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The Clayton Act and the Transamerica Case

PHIL C. NEAL*

Late in 1950 Congress amended Section 7 of the Clayton Act¹ to help arrest the further growth of industrial concentration in the United States.² Shortly before the amendment was adopted the Supreme Court had made its contribution toward vitalizing the Clayton Act by announcing, in the *Standard Stations* case, a strict version of Section 3.³ Viewed together, these events forecast serious obstacles in the path of corporate mergers. The action of Congress blocked off what had become one simple avenue for avoiding the prohibitions of the old Section 7, the merger by acquisition of assets.⁴ The Supreme Court decision suggested that the standard of illegality under Section 7 might acquire a strict meaning comparable to that under Section 3.⁵ These prospects have given rise to drastic predictions about the effects of Section 7 on corporate growth by external expansion.⁶ But a perusal of the

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1. 64 STAT. 1125 (1950), 15 U.S.C. § 18 (Supp. 1952), amending 38 STAT. 730 (1914), 15 U.S.C. § 18 (1946).

2. The committee reports favoring adoption of the amendment pointed with alarm to data on the level of concentration compiled by the Federal Trade Commission and others. See H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949); SEN. REP. NO. 1775, 81st Cong., 2d Sess. (1950).

3. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

4. Though commonly referred to as a loophole, this type of corporate acquisition was clearly not intended to be covered by the original Section 7, which viewed stock acquisitions and holding companies as the evils to be dealt with. The genuine loophole which developed in Section 7 was the acquisition of stock immediately followed by the acquisition of assets, held by the Supreme Court to place the transaction beyond the reach of the Federal Trade Commission. *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587 (1934). Why this defect should have caused virtual abandonment of further attempts to enforce Section 7 is not readily apparent in view of the alternative remedy by suit in equity. See 38 STAT. 736 (1914), 15 U.S.C. § 25 (1946). Nor is it apparent in view of the possibility of judicial aid to preserve the jurisdiction of the Federal Trade Commission. Cf. *Board of Governors v. Transamerica Corporation*, 184 F.2d 311 (9th Cir.), cert. denied 340 U.S. 883 (1950).

5. The law under the old Section 7 and the history of attempts to revise it are well reviewed in Comment, 57 YALE L.J. 613 (1948). See also Handler, *Industrial Mergers and the Antitrust Laws*, 32 COL. L. REV. 179 (1932); Comment, 39 YALE L.J. 1042 (1930). The 1950 revision has been commented on in Carson, *Corporate Mergers*, CCH ANTITRUST LAW SYMPOSIUM 167 (1952); Adelman, *Integration and the Outlook for the Future*, CCH ANTITRUST LAW SYMPOSIUM 135 (1951); Rostow, *Problems of Size and Integration*, CCH ANTITRUST LAW SYMPOSIUM 117 (1951); Note, 52 COL. L. REV. 766 (1952); Comment, 46 ILL. L. REV. 444 (1951); 64 HARV. L. REV. 1212 (1951).

6. "Thus, to say that there are few if any mergers which the Federal Trade Commission cannot forbid if it has a mind to is probably an understatement. It would be more nearly correct to turn the proposition around and say that there are few mergers it can approve even if it wants to." Adelman, *Integration and the Outlook for the Future*, CCH ANTITRUST LAW SYMPOSIUM 135, 148 (1951). See also Rostow, *Problems of Size and Integration*, CCH ANTITRUST LAW SYMPOSIUM 117, 120 (1951).

financial pages of the New York Times suggests that up to now the "new Section 7" has not discouraged all mergers, even among substantial corporations. Where mergers have taken place counsel have doubtless not guaranteed against antitrust risks, but it will be some time before one can plot with reasonable accuracy the probable course of Section 7 enforcement.⁷ In the meantime some additional speculation about the meaning and possible operation of the section may be in order.

A useful vehicle for some further examination of Section 7 is the *Transamerica* case, decided by the Federal Reserve Board on April 1, 1952,⁸ and presently pending before the Court of Appeals.⁹ It happens that the first case to suggest the possible effects of the new statute is one arising under the jurisdiction of the Federal Reserve Board, not the Federal Trade Commission; that the proceeding was the first ever commenced by the Reserve Board under Section 7; and that it was the old section, not the revised one, under which the proceeding was instituted and the order made. These facts may lessen somewhat the significance of the case in relation to transactions which fall within the jurisdiction of the FTC and the Department of Justice.¹⁰ The FTC will very likely have its own ideas about how Section 7 should be applied. Under current doctrines those ideas will be entitled to considerable judicial respect, at least so far as they can be exemplified in findings of "fact" and possibly even if they amount to "interpretations of the statute."¹¹

7. At the date this is written the Federal Trade Commission has only begun one case, *Pillsbury Mills, Inc.*, FTC Dkt. 6000, 3 CCH TRADE REG. SERV. ¶ 11,146 (June 26, 1952).

8. In the Matter of *Transamerica Corporation*, 38 FED. RES. BULL. 368 (1952). The proceeding is hereinafter cited as *Re Transamerica*. Preliminary skirmishes in the proceeding are reported in *Transamerica Corporation v. McCabe*, 80 F. Supp. 704 (D.D.C. 1948); *Board of Governors v. Transamerica Corporation*, 184 F.2d 311 (9th Cir. 1950); *Board of Governors v. Transamerica Corporation*, 184 F.2d 319 (9th Cir.) *cert. denied* 340 U.S. 883 (1950); and *Board of Governors v. Transamerica Corporation*, 184 F.2d 326 (9th Cir. 1950).

9. A petition for review by the Court of Appeals for the Third Circuit was filed by *Transamerica* on May 27, 1952.

10. The Federal Trade Commission has authority to enforce Section 7 in all cases except "where applicable" to corporations subject to the jurisdiction of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board or the Federal Reserve Board. 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. 1952). The Attorney General has concurrent jurisdiction to enforce Section 7 by suits in equity. 38 STAT. 736 (1914), 15 U.S.C. § 25 (1946). The Attorney General has, further, the right to intervene in an administrative proceeding under Section 7, pursuant to an amendment of Section 11 adopted in 1950. 64 STAT. 1126 (1950), 15 U.S.C. § 21 (Supp. 1952).

11. Compare *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948), with *FTC v. Gratz*, 253 U.S. 421, 427 (1920), reflecting the changed attitude toward the Federal Trade Commission Act. It remains to be seen whether an area for administrative discretion

But the usefulness of the *Transamerica* case as a case study is not limited to the value as precedent of the Reserve Board's decision or the ultimate decision on appeal. Nominally a proceeding under the old Section 7, it brings to the surface a number of problems which the earlier experience with Section 7 failed to reveal. In the event that Section 7 should become an important antitrust instrument, some of these problems seem certain to recur.

The interesting aspects of the *Transamerica* case derive from the fact that it is not a simple Section 7 case. As the Solicitor for the Federal Reserve Board stated, "this is a new case under Section 7. There has never been anything like it."¹² Virtually all the prior Section 7 cases were simple ones in several respects. They usually involved the merger¹³ of only a pair of corporations; these were usually corporations which had been or were alleged to have been in competition with each other; and the remedy of Section 7 was generally invoked before or shortly after the questioned transaction took place. The *Transamerica* case breaks new ground in all three respects. It applies Section 7 to a series of acquisitions, mostly of noncompeting firms, where many of the transactions took place years before the proceeding was commenced. A fourth novel aspect of the case results from the other three, namely, the problem of remedy. In the "simple" Section 7 case the remedy called for is clear. The commission has only to undo the transaction by ordering divestment of the stock or assets unlawfully acquired, as Section 11 of the Act directs.¹⁴ Where the case covers numerous acquisitions spanning a long period of years the commission may feel compelled to look forward rather than backward in shaping its remedy, and thus assume a role more like that of a court of equity framing relief in a Sherman Act monopoly case. How far it may go in assuming such a role is one of the problems suggested by the Reserve Board's order in the *Transamerica* case.

Before taking up the specific issues raised by the *Transamerica*

can be found in the administration of the Clayton Act. One obstacle is the dual scheme of enforcement—administrative and judicial—provided for in the Clayton Act. Cf. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 310 n.13 (1949).

12. Quoted in dissenting statement of Governor Powell. *Re Transamerica*, 38 FED. RES. BULL. 368, 395 (1952).

13. Throughout this article the term "merger" is used in a nontechnical sense, referring to any form of corporate acquisition which falls within the reach of the new Section 7—i.e., an acquisition of stock or of assets, by whatever form accomplished. The term "acquisition" is used interchangeably with "merger."

14. 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. 1952).

case, however, some general considerations affecting the interpretation of Section 7 will be examined. Of particular importance is the relation of Section 7 to the interpretation of Section 3 adopted in the *Standard Stations* case.

I. SECTION 7 AND THE STANDARD STATIONS CASE

The tests of illegality laid down by Section 7 have a delusive appearance of simplicity.¹⁵ In place of the broad area for definition left open by the Sherman Act, Section 7 purports to allow only a narrow factual inquiry. An acquisition is forbidden if "the effect may be substantially to lessen competition or to tend to create a monopoly." But this apparently simple test poses an exceptionally difficult inquiry for a conscientious trier of fact. Consider only the primary test, substantial lessening of competition. (1) The section calls for a prediction, not for a finding of present fact. (This can be expressed in terms of present fact—*i.e.*, the present tendency of a given state of facts to cause a lessening of competition—but stating the problem in this way does not make it any easier.) (2) The prediction must be made, not on the basis of commonly recurring, typical fact situations whose observed consequences are well known, but in situations having so many variables that each case is almost unique. (3) This means that in interpreting the evidence the trier must draw heavily upon generalized knowledge and expert judgment. What purports to be finding of fact must often be largely opinion. (4) The innocent words "may be" comprehend two variables of great importance, the degree of probability which will satisfy the statute and the period of time for which the probability is to be estimated. How likely must the effect be

15. In its amended form Section 7 provides, so far as material here:

"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.

"No corporation 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 one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly." 38 STAT. 731 (1914), as amended, 15 U.S.C. § 18 (Supp. 1952).

and how soon must it be likely to come about?¹⁶ The best the courts have done with the first variable is a rough distinction between "mere possibility" and "reasonable probability."¹⁷ As to the second, they have not yet said whether Section 7 concerns itself with the health of competition in the long run, the short run or the here and now. On these matters the trier of fact has been left at large. (5) The trier is almost equally unguided as to how much lessening of competition shall be regarded as "substantial" within the meaning of the statute. The current trend of interpretation seems to be to convert the adverb into an adjective and transpose it, so that the inquiry is whether "substantial competition" is lessened, not whether competition is "substantially lessened."¹⁸ This changes the problem considerably but does not necessarily simplify it.

These repositories of ambiguity make the Clayton Act formula a dubious improvement on the rule of reason from the standpoint of clarity and predictability. Difficult as is the task of "fact finding" which it imposes on an agency assumed to have expert competence, the formula is even more of a challenge to others who must apply it. Among these are counsel, who must predict the tendency of the agency to find a tendency to lessen competition before they can give advice on proposed transactions; and the courts, which must review the agency's performance and sometimes do the fact finding themselves. This is bound to affect the statute's interpretation. As the Court suggested in the *Standard Stations* decision, Congress must have written the law on the assumption that the judges are human, whatever illusions it may have had about the experts.¹⁹

Thus one phase of the problem of interpreting Section 7 is how far its substantive complexities can be escaped in the interests of

16. "We can never forecast with certainty; all prophecy is a guess, but the reliability of a guess decreases with the length of the future which it seeks to penetrate. . . ." L. Hand, J., in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

17. *Compare* *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 738 (1945), with *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922). See also *FTC v. Morton Salt Co.*, 334 U.S. 37, 55-61 (1948) (dissenting opinion); SEN. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950), adopting the reasonable probability test.

18. *Cf. Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

19. "The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. . . . Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance." *Standard Oil Co. of California v. United States*, 337 U.S. 293, 310 n.13 (1949).

administrative practicality. Two avenues of partial escape can be seen in the cases which have applied the Clayton Act formula. One, incorporated by Congress in the old Section 7, was to invoke the formula only against relatively simple fact situations. In its old form the statute qualified the test of lessening competition by the phrase, "between the corporation whose stock is so acquired and the corporation making the acquisition. . . ."²⁰ So long as the competition in question was only the competition between the acquiring and acquired corporations most of the intricacies of the formula could be by-passed. Common experience provides a solid basis for inferring that when two corporations come under a single management any previous competition between them is unlikely to survive. Intramural rivalry is not competition in the eyes of the law,²¹ paradoxical though this may seem in the light of recent cases holding that intramural co-operation may be conspiracy.²² Thus mergers between competing corporations raised few of the difficult factual questions latent in the Section 7 test. Indeed, so automatic was the section's operation that the Court felt compelled to provide an escape valve by introducing the requirement that the competition eliminated be "substantial" and that "public injury" be a consequence of the transaction.²³ A somewhat analogous way of avoiding the similar factual difficulties posed by Section 3 was to confine it by interpretation to defendants who were "dominant" in their respective fields. The fact of dominance, which could be established by various statistical measures of the defendant's share of the market, supported a strong inference that the use of exclusive-dealing or tying contracts by the defendant would lessen competition—substantially, immediately, and in all likelihood.²⁴

20. It provided: "No corporation engaged in commerce shall acquire, 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." 38 STAT. 732, 15 U.S.C. § 18 (1946). The second paragraph, relating to holding companies, contained a similar qualification.

21. The contrary holding in *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656 (3d Cir. 1931), seems clearly unreliable today.

22. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); see *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

23. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). Subsequent cases applying the doctrine are collected in *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 125 (N.D. Ohio 1935).

24. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922).

The built-in protective feature of Section 7 is no longer available. Elimination of the "between" clause, which was one of the principal changes effected by the 1950 revision, releases the complicated Clayton Act formula for active duty against all sorts of corporate acquisitions, including those where the effect on competition is subtle as well as those where it is simple. It would still be possible administratively to limit its operation to transactions which have an immediate and obvious impact on competition, but this would be contrary to the purpose of the amendment. Congress made it quite clear that the amendment was to make the section reach all types of acquisitions, "vertical and conglomerate as well as horizontal."²⁵

A second avenue of possible escape from the subtleties of the Clayton Act formula is to modify the formula itself by interpretation. This is essentially what has happened with Section 3. In the *Standard Stations* case the Supreme Court decided that a violation of Section 3 can be established merely by proof that contracts of the type described by Section 3 have been made and that such contracts apply to commerce which is "substantial." Such proof is not only sufficient to support an inference that "the effect may be substantially to lessen competition" but precludes any contrary inference, and it is not error for the trier of fact to exclude or ignore evidence that in the particular circumstances the contracts have no tendency to lessen competition substantially. Thus to satisfy the statute it need not "be demonstrated that competitive activity . . . probably will diminish,"²⁶ let alone that competitive activity probably will diminish substantially. By thus converting the statute into something like a flat rule against certain types of contracts²⁷ the Court has saved the trier of fact from the difficult task of predicting the impact of exclusive-dealing contracts in particular situations. An important question is whether the Court might develop a similar rationale with respect to Section 7.

25. H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949).

26. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299 (1949).

27. Questions remain as to when commerce is "substantial" and, more important, as to what kinds of contractual arrangements fit the Section 3 description. Solution of the latter problem may require consideration of the very kinds of factors the Court desired to avoid in *Standard Stations*. For example, would a thirty-day contract to supply all the steel requirements of General Motors violate Section 3? Exclusive-dealing contracts are not a "self-operating" category of violations. Cf. Frankfurter, J., dissenting in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 605 (1951); *United States v. Richfield Oil Co.*, 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd* 343 U.S. 922, *rehearing denied* 343 U.S. 958 (1952); *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949).

In considering whether the *Standard Stations* doctrine can be transplanted to Section 7, three possible explanations for that decision deserve examination. First, the Court was somewhat influenced by precedent, namely, the *International Salt* case.²⁸ While it recognized that the *International Salt* case could be distinguished, the Court was unwilling to accept the burden of inquiry and judgment which this would have entailed.²⁹ No comparable precedent under Section 7 exists, and a court interpreting Section 7 would be less confined by the *Standard Stations* case than that court was by the *International Salt* case. Second, the Court found support in the presumed intent of Congress, pointing to evidence in the legislative history that Congress really meant to forbid practically all exclusive-dealing contracts.³⁰ No attempt will be made here to explore the legislative history of the new Section 7 on this point,³¹ but a good deal of evidence could be produced to show that Congress did not think it was forbidding practically all mergers.³² Third, the Court evidently felt that there was a rational connection between the fact of exclusive-dealing contracts and the inference of probable lessening of competition—a rational connection strong enough not only to support the inference but to compel it. Indication that the Court relied at least in part on such a factual basis for the rule of law it announced is found at various points in the opinion but especially in the following passage:

We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial.³³

28. *International Salt Co. v. United States*, 332 U.S. 392 (1947) (sustaining summary judgment against contracts tying purchase of salt to lease of patented salt-dispensing machines).

29. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-9 (1949).

30. See Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Dealing Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 933-37 (1952).

31. The legislative history is reviewed in Note, 52 COL. L. REV. 766 (1952).

32. E.g., SEN. REP. No. 1775, 81st Cong., 2d Sess. 4, 7 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-8 (1949); *Hearings before a Subcommittee of the Committee on the Judiciary on H.R. 515*, 80th Cong., 1st Sess. 23 (1947); 95 CONG. REC. 11488 (1949); 96 CONG. REC. 16435, 16450 (1950).

33. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 314 (1949).

This statement suggests the most plausible basis for an irrebuttable inference that exclusive-dealing contracts *per se* satisfy the factual test of the Clayton Act. One way of looking at the problem is to consider the trade of the bound dealers as constituting a "market" and the competition for that trade as the "competition" which must not be lessened. Taking this narrow view of "competition" one readily concludes that contracts which "foreclose" such competition "substantially lessen competition." Of course, if Congress had meant for "competition" to be construed thus narrowly it could have expressed its purpose more concisely by an outright prohibition of such contracts whenever they cover a substantial amount of commerce. The important point for present purposes, however, is that on the Court's view of the relevant "competition" its conclusion rests on a rational and necessary inference from the facts. It is also important to note the strength of the inference. It is not merely an inference that the contracts *probably* will *lessen* competition; the inference is that they are virtually *certain* to *eliminate* competition.

In attempting to apply the *Standard Stations* decision to Section 7 problems it is important to inquire whether any comparable factual basis exists for simplifying the test of illegality by presumptions or irrebuttable inferences. In what kinds of situations, if any, is it possible to find in the "bare facts" of the transaction such a strong inference of probable lessening of competition that further inquiry is unnecessary?

In vertical integrations the analogy is clear. From one standpoint the vertical integration is merely a more conclusive form of exclusive-dealing arrangement. It substitutes for the impermanent bonds of contract the enduring ones of property.³⁴ Debate over whether the *Standard Stations* principle applies to vertical integrations must center on the question whether Congress meant to overturn the explicit holding of the *Columbia Steel* case³⁵ that vertical integration is not unlawful *per se* under the Sherman Act, a question which is not answered by the legislative history.³⁶ As in the

34. See Douglas, J., dissenting in *Standard Oil Co. of California v. United States*, 337 U.S. 293, 319 (1949).

35. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

36. While making clear that the new section was to apply to vertical integrations, the committee reports did not suggest that all vertical integrations would be prohibited. It was intimated that the result on the particular facts in the *Columbia Steel* case would have been different under the amended Section 7. See H.R. REP. No. 1191, 81st Cong., 1st Sess. 10 (1949); 96 CONG. REC. 16452, 16453 (1950). See also Celler, *The New Anti-Merger*

case of exclusive-dealing contracts, the key choice is whether the "competition" to be protected is competition for the trade of the acquired corporation or competition in the "whole market."

In "conglomerate" acquisitions it is much more difficult to find any basis for a doctrine analogous to the *Standard Stations* interpretation of Section 3. Conglomerate acquisitions, according to the House committee report on the Section 7 amendment, "are those in which there is no discernible relationship in the nature of business between the acquiring and acquired firms."³⁷ In other words, the acquired firm is neither competitor, customer, nor supplier of the acquiring firm. Since there is no pre-existing market relationship between the two firms, the fact that they are brought under common ownership and management does not suggest any immediate or obvious alteration in market relationships in any circle of competition, wide or narrow. Such threats to competition as may arise from the transaction are more varied and subtle than in mergers of competitors or mergers of vertical integration. In addition they are likely to require a longer period to make themselves felt. For convenience one might distinguish between primary and secondary threats to competition. Buyer-seller mergers and mergers of competitors always have a primary impact on competition: they immediately eliminate or foreclose competition in some segment of the market. This alone may be enough to satisfy Section 7. Such mergers may also have secondary effects on competition in the "market as a whole"—perhaps even beneficial effects, as where the merger strengthens the ability of the combined firms to offer competition to other firms. A court might hold, in dealing with a situation presenting primary effects, that the possibility of such secondary effects, good or bad, is to be ignored in determining the legality of the transaction. This in effect is what the Court has held in applying Section 3. But in conglomerate acquisitions the *only* effects on competition are secondary effects, which must be analyzed before Section 7 can properly be applied. Hence it would seem that economic inquiry into the actual effect of the acquisition on the markets affected such as the Court shied away from in the *Standard Stations* case can hardly be avoided. The trier of fact must venture into the difficult realm of prediction which Section 7 literally commands.

Statute, 37 A.B.A.J. 897, 900 (1951); Carson, *Corporate Mergers*, CCH ANTITRUST LAW SYMPOSIUM 167, 174 (1952); Note, 52 COL. L. REV. 766, 773 (1952).

37. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).

If this conclusion is sound, the application of Section 7, at least to conglomerate acquisitions, will ordinarily involve the following steps: (1) determining the market or markets in which competition may be affected, a matter of both fact and judgment;³⁸ (2) appraising the existing strength (or "market control") of the acquiring and acquired firms, respectively, in these markets; (3) identifying the elements of the proposed transaction which may strengthen the market position of either or both firms, such as financial power, established good will of one firm, diversification of risk, reduction of overhead, etc.; (4) identifying all other factors, known and expectable, which may significantly influence the course of competition in the market or markets in question; (5) on the basis of these facts, forming an estimate of the probability that the transaction will be followed sooner or later by a "substantial" lessening of competition in one or more markets, which lessening of competition would not otherwise occur; (6) exercising a judgment as to how high a probability of such lessening is necessary to satisfy the statutory test, "where the effect may be." Such an inquiry would be not unlike the kind of investigation which some of the specialized regulatory agencies must make in merger and related cases where advance approval of the transaction is required, though of course under standards of legality varying from the Clayton Act formula.³⁹

The conclusion that conglomerate-merger cases call for a full-scale economic inquiry can be qualified. Among the possible reasons for making such acquisitions is the prospect of employing an existing strategic advantage as a "lever" in a new market.⁴⁰ Among such strategic advantages may be patents or other kinds of monopoly position, the leverage of a "full line" of related products which can be forced on buyers, or a command of strategic channels of distribution which can be employed for additional products. Presence of the elements of such a conquest—(1) the possession of unusual strength in one market and (2) the possibility of exploiting it in another market—may well support an inference which will satisfy the standard of Section 7 and end the need for

38. See discussion pp. 205-6 *infra*.

39. See, e.g., *American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc.*, 7 C.A.B. 365 (1946).

40. See *Adelman, Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 57 (1949). See also *United States v. Swift & Co.*, 268 U.S. 106, 115 (1932); *Adelman, Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1314 (1948).

further inquiry. In short, it may be possible to identify in connection with conglomerate acquisitions some typical characteristics which might carry special threats to competition. If so, such characteristics may become the basis for presumptions or even conclusive inferences which will serve to limit the inquiry under Section 7 as the *Standard Stations* case has done under Section 3.

Problems similar to those of conglomerate mergers are presented by a third category to which Section 7 may be applied. These are mergers or acquisitions of similar but noncompeting firms. Under the House committee's classification such mergers are "horizontal" because "the firms involved are engaged in roughly similar lines of endeavor."⁴¹ Within the committee's category, however, it is important to distinguish between mergers of firms that compete with one another and those that do not. In the former the application of Section 7 is comparatively simple; in the latter it is not. A milk-distributing company acquires local distributing firms in widely separated communities; an Eastern furniture manufacturer acquires a factory on the West Coast; a grocery chain expands by acquiring numerous existing stores in different localities. If the acquisitions are in truly separate markets the problem of determining the probable effect on competition in any market is scarcely different from that in conglomerate acquisitions. There is no "primary" impact on competition. The threat to competition, if any, is secondary—the combined firm may possess sources of strength which will enable it to outstrip competitors so far in one or more markets that competition itself will eventually suffer. To identify and evaluate such sources of special strength is the task of the trier of fact. This requires full inquiry into the facts and as much insight into the future as circumstances permit. Again, it may be possible with experience to identify special characteristics or develop rules of thumb which will simplify the problem of proof, but it is not obvious what those possibilities are.

The *Transamerica* case exemplifies, in its main outlines, this last category of acquisitions. The remainder of this article will consider some problems of interpretation of Section 7 which are raised by the facts of the *Transamerica* case, and some others which are merely suggested by those facts. The discussion will consider (A) the substantive requirements of the statute; (B) the vantage

41. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).

point from which the inquiry is to be made and the evidence which may be considered; and, briefly, (C) the remedy available.⁴²

II. SECTION 7 AND THE TRANSAMERICA CASE

Unfortunately, the facts of the case cannot be shortly stated, and a fairly full statement of them is necessary to understand the problems it raises. The summary which follows is based almost entirely on the Board's findings of fact, which occupy 24 double-column pages in the Federal Reserve Bulletin.

Transamerica Corporation is a holding company, formed in 1928 to acquire the diverse banking interests of A. P. Giannini and his associates. The principal bank holding at that time was Bank of Italy National Trust and Savings Association, a California bank with an extensive branch-banking system in California. In 1930 Bank of Italy became Bank of America National Trust and Savings Association. Between 1928 and 1948, when the complaint under Section 7 was issued by the Federal Reserve Board, Transamerica acquired numerous other majority-stock interests in banks. These included major banks in Oregon, Washington, Nevada and Arizona, as well as many smaller banks in California and some in these other states. Some of the additional acquisitions were merged into one or another of the banks previously acquired—chiefly into Bank of America—while others continued to exist as separate banks majority-owned by Transamerica. The Board's complaint listed some 46 banks whose stock was majority-owned by Transamerica in 1948. These were in addition to Bank of America, the largest component in the "group."⁴³ From 1928 to 1937 Transamerica owned 99 percent of the stock of Bank of America but thereafter it materially reduced its stock ownership by distributions and sales, until at the time the proceeding was commenced it owned only about 23 percent. While the proceeding was pending, further reductions were made and at the time the order was issued Trans-

42. Important issues raised by the case but not dealt with in this discussion are whether banking is interstate commerce and whether Section 7 of the Clayton Act applies to banks. These issues, as well as some other aspects of the case relating especially to the banking business, are discussed in a Note, *Transamerica—The Bankholding Company Problem*, 1 STAN. L. REV. 658 (1949). See also Berle, *Banking Under the Antitrust Laws*, 49 COL. L. REV. 589 (1949).

43. Use of the term "group" was a controversial issue in the proceeding before the Board. It was used by the Solicitor to emphasize the alleged unified control by Transamerica of all banks, including Bank of America. Transamerica objected to the term because of its insistence that it did not control Bank of America.

america owned only 5.6 percent of the stock of Bank of America.⁴⁴ Nevertheless, the Board found that through interlocking directorates, long-established personal relationships, and other factors Transamerica controlled Bank of America.⁴⁵ While this finding is the keystone of the case, it raises issues unrelated to the questions of interpretation of Section 7 with which this article is concerned, and its basis will not be explored here. It is important to note, however, that the Board's case rests on the premise that Bank of America is a bank controlled though not majority-owned by Transamerica.

The Board's complaint charged, and its decision found, that the "acquisition, holding and use" by Transamerica of the stock of each of the banks majority-owned by it at the time of the complaint, and of the stock of Bank of America, constituted a violation of Section 7 of the Clayton Act. The precise language of the decision was that such acquisition, holding and use "constitutes and is a continuing violation of Section 7." The Board's order, however, was not as sweeping as its finding of violation. It required Transamerica to divest itself of all its stock in all the banks in question, with one exception. The exception was Bank of America. The Board found that even if stock divestment took place Transamerica would probably continue its control. Accordingly, it concluded that allowing Transamerica to retain Bank of America but requiring divestiture of all the other banks was the "relief necessary and appropriate to put an end to the aforesaid violations of law in a manner which will have a practical result consistent with the intent and purpose of said Section 7."⁴⁶

The array of statistics offered by the Board to demonstrate the impressive size of Transamerica's banking operations tends to obscure the relationship of the questioned acquisitions to the total operations. The statistics showed that as of 1948⁴⁷ Transamerica-

44. *Re Transamerica*, Findings, Par. 5 (a), 38 FED. RES. BULL. 368, 373 (1952).

45. *Re Transamerica*, Findings, Par. 5 (j), 38 FED. RES. BULL. 368, 380 (1952). After the entry of the Board's order Transamerica disposed of the remainder of its stock in Bank of America, partly by sale and partly by distribution. N.Y. Times, Oct. 21, 1952, p. 45, col. 2. One of the issues which must be considered on the appeal is whether this circumstance upsets the Board's finding of control or affects the appropriateness of its order.

46. *Re Transamerica*, Conclusion and Order, 38 FED. RES. BULL. 368, 391 (1952). Two of the seven members of the Board dissented. One of these, Governor Powell, filed a dissenting opinion. 38 FED. RES. BULL. 368, 395-98 (1952). Two other members of the Board took no part in the case. The three majority votes included that of Governor Evans, who sat as hearing officer and whose recommended decision was adopted *in toto*.

47. Most of the Board's data relate to 1948, the year in which the proceeding was commenced, but apparently the general picture given by such data would not be greatly changed by including later years. See, e.g., *Re Transamerica*, Findings, Par. 8 (b) (1) (footnote to table), 38 FED. RES. BULL. 368, 384 (1952). But see note 45 *supra*.

controlled banking offices⁴⁸ numbered 645 and amounted to 41 percent of the banking offices in five Western states.⁴⁹ For the same five-state area Transamerica's share of all bank deposits was 39 percent⁵⁰ and of all bank loans 50 percent.⁵¹ Similar percentages for Transamerica's share of the total banking business were reflected by other indexes, such as number of employees and percentage of demand deposits by dollar volume and by number of accounts in various categories.⁵²

The data likewise presented an impressive picture of Transamerica's relative growth from 1928, the date of its formation, to 1948. Thus in California it had grown from 352 offices, amounting to 27 percent of all California banking offices, to 556 offices constituting 51 percent.⁵³ In the same state its deposits grew from \$.8 billion to \$5.6 billion, or from 24 percent of the state's total to 44 percent;⁵⁴ and its loans increased from 23 percent to 57 percent of the California total.⁵⁵ The data showed similar growth in Oregon and Nevada, though in Arizona and Washington the figures showed little change or a slight decline in Transamerica's relative position over the years. A considerable part of this growth—at least as to number of banking offices—was accomplished by acquiring existing banking offices rather than by "internal" growth of banks already owned. Thus one figure given by the Board was that from 1928 to 1948 Transamerica acquired some 240 banks and branches in California.⁵⁶ Another statement was that the total number of banks and branches acquired by Transamerica to June 30, 1948 was 679, as compared with 233 branches established *de novo*, but these figures apparently referred to the entire period

48. The term "Transamerica-controlled" includes offices of Bank of America as well as offices of banks in which Transamerica owned a majority of the stock.

49. For the individual states the number of offices and the percentages were: California, 556 offices, 51 percent; Oregon, 57 offices, 36 percent; Nevada, 15 offices, 60 percent; Arizona, 7 offices, 13 percent; Washington, 10 offices, 4 percent. *Re Transamerica, Findings*, Par. 8 (b) (1), 38 FED. RES. BULL. 368, 384 (1952).

50. By states: California, 44 percent; Oregon, 44 percent; Nevada, 78 percent; Arizona, 20 percent; Washington, 5 percent. *Re Transamerica, Findings*, Par. 8 (c), 38 FED. RES. BULL. 368, 386-87 (1952).

51. By states: California, 57 percent; Oregon, 47 percent; Nevada, 79 percent; Arizona, 15 percent; Washington, 7 percent. *Re Transamerica, Findings*, Par. 8 (d), 38 FED. RES. BULL. 368, 387 (1952).

52. See *Re Transamerica, Findings*, Par. 8 (c), (f), (g), (h), 38 FED. RES. BULL. 368, 387-89 (1952).

53. *Re Transamerica, Findings*, Par. 8 (b) (1), 38 FED. RES. BULL. 368, 384-85 (1952).

54. *Re Transamerica, Findings*, Par. 8 (c), 38 FED. RES. BULL. 368, 386 (1952).

55. *Re Transamerica, Findings*, Par. 8 (d), 38 FED. RES. BULL. 368, 387 (1952).

56. *Re Transamerica, Findings*, Par. 4 (a), 38 FED. RES. BULL. 368, 372 (1952). A comparable figure for the five states was not given.

1904-1948, covering not only Transamerica but its predecessor corporations. The statement is therefore somewhat misleading in speaking of banks "acquired by Transamerica."⁵⁷ The Board's figures do not purport to show what percent of the growth in deposits and loans was due to acquisitions, although Transamerica contended that the growth measured in these terms was largely internal.⁵⁸

These over-all figures stressed by the Board tend to create the impression of an integrated, monolithic enterprise, in relation to which the proposed divestiture of some 47 banks having 645 or more banking offices suggests a major contribution to competition. A closer analysis of the structure of Transamerica's holdings puts the Board's complaint in rather a different light. What the Board has actually undertaken in this case is not the undoing of the vast number of individual acquisitions which have contributed to the Transamerica banking empire. Rather, the decision calls primarily for the splitting apart of several major fragments located in different states, accompanied by the splintering off of some minor pieces of the structure.

The Board's findings list some 47 commercial banks stated to have been majority-owned, or minority-owned but controlled by Transamerica, at the date of the filing of the amended complaint, July 19, 1949.⁵⁹ Of the 645 banking offices attributed to Transamerica as of 1948, however, the vast majority were branch offices of one of five branch-bank systems, each in a different state: Bank of America (California), First National Bank of Portland (Oregon), First National Bank of Reno (Nevada), First National Bank of Arizona (Arizona), and National Bank of Washington (Washington). Among these banks, moreover, the great preponderance of banking offices was concentrated in only one, Bank of America. Precise figures as to the distribution of banking offices among specific banks do not appear in the findings or in the briefs of the parties, but the general conclusion is clear. The Board stated that 554 of the 645 banking offices were located in California⁶⁰ and Transamerica contended in its brief that Bank of America alone accounted for more than 85 percent of the total offices in the five

57. *Re Transamerica*, Findings, Par. 8 (b) (3), 38 FED. RES. BULL. 368, 385-86 (1952).

58. Brief for Transamerica, pp. 74-75.

59. *Re Transamerica*, Findings, Par. 1 (b), 38 FED. RES. BULL. 368, 369 (1952). The only bank controlled but not majority-owned was Bank of America.

60. *Re Transamerica*, Findings, Par. 4 (d), 38 FED. RES. BULL. 368, 373 (1952).

states.⁶¹ Inspection of the list of 47 banks whose stock was owned by Transamerica indicates that most of them were banks in small communities such as Crows Landing, California, and Sweet Home, Oregon.⁶² Apart from the five major banks with their branches, therefore, Transamerica held a controlling stock interest in some 25 commercial banks in California, 15 in Oregon, and 2 in Nevada, and apparently most of these 42 were comparatively small local banks.⁶³

Taking the Board's figure that Transamerica or its predecessors had acquired since 1904 a total of 679 banks and branches,⁶⁴ only a small proportion of such acquisitions fell within reach of the Board's complaint based on Section 7. The acquisitions can be grouped into four classes: (1) The five major banks, some or all of which already had branch banks when acquired by Transamerica.⁶⁵ (2) Banks acquired by one or another of these major banks prior to the time the stock of the major banks was acquired by Transamerica. This would include mainly the large number of banks acquired by Bank of Italy and its related corporations between 1904 and 1928, when Transamerica acquired the stock of Bank of Italy.⁶⁶ (3) Banks and branches whose stock was acquired by Transamerica and which were subsequently converted into branches of one of the major banks. This includes some 200 banks and branches in California, acquired by Transamerica and absorbed into Bank of America; about 40 in Oregon, absorbed into First National Bank of Portland; 4 in Nevada, absorbed into First National Bank of Nevada; and 9 in Washington, absorbed into National Bank of Washington.⁶⁷ (4) Banks, other than the five

61. Brief for Transamerica, p. 27.

62. The second largest branch system appears to be that of the First National of Portland. According to the findings, Oregon accounts for 57 of the banking offices, including 44 branch offices. The single bank owned in Arizona accounts for 6 offices and the single bank in Washington for 10. *Re Transamerica*, Findings, Par. 4 (d), 38 FED. RES. BULL. 368, 373 (1952).

63. *Re Transamerica*, Findings, Par. 1 (b), 38 FED. RES. BULL. 368, 369 (1952).

64. *Re Transamerica*, Findings, Par. 8 (b) (3), 38 FED. RES. BULL. 368, 385-86 (1952).

65. Bank of Italy, which subsequently became Bank of America, operated some 284 branches in California when Transamerica acquired its stock in 1928. *Re Transamerica*, Findings, Par. 3 (c), 38 FED. RES. BULL. 368, 371 (1952). First National Bank of Portland, First National Bank of Nevada, National Bank of Washington, and First National Bank of Arizona apparently had few branches when acquired by Transamerica in 1930, 1934, 1936, and 1937, respectively. See *Re Transamerica*, Findings, Par. 8 (b) (1) (table), 38 FED. RES. BULL. 368, 384 (1952); Brief for Transamerica, p. 34.

66. See note 65 *supra*. The number of acquisitions as distinguished from *de novo* branches does not appear in the findings.

67. *Re Transamerica*, Findings, Par. 4 (a), (b), 38 FED. RES. BULL. 368, 372 (1952). It does not appear from the findings whether any acquisitions were made directly by the

major banks, whose stock was acquired by Transamerica and was still held by Transamerica at the time the proceeding was instituted. These are the 42 banks referred to in the preceding paragraph. Some of them, no doubt, were "in transit" to one of the major banks at the time the proceeding was instituted, that is, were destined to become branches of one of the major banks. During the course of the Board proceeding Transamerica attempted to "branch" 22 of these banks into Bank of America but was enjoined from doing so on the ground that the transfer would divest the Federal Reserve Board of its jurisdiction.⁶⁸

Of these four groups of acquisitions only the first and fourth, consisting of banks whose stock was still held by Transamerica, were complained of by the Board as violations of Section 7. The acquisitions which resulted in the creation of new branches of one or another of the banks whose stock Transamerica owned were not challenged. Presumably they were beyond the Board's jurisdiction either in this proceeding or in a proceeding against the banks of which the acquired banks became branches.⁶⁹ In relation to the entire concentration produced by the acquisitions, therefore, the challenged stockholdings were somewhat like the portion of an iceberg which rises above the surface. The real mass of the enterprise, Bank of America, lay below, impregnable to the Board's attack.

These facts place in better perspective the issues framed by the complaint. In simplest terms the Board's task was to determine whether the joining together of five state-wide banking systems, plus some 42 independent banks, created the tendency to lessen competition or bring about monopoly which Section 7 forbids. This oversimplifies the matter somewhat. As will later be shown,⁷⁰ Section 7 actually calls for an appraisal of each acquisition in the light of circumstances existing when it was made. But to analyze

constituent banks without use of Transamerica as a conduit. The "usual method" was for Transamerica to acquire stock and then convey the assets to one of the controlled banks. *Re Transamerica*, Findings, Par. 4 (c), 38 FED. RES. BULL. 368, 372 (1952).

68. *Board of Governors v. Transamerica Corporation*, 184 F.2d 311 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950).

69. See note 4 *supra*. The 1950 amendment apparently does not broaden the powers of the Federal Reserve Board to deal with asset acquisitions, since the new prohibition against asset acquisitions applies only to corporations subject to the jurisdiction of the Federal Trade Commission. Section 7, as amended, 64 STAT. 1125 (1950), 15 U.S.C. § 18 (Supp. 1952). Arguably, however, the amendment does give the Reserve Board power to divest assets following an unlawful stock acquisition. See Section 11 as amended, 64 STAT. 1126 (1950), 15 U.S.C. § 21 (Supp. 1952).

70. See discussion pp. 220-25 *infra*.

the basis for the Board's decision it will be helpful to treat the case, as the Board seems to have done, on the assumption that all the acquisitions were simultaneous. On this assumption the ensuing discussion will consider the possible grounds on which the Board's conclusions can be rested and the interpretation of Section 7 which those conclusions suggest. This quest is at once more difficult and more interesting because of the Board's own failure to discuss any of the issues of interpretation posed by the case.

A. The Grounds of Violation

(1) *Elimination of competition between acquired and acquiring corporations.* The easiest ground on which the Board might have rested its findings of violations, had such a ground been available, would have been that the acquired banks were in competition with other banks controlled by Transamerica or with each other, and that such competition was eliminated by the acquisitions. Apparently this ground would have been available in a few cases. Transamerica conceded in its brief that nine of the California banks involved had offices in communities where Bank of America branches were also located when these banks were acquired.⁷¹ Presumably they were in competition with Bank of America before their acquisition. For reasons which have already been discussed, elimination of this competition would seem to be a primary impact sufficient to satisfy Section 7 in either its old or its new form, notwithstanding Transamerica's argument that "competition" by these banks had not decreased following their acquisition.⁷² To support this ground the Board would also have had to find that the pre-existing competition was "substantial," a requirement indicated not only by the old *International Shoe* case⁷³ interpreting Section 7 but by the *Standard Stations* case as well.⁷⁴ Under the old interpretation of Section 7 it would also have been required to find that the lessening of competition was detrimental to the public interest.⁷⁵ Though much relied on by Transamerica, this latter requirement seems most unlikely to find a place in the revival of Section 7. Despite some approving references to *International Shoe*

71. Brief for Transamerica, pp. 38-40.

72. Brief for Transamerica, pp. 39-40.

73. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

74. *I.e.*, a substantial lessening of an insignificant amount of competition will not suffice, although it might literally satisfy the statute.

75. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

in the committee reports, one dominant theme in the arguments for amendment of Section 7 was restoration of "the Clayton Act test" to its pristine strictness and disavowal of a "Sherman Act" treatment of mergers.⁷⁶ Moreover, on this point the *Standard Stations* decision is plainly persuasive for Section 7. The Board would have been justified in assuming that in this respect the *International Shoe* case no longer prevails.⁷⁷

Whether the evidence would have supported findings of substantial previous competition between a Transamerica bank and any of the other challenged acquisitions is at least doubtful. Transamerica argued that it would not.⁷⁸ The five major banks were located in separate states and this renders unlikely the existence of competition among them. The Board itself found that with respect to the crucial phases of their business the competitive area of commercial banks is the area within which customers may conveniently visit the bank.⁷⁹ Transamerica asserted that all but nine of the other banks which it had acquired (*i.e.*, other than the five major ones) were located in communities entirely separate and apart from any community in which a Transamerica bank did business.⁸⁰ The statement was not controverted in the briefs of the Solicitor for the Board. These facts suggest that the Board would have had difficulty in deciding the case on the test of elimination of competition between acquired and acquiring corporations.

In any event, the Board made no attempt to dispose of the issues on such a ground. It made no findings as to the existence or non-existence of competition between any two or more of the banks whose stock was owned by Transamerica at the date of the proceeding. What the Board did find was that in the past "the Transamerica group" had in numerous instances acquired banks which were in competition with each other or with other members of the group, and had discontinued such competing banks or

76. SEN. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949); *Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on H.R. 2734*, 81st Cong., 1st and 2d Sess. 22, 23, 28, 47 (1949-1950); *Hearings before a Subcommittee of the Committee on the Judiciary of the House of Representatives on H.R. 2734*, 81st Cong., 1st Sess. 50, 56 (1949); 96 CONG. REC. 16502 (1950).

77. But rejection of the "public injury" or "rule of reason" inquiry does not necessarily mean rejection of all economic inquiry. The *Standard Stations* opinion somewhat confused the two. See *Standard Oil Co. of California v. United States*, 337 U.S. 293, 313 (1949).

78. Brief for Transamerica, pp. 30-38.

79. *Re Transamerica*, Findings, Par. 7 (f), 38 FED. RES. BULL. 368, 383 (1952).

80. Brief for Transamerica, pp. 36-37.

absorbed them into others. The findings on this point were set forth in several tables purporting to show the number of communities having, respectively, one, two, three or four banks at the date of the proceeding and in which Transamerica or its predecessors had acquired more than one bank. For example, it appears that in some 31 communities having only one bank "the Transamerica group" had in the past acquired two or more banks, while in 41 communities presently having two banks the Transamerica group had acquired two or more banks.⁸¹ From these figures, and making allowances for some uncertainties as to their interpretation,⁸² it is apparent that a substantial amount of banking competition had been eliminated by the past operations of Transamerica or its predecessor and constituent corporations. Since the data related to the period 1904 to 1948 they do not tell how much of this elimination of competition occurred as a result of acquisitions made by Transamerica itself and it is not clear what significance the Board attached to these facts. It did not indicate which, if any, of the acquisitions under attack in this proceeding was among the acquisitions reflected in these tables. Quite clearly the Board did not choose to rest its decision on the ground that acquisitions named in its complaint had eliminated competition between acquired and acquiring corporations.

It is not easy to understand how the Board was persuaded that it could dispense with this basis for its order. The proceeding was begun in 1948, prior to Section 7's amendment, and the Board's order was expressly rested upon the provisions of the original section.⁸³ Even if the Board could have resorted to the changed standard of legality incorporated in the 1950 amendment, it did not purport to do so. The old section made competition between the acquired corporations the critical factor so far as the test of substantial lessening of competition was concerned.⁸⁴ The wider view

81. *Re Transamerica*, Findings, Par. 8 (b) (3), 38 FED. RES. BULL. 368, 385-86 (1952).

82. The tables do not indicate, for example, whether the "banking offices" were in all cases independently owned and in competition before they were acquired by the Transamerica group.

83. *Re Transamerica*, Conclusion and Order, 38 FED. RES. BULL. 368, 391 (1952).

84. 38 STAT. 731 (1914), 15 U.S.C. § 18 (1946). The applicable portion of Section 7 was the second paragraph, reading as follows:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition *between such corporations, or any of them*, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." [Emphasis supplied.]

of competition adopted by the new Section 7⁸⁵ was not available and was not relied on either by the Board or by its counsel.

It is true that even the old section contained alternative tests of illegality which were not dependent on finding a lessening of competition between acquiring and acquired firms. It provided that an acquisition was unlawful if its effect might be "to restrain such⁸⁶ commerce in any section or community, or tend to create a monopoly of any line of commerce."⁸⁷ Significantly, the Solicitor for the Board in his reply brief failed to meet directly Transamerica's argument that the "between" clause of Section 7 had not been satisfied, and instead shifted the major weight of his argument to the tendency-to-monopoly clause.⁸⁸ In its conclusions, however, the Board made no distinction between the lessening-competition test and the tests of restraint of commerce and tendency to monopoly. Instead it found generally that the effect of Transamerica's acquisitions "may be to substantially lessen competition and restrain commerce in commercial banking in the States of California, Oregon, Nevada, Arizona, and Washington, and tend to create a monopoly in such line of commerce in said area."⁸⁹

Thus the Board apparently treated Section 7 as though the "between" clause did not exist. Whether justified or not, this disregard of the literal terms of the old section enhances the importance of the case for the study of the new Section 7. In effect, the Board appears to have applied virtually the same tests of legality as those prescribed by Section 7 in its present form.

(2) "*Quantitative substantiality*": *Applicability of the Standard Stations case*. A second "easy" ground for deciding the case would have been the theory offered by the Board's Solicitor, based on the decision of the Supreme Court in the *Standard Stations* case.⁹⁰ That decision, urged the Solicitor, was "dispositive of all major

85. ". . . 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." 64 STAT. 1126 (1950), 15 U.S.C. § 18 (Supp. 1952).

86. The antecedent of "such" was not clear. Arguably this also meant to limit the inquiry to the effect upon competition between the acquired corporations.

87. 38 STAT. 732 (1914), 15 U.S.C. § 18 (1946).

88. Reply Brief of Counsel for the Board, pp. 5-18. This shift seems to render the Solicitor's earlier reliance on the *Standard Stations* case pointless, for that case relied on the "substantiality" test, not on tendency to monopoly.

89. *Re Transamerica*, Findings, Par. 10 (c), 38 FED. RES. BULL. 368, 391 (1952).

90. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949). See discussion pp. 182-88 *supra*.

issues of Section 7 interpretation which are involved here."⁹¹ The burden of this argument was that "the evidentiary test of quantitative substantiality" applied in *Standard Stations* should be applied to Transamerica's case. "The Transamerica acquisitions are substantial in every sense of that word. They are more than substantial; they are overwhelming."⁹²

These and certain other statements in the brief of counsel for the Board suggest for merger cases a simple, if drastic, version of the *Standard Stations* rule. Mergers would be prohibited whenever they are "quantitatively substantial." It is not clear whether under such a test substantiality would be determined by the size of the acquiring corporation, the acquired corporation, or the combination. The real objection to such a test, however, is that it oversimplifies the *Standard Stations* holding. As already noted,⁹³ the underlying thought in that case seems to have been that every exclusive-dealing contract eliminates some competition, by foreclosing competition in the "market" of the tied dealer. The "substantiality" of this effect depends, then, simply on the amount of commerce coming under such contracts. Thus "quantitative substantiality" is the second step in a two-step analysis. The Solicitor's argument in the *Transamerica* case stressed the second step without showing clearly how the first step was satisfied by the questioned acquisitions. Certainly it cannot be satisfied merely by evidence of the present size and the number of past acquisitions of Transamerica. The Supreme Court in the *Standard Stations* case did not hold the contracts illegal merely because Standard Oil Company of California was a big company. The commerce which it considered relevant was the commerce covered by the very contracts in question—i.e., the commerce as to which competition was foreclosed, not the total assets or the total business volume of the defendant.

It is possible, perhaps, to construct a better parallel with the *Standard Stations* doctrine than the one urged by the Solicitor. Every acquisition—horizontal, vertical, or conglomerate—eliminates the possibility that the acquired corporation will ever compete with the acquirer. By disregarding the question whether such competition was likely to occur in the absence of the acquisition,

91. Brief of Counsel for the Board, pp. 29, 36.

92. *Id.* at 44.

93. See pp. 186-87 *supra*.

one might say that every acquisition eliminates potential competition. From this proposition it is but a brief step to the conclusion that if the acquired corporation was "substantial" there has been elimination of substantial (potential) competition. The word "foreclosed" can then be substituted for the word "eliminated" and the applicability of *Standard Stations* is apparent. If this suggestion must be met on its merits, perhaps the best brief answer is that Congress must have had some other notion in mind when it eliminated the "between" clause; for under the suggested formula, the statute in its old form would have covered every type of merger and not merely those of competing corporations.

The Findings and Conclusion of the Reserve Board do not reveal whether the theory of "quantitative substantiality" was accepted by the Board. The dissenting opinion of Governor Powell seems to suggest that it was.⁹⁴

(3) *The "market occupancy" theory.* A more complicated version of the Solicitor's argument based on the *Standard Stations* decision may be described as the market-occupancy theory. This theory has general significance for firms which expand by acquisition of similar but noncompeting branches, such as chain retail concerns. The major premise of the Solicitor's theory was that an acquisition violates Section 7 if the acquiring firm already possesses market "dominance" or even a substantial degree of market control, though falling short of dominance.⁹⁵ The minor premise was that statistics showing Transamerica's "market occupancy" proved its market dominance or control.⁹⁶ The findings of the Board, by their strong emphasis upon the statistics relied on by the Solicitor, and by their references to Transamerica's "market occupancy,"⁹⁷

94. "Principal reliance, as I understand, is based on the Standard Oil case . . . , a five-to-four decision involving not Section 7 but Section 3 of the Clayton Act. This decision is said by the Board's Solicitor to require the Board to hold that any stock acquisition resulting in control of a 'quantitatively substantial' amount of business may have the effect of substantially lessening competition, restraining commerce and tending to monopoly, and is therefore in violation of Section 7. I am unable to agree with this." Dissenting statement of Governor Oliver S. Powell, *Re Transamerica*, 38 FED. RES. BULL. 368, 395 (1952). Whether the "principal reliance" was that of the Board or only of the Solicitor is left in doubt by Governor Powell's remarks.

95. Brief of Counsel for the Board, pp. 36, 37.

96. Referring to the fact that in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), control of two-fifths of the available retail outlets was held to establish market dominance, the Solicitor argued, "Here we have a similar total of controlled outlets and even a higher total of deposits and loans. . . ." Brief of Counsel for the Board, p. 36. See also *id.* at 32; Reply Brief of Counsel for the Board, pp. 19-20.

97. *Re Transamerica*, Findings, Pars. 8, 10 (c), 38 FED. RES. BULL. 368, 384-89, 390-91 (1952).

suggest that this theory played an important part in the Board's decision.⁹⁸

The major premise of this theory can be accepted as a roughly accurate statement of the purpose of Section 7, although it requires qualification. (However, the Solicitor's reliance on the *Standard Stations* decision for this aspect of his argument seems misplaced. The argument represents a position more nearly analogous to the line of earlier Section 3 decisions.⁹⁹) The main purpose of Section 7 was to arrest the growth of market power before it reaches the point at which the Sherman Act would come into play.¹⁰⁰ Acquisitions which enhance the power of a firm already having a monopoly unlawful under the Sherman Act, or which enable a firm to achieve monopoly, obviously violate Section 7. But the purposes of Section 7 would not be satisfied by restraining market power just short of monopoly power; the objective was to put the roadblock much farther back on the path of growth.¹⁰¹ The statute seeks to express this purpose in its formula which speaks of "substantial lessening of competition" and "tendency to monopoly." As one special case under this general formula, it seems reasonable to say that the statute forbids any acquisition which increases the market control of a firm already possessing "substantial" market control. Literally, perhaps, the statute does not go quite so far, because theoretically even a firm having substantial market control might make an acquisition which only slightly increased its market power and therefore did not "substantially" lessen competition. But even such an acquisition could be brought within the tendency-to-monopoly clause, and since the purpose of the statute is to prevent undue growth by nibbling acquisitions as well as by large-sized chunks,¹⁰² it may reasonably be interpreted

98. See also the dissenting statement of Governor Powell, *Re Transamerica*, 38 FED. RES. BULL. 368, 395 (1952).

99. See review of those decisions in *Standard Oil Co. of California v. United States*, 337 U.S. 293, 300-305 (1949). The distinctive feature of the *Standard Stations* holding, it has generally been supposed, was that it made exclusive-dealing contracts unlawful without regard to the existence of dominant or even substantial market control on the part of the defendant. See Comment, 48 MICH. L. REV. 505 (1950); 18 FORD. L. REV. 306 (1949); 35 IOWA L. REV. 131 (1949). But see Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality under the Clayton Act*, 98 U. of PA. L. REV. 10 (1949).

100. See, e.g., H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949); SEN. REP. No. 1775, 81st Cong., 2d Sess. 4 (1950).

101. *Ibid.*

102. See SEN. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950). Cf. *International Salt Co. v. United States*, 332 U.S. 392 (1947).

to cover even minor acquisitions by a firm which has already achieved substantial market control.

An important element of this major premise, however, is that the acquisition in question enlarges the existing market control, however slightly. Suppose Corporations A and B are competitors in Market X, that B's sales constitute a very slight fraction of the market, and that A and B compete only as to part of B's output. If A were also a minor concern the merger of A and B probably would not violate Section 7. But if A already possesses substantial market control in Market X the acquisition of B by A might well be held to violate Section 7, even though the effect on the market is slight, simply because it enlarges A's already substantial power. Assume, however, that B is not a competitor of A but is engaged in the same business in a different market Y, where A does not operate. Under these circumstances the acquisition of B by A would present quite a different problem, for it would not be obvious that this transaction would increase A's control in Market X nor that it would threaten competition in Market Y. This distinction was not dealt with in the briefs of the Solicitor, undoubtedly for the same reasons which led him to assume that Transamerica's "substantial market control" had been established. He assumed that any increase in the bank holdings of Transamerica was *ipso facto* an increase in its market control. This brings us to the minor premise of this theory—namely, that the statistics as to "market occupancy" proved the existence of substantial market control.

The term "market occupancy" was used by the parties and the Board to describe the proportion of Transamerica's commercial banking business to the total commercial banking business in five Western states. This proportion was measured in various ways, which have already been described.¹⁰³ Its determination occupied a central place in the factual inquiry conducted by the Board and in the results reported in its findings. The importance of these statistics to the Solicitor's theory of the case may be gathered from this statement:

In presenting the Board's case we have consistently adhered to the view that the determination of this issue is largely governed by statistics, that is, by showing how many commercial banking offices and how much of the commercial bank deposits and credit in the five-state area are now controlled by Transamerica.¹⁰⁴

103. See pp. 192-94 *supra*.

104. Brief of Counsel for the Board, p. 22.

In antitrust cases a defendant's share of the market is often treated as an index of the defendant's market control.¹⁰⁵ Its share of the market may be measured in various ways, such as percent of sales, percent of capacity, or percent of outlets controlled or owned.¹⁰⁶ But a defendant's share of the market is not necessarily a reliable indicator of the amount of market control—*i.e.*, power to fix prices or to exclude competitors¹⁰⁷—the defendant possesses. Market control may be limited or enhanced by strong influences which are not reflected in the distribution of business among competitors. As the Supreme Court has said, the significance of a given percentage figure depends on the setting in which it is placed.¹⁰⁸ For example, the power to fix prices may be limited by the availability of foreign goods¹⁰⁹ or by the ease with which new competition can enter the business. The market control of a large producer will be very different in a strongly competitive industry than in one which recognizes the price leadership of the large concern. The existence or nonexistence of strong countervailing forces in the bargaining arena will also greatly affect the extent of market control possessed by a firm with a large share of the market.¹¹⁰

Despite such limitations, share-of-the-market evidence has been relied on as a measure of market control in important recent cases.¹¹¹ But, as these cases have recognized, an essential element in such evidence is a valid determination of what the market comprises.¹¹² A figure reflecting the defendant's share of Markets Y and Z is not an indicator of its control in Market X. Determination of the relevant market is likely to be largely a question of judgment. The problem is to mark out the class of buyers and the class of sellers deemed to be the significant participants in the segment of competition in question. The ideal market for purposes of analysis

105. See, *e.g.*, *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

106. *E.g.*, *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (percent of capacity); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941) (percent of sales); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922) (percent of outlets controlled).

107. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745 (1949).

108. *United States v. Columbia Steel Co.*, 334 U.S. 495, 528 (1948).

109. *Cf. United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

110. See GALBRAITH, *AMERICAN CAPITALISM, THE THEORY OF COUNTERVAILING POWER* c. 9 (1952).

111. See cases cited note 105 *supra*.

112. *E.g.*, *United States v. Columbia Steel Co.*, 334 U.S. 495, 509 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

would be a class of sellers and a class of buyers such that all the sellers compete for the trade of all of the buyers and no others, and each of the buyers can buy from any of the sellers in the class and no others. In fact most sellers are likely to compete with different groups of sellers for different customers, and a buyer will have alternative groups of sellers with whom he can deal, since his range of choice includes the purchase of substitute products. Markets overlap and intermingle, both geographically and productwise. Furthermore, these complex relationships are not static but shift as the conditions of competition change.

These problems are present in the banking field as in other fields. For the local merchant in Town A the local bank may be the only convenient place to do business. The commuter has a choice between the local bank and the city banks; for his business they are all in competition. The large corporation which needs money may shop around among local banks, large banks in distant cities, insurance companies, and others; the prospective home buyer needing a mortgage loan may have a choice of the local bank, the building and loan association, or an insurance company; the small business may have to depend on one of the local banks for its short-term money.

The Board made findings as to the relevant market or markets in Transamerica's case. In terms of product (in this case, services) it limited the inquiry to competition among commercial banks.¹¹³ It recognized, as Transamerica contended, that with respect to some of their functions commercial banks experience competition from nonbanking institutions. But it concluded that in certain major functions commercial banks can be treated as a separate competitive group. In the functions of money-payment and money-creation, the Board found, the services of commercial banks are unique,¹¹⁴ while in the furnishing of short-term business credit

113. *Re Transamerica*, Findings, Par. 7 (a)-(c), 38 FED. RES. BULL. 368, 382-83 (1952).

114. *Re Transamerica*, Findings, Par. 7 (b), 38 FED. RES. BULL. 368, 382 (1952). The "money-payment" function refers to the services associated with demand-deposit accounts. "Money creation" refers to the process by which the banking system as a whole is able to expand the volume of credit in circulation. Since this is a function of the banking system as a whole rather than of individual banks, it is somewhat difficult to see how this function is relevant to competition. Banks compete to lend money; they do not compete to create money. Nor is it clear that competition is a major objective of public policy in either function. See Berle, *Banking Under the Antitrust Laws*, 49 COL. L. REV. 589 (1949). On the other hand, the Board ignored completely the relationship between Transamerica's banks and its own nonbank enterprises, a relationship which might induce genuine anti-competitive practices.

commercial banks occupy a pre-eminent position.¹¹⁵ Thus the Board excluded evidence offered by Transamerica to show the extent of nonbank competition in respect to a variety of other services, including the making of real-estate, personal, agricultural, installment, term and other types of loans.¹¹⁶

How large a share of the business of Transamerica was attributable to these other types of service, as to which nonbank competition admittedly existed, does not appear from the findings. Undoubtedly the Board was justified in making a judgment as to the area of competition to be considered. It was not required to find that the standards of Section 7 were violated in each and every line of Transamerica's business. Section 7 forbids the lessening of competition in *any* line of commerce. An acquisition which involves two or more lines of business would seem to violate Section 7 if it has the prohibited effect in any one of them, regardless of the relative importance of that line in the transaction as a whole.¹¹⁷ The exclusion of some of Transamerica's business from consideration has this consequence, however: The percentage figures, based on total business done, lose some of their significance because some unknown portion of the total ought to be compared not with commercial banks alone but with other institutions as well. Thus the statistics showing Transamerica's loans as a percentage of all *bank loans* undoubtedly exaggerate Transamerica's share of all the *lending business* for which it competes.

As to the geographic area of the market, the Board found:

Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer.¹¹⁸

Consistently with this finding the Board refused to consider evidence that in making some kinds of loans Transamerica was in

115. *Re Transamerica*, Findings, Par. 7 (b), 38 FED. RES. BULL. 368, 382 (1952).

116. *Re Transamerica*, Findings, Par. 7 (g), 38 FED. RES. BULL. 368, 383-84 (1952).

117. "It is intended that acquisitions . . . will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition." SEN. REP. NO. 1775, 81st Cong., 2d Sess. 5 (1950). *Cf. George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253 (1929) (similar interpretation of Section 2 of Clayton Act).

118. *Re Transamerica*, Findings, Par. 7 (f), 38 FED. RES. BULL. 368, 383 (1952). See also *Re Transamerica*, Findings, Par. 10 (a), 38 FED. RES. BULL. 368, 390 (1952).

competition with other banks as far away as New York. In other words, the "market" in which Transamerica's market control had to be measured was not a five-state area, nor five state-wide areas, but a large number of individual markets, approximately community-wide in size.

Yet the principal evidence of Transamerica's market position was the Board's data concerning Transamerica's share of the aggregate commercial banking business in a five-state area, described as evidence of "market occupancy." One of the most important questions in the case was whether such evidence constituted proof of market control in the markets in which Transamerica operated.

It cannot be doubted that if Transamerica did something like 40 percent of the total banking business in the five-state area it must have done 40 percent or more in some local competitive area or areas. But it is a long jump from this inference to the further one that in all or most of its market areas Transamerica's share was 40 percent or better. The findings of the Board furnish no basis for deciding whether Transamerica's share of the business was evenly spread among the communities in which it operated, or was very high in some and much lower in others. The statistics do provide two reasons for doubt that Transamerica's "market occupancy" was evenly distributed throughout the actual markets in which it operated. (1) They showed great disparity in Transamerica's aggregate position considered state by state.¹¹⁹ (2) They showed that in a large number of communities Transamerica operated the only bank, so that in those communities its share of the market must have been 100 percent.¹²⁰ If the average for all communities was around 40 percent, it must follow that in some other communities Transamerica's share of the business was a good deal less than 40 percent.

Thus it is difficult to find in the statistics concerning Transamerica's share of the five-state banking business any strong basis for an inference of market control in that area, either "dominant" or "substantial." The basic difficulty is that the five-state area does not constitute a banking market. Apparently the chief argument for using the five-state area as the basis for the Board's statistics was

119. *E.g.*, it had 51 percent of the banking offices in California, 36 percent in Oregon, 60 percent in Nevada, 13 percent in Arizona, and 4 percent in Washington. Similar disparities existed by the other indexes employed. *Re Transamerica*, Findings, Par. 8, 38 FED. RES. BULL. 368, 384-89 (1952).

120. *Re Transamerica*, Findings, Par. 8 (b) (3), 38 FED. RES. BULL. 368, 385-86 (1952).

that these were the five contiguous states in which Transamerica had banking interests.¹²¹ It is true that Section 7 speaks of lessening competition in any line of commerce "in any section of the country." Yet the legislative history of the revised section makes clear—what could scarcely have been open to doubt—that this phrase refers to a market in the economic sense. The report of the Senate Committee stated:

What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.

As the Supreme Court stated in *Standard Oil Co. v. U.S.* (337 U.S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."¹²²

If the market-occupancy statistics fail to reveal with any accuracy Transamerica's market control in the actual arenas of banking competition, they fail equally to indicate the effect upon Transamerica's market control of the particular acquisitions challenged as violative of Section 7. All that can confidently be said is that the putting together of five state-wide banking systems plus the acquisition of a number of additional banks changed the holding company's "market occupancy" as defined by the Board. Some of the acquisitions increased the percent of market occupancy; others, by taking in new territory, diluted it. For the five-state area as a whole the market occupancy was increased during the period reviewed by the Board; but selection of a different area, either larger or smaller, might have produced quite different percentages of occupancy which would have been equally relevant—or equally irrelevant—to the issue of market control.¹²³

121. Reply Brief of Counsel for the Board, pp. 41-42. Transamerica also owned a 7 percent stock interest in National City Bank of New York. *Re Transamerica, Findings*, Par. 1 (c) (2), 38 FED. RES. BULL. 368, 369 (1952).

122. SEN. REP. No. 1775, 81st Cong., 2d Sess. 5-6 (1950).

123. Compare: "All A & P stores in the United States and Canada are grouped by the Company into local 'units' which coincide fairly well with metropolitan districts and with local market areas. The government insists, rightly in my opinion, that it is the share of these *local* markets rather than of the national market which is relevant to any consideration of monopoly power. . . . It is highly significant that in a brief of 1100 pages

(4) *Size and probable effect on competition.* The weaknesses in each of these statistical or short-cut solutions tend to confirm the analysis suggested earlier. In a case such as Transamerica's, involving acquisitions of firms in separate market areas, there is likely to be no satisfactory substitute for the complicated economic inquiry which is literally demanded by Section 7. Applying the section to Transamerica's acquisitions, the question is hard to avoid: What was the probable effect on banking competition in places like San Francisco and Las Vegas, Tehachapi and Corvallis, as Transamerica successively gathered into its hands the stock control of existing banks in these and other communities, scattered from Tacoma to Phoenix? Two conjectures may be ventured about the answer to such an inquiry: (1) the answer is not obvious, and (2) it is likely to be different for different communities. These conjectures seem reasonable even if one makes the simplifying assumption that the acquisitions are to be judged as if they all occurred at once.

Given the magnitude of the task, it is hardly surprising that the Board failed to make findings as to the probable effect of the acquisitions in each and every community in which banking competition might have been affected. No doubt it was not required to do this. The convenient solvent of substantiality helps here as in other problems arising under the statute: If there was a reasonable probability that the effect of an acquisition would be to lessen competition substantially in a substantial number of banking markets, or in a substantial banking market, the statute was violated. Just as the statute does not require lessening of competition in every line of commerce in which an acquirer may be engaged, so it should not require lessening in *every* market area in a given line. But the findings in this case do not point to *any* particular market area or areas in which an adverse effect on competition might be predicted. They contain only a generalized judgment that the acquisitions may have the prohibited effect in the five states named. Literally this is the ultimate finding called for by the statute ("in any line of commerce in any section of the country") but since the section of the country named is not competitively significant the finding seems inadequate.

The more serious question, perhaps, is whether the findings

there is not even one table presenting either the dollar or physical volume of sales or the share of the market, for the years in question, in the several units as described above." Adelman, *The A&P Case: A Study in Applied Economic Theory*, 63 Q.J. ECON. 238 (1949).

reflect a genuine economic judgment as to the likelihood of harm to competition or whether they merely express a preference for smaller enterprises in the banking field. The failure of the Board to spell out the reasoning by which its economic judgment was arrived at gives rise to some doubt on this point.

The most significant economic fact emerging from the findings is the great size of the Transamerica banking holdings, both in absolute terms and in relation to other banks. No elaborate investigation was necessary to determine this. Bank of America alone is recognized as the largest commercial bank in the world.¹²⁴ Such size obviously carries with it the possibility of harm to competition. A branch of the Bank of America is probably a more serious competitive threat to its rival in Middletown than would be a local independent bank—because of its greater financial backing if for no other reason, but also because of advantages of organization, experience, reputation, diversification of risks and the like. The power of Bank of America to compete more effectively may be, for the same reasons, a power to drive out competition if the Bank should choose to do so and a power to discourage competition whether it chooses to or not. Whether the power extends this far depends partly upon the extent of the advantage held and partly upon the strength of the deterrents against its exercise.

The advantages of size may be so great that strong likelihood of harm to competition can be predicted. The Board's decision may imply a judgment that this was the case with Transamerica. But the advantages which make a Transamerica bank a dangerous competitor in any particular locality might equally accrue to a bank one-tenth its size or even to an individual bank with sufficient financial resources. Would a bank with fifty branches be forbidden to acquire one of the two banks in town A on the ground that its superior resources might be employed in a brief but intensive competition which would drive out the other bank? Or would a bank with only two branches be forbidden to make the same acquisition because the resources of its wealthy owners could be used to the same end?

The Board's findings, while referring in a general way to the potential effects of size, furnished no indication of how it determined the maximum tolerable size of a firm in the banking field

124. See San Francisco Chronicle, Jan. 3, 1953, p. 11, cols. 1, 2.

or of how it knew that Transamerica exceeded such a size. It stated, "As the size and resources of a banking group increase, its power to suppress potential competition increases. Its size alone may discourage and prevent the establishment of independent banks in direct competition with it, or serve as an inducement to existing small banks, likely to be, or already, in direct competition with it, to sell to the group at its solicitation."¹²⁵ This states only what is obvious; the crucial question is where the point is reached at which size becomes the kind of threat to competition that Section 7 forbids. The Board's conclusion imports a judgment that this point was passed, but the basis for that judgment is not stated. Either it rests upon reasoning and expert knowledge not set forth in the findings, or it is a judgment so largely in the subjective realm that it may fairly be called a pure policy determination.

The relationship of size to competition may be so conjectural in cases of this type that it is unreasonable to expect even an expert body to formulate standards or criteria for application of the statute. The Board might conceivably have found evidence of specific instances in which Transamerica's advantages had enabled it to snuff out existing competition or to discourage projected new competition.¹²⁶ Possibly some of the numerous instances in which it had acquired more than one bank in the same community would have evidenced such a tendency, but these were not cited as consequences of Transamerica's size. Again the Board might have found an intent on the part of Transamerica to employ its superior resources and size for the purpose of waging destructive competition, but such an intent was not found and the Board said that evidence offered by Transamerica to negative such an intent was immaterial.¹²⁷ In the absence of tangible evidence of the effects of size or of purpose to employ size in a monopolistic manner, it may be extremely difficult to particularize the grounds on which size alone is to be condemned. It is this which makes the extension of Section 7 to conglomerate acquisitions and other acquisitions of non-competing firms a more drastic change than Congress appears to have realized.

125. *Re Transamerica*, Findings, Par. 10 (b), 38 FED. RES. BULL. 368, 390 (1952).

126. Although it is doubtful that evidence of actual effect should be used to prove probable effect at date of acquisition (see pp. 220-25 *infra*), this would not bar consideration of the effect of earlier transactions as bearing on the probable effect of later ones.

127. *Re Transamerica*, Findings, Par. 10 (c), 38 FED. RES. BULL. 368, 390 (1952). The Board found only a purpose to expand, not a purpose to restrain competition or monopolize. *Re Transamerica*, Findings, Par. 6 (c), 38 FED. RES. BULL. 368, 381 (1952).

In amending Section 7 Congress hoped to make it, as the legislative history shows, an effective weapon against concentration.¹²⁸ In doing so, it preserved a formula which in terms is concerned with protecting competition, not with preventing concentration. But the problem of competition and the problem of concentration, or bigness, are not necessarily the same. The difficulties of employing the formula in situations where great concentration is not directly reflected in impact on competition are illustrated by the *Transamerica* case. They would be even more clearly illustrated in a case where the concentration consisted of enterprises in diverse lines of competition, as in some of the illustrations cited to Congress.¹²⁹

It remains to consider whether these difficulties are obviated by the second test of Section 7, tendency to create a monopoly.

(5) *Tendency to monopoly.* The discussion to this point has assumed that Section 7 is wholly concerned with preventing undue growth of market control, since "lessening of competition" can scarcely mean anything but increase in the market control of one or more competitors. Perhaps it is arguable, however, that the second test furnished by Section 7, tendency to create a monopoly, invites the use of different criteria. The tendency-to-monopoly test takes on special significance in *Transamerica's* case because in principle the lessening-competition test was applicable only in its old and qualified form, as was noted earlier.¹³⁰ Does "tend to create monopoly" mean anything more than an aggravated extension of market control?

Under the Sherman Act, the meaning of the term "monopoly" has come to approximate the concept of monopoly in economics.¹³¹ In this sense monopoly means an excessive degree of market con-

128. The House report stated that "the broad economic problem of high and increasing concentration" was the problem with which the legislation was concerned. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 3 (1949). The Senate report said, "The purpose of the proposed bill . . . is to limit future increases in the level of economic concentration. . . ." SEN. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950). Yet Congress was also assured that "[t]his proposal is in no sense antagonistic to so-called big business." H.R. REP. NO. 1191, 81st Cong., 1st Sess. 13 (1949).

129. E.g., charts showing acquisitions of Borden Company and American Home Products Company. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 10-11 (1949). Compare the recent acquisition by W. R. Grace & Co. of Foster & Kleiser Company, a large outdoor-advertising concern. See N.Y. Times, Oct. 18, 1952, p. 26, cols. 2, 3.

130. See p. 199 *supra*.

131. The development is traced in Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947).

trol, whether viewed in terms of power to fix prices¹³² or power to exclude rivals from the market¹³³ or both; the difficult question is how great a degree is excessive. Under Section 7, however, this question need never be reached if monopoly means excessive market control; since any substantial lessening of competition is forbidden, tendency to monopoly is merely an *a fortiori* case. Indeed, if monopoly as used in Section 7 has the same general meaning that it has under the Sherman Act it is difficult to see that the tendency-to-monopoly test serves any useful purpose.¹³⁴ Any acquisition which satisfies that test must result in substantial lessening of competition, either actual or potential.¹³⁵ Conceivably, therefore, monopoly as used in Section 7 should not be limited to cases of excessive market control but should cover some situations which would not be reached by the test of substantial lessening of competition.

If monopoly is not to be limited to its Sherman Act sense a plausible case could be made for extending it to cover "market occupancy" situations like that shown by the Transamerica statistics. In some sense Transamerica has tended to pre-empt the banking business in the Western states even though in respect to market control it may be nothing more than a healthy competitor, able neither to fix prices nor to eliminate competitors. Imagine a grocery concern with stores in every town in the country and with 30 or 40 percent of the total grocery business. For others than economists it might well seem that such a concern was monopolizing or tending to monopolize, though subject to vigorous and undiminishing competition practically everywhere. It can be argued that a firm which expands unduly is monopolizing business opportunities, as a garrulous person monopolizes conversation. Public policy is not necessarily concerned only with the preservation of choices for customers. It may also seek to preserve opportunities for entre-

132. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

133. *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

134. Under the old Section 7 the tendency-to-monopoly clause served a more obvious function, since the lessening-competition clause was narrowly limited by the "between" clause. Tendency to monopoly might theoretically be found even though the corporations were not competing ones. See *Aluminum Co. of America v. FTC*, 284 Fed. 401, 407 (3d Cir. 1922).

135. That potential competition is included in the competition which is protected, see *Aluminum Co. of America v. FTC*, 284 Fed. 401 (3d Cir. 1922), *cert. denied* 261 U.S. 616 (1923). Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945): "... so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. The Clayton Act itself speaks in that alternative: 'to injure, destroy, or prevent competition.' § 13 (a) 15 U.S.C.A."

preneurs, not merely for the ultimate benefit of competition but as an end in itself.

Support for such a concept of monopoly is not wanting in the American antitrust tradition.¹³⁶ The broader social purposes of the antitrust laws have perhaps been eclipsed by recent emphasis upon the economic ones. But those broader purposes have nowhere received more explicit recognition than in *United States v. Aluminum Company of America*,¹³⁷ a monopoly case most often remarked for its analysis of market control. In condemning monopolies, said Judge Hand, Congress "was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. . . . Throughout the history of these 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."¹³⁸

If Section 7 will support a concept of monopoly based on such considerations and unrelated to market control, it may well be that Transamerica's expansion presents a good case for applying it. Transamerica's own version of its growth suggests a resemblance to Alcoa's offense. It offered to prove that "Bank of America and the Transamerica majority-owned banks grew as a result of providing a greater variety of services to a greater number of people, and by constant effort to render services which were better in quality and cheaper in cost than those offered by competitors"¹³⁹ and that "the intent and effect of the transactions by which Bank of America and the Transamerica majority-owned banks have extended their facilities have been to give more and better service to more people over a wider area."¹⁴⁰ One can almost hear Judge Hand's rejoinder to Alcoa, declaring such a plea irrelevant:

The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a

136. See Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153, 154-55 (1947); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567, 569 (1947).

137. 148 F.2d 416 (2d Cir. 1945).

138. *Id.* at 427, 429.

139. *Re Transamerica*, 38 FED. RES. BULL. 368, 398 (1952).

140. *Ibid.*

market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.¹⁴¹

But an important, perhaps crucial, difference exists between Alcoa's position and that of Transamerica. Alcoa did clearly have market control. The court had already found it to be a monopoly. The question to which Judge Hand's remarks were directed was a different question: Was Alcoa, though possessed of monopoly, clearly guilty of "monopolizing"? Alcoa's pre-emption of opportunities may have defeated social purposes of the antitrust laws, but it also served to maintain its market control. The persons it excluded from the aluminum business were potential competitors, not merely alternative entrepreneurs. Transamerica's expansion, so far as concerns the acquisitions challenged in this case, served mainly to carry it into new markets, not to protect old ones. In doing so, it doubtless reduced the number of small-town bankers but arguably it did not reduce the number of competitors.

Thus Transamerica's case raises issues suggested but not decided by Alcoa's case. May expansion tend to "monopoly" though it fails to increase market control or to lessen competition substantially? Is market control the essence or only one manifestation of monopoly under the antitrust laws? Does monopoly in Section 7 mean something different than monopoly under the Sherman Act? The Reserve Board's decision does not attempt to answer these questions, but to the extent its conclusion rests on the tendency-to-monopoly clause they are difficult to avoid. Except on such a theory of "monopolizing" as has been suggested, it is difficult to understand the significance for this proceeding of the numerous acquisitions made by Transamerica in the past but not directly attacked in this case. The "cumulative effect" of all these acquisitions was greatly stressed by the Board's Solicitor and evidently influenced the Board. As has been seen, the facts fail to show that the acquisitions *had* a "cumulative effect" upon Transamerica's market

141. 148 F.2d 416, 431 (2d Cir. 1945).

control. If not, their significance must be that the mere accumulation of a large number of separate enterprises is itself unlawful, at least where that accumulation takes place by means of acquisitions.

There is little concrete authority for such a position. Under Section 7 the tendency-to-monopoly clause has received scant attention in prior decisions.¹⁴² Under the Sherman Act, the motion-picture theater cases point to the possibility that accumulation of a chain of local enterprises may result in unlawful monopoly, but only in a setting of unlawful market control.¹⁴³ The committee reports on the bill which became the new Section 7 fail to suggest any new or special meaning for the term monopoly; they leave the impression that the draftsmen thought of both the lessening-competition and the tendency-to-monopoly tests as concerned with the same phenomenon, impairment of competition. The impression is strengthened by the qualifying phrase, "in any section of the country," which modifies both tests and which was used to mean an economic market, as has been noted.¹⁴⁴ Yet it is also true that the reports indicated a purpose to deal effectively with "horizontal" and "conglomerate" acquisitions. Possibly that purpose cannot be fully carried out except by an expansive interpretation of the term monopoly.

If this is the direction that Section 7 is to take, the fact that it gives a new twist to an old concept is no ground for surprise nor, perhaps, for objection. Striking change in content with little change in form has been a characteristic of the development of our antitrust law.¹⁴⁵ If there is special cause for concern about the new concept of monopoly which may be implicit in the *Transamerica* case it is the absence of any bench marks by which to measure monopoly in this new sense. The difficulty is similar to

142. See *Aluminum Co. of America v. FTC*, 284 Fed. 401, 407-8 (3d Cir. 1922); cf. *International Shoe Co. v. FTC*, 280 U.S. 291, 294 (1930); *V. Vivaudou, Inc. v. FTC*, 54 Fed. 273, 275 (2d Cir. 1931); *Temple Anthracite Coal Co. v. FTC*, 51 Fed. 656, 660 (3d Cir. 1931); *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 125 (N.D. Ohio 1935).

143. *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-75 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); see McDonough and Winslow, *The Motion Picture Industry: United States v. Oligopoly*, 1 STAN. L. REV. 385 (1949).

144. See p. 209 *supra*.

145. The outstanding example, perhaps, is the evolution of the conspiracy concept. See Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950); Note, *Conscious Parallelism—Fact or Fancy?* 3 STAN. L. REV. 679 (1951).

the difficulty of using size alone as an index of threat to competition. There, however, it is at least possible that economic criteria may provide some standard for judgment. Here economic criteria clearly give way to judgments based on competing social values. How the balance is to be struck between such values cannot be determined from anything Congress has said in Section 7. Offhand there seems no greater reason for saying that a bank with 40 percent of the banking offices in five states is tending to monopoly than a grocery chain with 40 percent of the stores in a single county or city, or than a firm with the same number of banking offices or grocery stores scattered within 48 states.

If expansion alone may constitute a tendency to monopoly, regardless of effect on market control or competition, the Board may have been correct in concluding that Transamerica's expansion exceeded all permissible bounds. But that can hardly be determined without knowing how the Board decided what the permissible bounds are. If "market occupancy" is the clue, all that can be deduced from the decision is a logical but hardly sensible rule of thumb for expanding concerns: disperse the enterprise over the widest possible geographic area.¹⁴⁶

The foregoing discussion has examined a number of different grounds or theories on which the Reserve Board's application of Section 7 may have rested. It has sought to show certain weaknesses in each of those theories, in the belief that similar difficulties will arise in attempts to apply Section 7 to many of the mergers which it nominally covers in its present form. In considerable measure the difficulties are inherent in the statute. Some additional complications arise, however, from the effort which was made in this case to employ Section 7 for the purpose of breaking up an established integration growing out of a series of transactions, rather than for the simpler purpose of preventing a particular transaction from taking place. These complications, about to be considered, seem to indicate that Section 7 is not well suited to the curative task undertaken in this case and ought to be relied on mainly for the preventive purposes which brought it into being.

146. For a study of some of the causes and consequences of territorial expansion of firms, see Hale, *Dispersion: Monopoly and Geographic Integration*, 30 TEXAS L. REV. 421 (1952).

B. The Vantage Point in Retroactive Application of Section 7

Transamerica's case brings to the fore the possibility of invoking Section 7 against an acquisition of stock long after it has been effected. The complaint in the case, issued in 1948, charged Transamerica with violating Section 7 in respect to each of the banks which was majority-owned by it and also in respect to its stock ownership in Bank of America, which then stood at 22.88 percent. Transamerica had acquired all the stock of the Bank of Italy, which subsequently became Bank of America, in 1928¹⁴⁷ and had acquired the stock of other major constituents of its banking enterprise between 1930 and 1937.¹⁴⁸ The Board found that all of these stock acquisitions constituted violations of Section 7 and ordered divestiture of all but Bank of America.¹⁴⁹

Presumably the same possibility of belated application of Section 7 exists in the case of asset acquisitions. This possibility exists both because there is no statute of limitations applicable to Section 7 transactions and because the violation is probably a continuing one anyway. On the latter point, it might be argued from the language of Section 7 that the offense is the acquisition, not the holding, of stock or assets and that the violation is complete when the acquisition is complete. Certain language in Section 11, however, suggests that the offense continues as long as the acquirer continues to hold the stock or assets which were unlawfully acquired.¹⁵⁰ But even if the continued holding of the stock or assets does not keep the violation alive, there appears to be no statute of limitations to inter it.¹⁵¹ Conceivably, a court might hold that

147. *Re Transamerica*, Findings, Par. 3 (c), 38 FED. RES. BULL. 368, 371 (1952).

148. Brief for Transamerica, pp. 33-34.

149. *Re Transamerica*, Conclusion and Order, 38 FED. RES. BULL. 368, 391-92 (1952). The Board declined to order divestiture of Bank of America because it believed divestiture would not terminate Transamerica's control.

150. "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person *is violating or has violated* any of the provisions of [sections 2, 3, 7, and 8], it shall issue . . . a complaint . . . If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections *have been or are being* violated, it . . . shall issue . . . an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, *held* . . . contrary to the provisions of . . . [section 7]. . . ." [Emphasis supplied.] 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. 1952).

151. The administrative proceeding is not a suit to recover a "fine, penalty, or forfeiture" to which 28 U.S.C. § 2462 (Supp. 1952) would apply. *Cf. Atlanta v. Chattanooga Foundry & Pipe Co.*, 203 U.S. 390 (1906) (statute not applicable to treble-damages action under antitrust laws). There is no other federal statute of limitations which might apply and no basis exists for invoking a state statute. Even if a suit in equity were brought pursuant to Section 15 of the Clayton Act, instead of an administrative proceeding, state statutes of limitation would not apply. *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946).

delay by the administrative body in instituting proceedings would bar the agency under the doctrine of laches, but there is little authority for this position,¹⁵² although agencies have occasionally recognized that unreasonable delay is a ground for refusing to exercise their discretionary powers.¹⁵³

Difficult questions concerning the inquiry under Section 7 and the nature of the proof may thus arise. Suppose the FTC issues a complaint in 1955 charging that corporation A violated Section 7 when it acquired Corporation B in 1950. (1) Is the illegality of the transaction to be tested by its probable effect viewed as of 1950 or its probable effect viewed as of 1955? (2) If the proper test is the 1950 one, to what extent may evidence of events since 1950 be taken into account, either to establish or to negative the violation—is it relevant that competition may have increased or declined since the transaction?

(1) Considering only the language of Section 7 it seems reasonably clear that the controlling test is the probable effect at the date of acquisition. The statute provides: "No corporation shall acquire [stock or assets] where the effect of such acquisition may be [to lessen competition, etc.]." The prohibition is addressed to parties who contemplate engaging in merger transactions and is meant, in the first instance, to guide them in deciding upon a course of action. The only standard they are capable of applying is one addressed to the circumstances viewed as of the date of the proposed transaction. Since this is the standard which the parties must apply in deciding whether to undertake a transaction, it seems reasonable to conclude that it is the standard which enforcement

But cf. *United West Coast Theatres Corp. v. South Side Theatres*, 86 F. Supp. 109, 111 (S.D. Cal. 1949) (state statute applied to private equity suit under antitrust laws).

152. The absence of any statute of limitations applicable to complaint proceedings under the Wagner Act created difficulty where back pay was ordered. To obviate this difficulty, the National Labor Relations Board resorted to the doctrine of laches. See *In re L. C. Smith & Corona Typewriters, Inc.*, 11 N.L.R.B. 1382 (1939); SEN. REP. NO. 105, 80th Cong., 1st Sess. 26 (1947). But the Board refused to apply the doctrine where it had delayed processing an unfair-labor-practice charge. The refusal was upheld by the Third Circuit, which refused to apply its own version of the doctrine. *NLRB v. Wilson Line*, 122 F.2d 809 (3d Cir. 1941); *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235 (3d Cir. 1941). The Board did not, however, have unlimited discretion. See, e.g., *NLRB v. Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941) (error for Board to order back pay for entire period where complainants had delayed for 18 months before filing charges with Board). Much of the difficulty has been remedied by Section 10 (b) of the Taft-Hartley Act, which provides a six-month limitation on the filing of an unfair-labor-practice charge. 61 STAT. 146 (1947), 29 U.S.C. § 160 (b) (Supp. 1952).

153. See, e.g., *In the Matter of Officer, Fed. Docket No. 1105* (Civ. Serv. Comm. Jan. 27, 1945); *In the Matter of John H. Nance, Jr.*, 5 C.A.B. 201 (1941); *In re L. C. Smith & Corona Typewriters, Inc.*, 11 N.L.R.B. 1382 (1939).

agencies should apply in deciding whether the transaction violates the statute.

This conclusion is supported by the generally recognized purposes of the statute. Section 7, like other portions of the Clayton Act, is often spoken of as being preventive in character, designed to help check monopolistic tendencies "in their incipency." Section 7 is meant to deter threats to competition, not merely to prevent transactions which are certain to harm competition. It ought not to be construed in a way which might encourage persons to undertake threatening transactions on the chance that by the time an enforcement agency acts the threat will have been dissipated. On the other hand, the statute probably ought not to be construed to subject good-faith acquirers to the hazard that an apparently harmless transaction will become illegal through unforeseen later developments.

In the Federal Reserve Board proceeding Transamerica argued strenuously that the Board was required to make a separate finding as to the probable effect of each acquisition at the time such acquisition was made.¹⁵⁴ The Solicitor, while stressing the preventive and forward-looking characteristics of the Section 7 test, insisted that the test should look forward from the date of the proceeding and that separate inquiry as to each acquisition would render the case needlessly complex.¹⁵⁵ The Board evidently agreed with the Solicitor, for its findings seem to speak from the date of the decision: "[I]t is clear . . . that the effect of [Transamerica's] *holding and use* of such stocks may be to substantially lessen competition and restrain commerce in commercial banking. . . ."¹⁵⁶ It made no separate findings as to the effect or probable effect of the individual acquisitions.

It seems doubtful that such a finding would suffice in the case of a single acquisition challenged ten or twenty years after it took place. The Board's finding must mean either that the effect of the acquisitions may *have been* to lessen competition, or else that the effect of divestment *may be* to *increase* competition (and hence the continued holding may lessen potential competition). Such a finding would be consistent with a statute which read, "No corporation shall acquire *or continue to hold* stock or assets . . . *when-*

154. Brief for Transamerica, pp. 33-38.

155. Brief of Counsel for the Board, pp. 19-21; Reply Brief, pp. 6-8.

156. *Re Transamerica*, Findings, Par. 10 (c), 38 FED. RES. BULL. 368, 390-91 (1952).

ever it shall appear that the effect of such acquisition or continued holding may be to substantially lessen competition." But such a statute would obviously go well beyond the purposes of the present Section 7. Continued holding of the unlawfully acquired stock or assets is important, of course, as a prerequisite to invoking the remedy specified by Section 11. If they are no longer held there is nothing to divest. But the fact that they are still held does not dispense with the need for finding that they were unlawfully acquired.

But possibly a different conclusion can be defended in the case of a series of acquisitions. Assume that Corporation A acquires B, C, D and E over a period of years, that each of the first three acquisitions carries a negligible threat to competition when made, but that the cumulative effect when Acquisition E is made represents a serious threat, *i.e.*, a substantial increase in A's market control. Is it only Acquisition E—the straw that breaks the camel's back—which is unlawful, or should all four acquisitions be treated as unlawful because all contribute to the result? Clearly all should be unlawful if A had all four in contemplation when it made the first; its intent would be a circumstance bearing on the probable effect. But even if A had no such intent, it can be argued that A should take the risk of later actions of its own which render earlier acquisitions harmful. While not literally in accord with the statute, such a result would not be an unreasonable construction of the statute. Perhaps the Board had some such reasoning in mind in Transamerica's case (although the difficulty remains, as we have seen, that the cumulative significance of the acquisitions is far from clear).

(2) If one of the hazards of Section 7 is that an acquisition will be judged by later conditions rather than those existing when the fatal step was taken, this hazard can be reduced by requiring the trier to make a finding as to the probable effect at date of acquisition. But this alone will not insure faithful adherence to the standard laid down by the statute. Wherever Section 7 is invoked against transactions long past, the temptation will be great to use evidence of actual effects to prove probable effects. If competition has declined noticeably following the acquisition or acquisitions, the plaintiff will rely upon this as proof that the transaction was a threatening one when made. Equally, if competition has continued undiminished or has increased, the defendant will urge this as

evidence that the transaction was innocent.¹⁵⁷ The longer the period since the acquisition the greater will be the inclination to consider the observed condition of the industry in the years following the acquisition. The comparative ease of obtaining evidence of actual "effects" and the difficulty of reconstructing the situation in the industry as of the date of acquisition furnish strong practical reasons for such a tendency.

From the standpoint of logical relevance, however, there are difficulties in the way of using such evidence. Suppose it can be established that in the years following A's acquisition of B competition in B's markets has noticeably declined: other firms have gone out of business, prices have tended to become uniform and rigid, profits of firms remaining have become greater while output has declined. In a Section 7 proceeding against A, attorneys for the FTC argue that such evidence is relevant because it tends to show that the acquisition has in fact had an adverse effect on competition, and that this greatly strengthens the inference that at the time it was made the acquisition was potentially harmful.

The first objection, clearly, relates to the problem of causation. How is it known that the observed condition of competition is, in whole or in part, an "effect" of the acquisition? It may be argued that there is no necessity for showing that the acquisition was a "proximate cause" of the decline in competition, and that it is enough if the acquisition "contributed" to the decline.¹⁵⁸ But this does not avoid the difficulty; some causal connection must still be established. There is a danger of circular reasoning. It may be that the only reason for inferring a causal connection between the acquisition and the ensuing decline in competition is the assumed tendency of the acquisition to cause such a decline. Indeed, the usual (if not invariable) method of establishing cause and effect involves this very form of reasoning. The event being shown, the fact that it was caused by something else is deduced from the known capacity or tendency of the something else to produce that kind of event.¹⁵⁹ But if this capacity or tendency is the very question at issue, obviously

157. See *Standard Oil Co. of California v. United States*, 337 U.S. 293, 309 (1949); Brief for Transamerica, pp. 40-48; *Re Transamerica*, Findings, Par. 7 (a), 38 FED. RES. BULL. 368, 382 (1952).

158. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20 (1940). One of the best analyses of the problem of causation in antitrust cases is that of Judge Wyzanski in *Momand v. Universal Film Exchange*, 72 F. Supp. 469, 480-82 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir. 1948).

159. See WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 234-35 (3d ed. 1937).

the causal connection cannot be established merely by proving the event. It must be established on the basis of other—preferably numerous other—cause-and-effect sequences.

The dangers of resort to such evidence are illustrated by one aspect of the *Transamerica* findings. The Board made some point of the fact that while Transamerica was expanding, the total number of banking offices in California declined. Transamerica grew from 352 offices in California in 1928 to 556 offices in 1948, while the total offices in California decreased from 1,320 in 1928 to 1,093 in 1948.¹⁶⁰ If these facts were noted only to emphasize the magnitude of Transamerica's relative growth their significance is only that of the "market occupancy" data in general. But there is a suggestion that these data indicate something more. The Board stated, "These changes occurred during a period when the population of the five-state area was increasing by 70 to 80 percent, and the income of the population, retail sales, and business generally increased by much larger percentages."¹⁶¹ The same note is struck again briefly in the conclusory findings of the Board: "[D]espite the tremendous growth of population and wealth in this area the expansion of Transamerica has been accompanied by a decrease in the number of banking offices independent of Transamerica. . . ."¹⁶²

The import of these statements is not clear, but the suggestion seems to be that Transamerica's expansion deterred the growth of banks independent of Transamerica and even held down the total number of banking offices in the area. If these are the inferences the Board drew they are not warranted by the data. Assuming that banking operations have not increased in the manner or to the extent which might have been expected, and therefore that some inhibiting factor has been present, the figures cited by the Board do not show any causal connection between Transamerica's growth and such retarding of over-all development. Such evidence is quite as consistent with the view that but for Transamerica's operations the over-all growth might have been much less.

But even if the causal connection between an acquisition and the impairment of competition can be taken as established, there is a further theoretical objection to use of post-acquisition evidence. This is simply that the occurrence of an event proves nothing about

160. *Re Transamerica*, Findings, Par. 8 (b) (2), 38 FED. RES. BULL. 368, 385 (1952).

161. *Ibid.*

162. *Re Transamerica*, Findings, Par. 10 (c), 38 FED. RES. BULL. 368, 391 (1952).

the probability that it would happen. A race may be won by a horse on which the odds were 100-to-1. This does not prove that the horse was a sure thing or even that the odds makers were wrong. A statement of probabilities recognizes that the improbable as well as the probable may occur. If competition declines following an acquisition, and the decline can be said to have been caused by the acquisition, this proves only that such a sequence of events was possible. It does not prove, or tend to prove, that the event was probable or likely. A violation of Section 7 requires more than a possibility that harm to competition will result.¹⁶³ How large a probability is necessary cannot be stated on the basis of the statute's language or the decided cases. Nothing approaching certainty is required, and perhaps not even a 50 percent chance. But there must be more than a mere possibility.

It is not suggested that there is a clear-cut solution to this problem or that post-acquisition evidence must be rigidly excluded. Possibly the answer should be that where competition has noticeably declined following an acquisition the burden should rest with the defendant to prove that the acquisition was not the cause, or that the sequence of events was startling rather than expectable. The main point here is that applying the Section 7 tests becomes an exceedingly complex process when the acquisition in question occurred long before the proceeding, especially if the proper standard is probability at the date of acquisition. These difficulties cause one to doubt whether Section 7 was ever expected to be employed under such circumstances.

C. *The Remedy*

Long delay in proceeding under Section 7 not only complicates the proof and the test of illegality but raises serious questions concerning the adequacy of the remedy. The *Transamerica* case illustrates some of the difficulties and suggests others. The basic problem is that Section 11 of the Clayton Act provides a remedy which fits the circumstances of the violation. The longer the period between acquisition and remedy, the less likely it is that the circumstances in which the violation arose will correspond to the circumstances in which remedy is afforded.

So far as relevant to the violations of Section 7, Section 11 pro-

163. See cases cited note 17 *supra*.

vides that if the administrative agency shall be of the opinion that Section 7 has been violated by any person it

shall issue and cause to be served on such person an order requiring such person to . . . divest itself of the stock, or other share capital, or assets, held . . . in the manner and within the time fixed by said order.¹⁶⁴

The provision is mandatory in form and limited in scope. Instead of giving the agency broad powers to effectuate the purposes of the Act, it provides a specific remedy for a specific situation and apparently directs the agency to apply the remedy whenever a violation is found. If the violation is an acquisition of stock or assets which took place five or ten years before the Commission issues its order, a number of possible weaknesses in this simple remedy of divestiture may appear.

1. The divestiture may be impracticable. This is especially likely to be the case where the defendant has acquired assets. The assets may have been transformed in character or commingled with other assets. Difficult problems of segregation and tracing may arise. Suppose, for example, that the Reserve Board's order in the *Transamerica* case had required divestiture of the assets of all the banks which had been acquired and thereafter merged into Bank of America (as it might well have done if Section 7 in its new form had been applicable to those acquisitions). If the acquired banks were not preserved as separate branches, could it be determined which assets of Bank of America were the assets so acquired? In the present proceeding the Board found a different but equally serious practical objection to divestiture. It concluded that Transamerica's control of Bank of America rested on so many factors other than stock ownership that any order of divestiture would fail to sever that control.¹⁶⁵

2. Divestiture of the stock or assets unlawfully acquired and held may be an inadequate remedy. Where the condition of the defendant or conditions in the industry have changed radically since the acquisition, divestiture of the particular stock or assets unlawfully acquired may not be the kind of divestiture best calculated to improve competitive conditions. For example, in the

164. 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (Supp. 1952).

165. *Re Transamerica*, Conclusion, 38 FED. RES. BULL. 368, 391 (1952). As noted before, a question on review will be whether the Board's order can stand in the face of Transamerica's later voluntary disposal of Bank of America stock. See note 45 *supra*.

Transamerica case it seems clear that splitting apart Transamerica's stockholdings is not the ideal remedy, granted the Board's conclusions that Transamerica has tended toward monopoly. The remedy leaves Bank of America intact and casts adrift a number of small banking units which must henceforth (if the order is sustained) survive alone. Had a more flexible remedy been available the Board would undoubtedly have preferred to fracture Bank of America itself and create a number of units of more nearly comparable size. It may be argued that the half-measures possible under Section 11 are better than none. But the Board's remedy, by going part way, weakens any basis which might have existed for a Sherman Act proceeding in which a genuine cure could be attempted. When the diagnosis calls for surgery, palliative treatment may be unwise.

3. Divestiture may be directly harmful to the public interest. Cases can be imagined in which the order of divestiture, far from remedying the competitive situation, would seriously impair it. Corporation A acquires Corporation B under such circumstances that violation of Section 7 is manifest. Five years later the FTC commences a proceeding under Section 7. By the time it is prepared to enter its order the growth of firm C and the demise of firms D, E and F have so altered the balance of competitive strength that separation of A and B would leave C in clear domination of the field. What shall the Commission do?

4. Divestiture may impose unjustifiable hardship on the defendant. Suppose Corporation A acquires the assets of Corporation B, consisting primarily of a medium-sized manufacturing plant, under circumstances which make the acquisition a violation of Section 7. In succeeding years A invests additional capital in this plant and ultimately enlarges it to three times the size at the time of acquisition. Thereafter the FTC proceeds under the new Section 7 and finds that the acquisition was unlawful. One solution to the problem of segregation presented—indeed, probably the only solution—would be to order divestment of the entire plant. But is it clear that the statute was meant to authorize or direct the Commission to impose such a drastic remedy, without regard to such factors as whether the defendant acted in good faith, whether the new investment was a "fruit" of the violation, whether the public interest requires divestiture, or other considerations which might influence a court framing relief in a suit in equity? Again,

suppose the defendant corporation has acquired Corporations A, B, C and D over a period of years and that the acquisition of D violates Section 7 because of the cumulative impact of the series. The FTC commences a proceeding attacking all the acquisitions and at about this time the defendant rids itself of A, B and C. These dispositions cannot undo the violation concerning D, for the violation occurred when the acquisition took place, but in these circumstances divestiture would have more the flavor of punishment than of remedy. Literally, however, Section 11 directs the commission to order divestiture.

Such examples suggest several basic questions concerning the remedy for Section 7 violations. Does the agency have any discretion to grant or withhold the relief specified by Section 11, once a violation of Section 7 has been found? Is it strictly limited to the power expressly conferred by Section 11—to divest *the* stock or assets unlawfully acquired—or may it frame a substitute plan of divestment better calculated to improve competition in the industry? If the answer to either question is in the affirmative, what considerations should guide the exercise of discretion?

It seems unlikely that the Court would read Section 11 as empowering the agency to divest stock or assets not directly related to the violation. The statute's narrow and explicit directions leave little room for finding here a broad mandate to restore competition. Doubtless the Court would now be willing to recognize that the granted powers include "a penumbra which will give scope for practical operation," as Mr. Justice Stone vainly argued in the *Arrow-Hart* case,¹⁶⁶ but the power to divest stock or assets unlawfully acquired will hardly support an implied power to act in all respects as a court of equity might act.

Discretion to withhold the remedy prescribed by Section 11 is probably easier to find, especially since the orders of the Commission or Board are enforceable by judicial decree. If the order would not be in the public interest a court might well withhold its enforcement power.¹⁶⁷ If so, the Commission ought to be justified in staying its own hand despite the apparently mandatory language of Section 11, thus avoiding the need for calling on judicial power.

166. *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587, 607 (1934) (dissenting opinion).

167. Cf. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359-60 (1933); *L. B. Silver Co. v. FTC*, 292 Fed. 752 (6th Cir. 1923).

In the *Standard Stations* case, however, the Court affirmed an injunction based on Section 3 merely upon a showing that the section was being violated and refused to consider the possible adverse effect of the injunction on competition in the industry.¹⁶⁸ On the Court's interpretation of Section 3 this result could hardly be avoided. Any ground which the Court might have given for withholding injunctive relief would in effect have been a repudiation of the meaning it had just attributed to the statute. This dilemma will be present in Section 7 cases as well. The finding of violation carries with it a determination by Congress, if not by the agency, that the public interest requires divestment. It may be, however, that the force of this congressional determination is weaker where the question of relief arises long after the occurrence of the violation.

If any discretion exists, the statute affords no guidance for its exercise. One point which seems plain is that the discretion must look forward from the time of the order, not from the time of the acquisition. If the position taken earlier is correct, this will impose a double burden on the agency. First, in determining whether there was a violation it must examine the transaction from the vantage point of the acquirer at the date of the acquisition. Second, it must examine the probable effects on competition of divesting the stock or assets today. Such an inquiry sounds very much like that called for in a Sherman Act case and very little like the prompt preventive remedy which Section 7 was presumably intended to provide.

III. CONCLUSION

In amending Section 7 of the Clayton Act Congress did more than close a loophole. It extended the reach of the statute to take in a much wider range of transactions, with the underlying objective of checking concentration. The *Transamerica* case, while not directly involving the new Section 7, suggests that the basic formula of Section 7 was inadequate to support the new burdens Congress placed upon it. In transactions where the threat to the public interest lies mainly in the size of the resulting concentration rather than in some immediate threat to competition, Section 7 affords a poor guide for public policy. On the one hand, it is not

168. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 311-12 (1949).

easy to find a labor-saving formula such as the Supreme Court has evolved from the similar language of Section 3. On the other hand, even elaborate economic inquiry may fail to yield reasonably definite answers as to whether the concentration threatens competition or "tends to create monopoly." If in spite of these difficulties the statute is employed against mergers which are principally objectionable because of their size, the result may be to vest in administrative judgment questions of policy much broader than Congress meant to delegate. Even if this is not true, the effort to apply the statute to such cases may cause the administrative agency to distort or treat lightly the literal requirements of the statutory formula. In either case it may be doubted whether the problems are wholly ripe for administrative determination.¹⁶⁹

It may be that purely economic criteria can be found for determining the maximum scale of enterprise which is consistent with the public interest in various fields, or for drawing the line between growth which is healthy and growth which "tends to create monopoly." It seems more likely that other social considerations must be taken into account. Whatever criteria are to govern, however, a more positive guide than Section 7 seems called for if Congress desires a satisfactory instrument for preventing concentration by corporate mergers and acquisitions. Pending a more decisive resolution of the issues of policy, the administrative authorities would be warranted in limiting the application of Section 7 to situations where the threat to competition is reasonably immediate and reasonably apparent.

Apart from these substantive difficulties which are inherent in the statute, the *Transamerica* case reveals additional complications which arise when Section 7 is applied retroactively. These difficulties suggest that the statute was framed primarily as a preventive remedy and was expected to be applied either before the unlawful transaction was consummated or shortly thereafter. If this is in fact the purpose of the statute, steps should be taken to limit its retroactive operation. One way to accomplish this would be to

169. "It is possible to say . . . that the responsibility for fashioning a policy, not only of great economic importance but also one that has divided the faiths and loyalties of classes of people, cannot appropriately be intrusted to the administrative. . . . [T]he choice, to have that finality and moral sanction necessary for enforcement, must, as a practical matter, be made according to a method which resolves it as if it were one of power rather than one of judgment. . . . Division within the administrative will . . . either tend to follow political lines or be believed to follow them, and the latter is almost more destructive of its position than the former." LANDIS, *THE ADMINISTRATIVE PROCESS* 55, 59-60 (1938).

adopt a fairly short statute of limitations. Another way, which would alleviate the problems considerably though it would not eliminate them, might be to provide means for an advance determination of the legality of acquisitions. Congress failed to pass an earlier bill containing a provision that would have compelled such determinations.¹⁷⁰ It is possible, however, that the Federal Trade Commission could still provide a voluntary advance determination under the declaratory-order provision of the Administrative Procedure Act.¹⁷¹ But it is worth noting that the earlier proposal, which not only provided for advance determination but contained more definite standards of illegality, was apparently rejected in order to save business from "bureaucratic control."¹⁷² Perhaps the opponents of Section 7 might better have concerned themselves with helping to fashion a workable administrative scheme.

If, on the other hand, Congress does not want corporate acquirers to gain sanctuary from Section 7 through lapse of time or by advance determinations of legality, other revisions of the statute are called for. First, it should be made clear whether the legality of the transaction is to be judged as of the time it took place or by its probable consequences looking forward from the date of the proceeding. Second, the enforcing agencies should be given powers adequate to cope with the situation which may have developed by the time the remedy is applied, and they should be given some guidance as to how those powers are to be exercised.

So long as the statute exists in its present form the agencies of administration must obviously do the best they can with it. Where the statute is used for major curative purposes, as in *Transamerica's* case, perhaps the Attorney General should carry the burden rather than the administrative agency having jurisdiction. This would not only permit the additional weapons of the Sherman Act to be brought into play, but would also invoke the substantial remedial powers of the court of equity and thus would promise a decree better adapted to the needs of the situation. Finally, where the administrative agency does exercise its powers, the general understanding of Section 7 will be enhanced if the agency heeds the

170. H.R. 4810, 79th Cong., 2d Sess. (1946) and successive bills; see H.R. REP. No. 1480, 79th Cong., 2d Sess. 3 (1946); H.R. REP. No. 1820, 79th Cong., 2d Sess. 1 (1946); H.R. REP. No. 596, 80th Cong., 1st Sess. 11 (1947); H.R. 4810 followed the lines of the TNEC recommendations. See T.N.E.C. FINAL REPORT AND RECOMMENDATIONS 38-39, SEN. DOC. No. 35, 77th Cong., 1st Sess. (1941).

171. § 5 (d), 60 STAT. 237 (1946), 5 U.S.C. § 1005 (d) (1946).

172. See H.R. REP. No. 596, 80th Cong., 1st Sess. 5-7, 11-12 (1947).

oft-repeated admonition to "elucidate by opinion the process by which ultimate determinations have been reached."¹⁷³ Whatever the merits of Transamerica's case, one curious to know whether it has suffered judgment for the right reasons would gladly trade a paragraph or two of the Board's findings for a page or two of opinion. It may be hoped that the court of appeals will be able to satisfy this curiosity and illuminate somewhat the future course of Section 7.

173. Jackson, J., dissenting in *FTC v. Ruberoid Co.*, 343 U.S. 470, 490 n.9 (1952).