The Effective Use of Postacquisition Evidence Under Section 7 of the Clayton Act

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INTRODUCTION

Section 7 of the Clayton Act prohibits corporate acquisitions which may substantially lessen competition or tend to create a monopoly.1 The Act demands that the probable economic consequences of an acquisition be measured at the "time of suit."2 Because suit may be brought at any time the acquisition threatens to violate the Act,3 many years may elapse between the acquisition

1. 15 U.S.C. § 18 (1976). Section 7 of the Clayton Act, as amended, reads as follows: No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. See generally Dougherty, Case Against Bigness: Politics, Power and Technological Inertia, 11 ANTITRUST L. & ECON. REV. 41 (1979); Kaplan, Potential Competition and Section 7 of the Clayton Act, 25 ANTITRUST BULL. 297 (1980); Lurie, Mergers Under the Burger Court: An Anti-Antitrust Bias and Its Implications, 23 VILL. L. REV. 213 (1978); Robinson, Recent Antitrust Developments: 1974, 75 COLUM. L. REV. 243 (1975); Withered, Reciprocity, Monopsony Power, and Section 7, 25 ANTITRUST BULL. 217 (1980); Note, Section 7 of the Clayton Act: A Legislative History, 52 COLUM. L. REV. 766 (1952).


3. 353 U.S. at 607. The impact is measured at the time of suit, rather than at the time of acquisition. Du Pont "time of suit" rule has been modified to the time of trial. United States v. General Dynamics Corp., 415 U.S. 486, 505 (1974). The terms are used interchangeably. This article will use the term "time of suit" to encompass both meanings. For a discussion of the significance of the shift to the time of trial, see Comment, The Treatment of Postacquisition Evidence under Section 7 of the Clayton Act: Significance of the Reference Point in Predicting the Effect of a Merger on Competition, 70 NW. U.L. REV. 814 (1975) (hereinafter cited as Comment, Postacquisition Reference Point). See generally Orrick, The Clayton Act: Then and Now, 24 ABA ANTITRUST SECTION 44 (1964); Subcommittee on Section 7, The Backward Sweep Theory and the Oligopoly Problem, 32 ABA ANTITRUST L.J. 306 (1966).

4. In order to accomplish the objective of §7 "to nip monopoly in the bud" the Government may bring suit "at any time the acquisition threatens to ripen into a prohibited effect." Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3rd Cir. 1953). Actions for damages under §7 are, however, subject to a four year statute of limitations. 15 U.S.C. § 15b (1976). This provision does not apply to equitable proceedings. Int'l. Tel. &
and the trial. Evidence of events occurring after the acquisition is admissible. The outcome of the trial may well be influenced by the weight accorded the postacquisition evidence.

In exceptional circumstances, a section 7 defendant may rely on postacquisition evidence to show a lack of probable anticompetitive effect. In most cases, however, such evidence is entitled to little weight. Several problems presented by excessive reliance on postacquisition evidence have led to the formulation of this rule. The most commonly cited problem is that defendants could avoid liability by temporarily refraining from conduct which would re-


5. An extreme example is found in the case that announced the time of suit rule, United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957). Between 1917 and 1919 du Pont purchased 23% of the stock of General Motors. The Government did not bring suit until 1949 and the Supreme Court decision invalidating the acquisition was not announced until 1957. See notes 14-18 infra and accompanying text.


Postacquisition evidence is an "evidence" topic only to the extent that it involves the possibility of manufactured evidence. See note 9 infra. The real issue is the appropriate weight to be accorded postacquisition evidence in various circumstances. As always, however, general relevance principles provide a basis for exclusion should the potential for prejudice outweigh the probative value of the evidence. Fed. R. Evid. 403.

7. See United States v. General Dynamics Corp., 415 U.S. 486, 506-08 (1974) discussed at notes 30-42, 109-110 infra and accompanying text. See also Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979), discussed at notes 116-117 infra and accompanying text; United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977), discussed at notes 103-108 infra and accompanying text; United States v. Hammermill Paper Co., 429 F. Supp. 1271 (W.D. Pa. 1977), discussed at text accompanying notes 113-115 infra; Coca-Cola Bottling Co. of New York, 93 F.T.C. 110 (1979), discussed at notes 94-99 infra and accompanying text; United Brands Co., 83 F.T.C. 1614 (1974), discussed at notes 78-82 infra. These cases illustrate that even when not controlling, such postacquisition evidence may be used with some effectiveness.

veal the anticompetitive impact of the acquisition. In addition, whether or not the defendant conceals the anticompetitive impact of a merger, the fact that there has not yet been a substantial lessening of competition at the time of trial does not mean that none will occur in the future. Moreover, a showing that the post-merger market is no less competitive than the pre-merger market is deceptive. The real issue is whether the post-merger market is less competitive than it would have been had the merger never occurred. Finally, as a matter of policy, the section 7 goal to "nip monopoly in the bud" would be frustrated if defendants were given a "free trial period" until anticompetitive effects became manifest. For these reasons, postacquisition evidence introduced to show that there has been no anticompetitive effect has traditionally been given little weight.

This article will set forth an historical perspective of the uses of postacquisition evidence. Particular consideration will be given to circumstances that may justify reliance upon postacquisition evidence. In addition, this article will evaluate the effectiveness of postacquisition evidence which demonstrates actual impact upon


[A] respondent, so long as the merger is the subject to an investigation or proceeding, may deliberately refrain from anticompetitive conduct - may sheathe, as it were, the market power conferred by the merger - and build, instead, a record of good behavior to be used in rebuttal in the proceeding. One consequence of a receptive attitude toward post-acquisition evidence on the part of the tribunals deciding Section 7 cases is that there will be frequent remands for further such evidence, as the instant case illustrates, until eventually, the proceeding may become so protracted as to preclude effective relief, or may terminate in the respondent's favor only because his good-conduct evidence has been persuasive. At that point, the respondent is free to take the wraps off the market power conferred by the merger.


The problem is similar to that raised by self-serving statements. See generally 1 S. GARD, JONES ON EVIDENCE § 4:61 (6th ed. 1972). In a sense, postacquisition evidence subject to manipulation by a defendant and self-serving statements both involve the possibility of "manufactured evidence" and must be evaluated carefully before they are accorded any weight. See generally Note, Analytical Approach to Post-Acquisition Evidence, supra note 6.

10. United States v. General Dynamics Corp., 415 U.S. 486, 505 (1974). Of course, should anticompetitive effects manifest themselves at a later date, du Pont would allow the merger to be challenged at that time. See notes 4 and 5 supra. Such a challenge would provide an inadequate remedy, however, because it would not achieve the § 7 goal of stopping anticompetitive effects in their incipiency. Id.


12. Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3rd Cir. 1953).

competition, a defendant's anticompetitive power, or post-merger market changes.

**AN HISTORICAL PERSPECTIVE**

*The Time of Suit Doctrine*

The rule that the probability of an acquisition's anticompetitive effect is to be assessed as of the time of suit\(^4\) provides the basis for the use of postacquisition evidence.\(^15\) If the probability of an acquisition's anticompetitive effect were measured as of the time of the merger itself, evidence of subsequent events would be irrelevant. Under the time of suit doctrine, however, postacquisition evidence is relevant because an assessment of probable effect on competition is measured as of the time the antitrust suit is brought. This rule was first announced in *United States v. E. I. du Pont de Nemours & Co.*\(^16\) In *du Pont*, the fact that the defendant pur-

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15. The value of postacquisition evidence has been the subject of considerable debate. Justice Harlan maintained that "[t]he value of post-merger evidence seems more than offset by the difficulties encountered in obtaining it." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 593 (1967) (Harlan, J., concurring).

Others have expressed concern for the ability of businesses to predict the legality of their actions. *Procter & Gamble Co.*, 63 F.T.C. 1203 (1962), rev'd, 386 U.S. 568 (1967). One commentator offers a reply to this concern:

> While there is much to be said for the proposition that parties ought to be able to determine the legality of their moves once and for all at the time that they make them, it is also apparent that the public can benefit by requiring a later divestiture of partial stock interests when they result in substantial foreclosures. However, if this latter proposition is adopted, the Government should be required to prove that there was a purpose and an intent to use the stock interest to secure an undue advantage.

*Bromley*, *Business' View of the DuPont-General Motors Decision*, 46 Geo. L.J. 646, 651 (1958) [hereinafter cited as Bromley].


posedly employed its General Motors stock to improve its position as a supplier of products to General Motors\(^7\) was found probative of whether its position as primary supplier to GM was an anticompetitive effect of the stock acquisition, or was attributable solely to du Pont's competitive merit.\(^8\) This case firmly established that, under the time of suit doctrine, postacquisition evidence may be valuable in assessing a merger's probable impact on competition.

**Postacquisition Evidence Used to Challenge and to Defend**

The government\(^9\) has traditionally been successful in relying on postacquisition evidence to show probable anticompetitive effects.\(^9\) In *United States v. E. I. du Pont de Nemours & Co.*,\(^10\) for instance, the Supreme Court permitted the government to rely upon postacquisition evidence to bolster its prima facie case. Postacquisition evidence showing anticompetitive power resulting from a merger and a defendant's willingness to exercise that power is reliable because the evidence clearly demonstrates a probability of anticompetitive effect. Furthermore, such evidence is not within the government's control and thus not subject to manipulation.

With regard to defensive use of postacquisition evidence, however, the Supreme Court has consistently reversed lower court opinions that relied too heavily upon postacquisition evidence offered by a defendant. In 1964, the Court reversed a district court opinion which placed heavy reliance on the postacquisition management policies introduced as evidence that the *status quo* had

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17. Id. at 606. The Court has been criticized for this interpretation of the evidence: I believe that industry generally resents that . . . the Court should have overturned unequivocal findings of the district court to the effect (1) that du Pont was a principal General Motors' supplier long before any stock purchase, (2) that du Pont maintained this position as a supplier for years following its stock purchase, and (3) that for the entire thirty years preceding the suit purchases by General Motors of du Pont products were based solely on the competitive merits of those products. Bromley, supra note 15, at 646.

18. 353 U.S. at 605-06.

19. Most of the reported cases dealing with postacquisition evidence have been brought by the government. This article will specify if the plaintiff is not the government.


been maintained.\textsuperscript{22} The following year the Court reversed a decision that relied upon the acquired company's fall in market share and relative lack of success in reciprocal buying.\textsuperscript{28} Finally, the Court again reversed a court of appeals decision that had upheld a merger after finding no evidence of anticompetitive impact.\textsuperscript{24} In these cases, the Supreme Court made it clear that there is no requirement that anticompetitive power manifest itself in anticompetitive action before a violation of section 7 occurs.\textsuperscript{25} For some time after \textit{du Pont} permitted consideration of postacquisition evidence in determining probable anticompetitive effects, it appeared as though such evidence always worked against, and never in favor of, a section 7 defendant.\textsuperscript{28}

Nonetheless, in exceptional circumstances postacquisition evidence may successfully negate the probability of anticompetitive impact. For example, evidence that after the merger the defendant does not have the power to engage in anticompetitive activities is

\begin{itemize}
  \item [22.] \textit{United States v. Continental Can Co.}, 378 U.S. 441 (1964). The Court noted that the defendant was under pressure because of the pending antitrust suit. \textit{Id.} at 463. The Court found that the acquiring can manufacturer and the acquired glass container manufacturer "were set off directly against one another in this [competitive] process and that the merger therefore carries with it the probability of foreclosing actual and potential competition between these two concerns." \textit{Id.} In light of the acquiring can manufacturer's power to guide the acquired glass container manufacturer's development consistently with the former's interest in metal containers, the merger was in violation of § 7, regardless of postacquisition management policies. \textit{Id.}
  \item [25.] \textit{Id.}
  \item [26.] The unfairness of this situation was noted by the majority in \textit{General Dynamics}: "In the context of the present case the 'time of suit' rule coupled with the limited weight given to post-merger evidence of no anticompetitive impact tends to give the Government a 'heads-I-win, tails-you-lose' advantage over a § 7 defendant; post-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded 'too much weight.'

415 U.S. at 505 n.13. One commentator interpreted this passage as an indication that "the majority viewed the determination of the weight to be given post-acquisition evidence solely as a question of fair play." Lurie, \textit{Mergers Under the Burger Court: An Anti-Antitrust Bias and Its Implications}, 23 \textit{Vill. L. Rev.} 213, 248 (1978).

The courts' reluctance to give much weight to postacquisition evidence offered by a defendant may be a reflection of the antitrust trends of the time. In 1966 Justice Stewart reflected that the "sole consistency . . . in litigation under § 7 [is that] the Government always wins." \textit{United States v. Von's Grocery}, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). \n\end{itemize}
highly probative. In addition, defendants can rely on evidence showing that the pre-merger market has changed, and that the nature of the post-merger market prevents the merger from having an anticompetitive impact.

*The United States v. General Dynamics Corp. Decision*

Defense reliance upon evidence showing a change in the dynamics of the market presents few of the problems typically associated with the use of postacquisition evidence. Generally, changes in the nature of the entire market are not susceptible to manipulation by the defendant. Furthermore, this evidence presumably relates to the probable effect on competition, as opposed to the actual impact. Finally, it does not frustrate the section 7 policy of stopping anticompetitive mergers in their incipiency since it does not give the defendant a "free trial period."

In *United States v. General Dynamics Corp.*, the Supreme Court made it clear that when the usual problems associated with postacquisition evidence are not present, and when postacquisition evidence negates the probability of a lessening of competition, it can be given controlling weight. In that case, the defendant proved postacquisition changes in the pattern and structure of the coal industry, as well as a dramatic decrease in the acquired company's reserve supply of coal. Specifically, while the coal industry had become dominated by long-term requirements contracts, the acquired company’s uncommitted coal reserves had dwindled. The cumulative effect of these changes was to prevent the company from effectively competing for future contracts.

The Court noted the traditional reasons for limiting the weight

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27. See notes 62-64 infra and accompanying text.
28. See notes 29-42 and 58-103 infra and text accompanying.
29. One exception may be markets which are dominated by the defendant, so as to enable the simulation of market changes.
30. This consideration is discussed more fully at notes 43-56 infra and accompanying text.
33. See notes 9-13 supra and accompanying text.
34. 415 U.S. at 504-06.
35. Id. at 506.
36. Id. The changes in the market had made substantial uncommitted reserves essential to competition for future contacts.
given postacquisition evidence, but found that in this case they did
not apply. First, the evidence was not susceptible to manipulation
by the defendant.37 Second, the demonstration of weak coal
reserves was not merely evidence that no lessening of competition
had yet occurred. It necessarily implied that the acquired company
was not merely disinclined but was unable to compete effectively
for future contracts.38 Finally, because the market changes were
the product of inevitable pressures on the coal industry,39 it could
not reasonably be thought that competition might have been more
active had the acquisition never occurred.40

In General Dynamics, the reasons for according postacquisition
evidence little weight were not applicable and the evidence was
probative of the acquisition’s future impact on competition.41 The
Supreme Court thus relied on the postacquisition evidence pro-
ferred by the defendant to validate the acquisition which otherwise
would have been found to violate section 7.42 Yet, the Court specif-
ically recognized and addressed the reasons why such postacquisi-
tion evidence has traditionally been given little weight in assessing
future anticompetitive effect. In so doing, the Court implied that
in the usual case these concerns will continue to limit the weight
 accorded postacquisition evidence offered by a defendant.

ACTUAL EFFECT OR PROBABLE EFFECT?

The Clayton Act proscribes mergers which carry a probability of

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37. "[The evidence] could not reflect a positive decision on the part of the merged com-
panies to deliberately but temporarily refrain from anti-competitive actions." Id.
38. Id.
39. Justice Douglas, dissenting, pointed out that much of the reduction in the acquired's
uncommitted coal reserves resulted from contractual commitments made after the acquisi-
tion. Id. at 524 (Douglas, J., dissenting). Thus, some of the crucial evidence was within the
control of the defendant (although it had been contractually removed from the defendant's
control by the time of suit.) For a similar situation, see United States v. International Har-
vester Co., 564 F.2d 769 (7th Cir. 1977), discussed at notes 103-108 supra and accompanying
text.
40. 415 U.S. at 506.
41. The Court indicated that the government’s statistical showing "would ... have suf-
 ficed to support a finding of 'undue concentration' in the absence of other considera-
tions. ..." Id. at 498. The market was already concentrated and the merger at issue signifi-
cantly increased the market share of the merged company. Id. at 495-96. It is thus clear
that, absent the postacquisition changes, the acquisition would have violated § 7.
42. Id. Justice Douglas, dissenting, found the evidence much less probative, pointing out
that the district court made no finding regarding the availability of new reserves at the time
of the acquisition or the time when the complaint was filed. Douglas also noted that other
coal companies acquired new reserves after the acquisition. Id. at 524 (Douglas, J.,
dissenting).
substantially lessening competition.\textsuperscript{43} Since section 7 was designed to stop anticompetitive effects in their incipiency,\textsuperscript{44} mergers can be challenged before any \textit{actual} anticompetitive effect has occurred.\textsuperscript{45} Defendants have, however, attempted to use postacquisition evidence to demonstrate not only that there is no probability that the merger will have a future anticompetitive effect, but also that the merger has not in fact had an anticompetitive impact.

Postacquisition evidence of a merger's actual impact on competition was relied upon by the defendant in \textit{FTC v. Consolidated Foods}.\textsuperscript{46} The defendant claimed that this evidence showed the absence of anticompetitive power\textsuperscript{47} and the improbability of future anticompetitive effect. The evidence presented by the defendant was that Consolidated's attempts to establish reciprocal buying programs\textsuperscript{48} had been relatively unsuccessful. Its effort to turn this postacquisition evidence into an effective defensive tool failed. First, the evidence was ambiguous. It could also be interpreted, as the Federal Trade Commission argued, as proof that Consolidated did have anticompetitive reciprocal buying power and the willingness to exercise that power.\textsuperscript{49} Second, many of the traditional reasons for according postacquisition evidence little weight applied. As a result, the Court refused to rely on the postacquisition evidence in support of the defendant's position.\textsuperscript{50} The Court recognized that to do otherwise would be to permit the parties to simply bide their time until reciprocity was allowed to fully develop and succeed.\textsuperscript{51} The Court also noted that even if the post-merger market were actually no less competitive than the pre-merger market, it was impossible to know whether the post-merger market might not have been even more competitive had the merger never

\textsuperscript{43} See note 2 \textit{supra} and accompanying text.
\textsuperscript{44} Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3rd Cir. 1953).
\textsuperscript{45} See notes 53-55 \textit{infra} and text accompanying.
\textsuperscript{46} 380 U.S. 592 (1965). This case is also discussed at notes 84-93 \textit{infra} and accompanying text. See also text accompanying note 23 \textit{supra}.
\textsuperscript{47} See notes 84-93 \textit{infra} and accompanying text.
\textsuperscript{48} Reciprocal buying involves an arrangement between two firms that each will buy the products of the other. Conglomerates, by virtue of their large volume of purchasing, may be able to pressure other companies into reciprocal buying arrangements by threatening to cease purchasing the other companies' products. See \textit{generally} authorities cited in note 83 \textit{infra}.
\textsuperscript{49} See notes 84-93 \textit{infra} and text accompanying.
\textsuperscript{50} In contrast, the Court did rely on postacquisition evidence supporting the government's position. See note 88 \textit{infra} and accompanying text.
\textsuperscript{51} 380 U.S. at 598.
occurred.\textsuperscript{52}

The Supreme Court again addressed the absence of actual anticompetitive impact in \textit{FTC v. Procter \& Gamble Co.}\textsuperscript{53} In that case, the court of appeals relied heavily upon postacquisition evidence introduced by the defendant. This evidence showed that competitors of the acquired company were selling larger quantities of bleach than before the merger, and that the acquired company's market share had not significantly increased.\textsuperscript{54} The court of appeals concluded that the evidence had not proved anticompetitive effects. The Supreme Court reversed, finding "no requirement that the anticompetitive power manifest itself in anticompetitive action before \textsection{7} can be called into play."\textsuperscript{55}

It is clear then, that postacquisition evidence of actual anticompetitive effect is not a prerequisite to proving a section 7 violation. Moreover, evidence of the absence of anticompetitive impact is viewed as not compelling and is accorded little, if any, weight. The danger is that postacquisition evidence showing no actual anticompetitive effect might disguise an acquisition with an aura of harmlessness. This would allow the evidence of no actual anticompetitive effect "to override all probabilities"\textsuperscript{56} of future anticompetitive effect. Yet, it may be that, as in \textit{Consolidated Foods}, postacquisition evidence offered to show that a defendant does not have anticompetitive power will also reflect the absence of any anticompetitive impact. Therefore, the rule that postacquisition evidence be given only limited weight must be observed even when postacquisition evidence is offered by a defendant to negate its power and willingness to use an acquisition for anticompetitive purposes.

**APPLICATIONS OF POSTACQUISITION EVIDENCE**

The often limited weight of postacquisition evidence has not prevented its application in certain contexts.\textsuperscript{57} Postacquisition evidence has been instrumental in evaluating a section 7 defendant's

\textsuperscript{52} \textit{Id.} These problems were identified in response to the court of appeals' interpretation of the evidence as showing no anticompetitive impact. The court of appeals noted that "[p]robability can best be gauged by what the past has taught." 329 F.2d 623, 627 (7th Cir. 1964).

\textsuperscript{53} 386 U.S. 568 (1967).

\textsuperscript{54} \textit{Id.} at 576.

\textsuperscript{55} \textit{Id.} at 577. The Court also noted that the increased quantity of competitors' sales was irrelevant in light of the acquired company's increased market share. \textit{Id.} at 579.

\textsuperscript{56} \textit{FTC v. Consolidated Foods}, 380 U.S. 592, 598 (1965).

\textsuperscript{57} The probative value of postacquisition evidence, like any other evidence, is largely determined by the context in which it is presented.
Postacquisition Evidence

Anticompetitive power and willingness to exercise that power. It has also served as an indicator of post-merger changes in the nature of the market.

Evaluating a Defendant's Anticompetitive Power

Vertical Mergers

When two separate companies interacting vertically as supplier and purchaser merge into one entity competitors of each of those companies may be foreclosed from trading with the other company. In the area of vertical mergers, anticompetitive power is likely to be manifested as the power to so foreclose. In United States v. Kimberly-Clark Corp., postacquisition evidence showed that the merger of a paper manufacturer and a paper merchant gave the parent company the power to control the acquired company's distribution. It also showed that this power was exercised to increase distribution of the parent company's product. The district court relied, inter alia, upon this postacquisition evidence and the trend toward vertical mergers in the industry in finding a probability that the merger would lessen competition.

Another district court decision, United States v. Hammermill Paper Co., which also involved a merger between a paper manufacturer and paper merchant, provides an instructive comparison. In Hammermill, the postacquisition evidence concerning foreclosure was favorable to the defendant. Although the same potential for foreclosure existed, postacquisition evidence showed that foreclosure had not occurred. The acquiring and acquired companies maintained separate profit centers and manifested no intention to attempt foreclosure. The court stated that the defendant's pre-acquisition motives were defensive, and relied upon postacquisition


60. Id. at 460.

61. Id. at 460-61.


63. But see discussion identifying market shares not subject to foreclosure, Id. at 1283-85. The concept of separate profit centers is discussed in Geneen, Concepts of a Conglomerate or a Multi-Market Company: A Businessman's View, 39 Antitrust L.J. 4, 13 (1969).

64. 429 F. Supp. at 1289-91.
evidence to the extent that it did not disprove this finding. Although other aspects of the case were also important, the postacquisition evidence indicating that Hammermill did not intend to foreclose played a role in the court’s finding that the merger did not violate section 7. Hammermill and Kimberly-Clark suggest, then, that the outcome of a section 7 challenge may be influenced in either direction by postacquisition evidence indicating whether the defendant has the power and willingness to foreclose.

Conglomerate mergers

1. Power of a “Deep Pocket”

In the context of conglomerate mergers, the power to substantially lessen competition often results from introducing the “deep pocket” of a wealthy parent company into an industry populated by smaller companies. This concept was discussed in Ekco Products Co. v. FTC. In that case, a large manufacturing company acquired a smaller company that had a virtual monopoly in its field. The Federal Trade Commission argued that the merger would probably lessen competition, pointing to the parent company’s ability to entrench the acquired company by purchasing new competitors as they entered the market. The parent company’s power and intent to do so were confirmed by postacquisition evidence that the parent company acquired one new entrant and had attempted to acquire another.

The Seventh Circuit Court of Appeals determined that the purchase of a virtual monopolist by a large corporation does not, in and of itself, constitute a violation of section 7. Such a purchase, however, in conjunction with the postacquisition evidence of attempted entrenchment, was sufficient to support the conclusion that the merger would probably preserve the acquired company’s monopoly position. Thus, the postacquisition evidence showing

66. 347 F.2d 745 (7th Cir. 1965).
67. The power to purchase competitors was not within the resources of the acquired company. Id. at 752.
68. Id. at 751.
69. Id. at 752. The court also found that the acquiring company was itself a potential entrant into the acquired company’s field of industry. Id.
an exercise of power\textsuperscript{70} to substantially lessen competition was important in proving the section 7 violation.

Similarly, in \textit{General Food Corp. v. FTC},\textsuperscript{71} the Federal Trade Commission successfully relied upon postacquisition evidence to show that the merged company had used its “deep pocket.” The evidence showed that General Foods had engaged in an anticompetitive advertising campaign that raised barriers to entry and triggered the merger of its major competitor.\textsuperscript{72}\textsuperscript{7} In so doing, the parent company had demonstrated its power to upset the competitive balance and its willingness to exercise that power.\textsuperscript{72} Likewise, in \textit{Reynolds Metals Co. v. FTC}\textsuperscript{74} the power of the “deep pocket” or “rich parent” created the power to sell at prices approximating cost or below and to undercut the less affluent competition.\textsuperscript{75\textsuperscript{7}} Postacquisition evidence showed that the defendant had in fact exercised its “deep pocket” power to cut prices, increasing its own sales at the expense of its smaller competitors.\textsuperscript{76}

In contrast, the anticompetitive power inherent in the “deep pocket” of a wealthy parent company, in the absence of postacquisition evidence of efforts to exercise that power, may not be sufficient to trigger a finding of probable anticompetitive effect.\textsuperscript{77}

\textit{In re United Brands Co.},\textsuperscript{78} a wealthy concern entered the lettuce industry by acquiring several small, independent lettuce growers. At

\begin{enumerate}
\item The evidence can also be viewed as a showing of actual, present anticompetitive effect.
\item 386 F.2d 936 (3rd Cir. 1967), \textit{cert. denied}, 391 U.S. 919 (1968).
\item The defendant argued that the postacquisition evidence reflected strong competition. \textit{Id.} at 946. Thus, the interpretation of the evidence was crucial in this case. \textit{See also FTC v. Consolidated Foods Corp.}, 380 U.S. 592 (1965), discussed \textit{infra} notes 84-93 and accompanying text.
\item This evidence could also be viewed as a demonstration of actual lessening of competition.
\item 309 F.2d 223 (D.C. Cir. 1962).
\item \textit{Id.} at 229-30. \textit{Reynolds} actually involved a vertical merger between an aluminum manufacturer and a company in the business of converting aluminum foil into decorative florist foil. The court's analysis, however, focused on the “deep pocket” effect rather than the vertical aspects of the merger.
\item \textit{Id.} at 230. The court noted the Commission's finding that this conduct had an \textit{actual} anticompetitive effect. At the same time, the court recognized that “[t]he Commission is not required to establish that the Reynolds' acquisition of Arrow did in fact have anticompetitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition.” \textit{Id.}
\item Whether postacquisition evidence of efforts to exercise anticompetitive power should be required in order to trigger a Section 7 violation is essentially a policy question, outside the scope of this article.
\item 83 F.T.C. 1614 (1974).
\end{enumerate}
the time of the acquisition the industry was composed predominantly of highly competitive small businesses. Although postacquisition evidence showed that the parent company gave financial assistance to the acquired company, helping it survive heavy losses, the evidence did not show any predatory pricing. Notably, in upholding the merger the Federal Trade Commission found it necessary to place considerable emphasis on this postacquisition evidence, because the probable effects of the acquisition seemed so uncertain. The Commission found that although the respondent had used its “deep pocket” to help the acquired company, the ability to sustain large losses does not, in itself, pose a threat to competition. The Commission distinguished the mere ability to survive heavy losses from “the ability to incur losses which others cannot incur, coupled with a predatory pricing scheme. . . .” Apparently, additional postacquisition evidence of this sort would have been significant.

80. 83 F.T.C. at 1703.
81. Id. at 1703 n.8.
82. Similarly, the Commission did not find the unrealized potential for preferential prices significant, without more. Id. at 1703-04.

United Brands also involved other postacquisition evidence. The Commission reviewed the respondent’s discontinued attempt to establish an anticompetitive brand differentiation program:

Its plan was simply to get control of enough lettuce acreage to permit it to “subdue” the short-run forces of supply and demand, i.e., to acquire “some degree of control over the market and prices . . . .” The appearance of product superiority that would be needed to justify the “premium” prices it proposed to charge was to be acquired in the straight-forward fashion of simply separating the regular yield from its farms into two parts. The best of the crop would be packaged and sold as “Chiquita” brand lettuce at the 30 percent to 50 percent higher price. The rest of the crop would be left unpackaged and sold at the going market price, the one received by its competitors for their total lettuce crop. Respondent’s average price, in other words, would be substantially higher than its competitors’ prices although its average quality would admittedly be no better than theirs.

Id. at 1963. (Thompson, Comm’r., concurring) (footnote omitted).

The Commission rejected the administrative law judge’s suggestion that the postacquisition withdrawal of the program be viewed with skepticism, since its timing coincided with the Commission’s investigation. Id. at 1711. Instead it looked at other evidence, including postacquisition evidence, concluding that “there appear to be numerous market factors which contributed to the program’s failure.” Id. at 1711-12. In addition, insufficient quantities of raw product prevented respondent from providing a sufficiently steady supply and high volume of high quality lettuce to make the program successful. Id. at 1713. In short, although the respondent intended to use the mergers anticompetitively, because the evi-
2. Power to Engage in Reciprocal Buying

In addition to the power of the "deep pocket," conglomerate mergers may also give rise to the power to engage in reciprocal buying. Reciprocal buying involves an arrangement between two firms that each will buy the products of the other. Conglomerates, by virtue of their large volume of purchasing, may be able to pressure other companies into reciprocal buying arrangements by threatening to cease purchasing the other companies' products. The existence of this power also may be proved by postacquisition evidence. In FTC v. Consolidated Foods Corp., a company owning a network of wholesale and retail food stores acquired a manufacturer whose products, dehydrated onion and garlic, were sold to food processors. The acquiring company purchased substantial quantities of the food processors' end product. The Federal Trade Commission found that the parent company had reciprocal buying power, had demonstrated a willingness to exploit it, and had used it to create a protected market for the acquired company. The Seventh Circuit Court of Appeals, however, noted that the acquired company had experienced only a seven per cent market share increase in dehydrated onions, and a twelve per cent market share decrease in dehydrated garlic. In examining these factors, the court interpreted the company's attempts at establishing reciprocal buying arrangements as unsuccessful.

dence, including postacquisition evidence, demonstrated that it did not have the power to succeed, the branding program did not provide a basis for a § 7 violation. Id. at 1714.

83. The essence of [a reciprocal buying arrangement] is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases . . . . Where such a relationship is well established, it prevents the competitors of each company from selling to the other company, and affords to each company whatever increase of size and strength can be derived from an assured place as supplier to the other.


84. 380 U.S. 592 (1965).

85. Id. at 595.

86. Id. at 599.

87. Consolidated Foods Corp. v. FTC, 329 F.2d 623, 626 (7th Cir. 1964), rev'd, 380 U.S. 594 (1965). The court's view of the use of postacquisition evidence is reflected in its statement that "[p]robability can best be gauged by what the past has taught." Id. at 627. Accord, 380 U.S. 592, 606 (Stewart, J., concurring), discussed at notes 97-99 infra and text
On appeal to the Supreme Court, Justice Douglas, writing for the majority, viewed this same evidence as an indication that reciprocity was repeatedly attempted and was sometimes successful.\textsuperscript{88} This evidence, together with the peculiar structure of the industry,\textsuperscript{89} was held sufficient to support a finding of probability of reciprocal buying. The Court reversed the circuit court’s decision for relying too heavily upon postacquisition evidence.\textsuperscript{90}

It is noteworthy that Justice Stewart, in his concurring opinion,\textsuperscript{91} argued that because it is the best evidence available, the weight of postacquisition evidence should not be limited. He maintained that the true error of the court of appeals was its interpretation of the postacquisition evidence. Stewart interpreted the postacquisition evidence as a demonstration that although the defendant’s attempts at reciprocal buying met with mixed results, they were successful when directed toward the smaller processors in the industry. Stewart found this point dispositive of the probability of anticompetitive effect. He indicated that neither the opportunity for reciprocity alone nor the mere effort at reciprocity could support a finding of probable anticompetitive effect.\textsuperscript{92} Stewart urged the development of a standard for determining exactly how effective reciprocity attempts must be in order to trigger a finding of probability of anticompetitive effect.\textsuperscript{93} Although only the Commission and Justice Stewart directly addressed the questions of power and its exercise, each opinion ultimately turned on an evaluation of the postacquisition evidence as it reflected the defendant’s power and intent to establish anticompetitive reciprocity arrangements.

\textsuperscript{88} FTC v. Consolidated Foods Corp., 380 U.S. 592, 600 (1965).
\textsuperscript{89} It was a two-firm oligopoly. The acquired company was second to the leader, trailed by a distant third competitor. Moreover, many customers found it best to use two suppliers to protect their source of supply. Id.
\textsuperscript{90} Id. at 598. Although the Supreme Court also accorded substantial weight to the postacquisition evidence to support a finding of probable anticompetitive impact, the considerations involved in that type of application are quite different. See text accompanying notes 19-29 \textit{supra}.
\textsuperscript{91} Id. at 602 (Stewart, J., concurring).
\textsuperscript{92} “[I]t is not enough to say that the merger is illegal merely because reciprocity attempts ‘sometimes worked.’” Id. at 604 (Stewart, J., concurring).
\textsuperscript{93} Id. (Stewart, J., concurring).
Horizontal Mergers

In *In re Coca-Cola Bottling Co. of New York* the respondent, a producer of fine wine, acquired a producer of sweet wine. Market shares and concentration ratios resulting from this horizontal merger were too small to provide a basis for a section 7 violation. The Federal Trade Commission contended, however, that as a result of the merger, the acquiring company could condition the distribution of its fine wine upon acceptance of the sweet wine. Thus, there was a probability that the merger would result in the foreclosure of competitors from business with the acquiring company's distributors. The respondent countered this argument by pointing to the failure of its postacquisition attempt to consolidate the sales organizations for the two products, and its subsequent reseparation of the sales organizations. In deciding the case, the Commission recognized that consolidation of sales was readily within the control of the respondent, and that the failure of past efforts to consolidate did not necessarily mean that further attempts would not be made. The evidence as a whole, however, including the strength of the acquired concern's competitors, was found to indicate no probability of anti-competitive effect. Although the Commission did not expressly acknowledge it, postacquisition evidence appears to have confirmed its conclusion that the respondent did not have power to foreclose.

Other postacquisition evidence in *Coca-Cola* received greater recognition. The Commission argued that the acquisition would have an anticompetitive effect because the respondent was trying to change the image of the acquired concern in order to achieve acceptance of its product as a table wine, and to raise prices.

95. *Id.* at 206. The Commission further discounted the significance of the figures to take account of postacquisition losses which were so calamitous as to negate any inference that they were the result of manipulation by the respondent. *Id.*
96. *Id.* at 208.
97. *Id.* at 209.
98. *Id.*
99. *Id.* at 209.
100. *Id.* at 209. The Commission compared this attempt with the branding program in *United Brands*, 83 F.T.C. 1614 (1974). See note 82 supra. The postacquisition attempt to change the image of the acquired wine in order to achieve acceptance as a table wine could have significance to other aspects of the case. Defense counsel had argued that the two wines were so different in quality and use that the sweet wine would not compete with the acquiring company's table wine. Although the Commission nevertheless characterized the merger as horizontal, this asserted difference in the products was important to the ultimate deci-
This effort, however, encountered an unfavorable market response, and in fact resulted in diminished purchases and huge losses.\textsuperscript{101} The Commission, without indicating any other basis for its conclusion, found the record insufficient to indicate that the respondent would succeed in its attempt “to sell old wine in new bottles at a higher price.”\textsuperscript{102} Thus, it seems that the question of power was determined, in the absence of contrary indications, by postacquisition evidence that the respondents’ arguably anticompetitive attempts had failed.

Another example of effective defensive use of postacquisition evidence relevant to horizontal mergers is found in United States v. International Harvester Co.\textsuperscript{103} Postacquisition evidence in this case showed that the acquiring company had taken steps to limit its power to control the acquired company. The original stock purchase agreement gave the respondent a 39\% interest in the acquired company. Subsequent to the filing of the complaint, those holdings were reduced to 36\%.\textsuperscript{104} Furthermore, a provision effectively giving the acquiring company veto power over certain corporate decisions was deleted from the agreement.\textsuperscript{105} The evidence also showed that the acquiring company had not interfered with the business activities of the acquired concern.\textsuperscript{106} Thus, postacquisition evidence showed not only that the defendant’s power to control the acquired company was limited, but also that the defendant intended to limit that power.\textsuperscript{107}

\footnotesize{\textit{Coca-Cola Bottling Co. of New York, 93 F.T.C. 110, 207 (1979).} This treatment can be contrasted with a different attitude expressed in United States v. Continental Can Co., 378 U.S. 441 (1964). See note 22 supra and accompanying text.}

\footnotesize{\textit{Id. at 210.} Thus, the Commission avoided the question of whether that conduct would be considered anticompetitive.}

\footnotesize{\textit{564 F.2d 769 (7th Cir. 1977).}}

\footnotesize{\textit{Id. at 776.} The Court said that the parent company’s holdings would be further reduced to 33-1/3\%. \textit{Id.}}

\footnotesize{\textit{Id. at 777.}}

\footnotesize{\textit{Postacquisition evidence also showed that both companies experienced increased market shares and became stronger competitors. In addition there was active price competition between the two. \textit{Id. at 778.}}}
In affirming the district court's decision upholding the merger, the court of appeals found that postacquisition evidence had not been given too much weight. Much of the postacquisition evidence was beyond the power of the parties to manipulate and depicted only part of the overall scene. This case also reveals that postacquisition moves by a defendant limiting the defendant's anticompetitive power can be an effective defensive measure when it is not within the defendant's power to reverse the limitation.

_Evaluating Market Changes_

Another type of postacquisition evidence that has been effective is evidence showing changes in the operation of the market. In _United States v. General Dynamics Corp._, for instance, the increasing dominance of long-term contracts in the coal industry, together with the depletion of the acquired's uncommitted coal reserve position, made past performance statistics an unreliable indicator of the future performance of the merged company. These past performance statistics would otherwise have been conclusive evidence of probable anticompetitive effect. Instead, the postacquisition evidence of market changes was controlling in the Supreme Court's decision that the merger did not violate section 7.

Subsequent cases have also relied upon postacquisition evidence of market changes. In _United States v. Healthco Inc._, the government challenged the vertical merger of a dental products manufacturer and a dental products distributor. The defendant relied on _General Dynamics_, arguing that the increasing importance of mail order sales and direct sales in the dental products industry after the merger diminished the significance of sales by dental dealers. Therefore, the defendant argued, any foreclosure caused by the

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108. 564 F.2d at 780. More precisely, the evidence was not outside the power of the defendant at the time of the changes; after the fact, however, the contractual provisions were presumably permanent.


110. _Id._ at 504-506.

merger would be insignificant. The evidence, however, provided scant support for the defendant’s position that the business relationship between manufacturers and dealers in dental products had become less important to distribution. The court found this change in the market to be speculative, and thus insufficient to warrant upholding an otherwise anticompetitive merger.112

A similar presentation of postacquisition evidence showing market alteration was more successful in United States v. Hammermill Paper Co.113 There the court agreed with the defendant that paper merchants were of declining significance to the distribution of paper products. The court based its opinion on the gradual decline in the percentage of the market served by distributors from 60% at the time of the merger to 40% at the time of suit.114 This evidence provided one of several bases for the court’s finding that significant foreclosure was not a probable result of the vertical merger at issue.115

Similarly, the peculiar facts of Fruehauf Corp. v. FTC116 compelled heavy reliance upon the defendant’s postacquisition evidence of market changes. The Federal Trade Commission initially found that the acquisition of an auto parts supplier by a manufacturer of various auto devices, including trailer anti-skid devices, would probably foreclose other manufacturers from access to the acquired company’s supplies. Between the time of the Commission’s finding and the court of appeals’ decision, however, the legal requirement that trailers be equipped with anti-skid devices was removed.117 The court of appeals found that the change in the law stripped the market of its viability, thereby rendering unsupported the Commission’s finding that the merger would anticompetitively effect the market for anti-skid devices.118

In RSR Corp. v. FTC,119 postacquisition evidence was used to establish both the product and the geographic markets. The court looked at evidence that the acquiring company’s plant in Newark,

112. Id. at 273.
114. Id. at 1286. Cf. United States v. Kimberly-Clark Corp., 264 F. Supp. 439 (N.D. Cal. 1967) (paper merchants, at the time of that suit, were significant in the market). For further comparison of the cases, see 429 F. Supp. at 1287.)
116. 603 F.2d 345 (2d Cir. 1979).
117. Id. at 355.
118. Id.
119. 602 F.2d 1317 (9th Cir. 1979), cert. denied, 445 U.S. 927 (1980).
New Jersey was not replaced according to earlier plans because the acquired company's plant in Walkill, New York could serve the same market. This evidence justified including the Walkill, New York region in a determination of the relevant geographic market.\footnote{120}

The product market in \textit{RSR Corp.} was also in dispute. The defendant contended that it included both primary and secondary lead, arguing that the data on competing uses did not account for recent developments in the industry. Specifically, the defendant argued that the increased use of maintenance-free batteries, which can be made with either primary or secondary lead, was increasing competition between primary and secondary lead producers.\footnote{121} The court first noted the traditional limitation on the weight of postacquisition evidence.\footnote{Id. at 1322-23.} It then found that the future of maintenance-free batteries was too speculative to carry weight in evaluating the probable anticompetitive effect of the merger.\footnote{Id. at 1323.}

**CONCLUSION**

Postacquisition evidence offered by a party challenging a merger has long been recognized as effective in prosecuting a violation of section 7 of the Clayton Act. Defensive use of postacquisition evidence has, however, been viewed with distrust. Although the apparent unfairness of this dichotomy has generated criticism, the difference in treatment is generally justified by the problems underlying defensive use of postacquisition evidence. It is beyond doubt that postacquisition evidence showing that a merger has not yet had an anticompetitive effect is unreliable. Such evidence cannot justify validating a merger because section 7 guards not only against actual anticompetitive impact, but also against probable

\footnote{120. Id. at 1322-23.}
\footnote{121. Id. at 1322.}
\footnote{122. Id. It is questionable, however, whether this postacquisition evidence presents problems. It is clearly outside the defendant's control and is directly probative of the issue concerning the area of competition. In addition, since the evidence doesn't bear on anticompetitive effects it need not be compared to any other time frame. Likewise, relying on this evidence will not frustrate the "incipiency" policies of § 7. Finally, the evidence has no tendency to make the merger appear either more or less dangerous. See Warner-Lambert Co., 87 F.T.C. 812 (1976). In that case the government tried to use postacquisition evidence to establish sufficient competition between the merged entities to support a determination of relevant product market. The evidence did not support the contention. Even considering postacquisition inventions in the product market, the quantities were, as yet, \textit{de minimus}. Id. at 896.}
\footnote{123. 602 F.2d at 1322.}
future anticompetitive effect of the merger.

Postacquisition evidence can nevertheless be an effective defensive tool in certain situations. It may be relied upon when it reveals changes in the operation of the market or disproves a defendant's anticompetitive power. Furthermore, postacquisition evidence reflecting a defendant's unwillingness to exercise its anticompetitive power may bolster its defense. As a result, merging companies may reduce their exposure to a section 7 challenge by structurally limiting their anticompetitive power.

Nevertheless, even evidence purportedly disproving a defendant's anticompetitive power must be carefully evaluated. As illustrated in *Consolidated Foods*, this type of evidence is susceptible to misinterpretation. There is also a danger that postacquisition evidence relevant to whether a defendant has anticompetitive power will be used to improperly infer that there has been no actual anticompetitive effect. Therefore, although postacquisition evidence can be an effective defensive tool in certain situations, the traditional limitation on the weight of that evidence retains its vitality.

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