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USE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IN CONGLOMERATE MERGER CASES

*by William F. Lemke, Jr.**

In the past, the principal challenges to mergers and acquisitions have been made through use of Sections 1 and 2 of the Sherman Anti-Trust Act¹ or Section 7 of the Clayton Act.² It is apparent that these statutory provisions will be utilized in current proceedings against conglomerate mergers or acquisitions.³ Assistant Attorney General Richard W. McLaren is reported to have stated that Section 7 of the Clayton Act should be further tested against conglomerates before determining whether new legislation is needed.⁴

There is another federal statute which may be available to complement or supplement Sherman and Clayton in conglomerate merger cases. Section 5 of the Federal Trade Commission Act prohibits use of "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"⁵ Although it is not one of those statutes which are designated as "antitrust laws" by Section 1 of the Clayton Act,⁶ Section 5 of the Federal Trade Commission Act has frequently been used against practices similar to those which have been found to be in restraint of trade in violation of the antitrust laws. Accordingly, Section 5 is available for use in support of, or perhaps in extension of, the policies of the antitrust laws.

To what extent is the Federal Trade Commission authorized under

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¹ 15 U.S.C. §§ 1, 2 (1964). Section 1 declares contracts, conspiracies and combinations in restraint of trade to be illegal. Section 2 prohibits monopolizing, attempting to monopolize and combining or conspiring to monopolize.

² 15 U.S.C. § 18 (1964). This section prohibits the acquisition of all or part of the assets or all or part of the stock of one corporation by another corporation where the effect of the acquisition may be to substantially lessen competition or tend to create a monopoly.

³ See *United States v. International Tel. & Tel. Corp.*, Civil No. 13320 (D. Conn., filed Aug. 1, 1969); *United States v. International Tel. & Tel. Corp.*, Civil No. 13319 (D. Conn., filed Aug. 1, 1969); *United States v. Northwest Indus., Inc.*, Civil No. 69-C-1102 (N.D. Ill., filed May 21, 1969); *United States v. International Tel. & Tel. Corp.*, Civil No. 69-C-924 (N.D. Ill., filed April 28, 1969); *United States v. Ling-Temco-Vought, Inc.*, Civil No. 69-438 (W.D. Pa., filed April 14, 1969).

⁴ Wall St. Jour., Jan. 30, 1969, at 8, col. 2.

⁵ 15 U.S.C. § 45(a)(1) (1964).

⁶ 15 U.S.C. § 12 (1964).

Section 5 to enforce antitrust restraints? In *FTC v. Gratz*,⁷ the United States Supreme Court considered the applicability of Section 5 to a tying arrangement. The Court held that the arrangement did not violate the Act stating that the words, "unfair methods of competition, [were] inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."⁸ The *Gratz* court also held the ultimate decision whether a given practice was, as a matter of law, an unfair method of competition should be made by the courts.

The restrictive position taken in *Gratz* in its interpretation of unfair methods of competition was eventually repudiated in *FTC v. R. F. Keppel & Bros. Inc.*⁹ There the Court held the words "unfair methods of competition" were not intended by Congress to be limited to "fixed and unyielding categories." Rather, they established a flexible standard which might be applied to future practices unknown at the time the statute was enacted. The Court said that "[n]ew or different practices must be considered as they arise in the light of the circumstances in which they are employed."¹⁰ *Keppel* reaffirmed the *Gratz* ruling that the issue of whether a given practice is prohibited should be for the courts to determine.

I. ORGANIZATION OF ANTITRUST CASES

Since *Keppel*, the Court has continued to be flexible in its interpretation of Section 5 of the Federal Trade Commission Act in deceptive practice,¹¹ restraint of trade and other antitrust cases.¹² In the restraint of trade or antitrust area it is suggested that the cases may be grouped into three broad categories.

Violation of the antitrust laws is a violation of Section 5. The provisions of the antitrust laws constitute statements of public policy which the courts may use as a standard in making determinations whether unfair methods of competition in violation of Section 5 have been utilized. In *Fashion Originators Guild of America v. FTC*,¹³ the Supreme

⁷ 253 U.S. 421 (1920).

⁸ *Id.* at 427.

⁹ 291 U.S. 304 (1934).

¹⁰ *Id.* at 306-10, 314.

¹¹ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

¹² See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

¹³ 312 U.S. 457 (1941).

Court stated: "If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."¹⁴

Practices which contravene the "spirit" of the antitrust laws, but are exempt because of technical or jurisdictional omissions are violations of Section 5. This category of cases is best illustrated by *The Grand Union Co. v. FTC*¹⁵ where the Commission applied Section 5 of the Federal Trade Commission Act to a practice not specifically covered by Section 2 of the Clayton Act.¹⁶ Section 2 of the Clayton Act makes it illegal for a seller to pay advertising allowances to his competing customers unless it is done on a proportionally equal basis,¹⁷ but does not make it correspondingly illegal for a buyer to knowingly induce and receive such allowances. Noting that the Robinson-Patman Act *did* apply buyer liability in cases where illegal discriminations in *price* were knowingly induced or received,¹⁸ the Commission sought to remedy a possible oversight in the statute by charging a buyer who had received discriminatory advertising allowances with violation of Section 5 of the Federal Trade Commission Act.¹⁹ In its opinion upholding the Commission the court said:

The Commission is not upsetting specific Congressional policies; the proceedings did not 'circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.'²⁰ . . . Jurisdiction, perhaps, has been expanded from the technical confines of § 2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of *buying* power.

The Commission's decision here is entirely consistent with the basic purpose and policy of § 5 of the Federal Trade Commission Act.

¹⁴ *Id.* at 463. See also *FTC v. Motion Picture Advertising Serv. Co.* 344 U.S. 392 (1953).

¹⁵ 300 F.2d 92 (2d Cir. 1962). See also *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

¹⁶ Clayton Antitrust Act § 2, 15 U.S.C. § 13(a)-(f) (1964). 15 U.S.C. §§ 13, 13a-13c, 21a are popularly known as the Robinson-Patman Act.

¹⁷ 15 U.S.C. § 13(d) (1964).

¹⁸ *Id.* at § 13(f).

¹⁹ 15 U.S.C. § 45(a)(1) (1964). Sellers who paid the discriminatory advertising allowances had already been found to have violated 15 U.S.C. § 13(d) (1964). *Swanee Paper Corp. v. FTC*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

²⁰ *Grand Union Co. v. FTC*, 300 F.2d 92, 98 n.17 (2d Cir. 1962): "See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 149 n.78."

That section did not define 'unfair competition'; the concept was left flexible, so that the Commission could apply the broad Congressional standard to the myriad fact situations which would arise.²¹

Practices not within the ambit of the antitrust laws may violate Section 5. The Sherman Act is regarded as the basic antitrust law. The Clayton Act is sometimes said to have been intended to nip incipient antitrust violations in the bud before they blossom into Sherman Act violations.²² Section 5 is broader because action which runs counter to the public policy declared in the acts constitutes a violation of Section 5. In a number of cases the courts have held or indicated that Section 5 applies to situations where neither the Sherman Act nor Clayton Act tests were met.

In *FTC v. Cement Institute*,²³ a case involving use of a basing point pricing system, the Court had the following to say about Section 5:

Far from being regarded as a rival of the Justice Department and the district courts in dissolving combinations in restraint of trade, the new Commission was envisioned as an aid to them. . . . All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages²⁴

In *Atlantic Refining Co. v. FTC*²⁵ the Court remarked:

As our cases hold, all that is necessary in Section 5 proceedings to find a violation is to discover conduct that 'runs counter to the public policy' declared in the Act. *Fashion Originators Guild v. Federal Trade Comm'n*, 312 U.S. 457, 463 (1941). But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of the antitrust laws was, we believe, entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations. (Citations omitted).²⁶

In *FTC v. Brown Shoe Co.*,²⁷ a shoe manufacturer had fran-

²¹ 300 F.2d 92, 98 (2d Cir. 1962).

²² *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

²³ 333 U.S. 683 (1948).

²⁴ *Id.* at 692-93.

²⁵ 381 U.S. 357 (1965).

²⁶ *Id.* at 369.

²⁷ 384 U.S. 316 (1966).

chise agreements with retailers requiring them to concentrate their business in certain grade and price levels and not to handle shoes of competitors. In holding there was a Section 5 violation the Court declared:

[I]t is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.²⁸

[O]ur cases hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.²⁹

The FTC has recently embarked on a policy of merger prosecution under Section 5 of the Federal Trade Commission Act. The Commission, armed with the broad interpretation given Section 5 by the courts, has issued complaints attacking several recent mergers. These complaints call for an extension of the classifications and theories of the precedent from which they flow. This recent history portends of what may become vigorous antitrust enforcement under Section 5.³⁰

A. *Violation of the antitrust laws is a violation of Section 5.*

The Commission determined this matter to its satisfaction in *Foremost Dairies, Inc.*³¹ where it overruled a hearing examiner's holding that mergers and acquisitions could be considered by the Commission only under Section 7 of the Clayton Act. The Commission decided facts indicating a violation of Section 7 of the Clayton Act could also indicate a violation of Section 5 of the Federal Trade Commission Act. The Commission went on to state that practices not technically within the reach of the Clayton Act might nevertheless constitute a violation of Section 5.

²⁸ *Id.* at 320-21.

²⁹ *Id.* at 322. See also *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968); *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958); *Luria Bros. & Co. v. FTC*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968). But see *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), where both dissenting opinions suggest that Section 5 of the FTC Act might prohibit a practice which was not prohibited by the Sherman Act.

³⁰ Classification is undertaken with the realization that some proceedings may fall into more than one category and that there may be honest differences of opinion concerning the category into which any given proceeding should most appropriately be grouped.

³¹ 60 F.T.C. 944 (1962).

In *Golden Grain Macaroni Company*³² the complaint charged only a violation of Section 5. It was alleged the respondent had made several acquisitions which substantially lessened competition in the relevant market. Respondent was also charged with monopolizing, selling below cost, discriminating in price, engaging in price wars, and removing competitors' products from shelves of retail outlets by a buying-up program. The hearing examiner's initial decision ordered respondent to divest itself of one of the acquisitions. He referred to the apparent policy of the Clayton Act against increasing economic concentration and held there was an unfair method of competition in violation of Section 5.³³

In *The Stanley Works*,³⁴ a complaint has been issued charging violations of both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.³⁵ The merger of Stanley, one of the nation's leading producers of a full line of hardware, with Amerock Corp., a dominant producer of cabinet and furniture hardware, was alleged to have created an unreasonable restraint of trade and a dangerous tendency to unduly hinder competition thereby violating Section 5 in the following respects: a) elimination or possible elimination of substantial actual or potential competition; b) substituting the more powerful Stanley for the Amerock units in the industry thereby increasing entry barriers and depriving smaller concerns of equal opportunity to compete; c) denying free and open competition; and d) accelerating an increasing level of concentration.

B. *Section 5 used to remedy jurisdictional deficiencies, etc.*

The Federal Trade Commission has, on a number of occasions, relied upon Section 5 of the Federal Trade Commission Act in merger cases where for jurisdictional reasons or form of business organization Section 7 of the Clayton Act did not apply. This is analogous to the Justice Department's use of Section 1 or 2 of the Sherman Act in such situations.³⁶ A major distinction is that Section 5 does not re-

³² 3 TRADE REG. REP. ¶ 17,961 (FTC 1967).

³³ 3 TRADE REG. REP. ¶ 18,768 (FTC 1969).

³⁴ 3 TRADE REG. REP. ¶ 18,338 (FTC 1968).

³⁵ See also *Allied Chem. Co.*, 3 TRADE REG. REP. ¶ 18,496 (FTC 1968) (alleging violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act); *Freuhauf Trailer Co.* [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,260 (FTC 1965) (alleging violation of Section 7 of the Clayton Act); *L.G. Balfour Co.*, 3 TRADE REG. REP. ¶ 18,485 (FTC 1968) (alleging violation of Section 5 of the Federal Trade Commission Act).

³⁶ See *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

quire as high a level of restraint on competition as do the Sherman Act provisions.³⁷

In *Beatrice Foods Company*,³⁸ the respondent was alleged to have acquired 175 independent dairy companies and to have become the third largest dairy company in the United States. It was charged with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Many of the acquired dairies were not corporations and may not have been engaged in interstate commerce.³⁹ In its opinion the Commission said:

There is, however, at least one important difference in scope between Section 7 and Section 5. While Section 7 is applicable only to corporate acquisitions, Section 5 expressly forbids unfair methods of competition on the part of persons and partnerships as well as corporations. Had Congress deliberately limited Section 7 to corporations, determining that acquisitions involving persons and partnerships should not be governed by the same standards applicable to corporate acquisitions, we would hesitate to conclude that such acquisitions are to be tested in Section 5 proceedings under Section 7 standards. But no such Congressional intent is discernable. So far as appears, Section 7 was not made applicable to noncorporate acquisitions only because corporate acquisitions were in the forefront of Congressional concern and attention.

. . . .

Applying Section 5 to noncorporate acquisitions effectuates, rather than circumvents or conflicts with Congress' policy with respect to the prevention of anticompetitive acquisitions.⁴⁰

The Commission recently issued a complaint against *Ash Grove Cement Company*⁴¹ charging violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The cement company which had acquired the capital stock of two other companies in the industry and also acquired the assets used in a rock quarrying business by a third company. The Commission complaint alleged the corporate stock acquisitions were violations of Section 7, and the asset acquisition from individuals was alleged to be a Section 5 violation. Together, it was alleged, the stock and asset acquisitions were anti-com-

³⁷ See cases cited *supra* note 29.

³⁸ [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,244 (FTC 1965).

³⁹ Section 7 of the Clayton Act applies to corporations engaged in commerce which are involved in acquisition of stock or assets of other corporations also engaged in commerce. 15 U.S.C. § 18 (1964).

⁴⁰ *Beatrice Foods Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,244, at 22,335-36 (FTC 1965).

⁴¹ 3 TRADE REG. REP. ¶ 18,849 (FTC 1969).

petitive and tended to be monopolistic.

C. *Section 5 applied to practices beyond the ambit of antitrust laws.*

In *L. G. Balfour Company*,⁴² the Commission's complaint charged only a violation of Section 5. Various anti-competitive and monopolistic practices were involved including the secret acquisition of another company in the industry which was held out as continuing to be an independent competitor. The Commission found that concealing the fact of this acquisition was an unfair method of competition which aided the Balfour Company in maintaining and increasing its monopolistic position.⁴³

In *Maremont Corporation*,⁴⁴ proceedings have been instituted by the Commission under Sections 5 and 7. Maremont is a major re-builder and producer of automobile replacement parts. It also owns and operates one of the largest warehouse distribution chains in the United States. The complaint challenges acquisitions of automotive parts manufacturers, rebuilders and warehouse distributors. One charge in the complaint is that:

Maremont's plan to continue making distribution acquisitions until it has established a nationwide network of warehouse distributors constitutes an unfair method of competition in commerce . . . violative of Section 5 of the Federal Trade Commission Act * * * because in light of its acquisitions to date each and every additional distribution acquisition may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act as amended. * * *⁴⁵

It will be recalled that the Supreme Court was interpreting Section 7 of the Clayton Act in *Brown Shoe Co. v. United States*⁴⁶ when it stated that "[i]t is true, of course, that the statute prohibits a given merger only if the effect of *that* merger may be substantially to lessen competi-

⁴² 3 TRADE REG. REP. ¶ 18,485 (FTC 1968).

⁴³ See *Rader v. Balfour*, 1969 Trade Cas. ¶ 72,709 (N.D. Ill. 1968). In that case the issue was whether the Balfour case tolled the statute of limitations in a private suit. In discussing the distinction between FTC enforcement of a Clayton Act provision and enforcement of Section 5 provisions, the court said:

In the case at bar, on the other hand, the FTC proceeding was not one to enforce an 'antitrust law' as that term is specifically defined in Section 1 of the Clayton Act; the FTC proceeding was an administrative proceeding dealing with a much broader category of regulation than what is forbidden by the 'antitrust laws'. *Id.* at 86,536.

⁴⁴ 3 TRADE REG. REP. ¶ 18,431 (FTC 1968).

⁴⁵ *Id.* at 20,765.

⁴⁶ 370 U.S. 294 (1962).

tion."⁴⁷ The *Maremont* case, still at the complaint stage, challenges a plan to continue making future acquisitions, and appears to represent a substantial step beyond the *Brown Shoe* doctrine of confining the measure of competitive impact to the specific merger under consideration.

The acquisition by The Bendix Corporation of Fram Corporation was challenged by the Commission in a complaint charging violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.⁴⁸ The acquisition was a conglomerate type product extension merger in which Bendix, a major diversified manufacturer of components and assemblies for automotive, aerospace, automation, oceanic, scientific and other uses, acquired Fram, the nation's third largest manufacturer of automotive filters and also a substantial producer of water filter separators and aerospace fuel filters. The complaint was patterned after *FTC v. Procter & Gamble Co. (Clorox)*,⁴⁹ but constituted a step beyond *Procter* because it was based on Section 5 as well as Section 7 and because Bendix was not as closely affiliated with, nor as likely to have as direct a competitive impact in Fram's market as did Procter in the Clorox market. In an initial decision, a hearing examiner dismissed the complaint.⁵⁰ His action is subject to Commission review and it will be interesting to see whether the agency uses this opportunity to explore the reaches of Section 5.

II. POSSIBLE APPLICATION OF EXTENDED SECTION 5 POWERS

Assuming that Section 5 of the Federal Trade Commission Act is violated by practices not having sufficient anti-competitive effect to be violations of the Clayton or Sherman Acts, what is the potential of Section 5 in the conglomerate field? There are some areas where Section 5 might apply. Application must be tempered by the realization that factual situations in conglomerate acquisitions are myriad and that each merger will produce its own peculiar facts.

⁴⁷ *Id.* at 332. But see *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1091 (1962), where the Commission states:

We have previously rejected the argument under Section 7 that certain acquisitions in a series of acquisitions, none of which can be shown to have the adverse effect on competition required by Section 7, become illegal and may be ordered divested for the reason that the cumulative effect on competition of these prior mergers may be such as to make any further acquisition illegal. On the other hand, we have no doubt that where, as here, a respondent with a proclivity for growth by acquisitions is charged with a violation of Section 5, the cumulative effect of all of its acquisitions is of importance.

⁴⁸ *Bendix Corp.*, 3 TRADE REG. REP. ¶ 17,997 (FTC 1967).

⁴⁹ 386 U.S. 568 (1967).

⁵⁰ *Bendix Corp.*, 3 TRADE REG. REP. ¶ 18,896 (FTC 1969).

The Commission has the burden of demonstrating the existence of "unfair methods of competition", in Section 5 cases. One standard for determining this was provided by *Gratz*⁵¹ where the Supreme Court said to constitute unfair methods of competition the practices must be "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."⁵²

In *United States v. Von's Grocery Co.*,⁵³ the Supreme Court said that "the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."⁵⁴ Does this statement regarding Section 7 of the Clayton Act establish a public policy standard which the Commission may use as a guideline in Section 5 cases? Arguably, if a major conglomerate acquires a medium-sized company in an industry where the conglomerate is not previously represented, this would be contrary to the *Von's* statement of public policy. Any increase in size of a conglomerate might be regarded as an increase in concentration unless the conglomerate simultaneously divests itself of a subsidiary or division it already owns.⁵⁵ Likewise, any conglomerate acquisition of a small company reduces by one the number of small independent competitors in business.

In *Procter and Gamble*,⁵⁶ the acquirer was a large corporation and the acquired company (Clorox) was the dominant company in the bleach industry. In holding the merger illegal the Court found that Clorox would be aided by the advertising and promotional power of Procter, thus increasing Clorox' domination of the bleach industry. Had the acquired company not been a dominant factor in its industry, the unfair methods of competition standards of Section 5 might be met even though there may not be a violation of Section 7.⁵⁷

In *FTC v. Consolidated Foods Corp.*⁵⁸ the intention to use and the actual use of reciprocity to benefit the acquired company was accepted

⁵¹ *FTC v. Gratz*, 253 U.S. 421 (1920).

⁵² *Id.* at 427.

⁵³ 384 U.S. 270 (1966).

⁵⁴ *Id.* at 275.

⁵⁵ Assistant Attorney General Donald F. Turner in a statement before the Senate Small Business Committee, on April 6, 1967 stated: "For example, . . . Congress could pass a statute that would say to the top 50 or 100 companies 'anytime you make an acquisition in excess of a certain size you must peel off assets of comparable magnitude.'" BNA ANTITRUST & TRADE REG. REP. NO. 300, at 11 (Apr. 11, 1967).

⁵⁶ 386 U.S. 568 (1967).

⁵⁷ *Cf. United States v. International Tel. & Tel. Corp.*, Civil No. 13320 (D. Conn. filed Aug. 1, 1969).

⁵⁸ 380 U.S. 592 (1965).

as evidence showing a reasonable probability of substantial lessening of competition as required by Section 7 of the Clayton Act. In later conglomerate cases, the question has been raised whether the existence of an economic structure which might make reciprocity possible is enough, in the absence of any actual use of reciprocity or any plan to use it, to establish a probable violation of Section 7.⁵⁹ The lower courts have divided on this issue.⁶⁰ When the question is decided by the Supreme Court, the Justices could use Section 5 of the Federal Trade Commission Act in preference to Section 7 of the Clayton Act on the theory of the dissent in *Fortner Enterprises, Inc. v. United States Steel Corporation*⁶¹ which suggested that a practice not amounting to a Sherman Act violation might be an unfair method of competition under Section 5.

Access to new financial resources are often an important factor in conglomerate mergers. The resources may be those of the acquiring corporation which would become available to the acquired company giving the latter a possible competitive advantage over the remaining companies in its industry.⁶² Or the resources may be those of the acquired company which might become available to other divisions of the conglomerate in need of financial support.⁶³ In either situation, the existence of a "deep pocket" which could be drawn upon provides economic power that did not exist before the merger was consummated.⁶⁴

Possession of dominant economic power plus use of such power on one market to curtail competition in another market was held to violate Section 5 in *Atlantic Refining Company v. FTC*.⁶⁵ This case was followed by *FTC v. Texaco, Inc.*⁶⁶ where the court found a major oil company's dominant economic power over its filling station dealers, al-

⁵⁹ See *United States v. International Tel. & Tel. Corp.*, Civil No. 13320 (D. Conn. filed Aug. 1, 1969).

⁶⁰ Compare *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), and *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963), with *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969), and *United States v. International Tel. & Tel. Corp.*, Civil No. 13320 (D. Conn. filed Aug. 1, 1969).

⁶¹ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 at 520 (1969).

⁶² See *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

⁶³ See *United States v. International Tel. & Tel. Corp.*, Civil No. 13320 (D. Conn. filed Aug. 1, 1969).

⁶⁴ *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

⁶⁵ 381 U.S. 357 (1965).

⁶⁶ 393 U.S. 223 (1968).

though not used in a coercive fashion, was nevertheless effective in controlling their purchases of automotive accessories. In *Fortner*⁶⁷ the Supreme Court recognized the importance of financing when it held that special or unique financing which was not generally advisable might be used as a tying device. It may be significant that the two dissenting opinions in this case could not agree whether there was a Sherman Act violation but each suggested the situation might be dealt with under Section 5 of the Federal Trade Commission Act.

In *Maremont*⁶⁸ the Commission has alleged a series of horizontal and vertical mergers violative of Section 7 of the Clayton Act and that disclosed plans of the acquiring company to continue to make acquisitions violates Section 5 of the Federal Trade Commission Act. Using the same theory, the Commission could use Section 5 to challenge conglomerates which have already made numerous acquisitions and have plans to continue making conglomerate mergers in the future.

Is it unfair for a large multi-industry conglomerate to merge into an industry which has been characterized by single industry concerns? Is it unfair to introduce a large conglomerate which has a well known public relations "image" into an industry consisting of companies that are unknown or little known to the public? One of the arguments against tying contracts or reciprocity arrangements is that their use introduces a foreign element into competition which causes decisions to purchase or sell to be made for reasons other than quality, cost, service and other factors relating to the intrinsic worth of a product. Perhaps these same arguments may apply in cases where a conglomerate brings to the product line of an acquired company an image earned in completely different product lines and completely different industries as well as through different quality controls.⁶⁹ The future use of Section 5 of the Federal Trade Commission Act in conglomerate merger cases remains to be more fully explored and is limited only by the factual situations which may be created by specific acquisitions.

III. REMEDIES

An effective remedy in merger cases is the preliminary injunction which serves to halt an acquisition before its consummation. Even in

⁶⁷ 394 U.S. 495 (1969).

⁶⁸ 3 TRADE REG. REP. ¶ 18,431 (FTC 1968).

⁶⁹ See *Litton Indus., Inc.*, 3 TRADE REG. REP. ¶ 18,729 (FTC 1968), where the FTC alleged in the Section 7 complaint that Litton used the acquisition route as a means to improve its product line (typewriters) thereby avoiding a commitment to original research and development.

cases where the preliminary injunction is denied, the denial can be granted on condition that the acquired company is operated separately until the litigation reaches final determination.⁷⁰ Hold separate orders eliminate the problem of "scrambled assets" before a final ruling on a merger's legality.

The Federal Trade Commission Act does not grant preliminary injunction authority to the Commission—a serious limitation on the Commission's remedial powers. This limitation has been alleviated to some extent by the holding that the All Writs Act⁷¹ can be used if the Commission can convince a federal appellate court that it is necessary to maintain the status quo and to preserve the court's jurisdiction if it were called upon to review the Commission's action.⁷² In some cases, without resorting to the All Writs Act, the Commission has been able to obtain agreement from the respondent to hold the acquiring and acquired companies separate pending the outcome of Commission merger proceedings.⁷³

Violation of Section 5 of the Federal Trade Commission Act is not a violation of an antitrust law.⁷⁴ Consequently, the private suit advantages granted by the Clayton Act do not result from violation of Section 5.⁷⁵ In early cases it was held that the Federal Trade Commission did not have authority to order divestiture of assets even in Section 7 violations.⁷⁶ Since the amendment to Section 7 in 1950, the Commission's power to order divestiture in Clayton Act cases has been recognized and utilized.⁷⁷ The Commission has also ordered divestiture in cases brought only under Section 5 of the Federal Trade Commission Act. This remedy has been used in those instances where it was apparent that the only way to restore competition was to re-establish the acquired company as an independent competitive entity.⁷⁸

There are a number of remedial devices available to the Commission which are more flexible than those available to the courts and therefore perhaps more useful in disposing of complex conglomerate

⁷⁰ See *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969).

⁷¹ 28 U.S.C. § 1651(a) (1964).

⁷² *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

⁷³ See, e.g., *A.G. Spaulding & Bros. Inc.*, 1 TRADE REG. REP. ¶ 4360.05 (FTC 1966).

⁷⁴ Clayton Antitrust Act § 1, 15 U.S.C. § 12 (1964).

⁷⁵ *Rader v. Balfour*, 1969 Trade Cas. ¶ 72,709 (N.D. Ill. 1968). See also *Y & Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709 (E.D. Pa. 1967).

⁷⁶ See, e.g., *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927).

⁷⁷ See *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966); *Luria Bros. & Co. v. FTC*, 389 F.2d 847 (3rd Cir.), cert. denied, 393 U.S. 829 (1968).

⁷⁸ See *L.G. Balfour Co.*, 3 TRADE REG. REP. ¶ 18,485 (FTC 1968).

merger cases. One of these is the use of administrative discretion as authorized by the Administrative Procedure Act.⁷⁹ In *Chesebrough-Pond's, Inc.*⁸⁰ the Commission stated:

Section 5(d) of the Administrative Procedure Act authorizes agencies, including the Commission, ' . . . in its sound discretion, with like effect as in the case of other orders to issue a declaratory order to terminate a controversy or remove uncertainty.' The Commission's action in these cases is an exercise of this authorized discretion. Although we are not issuing an injunctive order, we have found that certain practices are unlawful, relying upon respondents' advance assurances that these declaratory findings will be looked upon by them as a binding guide to future conduct. A cease and desist order is not always, and in all circumstances, the most appropriate and effective disposition of a proceeding where the primary need is to define and declare the requirements of the law.⁸¹

Another remedial device is the Assurance of Voluntary Discontinuance⁸² which the Commission uses to terminate alleged violations without formal proceedings if the proposed respondent will give assurances that he will discontinue and not resume a questioned practice. These assurances have been used in restraint of trade cases.⁸³

Still another remedial device is the Advisory Opinion.⁸⁴ In appropriate cases, if a request is made before a contemplated acquisition is consummated, the Commission will give the requesting party an advisory opinion expressing the Commission's views as to the legality of the acquisition.⁸⁵ Digests of advisory opinions are published at irregular intervals. If these published opinions are expanded beyond their current rather cryptic form, they have the potentiality of becoming valuable guidelines in merger cases. A somewhat similar device is the Trade Regulation Rule⁸⁶ which can be used by the Commission to make advance findings that certain practices will be regarded as illegal and that the Trade Regulation Rule will be used against them to the extent it is applicable.

There have been many unsuccessful attempts to persuade Congress to enact legislation which would require that companies planning to

⁷⁹ 5 U.S.C. § 554(e) (Supp. IV 1969).

⁸⁰ [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,007 (FTC 1964).

⁸¹ *Id.* at 22,098.

⁸² FTC Procedures and Rules of Practice, 16 C.F.R. § 2.21 (1969).

⁸³ See reference to Stephenson-Adamson Mfg. Co., FTC News Summary, July 2, 1969.

⁸⁴ FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1-1.4 (1968).

⁸⁵ 3 TRADE REG. REP. ¶¶ 18,186 - 18,211 (FTC 1968).

⁸⁶ FTC Procedures and Rules of Practice, 16 C.F.R. § 1.12 (1969).

make mergers or acquisitions give advance notice to the Commission and the Department of Justice. Recently the Commission has attempted to obtain advance notice regarding significant mergers through use of its statutory power to require corporations engaged in commerce to make special reports regarding their business activities.⁸⁷ The Commission has notified companies with assets over \$250 million that special reports giving sixty days' advance notice of certain mergers or acquisitions must be filed. Notification is also required where the combined assets after a proposed merger would be \$250 million or more.⁸⁸

In complex conglomerate merger cases administrative handling by the Federal Trade Commission may often be desirable because of the flexibility of the remedies which are available. Coupled with this is the agency expertise gained from dealing with many more merger cases than the average trial court is called upon to decide.

CONCLUSION

It appears certain that Section 5 of the Federal Trade Commission Act will continue to be used in merger cases where Section 7 of the Clayton Act would normally be applicable except for the technical or jurisdictional deficiencies which are in that statute. It is conceivable that Section 5 may also be applied in conglomerate merger cases in such a way as to go beyond the Clayton and Sherman Acts to reach acquisitions which would not be affected by either of these statutes.

The commission appointed by the American Bar Association to study the Federal Trade Commission concluded that the Commission could perform valuable service in the antitrust field by concentrating on difficult and complex problems.⁸⁹ One can conceive of no more difficult problem than that of the conglomerate merger.

⁸⁷ 15 U.S.C. § 46 (b) (1964).

⁸⁸ 1 TRADE REG. REP. ¶ 4455 (FTC resolution of April 8, 1969).

⁸⁹ ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).