

STUDENT COMMENTS

HORIZONTAL MERGERS AND THE RESOURCE RESERVES DEPLETION DEFENSE—UNITED STATES v. GENERAL DYNAMICS CORP.

I. INTRODUCTION

In 1954, Material Service Corporation, a deep mining coal producer, began acquiring the stock of the United Electric Coal Companies, a strip mining coal producer.¹ Shortly after attaining effective control of United Electric in 1959,² Material Service was itself acquired by appellee General Dynamics Corporation, a large conglomerate seeking to diversify its operations along non-defense lines.³ In 1966 United Electric became a wholly owned subsidiary of General Dynamics and the conglomerate thereby became the nation's fifth largest coal producer.⁴

It was horizontal corporate growth⁵ of this nature, by competitor acquisition rather than internal expansion or new entry,⁶ which the Supreme Court, in a number of decisions during the 1960's, determined to be all but contrary to the general policy underlying section 7 of the Clayton Act⁷ of preserving fragmented industries.⁸ Now, twelve years after the seminal *Brown Shoe Co. v. United States*⁹ decision, during which period of time the Court moved perilously close to a per se rule of illegality for horizontal mergers,¹⁰ the majority opinion in *United States v. General*

¹ *United States v. General Dynamics Corp.*, 415 U.S. 486, 488-89 (1974).

² *Id.* at 489. Material Service then owned 34% of United Electric's outstanding shares.
Id.

³ *Id.*

⁴ *Id.* at 489-90.

⁵ A merger is "horizontal" if it brings together enterprises at the same level of operation.
L. Schwartz, *Free Enterprise and Economic Organization* 130 (4th ed. 1972).

⁶ It would seem that new entry into an industry or market, not accompanied by a plan of monopolization, comports with the congressional objective of promoting competition, by providing more competitors. Internal expansion, absent monopolistic practices, provides a stronger competitor and may raise the general level of competition in an industry or market. Growth by acquisition, on the other hand, if unaccompanied by entry of other firms, will simply lead to an increase in economic concentration in the industry or market, with a smaller number of firms controlling a larger proportion of the economic activity.

Markets may also be foreclosed by other means, such as requirements contracts; but "integration by merger is more suspect than integration by contract, because of the greater permanence of the former." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 366 (1963).

⁷ 15 U.S.C. § 18 (1970). See note 39 *infra*. Not all such acquisitions violate § 7. See note 14 *infra*.

⁸ See note 18 *infra*.

⁹ 370 U.S. 294 (1962).

¹⁰ See text at notes 25-38, 68-74 *infra*.

*Dynamics*¹¹ indicates a reaffirmation of the essentially qualitative approach to section 7 litigation set forth in *Brown Shoe*.¹²

II. SECTION 7 MERGER ANALYSIS

The Clayton Act is intended to prevent the growth and domination of "trusts, conspiracies, and monopolies in their incipency and before consummation."¹³ In the context of growth by merger and acquisition, this means that if the resulting firm presents a probability of anticompetitive effect, the merger will be prohibited.¹⁴ The probability of such an effect is to be determined as of the time of the merger;¹⁵ however, the requisite probability need not immediately appear, and the Government may bring suit at any later date that an anticompetitive effect becomes a substantial threat.¹⁶

A major amendment of section 7 in 1950 clarified Congress' desire that the validity of corporate acquisitions be evaluated not merely as to competition foreclosed between the merging firms, but also as to "their effect on competition generally in an economically significant market."¹⁷ Thus, the general aim of section 7 is to protect competition, not competitors.¹⁸

Probable anticompetitive effect must be found to exist within a "line of commerce" and a "section of the country."¹⁹ The goal served

¹¹ 415 U.S. 486 (1974).

¹² 370 U.S. at 321-22. The Court in *General Dynamics* rejected, for the first time under the amended § 7, concentration statistics in deference to "other considerations" peculiar to the coal industry. 415 U.S. at 497-98. It may be noted that the Government did not lose a Clayton Act § 7 suit in the Supreme Court during the tenure of Chief Justice Warren (1953-69). *Providence Sunday Journal*, Jan. 12, 1975, at F-10, col. 3.

¹³ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), quoting S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914) (emphasis deleted).

¹⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). "Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities." *Id.* At the same time, Congress intended to proscribe mergers only to the extent that they may tend to lessen competition. *Id.* at 320. Some mergers might be demonstrably procompetitive rather than anticompetitive, *id.* at 319, or their anticompetitive effects might be de minimis. *Id.* at 329. Acquisition of a failing company may be in the public interest when viewed against the certain economic dislocation engendered by its separate demise. 415 U.S. at 507.

¹⁵ Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), is directed at acquisitions, not the subsequent use of power so obtained. L. Schwartz, *Free Enterprise and Economic Organization* 183 (4th ed. 1972).

¹⁶ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957). "Incipency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect." *Id.*

¹⁷ *Brown Shoe*, 370 U.S. at 335.

¹⁸ *Id.* at 320. At the same time, Congress felt that this goal was best served, even though at occasionally higher costs and prices, by fragmented industries and markets. *Id.* at 344.

¹⁹ 15 U.S.C. § 18 (1970); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974); *du Pont*, 353 U.S. at 593. Determination of a section of the country, or geographic market, is necessary for traditional § 7 analysis. 15 U.S.C. § 18 (1970); *Brown Shoe*, 370 U.S. at 324. Geographic submarkets may be appropriate. *Id.* at 336. The Government need establish only one such relevant market to satisfy the requirements of § 7. See *Marine Bancorporation*, 418 U.S. at 621 n.20. The Government need not prove this market by "metes

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by defining the relevant market is the recognition of effective, realistic "competition where, in fact, competition exists."²⁰ The line of commerce, or product market, is determined initially by the reasonable interchangeability of use between the products of the firms under consideration and proposed substitutes for them.²¹ Within this broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."²² Furthermore, "[c]ompetition is not just rivalry among sellers. It is rivalry for the custom of buyers. . . . Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."²³ The definition of a product market is essentially a question of fact.²⁴

The anticompetitive effect of a merger is to be determined through an analysis of the acquisition in the economic context of the particular relevant market.²⁵ Ordinarily, this would require a complicated and time consuming industry study as a prerequisite to an informed prediction of the likelihood of future, substantial lessening of competition.²⁶ Statistical market share information, however,

and bounds." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). The issue is not where the merging parties do business or compete, but "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). "The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of § 7." *Brown Shoe*, 370 U.S. at 337. See note 45 *infra*.

²⁰ *Brown Shoe*, 370 U.S. at 326.

²¹ *Id.* at 325. This is essentially the "cellophane" test under the Sherman Act § 2, 15 U.S.C. § 2 (1970), developed in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

²² *Brown Shoe*, 370 U.S. at 325, citing *du Pont*, 353 U.S. at 593-95. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325.

²³ *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958). Consumer practices may in fact lead to a product market which cuts across industry lines. *United States v. Continental Can Co.*, 378 U.S. 441, 457 (1964). Products need not be fungible to be considered within the same relevant market. *Id.* at 449.

²⁴ *Cass Student Advertising Inc. v. National Educ. Advertising Servs., Inc.*, 374 F. Supp. 796, 800 & n.6 (N.D. Ill. 1974). But cf. L. Schwartz, *Free Enterprise and Economic Organization* 101 (4th ed. 1972). That it is a question of fact is important. "The findings and conclusions of the District Court are . . . governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to [the Supreme Court] as when a civil case is being reviewed by a court of appeals." 415 U.S. at 508. The Court in *General Dynamics* specifically declined to reach the issue of product market definition, *id.* at 510, but one may infer that, as a fact question, the definition of product market would also be subject to Fed. R. Civ. P. 52(a). Thus, since the analysis of substantial anticompetitive effect is dependent upon the size and characteristics of a relevant market, the Government's success in merger suits could become highly contingent upon the fact finding of the district court in the first instance. Most significantly, the application of Rule 52(a) to the issue of relevant product market could lead to seemingly inconsistent results in seemingly similar situations. *Cass*, 374 F. Supp. at 802. See text at notes 110-14, 147-48 *infra*.

²⁵ *Brown Shoe*, 370 U.S. at 321-22, 328-29.

²⁶ *Id.* at 329.

"provide[s] a graphic picture of the immediate impact of a merger,"²⁷ and, in *United States v. Philadelphia National Bank*,²⁸ the Court decided that in certain cases the elaborate proof of market structure, market behavior, and probable anticompetitive effect would be unnecessary.²⁹ Instead, a strong presumption of illegality was said to arise whenever the resulting market share of the merged firms is high and contributes to a significant rise in the economic concentration in that market.³⁰ The Court recently explained in *General Dynamics*:

The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to 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."³¹

*United States v. Von's Grocery Co.*³² presented the exact threat of concentration that Congress wished to halt.³³ An observable decline in the number of single groceries, coupled with an increase in the number of chain store operations in the Los Angeles food retailing market (much of that growth credited to acquisitions of smaller competitors by larger companies), led the Court to invalidate the merger of two aggressive competitors based on market share projections and trends.³⁴

Similarly, in *United States v. Continental Can Co.*³⁵ a merger between the second and sixth largest producers in the combined metal and glass container market, resulting in a twenty-five percent market share for the acquiring firm in an already concentrated

²⁷ Id. at 343 n.70.

²⁸ 374 U.S. 321 (1963).

²⁹ Id. at 362-63.

³⁰ Id. at 363. The Court declined to decide the smallest market share which would be so inherently suspect, but found the 30% share of the merged commercial banks, and the combined share of 59% for the top two banks in the relevant market, to be a clear anticompetitive threat. Id. at 364-65. It should be noted, however, that the Court indicated that this numerical test did not invalidate the earlier statement in *Brown Shoe* that between the extremes, where foreclosure is neither of monopoly nor de minimis proportions, market shares are not decisive. See id. at 362-63; *Brown Shoe*, 370 U.S. at 329.

³¹ 415 U.S. at 497.

³² 384 U.S. 270 (1966).

³³ Id. at 277. In 1958 Von's ranked third in the Los Angeles retail food market and Shopping Bag, the chain acquired by Von's in 1960, ranked sixth, in terms of net sales. In 1960, their combined sales were 7.5% of the total market. Id. at 272. The top four had 24.4% of sales; the top eight, 40.9%; and the top twelve, 48.8%. Id. at 281. The increase in concentration in the market as a result of the merger attributable to the top four was 18%; the top eight, 7.6%; and the top twelve, 2.5%. 415 U.S. at 495 n.7.

³⁴ 384 U.S. at 272-73, 278.

³⁵ 378 U.S. 441 (1964).

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market, was held to be illegal.³⁶ In *United States v. Aluminum Co. of America*,³⁷ the acquisition of Rome Cable Corporation, producers of only 1.3 percent of the total bare and insulated aluminum electrical power cable in the industry, by Alcoa, who held 27.8 percent of the same market, was declared inherently anticompetitive in view of the small but certain increase in concentration expected from the merger.³⁸

III. General Dynamics

In reliance upon the Court's past sensitivity to even minor increases in concentration, the Justice Department brought suit against successor General Dynamics alleging that the acquisition of United Electric by Material Service in 1959 had presented a substantial likelihood of anticompetitive effect in the production and sale of coal in either or both of two midwestern markets, in violation of section 7 of the Clayton Act.³⁹

The district court⁴⁰ rejected the Government's claims. Analyzing the historical changes in the demand for coal⁴¹ and the corresponding changes in the coal industry which reflected the "long term" orientation of the electric utility market, coal's mainstay among modern consumers,⁴² the court found the evolution to fewer and larger coal companies "inevitable."⁴³ It then defined the relevant product market for section 7 purposes as "energy" in general, finding significant competition from other fuels such as oil, natural gas and uranium.⁴⁴ The court specifically rejected coal as a distinct submarket within which to analyze the anticompetitive effects of the merger.⁴⁵

³⁶ Id. at 459-61.

³⁷ 377 U.S. 271 (1964).

³⁸ Id. at 278, 280. The top two firms in the market already held 50% of the business; the top five, 76%. Id. at 278.

³⁹ Id. at 490. Clayton Act § 7, 15 U.S.C. § 18 (1970), provides in pertinent part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . 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. . . .

⁴⁰ *United States v. General Dynamics Corp.*, 341 F. Supp. 534 (N.D. Ill. 1972).

⁴¹ Id. at 538-39, 545. Prominent among the changes were the dieselization of the railroads and increasing competition from other fuels in the home heating market. Id. at 545. Air pollution restrictions have had and will likely continue to have a great effect on coal usage in the future. Id. at 553-54. Counterbalancing that effect will undoubtedly be shifting relative costs among the competing fuels. See id. at 540, 544.

⁴² Id. at 539, 543.

⁴³ Id. at 543-44.

⁴⁴ Id. at 555-56.

⁴⁵ Id. at 555. See text at notes 110-14 *infra*. The Government had offered as the relevant geographic market the state of Illinois, and in the alternative, a wider, industry recognized sales region known as the Eastern Interior Coal Province. 341 F. Supp. at 556. The district court, however, preferred greater refinement in delineating the effective area of competition

The Government sought to prove the probable anticompetitive effect of the merger by utilizing a statistical market share/market concentration analysis.⁴⁶ However, the district court rejected the detailed showing, deeming it wholly inapposite to the competitive realities of coal as an extractive industry doing business primarily through long term requirements contracts.⁴⁷

On direct appeal,⁴⁸ the Supreme Court concluded that the Government's statistical proof failed to establish a likely anticompetitive effect from the acquisition in *any* market, in view of other pertinent considerations affecting the coal industry and United Electric.⁴⁹ The Court held that in an extractive industry, a merger among competitors where the acquired firm lacks sufficient resource reserves to compete effectively in the future, does not present a probable anticompetitive effect and therefore does not violate section 7.

Agreeing that competition among energy producers supplying the electric utility market is primarily for requirements contracts,⁵⁰ the Court concluded, as had the district court,⁵¹ that a coal producer must have adequate resource reserves to ensure its future ability to perform and thereby maintain its competitive position.⁵² United Electric's coal reserves prospects for the future were found to be "unpromising,"⁵³ and therefore the firm could not be considered a competitive force.⁵⁴ Since United Electric could not contribute meaningfully to competition standing alone, the merger with Material Service was deemed to not affect competition adversely, and accordingly there was no violation of section 7.⁵⁵

The Supreme Court adopted the district court's "reserves analysis"⁵⁶ without reaching the issue of whether the district court had properly defined the relevant market.⁵⁷ Indeed, the Court

and defined the geographic market in terms of ICC freight rate districts. *Id.* at 556-57. See note 19 *supra*.

⁴⁶ 341 F. Supp. at 558, 560. See 415 U.S. at 494-96 (tables). Past decisions had found § 7 violations based on aggregate statistics comparable to those utilized in *General Dynamics*. See cases cited at *General Dynamics*, 415 U.S. at 494 n.6, 496. See text at notes 27-38 *supra*. "It is not the absolute size of a business unit that is significant, but its size in relation to the size of the market in which it operates." C. Wilcox, *Public Policies Toward Business* 89 (3d ed. 1966). But see text at notes 68-74 *infra*.

⁴⁷ 341 F. Supp. at 541, 543-44, 560.

⁴⁸ The appeal to the Supreme Court was pursuant to the Expediting Act, 15 U.S.C. § 29 (1970). 415 U.S. at 488.

⁴⁹ 415 U.S. at 510-11.

⁵⁰ *Id.* at 501.

⁵¹ 341 F. Supp. at 559.

⁵² 415 U.S. at 502.

⁵³ *Id.*, quoting 341 F. Supp. at 559. All but 7.7% of United Electric's 52 million tons of economically mineable reserves were under contract at the time of the trial. 341 F. Supp. at 538.

⁵⁴ 415 U.S. at 503-04, 509-10.

⁵⁵ *Id.* at 503-04, 510.

⁵⁶ *Id.* at 498, 506-08.

⁵⁷ *Id.* at 511.

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deemed the lower court's attempt at such definition "superfluous,"⁵⁸ because, irrespective of the markets within which Material Service and United Electric might be found to compete, the Government's statistical showing did not establish a probability of substantial anticompetitive effect.⁵⁹

In a vigorous dissent, Justice Douglas argued that the district court had in fact applied the "failing company doctrine"⁶⁰ to the 1959 merger without requiring the defendant to meet that defense's traditionally narrow requirements.⁶¹ In addition, he indicated that the lower court failed to make any findings as of the time of the merger, and thus had relied solely on post acquisition evidence.⁶² Justice Douglas noted certain relevant factors, not considered in the court below, with respect to United Electric's future potential, which would have diminished the conclusiveness ascribed to the firm's presently unpromising reserves position.⁶³ Finally, he criticized the majority's failure to determine the proper relevant market, "a necessary predicate to a finding of a violation of the Clayton Act"⁶⁴ Noting that inter-industry competition did not preclude the finding of a relevant single industry submarket,⁶⁵ Justice Douglas found coal to have price advantages and operational disadvantages so unique as to warrant recognition as a separate submarket for section 7 purposes.⁶⁶

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ See text at notes 87-98 *infra*. This had been the Government's position. 415 U.S. at 506.

⁶¹ Id. at 523 (Douglas, J., dissenting).

⁶² Id. at 523-24 (Douglas, J., dissenting). "The value of post-merger evidence seems more than offset by the difficulties encountered in obtaining it." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 593 (1967) (Harlan, J., concurring). Even extensive post acquisition evidence will not conclusively negate the possibility of anticompetitive effects. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965).

⁶³ 415 U.S. at 524-25 (Douglas, J., dissenting). The firm still owned deep shaft reserves and, at any time after 1959, might have reacquired its then recent deep mining expertise; or changing economies and technology might have rendered the reserves it owned or could acquire economically mineable. Id.

⁶⁴ Id. at 513 (Douglas, J., dissenting), quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

⁶⁵ 415 U.S. at 514-15 (Douglas, J., dissenting), citing *United States v. Aluminum Co. of America*, 377 U.S. 271, 275 (1964), and *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

⁶⁶ 415 U.S. at 515 (Douglas, J., dissenting). Coal burning facilities are specialized and not readily adaptable to other fuels, and therefore there is little interfuel price sensitivity. Id. at 517. The district court had based its finding of significant interfuel competition on the design and conversion stages of electric generating facilities, at which point all fuels are technically available. See 341 F. Supp. at 545-50. Justice Douglas' point relates to the operational stages, where a fuel type has been locked in. See 415 U.S. at 517. The lower court appeared to acknowledge that competition at least among coal suppliers for a given customer terminates when design decisions have been made and a requirements contract has been negotiated. See 341 F. Supp. at 542, 543. Logically, interfuel competition ends at that point as well, barring multi-fuel capability, until subsequent conversion. Accepting present technological limitations, see *In re Kennecott Copper Corp.*, 98 F.T.C. 744, 915 (1971), *aff'd sub nom.*

This comment has briefly examined the case law of horizontal mergers under section 7 of the Clayton Act. It will now attempt to place *General Dynamics* in perspective under that law, with respect to (1) the depleted resource reserves analysis as an approach to determining the probability of anticompetitive effect; and (2) the district court's "energy" market definition and the Supreme Court's subsequent characterization of any market definition as "superfluous" under the reserves analysis.⁶⁷

IV. THE BREAKTHROUGH

The *Von's—Continental Can—Alcoa* line of decisions, stressing "bigness" to the possible exclusion of other considerations, drew strong criticism. Justice Stewart, dissenting in *Von's*, asserted that the Court's startling "per se" approach failed to appraise the merger within the realities of the contemporary retail food industry in highly urbanized Los Angeles.⁶⁸ Citing *Brown Shoe Co. v. United States*,⁶⁹ he reasserted the necessity of a proper industry and market study,⁷⁰ except in the "specialized situation" represented by *Philadelphia National Bank*.⁷¹ He further declared that the majority had failed to demonstrate any connection between an increase in market share and an increase in market power.⁷² Rather, Stewart suggested, the concentration in *Von's* was a natural result of market evolution.⁷³ The feeling spread among certain Justices that the quantitative emphasis was even distorting the majority's perceptions of relevant markets.⁷⁴

Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974), the design and conversion stages are the more appropriate points to observe. See text at notes 115-21 *infra*.

⁶⁷ 415 U.S. at 410-11. The geographic market definition is beyond the scope of this comment.

⁶⁸ 384 U.S. at 282-83 (Stewart, J., dissenting). "Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution." *Id.* at 288.

⁶⁹ 370 U.S. 294 (1962).

⁷⁰ 384 U.S. at 282 & n.1 (Stewart, J., dissenting). The purpose of such a study would be to determine underlying trends and changes which concentration ratios alone would obscure.

⁷¹ *Id.* at 301-02 & n.35 (Stewart, J., dissenting). Stewart apparently was referring to the fact that the merger in *Philadelphia Nat'l Bank* would result in a 33% increase in concentration, in an already concentrated market. 374 U.S. at 364-65. See text at note 30 *supra*. Justice Stewart viewed the *Von's* statistics as mild in comparison, and indeed when viewed against market exit and entry statistics, indicative of successful, thriving competition. 384 U.S. at 298-30.

⁷² *Id.* at 297 (Stewart, J., dissenting).

⁷³ *Id.* at 288, 289 n.14 (Stewart, J., dissenting). Small competitors, however, remained strong. *Id.* at 298-301.

⁷⁴ See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546, 555 (1966) (Harlan & Stewart, JJ., concurring); *United States v. Aluminum Co. of America*, 377 U.S. 271, 283-85 (1964) (Stewart, Harlan & Goldberg, JJ., dissenting). The skepticism carried over into *Sherman Act § 2* litigation, see *United States v. Grinnell Corp.*, 384 U.S. 563, 590-93 (1966) (Fortas & Stewart, JJ., dissenting).

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The breakthrough came in *General Dynamics*. This time, it was the majority opinion which rejected the Government's otherwise proper quantitative market case in deference to other *qualitative* factors unique to the coal industry.⁷⁵ The "other considerations" upon which both the district court and Supreme Court focused were the nature of modern competitive marketing in the coal industry and United Electric's inability to participate further within that framework.⁷⁶ Traditional market share analysis stresses the position of power occupied by each of the merging firms, as well as the resulting firm. Power, which may be expressed in terms of past sales or production statistics, primarily signifies the relative ability of firms to influence the variables of the marketplace and the actions of competitors.⁷⁷ In a truly competitive market, they are unable to do either.⁷⁸ The Court explained that the assumption usually is made that a company, which is strong in the relevant market in the recent past, will continue to be strong in the near future.⁷⁹ In markets exhibiting a tendency toward concentration, such companies are forbidden from merging by section 7 because of their presumed ability to continue to dominate.⁸⁰ On this basis, the Government had shown an apparent violation.⁸¹

But, the Court warned, "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's *future ability to compete*."⁸² Indeed, in the coal industry, production statistics were found to be less significant than coal reserves statistics.⁸³ The Court, adopting the district court's analysis, perceived the strongest competitors in the coal industry to be those companies with the greatest uncommitted recoverable reserves.⁸⁴

At the time of the trial, United Electric had minimal uncommitted reserves and was unable to acquire new resources.⁸⁵ Thus, the

⁷⁵ 415 U.S. at 497-98.

⁷⁶ Id. at 501-03; 341 F. Supp. at 539, 543, 559.

⁷⁷ Report of the Attorney General's National Committee to Study the Antitrust Laws 43-44 (1955).

⁷⁸ R. Lipsey & P. Steiner, *Economics* 251-52 (1966).

⁷⁹ 415 U.S. at 501.

⁸⁰ Id. The Clayton Act emphasizes the probability of such an effect, not its certainty. 15 U.S.C. § 18 (1970). See text at notes 13-16 supra.

⁸¹ 415 U.S. at 495-96. After the acquisition of United Electric, General Dynamics, through its subsidiary Material Service, ranked second in the Eastern Interior Coal Province Sales Area with a 12.4% market share, and first in Illinois with a 23.2% market share. The 1959 share of the top two coal producers in Illinois but for the merger would have been 36.6%; given the merger, it was 44.3%, an estimated 22.4% increase. In 1967, but for the merger it would have been 44.0%; given the merger, it was 52.9%, a 20.2% increase. Id. at 495, 496 (tables).

⁸² Id. at 501 (emphasis added).

⁸³ Id. at 501-02.

⁸⁴ Id.

⁸⁵ Id. at 503. Its 52 million tons of economically mineable reserves represented less than 1% of the total midwestern reserves of the thirty-seven coal producers in Illinois, Indiana, and western Kentucky. Moreover, only 4 million of the firm's 52 million tons of reserves were not committed under a long-term contract. 341 F. Supp. at 538. But see note 63 supra.

Court did not consider the company to be an effective competitive force for the future and therefore the merger presented no substantial likelihood of anticompetitive effect.⁸⁶

V. THE FAILING COMPANY DOCTRINE IN DISGUISE

In response to the Government's assertions, the Supreme Court expressly denied that this new "resource defense" was tantamount to the failing company doctrine.⁸⁷ As recognized in *International Shoe Co. v. FTC*,⁸⁸ that doctrine provides a defense to section 7 charges for mergers meeting two requirements: (1) the "resources" of the acquired firm must be so depleted and the possibility of rehabilitation so remote that business failure is gravely imminent; and (2) prospective purchasers other than the acquiring competitor must be unavailable.⁸⁹ The acquired firm must fulfill these requirements *at least* as of the time of the merger.⁹⁰

While section 7 is silent on the point, it would appear to be part of the statutory scheme that the acquisition of a firm on the verge of business collapse cannot result in the requisite probable lessening of competition necessary to sustain a violation.⁹¹ The Supreme Court has indicated its desire to retain the failing company doctrine's narrow scope as well as the requirement that one who asserts the defense must prove its conditions.⁹²

In *General Dynamics*, the Court characterized the resource defense as entirely different in thrust from the failing company doctrine. The former, it said, "went to the heart of the Government's statistical *prima facie* case"⁹³ by demonstrating that the acquired firm could not effectively compete in the future, whereas the latter dealt with the "entirely different point" of whether the acquired firm would be able to stay in business absent the merger.⁹⁴

⁸⁶ 415 U.S. at 508, 511.

⁸⁷ *Id.* at 506, 508. "Resource defense" is the author's own term.

⁸⁸ 280 U.S. 291 (1930).

⁸⁹ *Id.* at 302. These are usually *financial* resources; however, non-financial resources have also figured in discussions of the defense. E.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964) (natural gas reserves); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 978-79 (W.D. Pa. 1965) (crude oil reserves). See Blum, *The Failing Company Doctrine*, 16 B.C. Ind. & Com. L. Rev. 75, 91-94 (1974).

A third requirement, added later, that the prospects of reorganization through receivership or bankruptcy must be dim or non-existent, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969), appears to have been dropped, or at least subsumed under the first requirement. *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971).

⁹⁰ *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137 (1969); *United States Steel Corp. v. FTC*, 426 F.2d 592, 610 (6th Cir. 1970).

⁹¹ *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958), *aff'd* on other grounds, 362 U.S. 458 (1960). Congress has expressed approval of the doctrine. S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950); H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949).

⁹² *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138-39 (1969). See generally Blum, *supra* note 89.

⁹³ 415 U.S. at 508.

⁹⁴ *Id.*

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Since the issue was framed as inability to compete in the future, the Court continued, post acquisition evidence was highly pertinent to the analysis, because "unlike evidence showing only that no lessening of competition has yet occurred, the demonstration of weak coal reserves necessarily and logically implied that United Electric was not merely disinclined but unable to compete effectively for future contracts."⁹⁵

It is submitted that the Court ignored the practical meaning of its own explanation of the resource defense, thereby raising a distinction without a difference. If a company, for whatever reason, cannot effectively compete, then in a competitive market it will in due time fail. By the district court's findings, which the Supreme Court affirmed,⁹⁶ United Electric need only have committed its remaining four million tons of reserves to a utility customer, and its future ability to sell coal at all would have disappeared. At that point, barring access to new reserves, which was explicitly found not to exist,⁹⁷ United Electric's only surviving business activity would have been to service its outstanding prior contracts. There would appear to be no real difference between a company that is doomed to fail in the near future and one that qualifies for failing company status. If there is no hope of survival without a necessary resource, replenishment of which is unavailable to the company, the failing company doctrine is, it is submitted, the sole legally accepted means by which to avoid an otherwise proper section 7 challenge.⁹⁸ If the Court in *General Dynamics* truly intended to broaden the scope of the failing company doctrine, it should have clearly delineated the new standards for future application of that doctrine.

Furthermore, it is suggested that the Court should have qualified its apparent unabashed acceptance of purely post acquisition data in support of the depleted resources analysis. The traditional failing company defense must attach at least as of the time of merger.⁹⁹ As Justice Douglas indicated in dissent, there was no showing that United Electric was anything but a going concern in 1959, and therefore that there was no probability of anticompetitive effect at the time of the merger or, for that matter, at any time prior to the trial.¹⁰⁰ It is submitted that if one accepts the value of the

⁹⁵ Id. at 506.

⁹⁶ Id. at 508.

⁹⁷ 341 F. Supp. at 560.

⁹⁸ Indeed, while discussing the majority's concern for United Electric's exhausted reserves, Justice Douglas states: "Although the doctrine was not invoked by name, this appears to be an application of the 'failing company' defense." 415 U.S. at 523 (Douglas, J., dissenting).

⁹⁹ See text at note 90 supra.

¹⁰⁰ Id. at 524-25 (Douglas, J., dissenting). United Electric had a good name and a thriving coal marketing structure at the time of the acquisition and beyond. Id. at 525. Many of the commitments which reduced the firm's reserves occurred considerably after the acquisition. Id. at 524. There was no finding that additional mineable strip reserves were unavailable in 1959, nor any as to whether the presently unmineable reserves owned by United Electric

defendant's post acquisition data, due consideration should also be accorded to time of merger evidence and proof of anticompetitive effect subsequent to the merger but preceding the section 7 challenge. Otherwise, the resource defense could provide a "cure" for any undue competitive advantage which may have accrued to the firms after the date of merger, but prior to that time when the acquired firm ceased to be competitively functional.¹⁰¹ The demands of the Clayton Act will then have been nullified.

VI. AN OLD DEFENSE OR A CHANGE IN ANALYSIS?

On the other hand, *General Dynamics* may be an indication of a shift in attitude on the Court toward a more qualitative application of the policies behind the Clayton Act in an ever changing economy. Such an approach to section 7 is not without precedent. The Court in *Philadelphia National Bank* had stated that mergers resulting in high market shares and undue concentration must be enjoined, *but only* "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."¹⁰² In fact, in *Brown Shoe Co. v. United States*,¹⁰³ the Court had characterized as one possible mitigating factor "the inadequate resources of one of the parties [which may prevent] it from maintaining its competitive position."¹⁰⁴ If the Court has determined to pursue actively an analysis of "other considerations" in section 7 litigation, then *General Dynamics*, though perhaps not as succinctly written as might be wished, may prove to be a significant and beneficial antitrust decision. It would certainly seem ill-advised to ignore the predominant means of competition in the coal industry when it is competition which the Clayton Act deems worthy of protection.¹⁰⁵ It would be irresponsible not to recognize depletion of natural resources as a limiting factor on the vitality of a firm whose entire business is, in effect, such depletion. It is not unreasonable to draw logical inferences from presently existing facts rather than pursue a Pyrrhic victory on the basis of facts which no longer obtain, especially where the disruption attending divestiture is at stake.¹⁰⁶ Yet,

were unmineable in 1959. *Id.* The majority considered such factors insignificant under the reserves analysis. *Id.* at 507.

¹⁰¹ While private treble damage suits are authorized by § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), in the absence of a litigated judgment in favor of the Government, such actions are tremendously difficult to institute and prosecute successfully. L. Schwartz, *Free Enterprise and Economic Organization* 18 (4th ed. 1972).

¹⁰² 374 U.S. at 363.

¹⁰³ 370 U.S. 294 (1962).

¹⁰⁴ *Id.* at 346. No such condition was present in *Brown Shoe*. *Id.*

¹⁰⁵ See note 18 *supra* and accompanying text.

¹⁰⁶ Actually, the hardships of divestiture are better considered in the district court at the remedy stage, rather than on appeal as to the law. In *General Dynamics*, the district court, however, may have given this matter consideration sub silentio without ever reaching the remedy stage. See 341 F. Supp. at 560.

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this philosophical shift should not have been buried within an opinion which seems to attempt to conceal that very change.

It is submitted that the resource defense is, in truth, a form of the failing company defense, adapted to the realities of coal production and marketing. It does not make an entirely different point, but the same point in an unusual context. Nonetheless, the mere utilization of this defense in *General Dynamics* suggests that the Court may be willing to pursue a qualitative examination of economic factors in attempting to ascertain the true competitive impact of an acquisition under section 7. It appears that the Court may no longer place total reliance on the superficial certainty provided by a purely statistical analysis. The affirmance of the reserves analysis will hopefully serve to encourage the district courts to do the same.¹⁰⁷

VII. THE RELEVANT MARKET: ENERGY OR COAL?

Surprisingly, however, the Court felt it could apply this qualitative defense and then declare that it did not require the "necessary predicate" of market definition.¹⁰⁸ This, too, is a significant break with past case law. It would appear evident that without a relevant market, there can be no consideration of historical trends toward concentration, which is, of course, precisely what the Court had said was unnecessary under the reserves analysis.¹⁰⁹

Moreover, by avoiding the market definition issue, the Court left standing a conflict over the significance of inter-industry competition between coal and other fuels. In *Kennecott Copper Corp. v. FTC*,¹¹⁰ the United States Court of Appeals for the Tenth Circuit held: "The coal industry is a distinct submarket which has characteristics which are not shared by the other fuel industries. . . . [O]ther fuels appear to have a limited [competitive] effect."¹¹¹

¹⁰⁷ Indeed, the judiciary could adopt a treatment of § 7 cases not unlike that now accorded to bank mergers under the Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (1970), which directs consideration to whether the public interest in "meeting the convenience and needs of the community to be served" outweighs the anticompetitive effects of the proposed merger. 12 U.S.C. § 1828(c)(5)(B) (1970). See, e.g., *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 352-53, 367 (1970); *United States v. Third Nat'l Bank*, 390 U.S. 171, 181-82 (1968).

¹⁰⁸ 415 U.S. at 510.

¹⁰⁹ *Id.* The Court did, however, note that the trend toward concentration was a natural result of the market shift to supplying large utility consumers. *Id.* at 492-93. Compare this with Justice Stewart's analogous point in *United States v. Von's Grocery Co.*, 384 U.S. 270, 288-89 (1966) (Stewart, J., dissenting).

¹¹⁰ 467 F.2d 67 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974).

¹¹¹ 467 F.2d at 79.

[A]lthough there is an economic basis for . . . espousal of a total energy market . . . the record establishes the existence of a distinct coal industry as a submarket of such a broader market. There is industry, Government, and public recognition of the coal industry as a separate economic entity; and coal has peculiar characteristics and uses, as well as specialized vendors and distinct customers.

In re *Kennecott Copper Corp.*, 78 F.T.C. 744, 763 (1971) (Hearing Examiner). "The appro-

The findings of fact of the Federal Trade Commission in *Kennecott* and the district court in *General Dynamics* regarding the economic history, industry structure, and current parameters of coal marketing were in general agreement.¹¹² Yet, in *Kennecott* the relevant product market was defined as coal,¹¹³ whereas in *General Dynamics* it was found to be energy.¹¹⁴ This conflict, it is submitted, is a direct result of the application of different approaches to the issue of relevant product market definition.

As noted earlier, electric utilities have, through an historical process of elimination, become the main customers of the coal producers.¹¹⁵ Competition for these customers therefore quite naturally has taken its form from the needs of the electric generating industry.¹¹⁶ The tremendous investment represented by a new generating facility requires that a fuel source be chosen in its design stage, at least for the medium run, if not for the life of the facility.¹¹⁷ Consequently, the limited competition that exists among fuel sources is primarily directed to this initial period.¹¹⁸ Once a facility is "captured" under a long term requirements contract, competition for its future business is effectively foreclosed, not only from other coal suppliers (except for occasional spot purchases) but, for the most part, from other fuel sources as well.¹¹⁹

Finding this early stage interfuel competition "insistent, continuous, effective and quantitywise very substantial,"¹²⁰ the district court in *General Dynamics* decided that the relevant product market must encompass interfuel competition, and therefore defined the market as energy.¹²¹ Primary reliance for this approach was placed on *Continental Can Co. v. United States*.¹²²

priateness of . . . coal as the line of commerce is so clear that no elaborate citation of authority is required." *Id.* at 897.

The initial Hearing Examiner was inclined to consider the impact of interfuel competition, 78 F.T.C. at 763 (Hearing Examiner), but the opinion of the Commissioners rejected such consideration as an overstatement. *Id.* at 915, 916.

¹¹² Compare *General Dynamics*, 341 F. Supp. at 538-45 with *Kennecott*, 78 F.T.C. at 795-99 (Hearing Examiner).

¹¹³ 78 F.T.C. at 915.

¹¹⁴ 341 F. Supp. at 556.

¹¹⁵ *Id.* at 539; 78 F.T.C. at 796 (Hearing Examiner). See text at notes 41-42 *supra*.

¹¹⁶ 341 F. Supp. at 542-43. Such contracts are beneficial to the coal producers who make sizeable operational investments based thereon, as well as to the utilities who need assurance of continued supply for uninterrupted service. *Id.* at 543. The propriety of long term requirements contracts with utilities in spite of their inherent foreclosure of competition for long periods of time was determined in *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334-35 (1961).

¹¹⁷ See 341 F. Supp. at 542, 543.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 556, quoting *United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964).

¹²¹ 341 F. Supp. at 556. Midwest coal consumers were found typically to be large utility and industrial corporations, sophisticated in the energy market. Fuel purchasing decisions were found to be consistently based primarily on comparison of coal with other fuels. *Id.* at 555.

¹²² 378 U.S. 441 (1964). In *Continental Can*, glass and metal containers were placed in

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The FTC in *Kennecott*, on the other hand, placed its emphasis on the submarket indicia test set out in *Brown Shoe Co. v. United States*¹²³ and accordingly found coal as a product market distinct from all other fuels.¹²⁴ The divergence in approach is significant: *Continental Can* looks at competition as it occurs to define the common "industry,"¹²⁵ whereas *Brown Shoe* looks at the *distinguishing characteristics of the product itself* to determine its likely competition.¹²⁶ Both approaches yield a relevant product market. The inquiry thus becomes: when is either applied, and was the approach followed in *General Dynamics* correct? It is suggested that the two approaches are viewed by the courts as complementary: one or the other is applied according to whether the main product under consideration is perceived by the court (1) as an ultimate commodity; or (2) as a component of a process.

VIII. MARKET DEFINITION BASED ON PRODUCT USAGE

A product may be said to be in commodity usage when its purchase is primarily for the immediate satisfaction of a finite, self-limiting need. The commodity user generally requires an end product to satisfy this perceived need.¹²⁷ Process usage, on the other hand, involves the purchase of one product in order that it may be applied to the creation of a second product, the identity of the first being totally subsumed within the identity of the second. The process user can vary the means by which he arrives at the final product. Thus, while the commodity user enters the market in search of the product which most nearly satisfies his definite need, the process user is not so constrained. Industrial processes, especially, can be altered and adapted to varying "raw inputs," given an appropriate time period and an economic incentive to do so.¹²⁸

Where a court conceives of commodity usage as the principal

the same relevant product market in view of the general confrontation between the two: while not immediately interchangeable because of differing machinery, either type of container could usually be used to hold the same contents. And, as the Court found, there was an exchange between the two over time. 378 U.S. at 453-55. Therefore, because each industry also recognized that its competition included the other, the Court grouped them in the same market. *Id.* at 457. Justice Harlan dissented, viewing the majority's approach to market definition as backward, see *id.* at 467-68, and the definition itself as an invention "which no one . . . imagined [existed]; for which businessmen and economists will look in vain; . . . which sprang into existence only when the merger took place and will cease to exist when the merger is undone." *Id.* at 476-77. Justice Stewart, who wrote the majority opinion in *General Dynamics*, joined in this dissent. *Id.* at 467.

¹²³ 370 U.S. 294, 325 (1962).

¹²⁴ 78 F.T.C. at 915.

¹²⁵ 378 U.S. at 453-55.

¹²⁶ 370 U.S. at 325.

¹²⁷ Shoes are an example of a product in commodity usage. They satisfy the need to protect one's feet.

¹²⁸ For example, coal is generally in process usage: boiler coal produces heat energy, which is used to produce steam to generate electricity. 341 F. Supp. at 545. Metallurgical coal is used to make iron. *Cf. id.* at 536.

use for the products of horizontally merging firms, it will tend to choose the *Brown Shoe* approach to market definition. This approach focuses on similarities and differences in function, appearance, price, quality and the like to arrive at narrower submarkets on the basis of differentiating characteristics. Any such factor is appropriate for consideration from the outset under the *Brown Shoe* approach.¹²⁹

Conversely, when a court perceives process usage to be the primary use for the products, it will likely employ the *Continental Can* approach. Under this approach, a court determines which products are used interchangeably over time as inputs in the process to ascertain where the competition exists, rather than attempting to assemble the likely competition on the basis of differentiating characteristics which may pose no problem at all to a process user able to select and vary his methods.¹³⁰

It is submitted that each approach has much to recommend it. It is sensible and sound from the standpoint of classical economics to regard as truly competitive only those products which are substitutable for the same uses and which bear further peculiar similarities to each other sufficient to separate them from other products which less perfectly fulfill a perceived finite need. It is equally sensible, albeit more intuitive, to view competition as it exists in the recognition and marketing conduct of the public and the supposed competitors themselves.¹³¹ As the guiding purpose of the antitrust laws is the protection of competition,¹³² the courts cannot tailor the product market to fit the business of the defendant in disregard of the realities of the marketplace.¹³³

The course of section 7 decisions lends support to the above analysis. In *United States v. Aluminum Co. of America*,¹³⁴ aluminum electrical power cable was found to be a submarket separate from copper electrical cable by applying the *Brown Shoe* tests to determine a strong differentiating factor: price. Aluminum cable was being considered in a commodity usage—power transmis-

¹²⁹ 370 U.S. at 325.

¹³⁰ 378 U.S. at 453-55.

¹³¹ Support for this approach is indeed also found in *Brown Shoe*. 370 U.S. at 326. However, the Court suggested that this test was appropriate only for determining the "outer boundaries of the product market." *Id.* at 325. Moreover, the Court appeared to place greater emphasis on the interchangeability resulting from the characteristics shared by certain products rather than that resulting from the existence of marketplace competition. *See id.*

¹³² *Id.* at 320.

¹³³ *United States v. Grinnell Corp.*, 384 U.S. 563, 590 (1966) (Fortas, J., dissenting). Given perfect knowledge, either approach should yield the same market definition; the evidence itself would make clear the applicability of the right approach. However in the usual case, where the evidence is less than perfect, more depends upon the initial choice of approach by the district court. A wrong choice will affect the analysis of the relevant market, even to the point of yielding a distortion of reality. *See text at notes 144-46 infra.*

¹³⁴ 377 U.S. 271 (1964).

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sion lines.¹³⁵ In *United States v. Greater Buffalo Press, Inc.*,¹³⁶ the Supreme Court reversed the district court's finding of two separate lines of commerce—printing of color comic strip supplements for syndicates engaged in the sale of copyrighted strips to newspapers and printing of color comic strips for papers that do not print their own—favoring a broader market rather than submarkets which might be indicated by *Brown Shoe* indicia.¹³⁷ Noting that a printing firm could really do either, and that one type of comic strip supplement was functionally no different from the other, the Court defined the market as printing and distribution of comic strip supplements.¹³⁸ "Comic strip supplements" are a product in a process usage—the assemblage of a newspaper which can contain either syndicated or unsyndicated strips.¹³⁹

Clearly a situation can present itself where even in a process usage a product will be so distinctive that its users will treat it as a non-fungible component in the production process and thus justify its placement in a separate submarket. The creation of a submarket in this instance is entirely consistent with the *Continental Can* approach because it is the result of judicial recognition of the market's competitive realities. In *United States v. Pennzoil Co.*,¹⁴⁰ Pennsylvania grade crude oil was found to be distinct from all other crude oils for refining, a process usage, because the petroleum industry recognized it as a separate entity, which commanded a premium price, was easy to refine and had a reputation as being of the highest quality.¹⁴¹ Similarly, the district court in *General*

¹³⁵ Id. at 274-77.

¹³⁶ 402 U.S. 549 (1971).

¹³⁷ Id. at 552-53.

¹³⁸ Id. at 552.

¹³⁹ The following cases also lend support to the theory propounded in the text: *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 660-66 (1974) (commercial banking credit, *Continental Can* applied); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, — F.2d —, — (9th Cir. 1975) (refreshment concession franchises, *Continental Can* applied); *United States v. American Technical Indus., Inc.*, 1974-1 Trade Cas. ¶ 74,873, at 95869, 95872-73 (M.D. Pa. 1974) (artificial Christmas trees, *Brown Shoe* applied); *United States v. Crowell, Collier, & MacMillan, Inc.*, 361 F. Supp. 983, 990, 991 (S.D.N.Y. 1973) (marching band uniforms were distinguished from police and usher uniforms, *Brown Shoe* applied; but blazers were found to be interchangeable with military style marching band uniforms, *Continental Can* applied); *In re American Brake Shoe Co.*, 73 F.T.C. 610, 674-75 (1968), aff'd sub nom. *Abex Corp. v. FTC*, 420 F.2d 928, 931-32 (6th Cir. 1970) (sintered metal friction materials, *Brown Shoe* applied); *United States v. Times Mirror Co.*, 274 F. Supp. 606, 617-18 (C.D. Cal. 1967) (daily newspapers, *Brown Shoe* applied; *Continental Can* quoted in warning against unduly broad markets). But see, *Elco Corp. v. Microdot Inc.*, 360 F. Supp. 741, 747-49 (D. Del. 1973) (metal plate connector subassemblies; both *Brown Shoe* and *Continental Can* applied).

¹⁴⁰ 252 F. Supp. 962 (W.D. Pa. 1965).

¹⁴¹ Id. at 973. *Brown Shoe* contains a statement which supports the *Continental Can* approach. 370 U.S. at 325. See note 120 supra. Similarly, there is language in *Continental Can* which supports the *Brown Shoe* approach. 378 U.S. at 449, 453. However, it is submitted that this dicta does not undermine the theory propounded in the text, but rather lends support to it by showing the existence of two different approaches moving in two different directions.

Dynamics impliedly acknowledged the existence of characteristics unique to coal.¹⁴² It found, however, in the context of the usage under consideration, that competition from other fuel sources existed and, following *Continental Can*, necessitated a broader market definition.¹⁴³

It is submitted that to the extent that other fuels compete with coal in the electric utility *energy supply* market, they are appropriately considered in the same relevant market, applying *Continental Can*, even though an application of *Brown Shoe* would indicate considerable characteristic differences among the fuels. At the design and conversion stages, which are the only real stages of competition, relative costs of fuels are more determinative than characteristic differences.¹⁴⁴ As noted, the FTC in *Kennecott* defined coal as the relevant market in reliance on *Brown Shoe* indicia.¹⁴⁵ As *Kennecott* involved coal in the same process usage as that considered in *General Dynamics*, it would seem that, if the above analysis is correct, *Kennecott* was wrongly decided.¹⁴⁶

An alternative explanation may be that in *Kennecott* the FTC was presented with more, better and certainly different evidence pointing to coal as a distinct submarket than was the district court in *General Dynamics*.¹⁴⁷ If so, then the conclusion must be reached that the conflict is the unfortunate but inevitable result of the dual system of enforcement of section 7.¹⁴⁸ Yet in failing to resolve the conflict with *Kennecott*, and casting doubt upon the heretofore formal necessity of market definition under section 7, the Court has left the legal community in a state of suspense.¹⁴⁹

¹⁴² See 341 F. Supp. at 540, 543, 555-56.

¹⁴³ Id. at 545-56.

¹⁴⁴ 78 F.T.C. at 797, 799 (Hearing Examiner).

¹⁴⁵ 78 F.T.C. at 915. See text at note 124 supra.

¹⁴⁶ The discrepancy centers on the quantity of design stage competition. The FTC found coal to have an advantage at this stage, 78 F.T.C. at 915, 916, whereas the district court more convincingly found that coal was confronted with significant competition from other fuels. 341 F. Supp. at 540, 545-55.

¹⁴⁷ See notes 24, 133 supra.

¹⁴⁸ Jurisdiction to enforce § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), is given to the Justice Department, 15 U.S.C. § 25 (1970), and to the Federal Trade Commission, 15 U.S.C. § 21(a) (1970).

¹⁴⁹ However, it could be contended that there was a tacit market definition in *General Dynamics*, for with whomever else United Electric competed in the past, it certainly competed with other coal producers. Thus, the relevant product market had to include at least the coal market. Arguably, both the resources defense and the traditional failing company doctrine are self-defining of markets when applied to single product firms, even though neither of them depends upon the market definition for its logical force. This is not true for a multi-product firm, for then the viability of each line of the firm's business must be assessed before the failing company doctrine can be applied. If the defense cannot be proved for the entire operation, a full § 7 analysis, including market definitions, must be undertaken. See Department of Justice, Merger Guidelines 12 (1968). As *General Dynamics* presented a single product firm and an immediately successful defense which obviated further § 7 analysis, it may have in truth been unnecessary for the Supreme Court to say more with regard to product market: the facts said all that the law in this case required. Yet, in expressly declining

CONCLUSION

The Court had hinted in the past that lack of essential resources could mitigate an acquisition's otherwise probable anticompetitive effect. But the tenor of the Court's analysis in *General Dynamics* indicates that this decision was something other than the fulfillment of a past promise. The resource defense is a meaningful creation in the framework presented by the case, for if indeed United Electric had no prospects of acquiring or discovering new coal reserves, then the challenged merger was unlikely to result in a substantial anticompetitive effect. Time of merger inquiries should, under such circumstances, give way to the pragmatic realities present at the time of the suit. And, because all companies concerned in the 1959 acquisition produced only coal, the Court's failure to confront the issue of market definition is perhaps understandable, though certainly not laudable in view of the arguably erroneous *Kennecott* precedent.¹⁵⁰

But it will now require several more decisions to clarify the Court's position. If, as seems likely, the resource defense is merely the failing company doctrine modified to meet the peculiar and practical considerations of the extractive industries, it should have been labeled and restricted as such. If, on the other hand, *General Dynamics* indicates a shift to active pursuit of "other considerations," then while that change could have been more clearly heralded, it still should prove a significant and beneficial decision.

STEVEN LENKOWSKY

to review the market definition of the district court, the Supreme Court in *General Dynamics* has only added to the confusion.

¹⁵⁰ See note 149 *supra*.