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Reciprocity and Economic Concentration Aspects of the ITT Mergers–Should the Government Have Settled

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COMMENTS

RECIPROCITY AND ECONOMIC CONCENTRATION ASPECTS OF THE ITT MERGERS—SHOULD THE GOVERNMENT HAVE SETTLED?

I. INTRODUCTION

Over the last two decades the trend in the United States has been toward a concentration of economic power in fewer and larger corporations.[1] While many factors may have contributed to this trend, the result is at least partially credited to extensive merger activity.[2] In recent years this merger activity has been predominantly conglomerate rather than horizontal and vertical.[3] Between 1961 and 1969 International Telephone and Telegraph Company, one of the leading conglomerates, merged with 52 domestic companies and a number of foreign companies.[4] As a result of its merger activity, in 1969[5] ITT ranked ninth on *Fortune's* list of the nation's 500 largest industrial corporations.[6] Among ITT's 1969 acquisitions were Grinnell Corporation, The Hartford Fire Insurance Company, and Canteen Corporation. The Antitrust Division of the Justice Department moved to block the mergers

1. *See, e.g., Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., pt. 8 (1969-70) [hereinafter cited as *Concentration Hearings*].

2. *Id.* at 4550-54.

3. FTC Press Release (March 18, 1968); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV L. REV. 1313, 1314 (1965). Turner points out that there are three types of mergers: vertical, horizontal, and conglomerate. A vertical merger is the acquisitional expansion of a firm toward the control of its raw material suppliers or toward its product outlets. A horizontal merger is the acquisition of one firm by another producing the same or similar product line. A conglomerate merger has been defined as any merger which is neither vertical nor horizontal. *Id.*

Turner further divides conglomerate mergers into either "pure" or "mixed." In a pure conglomerate merger there is no discernible economic relationship between the acquiring and the acquired firms; the mixed conglomerate merger may have horizontal or vertical characteristics, none of which are so dominant to classify the merger as anything but conglomerate. *Id.* at 1315.

4. United States v. ITT, 306 F. Supp. 766, 771 (D. Conn. 1969).

5. The year 1969 was chosen for this data since the mergers with which this paper is concerned occurred in that year.

6. *Fortune*, May 1970, p. 184.

with Grinnell,[7] Hartford,[8] and Canteen[9] as violative of section 7 of the Clayton Act.[10] The three cases—the preliminary injunction proceeding and the two divestiture proceedings—are significant from the standpoint of antitrust law because the government lost all three in the district courts even though the Supreme Court had found in favor of the government in an earlier case with very similar facts.[11] The government filed an appeal to the Supreme Court, but the appeal was later dismissed by agreement of the parties[12] under Rule 60 of the Supreme Court Rules.[13] The reciprocity and economic concentration issues[14] of these mergers will be analyzed to determine whether the government should have settled both from economic and legal points of view.

II. RECIPROCITY

One of the government's strongest arguments against the mergers was that they would increase the probability of ITT's engaging in reciprocity. Reciprocity is "both the use of purchasing power to obtain sales and the practice of preferring one's

7. United States v. ITT, 324 F. Supp. 19 (D. Conn. 1970) (divestiture); United States v. ITT, 306 F. Supp. 766 (D. Conn. 1969) (preliminary injunction) [hereinafter cited without names].

8. 306 F. Supp. 766 (D. Conn. 1969).

9. United States v. ITT, 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971) (divestiture) [hereinafter cited without name].

10. 15 U.S.C. § 18 (1970). The relevant portion of the section states:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of 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.

11. FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), discussed in text accompanying note 23 *infra*.

12. On September 24, 1971, ITT entered into three consent decrees to end the litigation against it in the three mergers. *See* text accompanying notes 122-25 *infra*.

13. United States v. ITT, 404 U.S. 801 (1971). SUP. CT. R. 60(1) states as follows: "Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal . . . be dismissed . . . the clerk shall, without further reference to the court, enter an order of dismissal."

14. The government's other contentions were that the mergers increased barriers to entry and led to vertical integration. Also, in the Grinnell and Hartford cases the government argued that the mergers would eliminate horizontal competition. Only the reciprocity and economic concentration issues will be considered in this article since the other issues involved only a de minimis economic effect.

customers in purchasing."[15] "The essence of the arrangement is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases."[16] Perhaps reciprocity can best be understood by use of an example. X, a manufacturer of large trucks, purchases tires from Y to be placed on the trucks as they come off the assembly line. Y uses trucks in the transportation of its tires. X tells Y that if Y hopes to continue selling tires to X, Y must purchase all its new trucks from X.

Reciprocity should not be encouraged because it "distorts the pattern of trade away from the ideal, with no compensating economic advantages."[17]

> Whenever considerations of reciprocity enter into the making of purchases or sales, there is a departure from the process of open competition from which derive many of the benefits of a free enterprise system. In theory the industrial purchaser seeks out that supplier who will give him the most satisfactory product at the least cost, partly because lower costs will give him an enhanced return, but also because his product must be of superior quality to resist the onslaught of his competitors. If industrial producers adopt this attitude in making their purchases, hopefully the consumer benefits by securing a better product at a lower price.[18]

If, instead, the industrial purchaser allows the practice of reciprocity to affect his purchasing decisions, the component acquired for his final product may be higher in price or poorer in quality than if price and quality were the only relevant considerations.[19] The injury may befall the ultimate consumer who has to pay a higher price or who receives inferior goods. It has been persuasively contended, however, that this injury is more likely not to exist since reciprocity more readily occurs in industries in which products are homogeneous and the prices charged by competing sellers are essentially the same.[20] The real injury is probably borne by the competing sellers who are, in essence, foreclosed

15. Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964).

16. Edwards, *Conglomerate Bigness as a Source of Power*, NATIONAL BUREAU OF ECONOMIC RESEARCH, BUSINESS CONCENTRATION AND PRICE POLICY 331, 342 (1955).

17. Turner, *supra* note 3, at 1387.

18. Hausman, *supra* note 15, at 879 (citations omitted).

19. *Id.*

20. Ammer, *Realistic Reciprocity*, 40 HARV. BUS. REV. 116 (1962).

from competing for the industrial purchaser's business because the sellers cannot rely on the traditional method of producing a component of superior quality and lower price to win the purchaser's favor. Although the purpose of antitrust law is to protect competition, not competitors, anything which adversely affects a large number of competitors will eventually have a substantial adverse effect on competition. The government developed this latter consideration into an argument against the ITT mergers.

If firm X hopes to encourage its suppliers to buy from X in return for its continuance of business with those suppliers, X must be a significant purchaser from its suppliers. Otherwise, the suppliers could not be coerced into submitting to X's demands. Thus, anything which increases X's purchasing power also increases the opportunities to engage in reciprocity. Similarly, X could not coerce its suppliers into purchasing from it unless the suppliers were also substantial users of X's product. In other words, X could not force its suppliers to buy a product they do not use. Anything which increases the suppliers' demand for products sold by X will also increase reciprocity opportunities. When X diversifies through a conglomerate merger, X not only increases its own purchasing power but also increases the likelihood that its suppliers will have a demand for the new products it trades. For example, firms B, C, and D must purchase sidgets to make widgets which they sell to firm X. If X produces only gadgets which are not substitutes for sidgets, X cannot force B, C, and D to purchase gadgets by threatening to stop purchasing widgets from them. If Y, which does produce sidgets, is acquired by X through a conglomerate merger, the possibilities for reciprocity are increased significantly. As Professor Hausman has indicated: "[d]iversificiation not only increases the number of opportunities for reciprocal buying; it increases their magnitude."[21]

> A single-line producer, even though a near monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying . . . a firm may so enlarge its buying as to give it the power to increase its sales.[22]

21. Hausman, *supra* note 15, at 876.

22. Stocking & Mueller, *Business Reciprocity and the Size of Firms*, 30 J. BUS. U. CHI. 73, 77 (1957).

III. THE CONSOLIDATED FOODS CASE

The government relied heavily on reciprocity in attempting to block all three mergers. Support for its position was based on the leading Supreme Court decision, *FTC v. Consolidated Foods Corp.*[23] Consolidated is a wholesaler and retailer of numerous food products which it purchases to resell through its retail stores. Gentry produces dehydrated onion and garlic used by some of Consolidated's suppliers to make soup. In 1951 Consolidated acquired Gentry, but in 1963 the FTC ordered divestiture on the ground that Consolidated could force its suppliers to purchase their onion and garlic from Gentry.[24] The Commission analogized reciprocity to tying arrangements which have virtually been declared illegal per se by the Supreme Court.[25] A tying arrangement may be illustrated by the following example. R retail store wants to purchase bed frames from S supplier. S will sell bed frames to R only if R will also buy S's mattresses.[26] The Commission apparently believed reciprocity so analogous to tying that reciprocity too should be illegal per se. "[Reciprocity] distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit."[27]

The possibilities for reciprocity undoubtedly existed because Consolidated, with net sales of over a quarter billion dollars, was a substantial purchaser from its suppliers, and they in turn purchased about 25% of the onion and garlic in the industry.[28] The Commission had before it evidence that Consolidated had occasionally tried to force Gentry's onions and garlic onto the food processors, but there was no evidence of a systematic effort.[29] The Commission, however, thought Consolidated could succeed in its efforts because of its massive purchasing power. Thus the Commission found Consolidated's ownership of Gentry was a threat to competition in violation of section 7 of the Clayton Act.

23. 380 U.S. 592 (1965).

24. 62 F.T.C. 929, 963 (1963), *rev'd*, 329 F.2d 623 (7th Cir. 1964), *rev'd*, 380 U.S. 592 (1965).

25. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

26. *See* Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552, 553-58 (1965).

27. 62 F.T.C. at 952.

28. *Id.* at 957.

29. *Id.* at 958.

The Commission's ruling evoked criticism from many commentators[30] because there appeared to be a legitimate argument that, even though opportunities for "friendly" reciprocity existed,[31] Consolidated simply did not have the leverage to coerce the food processors to buy from Gentry. If this argument were true, there could not have been the substantial lessening of competition required to find a merger illegal under the Clayton Act. Thus on appeal to the Seventh Circuit,[32] Consolidated argued it could not afford to reject national brand goods if its suppliers refused to purchase from Gentry since those goods had received wide consumer acceptance. Furthermore, the national brand food processors were well aware of this fact. Therefore, Consolidated concluded, its power was only illusory, and the national suppliers knew it would not make purchasing decisions on the basis of whether the suppliers bought from Gentry. This argument, supported by post-acquisitional evidence that Gentry had actually lost ground in the garlic market even though its onion market had increased, persuaded the circuit court to conclude that the Commission had failed to show a probability of a substantial lessening of competition.[33]

The Supreme Court reversed the circuit court, stating "at the outset that 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed."[34] While declaring that the "mere possibility" reciprocity will injure competition is not enough,[35] the Court stressed that "Section 7 of the Clayton Act is concerned 'with probabilities, not certainties.'"[36] The Court would not say there was insufficient evidence for the Commission to have found the probability of a lessening of competition. "Reciprocity was tried over and again and it sometimes worked."[37] The Court was not so impressed as was the circuit court with the evidence that Gentry had lost twelve percent of its garlic market since the

30. *See, e.g.,* Turner, *supra* note 3, at 1391-93; Ferguson, *supra* note 26, at 574; Hale & Hale, *Reciprocity Under the Antitrust Laws: A Comment,* 113 U. PA. L. REV. 69, 70-74 (1964).

31. If price, quality, and service are equal, there is no reason one firm cannot be persuaded to buy from another. *See* Ferguson, *supra* note 26, at 578.

32. Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir. 1964).

33. *Id.* at 626.

34. 380 U.S. at 594.

35. *Id.* at 598.

36. *Id.* at 594-95.

37. *Id.* at 600.

merger. The Court quoted with approval the Commission's language:

> We do not know that its share [of the garlic market] would not have fallen still farther, had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price, and service competition.[38]

It does not appear the Court accepted the Commission's suggestion that reciprocity should be illegal per se. This interpretation of the Court's opinion has been questioned, however, in light of an economic analysis of the evidence presented. Professor Hinnegan found sufficient reason independent of reciprocity to explain Gentry's new position in the onion market:

> [T]he bulk of evidence is fully consistent with Gentry's increased onion market share for reasons totally divorced from reciprocity. Gentry was competitive in price, quality, and service, the traditional selling tools in the food industry . . . . Gentry developed a new processing method, greatly improving its product; the industry was expanding rapidly due to the increasing consumer demand for dehydrated foods using onion and garlic (*e.g.*, dried soups and Italian foods) and processors desired a second source of supply for their increased requirements.[39]

IV. ITT MERGERS

The government claimed the Grinnell, Hartford, and Canteen mergers would give rise to reciprocal dealing by creating a market structure conducive to reciprocity and reciprocity effect.[40] The district courts which heard the cases applied a three-step analysis to determine whether the mergers violated section 7. First, the merger must significantly increase the opportunities for

38. *Id.* at 599, *quoting from* 62 F.T.C. at 960.

39. Hinnegan, *Potential Reciprocity and the Conglomerate Merger: Consolidated Foods Revisited,* 17 BUFF. L. REV. 631, 645 (1968).

40. "[R]eciprocity effect refers to the tendency of a company selling or desiring to sell to another company to channel its purchases to that company." 306 F. Supp. at 781. *See also* United States v. White Consol. Indus., Inc., 323 F. Supp. 1397 (N.D. Ohio 1971) in which a district court accepted this theory while enjoining a merger in violation of section 7.

reciprocal dealing. Second, there must be a reasonable probability that those opportunities will be exploited. Third, the resulting reciprocal dealing, if any, must have a tendency substantially to lessen competition.

A. *ITT-Grinnell*[41]

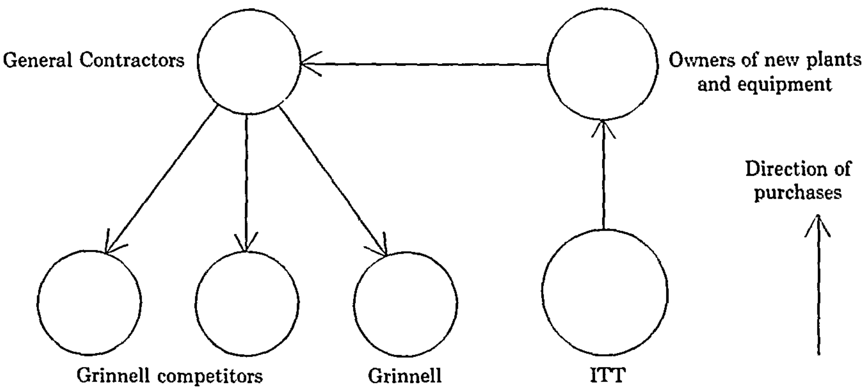
Before acquisition by ITT, Grinnell was the 268th largest industrial corporation in the United States with annual sales of approximately 350 million dollars.[42] Grinnell was the largest manufacturer and installer of automatic sprinkler fire protection systems in the country and also a producer of piping for power generating plants and devices from which piping is suspended.[43] The government claimed all these products were in the relevant lines of commerce, but the court primarily confined its discussion to the automatic sprinkler systems. The government contended that ITT would use its power to exert pressure on its suppliers to transfer their purchases of spinkler systems to Grinnell.[44] A further contention was that, even if ITT exerted no pressure, its suppliers would readily transfer their purchases of sprinkler systems to Grinnell in hopes of gaining favor with ITT.[45]

As was previously discussed, in order for a merger to increase significantly the opportunities for reciprocal dealing, two conditions must be present: (1) the acquiring firm (ITT) must be so significant a customer of its suppliers that they would not risk losing its patronage and (2) the suppliers must in turn be substantial purchasers of the acquired firm's products (Grinnell's sprinklers). There was no dispute about the first criterion since the defendants apparently conceded that ITT was a customer its suppliers did not desire to lose.[46] There was evidence, however, concerning the second criterion that ITT's suppliers were not significant purchasers of sprinkler systems. Many of the customers of sprinkler systems are non-industrial—*e.g.*, hospitals, educational insitutions and retail establishments—and most sprin-

41. 324 F. Supp. 19 (D. Conn. 1970); 306 F. Supp. 766 (D. Conn. 1969).
42. 306 F. Supp. at 771.
43. *Id.* at 771-72.
44. *Id.* at 781.
45. *Id.*
46. 324 F. Supp. at 42. *But see* United States v. ITT, 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971) in which ITT introduced evidence tending to show itself only a minor purchaser of the products sold by its suppliers.

kler work is awarded on the basis of competitive bidding.[47] Also, general contractors purchase the largest portion of sprinkler systems based on bids for construction of new plants and equipment. The district court thought this last factor minimized the possible danger of reciprocity since these contractors are not significant suppliers of ITT.[48] Thus the court concluded that no significant opportunities for reciprocal dealing existed because most of Grinnell's products were purchased by non-suppliers of ITT and, therefore, ITT had no leverage to force "independent" purchasers to buy from Grinnell.

The court's reasoning seems slightly flawed since the court does not consider what may be called "conduit" power.[49] ITT may not have any direct influence over the general contractors who buy most of the sprinkler systems, but ITT does have power to influence the purchasers of the new construction who are suppliers of ITT. This may be illustrated by way of a diagram:



Uncontroverted evidence showed that in a given year ITT accounted for 28% of total new plant and equipment expenditures by all United States industries.[50] This fact makes the owners of new plants and equipment significant suppliers of ITT. Since the general contractors sell their services almost exclusively to the owners of new plants and equipment, the general contractors are significant suppliers of the owners. It is not too difficult to imag-

47. 324 F. Supp. at 43.

48. *Id.* at 44.

49. Although the term was not used, the same kind of situation was recognized in United States v. Ingersoll Rand Co., 320 F.2d 509 (3rd Cir. 1963). *See* discussion accompanying note 66 *infra*.

50. 306 F. Supp. at 781.

ine ITT's applying pressure to the owners who want to remain in good favor with ITT and in turn the owners' placing pressure on the general contractors to purchase from Grinnell. This "completed circuit" would have the same effect as ITT's directly influencing the general contractors. The court did not consider this likely since the general contractors made purchases on the basis of competitive bids, and it would have been contrary to the ethical standards of the contractors to show favoritism by allowing one bidder an opportunity to match the lowest bid.[51] The court may have been correct, but in light of *Consolidated Foods* it seems unlikely the Supreme Court would have placed such great weight on the ethical standards of the general contractors if the probability of a substantial lessening of competition had otherwise been shown.

B. *ITT-Hartford*[52]

Prior to merging with ITT, The Hartford Fire Insurance Company ranked fourth in the United States among companies writing property and liability insurance through independent agents and sixth among all property and liability insurance companies.[53] It had total assets of approximately two billion dollars and annual premium receipts of approximately one billion dollars. Although primarily a property and liability insurance company, Hartford had subsidiaries engaged in writing annuity contracts and surety bonds as well as fire, marine, casualty, life, accident and health insurance. Within ten years of entering the life insurance business in 1959, Hartford had in force about 2.5 billion dollars of life insurance.

The primary argument against the ITT-Hartford merger was also reciprocity. The government claimed ITT would exert pressure on its suppliers to transfer their insurance business to Hartford or else lose ITT as a purchaser. Even in the absence of pressure, the suppliers would tend to switch their insurance business to Hartford to gain favor with ITT. Again there was no dispute that ITT was a significant customer of its suppliers, but there was disagreement about whether ITT's suppliers were significant pur-

51. 324 F. Supp. at 43-44.
52. 324 F. Supp. 19 (D. Conn. 1970); 306 F. Supp. 766 (D. Conn. 1969).
53. 306 F. Supp. at 772. All remaining information in this paragraph is taken from the same source.

chasers of the type of insurance Hartford sold.[54] Not attempting to reconcile the conflicting evidence, the court turned to other factors to determine whether the merger created an opportunity for reciprocal dealing. Among these factors was whether insurance is the type of product which lends itself to reciprocal buying arrangements.[55] The government introduced evidence showing that insurance is essentially interchangeable and that large companies often change from one insurance company to another.[56] The defendant's evidence demonstrated two reasons why it would be disadvantageous for a company to change insurance carriers. First, the company might gain a reputation as a carrier-switcher and, thereafter, find insurers reluctant to insure it and incur large startup costs without the expectation of a substantial coverage period.[57] Although such a result might occur if the company made a habit of switching carriers, it seemed unlikely here in light of the government's contention that ITT suppliers would switch at the urging of ITT and that Hartford would be waiting with open arms. After acquiring insurance with Hartford, the suppliers would do no more switching to give them a bad reputation.

Second, a surplus may build up on the companies' accounts during periods when few claims are filed. Such a surplus has a two-fold effect: (1) it makes the insurer more tolerant during periods when the accounts are unprofitable and (2) it aids in obtaining lower premiums when the insurance contract is renegotiated.[58] What the defendants did not emphasize is that both of these effects are conditioned on the existence of a surplus; if the surplus does not exist, these effects do not apply. As to the second effect of a surplus, the fact that few claims have been filed against any insurer would also seem to aid in obtaining lower premiums when negotiating with a new insurer. The court, nevertheless, concluded that there is little motive for companies to change insurers. The argument seems circular, however, because the court did not consider the factor which the government contended was the primary motive for the merger—reciprocity. If the opportunity for reciprocity existed, it may have been a sufficient motive to counteract any disadvantage a company encountered by

54. *Id.* at 787.
55. *Id.*
56. *Id.*
57. *Id.* at 788.
58. *Id.*

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switching insurers. It is not readily apparent, therefore, why the court believed this factor (*i.e.*, whether insurance lends itself to reciprocal dealing) to be an independent consideration in determining if the merger created opportunities for reciprocity. The court, nevertheless, concluded that the merger created no significant new opportunities for reciprocity.

C. ITT—Canteen[59]

Prior to its merger with ITT, Canteen Corporation was primarily a seller of vending and manual food service to industrial, commercial, educational and medical customers.[60] It also owned a division engaged in the vending of cigars and cigarettes and a subsidiary engaged in a small commercial finance business. Canteen ranked second among companies operating exclusively in the on-site food service market but ranked only eighth among food service companies which had widely diversified.

Reciprocity was again the major argument against the merger, and the government's contention was the same—ITT would use its power to coerce its suppliers into transferring their food service business to Canteen and that, even without pressure, its suppliers would tend to purchase from Canteen to gain favor with ITT. The defendants were better prepared to argue the merits here than they were in the two preceding mergers. This time they controverted the government's evidence that ITT was so significant a customer of its suppliers that its suppliers would not risk losing its patronage. Even though ITT's annual purchases for 1968 were 840 million dollars, evidence was introduced to show this amount was an inconsequential percentage of its suppliers' sales.[61] Purchases by ITT and Canteen of $20,000 or more from companies comprising *Fortune's* list of the 500 largest industrial corporations averaged only 0.118% of those suppliers' total sales.[62] This evidence is not very persuasive, however, since all ITT suppliers are not large enough to be listed in *Fortune* and some of the smaller ones might depend significantly on purchases by ITT. This approach is directly analogous to Mr. Justice Stewart's concurring opinion in *Consolidated* in which he contended the small

59. 1971 Trade Cas. at 90,530.

60. *Id.* at 90,538. All remaining information in this paragraph is taken from the same source.

61. *Id.* at 90,549.

62. *Id.*

suppliers of Consolidated could be coerced into practicing reciprocity even if the national suppliers could not.[63]

ITT's evidence seems weak for still another reason. The figure used by the defendants and by the court was an average which did not show the percentages of ITT's purchases from individual suppliers. Thus ITT might have made significant purchases from several individual suppliers, and this fact could have been disguised by adding to the data many companies with large annual sales which sold very little or nothing to ITT.

The defendants also argued that ITT's suppliers were not significant purchasers of the kind of food service in which Canteen was engaged. In their argument they attacked the government's use of statistics that were very similar to those which the defendants had used in arguing ITT was not a significant customer of its suppliers.[64] In addition to evidence about the two major factors used to determine whether a merger creates a significant opportunity for reciprocity, the court also wanted evidence about the size and diversification of other companies to which ITT's suppliers sold their products, the degree to which the markets within which ITT's suppliers operated were competitively structured and the extent to which the food service lent itself to reciprocal dealing.[65] The government was unprepared to present evidence along these lines, and the court concluded the government had failed to show that ITT had the power to effect a substantial increase in reciprocal dealing as a result of the merger.

D. *All Three Mergers*

Even if one assumes ITT had the power to coerce its suppliers into engaging in reciprocal dealing, whether ITT would have exploited its power is a different question. Apparently, however, some courts favor removing the temptation when it exists. Prior to the Supreme Court's decision in *Consolidated Foods*, the Third Circuit upheld a district court decision granting a preliminary injunction in *United States v. Ingersoll-Rand Co.*[66] Ingersoll-

63. 380 U.S. at 607-08.

64. 1971 Trade Cas. at 90,548.

65. *Id.* at 90,546. The court believed these factors were important on the basis of two law review articles: Turner, *supra* note 3, at 1387-88, and Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 327 (1967).

66. 320 F.2d 509 (3rd Cir. 1963).

Rand, a large designer and manufacturer of industrial machinery, had entered agreements to acquire three leading manufacturers of underground coal mining machinery. One of the contentions the government relied upon to defeat the merger was reciprocity. The government argued that the merger would substantially increase the purchasing power of Ingersoll-Rand, especially in steel. Since the steel industry is one of the largest markets for coal, the merger would create an opportunity for reciprocity. Ingersoll-Rand could exert the force of its purchasing power through the steel industry to increase sales of equipment by the newly acquired firms. The potential of this situation, however, troubled the court more than the probability of actual coercion.

> [T]he mere existence of this purchasing power *might* make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the goodwill of the possessor. Certainly the steel producer who seeks orders from Ingersoll-Rand *may tend to prefer* the acquired companies as the source of supply of equipment used in his "captive" mines, and the advantages accruing to him from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand.[67]

Thus the district court found the mere creation of an opportunity to enter into reciprocity arrangements resulting from a merger was sufficient alone to grant a preliminary injunction. In affirming the lower court's holding, the Third Circuit stated:

> [W]e take the view that all the United States is required to establish at the present stage of this case is the probability of a lessening of competition and a showing of reasonable probability of success on final hearing. We agree with the court below in its conclusion that the United States has met this burden in both respects.[68]

After the *Consolidated Foods* decision, one is tempted to question the reliability of the *Ingersoll-Rand* position on reciprocity. However, *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*[69] gave the Third Circuit an opportunity to reexamine its prior position in light of *Consolidated Foods.*

67. 218 F. Supp. at 552, *quoted in* 320 F.2d at 524 (emphasis added).
68. 320 F.2d at 525.
69. 414 F.2d 506 (3rd Cir. 1969), *cert.denied,* 396 U.S. 1009 (1970).

Once again the court determined that the opportunity for reciprocal dealing was enough to grant a preliminary injunction. White Consolidated Industries, a large diversified manufacturer, attempted to acquire Allis-Chalmers, a manufacturer only slightly smaller than White in terms of annual sales.[70] Allis-Chalmers sought a preliminary injunction to stop the acquisition, in part because it would create the opportunity to engage in reciprocity. The court granted the injunction after noting that both White and Allis-Chalmers were substantial purchasers from the steel companies and that the steel companies were substantial purchasers from Blaw-Knox, a White subsidiary. Although the opportunities for reciprocity already existed, the addition of Allis-Chalmers substantially increased those opportunities. Clearly the Third Circuit has interpreted *Consolidated Foods* to mean that any merger creating a market structure conducive to reciprocal dealing violates section 7.[71]

In *United States v. White Consolidated Industries, Inc.*,[72] the District Court for Northern Ohio granted a preliminary injunction to prevent the merger of White Consolidated and White Motor Corporation, two large diversified companies. The government contended that the merger would lead not to coercive reciprocity but instead to "reciprocity effect."[73] The court accepted the government's argument and cited *Allis-Chalmers* to support its position.

> Although this Court is not bound by decisions of the Court of Appeals for the Third Circuit, the logic of its opinion in the *Allis-Chalmers* case seems both inescapable and quite compelling. The result of a merger between the defendant corporations would be no less than a super conglomerate, whose impact upon the market can hardly be gauged . . . . [T]heir mere size in the market will operate as a lever which in turn will lessen competition. Unquestionably, other firms will hesitate to compete too zealously with one division out of fear of antagonizing the entire firm and losing it as a customer for other goods.[74]

Other courts have interpreted *Consolidated Foods* to require

70. In 1967 Allis-Chalmers had annual sales of $821,000,000 while in 1968 White's total sales were $825,000,000. *Id.* at 511.

71. The court uses language to this effect. *Id.* at 518.

72. 323 F. Supp. 1397 (N.D. Ohio 1971).

73. *See* note 40 *supra*.

74. 323 F. Supp. at 1398-99.

a probability of reciprocal dealing. Thus in *United States v. Penick & Ford, Ltd.*[75] and *United States v. Northwest Industries, Inc.*,[76] the district courts refused to grant preliminary injunctions even though they recognized the potential for reciprocity had been substantially increased. In *Penick & Ford* the court was also impressed with a company policy against reciprocity.

In the ITT cases the government argued it need only show opportunities for reciprocity to defeat the mergers under section 7. In essence, the government had interpreted *Consolidated Foods* to prohibit any merger creating a possibility of lessened competition. This interpretation would have amounted to a per se rule condemning reciprocity. The result would be the condemnation of all conglomerate mergers since it is difficult to imagine a conglomerate merger which does not increase the opportunities for engaging in reciprocity.[77] Such a test seems too rigid to make economic sense because some mergers may even enchance competition.[78] In his concurring opinion in *Consolidated Foods*, Mr. Justice Stewart stated the more economically realistic approach: "Clearly the opportunity for reciprocity is not alone enough to invalidate a merger under § 7. The Clayton Act was not passed to outlaw diversification."[79]

The language of section 7 is explicit in its requirement that the relevant consideration for illegality is whether there is a *probability*, and not a *possibility*, competition will be substantially lessened. In other words, "[i]t is the *effect* of reciprocity, not the *fact* of reciprocity, which is pertinent."[80] In trying to determine what meaning the Supreme Court in *Consolidated Foods* gave such words as "probable" and "substantial," Professor Hinnegan has suggested the terms are a matter of degree:

> "[P]robable" lies somewhere between "possible" and "certain," and "substantial" between "some" and "all." Thus, the question is "where along the spectrum do we find the Supreme

75. 242 F. Supp. 518 (D.N.J. 1965).

76. 301 F. Supp. 1066 (N.D. Ill. 1969).

77. Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture?*, 9 ANTITRUST BULL. 201, 204 (1964).

78. If ITT had acquired a small company which had been struggling in an industry among giants, competition may have been increased by the merger.

79. 380 U.S. at 603.

80. Phillips, *Reciprocity Under the Antitrust Laws: Observations on the Hales' Comment*, 113 U. PA. L. REV. 77, 78 (1964) (emphasis added).

> Court?" And the answer, suggested by a reading of the record in the case, is "Very near the low end."[81]

There are indications that Professor Hinnegan is correct. Mr. Justice Stewart found it necessary to write a concurring opinion stating flatly that the opportunity to engage in reciprocity is not enough to invalidate a merger under section 7 and that the test is still probability of substantial lessening of competition.[82] Further he stated, "The record in this case is sorely incomplete, and a reviewing court is given little guidance in determining why this merger should be voided, if reciprocity-creating mergers are not per se invalid."[83] He went on to find, however, "just enough to support the invalidation of the merger, but because of evidence not referred to in the Court's opinion."[84] Therefore, it seems the Court has established a presumption of illegality whenever a merger creates the *possibility* of the use of reciprocal buying to influence a substantial share of the market and the structure of the market is such that the reciprocity will lessen competition.[85]

It is unnecessary to have market power to engage in reciprocal dealing since even very small entities find the practice attractive.[86] For example, X is a gas station operator and Y is the owner of a local grocery store. X agrees to buy all his groceries from Y if Y will agree to buy all his gasoline from X. Surely this is reciprocity and there is some foreclosure in the relevant markets of groceries and gasoline. Thus this situation does have an adverse effect on competition. The question, however, is whether the antitrust machinery is prepared to police this type of situation, and apparently the answer is "No." The antitrust machinery has more than enough to do without chasing elusive butterflies when elephants are on the loose. Thus any anticompetitive practice which creates a de minimis problem should not be the subject of concern.

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81. Hinnegan, *supra* note 39, at 645.

82. 380 U.S. at 605.

83. *Id.* at 606.

84. *Id.* at 607. Although he accepted Consolidated's argument that national brand processors could not be pressured, Mr. Justice Stewart believed the smaller processors whose labels had not received wide consumer acceptance could be pressured. *Id.*

Even if this were true, there is some question whether competition would be *substantially* lessened. There was evidence that about 90% of Gentry's sales were to customers buying over 10,000 pounds of either onions or garlic or both. The national suppliers naturally made up the vast majority, if not all, of the 90%. Thus only around 10% of Gentry's sales could have been the result of coercive reciprocity.

85. *See, e.g.*, Harsha, *supra* note 77; 44 TEX. L. REV. 1019, 1022-23 (1966).

86. Ferguson, *supra* note 26, at 579.

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Although market power is not a prerequisite for reciprocity, it is a prerequisite for reciprocity to result in an anticompetitive effect.[87] When there is already an oligopolistic market structure, there seems to be no reason to tolerate even the slightest foreclosure. Market structure may have been a key factor in the Supreme Court's invalidation of the merger in *Consolidated Foods.*[88] Gentry and one other competitor held about ninety percent of the dehydrated garlic and onion market. The Court believed Consolidated would use its leverage to strengthen Gentry's position, and the Court saw no justification for allowing such action. An analogy may be drawn to the acquisitions in the present cases. Although the district court did not find Grinnell dominant in any market, the court did determine that in Grinnell's relatively oligopolistic product markets its shares ranged from 4% to 44.3%. Likewise, Hartford and Canteen held significant shares of their respective product markets. If the market structure of the acquired firm is oligopolistic, it may be presumed competition will be substantially lessened if there is a probability reciprocity will occur. This presumption would not drastically distort the economic meaning of section 7. If it could be established, therefore, that reciprocity would *probably* result, there seems to be no justification for allowing the acquisitions. It seems, however, the test must remain whether there is a *probability*, not *possibility*, reciprocity will occur.

Evidence was presented in all three cases that ITT would not have taken advantage of opportunities for reciprocal dealing even if such opportunities were created by the mergers. First, ITT is organized into a series of profit centers each having its own decentralized purchasing and sales department. Managers within a profit center are paid and promoted according to the success and profit in their profit center rather than according to the performance of ITT as a whole. Arguably, a manager would have no incentive to engage in reciprocity, which can be very inefficient, since it would taint the performance of his profit center even if it aided another. The argument is imperfect, however, since several managers may collaborate to work out a solution favorable to all. Further, it is entirely inapplicable where reciprocity is used

87. *Id.*

88. Brodley, *supra* note 65, at 325-29.

merely to capture all the business when the prices are the same as those of competitors.[89]

Second, ITT does not collect purchasing and sales data necessary to identify reciprocal purchasing opportunities. It has been contended for some time that reciprocity presents its greatest danger when it is practiced on a formalized basis.[90] Unless there is an effective system of information, coordination, and communication to obtain the evidence of reciprocity necessary to police it, apparently there is no significant danger to free competition.[91] Thus without this purchasing and sales data, there may be little chance that ITT could engage in systematic reciprocity which would violate section 7.

ITT also argued that it has had a strong written policy against reciprocity since 1966 and an unwritten one prior to that date. Conceivably the desire to place the policy in writing was a direct result of the Supreme Court's decision in *Consolidated Foods* in 1965. The court was impressed with ITT's policy—so much so that it distinguished two unfavorable cases from the Third Circuit solely on the basis of this policy.

> While *Ingersoll-Rand* and *Allis-Chalmers* lend strong support to the theory that a merger which will bring about a market structure favorable to reciprocal dealing offends Section 7, *there is a crucial factual distinction between these two cases and the instant case. In Ingersoll-Rand and Allis-Chalmers, there was no evidence of company policy against reciprocal dealing*; in the instant case there is evidence to that effect which the Court regards as substantial, credible and persuasive.[92]

Despite the weight the court seemingly gave this evidence, it is doubtful that the mere existence of a written policy would ever be determinative. In the present cases, however, the policy was reinforced by the most persuasive evidence—ITT's past record. The government launched an extensive investigation into ITT's conduct over the last decade, including its 104 acquisitions during that time period. When this search was completed, the govern-

89. As indicated previously, reciprocity generally occurs in industries with homogeneous products and similar prices. *See* text accompanying note 20 *supra*.

90. Ammer, *supra* note 20.

91. *Id.* It may be questioned, however, whether the lack of data will prevent the reciprocity from being harmful to competition or will merely affect the degree of harm to competition.

92. 306 F. Supp. at 785 (emphasis added).

ment had failed to uncover persuasive evidence that ITT had either engaged in reciprocal dealing on its own or had benefited from reciprocity effect on the part of its suppliers.[93] It is difficult to believe that a corporation the size of ITT has not engaged in reciprocity over the last decade, but the lack of evidence may have convinced the courts that the policy against reciprocity was actually working. Likewise, no evidence of reciprocity effect from prior mergers was revealed, and the courts believed it improbable that reciprocity effect would result from the present mergers after it became apparent to ITT's suppliers that ITT did not intend to reciprocate.

One major difference between the ITT cases and the *Consolidated Foods* case is that Consolidated was attacked eleven years after the merger when there was some evidence of reciprocity. ITT, however, was attacked before any reciprocity could have occurred. Without post-acquisitional evidence or the showing of past involvement in reciprocal dealing, it will apparently be extremely difficult for the government to illustrate a probability of a significant increase in reciprocity. The United States District Court for the Southern District of New York applied *Consolidated Foods* in *United States v. General Dynamics Corp.*[94] to hold a conglomerate merger violative of section 7 on the basis of reciprocal dealing. General Dynamics acquired Liquid Carbonic and immediately began a program of reciprocity. In fact it was proved by the government that reciprocity was one of the primary motives for the acquisition. As in *Consolidated Foods* there was post-acquisitional evidence to which the government could point to prove that the merger had led to substantial increases in reciprocal dealings. In the ITT cases, however, the mergers were attacked by the government before there was time for a pattern of reciprocity to develop. Having foregone the possibility of acquiring post-acquisitional evidence and failing to uncover any past incidences of reciprocity by ITT, the government could not convince the courts that these three mergers were likely to result in

93. The government did present some evidence that ITT had engaged in reciprocity, but the court was not convinced. *See, e.g.*, Post-Trial Brief for the United States, p. 54:

> ITT has also engaged or attempted to engage in reciprocal practices over the years. Although ITT has issued an "anti-reciprocity policy" directive, this directive appears to be aimed at the prevention of a systematic reciprocity program throughout all of ITT, but does not forbid the use of reciprocal practices when convenient and useful to ITT.

94. 258 F. Supp. 36 (S.D.N.Y. 1966).

reciprocity when previous ITT mergers apparently had not. Thus the courts decided the mergers did not violate section 7.

V. ECONOMIC CONCENTRATION

The government also contended that the ITT mergers were part of a trend toward economic concentration of assets in fewer and larger corporations. This trend, which has an anticompetitive effect in numerous lines of commerce across the nation, has been the subject of several congressional hearings in the last few years.[95] Available data indicate that in 1968 the 200 largest corporations controlled a share of assets equal to that held by the 1,000 largest in 1941.[96] In late 1969 it was estimated that the top 200 manufacturing corporations controlled about two-thirds of all assets held by corporations engaged primarily in manufacturing.[97]

> This trend is even more disturbing when it is recognized that the level of overall concentration of corporation decision-making may, in many instances, be much greater . . . . [M]any of the top 200 corporations are partially linked with each other and with other corporations in ways that may prevent or discourage independent behavior in market decisions. Two of the most important such ties are corporate joint ventures and management interlocks.[98]

Merger activity has played the most significant role in centralizing this control of industrial assets.[99] Further, the largest corporations have been the most active in mergers, and the acquired firms have generally been the leaders in their industries.

> The 200 largest manufacturing corporations of 1968 made over 60 per cent (measured by assets) of all large manufacturing and mining acquisitions occurring during the 21-year period 1948-68 . . . . Over this period they acquired 3,900 companies with combined assets in excess of $50 billion . . . .
>
> During 1961-68, the 25 most active acquiring corporations made acquisitions totaling $20 billion, or almost 60 per cent of all acquisitions of the top 200 during the period. . . .[100]

95. *See, e.g., Concentration Hearings, supra* note 1; *Hearings on the Status and Future of Small Business Before the Senate Select Comm. on Small Business*, 90th Cong., 1st Sess., pt.2 (1967).

96. *Concentration Hearings* at 4549.

97. *Id.* at 4550.

98. *Id.*

99. *Id.*

100. *Id.* at 4558.

The greatest number of these mergers in recent years has been of the conglomerate nature rather than horizontal and vertical.[101] ITT alone accounted for over 100 mergers in the decade of 1960-70.[102]

In the preliminary injunction hearing against Grinnell and Hartford and the later trial on the merits against Grinnell, the government wanted to introduce testimony by Dr. Willard F. Mueller, former chief economist of the Federal Trade Commission, that this trend among conglomerates has anticompetitive consequences in "numerous though undesignated individual 'lines of commerce.'"[103] Although the opinions do not elaborate upon this argument, Dr. Mueller explained it in detail in a congressional hearing.[104] Not only do conglomerate acquisitions increase the likelihood that the same or related decisionmakers will have access to competing firms through such means as interlocking directorates, but also the conglomerate's size and diversification create mutual interdependence and forbearance with other firms:

> By increasing both size and diversification, conglomerate merger increases the number of contact points shared with competitors, suppliers, and customers, thereby increasing the mutual awareness of common interests among firms. Simply put, growing conglomeration and overall industrial concentration greatly broaden and extend traditional "communities of interest" among key industrial decisionmakers.[105]
>
> . . . .
>
> Reciprocal buying is symptomatic, a manifestation of the more general problem of conglomerate interdependence and forbearance. In many respects conglomerate interdependence and forbearance represents the most serious threat to competition resulting from the growing merger-achieved centralization of economic resources among a relatively few conglomerate enterprises that meet as actual or potential competitors in many markets.[106]

It is best to explain this argument with an example used by Dr.

101. FTC Press Release (March 18, 1968).
102. 1971 Trade Cas. at 90,551.
103. 324 F. Supp. at 52.
104. *Concentration Hearings* at 4566-69.
105. *Id.* at 4567.
106. *Id.* at 4568.

Mueller.[107] Consolidated Foods is not only one of the nation's largest food manufacturers, it was, until recently, one of the largest food retailers. In 1965 Consolidated acquired several retail stores in Chicago and began promotional price competition. Among the other retailers in Chicago were several large chains, including National Tea Company which is also an important customer of Consolidated's manufactured foods. National Tea threatened to stop carrying Consolidated's products if the price competition continued and Consolidated, not wanting to lose an important customer, soon terminated the practice.

> Conglomerate interdependence and forbearance has thus eliminated actual as well as potential competition. Because Consolidated was a food manufacturer as well as a food retailer, the competitive strategies it followed in one market threatened to boomerang by inviting retaliation in another. Had National Tea not been one of its customers, Consolidated could have behaved independently of National Tea in expanding its food retailing operations in Chicago.[108]

In the same manner the government claimed the Hartford and Grinnell mergers would tend to lessen competition in some lines of commerce perhaps unrelated to the products of those companies. The court not only refused to accept this argument but excluded the evidence as being irrelevant since

> the legislative history, the statute itself and the controlling decisional law all make it clear beyond a peradventure of a doubt that in a Section 7 case the alleged anticompetitive effects of a merger must be examined in the context of *specific product and geographic markets* . . . .[109]

The language of the statute indicates only that an acquisition is illegal if "*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."[110] Further, the House[111] and Senate[112] Reports recommending passage of section 7 do not

107. *Id.* at 4567-68.

108. *Id.* at 4568.

109. 324 F. Supp. at 52.

110. 15 U.S.C. § 18 (1970) (emphasis added).

111. "[T]he purpose of the bill is to protect competition *in each line of commerce* in each section of the country." H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949) (emphasis added).

112. "It is intended that acquisitions which substantially lessen competition, as well

unequivocally state that *particular* lines of commerce must be determined. The court is quite correct, however, in saying that decisional law has followed a practice of defining a specific line of commerce to examine the alleged anticompetitive effect of the merger,[113] but none of the cases yet have involved a pure conglomerate acquisition.[114]

Based solely on an analysis of the committee reports and congressional debates, it is arguable that in passing section 7, Congress was concerned not only with concentration within a particular industry but with economic concentration in general. If so, the determination of whether a particular merger were anticompetitive would not be restricted to an analysis of the impact on specific lines of commerce or definite geographic markets.[115] This position is essentially the same as that of the government in claiming that anticompetitive effects, although presently unascertainable, will result *somewhere* along the product lines of the conglomerate since the mergers increase the "contact points" shared with competitors, suppliers and customers. The government's test for expanding section 7 would apparently condemn all large conglomerate mergers involving the acquisition of firms which already hold leading positions in concentrated industries. The purported justification is that economic concentration, if allowed to continue in this manner, *will eventually* have a substantial anticompetitive effect; thus it should be stopped before the trend becomes irreversible. The problem with this per se rule is that it would condemn all mergers increasing economic concentration even though some of those mergers might have procompetitive effects.[116] The Supreme Court would probably not have accepted this rule had the government appealed from the district courts' decisions. Given the inclination of the Court for presumptive rules, however, it might have presumed such a

as those which tend to create a monopoly, will be unlawful if they have the specified effect *in any line of commerce* . . . ." S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

113. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

114. *See* note 3 *supra*.

115. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 555-58 (1968).

116. For a discussion, *see* Note, *Conglomerates and Section 7: Is Size Enough?*, 70 COLUM. L. REV. 337, 357 (1970).

merger to be illegal, forcing the parties to rebut the presumption with a showing of economic justification. Such an "expansion" of section 7 would give the Justice Department another weapon against the pure conglomerate without doing violence to the congressional intent. On the other hand, if the Court were not to expand its interpretation of section 7, congressional action would be required to meet the problem of the pure conglomerate. It is unfortunate the Supreme Court never had the opportunity to accept or reject this expansion of section 7, for it is unlikely new legislation attacking the problem will be forthcoming unless this expansion is rejected.

VI. CONCLUSIONS

Unless there was pertinent evidence presented at the trials which the opinions did not consider, it appears that the district courts reached the proper results based on an economic analysis and the presently acceptable interpretation of section 7. Certainly the potential for reciprocity was significantly increased by the mergers, and perhaps enough evidence was presented to prove ITT had the power to force its suppliers to purchase from its new acquisitions. That alone, however, is insufficient to halt the mergers. To complete its case, the government had to prove a probability reciprocity would result from the mergers. Thus, the most notable gap in the government's case was its failure to establish that *any form* of reciprocal dealing would occur. Whether the government's inability to illustrate a probable increase in reciprocal dealing was the result of ITT's written policy, profit center concept, failure to collect purchasing and sales data, or simply the government's poor research, the district courts were correct in their conclusions that the mergers should not be "condemned by conjecture" on the evidence presented. Similarly, the district courts were correct in rejecting the government's economic concentration argument since the Supreme Court decisions have emphasized the necessity of defining the relevant product markets to measure the anticompetitive effects of the mergers. If section 7 does not require this kind of analysis in cases involving "pure" conglomerates, the Supreme Court should make that decision. If section 7 cannot bear this interpretation, the problem may be resolved only by congressional action.

Even if the decisions were economically sound, the legal question remains unanswered: How would the Supreme Court

have decided the cases had they been appealed? The Court would probably have condemned the ITT mergers in a decision as questionable from an economic analysis as was *Consolidated Foods.* Perhaps, however, an in-depth economic analysis diminishes the effectiveness of section 7 since the government's enforcement resources are so limited and the range of factual inquiry required is so broad.[117] Further, even after all the relevant economic facts and theory have been examined, any judgment concerning the future effects of a merger must still be partly based on conjecture.[118] Since this judgment determines the legal validity of a business decision, perhaps it should not be based on a time consuming, expensive and cumbersome analysis. The Supreme Court gives credibility to this argument in *United States v. Philadelphia National Bank*[119] stating:

> [U]nless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded . . . . And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.[120]

It appears from *Consolidated Foods* the Court has done precisely that—*i.e.*, replaced a broad range of objective proof with a presumptive rule to simplify the law and to lighten its enforcement tasks.[121] Thus any merger is presumed to be in violation of section 7 if it would create a market structure conducive to reciprocity and if the potential reciprocity would enable the acquired firm to strengthen or to retain its position in an already oligopolistic market. Whether this presumption is rebuttable and, if so, how it could be adequately rebutted are difficult to determine since *Consolidated Foods* is the only reciprocity-merger case to have reached the Supreme Court.

ITT also lacked confidence in the district courts' interpretation of *Consolidated Foods* and/or section 7 since, after winning all three cases, ITT entered into three consent decrees with the Justice Department to prevent an appeal.[122] ITT was ordered to

117. 44 TEX. L. REV. 1019, 1023 (1966).
118. *Id.*
119. 374 U.S. 321 (1963).
120. *Id.* at 362.
121. Harsha, *supra* note 77. *See also* 44 TEX. L. REV. 1019, 1023 (1966).
122. United States v. ITT, 1971 Trade Cas. ¶ 73,667 (N.D. Ill. 1971) (ITT Canteen

divest itself of all its interest in the Fire Protection Division of Grinnell and all the assets of both Hajoca Corporation[123] and Canteen.[124] Further, ITT had to divest itself of the following companies: Levitt and Sons, Inc., Avis, Inc., Hamilton Life Insurance Company, and ITT Life Insurance Company of New York; or in the alternative, Hartford.[125] ITT chose to retain Hartford and sell the others. Also, ITT was enjoined for ten years from participating in any reciprocal relations involving its new acquisitions.

The settlement created much controversy because many people believed the government could have won the cases on appeal to the Supreme Court.[126] Therefore, *why* did the government settle? Normally a settlement is reached when neither party is willing to gamble on the final outcome, but a settlement in the antitrust field is a good substitute for a decision only if the same purposes are achieved. Were the same purposes achieved in the present situation? Perhaps the short-run objective was reached since ITT did have to divest itself of many of the holdings which the government believed presented problems, but the more important long-run objective was sacrificed. Stated simply, the law on conglomerate mergers is anything but clear. While commentators have criticized *Consolidated Foods* from an economic analysis, the government has attempted to expand section 7 to reach the pure conglomerate. Since an out-of-court settlement has no value as precedent, the present situation called not for a settlement for one company but for an elaboration by the Supreme Court upon the law affecting all future conglomerate mergers. For this purpose it is irrelevant whether or not the Supreme Court would have rejected the district courts' approach. Before businessmen can bring their activities within the boundaries of the law, those boundaries must be well defined. At least for the present, the consent decrees have eliminated the opportunity for clarifying the law on conglomerate mergers.

One final point should be made. When an area of the law is

Corp.); United States v. ITT, 1971 Trade Cas. ¶ 73,666 (D. Conn. 1971) (Hartford Fire); United States v. ITT, 1971 Trade Cas. ¶ 73,665 (D. Conn. 1971) (Grinnell).

123. 1971 Trade Cas. at 90,764 (Grinnell).

124. 1971 Trade Cas. at 90,775 (ITT Canteen Corp.).

125. 1971 Trade Cas. at 90,768 (Hartford Fire).

126. In March of 1972 it was disclosed that an ITT subsidiary (Sheraton Inn Corp.) had made a $400,000 contribution to the Republican Party. Lawrence O'Brien, an ex-Chairman of the Democratic Party, reiterated a claim he had made in December of 1971 that the Nixon Administration had made a deal with ITT in return for the consent decrees.

unsettled, it must be interpreted and clarified. In our federal system the task of interpretation has traditionally been that of the judiciary which, at least theoretically, is independent of those in political power. On the other hand, the members of the executive branch of the government, particularly the Justice Department, are extremely political and are subject to the whim of those who appoint them to and remove them from office. Therefore, the executive branch seems to be the wrong decisionmaker if separation of powers is to continue to exist.[127] Since an increase in economic concentration will probably lead to an increase in political power, perhaps Congress should consider the curtailment of the Justice Department's power to enter into consent decrees and thereby force such matters to be settled in the courts which are the proper arbiters of legal questions.

F. MARION HUGHES

127. A special House subcommittee has announced plans to hold further hearings concerning the ITT cases and the consent decrees. This announcement resulted from a study made by the Securities and Exchange Commission in 1972 allegedly linking President Nixon, Vice-President Agnew, former Attorney General John Mitchell, and other high administration officials with the antitrust settlement of 1971. N.Y. Times, March 29, 1973, at 1, Col. 4.