THE SEMINAL CASES

UNITED STATES V. PHILADELPHIA NATIONAL BANK (1963).[1] The Supreme Court provided a solution to one of the most basic questions of merger antitrust law raised by *Brown Shoe* the next year in *Philadelphia National Bank*. There, the Court held that the plaintiff can make a prima facie showing of the requisite anticompetitive effect of a horizontal acquisition through an evidentiary presumption where the combined share of the merging firms, in light of the degree of concentration already present in the market, is sufficiently high:

> [A] merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[2]

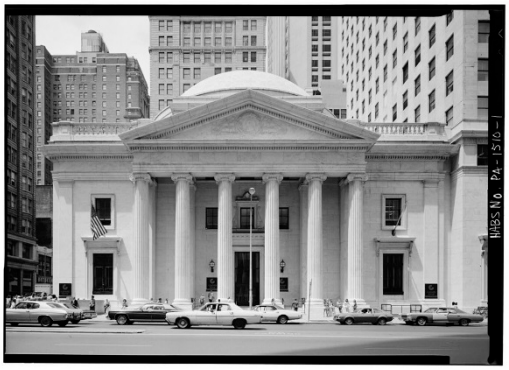
The *Philadelphia National Bank* Court did not fix numerical figures for invoking this presumption. In *Philadelphia National Bank* itself, however, the Court found the presumption established when the merging firms combined held over 30% of a relevant market in which the four largest firms held over 75%.[3]

On February 25, 1961, the Department of Justice filed a civil suit to enjoin the proposed merger of The Philadelphia National Bank ("PNB") and Girard Trust Corn Exchange Bank. The complaint charged that the acquisition may tend substantially to lessen competition in commercial bank services in the four-county Philadelphia metropolitan region in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act. PNB was a national bank with assets in excess of $1 billion and the second largest commercial bank in the four-county region. Girard was a state bank with assets of over $750 million and the third largest commercial bank in the area. PNB and Girard, which were both headquartered in Philadelphia, accounted for approximately 21% and 16%, respectively, of the commercial bank assets in the four-county area. If the merger was consummated, the resulting bank would become the largest in the area, with approximately 36% of the area's total bank assets. As a result of the merger, the two-firm concentration ratio would rise from 44% to 59%, and the four-firm concentration would rise from ___% to 78%.

1. 374 U.S. 321 (1963), *rev'g* 201 F. Supp. 348 (E.D. Pa. 1962).
2. *Id.* at 363.
3. *Id*. at 331.

The government's case at trial was straightforward. The Justice Department relied principally on statistical market share evidence. The Department also introduced testimony by economists and bankers that, notwithstanding the extensive degree of federal and state regulation of the banking industry, there remained substantial areas where product availability, price and quality were determined by competitive forces; that concentration in commercial banking, which the proposed merger would increase, would reduce these competitive forces; that the "area of the country" in which the competitive effect of the merger would be felt primarily would be the area in which the merging parties had their offices and branches, that is, a four-county area around Philadelphia; and that the relevant "line of commerce" was commercial banking. PNB and Girard responded by introducing contrary evidence on these propositions, as well as evidence that the merger was justified because the resulting bank would be better able to compete with out-of-state (particularly New York) banks, would attract new business to Philadelphia, and would generally promote the economic development of the region.

After a trial on the merits, the district court found that commercial banking was a proper relevant product market, but that the four-county metropolitan area was not a relevant geographic market because of competition with other banks for bank business throughout the greater northeastern United States. The district court also found that, even if the four-county region was an appropriate "area of the country" for merger antitrust analysis, there was no reasonable probability that the challenged transaction would substantially lessen competition among commercial banks in that area. Finally, the court found that the merger would benefit the Philadelphia metropolitan area economically. Accordingly, the district court dismissed the complaint.



Girard Trust Corn Exchange Bank
Main office

The government appealed directly to the Supreme Court under the Expediting Act. In six-to-two decision, the Supreme Court reversed,

holding that the merger would violate Section 7 of the Clayton Act, and remanded the case with instructions to the district court to enter judgment enjoining the combination.[4] Justice William J. Brennan, Jr., wrote the opinion for the majority.

Product market definition presented "no difficulty" for the Court. With virtually no analysis, the Court agreed with the district court that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' composes a distinct line of commerce."[5] A reading of the opinion suggests as much as anything that the Court believed that the market should be no larger than commercial banking because—at least in the early 1960s—commercial bank products were insulated from competition from other types of institutions either by regulation, as in the case of checking accounts; by a cost advantage over similar products offered by other firms, such as personal finance companies (whose working capital consists substantially of bank loans); or by simple if unexplained consumer preference, most clearly illustrated by savings accounts offered by banks which paid a lower rate of interest than thrift institutions yet remained competitive. More mysterious, and still an analytical problem today, is why the "cluster" of all commercial bank products comprised the relevant product market, as opposed to disaggregating various bank products into distinct lines of commerce for purpose of merger analysis. The Supreme Court offered no explanation, stating summarily only that "commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.'"[6]

The Supreme Court devoted more attention to the question of geographic market definition. Here, the Court departed from the conclusion of the district court that the northeastern United States was the relevant area of the country. In an oft-quoted passage, the Court observed that "the proper question" to be asked is "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[7] This "area of effective competition" is determined as much by where existing purchasers can turn for supplies as by the trade area in which the parties operate.[8] The Court found that convenience of location is essential in banking, and consequently that inconvenience localizes competition in banking the same way that high transportation costs localize competition in other industries.[9] The Court then quickly leaped from the statement of these rules to the conclusion that the relevant geographic market was the four-county metropolitan area, where the "vast

4. The Court reserved the question of whether the combination also violated Section 1 of the Sherman Act.

5. *Id*. at 356.

6. *Id*. at 357 (citing Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 811 (9th Cir. 1961)).

7. *Id*. at 357 (citing BETTY BOCK, MERGERS AND MARKETS 42 (1960)).

8. *Id*. at 359 (citing Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)).

9. *Id*. at 358-59 (citing Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958)).

bulk" of both PNB's and Girard's business originated. The Court recognized that some business, particularly with large depositors and borrowers, originated outside the four-county area, and that some small customers would find the four-county area much too large for all banks within it to be meaningfully accessible. Accordingly, a compromise was required:

> But that in banking the relevant geographic market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.[10]

To support its four-county compromise, the Court cited Pennsylvania banking law, which applied equally to both parties and which limited branch banks to counties contiguous to the home county. In the case of banks headquartered in Philadelphia, as were PNB and Girard, Pennsylvania law then permitted branching in the four-county metropolitan area, and both PNB and Girard had branches in each of the four counties.

Having defined the product and geographic dimensions of the relevant market, the Court turned to the merger's expected effect on competition. The Court observed:

> Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency." Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simply the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.[11]

Balancing these concerns, the Court concluded "in certain cases . . . elaborate proof of market structure, market behavior, or probable anticompetitive effects" was unnecessary and unwarranted.[12] Instead, given that the dominant theme motivating

10. *Id.* at 361.
11. 374 U.S. at 363 (citations omitted).
12. *Id.*.

the Celler-Kefauver Act was an "intense congressional concern" over "a rising tide of economic concentration in the American economy,"[13] the Court held the requisite anticompetitive effect could be presumed from the changes in the market share distribution:

> Specifically, we think that a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[14]

The Court noted that this presumption is "fully consonant with economic theory": "That '[c]ompetition is likely to be greatest when there are many sellers, none of which has a significant market share,' is a common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute."[15]

Without establishing a hard and fast threshold, the Court held that PNB's and Girard's combined market share of 30% was "undue," and that an increase in the two-firm concentration ratio from 44% to 59% and the four-firm concentration ratio from ___ to 78% represented a "significant increase" in market concentration, so that the presumptive rule of illegality was triggered. The Court observed in a footnote that Carl Kaysen and Donald Turner recommended in their seminal work that a combined 20% share should be the threshold of prima facie unlawfulness,[16] George Stigler also would employ a 20% threshold,[17] Jesse Markham would use a 25% test,[18] and Derek Bok would look primarily to changes in market concentration of 7% or 8%.[19] The Supreme Court observed that since a 30% combined share presents a "clear" threat to

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13. *Id*.

14. *Id*. (citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)).

15. *Id*. (internal citations and footnote omitted). To support the basic economic proposition, the Court cited JOE S. BAIN, BARRIERS TO NEW COMPETITION 27 (1956); CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 133 (1959); FRITZ MACHLUP, THE ECONOMICS OF SELLERS' COMPETITION 84-93, 333-36 (1956); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 308-16, 328 (1960); Jesse M. Markham, *Merger Policy under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 521-22 (1957); Edward S. Mason, *Market Power and Business Conduct: Some Comments*, 46 AM. ECON. REV. 471 (1956); George Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955).

16. CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY ___ (1959).

17. George Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955).

18. Jesse M. Markham, *Merger Policy under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 522 (1957).

19. Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 328-29 (1960). Actually, in his published article Bok recommended 5% as a threshold. *Id*.

competition it was unnecessary to specify a minimum threshold, and emphasized that the fact that a merger results in a firm with less than 30% does not raise an inference that the combination does not violate Section 7.[20]

After finding a prima facie violation, the Court turned to whether there was anything in the record by way of a negative defense to rebut the inference of anticompetitive effect derived from the market share distribution. First, the Court rejected as inadequate testimony of bank officers that competition in the Philadelphia area was vigorous and would continue to be so after the merger, especially since the witnesses could not give concrete reasons for their conclusions. In addition, while testimony from representatives of the parties suffered from its inherently self-serving nature, the fact that other testimony was from bank officers representing small competitor banks did not substantially enhance its probative value, since in an oligopolistic market small companies may be content to follow the anticompetitive lead of the larger firms.[21] Second, the Court found irrelevant the fact that multiple banks would continue serving the Philadelphia area, and so afford any customers dissatisfied with the services of the merged firm with ready alternatives. Section 7, the Court repeated, was intended to arrest the trend toward concentration in its incipiency, before the customers' alternatives disappeared. The Court intimated that ease of entry of new competitors might ensure the continued competition and the availability of consumer alternatives, but given the fact that entry into banking was regulated the Court did not explore this possibility.[22] Finally, the Court rejected the argument that the extensive degree of regulation made the banking industry immune from the anticompetitive effects of concentration. The Court found that competition among banks existed along a variety of dimensions—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, personal accommodations, advertising, and special services—and, at least by implication, suggested that a threatened diminution of competition along any of these dimensions was within the purview of Section 7.

Finally, the Court considered and rejected each of the three affirmative defenses offered by the banks. First, as a matter of fact, contrary to the banks' contentions, mergers were not the only means of following their customers to the suburbs; banks could open de novo branches rather than acquiring existing ones. In this connection, the Court noted that "one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."[23] The Court left unaddressed the question of the legal significance of being able to "follow" one's customers, assuming for whatever reason that de novo entry was not feasible. Second, the Court found irrelevant the fact that the merger would enable the resulting bank better to compete with large out-of-state banks,

20. *Philadelphia Nat'l Bank*, 374 U.S. at 364-65 & n.41.

21. *Id.* at 367 n.43.

22. *Id.* at 367 & n.44.

23. *Id.* at 370.

particularly New York banks, for large loans, although it did not reject categorically a defense of "countervailing power":

> We reject this application of "countervailing power." If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market.[24]

Finally, the Supreme Court held that the district court's finding that the merger would bring business to the Philadelphia area was without legal significance:

> [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 § 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.[25]

Although the Court may have been carried away by its rhetoric in speaking of "benign" anticompetitive mergers (one charitable possibility is an anticompetitive merger that does not precipitate other mergers or acquisitions in the market), the Court's instruction was clear: legality under Section 7 turned on the threat of an anticompetitive effect—still not precisely defined but clearly related to the notion of concentration—in some relevant market. As long as the requisite threat to competition existed, other putatively beneficial consequences in the market offered no defense to a Section 7 violation.

Although the *Philadelphia National Bank* Court stressed that a presumption of anticompetitive effect based on market shares was rebuttable, with the acquiescence if not encouragement of the Supreme Court, the lower courts rapidly transformed that rather mechanical presumption into a conclusive evidentiary inference. As a result, for years market definition—from which the market shares and market concentrations would be derived—was the battleground on which antitrust challenges were fought, making *Philadelphia National Bank* the critical case for results, if not theory.

24. *Id.* at 370-71.

25. *Id*. at 371.

NOTES

1. Richard Posner, Brennan's law clerk during the 1962-63 term, reports that he wrote Brennan's opinion for the majority in *Philadelphia National Bank*.[26] Posner said that Brennan "wasn't very interested in the details of legal analysis, so we law clerks wrote the opinions and he would go over them."[27] While on the Harvard Law Review, Posner had been assigned to cite check a portion of path-breaking article by Derek Bok entitled *Section 7 and the Merging of Law and Economics* in which Bok had argued for a simplified approach to Section 7 cases.[28] In *Philadelphia National Bank*, Posner incorporated the idea of a simple prima facie showing of anticompetitive effect in what is now known as the *PNB* presumption.

After clerking for Justice Brennan, Posner served from 1963 to 1965 as an attorney-advisor to FTC Commissioner Philip Elman. For the next two years, Posner was an assistant to Solicitor General Thurgood Marshall. Posner joined the faculty of the Stanford Law School in 1968 as an associate professor and moved to the University of Chicago Law School as a professor in 1969. In 1981, Posner was nominated by President Ronald Reagan to be a judge on the Court of Appeals for the Seventh Circuit, where he served as chief judge from 1993 to 2000.

UNITED STATES V. ALUMINUM CO. OF AMERICA (ROME CABLE) (1964).[29] On April 1, 1960, the Department of Justice filed a civil complaint charging that the acquisition by the Aluminum Company of America (Alcoa) of Rome Corporation violated Section 7 of the Clayton Act. Alcoa was a fully integrated aluminum producer. It was the nation's largest refiner of aluminum ore into primary aluminum, accounting for about 38% of total U.S. primary aluminum production capacity. It also manufactured a wide variety of intermediate and final aluminum products, including aluminum wire and cable. Alcoa made no copper products. Rome was primarily engaged in the manufacture of copper wire and cable products, although in 1952 it began making aluminum rod from aluminum ingot purchased from primary producers. Still, at the time of the acquisition, over 90% of Rome's production was of insulated copper products. Alcoa acquired Rome on March 31, 1959, in a stock exchange valued at the time at about $32

26, *See* Interview with Richard Posner, Securities and Exchange Commission Historical Society Oral History Project 2 (Jan. 25 2011).

27. Id. at 2.

28. *See* Derek C. Bok, *Section 7 and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

29. 377 U.S. 271 (1964), *rev'g* 214 F. Supp. 501 (N.D.N.Y. 1963) (Blue Book No. 1512).

million.[30] The complaint alleged that the acquisition would substantially lessen actual and potential competition in "various wire and cable products" generally and between Alcoa and Rome in particular, and sought an order of divestiture and an injunction against further acquisitions of any company engaged in the production or sale of wire or cable products, conduit, or cable accessories.

After a four-week trial on the merits, the district court held that the acquisition did not violate Section 7 and dismissed the complaint. Product market definition was the central issue. The district court found that aluminum wire and cable were used almost exclusively by electric utilities for electric power transmission. Copper wire was also used for this purpose. In overhead lines, bar or lightly insulated aluminum conductor had virtually displaced copper conductor in new installations. Underground, however, where the conductor has to be heavily insulated, copper was by far the dominant conductor. The district court found that bare aluminum conductor was a separate line of commerce, but that insulated aluminum conductor had to be included in the same relevant market with insulated copper conductor. The court rejected an all aluminum conductor product market on the grounds that insulated cooper conductor had to be included in any market containing insulated aluminum conductor.[31] Within the two relevant markets found by the court—bare aluminum conductor and insulated aluminum plus copper conductor—the shares of the merging companies and the change in concentration resulting from the merger were not sufficiently high to warrant antitrust concern.

Alcoa/Rome Shares in Various Proposed Product Markets

Proposed	Alcoa		Rome		Combined		
lines of commerce	Share	Rank	Share	Rank	Share	Rank	D.C. Result
Bare aluminum conductor	32.5%		0.3%		32.8%		No violation
Insulated aluminum conductor	11.6%	3	4.7%	8	16.3%		No market
Insulated aluminum and copper conductor	0.3%		1.3%		1.6%		No violation
Aluminum conductor (bare and insulated)	27.8%	1	1.3%	9	29.1%	1	No market
All conductor	1.8%		1.4%		3.2%		No violation

Note: Blank cells indicate that the data was not contained in the court's opinion

30. *See Court in Antitrust Case Clears Alcoa Purchase of Rome Cable*, N.Y. TIMES, Jan. 30, 1963, at 12.

31. *Alcoa*, 214 F. Supp. at 510.

The district court made three other findings that supported its dismissal of the complaint. First, the court found that Alcoa's purpose in acquiring Rome was to gain expertise in the manufacture of more sophisticated types of insulated aluminum conductor and not to eliminate a competitor. Indeed, the court found that Alcoa and Rome competed in only four products and that Rome's production in the overlapping products was not significant.[32] Second, although the government argued that concentration in the aluminum *industry* was increasing, the court found that concentration in aluminum *conductors* was decreasing. Moreover, prior to the Rome acquisition, Alcoa had not acquired any companies involved in the manufacture or sale of aluminum conductor. Third, the court found that there was ease of entry into the manufacture and sale of aluminum conductor and that in the preceding ten years the number of insulated aluminum conductor manufacturers grew from four to twenty-nine (most of which, like Rome, were originally insulated copper conductor manufacturers). The court noted that several manufacturers had exited the business for failure to make a profit, indicating that the business was operating competitively.

On a direct appeal under the Expediting Act, the Supreme Court reversed in a six-to-three decision. Justice William O. Douglas wrote the majority opinion. Douglas focused immediately on the district court's rejection of an all aluminum conductor market. Douglas agreed that there is competition generally between insulated aluminum conductor and insulated copper conductor. But in overhead distribution, Douglas found, insulated aluminum conductor has "decisive advantages" over insulated copper conductor—including its costs being 50% to 65% of the cost of insulated copper conductor—and that its share of total installations increased from 6.5% in 1950 to 77.2% in 1959.[33] Douglas found that these facts justified making insulated aluminum conductor its own "submarket." Without further analysis, Douglas also held that it was "proper" to combine bare and insulated aluminum conductor into a single "all aluminum conductor" market, presumably on the view that it is permissible to combine two lines of commerce into a new single market.[34]

Douglas found that the Alcoa/Rome transaction violated Section 7 in an all aluminum conductor market. Douglas observed that the all aluminum conductor market was highly concentrated, with Alcoa as the largest producer, Alcoa and Kaiser Aluminum & Chemical Corporation controlling 50% of the market, and the largest five firms controlling more than 76% of the market. Quoting *Philadelphia National Bank*, Douglas noted that "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."[35] Douglas concluded:

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32. *Id*. at 512.

33. *Alcoa*, 377 U.S. at 276.

34. *Id*. at 276-77.

35. *Id*. at 279 (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963)).

> The acquisition of Rome added, it is said, only 1.3% to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reasonably likely to produce a substantial lessening of competition within the meaning of § 7. It is the basic premise of that law that competition will be most vital "when there are many sellers, none of which has any significant market share." *United States v. Philadelphia National Bank*, 374 U. S., at 363. It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors. Though percentagewise Rome may have seemed small in the year prior to the merger, it ranked ninth among all companies and fourth among independents in the aluminum conductor market; and in the insulated aluminum field it ranked eighth and fourth respectively. Furthermore, in the aluminum conductor market, no more than a dozen companies could account for as much as 1% of industry production in any one of the five years (1955-1959) for which statistics appear in the record. Rome's competition was therefore substantial. The record shows indeed that Rome was an aggressive competitor. It was a pioneer in aluminum insulation and developed one of the most widely used insulated conductors. Rome had a broad line of high-quality copper wire and cable products in addition to its aluminum conductor business, a special aptitude and skill in insulation, and an active and efficient research and sales organization. The effectiveness of its marketing organization is shown by the fact that after the merger Alcoa made Rome the distributor of its entire conductor line. Preservation of Rome, rather than its absorption by one of the giants, will keep it "as an important competitive factor," to use the words of S. Rep. No. 1775, [81st Cong., 2d Sess.] p. 3 [1950]. Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7.[36]

The Court reversed the judgment of the district court and remanded with instructions to fashion an appropriate divestiture decree.

Justice Potter Stewart, joined by Justices John M. Harlan and Arthur J. Goldberg, dissented. First, Stewart argued that the district court's "practical judgment," based on a pragmatic application of the *Brown Shoe* factors, that insulated aluminum conductors were not a relevant line of commerce should be sustained.[37] Second, even if insulated aluminum conductors were a relevant line of commerce, Stewart argued, the evidence showed that bare aluminum conductor and insulated aluminum conductor did not compete with one another and that it was improper to include them in the same relevant market. [38]

36. *Id.* at 280-81.

37. *Id.* at 284 (Stewart, J., dissenting).

38. *Id*. at 286.

UNITED STATES V. VON'S GROCERY CO. (1966).[39] On January 25, 1960, Von's and Shopping Bag Food Stores agreed to merge effective March 28, 1960. Von's operated 28 supermarkets in the Los Angeles area with total annual sales of approximately $85 million, yielding an average of approximately $3 million in sales per store. Shopping Bag operated 36 supermarkets in the area with total annual sales of approximately $79 million for an average of approximately $2.1 million in sales per store. In 1958, Von's ranked third and Shopping Bag Food Stores fifth in terms of total sales by grocery stores in the Los Angeles metropolitan area; Von's had approximately a 4.7% share and Shopping Bag approximately a 4.2% share. After the merger, the combined company would be the largest retail grocery chain in the Los Angeles area with a share of 8.9%.[40]

On March 25, 1960, three days before the effective date of the merger, the Department of Justice filed a civil complaint charging that the proposed merger violated Section 7 of the Clayton Act. The complaint alleged that the acquisition would substantially lessen competition in the purchase, distribution, and sale of groceries and related products in the Los Angeles area. The complaint also alleged that Von's competitive advantage over smaller sellers of groceries might be enhanced by the merger and that independent retailers might be deprived of a fair opportunity to compete with the combined firm. The government sought a preliminary injunction to block the closing pending an adjudication of the merits and a permanent injunction to block the transaction altogether.

The Department did not fare well in the district court. On March 28, the court denied the Department's application for a temporary restraining order (TRO) and allowed the merger to proceed. On June 3, 1960, the court denied the government's application for a preliminary injunction to require Von's and Shopping Bag to be operated as separate entities pending trial of the action. On December 15, the court denied the Department's motion for summary judgment, and on September 14, 1964, following a trial on the merits largely on a stipulated record, the court found for the defendants and dismissed the complaint.

Since the parties agreed both that the retail sale of groceries and related products was the relevant product market and that the Los Angeles metropolitan area was the

39. 384 U.S. 270 (1966), *rev'g* 233 F. Supp. 976 (S.D. Cal. 1964) (Blue Book No. 1510).

40. *Von's*, 233 F. Supp. at 980. The Supreme Court found the combined share to be 7.5% and the combined firm to be the second largest grocery retailer in the Los Angeles area. *See Von's*, 384 U.S. at 272.

relevant geographic market,[41] the only question for the court was the merger's probable effect on competition. The district court found that the market was characterized by ease of entry and was very competitive:

> In 1960, the approximately 4,800 stores in the area were operated by 4,000 separate concerns. During 1960, 128 new "single outlet" stores opened. The leading 20 chains opened 67 new stores in 1960 against 171 by smaller chains and single store operators. While the 10 leading chains accounted for 43.6%, the remainder, including 3,818 single store operators, accounted for 56.4% of the sales in the area in 1960. Another indication of the competitive situation is the fact that Shopping Bag's gross increased while its profits decreased. The witness, Hayden, president of the company, testified that this was occasioned by competition as well as the need for experienced executives.[42]

The court also noted the role of cooperatives, which allowed smaller stores to achieve the same volume purchasing discounts as the larger chains and which had open membership. Overall, the court found that the average shopper had from two to ten competing stores within convenient distance to shop and that competition, even after the merger, had driven prices down "about as far as possible."[43] The court concluded that the acquisition would have no likely adverse effect on competition:

> The government argues that over-all competition has been substantially reduced by the merger, but the proof falls short of establishing such to be the case. In fact, the figures relied upon by the government tend to establish to the contrary. Again it is repeated that in 1960 the approximately 4,800 stores in the area were operated by 4,000 separate concerns. The merger here did not materially change that situation. It did not increase or decrease competition store for store with any grocer, single store, or chain, since the acquired stores continued as before. As between stores, only a few of those of Von's and Shopping Bag were in direct competition since generally each company's stores were in different localities of the area. A few did compete directly. Apparently the reason for the failure of the evidence to pinpoint a decrease in competition was because there was actually no decrease.[44]

The government appealed directly to the Supreme Court under the Expediting Act. In a six-to-two decision, the Supreme Court reversed and remanded with instructions to the district court to enter a divestiture order. In an opinion by Justice Hugo L. Black, the Court quickly summarized the facts supporting its conclusion. Von's and Shopping Bag were respectively the third and sixth largest retail grocery stores in the Los Angeles area. Together, they became the second largest retail grocery retailer in the Los Angeles area, with a share of 7.5%. Prior to the merger,

41. *Id*. at 979.
42. *Id*. at 982.
43. *Id*. at 985.
44. *Id*. at 983-84.

both were "rapidly growing" and "highly successful."[45] At the same time, the number of owners operating single stores in the market had decreased from 5,365 in 1950 to 3,818 in 1961, and finally to 3,590 in 1963. Many of the single stores were being acquired by chains. Between 1949 and 1958, nine of the top twenty chains acquired 126 stores from their smaller competitors. Overall, the number of chains with two or more stores increased from 96 in 1953 to 150 in 1962. Although not part of the record, Black noted a table prepared by the FTC and included in the government's reply brief that mergers and acquisitions had "continued at a rapid rate since the merger."[46] Black concluded: "These facts alone are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7. Accordingly, we reverse."[47]

Black's opinion makes clear that the majority read the purpose of the Clayton Act following the Celler-Kefauver amendments was to arrest the "'rising tide' toward concentration into too few hands and to halt the gradual demise of the small businessman."[48] Although Black mentioned in passing that the combined company accounted for 7.5% of the grocery sales in the Los Angeles area, he never used this figure in his analysis. Nor did Black mention any concentration ratios in his opinion or make reference to, much less employ, the *PNB* presumption. To the majority, the key fact was that the number of single store operators was declining. While some single operators may have exited the market altogether because of inefficiency or mismanagement, others were acquired by larger chains.[49] Black concluded:

> It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition.[50]

Justice Potter Stewart, joined by Justice John M. Harlan, issued a vigorous dissent. Stewart noted that *Brown Shoe* had established two fundamental principles in

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45. *Von's*, 384 U.S. at 272.

46. *Id*. at 274. The table, reprinted as Appendix 2 to the majority opinion, show that 134 stores had been acquired by twelve companies between 1961 and 1964. *See id.* at 280.

47. *Id*.

48. *Id*. at 276; *see id.* at 275 ("[T]he 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.") (footnote omitted).

49. Using the numbers supplied in the Court's opinion, there were 547 fewer single store operators in the market in 1961 than there were in 1950. During roughly the same time period (1949 to 1948), nine of the top twenty chains acquired 126 stores from their smaller competitors. Assuming that these nine companies accounted for most of the acquisitions and assuming no entry into the market (certainly not correct), in the neighborhood of 75% of the single store operators shut down their stores rather than sold them to an acquirer.

50. *Id*. at 278.

applying Section 7: acquisitions were to be judged light of economic context of their industry and contemporary economic theory, and the purpose of Section 7 is to protect competition, not competitors. But, Stewart observed, the majority performed no analysis of the competitive effects of the acquisition and instead applied Section 7. Expanding upon the district court's analysis, Stewart concluded that any competitive analysis of Los Angeles retail grocery sales would reveal vigorous competition, an unconcentrated market, no trend forward concentration, considerable new entry, and substantial movement over time in the identities of many of the larger chains. Moreover, Stewart noted that, for the most part, Von's stores were located in the southern and western areas of Los Angeles and that Shopping Bag stores were located in the northern and eastern areas. Where Von's and Shopping Bag stores did compete directly, the record showed that there were also other chain stores and several smaller stores competing for the patronage of the same customers.[51] With respect to small grocers, Stewart concluded that they were in need of no protection. Stewart observed that they were thriving in Los Angeles, cooperative purchasing groups ensured that they could purchase at prices competitive with the large chains, and the most aggressive competitors were frequently single store operators. Stewart also observed that there are no substantial barriers to entry into the Los Angeles retail grocery market and that numerous new small firms had entered. Stewart pointedly noted that the majority did not and could not invoke the *PNB* presumption: "[T]he circumstances of the present merger fall far outside the simplified test established by that case for precisely the sort of merger here involved."[52] Stewart would have sustained the dismissal of the case by the district court.

NOTES

1. *Von's* is considered by most to be the poster child for aggressive antitrust restrictions on low market share horizontal transactions in unconcentrated markets. Interestingly, the argument in the Supreme Court for this aggressive position was made by Richard A. Posner.

UNITED STATES V. PABST BREWING CO. (1966).[53] On July 30, 1958, Pabst Brewing Company acquired the assets and business of Blatz Brewing Company from Schenley Industries, Inc. in a deal valued at about $14.5 million.[54] At the time of the acquisition, Pabst ranked tenth in sales of beer in the United States with 3.02% of the nationwide beer sales and operated four breweries: Milwaukee, Wisconsin, Peoria Heights, Illinois, Newark, New Jersey, and Los Angeles, California. Blatz ranked

51. *Id*. at 295-96 (Stewart, J., dissenting).

52. *Id*. at 302 (footnote omitted).

53. 384 U.S. 546 (1966), *rev'g* 233 F. Supp. 475 (E.D. Wis. 1964) (Blue Book No. 1479).

54. *Pabst Brewing Acquires Blatz From Schenley for 14.5 Million*, N.Y. TIMES, July 31, 1958, at 33.

eighteenth with 1.47% of nationwide bee sales and operated one brewery in Milwaukee, Wisconsin. Following the acquisition, the Blatz brewery was closed and Blatz brand beer was brewed in the four Pabst plants.

A little over a year later, on October 1, 1959, the Department of Justice filed a civil complaint charging that the acquisition violated Section 7 of the Clayton Act. The complaint alleged that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States, the State of Wisconsin, and the three state area of Wisconsin, Illinois and Michigan and sought a permanent injunction ordering Pabst to divest Blatz. Before trial, the parties stipulated that the relevant product market was the production, sale and distribution of beer and that the continental United States was a relevant geographic market. The issues for trial were whether the State of Wisconsin and the three state area of Wisconsin, Illinois and Michigan were also relevant geographic markets and whether the acquisition entailed a reasonable probability of a substantial lessening of competition in any properly defined relevant market.

The trial began on January 27, 1964. At 3:45 pm the next day, after offering 260 exhibits and reading portions of deposition testimony, the government rested.[55] Pabst then moved to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prove a prima facie case. After a full briefing and a hearing, the district court granted the motion and dismissed the complaint.

First, the district court held that the government failed to prove that either Wisconsin or the three state area of Wisconsin, Illinois and Michigan constituted a proper relevant market in which to analyze the competitive effects of the transaction. The government had argued that Wisconsin was a relevant market because (1) prior to the acquisition, the most intense competition between Pabst and Blatz existed in Wisconsin, and therefore the impact of the acquisition would be most severe in that state, (2) Wisconsin's standing in the beer industry made it an appreciable segment of the

55. The district court was clearly perturbed by this development, since the government had told the court repeatedly that it intended to call 71 live witnesses at trial, resulting in several reschedulings to accommodate a long trial. Two days before the trial was to start, the government changed its position and told the court that it would take no more than two trial days to present its case and that it would offer no witnesses. *See Pabst Brewing*, 233 F. Supp. at 478-80.

market, (3) each state was a separate relevant market, since each state has its own regulations affecting the beer industry, (4) Blatz prices were higher in Wisconsin than in any other state, and (5) Wisconsin's high per capita consumption of beer, high consumption of draught beer and large number of small, locally owned breweries made it a unique market. The government made analogous arguments for a Wisconsin-Illinois-Michigan relevant geographic market. The court, after a detailed analysis distinguishing the precedent cited by the government, rejected the two proposed markets because they did not reflect the "commercial realities" of the beer industry. Pabst and Blatz competed throughout most of the continental United States and nothing makes Wisconsin or the three state area distinct from the national beer market.

Second, the district court held that the government failed to prove a prima facie case of likely anticompetitive effects in the continental United States beer market, the only geographic market remaining in the case. The court held that the national market share of the combined company—4.79% in 1959 and 5.83% in 1961—was not by itself sufficient to predicate an "undue percentage of the relevant market" under the *PNB* presumption.[56] Moreover, the court found that the government failed to prove any trend toward concentration that Section 7 was intended to prevent. Significantly, after reviewing the precedent, the court held that only a trend toward concentration for Section 7 purposes was not merely a reduction in the number of competitors, but a reduction due to a history of acquisitions.[57] While the court acknowledged that the number of breweries had declined in the United States from 750 in 1934, to 264 in 1957, and finally to 229 in 1961, "[s]o far as the record discloses, not a single merger or acquisition in the beer industry preceded the acquisition of Blatz by Pabst and the decrease in the number of breweries resulted from the play of natural economic forces."[58] In light of the government's failure to prove a prima facie case of anticompetitive effect, the district court dismissed the complaint.

The government appealed directly to the Supreme Court under the Expediting Act. Although all nine justices voted to reverse, three of justice concurred only in the result.

Justice Black, the author of the majority opinion in *Von's*, again wrote the majority decision. First, Black held that the district court erred in failing to find that the government did prove a prima facie case that Wisconsin and Wisconsin-Michigan-Illinois were relevant geographic markets in which to assess the competitive effects of the transaction. Black gave short shrift to the question of geographic market definition. To Black, Section 7's requirement that the plaintiff prove a reasonable probable anticompetitive effect "in any section of the country"

56. *Id*. at 491.
57. *Id*. at 492.
58. *Id*. at 493.

did not mean that the plaintiff had to prove an economically meaningful geographic market:

> The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States "in *any* section" of the United States. This phrase does not call for the delineation of a "section of the country" by metes and bounds as a surveyor would lay off a plot of ground. The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of § 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant "economic" or "geographic" market is not an adequate ground on which to dismiss a § 7 case. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States.[59]

Without further analysis, Black sustained the government's proof of Wisconsin and Wisconsin-Michigan-Illinois as relevant "sections of the country" in which to analyze the competitive effects of the transaction.

Turning to competitive effects, Black reported the figures in the following two tables.

Pabst/Blatz

	Pabst		Blatz		Combined	
Section of the country	Share	Rank	Share	Rank	Share	Rank
Continental U.S. (1958)		10		18	4.49%	5
Continental U.S. (1961)					5.83%	3
Wis.-Mich.-Ill.	5.48%	7	5.84%	6	11.32%	
Wisconsin (1958)		4		1	23.95%	1
Wisconsin (1961)					27.41%	

59. *Pabst Brewing*, 384 U.S. at 549-50 (emphasis in original; internal citation and footnote omitted).

Trend toward Concentration

	United States		Wis.-Mich.-Ill.		Wisconsin	
	Breweries	10-FCR	Breweries	8-FCR	Breweries	4-FCR
1934	714					
1955					77	
1957		45.06%	104	58.93%		47.74%
1961	229	52.60%	86	67.65%	54	58.62%

Black concluded:

> These facts show a very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers. If not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands. . . . In accord with our prior cases, we hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three state area, and in the entire country was sufficient to show a violation of § 7 in each and all of these three areas.[60]

In reaching this result, Black rejected the district court's view that Section 7 was only concerned about a trend toward concentration due to mergers:

> Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, was concerned with arresting concentration in the American economy, whatever its cause, in its incipiency. To put a halt to what it considered to be a "rising tide" of concentration in American business, Congress, with full power to do so, decided "to clamp down with vigor on mergers." . . . We hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anti competitive effect of a merger may be.[61]

Justice Harlan, joined by Justice Stewart, concurred in the result.[62] While Harlan agreed that the government had made out a prima facie case that Wisconsin and Wisconsin-Michigan-Illinois are proper "sections of the country" in which to analyse the Pabst/Blatz merger, they disagreed with Black that a "section of the country" within Section 7 could be something other than a meaningful economic market. Here, Harlan believed that the government had satisfied its burden of proof by presenting evidence that that "significant barriers exist to prevent outside brewers from entering

60. *Id.* at 551-52 (footnote omitted).

61. *Id.* at 552-53 (citation omitted).

62. Recall that Justice Stewart, joined by Justice Harlan, dissented in *Von's*.

the Wisconsin market as effective competitors to those brewers already marketing beer there."[63] Contrary to the majority, Harlan and Stewart would have sustained the district court's finding that failed to prove a prima facie case of the requisite anticompetitive effect in the continental United States market.

Justice Abe Fortas also concurred in result, agreeing with Harlan and Stewart that proof of an economically meaningful relevant geographic market is an essential element of a Section 7 case: "Unless both the product and the geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality."[64]

UNITED STATES V. GENERAL DYNAMICS CORP. (1974).[65] In the ten or so years since *Philadelphia National Bank*, the *PNB* presumption had become conclusive. Moreover, given the flexibility of the courts in defining markets coupled with a strong tendency to accept the government's alleged markets, the *PNB* presumption could be triggered in almost every government case. As a practical matter, horizontal acquisitions by large companies even of small competitors became per se unlawful.

In 1974, the Supreme Court dramatically changed the course of horizontal merger analysis with its decision in *General Dynamics*. Not only did the Court return the *PNB* presumption to its rebuttable roots, the Court also brought a new emphasis to the importance of non-market share factors probative of the competitive consequences of horizontal acquisitions. Notwithstanding market shares of 15.1% and 8.1% in the relevant market and a rapidly declining number of industry participants—more than enough to invoke the rule of presumptive illegality under *Von's* and the other post-*Philadelphia National Bank* cases—the Court permitted one coal producer to acquire a controlling interest in another coal producer. The Court found that the acquired company's coal reserves were already committed by long-term contracts to electric utilities at predetermined prices. Lacking a supply of uncommitted coal that could be sold in the future at terms and conditions of the acquired firm's choosing, the Court found that acquired firm no longer was a significant independent competitive force which could affect prices and output in the marketplace. Accordingly, not only was the presumption of likely anticompetitive effect unreliable in this case, on the evidence before it the Court found no likelihood that the acquisition would substantially lessen competition in the future.

In 1954, Material Service Corporation acquired 10 percent of the stock of United Electric Coal Companies, a coal strip and open-pit miner in Illinois and Kentucky. Material was a large midwest building materials producer and supplier of building materials, concrete and limestone. Through its wholly-owned mining subsidiary Freeman Coal Mining Corporation, Material operated four deep coal mines in

63. *Pabst Brewing*, 384 U.S. at 558 (Harlan, J., concurring in result).

64. *Id.*at 562 (Fortas, J., concurring in result).

65. 415 U.S. 486 (1974), *aff'g* 341 F. Supp. 534 (N.D. Ill. 1972) (Blue Book No. 1861).

southern and central Illinois. Material had never operated a strip mine and lacked the experience and experience to do so. During the next several years, Material increased its stock ownership in United Electric and by 1959 Material had acquired more than 34 percent of United Electric's outstanding stock. This stock interest provided Material with effective control of United Electric and from 1959 forward Freeman and United Electric were operated under common control.

Several months after the 1959 management reorganization, Material was acquired by General Dynamics Corporation. At the time, General Dynamics was a large diversified company with the bulk of its revenues coming from sales of aircraft, communications and marine products to various government defense agencies. General Dynamics acquired a majority interest in Material as part of a diversification program to enter non-defense commercial businesses. In the early 1960s General Dynamics continued to increase its holding in United Electric, and in 1966 obtained the remaining outstanding stock through a tender offer and squeeze-out merger.

Although all of these developments had been publicly disclosed—indeed, the Justice Department had been furnished information about Material's stock interests in United Electric in 1960—it was not until 1967 that the Antitrust Division commenced its Section 7 action against the Material's acquisition of effective control and against General Dynamics solidification of that control. The action sought permanent relief in the form of an order requiring General Dynamics to divest its interest in United Electric.

The government approached the case as a straightforward horizontal merger. Both Material and United Electric sold coal in Wisconsin, Illinois, Kentucky, Iowa, and Missouri. Indeed, about half of the coal sold by each company was shipped to common customers, virtually all of which were electric utilities. The complaint alleged that the relevant product market was coal, and that the relevant geographic market was the State of Illinois, or alternatively, the Eastern Interior Coal Province Sales Area (which included Illinois and Indiana, as well as parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri), one of four major coal producing regions in the United States.

The government sought to prove that the acquisitions posed the requisite threat to competition for a Section 7 violation through the *PNB Bank* presumption. In 1959, Material accounted for 15.1% of Illinois coal production and 7.6% of the coal production in the Eastern Interior Coal Province, and was the second largest coal producer in each of these areas. United Electric's share was 8.1% in Illinois and 4.8% in the Eastern Province. By the time of trial in 1967, Material's coal production had dropped in Illinois to 12.9% and in the Eastern Province to 6.5%. Meanwhile, United Electric's share had increased slightly in Illinois to 8.9% and decreased slightly in the Eastern Province to 4.4%. The combination of Material and United Electric became the coal producer in Illinois in 1959 and the second largest in the Eastern Province.

General Dynamics-Material/United Electric

Market	General Dynamics Share Rank	United Electric Share Rank	Combined Firm Share Rank	n-CR	Change Pts Δ%	Conc. Trend
			1959			
Illinois	15.1% 2	8.1% 5	23.2% 1	2: 37.8% 4: 54.5 10: 84.0	7.7 22.4%	Yes
Eastern Interior Coal Province	7.6% 2	4.8% 6	12.4% 2	2: 29.6% 4: 43.0 10: 65.5	4.8 14.5%	Yes
			1967			
Illinois	12.9% 2	8.9% 6	21.8% 2	2: 37.8% 4: 54.5 10: 84.0	7.7 22.4%	Yes
Eastern Interior Coal Province	6.5% 5	4.4% 9	10.9% 2	2: 29.6% 4: 43.0 10: 65.5	4.8 14.5%	Yes

Rank: Market rank
Pts: Point change in the n-CR
Conc. Trend: Trend toward concentration
n-CR: N-firm concentration ratio
Δ%: Percentage change in the n-CR

At trial, the primary issues emerged: (1) the propriety of "coal" as the relevant product market; (2) the propriety of Illinois and the Eastern Interior Coal Sales Areas as the relevant product markets; and (3) the probability of any lessening of competition in the alleged relevant markets as a result of the acquisition of control over United Electric.

The district court rejected the government's proposed product market definition. It held, after an extensive discussion of the evidence, that interfuel competition between coal, oil, natural gas, and nuclear energy for electric utility supply contracts required that the relevant line of commerce for testing the competitive effect of the transaction to be the "energy market." The court also rejected the government's contention that coal was a relevant submarket, holding that such a submarket ignores what the buyers (almost exclusively electric utilities) actually do, that is, compare various forms of energy in making their purchasing decisions. The district court reasoned that if the competition between glass and metal containers was sufficient to include them both in the same relevant market, as the Supreme Court did in

Continental Can over the opposition of the defendants, then coal and other forms of energy sources should also be included in the same relevant market.[66]

The district court also rejected the government's proposed geographic market definitions. The court observed that the government's proposed markets were based on production patterns, not consumption patterns, and that no customer of either Material or United Electric purchased, or that any producer sold, coal throughout either of the government's proposed markets. Instead, the court found that the cost of transporting coal may approach 30% to 40% of its delivered price and is therefore a critical factor influencing the choice of coal suppliers that can realistically compete for a given utility's business. The evidence showed that mines located in Illinois, Indiana and western Kentucky long had been grouped into Freight Rate Districts designated by the Interstate Commerce Commission and that different rate districts serve a different and distinct geographic area.[67] Consequently, the court held that the relevant geographic markets in this case were eight Freight Rate Districts. The court also identified two individual customers to be relevant geographic markets. Commonwealth Edison, which has multiple facilities throughout the region, annually consumed a quantity of coal equal to the combined production of several freight rate districts and in fact purchases throughout multiple districts. Commonwealth Edison also had the most extensive commitment to the use of nuclear energy and had embarked on an air pollution reduction program that called for increasing use of nuclear energy, gas and oil. Similarly, the Metropolitan Chicago Intestate Air Quality Control Region had adopted air pollution control regulations that prohibited the burning of coal with high levels of sulfur content.

Although the district court found that the government's case was fatally deficient for failure to establish its alleged relevant markets, the district court further found that even if the government's proposed markets had been adopted the challenge would fail because of "the Government's failure to show that a substantial lessening of competition resulted from the United Electric-Freeman combination" in any product or geographic market.[68] This determination rested on three findings:

1. The decline in the number of coal producers in Illinois and in the Eastern Interior Coal Province occurred, not because of acquisitions by others, but as the inevitable result of the declining demand for coal as an energy source. This reduction in demand also was reflected in the fact that the combined company produced less coal in 1967 than it did in 1959. Accordingly, the court observed, the instant case is distinguishable from trend toward concentration resulting from mergers and acquisitions

66. *General Dynamics*, 341 F. Supp. at 555-56 (*citing as authority* United States v. Continental Can Co., 378 U.S. 441 (1964)).

67. The history and functions of the Freight Rate Districts in issue are discussed in Ayrshire Collieries Corp. v. United States,335 U.S. 573, 576 (1949).

68. *General Dynamics*, 341 F. Supp. at 557.

found in *Philadelphia National Bank* and *Von's* which justified preventing even slight increases in concentration.

2. Material and United Electric were "predominantly complementary in nature." United Electric was a strip mining company with no experience in deep mining nor any likelihood in acquiring it, while Material was a deep mining company with no experience or expertise in strip mining. Moreover, the mine and coal reserves of Material and United Electric were located in different freight rate districts. Finally, United Electric does not and cannot produce coal that meets the sulphur limits of the Metropolitan Chicago Intestate Air Quality Control Region. The only common sales in 1965-1967—the period chosen by the government for analysis—where to Commonwealth Edison.

3. The bulk of United Electric's existing reserves were either depleted or committed under long-term supply contracts and the prospect of obtaining new reserves was remote. Material had to use coal from one of its mines to discharge United Electric's obligations to Illinois Power Company when United Electric found its reserves inadequate. Several of United Electric's other long-term contracts were backed up by Material's reserves and could not have been obtained without this support. Nor could United Electric find new reserves. Evidence at trial, including testimony by government experts, showed that economically minable strip mine reserves were not presently available. Consequently, United Electric's ability to be a competitive force and affect the market price of coal was severely limited and steadily diminishing.

The district court concluded that, under these circumstances, the combination's continuation would not adversely affect competition nor would divestiture benefit competition. The court dismissed the government's complaint.

The government appealed directly to the Supreme Court under the Expediting Act. It sought to revive coal as a relevant line of commerce for antitrust analysis through a largely mechanical application of the *Brown Shoe* submarket indicia. Coal, the government argued, is recognized by the industry, governmental authorities, and the public as a separate economic entity. It is physically different from other forms of energy sources, its heat producing qualities are unique, as are its mining and production techniques. Coal is also sold at a delivered price per BTU significantly lower than other fuels, which makes it the fuel of choice for consumers—especially stream-driven electric utilities—for which fuel is the principal cost of production even in the face of small or temporary reductions in the price of other fuels such as oil or gas. Accordingly, while energy may have been a relevant product market in the instant case, coal by itself was also a relevant submarket.

The district court's error in rejecting the government's proposed geographic markets, the government argued, was the reverse of its error in rejecting the government's proposed product market. In choosing energy as the exclusive line of

commerce, the trial court ignored the existence of narrower, relevant submarkets; in adopting the narrower Freight Rate Districts as geographic markets, the court ignored the existence of broader geographic markets which also constituted relevant "sections of the country" in which to analyze the effect of the combination.

Finally, the government maintained that its proof at trial made out a *prima facie* case against the combination. The government noted that the Court had found mergers *prima facie* unlawful in cases involving smaller market shares that those of Material and United Electric in either the government's proposed relevant markets, at least where, as here, concentration had been rapidly increasing. Moreover, the district court's finding that United Electric's coal reserves were inadequate to make it an effective competitor in the future was flawed, the government argued, because it rested on the same economic premise as the "failing firm" defense and must be tested against the same standard. This includes a showing that the there was no alternative to the challenged acquisition to prolonging United Electric's life, including a sale to a less anticompetitive purchaser. Here, there was no finding that United Electric's reserves were so depleted that it was about to go out of business either in 1959 or 1967 but for the acquisitions in issue, that United Electric could not have acquired additional strip reserves after 1959 or 1967, that it could not have acquired deep-mining expertise and deep mining reserves if it had not become affiliated with Material, or that Material was the only available purchaser with access to additional coal reserves.

Interestingly, although the government devoted the bulk of its brief to the market definition questions and the application of the *PNB* presumption, the defendants largely ignored these issues and focused instead on the ultimate question of whether the evidence as a whole, especially United Electric's low reserves, supported the district court's conclusion that the combination did not threaten to harm competition. In a well-placed footnote, the defendants also observed that the trial judge, Chief Judge Edwin A. Robson of the Northern District of Illinois was a distinguished antitrust jurist, having served as the coordinating judge in the civil electrical equipment cases, and was one of the principal authors of the Manual for Complex and Multidistrict Litigation.[69] The defendants also pointed out that, despite a presumably diligent search, the government was unable to find a single customer to present at trial that thought the combination had led, or was likely to lead in the future, to a substantial lessening of competition in any market.

In a five-to-four decision, the Supreme Court affirmed the dismissal of the case. Justice Potter Stewart, the author of the dissents in *Alcoa (Rome Cable)* and *Von's* who also joined Harlan's special concurrence in *Pabst*, wrote the majority opinion. Consistent with his arguments for the need of careful economic analysis to predict the competitive effect of a merger, Stewart focused on how the *PNB* presumption

69. Brief for Appellees at 5 n.3, United States v. General Dynamics Corp., 415 U.S. 486 (1974).

was both triggered *and* rebutted in the case. To this end, despite the attention paid in the government's brief to the issues of market definition, Stewart did not dwell on the question but merely accepted arguendo the government's proposed product and geographic markets and market share statistics. Stewart also readily accepted the government's view that, within these markets, the *PNB* predicates of "undue percentage share" and "a significant increase in concentration" were satisfied, thus triggering the PNB presumption of anticompetitive effect.[70]

But recalling *Brown Shoe's* caution that statistical evidence of market share and concentration, while of great significance, were not conclusive, Stewart held that it was necessary to assess the evidence of the "structure, history and probable future" of the coal industry in order to determine the applicability of the presumption and ultimately the likelihood of an anticompetitive effect from the acquisition. After embarking on a lengthy summary of the district court's findings, Stewart observed that the *PNB* presumption implicitly assumed that "a company that has maintained a certain market share in the recent past will be in a position to do so in the immediate future":[71]

> Thus, companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7, not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor. In markets involving groceries or beer, as in *Von's* and *Pabst*, statistics involving annual sales naturally indicate the power of each company to compete in the future. Evidence of the amount of annual sales is relevant as a prediction of future competitive strength, since in most markets distribution systems and brand recognition are such significant factors that one may reasonably suppose that a company which has attracted a given number of sales will retain that competitive strength.[72]

Applied to the coal industry, Stewart concluded that a company's past ability to produce, as measured by its share of industry sales, is of "limited significance" in assessing its future ability to compete. For the most past, market shares based upon sales are locked in place at any point in time, representing not contemporaneous competition on the merits but rather the obligation to fulfill previously negotiated supply contracts. Therefore, the government's reliance on market shares based on historical sales to raise an inference of likely anticompetitive effect was unjustified.

Rather, since competition manifested itself more in rivalry for new long-term contracts, which in turn necessitated an uncommitted source of coal supply, Stewart observed that a better indicator of a firm's future competitive effectiveness is its share of uncommitted reserves of recoverable coal. The record revealed that United Electric's reserve position was very weak: while it ranked fifth among Illinois

70. *General Dynamics*, 415 U.S. at 494-95 nn.6-7.

71. *Id.* at 501.

72. *Id.*

producers in terms of annual production, it ranked tenth in reserve holdings with less than one percent of the reserves held by coal producers in Illinois, Indiana, and western Kentucky, having already depleted and closed many of its mines. Moreover, only about 8 percent of United Electric's reserves, representing roughly one-tenth of a percent of the three-state area industry reserves, were uncommitted. Given the weakness of United Electric as reflected in its uncommitted reserves, Stewart concluded that the district court was correct in finding that United Electric's acquisition and elimination as an independent participant in the marketplace would not substantially lessen competition.

Significantly, Stewart rejected the government's efforts to frame the analysis in terms of the "failing company" defense as the government had urged. Stewart noted that the failing company defense assumes that the challenged acquisition will lessen competition in the marketplace, but takes a "lesser of two evils" approach in permitting the transaction to go forward when the only available alternative is the failure of the company and its exit from the market. Accordingly, if the company will not imminently fail or if other alternatives to failure are available—especially the sale of the failing firm to a less anticompetitive purchaser—the defense cannot be sustained. Stewart observed that in this case, however, the defendants did not seek to justify an anticompetitive merger, but rather sought to show that the government's statistical showing of prima facie illegality was insufficient because it did not account for the inability of United Electric to compete effectively for long-term electric utility supply contracts in the future either with its own reserves or with reserves it could obtain in the absence of the challenged combination.

Justice Douglas, joined by Justices Brennan, White and Marshall, dissented. The dissent focused on the questions of product and geographic market definition, essentially adopting the government's analysis. Since the majority predicated its *PNB* analysis on the government's proposed markets, the dissent's conclusion that the government had proved its proposed markets served to establish the prima facie case. To the dissent, then, it only remained whether the defendants had succeeded in rebutting the *prima facie* case. Douglas would have found that they did not. Douglas would have treated the rebuttal in the nature of a failing firm defense as the government had urged. The viability of a failing firm defense is judged at the time of the acquisition. But the findings of the district court as to the weakened state of United Electric's coal reserves were as of the time of trial. Although no findings were made on the state of United Electric Reserves as of 1959, the time Material first gained effective control, 21 million tons of United Electric's 52 million tons of strip reserves existing at the time of time were committed in 1968, nine years after the challenged acquisition. Likewise, the finding that there were no economically available new strip reserves was made as of the time of trial; there was no finding that new strip reserves were not available in 1959 and the record demonstrated that several other companies made new acquisitions of strip reserves in the 1960s. Finally, Douglas questioned whether United Electric could have developed, contrary to the district court's finding, expertise in deep mining to be able to tap the 27

million tons of deep mining reserves it possessed in 1959. In any event, the existence of these deep reserves may have made United Electric (or at least these deep reserves) an attractive acquisition prospect to a company with which a combination posed less of a threat to competition. Since the requisite findings to make out a failing company defense were not made, the rebuttal of the government's *prima facie* case should have failed, at least on the record so far. Douglas would have remanded the case to the district court to assess the impact of the Material-United Electric combination on the Illinois and Province markets as of 1959.

NOTES

1. General Dynamics reflects a significant generational shift in the composition of the Court. Of the five members of the majority, not a single one other than Stewart was on the Court for any of the prior antitrust merger cases. On the other hand, with the exception of Marshall—who as the Solicitor General argued vigorously to block or dissolve the mergers in *Von's* and *Pabst*—all of the dissenting justices were present for all of the Court's merger antitrust decisions in the 1960s.

United States v. General Dynamics Corp. (1974)

	President	Sworn In	Replaced
Majority			
Potter Stewart (author)	Eisenhower	Oct. 14, 1958	Harold Burton
Warren E. Burger (C.J.)	Nixon	June 23, 1969	Earl Warren
Harry Blackmun	Nixon	June 9, 1970	Abe Fortas
Lewis F. Powell	Nixon	Jan. 7, 1972	Hugo Black
William Rehnquist	Nixon	Jan. 7, 1972	John M. Harlan
Minority			
William O. Douglas (author)	Roosevelt	Apr. 17, 1939	Louis Brandeis
William J. Brennan, Jr.	Eisenhower	Oct. 16, 1956	Sherman Minton
Byron White	Kennedy	Apr. 16, 1962	Charles E. Whittaker
Thurgood Marshall	Johnson	Oct. 2, 1967	Tom C. Clark

The following chart summarizes the votes from *Philadelphia National Bank* to *General Dynamics*.

PNB* to *General Dynamics

	PNB **(6-2)**	***Alcoa*** **(6-3)**		***Von's*** **(6-2)**	***Pabst*** **(9-0)**		***GD*** **(5-4)**
Warren	m	m		m	m	Burger	m
Black	m	m		M	M	Powell	m
Douglas	m	M		m	c		D
Clark	m	m		m	m	Marshall	d
Harlan	D	d		d	sc	Rehnquist	m
Brennan	M	m		m	m		d
Stewart	d	D		D	sc		M
White	--	m		c	sc		D
Goldberg	sc	d	Fortas	--	sc	Blackmun	m

M	Majority opinion author	D	Dissent author
m	Joined majority opinion	d	Joined dissent
c	Regular concurrence		
sc	Special concurrence		

Given their positions in *PNB*, *Alcoa*, and *Von's*, Stewart and Harlan would have been predictable votes for finding no violation in *General Dynamics*, and Rehnquist's replacement of Harlan did not affect the vote of that seat. The Burger and Powell replacements of Warren and Douglas, respectively, were critical to the Court's change of attitude toward mergers, since the votes of those seats changed. Blackmun, who replaced Fortas, provided the fifth vote. It is not clear how Fortas would have voted if he remained on the Court.

2. Since *General Dynamics* lower courts increasingly have employed more detailed and flexible qualitative analysis (albeit with varying degrees of theoretical guidance) of the likely competitive effects of proposed horizontal mergers and acquisitions. While concentration statistics continue to be the primary basis on which to predict the future competitive effects of an acquisition, plaintiffs today bear more of a burden of demonstrating the probative value of these statistics. Courts have considered a wide variety of factors in assessing the ability of the simple market structure model to predict the likelihood that the acquisition in question will be anticompetitive, including the degree of concentration and the level of sophistication among buyers; volatility in the market share distribution (particularly any trend towards deconcentration); changing demand patterns; the degree of product heterogeneity within the relevant market; the extent of excess industry capacity; the existence of vigorous competition from smaller, but strong and growing, competitors; the ease of entry into the relevant market; volatility in supplier or new customer relationships; a history of innovation from different companies in the market; the financial health of either or both of the parties, the likelihood that the acquired firm will exit the market in the absence of an acquisition; any preacquisition

anticompetitive conduct by the parties; and postacquisition continuation of price competition in the market.

UNITED STATES v. BAKER HUGHES, INC.,
908 F.2d 981 (D.C. Cir. 1990)

Before RUTH B. GINSBURG, SENTELLE, and THOMAS, Circuit Judges.

CLARENCE THOMAS, Circuit Judge:

Appellee Oy Tampella AB, a Finnish corporation, through its subsidiary Tamrock AG, manufactures and sells hardrock hydraulic underground drilling rigs (HHUDRs) in the United States and throughout the world. Appellee Baker Hughes Inc., a corporation based in Houston, Texas, owned a French subsidiary, Eimco Secoma, S.A. (Secoma), that was similarly involved in the HHUDR industry. In 1989, Tamrock proposed to acquire Secoma.

The United States challenged the proposed acquisition, charging that it would substantially lessen competition in the United States HHUDR market in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.[1] In December 1989, the government sought and obtained a temporary restraining order blocking the transaction. *See* Temporary Restraining Order, *United States v. Baker Hughes Inc.*, No. 89-03333 (D.D.C. Dec. 15, 1989). In February 1990, the district court held a bench trial and issued a decision rejecting the government's request for a permanent injunction and dismissing the section 7 claim. *See United States v. Baker Hughes Inc.*, 731 F. Supp. 3 (D.D.C. 1990). The government immediately appealed to this court, requesting expedited proceedings and an injunction pending appeal. We granted the motion for expedited briefing and argument, but denied the motion for an injunction pending appeal. The appellees consummated the acquisition shortly thereafter.

The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area,[2] the government establishes a

1. Section 7 prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

2. The parties in this case do not seriously contest the district court's definition of the relevant markets. The court defined the geographic market as the entire United States, *see* 731 F. Supp. at 5 6, and the relevant product as three types of HHUDRs: face drills ("jumbos"), long hole drills, and roof bolting drills, as well as associated spare parts, components, and accessories, and used drills. *See id.* at 4, 6 8.

Although the appellees quibble with the court's product market definition, they conclude that "the [district] court's product market definition presages its finding that the extent of present competition and ease of entry preclude finding a violation of Section 7." Brief for Appellees at 10 (emphasis added). If the appellees believe that the court's product market definition contributed to their victory, we see no reason to address their halfhearted and contradictory challenges to that definition.

presumption that the transaction will substantially lessen competition. *See United States v. Citizens & Southern Nat'l Bank,* 422 U.S. 86, 120-22, 95 S. Ct. 2099, 2118-19, 45 L.Ed.2d 41 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 363, 83 S. Ct. 1715, 1741, 10 L.Ed.2d 915 (1963). The burden of producing evidence to rebut this presumption then shifts to the defendant. *See, e.g., United States v. Marine Bancorporation,* 418 U.S. 602, 631, 94 S. Ct. 2856, 2874-75, 41 L.Ed.2d 978 (1974); *United States v. General Dynamics Corp.,* 415 U.S. 486, 496-504, 94 S. Ct. 1186, 1193-97, 39 L.Ed.2d 530 (1974); *Philadelphia Bank,* 374 U.S. at 363, 83 S. Ct. at 1741. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. *See Kaiser Aluminum & Chem. Corp. v. FTC,* 652 F.2d 1324, 1340 & n.12 (7th Cir. 1981).

By presenting statistics showing that combining the market shares of Tamrock and Secoma would significantly increase concentration in the already highly concentrated United States HHUDR market, the government established a prima facie case of anticompetitive effect.[3] The district court, however, found sufficient evidence that the merger would not substantially lessen competition to conclude that the defendants had rebutted this prima facie case. The government did not produce any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion.

In this appeal, the government assails the court's conclusion that the defendants rebutted the prima facie case. Doubtless aware that this court will set aside the district court's findings of fact only if they are clearly erroneous, *see* Fed. R. Civ. P. 52(a), the government frames the issue as a pure question of law, which we review de novo. The government's key contention is that the district court, which did not expressly state the legal standard that it applied in its analysis of rebuttal evidence, failed to apply a sufficiently stringent standard. The government argues that, as a matter of law, section 7 defendants can rebut a prima facie case *only by a clear showing that entry into the market by competitors would be quick and effective.* Because the district court failed to apply this standard, the government submits, the

3. From 1986 through 1988, Tamrock had an average 40.8% share of the United States HHUDR market, while Secoma's share averaged 17.5%. 731 F. Supp. at 6. In 1988 alone, the two firms enjoyed a combined share of 76% of the market. (The district court inaccurately calculated this figure as 66%. *See id.* at 10; Brief for Appellant at 10 n. 10; Brief for Appellees app. A.) The acquisition thus has brought about a dramatic increase in the Herfindahl-Hirschman Index (HHI)—a yardstick of concentration—for this market. The Department of Justice's Merger Guidelines characterize as "highly concentrated" any market in which the HHI exceeds 1800. *See* United States Dep't of Justice, Merger Guidelines § 3.1 (June 14, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,561-64 (1988). This acquisition has increased the HHI in this market from 2878 to 4303. Brief for Appellant at 5 n. 3, 12 (calculated from 1986-1988 figures; *see* 731 F. Supp. at 6).

court erred in concluding that the proposed acquisition would not substantially lessen future competition in the United States HHUDR market.

We find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case law, and in the government's own Merger Guidelines. Moreover, it is flawed on its merits in three fundamental respects. First, it assumes that ease of entry by competitors is the *only* consideration relevant to a section 7 defendant's rebuttal. Second, it requires that a defendant who seeks to show ease of entry bear the onerous burden of proving that entry will be "quick and effective." Finally, by stating that the defendant can rebut a prima facie case only by a *clear* showing, the standard in effect shifts the government's ultimate burden of persuasion to the defendant. Although the district court in this case did not expressly set forth a legal standard when it evaluated the defendants' rebuttal, we have carefully reviewed the court's thorough analysis of competitive conditions in the United States HHUDR market, and we are satisfied that the court effectively applied a standard faithful to section 7.[4] Concluding that the court applied this legal standard to factual findings that are not clearly erroneous, we affirm the court's denial of a permanent injunction and its dismissal of the government's section 7 claim.

I.

It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case. These factors include, but are not limited to, the absence of significant entry barriers in the relevant market. In this appeal, however, the government inexplicably imbues the entry factor with talismanic significance. If, to successfully rebut a prima facie case, a defendant *must* show that entry by competitors will be quick and effective, then other factors bearing on future competitiveness are all but irrelevant. The district court in this case considered at least two factors in addition to entry: the misleading nature of the statistics underlying the government's prima facie case and the sophistication of HHUDR consumers. These non-entry factors provide compelling support for the court's holding that Tamrock's acquisition of Secoma was not likely to lessen competition substantially. We have concluded that the court's consideration of these factors was crucial, and that the government's fixation on ease of entry is misplaced.

Section 7 involves *probabilities*, not certainties or possibilities.[5] The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a

4. Even if we found more impressive the argument that the district court did not clearly articulate the legal standard applicable to a section 7 rebuttal, it would remain open to us to affirm that court's judgment. *Cf. Nelson v. United States*, 838 F.2d 1280, 1285 (D.C. Cir. 1988) ("[W]e may affirm a trial court's decision on a basis not relied on by the district court where that ground finds support in the record.") (citation omitted).

5. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 82 S. Ct. 1502, 1522-23, 8 L.Ed.2d 510 (1962) ("Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes

variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness; the Supreme Court has never indicated that a defendant seeking to rebut a prima facie case is restricted to producing evidence of ease of entry. Indeed, in numerous cases, defendants have relied entirely on non-entry factors in successfully rebutting a prima facie case.

In *United States v. General Dynamics Corp.*, 415 U.S. 486, 94 S. Ct. 1186, 39 L.Ed.2d 530 (1974), for instance, the Supreme Court rejected the government's argument that a merger between two leading coal producers would violate section 7. Although the transaction would result in the two largest firms controlling about half of all sales in an industry that was already highly concentrated because of a rapid decline in the number of competitors, the defendants produced considerable evidence that the merger would not substantially lessen competition. One of the parties to the merger owned only minimal reserves of coal, an irreplaceable raw material, and had already committed these reserves through long-term contracts. This evidence led the Court to conclude that the government's statistics regarding concentration in the wake of the merger inaccurately portrayed the post-merger company's weak competitive stature, and that the defendants had therefore rebutted the prima facie case. *Id.* at 503-04, 94 S. Ct. at 1196-97. Nowhere did the Court consider barriers to entry.

Indeed, the Court in *General Dynamics* emphasized the comprehensive nature of a section 7 inquiry, quoting at length from its decision a decade earlier in *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L.Ed.2d 510 (1962). *See General Dynamics,* 415 U.S. at 498, 94 S. Ct. at 1194. In *Brown Shoe,* the Court applied section 7 stringently, holding that a merger that created a company with a 5% share of a highly fragmented market violated the statute. In arriving at this result, however, the Court stressed that a transaction must

> be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

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existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a *probable* anticompetitive effect were to be proscribed by this Act.") (footnote omitted) (emphasis added).

370 U.S. at 321-22, 82 S. Ct. at 1521-22 (footnote omitted).[6] All these factors are relevant in determining whether a transaction is likely to lessen competition substantially, but none is invariably dispositive. *See* Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 Harv. L. Rev. 491, 500 (1978).

In the wake of *General Dynamics,* the Supreme Court and lower courts have found section 7 defendants to have successfully rebutted the government's prima facie case by presenting evidence on a variety of factors other than ease of entry. *See, e.g., Citizens & Southern*, 422 U.S. at 121-23, 95 S. Ct. at 2119-20 (no lessening of competition, and thus no violation of section 7, where acquired banks were already associated with acquiring bank; no discussion of ease of entry); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) (acquired company's deteriorating market position both before and after acquisition rebutted prima facie case), *cert. denied*, 455 U.S. 921, 102 S. Ct. 1277, 71 L.Ed.2d 461 (1982); *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) (weak market position of acquiring company made substantial lessening of competition unlikely); *United States v. International Harvester Co.*, 564 F.2d 769, 773-79 (7th Cir. 1977) (company successfully rebutted prima facie case by showing, among other things, financial weakness of acquired company, de facto independence of acquired company from acquiring company, strong level of competition in relevant market, and tendency of the market toward even stronger levels of competition).

Indeed, that a variety of factors other than ease of entry can rebut a prima facie case has become hornbook law. *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 919, 920.1, 921, 925, 934, 935, 939, at 813-23 (Supp. 1989) (other factors include significance of market shares and concentration, likelihood of express collusion or tacit coordination, and prospect of efficiencies from merger); H. Hovenkamp, *Economics and Federal Antitrust Law* § 11.6, at 307-11 (1985) (other factors include supply of irreplaceable raw materials, excess capacity, degree of product homogeneity, marketing and sales methods, and absence of a trend toward concentration); L. Sullivan, *Handbook of the Law of Antitrust* § 204, at 622-25 (1977) (other factors include industry structure, weakness of data underlying prima facie case, elasticity of industry demand, inter-industry cross-elasticities of demand and supply, product differentiation, and efficiency). *See generally* Antitrust Section, ABA, *Horizontal Mergers: Law and Policy* 162-75, 201-04, 219-63 (Monograph No. 12, 1986).

It is not surprising, then, that the Department of Justice's own Merger Guidelines contain a detailed discussion of non-entry factors that can overcome a presumption of illegality established by market share statistics. *See* United States Dep't of Justice,

6. *See also id.* at 322 n. 38, 82 S. Ct. at 1522 n.38 ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

Merger Guidelines (June 14, 1984) [hereinafter Guidelines], *reprinted in* 4 Trade Reg.Rep. (CCH) ¶ 13,103, at 20,561-64 (1988). According to the Guidelines, these factors include changing market ***986 **227** conditions (§ 3.21), the financial condition of firms in the relevant market (§ 3.22), special factors affecting foreign firms (§ 3.23), the nature of the product and the terms of sale (§ 3.41), information about specific transactions and buyer market characteristics (§ 3.42), the conduct of firms in the market (§ 3.44), market performance (§ 3.45), and efficiencies (§ 3.5).

Given this acknowledged multiplicity of relevant factors, we are at a loss to understand on what basis the government has decided that "[t]o rebut the government's prima facie case, the defendants were *required* to show that *entry* would be both quick and effective in preventing supracompetitive prices." Brief for Appellants at 11-12 (emphasis added). If the district court in this case had focused exclusively on entry, it might be understandable that the government would mirror that focus in attacking the court's conclusion. The district court, however, canvassed a number of non-entry factors that contributed to its conclusion that the defendants had rebutted the prima facie case. By ignoring these factors, the government's arguments against that conclusion fall wide of the mark.

The district court's analysis of this case is fully consonant with precedent and logic. The court reviewed the evidence proffered by the defendants as part of its overall assessment of future competitiveness in the United States HHUDR market. As noted above, the court gave particular weight to two non-entry factors: the flawed underpinnings of the government's prima facie case and the sophistication of HHUDR consumers. The court's consideration of these factors was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects.

With respect to the first factor, the statistical basis of the prima facie case, the court accepted the defendants' argument that the government's statistics were misleading. Because the United States HHUDR market is minuscule, market share statistics are "volatile and shifting," 731 F. Supp. at 11, and easily skewed. In 1986, for instance, only 22 HHUDRs were sold in the United States. In 1987, the number rose to 43, and in 1988 it fell to 38. Every HHUDR sold during this period, thus, increased the seller's market share by two to five percent. A contract to provide multiple HHUDRs could catapult a firm from last to first place. The district court found that, in this unusual market, "at any given point in time an individual seller's future competitive strength may not be accurately reflected." *Id.* at 9. While acknowledging that the HHUDR market would be highly concentrated after Tamrock acquired Secoma, the court found that such concentration in and of itself would not doom competition. High concentration has long been the norm in this market. For example, only four firms sold HHUDRs in the United States between 1986 and 1989.

Id. at 5-6.[7] [FN7] Nor is concentration surprising where, as here, a product is esoteric and its market small. Indeed, the trial judge found that "[c]oncentration has existed for some time [in the United States HHUDR market] but there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation." *Id.* at 12.

The second non-entry factor that the district court considered was the sophistication of HHUDR consumers. HHUDRs currently cost hundreds of thousands of dollars, and orders can exceed $1 million. *Id.* at 8. These products are hardly trinkets sold to small consumers who may possess imperfect information and limited bargaining power. HHUDR buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order. *Id.* This sophistication, the court found, was likely to promote competition even in a highly concentrated market. *Id.* at 11.

The government has not provided us with any reason to suppose that these findings of fact are unsupported in the record or clearly erroneous, *see* Fed. R. Civ. P. 52(a). We thus accept them as correct. These findings provide considerable support for the district court's conclusion that the defendants successfully rebutted the government's prima facie case. Because the defendants also provided compelling evidence on ease of entry into this market, we need not decide whether these findings, without more, are sufficient to rebut the government's prima facie case. The foregoing analysis of non-entry factors is intended merely to underscore that, contrary to the government's assumption, these factors are relevant, and can even be dispositive, in a section 7 rebuttal analysis.

II.

The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time. *See, e.g., United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33, 93 S. Ct. 1096, 1100-01, 35 L.Ed.2d 475 (1973); *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990); *California v. American Stores Co.*, 872 F.2d 837, 842 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271, 110 S. Ct. 1853, 109 L.Ed.2d 240 (1990); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1335-36 (7th Cir. 1986). The district court in this case reviewed the prospects for future entry into the United States HHUDR market and concluded that, overall, entry was likely, particularly if Tamrock's acquisition of Secoma were to lead to supracompetitive pricing. The government attacks this conclusion, asserting that, as a matter of law, the court should have required the defendants to show clearly that entry would be "quick and effective." We reject this novel and unduly onerous standard. The district court's factual findings amply support its determination that future entry into the

7. *See also supra* note 3 (HHI of United States HHUDR market before merger was 2878; Department of Justice regards any market in which HHI exceeds 1800 as "highly concentrated").

United States HHUDR market is likely. This determination, in turn, supports the court's conclusion that the defendants successfully rebutted the government's prima facie case.

As authority for its "quick and effective" entry test, the government relies primarily on *United States v. Waste Management, Inc.*, 743 F.2d 976, 981-84 (2d Cir. 1984). This reliance is misplaced. Neither *Waste Management* nor any other case purports to establish a categorical "quick and effective" entry requirement. The Second Circuit in *Waste Management* simply noted that the defendant had successfully rebutted the government's prima facie case by showing that entry into the Dallas/Fort Worth trash collection market was "easy." *Id.* at 983. That a defendant *may* successfully rebut a prima facie case by showing quick and effective entry does not mean that successful rebuttal *requires* such a showing. We are at a loss to understand how the government derived from *Waste Management* (where, lest the irony be missed, the government lost) the proposition that "a defendant arguing supposed ease of entry can rebut the government's prima facie case *only* by clearly showing that entry will be both quick and effective at preventing supracompetitive pricing." Brief for Appellant at 14 (emphasis added).

That the "quick and effective" standard lacks support in precedent is not surprising, for it would require of defendants a degree of clairvoyance alien to section 7, which, as noted above, deals with probabilities, not certainties. Although the government disclaims any attempt to impose upon defendants the burden of proving that entry actually will occur, *see* Reply Brief for Appellant at 13 n. 13, we believe that an inflexible "quick and effective" entry requirement would tend to impose precisely such a burden. A defendant cannot realistically be expected to prove that new competitors will "quickly" or "effectively" enter unless it produces evidence regarding specific competitors and their plans. Such evidence is rarely available; potential competitors have a strong interest in downplaying the likelihood that they will enter a given market. When the government sarcastically "wonders how slow and ineffective entry rebuts a prima facie case," *id.* at 12, it misses a crucial point. If the totality of a defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the prima facie case rebutted. This is a far cry, however, from insisting that the defendant must *invariably* show that new competitors will enter quickly and effectively.

Furthermore, the supposed "quick and effective" entry requirement overlooks the point that a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs. *See Falstaff Brewing*, 410 U.S. at 532-33, 93 S. Ct. at 1100-01 (potential for defendant Falstaff to enter the market might induce brewers in the Northeast to maintain competitive prices); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581, 87 S. Ct. 1224, 1231-32, 18 L.Ed.2d 303 (1967) ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market . . . . [The] industry was influenced by each firm's predictions of the market behavior of its

competitors, actual *and potential.*") (emphasis added); *cf. Byars v. Bluff City News Co.*, 609 F.2d 843, 851 n. 19 (6th Cir. 1979) ("If entry barriers are low, the threat of potential competition operates as a significant check on monopoly power since competitors will quickly enter the market if prices are raised significantly."). If a firm that *never* enters a market can keep that market competitive, a defendant seeking to rebut a prima facie case certainly need not show that any firm *will* enter the relevant market.

The final flaw in the proposed "quick and effective" standard is its manipulability. The adjectives "quick" and "effective" are not self-defining, and have not traditionally been used in the section 7 context. The government's Merger Guidelines do not use the words when discussing entry, noting only that

> [i]f entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market.... In assessing the ease of entry into a market, the Department will consider the likelihood and probable magnitude of entry in response to a "small but significant and nontransitory" increase in price.

Guidelines § 3.3, *reprinted in* 4 Trade Reg. Rep. (CCH) at 20,562. In its brief, moreover, the government fails to state its own standard consistently, insisting at one point that a defendant show that entry will be "sure, swift, and substantial." Brief for Appellant at 16. Our uncertainty over the meaning and implications of "quick and effective" entry makes us all the more resistant to the imposition of such a requirement. Nor has the government shown that current section 7 law is so confused as to warrant the invention of a new standard.

The government's insistence on a "quick and effective" entry standard only reaffirms our doubts, raised in section I of this opinion, about the government's approach to section 7 analysis. Predicting future competitive conditions in a given market, as the statute and precedents require, calls for a comprehensive inquiry. The government's standard would improperly narrow the section 7 inquiry, channelling what should be an overall analysis of competitiveness into a determination of whether a defendant has shown particular facts.

Having rejected the "quick and effective" entry standard itself, we turn briefly to the government's more general argument that the district court's findings regarding ease of entry failed to support its conclusion that the defendants had rebutted the prima facie case. The district court in this case discussed a number of considerations that led it to conclude that entry barriers to the United States HHUDR market were not high enough to impede future entry should Tamrock's acquisition of Secoma lead to supracompetitive pricing. First, the court noted that at least two companies, Cannon and Ingersoll-Rand, had entered the United States HHUDR market in 1989,

and were poised for future expansion.[8] 731 F. Supp. at 9, 10, 11. Second, the court stressed that a number of firms competing in Canada and other countries had not penetrated the United States market, but could be expected to do so if Tamrock's acquisition of Secoma led to higher prices. *Id.* at 10-11.[9] Because the market is small, "[i]t is inexpensive to develop a separate sales and service network in the United States." *Id.* at 8. Third, these firms would exert competitive pressure on the United States HHUDR market even if they never actually entered the market. *Id.* at 10-11. Finally, the court noted that there had been tremendous turnover in the United States HHUDR market in the 1980s. Secoma, for example, did not sell a single HHUDR in the United States in 1983 or 1984, but then lowered its price and improved its service, becoming market leader by 1989. *Id.* at 9, 10. Secoma's growth suggests that competitors not only can, but probably will, enter or expand if this acquisition leads to higher prices. The district court, to be sure, also found some facts suggesting difficulty of entry,[10] but these findings do not negate its ultimate finding to the contrary.

In sum, we see no error—legal or factual—in the district court's determination that entry into the United States HHUDR market would likely avert anticompetitive effects from Tamrock's acquisition of Secoma. The court's determination on entry, considered along with the findings discussed in section I of this opinion, suffices to rebut the government's prima facie case.

III.

Finally, we consider the strength of the showing that a section 7 defendant must make to rebut a prima facie case. The district court simply reviewed the evidence that the defendants presented and concluded that the acquisition was not likely to substantially lessen competition. The government argues that the court erred by

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8. As the Guidelines note, " 'Entry' may occur as firms outside the market enter for the first time *or as fringe firms currently in the market greatly expand their current capacity.*" Guidelines § 3.3, *reprinted in* 4 Trade Reg. Rep. (CCH) at 20,562 n. 20 (emphasis added).

9. Some of these firms have already tried, but failed, to penetrate the United States HHUDR market. As the district court correctly noted, however, failed entry in the past does not necessarily imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive. *See* 731 F. Supp. at 11; *cf. Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n. 15, 107 S. Ct. 484, 494 n. 15, 93 L.Ed.2d 427 (1986) ("In evaluating entry barriers . . . a court should focus on whether significant entry barriers would exist *after* the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant.").

10. The court, for instance, noted that HHUDRs are custom-made, and thus are not readily interchangeable or replaceable. Buyers, therefore, tend to return to sellers from whom they have purchased in the past. 731 F. Supp. at 8. The court also found that HHUDR customers typically place great importance on assurances of product quality and reliable future service—considerations that may handicap new entrants. *Id.* It also noted the significant economies of scale involved in manufacturing HHUDRs. *Id.*

failing to require the defendants to make a "clear" showing. *See* Brief for Appellant at 13. The relevant precedents, however, suggest that this formulation overstates the defendants' burden. We conclude that a "clear" showing is unnecessary, and we are satisfied that the district court required the defendants to produce sufficient evidence.

The government's "clear showing" language is by no means unsupported in the case law. In the mid-1960s, the Supreme Court construed section 7 to prohibit virtually any horizontal merger or acquisition. At the time, the Court envisioned an ideal market as one composed of many small competitors, each enjoying only a small market share; the more closely a given market approximated this ideal, the more competitive it was presumed to be. *See United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280, 84 S. Ct. 1283, 1289, 12 L.Ed.2d 314 (1964) ("It is the basic premise of [section 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.' ") (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S. Ct. 1715, 1741, 10 L.Ed.2d 915 (1963)).

This perspective animated a series of decisions in which the Court stated that a section 7 defendant's market share measures its market power, that statistics alone establish a prima facie case, and that a defendant carries a heavy burden in seeking to rebut the presumption established by such a prima facie case. The Court most clearly articulated this approach in *Philadelphia Bank:*

> Th[e] intense congressional concern with the trend toward concentration [underlying section 7] warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence *clearly showing* that the merger is not likely to have such anticompetitive effects.

374 U.S. at 363, 83 S. Ct. at 1741 (emphasis added). *Philadelphia Bank* involved a proposed merger that would have created a bank commanding over 30% of a highly concentrated market. While acknowledging that the banks could in principle rebut the government's prima facie case, the Court found unpersuasive the banks' evidence challenging the alleged anticompetitive effect of the merger. *See id.* at 366-72, 83 S. Ct. at 1743-46.

In *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S. Ct. 1478, 16 L.Ed.2d 555 (1966), the Court further emphasized the weight of a defendant's burden. Despite evidence that a post-merger company had only a 7.5% share of the Los Angeles retail grocery market, the Court, citing anticompetitive "trends" in that market, ordered the merger undone. The Court summarily dismissed the defendants' contention that the post-merger market was highly competitive. *Id.* at 277-78, 86 S.

Ct. at 1482.[11] [FN11] Noting that the market was "marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers," the *Von's Grocery* Court predicted that, if the merger were not undone, the market "would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed." *Id.* at 278, 86 S. Ct. at 1482; *see also United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-52, 86 S. Ct. 1665, 1668-69, 16 L.Ed.2d 765 (1966) (acquisition producing brewer accounting for 4.49% of nationwide beer sales violates section 7; brewer's rebuttal evidence virtually ignored).

Although the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply. In *General Dynamics*, 415 U.S. at 498-504, 94 S. Ct. at 1194-97, the Court affirmed a district court determination that, by presenting evidence that undermined the government's statistics, section 7 defendants had successfully rebutted a prima facie case. In so holding, the Court did not expressly reaffirm or disavow *Philadelphia Bank's* statement that a company must "clearly" show that a transaction is not likely to have substantial anticompetitive effects. The Court simply held that the district court was justified, based on all the evidence, in finding that "no substantial lessening of competition occurred or was threatened by the acquisition." *General Dynamics*, 415 U.S. at 498, 94 S. Ct. at 1194.

General Dynamics began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence.[12] These cases discarded *Philadelphia Bank's* insistence that a defendant "clearly" disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a "showing." *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602, 631, 94 S. Ct. 2856, 2874-75, 41 L.Ed.2d 978 (1974) (after government established prima facie case, "the burden was then

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11. Justice Stewart, in dissent, emphasized the considerable amount of evidence in the record indicating the market's competitiveness. 384 U.S. at 290-301, 86 S. Ct. at 1489-95 (Stewart, J., dissenting).

12. Judge Posner has elucidated this point:

> The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act. . . . Applied to cases brought under Section 7, this principle requires the district court . . . to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038, 107 S. Ct. 1975, 95 L.Ed.2d 815 (1987).

upon appellees *to show* that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market") (citation omitted) (emphasis added); *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120, 95 S. Ct. 2099, 2118, 45 L.Ed.2d 41 (1975) (after government established prima facie case, "[i]t was . . . incumbent upon [the defendant] *to show* that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition") (emphasis added). Without overruling *Philadelphia Bank*, then, the Supreme Court has at the very least lightened the evidentiary burden on a section 7 defendant. *See generally* Note, 92 Harv. L. Rev. at 491 (describing impact of *General Dynamics* on section 7 jurisprudence).

In the aftermath of *General Dynamics* and its progeny, a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. *See American Stores*, 872 F.2d at 842 (defendant can rebut prima facie case "through evidence *demonstrating* that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition") (emphasis added); *cf. Waste Management*, 743 F.2d at 981 (defendant can rebut prima facie case "by *a demonstration* that the merger will not have anticompetitive effects") (emphasis added). The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities. In this setting, allocation of the burdens of proof assumes particular importance. By shifting the burden of producing evidence, present law allows both sides to make competing predictions about a transaction's effects. If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely. A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden. *See Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n. 12 (7th Cir. 1981); *cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981) (applying similar production-burden-shifting analysis to employment discrimination suits under title VII, and noting that "[t]he ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff," *id.* at 253, 101 S. Ct. at 1093); 9 J. Wigmore, *Evidence* § 2489, at 300 (J. Chadbourn rev. ed. 1981) (burden of persuasion "never shifts" away from plaintiff).

Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.[13] *Cf. Ball Memorial Hosp.*, 784 F.2d at 1336 (explaining that "[m]arket share is just a way of estimating market power, which is the ultimate consideration," and noting that "[w]hen there are better ways to estimate market power, the court should use them"). Requiring a "clear showing" in this setting would move far toward forcing a defendant to rebut a probability with a certainty.

* * *

The appellees in this case presented the district court with considerable evidence regarding the United States HHUDR market. The court credited the evidence concerning the sophistication of HHUDR consumers and the insignificance of entry barriers, as well as the argument that the statistics underlying the government's prima facie case were misleading. This evidence amply justified the court's conclusion that the prima facie case inaccurately depicted the probable anticompetitive effect of Tamrock's acquisition of Secoma. Because the government did not produce sufficient evidence to overcome this successful rebuttal, the district court concluded that "it is not likely that the acquisition will substantially lessen competition in the United States either immediately or long-term." 731 F. Supp. at 12. The government has given us no reason to reverse that conclusion

For the foregoing reasons, the judgment of the district court is

Affirmed.

NOTES

1. *Baker Hughes* is probably the most significant merger antitrust case decided since *General Dynamics*, having set forth the modern judicial paradigm for analysing

13. We refer the government to its own Merger Guidelines, which recognize that "[i]n a variety of situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market." Guidelines § 3.2, *reprinted in* 4 Trade Reg. Rep. (CCH) at 20,561. Although the Guidelines disclaim "slavish[ ] adhere[nce]" to such data, *id.*, statement, *reprinted in* 4 Trade Reg. Rep. (CCH) at 20,552, we fear that the Department of Justice has ignored its own admonition. The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery. *Cf. Syufy Enters.*, 903 F.2d at 672 ("It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources.").

horizontal mergers. No doubt its significance is aided by the fact that two of the three members of the panel—opinion author Clarence Thomas and Ruth B. Ginsburg—are now members of the Supreme Court.