Michigan Law Review

Volume 63 | Issue 8

1965

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Recommended Citation

Betty Bock, *The Relativity of Economic Evidence in Merger Cases-Emerging Decisions Force the Issue*, 63 MICH. L. REV. 1355 (1965).

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THE RELATIVITY OF ECONOMIC EVIDENCE IN MERGER CASES–EMERGING DECISIONS FORCE THE ISSUE

*Betty Bock**

THE antitrust laws are based on a set of concepts concerning the relations between economic justice and economic efficiency. In the process, they lay out a series of prohibitions on broadly identified forms of business behavior, which in some instances are known to have—and in other instances may have—substantial anti-competitive consequences. Although phrased in terms of individual company behavior, the laws are, in fact, primarily addressed to the maintenance of an overall economic environment favorable to an optimum output of goods and services at a minimal cost. The laws are also designed to provide an appropriate climate for technological innovation and economic growth.

Of more immediate concern, however, than these broad goals, are the concepts that lie behind the judgments of the courts seeking to give concrete content to the laws. Since the ultimate thrust of the statutes is directed toward maintaining and strengthening competition, there has always been wide latitude for the courts to interpret the meaning of competition in different markets. Because the laws are directed against practices that eliminate competition as well as those that are so excessively competitive that they deny other companies an opportunity for survival and growth, they may be thought of as aimed at conflicting targets or, if extreme interpretation is avoided, at achieving a *median* level of competition. Such a level cannot, however, be reached by mechanical rules that are applied uniformly in all competitive settings. For this reason, antitrust analysis, in general, and merger case analysis, in particular, require study of the varying effects of varying company behavior in varying markets; and this is true regardless of whether the relevant analysis is called "legal" or "economic" analysis.

The following discussion explores the interaction between law and economics as these two disciplines relate to the issues which arise under section 7 of the Clayton Act,[1] as amended in 1950, and exam-

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1. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

ines the correlative problems implicit in the working arrangements between lawyers and economists when they are asked to counsel an enforcement agency or an acquiring or acquired company concerning the potential competitive consequences of a merger.

I. Developing Economic Criteria for Merger Cases

A. *The Merger Act as an Economic Instrument*

Section 7 of the Clayton Act, as amended in 1950, prohibits mergers that may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. The law, therefore, fits smoothly into the intellectual paradoxes that envelop our views concerning democracy for the individual, as well as democracy for business. Indeed, like our programs for human democracy, our programs for competition and monopoly are designed both to foster equality of economic opportunity *and* to provide incentives for competitive excellence. At their extremes, these two goals are not fully compatible and pursuit of both may lead to deep-reaching ambiguities in concrete applications of the law.

Those who framed the amended merger act did not, it is clear, intend absolutely to prohibit mergers. Mergers were thought of as instruments for increasing or suppressing competition, depending upon a range of facts concerning the merging partners and the markets affected.[2] The new law was, therefore, designed to give the courts discretion to judge whether particular mergers raised probabilities of substantial anti-competitive effects. Its language was, however, so broad that guidelines had to be developed and redeveloped as new issues came before the courts.

The statutory language did make it clear that the law was directed at *potential* as well as actual substantial lessening of competition in *any* market. This has resulted in the development by the courts of a sliding, rather than a fixed, set of criteria geared to the potential effects of an acquisition upon competitive opportunities for actual or potential suppliers, competitors, or customers of either party to a merger.

To some extent this has come about through an increasing understanding of the variations in different markets; and to some extent it has resulted from the oscillating emphasis of the Supreme Court on predominantly rule-of-reason or predominantly per se tests, de-

2. Compare ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 124-25 (1955).

pending on the facts before it in particular cases and on its desire to seek the rule of law most appropriate to each set of issues.

B. *The Rule of Reason—Per Se Pendulum*

For many years there has been a tendency to distinguish between rule-of-reason and per se approaches to the evidence relevant to the solution of antitrust problems. The rule-of-reason approach stems from a conviction that specific company arrangements may, or may not, be harmful to competition and that it is the methods used in carrying them out, the settings in which they are practiced, and the results that should determine their legal status. By contrast, a per se approach suggests that, if there is evidence of a particular form of activity such as a price-fixing agreement or an agreement to allocate markets, that is, without more, conclusive proof that the law has been violated.

The question of whether a merger act inquiry should be a rule-of-reason or a per se inquiry arose early in the history of amended Clayton 7. The law does not state that mergers per se will lessen competition. As interpretations under the act have developed, however, the Supreme Court has tended to move back and forth between a predominantly rule-of-reason approach and a predominantly per se approach.

In *Brown Shoe Co. v. United States*[3] the Court adopted a rule-of-reason approach. Brown was primarily a shoe manufacturer which owned and franchised retail outlets, while Kinney was primarily a shoe wholesaler and retailer which owned manufacturing facilities. The combined percentage of domestic shoe manufacturing accounted for by both companies was as low as 4.5 per cent, while the combined percentage of domestic retail shoe sales was even lower. In specific local areas, however, Brown and Kinney outlets competed, and their combined percentages varied from a low of 5.0 per cent of children's shoes in Detroit, Michigan, to a high of 57.7 per cent of women's shoes in Dodge City, Kansas.

Facing these facts, the Supreme Court took what at the time appeared to be an unusual step, suggesting that the relevant geographic markets were different at the manufacturing and at the retail level: it held that the market for men's, women's, and children's shoes at the manufacturing level was national, while at the retail level the appropriate markets were cities of ten thousand or more

3. 370 U.S. 294 (1962).

population and their immediately surrounding areas where both Brown and Kinney had retail outlets.

The Court further held that, despite the fact that market shares constitute relevant evidence in merger cases and that Brown was one of the largest integrated shoe companies in the country and Kinney was the largest independent, these facts alone were not necessarily sufficient for a conclusion concerning the effects of the acquisition. The Court noted that formerly distinct manufacturing and retailing levels in the shoe industry had been coalescing, as major manufacturers acquired chains of outlets, and that normally after such a merger other manufacturers sold less to the acquired chains and non-integrated retailers bought more from manufacturers who were not affiliated with outlets. This trend, said the Court, was gradually making it more difficult for non-integrated manufacturers, as well as non-integrated retailers, to hold their own and to deal freely with outlets or suppliers who might simultaneously be their competitors.[4]

In *United States v. Philadelphia Nat'l Bank*,[5] the next case before it under the amended merger act, the Supreme Court found the key facts substantially different. The district court had found that the relevant geographic market included the entire Delaware River Valley area; but, because data for that market were not available, the court had examined the effects of the proposed acquisition of Girard Trust by Philadelphia Bank in terms of commercial banking in the United States as a whole. It found that the merger would bring the combined share of the new bank to a point where it would rank approximately thirty-sixth among the nation's commercial banks and that this was not an alarming position; nor, said the district court, did such a share presage a substantial lessening of competition of the type that the merger act was designed to prohibit.[6]

The Supreme Court thought otherwise. It held that the relevant market was Philadelphia County and three surrounding counties in which the majority of the depositors and borrowers of the banks were located. Philadelphia Bank had argued that major borrowers had found it necessary to utilize New York banks for financing and that only a bank as large as would be created by the proposed merger could handle this type of business in the Philadelphia area. The Supreme Court did not accept this reasoning. It noted that there is always a range of potential customers of varying sizes for all under-

4. *Id.* at 301.
5. 374 U.S. 321 (1963).
6. United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348, 366 (E.D. Pa. 1962).

takings and that it is not possible to construct an entire spectrum of suppliers whose sizes will correspond exactly to the needs of each buyer. It went on to find that, within the Philadelphia metropolitan area, Philadelphia Bank-Girard Trust would account for over thirty per cent of commercial bank loans and deposits and that the four largest banks in the area would account for over fifty per cent of such transactions. The Court also noted that, since both banks had active trust departments, the combined company would account for over ninety per cent of such business in the Philadelphia area. Without making other factual inquiries, the Court held that the acquisition might substantially lessen competition.[7]

Thus, *Philadelphia Bank* and *Brown Shoe* read together appear to teach that the higher the market shares and concentration in the relevant market, the less additional economic facts the Court will explore in determining whether an acquisition may substantially lessen competition. The two decisions also suggest that the Court is adopting a mixed per se and rule-of-reason approach to merger case problems, with the per se end of the spectrum more evident in *Philadelphia Bank* and the rule of reason end of the spectrum more evident in *Brown Shoe*. This in turn means that, following these decisions, the acquiring and acquired company had as great a stake in the definition of the relevant market as in a showing that an acquisition could not have adverse competitive effects.

In both of these cases, however, there were clear-cut relations between the merging partners prior to the acquisitions. Therefore, the major thrust of the Supreme Court's analyses went to determining the boundaries of the relevant markets and the potential effects of the realignment of pre-existing company relations.

In the cases that came before the Court in 1964, by contrast, there were no such simple relations between the merging companies. At the time El Paso Natural Gas acquired Northwest Pipeline, both companies distributed natural gas, but they had no common customers. El Paso was licensed by the Federal Power Commission to distribute in California, and Northwest Pipeline was licensed to distribute in the Rocky Mountain states. However, past negotiations between Northwest Pipeline and a major California customer of a distributor of El Paso's were sufficient to convince the Court that there was potential competition between El Paso and Northwest Pipeline and that the merger might substantially lessen such potential competition. The Court was here, of course, focusing on po-

7. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

tential geographic competition and was not concerned by the lack of past competition in deliveries.[8]

A related issue concerning potential product competition arose in connection with Continental Can's acquisition of Hazel-Atlas Glass. Continental Can had argued that metal cans and glass containers are manufactured by different industries and sold to different customers and that whatever competition exists is inter-industry rather than inter-product. Continental Can also argued that the acquisition was intended to permit both partners to diversify, that its metal can and glass container divisions were run on a competitive basis, and that the acquisition would increase its ability to compete with the largest can company and Hazel-Atlas' ability to compete with the two largest glass container companies.

Although the district court agreed with Continental Can, the Supreme Court found that there had been actual substitutions by users of one type of container for the other: that baby food had, for example, been packed primarily in cans in the past and is now packed primarily in glass; that beer is packed in both bottles and cans; and that Continental Can itself had been a prime mover in persuading soft drink manufacturers to shift from bottles to cans for packaging carbonated beverages. The Court held that there was every possibility of even more competition between metal and glass containers in the future and that to permit the second-ranking can manufacturer to merge with the third-ranking glass container manufacturer, with the new company accounting for approximately twenty-nine per cent of the metal-and-glass container market, might result in a substantial lessening of competition.[9] Although Hazel-Atlas' contribution to this percentage was small—approximately 3.2 per cent—the combined share of the two companies ran close to the thirty per cent figure deemed dangerous to potential competition in *Philadelphia Bank*.

With potential geographic and potential product competition given definitive weight in *El Paso* and *Continental Can*, the Supreme Court moved on to the more difficult questions raised by Alcoa's acquisition of Rome Cable.[10] In that case, there was a clear-cut, but limited, vertical relation between the two companies, since Rome Cable had purchased aluminum wire from Alcoa in order to make aluminum conductor. Rome Cable, however, was primarily a manufacturer of copper conductor; at the time of the acquisition, its share

8. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).
9. United States v. Continental Can Co., 378 U.S. 441, 461 (1964).
10. United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

of the aluminum conductor market was 1.3 per cent. But, since Alcoa's share was 27.8 per cent, the two together accounted for 29.1 per cent of the aluminum conductor market—a figure not far from the *Philadelphia Bank* and *Continental Can* danger limits. Furthermore, as in *Brown Shoe,* the Court found that the acquisition might result in a substantial lessening of potential competitive opportunity for independent fabricators.

With these decisions behind it, the Supreme Court faced the more complex issues implicit in the 1960 agreement by Olin Mathieson and Pennsalt to establish Penn-Olin as a joint venture for the manufacture of sodium chlorate in the Southeast. Prior to 1960, Pennsalt had been one of three United States companies manufacturing sodium chlorate, selling primarily in the West where its plant was located. One of its competitors, Hooker Chemical, had a plant in the East, while the other, American Potash, had one plant in the East and one in the West. Hooker and American Potash together accounted for ninety per cent of the sodium chlorate sold in the southeastern market.

During the late 1950's, Olin Mathieson and Pennsalt had separately considered building a sodium chlorate plant in the Southeast, but neither company took active steps in this direction. Olin Mathieson did, however, agree to act as agent for Pennsalt in the Southeast and its sales there accounted for the remaining ten per cent of that market. In 1960, with the southeastern sodium chlorate market expanding rapidly, Olin Mathieson and Pennsalt decided jointly to set up Penn-Olin, and in 1961, Pittsburgh Plate Glass also announced plans to build a plant in the area.

On these facts, the Supreme Court refused to agree with the the district court that the joint venture represented a net increase in competition and did not violate the law. The Court took the position that if *either* Olin Mathieson or Pennsalt had gone into the market alone while the other remained in the wings as a potential competitor, the joint enterprise would have lessened potential competition. The Court accordingly remanded the case to the district court with suggestions concerning the factors to be considered in making such a determination.[11]

C. *The Core Economic Analysis*

The factors bearing on *potential competition* and the various forms in which potential markets may be viewed, therefore, repre-

11. United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

sent the core of the economic analysis required in a merger case wherever the competitive consequences of an acquisition are not obvious. No one would assert that serious economic analysis would be required if the number one company in a clear-cut market were to acquire the number two company, if the combined company would account for seventy-five per cent of the market, with the next ranking company accounting for perhaps twelve per cent. Nor, at the other extreme, would anyone assert that extensive economic inquiry would be helpful if the 5,332d company in an industry acquired the 5,333d. By contrast, however, *El Paso, Continental Can, Alcoa* (Rome), and *Penn-Olin* all raised issues concerning the potentiality of competition, and each required careful study regardless of whether it is called "legal" or "economic" analysis, or merely "relevant" analysis of potential competition.

In *El Paso*, for example, the Supreme Court stated the conditions under which a company which has been an unsuccessful bidder for a customer's business could still be considered a potential competitor of the company that obtained the business. It held that such a determination should be based on:

- an assessment of the nature and extent of the market and the nearness of the absorbed company to it;
- the eagerness of the absorbed company to enter the market, its resourcefulness, and its potential ability to do so; and
- the growth potential of the market and the potential ability of the absorbed company to supply it.[12]

The Court further elaborated the criteria for potential competition in *Penn-Olin* by suggesting that the trial court should take account of such factors as the following in determining the probability that either Olin Mathieson *or* Pennsalt might have gone into the southeastern sodium clorate market alone, while the other remained a potential competitor:

- the number and power of the competitors in the relevant market;
- the background of their growth;
- the power of the joint venturers;
- the relationship of their lines of commerce;
- the competition existing between them and the power of each in dealing with competitors of the other;
- the setting in which the joint venture was created and the reasons for its existence;
- the line of commerce of the joint venture and its relationship to the activities of its parents;

12. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

- the adaptability of the line of commerce to non-competitive practices; and
- the potential power of the joint venture in the relevant market and the effect if one or the other of the joint venturers had entered the market alone, instead of through the joint venture.[13]

Indeed, it is apparent that the Supreme Court is becoming less concerned with mechanical lists of existing product or geographic market relations between an acquiring and acquired company than with answers to questions concerning who may be injured, how, where, and how badly. Its decisions are, therefore, increasingly concerned with whether an acquisition may substantially lessen *potential,* rather than *actual,* competition in *any* market. In the process, the Court is adopting a mixed rule-of-reason–per se approach, the ultimate consequences of which can become known only as distinctions between different degrees of potentiality are developed in future cases.

D. *The Relativity of Economic Criteria*

The Supreme Court's increasing emphasis on potential competition now cuts across previous criteria for determining the boundaries of relevant markets and for assessing the competitive factors that determine whether an acquisition may substantially lessen competition.

1. *Market Boundaries:* In *Brown Shoe,* the Court accepted the conventional economic concept of cross-elasticity of demand between a product and close substitutes as an appropriate test for determining the boundaries of *product markets,* while advancing a complementary concept of submarkets whose boundaries are set by such factors as industry or public recognition, peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[14]

And, in *Philadelphia Bank,* the Court ruled that the criteria for determining the boundaries of *geographic markets* and submarkets are similiar to those for product markets and submarkets. It held that a geographic market is not necessarily identical with the area in which the parties to a merger do business or even with the area in which they compete; rather, it depends upon "where, within the

13. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 177 (1964).

14. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962). For a detailed consideration of each of these factors, see BOCK, MERGERS AND MARKETS, A GUIDE TO ECONOMIC ANALYSIS OF CASE LAW 90-111 (3d ed. 1964).

area of competitive overlap, the effect of the merger on competition will be direct and immediate."[15]

In its 1964 decisions, however, the Supreme Court refused to apply these criteria whole-cloth, but instead picked and chose among them in locating product and geographic areas in which other companies might potentially be affected by an acquisition. Its earlier concepts of market boundaries lost their fixed outlines as the Court began to view markets in terms of future processes rather than past shapes.[16]

2. *Competitive Effects:* Equivalent considerations have bridged the Supreme Court's progress from its analysis of competitive consequences in *Brown Shoe* and *Philadelphia Bank* to the factors it considered in its 1964 decisions.

In *Brown Shoe* and *Philadelphia Bank* the lower the market shares and the degree of concentration, the more additional economic factors were considered. Taken together, however, these two cases focused on considerations concerning the absolute and relative size of the acquiring and acquired company, the number of competitors and the degree of concentration, the degree to which the market was open to entry, the extent to which formerly separate levels of distribution were joined through vertical integration, and the degree to which the acquisition might trigger additional acquisitions.

But the absence of any one or more of these factors did not serve as a defense in the next four merger act cases that came before the Court. Indeed, the brooding presence of potentiality lies over all parts of the Court's analysis in the 1964 cases. As a result, the Court dealt repeatedly in probabilities concerning the potential consequences of specific acquisitions for smaller, independent, less well-financed and otherwise less well-endowed companies than the acquiring-acquired team.

In practice, this has meant that the present Supreme Court majority has refused to be bound in any individual case by *all* of the criteria laid down in previous cases. And this in turn has meant that the majority has implicitly, if not explicitly, refused to lay out definitive sets of factors that will swing it in one direction or another in determining how the competitive future of third companies may be affected by an acquisition. Instead, the majority tends to work with kaleidoscopic arrangements of facts concerning competitive structures and processes in particular markets, so that its con-

15. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963).

16. BOCK, MERGERS AND MARKETS, AN ECONOMIC ANALYSIS OF THE 1964 SUPREME COURT MERGER DECISIONS ch. 4 (4th ed. 1965).

clusions become a function of the patterns in which it views the facts of each case.

II. The Place of Economic Analysis

With competitive history frequently moving faster than it can be documented by the companies who are making it, let alone by anyone from the outside assigned to survey it, and with judicial methods bound to facts that may have shifted by the time they are received in evidence and assessed by the courts, merger act enforcement implies a basic contrast between the changing processes of the economic world and the fixed rules of procedure designed to safeguard the rights of defendants and plaintiffs in legal proceedings.

This means, in effect, that when a major merger is contemplated, the officers of the acquiring and acquired company, as well as their legal and economic advisers, must explore not only data available in company and market records, but must also understand that there are likely to be wide areas for which no data exist that are directly relevant to an assessment of the effects of the prospective acquisition on third companies, including companies that are not at the time operating in the markets that may be affected. This type of situation is analogous to, but not necessarily identical with, that faced by a company planning to introduce new products, to invest in a new foreign country, or to develop a new technology. Precisely because judgments concerning such questions must be made partly in terms of hard facts and partly in terms of probability estimates, they closely resemble the judgments required by an acquiring-acquired company, by the staff of the enforcement agencies, and by the courts in assessing the future consequences of an acquisition.

While this type of estimate of market potential represents a familiar form of analysis for business, it has not been a part of the traditions of legal evidence and must, therefore, be built into these traditions if the merger act is to continue as a viable method of distinguishing between acquisitions that may substantially lessen competition and those that may in fact invigorate competition. But it is precisely this requirement for probability estimates that gives stature to economic analysis in the merger case area. If the appropriate facts always stood still and if the appropriate criteria were always clear-cut, the research departments of the merging companies and the investigatory arms of the enforcement agencies would be able to uncover the facts appropriate to merger act conclusions without any assistance from an economist. However, the inherent slipperiness of the data, the branching avenues of ignorance, and the overriding need for objective judgments concerning the effects of an acquisition on rapidly changing markets suggest that economic know-how may be of aid to those responsible for merger case decisions at each stage of analysis, from initial estimates of competitive risks for third companies to estimates of the viability of alternative solutions.

A. *Economic Advocacy v. Neutrality*

Economic assistance, however, is not able to attain unlimited results. A doctor, in the end, cannot immunize a patient from death, nor can an attorney usually reduce the taxable income of a profit-making institution to zero; the trained professional, however, in collaboration with his client, can frequently postpone or reduce the cost of the inevitable. Equally, economists, in collaboration with attorneys, can seek to look the facts in the face and help to work out the optimum methods of growth available to clients within the competitive ambiguities of the law.

But the economist's ultimate value will be greatest if he is permitted to function in an independent professional capacity rather than as an advocate committed in advance to any given set of conclusions. This is so because, with the relative paucity of facts concerning the functioning of markets, the outright advocate—on either side of a case—may overlook relevant information regarding how competition is carried on in specific settings, what the opportunities for innovation and inter-industry competition may be, and how competition from foreign industries may deflect the accuracy of estimates of the domestic effects of an acquisition.

Such a stance of relative neutrality is, however, one which many commentators consider a "disequilibrium position." Some have, for example, suggested that it is no more possible for an economist than for anyone else to avoid his own prejudices and loyalties—that no matter how neutral his vocabulary, his preconceptions cannot fail to influence his conclusions. If this were the whole truth, there would be little to distinguish the professional attorney from the professional economist working on a merger case. The attorney might spend more time on procedure and precedent, while the economist might spend more time gathering and marshalling facts concerning the composition of the companies and the markets affected; the economist would function simply as a second-line lawyer with specialized duties and a specialized commitment—not as an independently collaborating professional.

The present author would take exception to this view. If an economist is trained to explore for facts that aid in determination of the relevant structure, behavior, and performance of a market, he can be of value to either side in an adversary proceeding in suggesting whether a particular acquisition is likely to be tested by the enforcement agencies and, if tested, what types of facts and arguments are most relevant to the economic conclusions required by the law.

But if the economist is to achieve complementary professional status with the attorney who takes ultimate responsibility for a case, he must gain his position through continuing study of the substantive requirements of the law and of the facts concerning how competition differs in different markets. Although this is a large order, it is the appropriate one for an economist who seeks optimum participation in the work of resolving merger case problems.

B. *Economic Ignorance*

The preceding sections of this paper have suggested that an economist can make substantial contributions to merger case analysis by helping to isolate the elements of risk facing potential partners to a merger and by helping to select and verify relevant criteria for assessing competitive consequences in changing markets.

If he can raise relevant questions going to these issues, he can participate directly in the merger case process. But, by working in this fashion on a difficult merger problem, he reaches a heretical position where there is no sharp distinction between economic and legal analyses.

Indeed, whenever a merger decision will hinge on evidence concerning an acquiring and, more particularly, an acquired company's past acquisitions, methods of growth, present size, market shares, and position in its markets, as well as the size of the markets affected, the number of companies, the degree of concentration, the nature of vertical integration, and the competitive alternatives open to companies who are not affiliated with suppliers or customers, it is unclear whether the evidence is economic or legal. In fact, it is immaterial what vocabulary is used, provided it is understood that both the facts and the conclusions drawn from them must be made available within the framework of the requirements of legal evidence and must be relevant to the tests implicit in the statute and in the relevant decisions of the Supreme Court.

Whether such constraints may seem too severe to economists who are accustomed to move from aggregative data concerning concentration or oligopoly directly to conclusions concerning competition does not change the issue. If an economist wishes to carry his jargon and his hypothesis-making tools into a merger case, he should not be surprised if the attorneys with whom he works treat him as a technician rather than as a professional colleague. Nor should an attorney who seeks to use an economist in so limited a way be surprised if the results frequently are not convincing to the courts.

If, for example, an economist is invited to work up market share data after the market has been specified—perhaps as peanuts (if someone wants the merger reversed) or perhaps as peanuts, cocktail snacks, spreads, jams, and jellies as well as food for terriers and elephants (if someone wants the merger to be sustained)—he may find his work carries little conviction, except perhaps for the client who may be a peanut or an elephant lover. An economist who relegates himself to so purely a technical role will find that the courts tend to look elsewhere for their economic theories.

Services of this kind will, of course, continue to be requested as long as our system of law relies on adversary proceedings. It is, however, this author's position that such acrobatics do not require an economist and certainly do not require sensitivity to the problems of competition and economic growth in a constantly changing economy.

The economist who faces his relative ignorance in merger case matters and seeks to learn the facts concerning the alternative boundaries of the markets that may be affected and the factors that may be taken into account in assessing the competitive impact of an acquisition must accept the fact that he will be operating without full certainty as to the information that will prove relevant. Indeed, information concerning markets, market shares, and concentration generally must be supplemented by facts concerning whether a market is growing or declining, whether it is in the process of shifting its product, geographic, or company composition, and whether third companies have opportunities to grow along with the acquiring-acquired unit.

III. Joint Ventures in Risk-Taking

A. *Communication Between the Economist, Businessman, and Lawyer*

The preceding analysis suggests that there are no universally applicable rules for establishing a framework for the professional relations between lawyers and economists working in the merger case area. It is essential, however, that economists learn how to fit into a world of legal rules and legal logic applied to economic facts in economic settings.

On the substantive side, this means that an economist's hypothetical models can be of value only insofar as the assumptions built into them can be tested for their relevance in analyzing the conditions to which the models are addressed. An economist cannot fail to learn in the course of his first merger case that *ceteris paribus* assumptions are as likely to conceal as to reveal the core of a merger problem, since it is the fact that "other things do *not* remain equal" that determines the focus of a merger issue.

The economist's value will be greatest both as an adviser and as an expert witness if he considers it his primary responsibility to state with care what he knows, the limits of his knowledge, and the reservations that must be attached to his conclusions. If he can develop such skills and apply them to the critical facts concerning the effects of particular mergers in particular markets, he can become a functioning professional in a complex area in which judgments about the future must be drawn from limited, and sometimes exasperatingly limiting, facts.

It should be noted in this connection that the relative poverty of our information about industrial institutions and the relations among different company complexes, as well as the sketchiness of our understanding of methods of competition in specific industries and markets, tend to create serious pressures within the enforcement agencies and among companies seeking to grow through the merger route. These pressures are almost always first expressed in terms of drives toward per se rules—but different per se rules for those with different interests. Per se rules that might give comfort and certainty to the multi-industry company would be opposed by those concerned with equalizing opportunity for medium and smaller companies; similarly, per se rules designed to give short-term relief and certainty to small, non-integrated companies would be opposed by those who believe it is essential to avoid undue restrictions on the innovative vigor of the larger multi-industry companies. It is precisely because of this conflict that the laws have been written in general and, to some extent, ambiguous terms.

For the economist, destined we suspect, to live for many years in a world of shifting competitive facts, the most significant role is also the one least likely to allow him to build up a vested line of factual information. Because the merger act focuses on who may be injured, and how, and where, these questions must be explored concurrently by the enforcement agencies and by the companies seeking to go forward with major merger activities. An economist will, therefore, attain his greatest value in merger case work if he is experienced in obtaining relevant market facts and evaluating them in conjunction with attorneys whose skills and judgment are directed to the same data concerning the same markets.

It should also be noted that in most merger cases, officers of the company in question and industry members will have a more complete working knowledge of the facts than will staff members of an enforcement agency. This will normally work toward fluctuations in fact-finding methods and in case selection programs as agency staff members seek to overcome their own ignorance and to arrive at equitable conclusions as to what mergers should be attacked.

Facing this unavoidable disparity in knowledge between attorneys and economists and between industry members and members of enforcement staffs, the law schools can further mutual understanding by training students of trade regulation in methods of evaluating economic data, in assessing what the strengths and shortcomings of such data may be, and in determining how closely published statistics may correspond to the market situations to which their classifications relate. Equally precise training in the types of facts going into the major merger cases would benefit economists who plan to work with attorneys on such cases. Economists should have studied not merely textbook summaries of cases, but the texts of higher and lower court decisions as well as full trial records wherever possible. This type of training can go a long way toward furthering mutual professional trust and respect between antitrust attorneys and economists—be they policy-makers, explorers of competitive potential, or advocates in specific cases.

B. *The Economist's Value*

It follows that the present author believes that the role of an "economic expert" in a merger case is a modest one. Although a chemist may state with absolute certainty whether a fabric is flammable, merger questions are rarely so easily resolved, since almost every merger will increase competition in some ways, decrease it in others, and leave open questions along many lines. The merger expert's expertise should, therefore, rest on a sensitively balanced inquiry into who may be affected, how, and how badly. Indeed, the value of the economist will increase in proportion to his ability to articulate the exact degree of risk to competition and the exact balance of certainty attached to his assessment of this risk. In the process of preparing himself for such a role, an economist should, I think, learn as much as he can about the markets affected and how they operate. He should know the record and he should know as much as possible about the opportunities for competitive vitality for third companies not directly engaged in the merger.

Thus the value of an economist in a merger case setting increases in direct proportion to his ability to assimilate and compare complex bodies of facts, the precision with which he can marshal these facts, and the balance he can bring to his judgment concerning their meaning for competition. It follows also that collaboration between a lawyer and an economist should not be a mechanical one with the difference between the two skills viewed as sharply distinct; nor should it be a master-and-servant relationship which makes the economist a specialized law clerk or a highly specialized pleader. The relationship should, rather, be viewed as one of continuing mutual education in overcoming ignorance about what are essentially complex problems in estimating potential competition.

Such collaboration requires not only verbal but bone-deep understanding that neither legal nor economic problems in the merger case area come pure. Issues are unavoidably mixed, and the costs of overcoming ignorance in different factual settings are high. Joint aid in determining how to marshal existing facts and how to collect new bodies of evidence at appropriate costs presents one of the most fruitful fields for collaboration.

The economist's most responsible, and in the end most challenging, role can evolve only if he works from facts, through criteria, to conclusions based on experience concerning the delicate balance of equity involved in evaluating the effects of specific company activities on existing and potential competition. In the process we, as economists, may as well acknowledge openly that the emperor's clothes are not always imperial; the law has in many cases proved a blunt instrument in preserving and strengthening competition, and economic analysis is not always competent to prevent errors in judgment concerning the regulation of competition or to administer therapy when a company, or a group of companies, is found to be reducing competitive opportunity for third companies. The work of the economist, like that of the lawyer, should, however, be directed toward finding appropriate methods of preventive therapy that will maximize opportunities for competition and growth.

The present article is, then, a brief for a theory that responsible analysis of the effects of a merger upon potential competition requires that economists take joint responsibility with attorneys for developing economic facts and economic criteria that can reach the dignity of legal evidence and form the basis for legal conclusions. Such collaboration requires that the economist train himself to aid in developing methods of collecting data and in reaching estimates of potential competitive consequences shaped to meet the procedural requirements implicit in judicial tests of the admissibility, weight, and probative value of legal evidence.