines are solidified the law will, by necessity, make more merger decisions based, to a great deal, on judicial discretion. For this reason future attempts at mergers by prospective candidates must be made slowly and with considerable analysis of the surrounding conditions.

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