Case Notes

ANTITRUST—A CORPORATE MERGER CHALLENGED UNDER SECTION 7 OF THE CLAYTON ACT ALLOWED ON THE BASIS OF LACK OF PROBABLE FUTURE ABILITY TO COMPETE, EVEN THOUGH PAST PRODUCTION STATISTICS WOULD, IN THE ABSENCE OF OTHER CONSIDERATIONS, SUPPORT A FINDING OF UNDUE CONCENTRATION.—*United States v. General Dynamics Corp.* (U.S. Sup. Ct. 1974)

Material Service Corporation, a deep-mining coal producer, acquired control of the appellee, United Electric Coal Companies, a strip-mining coal producer, through stock purchases. Material Service Corporation was subsequently acquired by the appellee General Dynamics Corporation. The United States charged that the acquisition of United Electric by Material Service substantially lessened competition in violation of section 7 of the Clayton Act.[1] The United States District Court for the Northern District of Illinois found no violation of the Clayton Act.[2] The government appealed directly to the United States Supreme Court.[3] *Held*, affirmed, four justices dissenting. Past production statistics indicated, in the absence of other considerations, "undue concentration." However, United Electric did not have sufficient uncommitted coal reserves to be a significant competitive force in the marketplace. Thus, in terms of probable future ability to compete, rather than in terms of past production statistics, the acquisition did not substantially lessen competition. *United States v. General Dynamics Corp.*, 94 S. Ct. 1186 (1974).

I. MARKET DEFINITION—THE THRESHOLD ISSUE

Section 7 of the Clayton Act forbids those acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly," "in any line of commerce in any section of the country."[4] Thus, as a matter of logic,

> [d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition

1. 15 U.S.C. § 18 (1970). The pertinent part of the section reads as follows:
> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

2. United States v. General Dynamics Corp., 341 F. Supp. 534 (N.D. Ill. 1972).

3. 15 U.S.C. § 29 (1970). Referring to the preceding antitrust sections, the section states: "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

4. 15 U.S.C. § 18 (1970).

"within the area of effective competition". Substantiality can be determined only in terms of the market affected.

The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").[5]

A. *Product Market*

In defining the relevant product market, the Court stated:

> we are instructed on the one hand that "[f]or every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." On the other hand it is improper "to require that products be fungible to be considered in the relevant market." In defining the product market between these terminal extremes, we must recognize meaningful competition where it is found to exist. Though the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," there may be "within this broad market, well-defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes."[6] [citations omitted]

B. *Geographic Market*

An equally important problem in defining the area of effective competition is the ascertainment of the geographic market.

> The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market . . . . The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.[7]

An important indicator for determining the geographic area of effective competition is transportation costs.[8]

The importance of market definition in section 7 litigation cannot be overemphasized. It is the threshold issue. A broad or narrow determination of the relevant market may affect the ultimate outcome of the litigation.[9] The com-

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5. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962), *citing* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957).

6. United States v. Continental Can Co., 378 U.S. 441, 449 (1964), *citing*, in order of use, Times-Picayune v. United States, 345 U.S. 594, 612 n.31 (1953); United States v. duPont, 351 U.S. 377, 394 (1956); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

7. Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

8. Comment, *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627, 1633 (1959). Transportation costs were the controlling factor in the district court's geographic market determination in *General Dynamics*. United States v. General Dynamics Corp., 341 F. Supp. 534, 556-57 (N.D. Ill. 1972).

9. The interrelationship of market definition and outcome in section 7 litigation is well stated in Comment, *"Substantially to Lessen Competition . . .": Current Problems of*

plexity of the issue is attested to by the amount of judicial energy devoted to market determinations.[10]

II. The Effect on Competition

"Once the market is defined, the problem of measuring the effect of a merger on competition is confronted."[11] There are two approaches to this problem: (1) The qualitative market analysis utilized in *Brown Shoe Co. v. United States*[12]; (2) The quantitative market analysis utilized in *United States v. Philadelphia National Bank*.[13]

Horizontal Mergers, 68 Yale L.J. 1627, 1630-31 (1959):

> By restricted definition, courts may construct product ("line of commerce") and geographic ("section of the country") markets far more concentrated, and in which the merging corporations have a much larger share, than would appear if the markets were broadened to include a greater variety of products or additional regions of the country. Or, overly restrictive market definition may put the merging firms in separate markets and unjustifiably frustrate the statute. A market definition which is too broad may improperly dilute market shares and exonerate the merger or, alternatively, exaggerate the power of the merging firms by including areas and products in which they are sellers, but which are irrelevant to the competitive impact of the consolidation.

10. *See, e.g.*, United States v. General Dynamics Corp., 341 F. Supp. 534, 538-59 (N.D. Ill. 1972). Judge Robson's opinion at the trial court level in *General Dynamics* provides insight into the coal industry, and is fascinating reading, apart from its significance as a legal opinion. As a blueprint for litigation under section 7 of the Clayton Act, the opinion is also instructive. Judge Robson's topic headings in the opinion outline the *General Dynamics* litigation as follows:

I. Defendants
  - General Dynamics
  - Freeman Coal Mining Corporation (owned by Material Service)
  - The United Electric Coal Companies

II. Background of the Coal Industry
  - Changes in the Demand for Coal
  - Emergence of Utility Demand as the Principal Market for Coal
  - Changes in the Production of Coal
  - Changes in the Structure of the Coal Industry
  - The Principal Market for Coal: The Utility Industry
  - Competition for Utility Contracts

III. Interfuel Competition
  - Competition from Gas and Oil
  - Industrial Consumers
  - Utility Consumers
  - Competition from Nuclear Energy
  - Other Alternative Power Sources
  - Multi-Energy Companies
  - Air Pollution Restrictions
    - Intensify the Competition Coal Faces from Other Fuels
  - Abatement Techniques and their Effect on Coal
  - Sulphur Oxide Control Devices
  - The Adverse Effect of Air Pollution Control Devices on Coal Consumption

IV. The Relevant Product Market

V. The Relevant Geographical Market

VI. The Competitive Effect of the United Electric-Freeman Combination

11. Comment, *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 Yale L.J. 1627, 1636 (1959).

12. 370 U.S. 294 (1962).

13. 374 U.S. 321 (1963).

In 1962 in *Brown Shoe*, the merger of Brown Shoe Company and Kinney Company, who were manufacturers and retail sellers of shoes, was forbidden. The Court utilized a qualitative approach in assessing the competitive effects of the merger. This approach is illustrated by the following excerpt from the *Brown Shoe* opinion:

> [W]hile providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. . . . Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[14]

A year after *Brown Shoe* in *Philadelphia National Bank* the Court utilized a quantitative analysis, dispensing with the qualitative approach of *Brown Shoe*. *Philadelphia National Bank* involved the proposed merger of the second and third largest banks in the Philadelphia metropolitan area.[15] The consolidation was forbidden on the basis that the merger would result in a single bank controlling at least 30 percent of the commercial banking business in the relevant market, and would also result in a more than 33 percent increase in concentration in the relevant market due to an increase in the share of the largest two banks.[16] In reaching this conclusion the Court stated:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[17]

Thus, "elaborate proof of market structure, market behavior, or probable anticompetitive effects"[18] could be dispensed with and the government could

> rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."[19]

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14. Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 & n.38 (1962). *See* United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974).
15. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330 (1963).
16. *Id.* at 364-65.
17. *Id.* at 363. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1193-94 (1974). *See also* United States v. Pabst Brewing Co., 384 U.S. 546, 550-52 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); United States v. Continental Can Co., 378 U.S. 441, 458 (1964).
18. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).
19. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974), *citing*

Philadelphia National Bank retains a theoretical possibility that the defendant could rebut the government's statistical demonstration of concentration. This theoretical possibility has afforded little comfort to those opposing the government. In the words of one commentator, "the evidentiary burden laid down in *Philadelphia Nat'l Bank* does come perilously close to a per se ruling."[20]

III. What Happened in General Dynamics?

A. *The Competitive Strength of United Electric*

The district court viewed the merger of United Electric and Material Service in the context of "the 'structure, history and probable future' of the coal industry"[21] and found three significant factors. First, coal had become increasingly less able to compete with other sources of energy.[22] Second, the electric utility industry has become the mainstay of coal consumption.[23] Third, and most significant, nearly all coal sold to utilities is sold under long-term requirements contracts at a fixed rate for a fixed period of time.[24] This practice results in mutual benefit to the utilities and the suppliers by guaranteeing a supply of coal at an expected price over the life of a utility plant, and guaranteeing a source of revenue to the supplier upon which to base present operation and future expansion.[25] These three developments have limited the amounts of coal available for "spot", or small, sporadic purchases on the open market.[26] With a limited quantity of coal available for spot purchases, past statistics of the amount of coal produced become insignificant as indicators of future competitive strength.[27] It is irrelevant what a producer has sold in the past if he has nothing to sell in the future. Uncommitted supplies of coal are the basis of the ability to compete with other suppliers for sales of coal to consumers. Thus,

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United States v. Aluminum Co. of America, 377 U.S. 271, 279 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963).

20. Berghoff, *The Size Barrier in Merger Law—or Antitrust by the Numbers*, 27 Ohio St. L.J. 76, 87 (1966). Mr. Berghoff's conclusion in this article is instructive and foreshadows the holding in *General Dynamics*:

> Instead, [of a test based on size alone] the Court may continue to hold as it did in *Brown Shoe*: there is no quick and easy analysis of what complies with and what violates section 7, but rather there must be undertaken a functional, meaningful study of each merger in the context of its industry and in the full light of objective, open-minded criteria . . . .
>
> It is to be hoped that sound economic analysis will prevail over the occultism of antitrust by the numbers.

Id. at 101.

21. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974).

22. *Id.*; United States v. General Dynamics Corp., 341 F. Supp. 534, 539 (N.D. Ill. 1972).

23. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1195 (1974); United States v. General Dynamics Corp., 341 F. Supp. 534, 541 (N.D. Ill. 1972).

24. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1195 (1974); United States v. General Dynamics Corp., 341 F. Supp. 534, 543 (N.D. Ill. 1972).

25. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1195 (1974); United States v. General Dynamics Corp., 341 F. Supp. 534, 543 (N.D. Ill. 1972).

26. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1195 (1974); United States v. General Dynamics Corp., 341 F. Supp. 534, 543 (N.D. Ill. 1972).

27. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1195-96 (1974). The government relied on past production statistics and attempted to discredit the use of post-acquisition evidence by the trial court. They were unsuccessful. *Id.* at 1195, 1197.

kets.[45] On the other hand, Justice Douglas in his dissenting opinion followed the traditional market definition approach.[46] Certainly his approach is a logical one in defense of his point of view concerning the merits of the case. However, even if the majority accepted Justice Douglas' argument approving of the government's market definitions, the majority would still have affirmed the district court opinion.[47] There was simply no market in which competition would have been substantially lessened by the merger. This break from traditional analysis is one of the unique factors of the holding in *General Dynamics.* If nothing else, this highlights an admirable flexibility of the majority of the Court toward decision-making under section 7 of the Clayton Act. This is not to say that market definition analysis has been abrogated by the Court. On the contrary, the analysis was merely found to be unnecessary in *General Dynamics* and it will continue to be an integral part of section 7 litigation.

B. *The Revitalization of Brown Shoe*

Brown Shoe is representative of a wholistic, qualitative approach to litigation under section 7 of the Clayton Act.[48] The Court in *General Dynamics* revitalized *Brown Shoe*[49] and refused to use the more simplistic quantitative analysis utilized in *Philadelphia National Bank.*[50] However, this refusal cannot be construed as a total rejection of *Philadelphia National Bank.* Its utility has merely been diminished. Statistical market analysis will continue to be important. This is expressly stated in the *General Dynamics* opinion where it is said that statistics concerning market share and concentration are of "great significance" and still to be considered "the primary index of market power."[51] On the other hand, the statistics are not conclusive.[52] The market is to be further analyzed in terms of "its structure, history and probable future," to determine the probable anticompetitive effects of the merger.[53]

The revitalization of the qualitative approach will not be an automatic boon to defense counsel in section 7 litigation. The burden of proof remains a heavy one because of the continuing importance of market statistics. In addition, the question remains and is at this point unresolvable, of when and how

45. *See* notes 32-36 *supra* and accompanying text.
46. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1201 (1974) (Douglas, J., dissenting).
47. Indeed, the majority opinion leaves the distinct impression that at least some of the majority accepted the government's market definitions. The government's market share and concentration statistics were analyzed in the opinion and were criticized only because they presented a simplistic view of the effects of the merger. In addition, the restraint demonstrated by the Court would seem to be uncharacteristic if, in fact, all of the majority had agreed that the district court, and not the government, had properly characterized the product and geographic markets.
48. *See* note 14 *supra* and accompanying text.
49. *See* notes 38-44 *supra* and accompanying text.
50. See notes 15-20 *supra* and accompanying text.
51. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974), *citing* Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962).
52. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974).
53. *Id.* To put to rest any notion that *Brown Shoe* is considered by all commentators to be based upon sound principles, see Bork & Bowman, *The Crisis in Antitrust,* 65 COLUM. L. REV. 363, 370-73 (1965).

Philadelphia National Bank will be used. At what level of market share and concentration will a merger be forbidden? Prior rulings utilizing the quantitative approach will be helpful in this regard,[54] "in the absence of other considerations."[55] It is the willingness of the Court to examine these "other considerations" that gives *General Dynamics* significance, and the value of such an examination is made obvious by the holding in *General Dynamics*: viewing the merger in the limited sense by using only statistics of market share and concentration, General Dynamics had violated section 7;[56] viewing the merger as a whole, and qualitatively analyzing its effect on competition, the merger was allowed.[57]

C. *Deference to the Trial Court*

Of particular significance in the Supreme Court opinion in *General Dynamics* is the deference shown by the Court to the findings of the district court. The findings and conclusions of the district court were considered in light of the "clearly erroneous" standard of *Federal Rule of Civil Procedure* 52(a).[58] This is not a startling revelation in itself, but in the opinion of some critics "the Warren Court did not always pay a great deal of attention to the trial judge's findings, preferring instead to hear what the Justice Department had to say about the case."[59] This criticism would appear to be of at least arguable validity with respect to Justice Douglas' dissent in *General Dynamics*. Justice Douglas seems to be unwilling to grant a single concession to the district court. He concludes his dissent as follows: "Thus, from product and geographic markets to market share and industry concentration analysis to the failing company defense, the findings below are based on legal standards which are either incorrect or not disclosed."[60] Justice Douglas' forceful and tenacious argument

54. *See* notes 39, 44 *supra*.
55. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974).
56. *Id.* at 1193-94.
57. In theory, the more information that is processed through a decision-making system, the more accurate the assessment of the situation will be, and thus, the chances of a "right" decision are correspondingly greater. This is only true up to a point, at which point diminishing returns become significant, and the information entering the system amounts to mere "noise". This problem is particularly acute in litigation as complex as antitrust where the economic ramifications of a merger may be virtually impossible to pinpoint with any degree of accuracy, and in any case, may be incomprehensible to the judge acting as an economist. In fact, one possible explanation for the limited *Philadelphia National Bank* analysis may be a judicial timidity to venture into uncertain areas of human knowledge and judicial competence. However, to recognize that this is a problem is far from conceding that analysis should end with a statistical showing of market share and concentration. It is submitted that this limited type of analysis is well below the "noise" level, and that the more extensive analysis utilized in *General Dynamics* leads to a better chance of an accurate and fair assessment of the competitive effects of a merger (a "right" decision). If for no other reason than its simplicity, however, the statistical approach will continue to be an important factor in any section 7 litigation. *Cf.* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 347-49 (1960).
58. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1199 (1974). *Federal Rule of Civil Procedure* 52(a) reads in pertinent part as follows: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
59. Green, *Tipping the Scales*, Wall Street Journal, May 21, 1974, at 18, col. 2.
60. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1207-08 (1974) (Douglas, J., dissenting).

throughout the dissenting opinion could mean nothing more than that he merely disagrees with the majority. It is submitted, however, that his dissent implies a decidedly different conception of the "clearly erroneous" standard than the majority entertains.[61]

The traditional deferential application of the "clearly erroneous" rule in *General Dynamics* may reflect a shift in attitude toward actions brought under section 7 of the Clayton Act. Besides being indicative of a possible shift in attitude, the deference to the trial court is important for another very practical reason. The pattern of litigation under section 7 in the past has been "approval by the lower court, reversal on appeal."[62] Justice Douglas refers to this pattern as "a deep-seated judicial bias against § 7 of the Clayton Act."[63] With the trial court decisions on the whole in favor of the defendant, any deference to the trial court on appeal would also appear to be in the defendant's favor.

D. *The Role of the "Failing Company" Defense*

A common point of disagreement between the majority and the dissent in *General Dynamics* is the role of the "failing company" defense in the action.[64] This defense involves those situations where "consolidation is a firm's only means of survival."[65]

> A company invoking the defense has the burden of showing that its "resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure . . ." and further that it tried and failed to merge with a company other than the acquiring one.[66] [citations omitted]

The question in *General Dynamics* is not how the defense applies, but if the defense is applicable to the facts at all. If "reliance on depleted and committed resources"[67] is a "failing company" defense, there would be little problem in finding that the defendant, General Dynamics, had failed to meet its criteria.[68]

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61. One prior case in which the lack of deference to the trial court is particularly evident is *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) where the testimony of competitors of the merging banks was dismissed as being "lay evidence," reliance on which by the district court was "misplaced". *Id.* at 367.

62. Berghoff, *The Size Barrier in Merger Law—or Antitrust by the Numbers*, 27 OHIO ST. L.J. 76, 92 (1966).

63. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1208 (1974) (Douglas, J., dissenting).

64. *Id.* at 1198 (majority opinion), 1206 (dissenting opinion).

65. Comment, *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627, 1662 (1959).

66. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1198 (1974), *citing*, in order of use, International Shoe Co. v. FTC, 280 U.S. 291, 302 (1930); Citizen Publishing Co. v. United States, 394 U.S. 131, 138 (1969); United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971).

67. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1198 (1974).

68. United Electric was a "healthy and thriving company" and Material Service was not the only available purchaser. Thus, the two major elements of the defense had not been met: (1) "grave possibility of business failure" and (2) that "it had tried and failed to merge with a company other than the acquiring one." *Id.*

The majority concludes that the finding of inadequate reserves is inapposite to the "failing company" defense.[69] They would appear to have the better of the argument. The failing company is very different from the company who lacks a probable future ability to compete. By definition, a failing company has a viability close to zero at the time of acquisition.[70] Unless purchased for charitable reasons, the failing company is considered by the acquiring company to be capable of revitalization.[71] Thus, in terms of future ability to compete, the failing company would be a competitive force in the market. However, "the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business."[72]

On the other hand, a company in United Electric's position (a "healthy and thriving company")[73] has a high viability in terms of profitability at the time of acquisition, but a future ability to compete that is close to zero due to a lack of uncommitted resources. Thus, while the "failing company" defense may be seen as an exception to section 7 made for policy reasons,[74] the company without the future ability to compete comes within the express statutory language and does not "substantially lessen competition."[75]

E. *Future Ability to Compete*

An interesting question raised by *General Dynamics* is how close to a zero future ability to compete must a company be to allow its acquisition? It is clear from the case that there need not be a total lack of competitive future. United Electric did have four million tons of uncommitted reserves.[76] What if it had twice that figure? At some point, the quantity of uncommitted reserves would make the acquired company a significant competitive force. As the quantity of reserves approaches this significance level, the lack of reserves becomes less in the nature of an absolute defense (total inability to compete) and more in the nature of a mitigating factor that indicates an impaired ability to compete. In cases of extreme concentration, mere mitigation may not be enough to uphold a merger. In any event, "[t]he adequacy of crucial resources is one of the factors which should be considered in assessing the likely competitive effect of a merger."[77]

While to some extent, every antitrust case is *sui generis*,[78] perhaps the

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69. *Id.* at 1199.
70. Zero viability would, of course, be the failed or nonexistent company.
71. The uncertainty of revitalization would appear to be very high if only one company is interested in the acquisition.
72. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1199 (1974).
73. *Id.* at 1198.
74. *See generally* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 339-40 (1960).
75. 15 U.S.C. § 18 (1970).
76. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1196 (1974).
77. United States v. General Dynamics Corp., 341 F. Supp. 534, 559 (N.D. Ill. 1972), *citing* Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962).
78. United States v. General Dynamics Corp., 258 F. Supp. 36, 65 (S.D.N.Y. 1966). This case is unrelated, except by name, to the case that is the subject of this note.

unique fact situation in *General Dynamics* carries within it more than the usual limitations on generalization. A narrow reading of the case by the Supreme Court could make it virtually worthless as authority. However, the case does not demand a narrow reading. The lack of uncommitted coal reserves was an indicator of the probable future ability to compete,[79] and the probable future ability to compete is the generic criterion upon which the case rests. There is no reason in logic why the criterion of future ability to compete would not be applicable to all forms of enterprise. It goes hand in hand with the wholistic assessment of a merger that has been revitalized in *General Dynamics*.[80] The entire majority opinion in *General Dynamics* is couched in terms of the effect on competition,[81] and the future ability to compete is one method for assessing the effect on competition due to a particular merger.

Perhaps the concern of antitrust law with the anticompetitive effects of mergers was best stated in *Brown Shoe*: "Taken as a whole, the legislative history [of section 7 of the Clayton Act] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations tend to lessen competition."[82] Thus, the law is concerned with the ultimate effect on competition, not with the underlying reasons which impede a company from competing effectively in the future. The holding in *General Dynamics* is a tool to be used whenever, and for whatever reason, a merging corporation's probable future ability to compete has been impaired.

F. *The Government Does Not Always Win*

The significance of *General Dynamics* may ultimately be that it rebuts the criticism voiced by Justice Stewart in his dissenting opinion in *United States v. Von's Grocery Co.*[83] The "sole consistency" that Justice Stewart could find in litigation under section 7 of the Clayton Act was that "the Government always wins."[84] The dissenter of 1966 wrote the majority opinion in *General Dynamics*.[85]

Does *General Dynamics* represent the formation of a majority that will take a more conservative stance concerning antitrust?[86] The implications in

79. United States v. General Dynamics Corp., 94 S. Ct. 1186, 1196 (1974).

80. *See* notes 38-44 & 48-57 *supra* and accompanying text.

81. The Court stated the question in the case as "whether the District Court was justified in finding that other pertinent factors [in addition to statistics of market share and concentration] affecting the coal industry and the business of the respondents mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition." United States v. General Dynamics Corp., 94 S. Ct. 1186, 1194 (1974).

82. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

83. 384 U.S. 270, 281 (1966) (Stewart, J., dissenting).

84. *Id.* at 301.

85. In 1966 the Court was comprised of Chief Justice Warren and Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Fortas. At the time of the *General Dynamics* decision, the Court was comprised of Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell and Rehnquist. Thus, five new members have joined the Court since 1966.

86. The majority was comprised of Chief Justice Burger and Justices Stewart, Blackmun, Powell and Rehnquist. Thus, four of the Court's five new members added since 1966 joined in the majority opinion.

the holding of the case are broad enough to allow the individual members of the Court a great deal of flexibility, and it will take several cases to determine the course the Court will take.[87]

V. Conclusion

The broad implications of *General Dynamics* and the possibility of a more receptive Court provide no less of a challenge to defendants. Caution is still the order of the day for acquiring companies and their lawyers. However, the Justice Department may well look back on the pre-*General Dynamics* period as the "good old days." Litigation at the Supreme Court level under section 7 of the Clayton Act is now more in the nature of an even contest. It has lost its disconcerting predictability.

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87. Two recent decisions of the Supreme Court serve to emphasize the point stressed in this note that there appears to have been a shift in the attitude of the Court toward litigation under section 7 of the Clayton Act. *See* United States v. Marine Bancorporation, Inc., 94 S. Ct. 2856 (1974) (five to three decision, with the *General Dynamics* majority, *supra* note 86, holding against the government on the basis of failure to sustain the burden of proof required by the potential competition doctrine.); United States v. Connecticut Nat'l Bank, 94 S. Ct. 2788 (1974) (United States v. Marine Bancorporation, Inc., *supra*, followed.). It is noteworthy that *United States v. Marine Bancorporation, Inc.*, *supra* at 2875, cited *General Dynamics* for the proposition that concentration ratios can be unreliable indicators of actual market behavior.

ARBITRATION AND CIVIL RIGHTS—EMPLOYEE'S STATUTORY RIGHT TO A TRIAL DE NOVO UNDER EQUAL EMPLOYMENT PROVISIONS OF CIVIL RIGHTS ACT OF 1964 IS NOT FORECLOSED BY PRIOR SUBMISSION OF THE CLAIM TO FINAL ARBITRATION.—*Alexander v. Gardner-Denver Co.* (U.S. Sup. Ct. 1974).

Harrell Alexander was discharged from his job as a drill press operator with defendant on September 29, 1969, allegedly for producing too many defective or unusable parts. Following his discharge, on October 1, 1969, he filed a grievance[1] under the collective-bargaining agreement[2] in force between the Gardner-Denver Co.[3] and petitioner's union.[4] The agreement contained a broad arbitration clause covering differences arising between the Company and the Union as to the meaning and application of the provisions of the collective-bargaining agreement, and any trouble arising in the plant.[5] Disputes were to be submitted to a multi-step grievance procedure,[6] the first four steps of which involved negotiations between the Company and the Union, with the final step being arbitration. In the final pre-arbitration step Alexander raised for the first time the claim that his discharge resulted from racial discrimination.[7] The Company rejected all of petitioner's claims and the grievance proceeded to arbitration. On December 30, 1969, the arbitrator ruled that petitioner had been discharged for just cause, making no reference to petitioner's claim of racial discrimination.[8] On July 25, 1970, the Equal Employment Opportunity

1. Giving some credence to his allegation of unjust discharge was testimony by a Union official that others in the same plant had produced as many defective or unusable parts and as much wasted material without subsequent discharge. Also supporting Alexander's allegation was Union testimony that the Company's usual practice was to transfer an unsatisfactory trainee drill operator back to his former position rather than discharge him.

2. Article 4 of the agreement, a standard management rights clause, provides in relevant part: "The Union recognizes that all rights to hire, suspend, or discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, and the right to maintain order and efficiency are vested exclusively in the Company."

3. The Gardner-Denver Company will hereinafter be referred to as the Company.

4. Local No. 3029 of the United Steelworkers of America (hereinafter the Union).

5. Article 23, containing the grievance-arbitration procedures of the agreement provided in part: "Section 5. Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly."

6. Section 5 of Article 23, also containing the grievance-arbitration procedures, provides essentially that: Grievances had to be presented within 5 working days after the date of the occurrence or be considered waived. Grievances were to be presented to the employee's Foreman, the Superintendent, the Manager of manufacturing and the Personnel Manager respectively. If no settlement was reached within the first four steps the grievance could go to arbitration.

7. Article 5, Section 2 of the agreement provided that "the Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment."

8. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012, 1014 (D. Colo. 1971). The arbitrator made written findings and concluded "that the grievant was discharged for just cause. Consequently the grievance is denied."