

CASE NOTES

Trade Regulation—Clayton Act—Mergers—Failing Condition of Acquired Company Not an Absolute Defense.—*United States Steel Corp.*¹

—United States Steel Corporation is the nation's seventh largest industrial corporation and the largest manufacturer of steel in the country. It is also one of the country's four largest producers of Portland cement, a product used in the manufacture of ready-mix concrete. Certified Industries, Inc. is one of the four largest producers of ready-mix concrete and is the second largest consumer of Portland cement among the ready-mix producers within its marketing region, the New York metropolitan area. Despite its position in the market, Certified was in imminent danger of financial failure. On April 30, 1964, U.S. Steel, through one of its subsidiaries, acquired Certified. The Federal Trade Commission issued a complaint against U.S. Steel charging that the acquisition violated Section 7 of the Clayton Act since its effect "may be substantially to lessen competition."² The hearing examiner dismissed the complaint. Complaint counsel appealed and the Commission HELD: Reversed; U.S. Steel must divest itself of Certified within one year. The effect of the acquisition may be substantially to lessen competition and, despite the failing condition of Certified, the merger is prohibited by Section 7 of the Clayton Act.

Section 7 of the Clayton Act, as amended in 1950, is designed to supplement the Sherman Act.³ It is aimed at prohibiting "monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding."⁴ Section 7 prohibits one company from acquiring the assets or stock of another if the effect of the acquisition may be substantially to lessen competition within a particular product market in any relevant geographic section of the country. The product markets in *U.S. Steel* were conceded by the parties to be Portland cement and ready-mix concrete. Further, the examiner's finding that the relevant geographic market was the New York metropolitan area was accepted by both parties on appeal to the Commission.

Complaint counsel did not seriously challenge the examiner's finding that at the time of the acquisition Certified was in a failing condition.⁵ The

¹ 3 CCH Trade Reg. Rep. ¶ 18,626 (FTC Dec. 2, 1968) [hereinafter cited as 3 CCH].

² Section 7 provides in part:

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.

15 U.S.C. § 18 (1958).

³ See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

⁴ S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950). See also *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

⁵ 3 CCH at 20,976-77. The government argued that the proper time to judge the financial status of Certified was not the date of the acquisition but rather approximately fourteen months prior thereto, at which time U.S. Steel had assisted Certified in securing

relevance of this finding, however, in light of the famous *International Shoe*⁶ opinion and the resulting "failing company" defense,⁷ was a major source of contention between the parties. U.S. Steel argued successfully before the examiner that a showing that the acquired company was in a failing condition conferred absolute immunity from section 7. Complaint counsel urged, and was successful in its argument before the Commission, that the defense is not absolute but rather is relative in nature.

The failing company doctrine was first articulated in a section 7 action in *International Shoe v. FTC*.⁸ In that case, the Supreme Court, having found that in fact no substantial competition had existed between the acquired and acquiring companies and that, consequently, there could be no substantial lessening of competition between the firms⁹ added:

In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with a resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.¹⁰

Although this utterance by the Court has been neatly termed the "failing company defense," the nature of this defense has been the subject of much

a long term loan. The government urged that this assistance resulted in the rejection by Certified of two purchase offers from other firms and effectively "tied" Certified to U.S. Steel. The government contended that at this earlier date Certified was not in a failing condition. The Commission rejected this line of reasoning. *Id.* at 20,977.

⁶ *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

⁷ For discussions of the "failing company" defense, see generally Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339-47 (1960); Connor, Section 7 of the Clayton Act: The "Failing Company" Myth, 49 Geo. L.J. 84 (1960); Hale & Hale, Failing Firms and the Merger Provisions of the Antitrust Laws, 52 Ky. L.J. 597 (1964); Low, The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act, 35 Fordham L. Rev. 425 (1967); 61 Mich. L. Rev. 566 (1963).

⁸ 280 U.S. 291 (1930).

⁹ 280 U.S. at 296-99. The Court concluded that no competition existed as to 95% of the business of each company.

Section 7 of the Clayton Act at the time of *International Shoe* provided in part:

[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition *may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition*, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

Act of Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731 (emphasis added).

¹⁰ 280 U.S. at 302-03.

controversy.¹¹ The divergent views arising out of *U.S. Steel* are a recent manifestation of this dispute.

Disagreement over the nature of the failing company defense arises from two sources. First, the precise holding of the Court in *International Shoe* is unclear. Second, it is difficult to ascertain what effect, if any, the 1950 amendments to section 7 had on the doctrine.¹² It is arguable, as will appear below, that the 1950 amendments vitiate the rationale which supported the failing company defense under the pre-1950 section 7. In *U.S. Steel*, both Chairman Dixon, speaking for the majority, and Commissioner Elman, dissenting, avoid this argument by asserting that Congress intended the *International Shoe* "holding" to survive in the amended section 7.¹³ From this premise, each proceeds by way of his own interpretation of the "holding" in *International Shoe* to an opposite conclusion about the nature of the defense. Elman concludes that the Court in *International Shoe* set forth an absolute defense, while Dixon argues that the Court engaged in a balancing process. These positions are somewhat representative of the views held by both sides in the debate over the failing company defense.¹⁴ This note will examine these recent formulations and will propose a redefinition of the nature and effect of the failing company defense in light of the 1950 amendments.

Chairman Dixon argued that in articulating the failing company defense the Supreme Court was principally concerned with protecting the shareholders of the failing company and the communities in which that company was located. The Court balanced the probable injury to competition if the merger were allowed against the probable injury to third parties which would result if the merger were disallowed and the company failed. Under the facts of that case, Dixon contended, the Court decided that the prevention of the latter injury was of greater importance. Thus, Dixon's argument continues, in each section 7 proceeding involving a failing company, the Commission must engage in a two-step inquiry:

[W]e must determine whether the acquisition may result in a substantial lessening of competition and, if so, the acquisition must be declared illegal in the absence of probable harm to innocent indi-

¹¹ Compare the views expressed in Bok, *supra* note 7, at 343-44 (absolute defense if company cannot survive independently), Comment, *supra* note 7, at 581-83 (while not an absolute defense, the broad public interest in the prevention of failures can counterbalance anticompetitive effects), and Connor, *supra* note 7, at 98-99 (importance of the defense minimized, impeding failure is simply one factor to be used in assessment of anticompetitive impact).

¹² Under section 7 as amended in 1950, the inquiry to be made is whether there are probable anticompetitive effects "in any line of commerce," not merely whether there may be a lessening of competition between the acquired and acquiring firms. Further, Congress made it clear that section 7 was to apply to asset as well as stock acquisitions.

¹³ For Dixon's conclusion, see 3 CCH at 20,980; for Elman's, see *id.* at 20,991-92. Elman indicated that although that part of *International Shoe* which held that the two firms were not in competition may no longer be valid, the alternative holding of the Court based on the acquired firm's failing condition was "carried over intact into the amended statute." *Id.*

¹⁴ Compare the positions of Dixon and Elman with the views expressed in the authority cited *supra* note 11.

viduals so serious and substantial that the public interest requires that the acquisition nevertheless be permitted.¹⁵

The Commission, in *U.S. Steel*, applying step one of this test, found that in the market situation presented the acquisition could have substantial anti-competitive effects.¹⁶ Employing the balancing aspect of his test, Chairman Dixon found nothing in the record to support a holding that the economic harm to creditors, stockholders or employees was so acute as to outweigh the probable anticompetitive effects.¹⁷

Commissioner Elman, dissenting, argued that even though the Court in *International Shoe* might have concluded that the merger did not lessen competition between the acquired and acquiring companies, it had determined, as an alternative conclusion, that the acquired company's failing condition conferred upon the merger absolute immunity from section 7.¹⁸ Elman argued that the merger in *International Shoe* was one in which the probability of adverse competitive tendencies and effects was great, but that it was allowed because the acquired company was failing and injury to innocent parties would be avoided by the merger.¹⁹ The Court, urges Elman, did not attempt to balance the injurious effects of business failure against the anticompetitive effects. Its rationale was simple and clear. The acquired company was failing; if the merger were forbidden, injuries to stockholders and communities in which plants of the acquired company were located would ensue; therefore, in order to avoid these injuries, the merger was not illegal.²⁰ In any case involving an alleged failing company Elman would not engage in a balancing process, but rather would limit the task of the Commission to one simple inquiry: Is the company failing? Apparently Commissioner Elman is of the opinion that the various injurious factors mentioned by the Supreme Court in *International Shoe*, and which he views as only a partial list of considerations supporting the "defense,"²¹ so impressed the Supreme Court and Con-

¹⁵ 3 CCH at 20,981.

¹⁶ The hearing examiner had found that the acquisition did not substantially lessen competition within either product market. The Commission, however, believing that this finding was "distorted" by the examiner's view that the failing company defense is absolute, decided to review the question of competitive impact de novo. See *id.* at 20,983.

¹⁷ See *id.* at 20,989. Since the record lacked evidence which might establish sufficient mitigation of harm to third parties which might outweigh the probable anticompetitive effects, Dixon was spared the task of actually applying his balancing test to the fact situation before the Commission. Dixon did note that 70% of Certified's stock was held by five shareholders, and that the benefit to these shareholders in having Certified "saved" was of little significance when balanced against the possible anticompetitive effects of the merger. *Id.*

¹⁸ See *id.* at 20,991-93.

¹⁹ See *id.* at 20,992-93. Whether Commissioner Elman feels that the merger in *International Shoe* did in fact have "manifest anticompetitive tendencies and effects," it is clear that the Court in *International Shoe* held that the merger did not. See 280 U.S. at 295-99. Elman urges that rather than stressing the Court's finding of no competition or "quibbling" over what the Court held, the proper interpretive process is to look to the "net effect" of the opinion. In order to define this "net effect" Elman postulates that the Court assumed for the purpose of analyzing the failing company issue that substantial anticompetitive effects existed. See 3 CCH at 20,993.

²⁰ 3 CCH at 20,993.

²¹ *Id.* at 20,996-97. In addition to avoiding injuries to shareholders and communities,

gress that the simple showing of impending financial disaster will totally vitiate section 7. The "defense," as the Commissioner views it, is rigid. Regardless of the nature or extent of injuries to third parties, and irrespective of the extent of anticompetitive impact of a particular merger, section 7 is not violated if the acquired company is failing. This view holds, apparently, that when the Supreme Court in its formulation of the "failing company doctrine" mentioned the seriously injurious consequences of business failure it was merely stating the rationale of the defense rather than the preconditions to its application.

It is arguable that the Court in *International Shoe* did not engage in the balancing process which Chairman Dixon suggests, nor hold that the fact of financial failure provided an absolute defense, as Commissioner Elman contends. In the context of the pre-1950 section 7, which prohibited a lessening of competition between the acquired and acquiring firms and to which Section 1 Sherman Act criteria were applicable, the fact of financial failure arguably carried a dual import for the Court. First, since the prospect for future competition between the acquired and acquiring firms was entirely eliminated, no substantial lessening of competition could occur between the firms. And second, the mitigation of harm to third parties accomplished by the acquisition of the failing company meant that as measured by the Sherman Act standard of legality, the "rule of reason," public interest was served by the merger. The standard of legality under the Sherman Act, which standard was at the time of *International Shoe* applicable in Section 7 Clayton Act proceedings, is the presence or absence of prejudice to the public interest by undue restraint of trade.²² The courts had recognized that every agreement concerning trade restrains, and that only those which unduly restrained trade so as to be prejudicial to the public interest were prohibited by the Sherman Act.²³ Similarly, under section 7 it was argued that though every acquisition must lessen competition, only those which lessened competition to a substantial degree were prohibited by that section.²⁴

Viewed in this manner, the "holding" in *International Shoe* as articulated in its famous last paragraph, is simply a statement of two interrelated grounds for allowing the particular merger before the Court.²⁵ First, because

Elman points out that rescue of a company from failure benefits creditors, protects small business, is a means of withdrawing inefficient firms from the market, and is consistent with "due process."

²² See 280 U.S. at 298.

²³ In application of the Sherman Act standard the courts look to "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed," the nature, effect, and history of the restraint, and the purpose for which the restraint was imposed. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

²⁴ 280 U.S. at 298.

²⁵ The argument has been made, see 61 Mich. L. Rev. 566, 581-83 (1963), that a balancing test, such as that employed by Dixon, is the proper approach in post-1950 section 7 proceedings where the company acquired is in a failing condition. The balancing, termed a "two pronged Rule of Reason prognostication," *id.* at 582, is said to be consistent with *International Shoe* "once it is realized that the case involved two giants in the shoe industry. The probability of injury by the lessening of competition . . . was so great that the scales of the test were about as heavily weighted in favor of preventing merger as

the acquired company was failing, the possibility of future competition was eliminated; and second, as a makeweight, the merger mitigated probable harm to the public.²⁶ The aspect of the holding to which the *International Shoe* Court gave primary consideration was that the imminent financial failure negated the probability of future competition between the failing firm and the acquiring firm. Indeed, this is the reasoning by which the Court in *International Shoe* postulated the issue of the relevance of the fact of financial failure. The Court indicated that one of two principal grounds upon which the International Shoe Company appealed was "that at the time of the acquisition the financial condition of the [acquired company] was such as to necessitate liquidation or sale, and, therefore, the prospect for future competition or restraint was entirely eliminated."²⁷ The thrust of the Court's opinion, then, was that since competition between the companies had been minimal, and since the prospect for future competition was almost non-existent, there could be no lessening of competition to a substantial degree and thus no injury to the public interest. The Court's reference to mitigation of harm to third parties was added almost as an afterthought. There is no indication in its opinion that the Court undertook analysis of the extent of the beneficial aspects of the merger, nor that it engaged in any considered balancing of these aspects against probable anticompetitive effects.

To conclude, as Chairman Dixon does, that the Court in *International Shoe* was primarily concerned with protecting shareholders and the communities in which the acquired company's plants were located is to ascribe to the Court a solicitude not at all apparent in its opinion. The Court was principally concerned with the effect of the acquisition on competition between the acquired and acquiring companies. The argument, then, that this supposed solicitude requires in a failing company case a balancing of the injury to

possible . . . and still the scales tipped in favor of the 'failing company' doctrine." *Id.* at 583. To argue that the merger was allowed in *International Shoe* because the probable injury to third parties outweighed probable great anticompetitive effects seems to ignore both the market definition employed by the Court and the finding based thereon that there had been no substantial competition between the two companies. One may rightfully quarrel with the narrow market definition adopted by the Court, but it seems to be inappropriate to define the Court's holding on the basis of a fact finding which the Court explicitly rejected. See 280 U.S. at 299. Commissioner Elman similarly reinterprets the facts in the *International Shoe* case, but draws an opposite conclusion: that since the probability of competitive injury was so great and since the merger was allowed, the failing company doctrine is an absolute defense. 3 CCH at 20,992-93.

²⁶ It is not at all clear that it is proper in the application of the "rule of reason" to consider factors—such as mitigation of harm to creditors, shareholders and communities—which do not bear on the issue whether competition is promoted or inhibited by the acquisition in question. The Court in *International Shoe* expressly employed the rule of reason to support its holding that the acquisition of a company which had in fact only competed with the acquiring company in a small portion of the market did not violate section 7. 280 U.S. at 298-99. The Court did not expressly state that harm to shareholders and communities were factors to be considered in application of the rule of reason. However, an analysis of the two cases cited by the Court in support of its failing company utterance indicates that the Court felt that mitigation of harm to shareholders and communities is a relevant consideration in application of the rule. The authority cited by the Court was *United States v. United States Steel Corp.*, 251 U.S. 417, 446-47 (1920); and *American Press Ass'n v. United States*, 245 F. 91, 93-94 (7th Cir. 1917).

²⁷ 280 U.S. at 294.

competition against injury to third parties ignores both the precise holding and the underlying rationale of *International Shoe*. Similarly, the conclusion of Commissioner Elman, that the Court in *International Shoe* held that an acquisition of a failing company, absent any other purchaser, is *per se legal*, converts a narrow holding into a general rule of law capable of defeating the overriding congressional purpose to preserve competition.

The foregoing analysis rests upon the premise that financial failure means the same in a section 7 proceeding today as it meant to the Supreme Court in 1930. Although neither Dixon nor Elman gives consideration to the changes wrought in section 7 by the 1950 amendments, the statute has been altered in two important respects. The determination to be made today is no longer the narrow question whether there is a probability of substantial lessening of competition between the acquired and acquiring firms, but rather whether the acquisition tends substantially to lessen competition in any line of commerce in any section of the country. Thus, before 1950, if the acquired company was failing and about to be liquidated "it may have been reasonable to conclude that there was no more existing competition between the companies to be lessened by acquisition,"²⁸ and thus reasonable to hold that section 7 was not violated by the acquisition. However, under the amended section 7 this line of reasoning is no longer valid.

Further, Congress intended that the Sherman Act "rule of reason," which was the basis of the Court's dual holding in *International Shoe*, should no longer be applied in a section 7 action.²⁹ Thus, harm to shareholders and communities, considerations under the Sherman Act public interest standard,³⁰ though relevant at the time of the decision in *International Shoe*, are logically irrelevant in a proceeding under section 7 today.³¹ If the language of amended

²⁸ *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136-37 n.3 (1969).

²⁹ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 317 n.30 (1962); *Erie Sand & Gravel Co.*, 56 F.T.C. 437, 454 (1959); *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 567 (1953).

³⁰ They were so viewed by the examiner in *U.S. Steel*, 3 CCH at 20,978-79. See also note 26 *supra*.

³¹ The examiner concluded that the Court in *International Shoe* had held that the acquisition of a failing company was an absolute defense, and argued that the additional factors mentioned by the Court (harm to shareholders and communities, lack of a prospective purchaser, and the purpose of the acquisition) were relevant not to the question of competitive impact but rather to the question of the public interest, which standard is inapplicable under amended section 7. Thus, the examiner reasoned, these additional factors need no longer be considered. See 3 CCH at 20,978-79. Dixon expresses disagreement with this argument but fails to rebut its logic. He asserts that "all factors" considered by the Court in *International Shoe* are as meaningful today as they were prior to the 1950 amendments. *Id.* at 20,979. The Chairman is correct in the assertion that the presence of a prospective purchaser and the purpose of the acquisition are facts relevant to the question of competitive impact. Evidence of another prospective purchaser whose acquisition of the failing company would not violate section 7 is logically relevant to the question whether a particular respondent's acquisition would tend to lessen competition, since an acquisition by a purchaser of the former type would preserve a unit in the competitive system without compromising section 7. See *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969). Further, as the Supreme Court said in *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 n.48 (1962), evidence of the purpose of the merging parties is an aid in predicting their future conduct, and thus the probable effects of the merger. But Dixon makes no attempt to counter the argument that the other factors

section 7 and the principle that Sherman Act criteria are inapplicable in a section 7 action are kept in mind, all that would remain of the *International Shoe* reasoning today is that the fact of financial failure is only one factor to be considered in the determination whether the effect of the acquisition may be substantially to lessen competition.

Despite Congress' intent to make Sherman Act criteria inapplicable in section 7 cases, the argument persists that Congress expressly intended the *International Shoe* failing company doctrine to survive the section 7 amendments. In the Committee reports on the bill which amended section 7 in 1950, the final paragraph of *International Shoe* is cited in support of the proposition that the amended section 7 would not prevent a failing or bankrupt company from selling its assets to a competitor.³² Obviously, Congress never undertook a close legal analysis of the failing company defense. Somewhat paradoxically, it sought to preserve the "doctrine" itself but to remove from the section 7 area the rule-of-reason grounds so clearly underlying the doctrine.

Several approaches are available to resolve this apparent paradox. One method, of course, is to ignore the paradox and, in reliance on the fact that Congress approvingly quoted the last paragraph of *International Shoe*, begin with the premise that whatever the Court in that case did hold is wholly applicable today. This is the approach of Commissioners Dixon and Elman.³³ That this approach is perhaps inappropriate has been suggested by the recent case of *Citizen Publishing Co. v. United States*.³⁴ Justice Douglas, speaking for the majority, held that the failing company doctrine did not excuse the particular merger in question because the acquired company was not in fact in a failing condition. Noting that *International Shoe* was decided in 1930 and that section 7 under which it was decided was amended in 1950, he added: "We have no occasion, however, to determine what changes, if any, that amendment had on the 'failing company' doctrine."³⁵ Though this statement does not illuminate the present nature of the failing company doctrine, it does indicate that the meaning and possibly the validity of the doctrine, in light of the 1950 amendments, is far from settled.

One accommodative interpretation of the congressional intent is that in cases involving a failing company Sherman Act standards remain viable despite the general congressional intent to make the standards inapplicable in all other section 7 proceedings, and that the Sherman Act criteria should be applied on a case-by-case basis in all actions involving a failing company.³⁶ A second position is that Congress decided that the considerations mentioned by the Court in *International Shoe* (harm to shareholders and communities) justify the creation of an absolute defense in all section 7 actions. In view of the overriding congressional purpose to promote free competition and since the

mentioned by the Court (harm to shareholders and communities) are manifestations of the rule of reason and are thus no longer applicable under amended section 7.

³² H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950).

³³ See note 13 *supra* and accompanying text.

³⁴ 394 U.S. 131 (1969).

³⁵ *Id.* at 136-37 n.3. Cf. Connor, *supra* note 7, at 96-99.

³⁶ See Comment, *supra* note 7, at 582-83.

extent of harm to third parties conceivably will vary widely, the validity of this latter position seems doubtful. Finally, it has been argued that Congress *must* have intended that the failing condition of an acquired firm is to be one of the factors used in the assessment of the impact of an acquisition on competition.³⁷

In the last analysis, however, none of these resolutions is necessarily correct, for it is nearly impossible to determine with any certainty what Congress did intend.³⁸ Aside from the instant case, no other tribunal has attempted in any reasoned manner to analyze the issues involved.³⁹ No doubt exists that Congress intended that the acquisition of a failing company be given special consideration and that in some circumstances a failing company could be acquired by a competitor without violation of section 7. However, beyond this observation, congressional intent remains inscrutable. It is mere speculation to surmise either that Congress adopted the entire *International Shoe* rationale or to guess what it might have intended in the light of a careful analysis of that decision.

It is submitted that although the fact of financial failure under the pre-1950 section 7 was clearly relevant to the probability of a substantial lessening of competition between the acquired and acquiring firms, the amendments of 1950 substantially reduced the relevance of the fact of financial failure by expansion of the inquiry into the probability of anticompetitive effects in any line of commerce. The fact of financial failure is still a consideration in the assessment of the probability of anticompetitive effects, but its role in this inquiry is to a great extent diluted.⁴⁰ Since the amended section 7 is a pro-

³⁷ See Connor, *supra* note 7, at 98.

³⁸ Commissioner Elman admits that Congress did not define its reasons for carrying the failing company doctrine into amended section 7, 3 CCH at 20,996, but goes on to speculate as to what those reasons might have been. See also note 21 *supra*.

³⁹ The failing company defense was successfully asserted in *Union Leader Corp. v. Newspapers of New Eng., Inc.*, 284 F.2d 582, 589 (1st Cir. 1960) ("If competition is doomed . . . it cannot be 'lessened' by a change in ownership."); *United States v. Maryland and Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.C. Cir. 1958) (the acquisition of a failing company cannot result in a lessening of competition), *aff'd*, without mention of the failing company doctrine, 362 U.S. 458 (1960). The defense was asserted unsuccessfully in *United States v. Third Nat'l Bank*, 390 U.S. 171, 183 (1968) (a merging bank not failing); *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966) (merging companies not failing); *United States v. Natural Gas Co.*, 376 U.S. 651, 661 (1964) (acquired company not failing); *United States v. Nat'l Bank*, 374 U.S. 321, 371-72 & n.46 (1963) (companies involved in a proposed merger not failing); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (summary judgment by district court improper because there were genuine issues of fact relating to the failing company defense). None of these cases presents a reasoned discussion of the failing company defense. For an analysis of other cases involving the defense, see Connor, *supra* note 7, at 90-92.

⁴⁰ Dixon noted that

given a situation wherein a company is a substantial customer for the product of a heavily concentrated market, and enjoys a substantial portion of a concentrated market of small, localized sellers which is in the throes of a movement toward vertical integration, its acquisition by a leading supplier who possesses oligopoly power in a number of diverse fields, will predictably have adverse competitive impact upon at least one relevant market *no matter what the*

vision very different from the section applied by the Court in *International Shoe*, the reasoning and thus the holding of the Court in that case is largely irrelevant in a section 7 action today.

It would seem that the proper procedure in any case involving a failing company is to observe only as much of congressional intent as is clear and, beyond that, to apply amended section 7 strictly. In cases where the acquired company is found to be in a failing condition, the courts or Commission should consider this finding as merely one more criterion for the determination whether the effect of the acquisition may be to lessen competition substantially in any line of commerce in any section of the country.⁴¹ The fact that the acquisition may mitigate probable harm to third parties and is in this sense a benevolent merger is irrelevant to this determination.⁴² If Congress did in fact intend that the courts engage in a balancing process, or if it intended that the acquisition of a failing company was to be entirely immune from section 7, it should be left to Congress to make clear that intent by an express

financial condition of the company at the time of the acquisition.

3 CCH at 20,982-83 (emphasis added).

⁴¹ In *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962), the Court said: [A]t the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. . . . [S]upporters of the amendments indicated that [the Act] would not impede, for example . . . a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.

The Court did not say that such mergers can never violate section 7 because of the benefits to third parties which will flow from the merger. It said that section 7 is not violated by a merger which, rather than lessening competition, in fact stimulates it.

⁴² It may be noted that the Court in *United States v. National Bank*, 374 U.S. 321 (1963), rejected defendants' argument that the merger would bring new business to the area and stimulate economic development. In this regard, the Court said that

a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

Id. at 371. Thus, arguably, positive benefits of a merger not bearing on competition are irrelevant in a section 7 action. As the Court suggests, such "reckoning," like the balancing of the Dixon test, is not a proper judicial process. Yet, a few lines after the quoted passage, the Court adds that section 7 does not exclude defenses to a particular challenged merger based on dangers to liquidity or solvency which the merger might avert, and cites *International Shoe*, *id.* at 371-72 & n.46. As is often the case, however, the issue was not before the Court and received no consideration beyond this remark. It seems paradoxical that the Court resolves not to consider the social and economic benefits of a particular merger, while at the same time, in dicta, it expresses a willingness to accept a defense based upon the prevention of dangers to liquidity or solvency. Unless the aversion of dangers to liquidity and solvency is made relevant only to the question of the impact of the acquisition on competition, or unless the Court is assuming that Congress has already done the reckoning and created an absolute defense (the Court makes no reference to congressional intent, but merely cites *International Shoe*), it would seem in effect to be no more than a reckoning of social and economic debits and credits to consider the mitigation of such dangers as a defense.

exception to section 7. The problem arises primarily from Congress' vague allusion to *International Shoe*. The Congress, then, should act to resolve this issue of its own making. The courts and Commission should not engraft an exception to the present section 7 on the infirm ground of either an aging decision under the pre-1950 section 7, or of meager congressional reference to that decision.

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Labor Law—Labor-Management Relations Act—Remedial Power of the National Labor Relations Board—Award of Fringe Benefits.—*NLRB v. Strong*.¹—Defendant Strong was a member of a multi-employer bargaining association which negotiated a collective bargaining agreement with the Roofers Union of Southern California. Strong attempted to withdraw from the association after the agreement became effective, and refused to sign the agreement. The union filed unfair labor practice charges with the National Labor Relations Board, and the Board found that Strong's refusal to sign the agreement constituted an unfair labor practice under sections 8(a)(5) and (1) of the Labor-Management Relations Act.² The Board issued an order requiring the defendant to cease and desist from unfair labor practices, to sign the agreement, to post notices and to "pay to the appropriate source any fringe benefits provided for in the . . . contract."³ The order did *not* provide for any back pay payments.⁴ The Ninth Circuit Court of Appeals enforced the Board's order except for the provision requiring the payment of fringe benefits. The court stated that

[t]he order of the Board requiring the payment of fringe benefits to the appropriate source is an order to respondent to carry out provisions of the contract and is beyond the power of the Board.⁵

Although the court did not elaborate, it impliedly held that the Board had no power to award fringe benefits under Section 10(c) of the Labor-Management Relations Act.⁶ That section provides in part that the Board

shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

The Supreme Court granted certiorari⁷ to consider whether the Board was empowered under section 10(c) to award fringe benefits to remedy an unfair labor practice. The Court reversed and HELD: The Board is empowered by

¹ 393 U.S. 357 (1969).

² 29 U.S.C. §§ 158(a)(5), (1) (1964).

³ 152 N.L.R.B. 9, 14 (1965).

⁴ The employees apparently continued working during the unfair labor practice. This possibility is more fully discussed *infra* at p. 1023.

⁵ *NLRB v. Strong*, 386 F.2d 929, 933 (9th Cir. 1968).

⁶ 29 U.S.C. § 160(c) (1964).

⁷ 391 U.S. 933 (1968).