A Businessman's View of Some Antitrust Problems—Particularly Mergers, Acquisitions, and Corporate Size

by

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Standard Oil Company (New Jersey)

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A BUSINESSMAN'S VIEW OF SOME ANTITRUST PROBLEMS—PARTICULARLY MERGERS, ACQUISITIONS, AND CORPORATE SIZE*

By M. J. RATHBONE

Director and former Chairman of the Board
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It is a pleasure for me to be with you this morning and to have this opportunity to join in your discussion. Your chairman first suggested that my remarks might be entitled "A Businessman's View of the Sherman Act." But he was kind enough to add that I would be free to discuss any aspect of the broad antitrust field that I might choose. As my title indicates, I have taken advantage of this latitude, and will limit my remarks to some specific questions.

I am aware, of course, that a great deal is being spoken and written these days on these particular subjects, and it is difficult to advance any ideas regarding them which have not been stated recently by many others. Furthermore, not being a lawyer, I would not pretend to give you a legal treatment of these matters in any case. I speak only as a businessman who has been intimately concerned with antitrust matters in the conduct of his business for some 40 years. I am not sure that enough businessmen have spoken out on these subjects. From that viewpoint, therefore, I would like to discuss with you four main thoughts:

1. When one looks at the more recent applications of the antitrust laws, especially in the field of mergers and acquisitions, it seems that, although the laws themselves are aimed against presumed cases of monopoly and suppression of competition, they are often being directed against a quite different target—namely, bigness.
2. Underlying this situation seems to be the acceptance of a number of legal and economic concepts which do not sufficiently reflect the economic realities of the modern business world.
3. The result is that some antitrust decisions may actually operate to diminish competition; hamper the dynamic growth of our economy; and hurt the interests of consumers, employees, and business—small as well as large.
4. To correct this tendency and assure the continued strength, competitiveness, productivity, and vigorous growth ot the American economy, this nation urgently needs a new look at the impact of the administration of our antitrust laws on bigness, mergers, and acquisitions.

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businessmen—and lawyers and scholars too—who study these matters are asking more and more insistently such questions as these:

> Are we approaching a point where bigness in business, in and of itself, is bad and should be curbed by the antitrust laws? Is mere bigness—especially where a merger or acquisition is involved—becoming an offense even when competition remains vigorous and may actually be stimulated, and the public benefited in the final analysis?

These are far from being academic questions. The direction in which our antitrust law seems to be moving in this area can profoundly affect our national life in the years to come.

I can best illustrate this problem by referring to one or two recent decisions in antitrust cases. First, the United States District Court in Rhode Island, in its decision in December 1964 in the case of *United States* v. *Grinnell Corp.*,[1] made the following rather striking statement:

> "To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2" (of the Sherman Act).[2]

Then the court went on to list what the government need *not* prove, as follows:

> ". . . defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role."[3]

Finally, the court explicitly declared that the defendant company, in order to clear itself of the presumption of having monopolized illegally, must

> "maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial.' "[4]

There are two troublesome points in this statement. First, it appears to justify a dangerous short cut in proving violations. The case against a defendant company would seem to be already one short

[1] 1964 Trade Cas. ¶ 80242 (D.R.I. Nov. 27, 1964).

[2] *Id.* at 80246.

[3] *Ibid.*

[4] *Ibid.*

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ıptive approach can be found in other cases.
ne Court last June, in deciding that Conti-
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ental Can Co., 378 U.S. 441, 458 (1964).

I believe, in fact, that behind these simplified rules there lie a number of erroneous ideas about the realities of modern business life in this country. Some of these ideas relate to the problem of bigness, or "concentration," in American industry. Others relate specifically to the economic effects of mergers and acquisitions. Let me now discuss briefly some of these key ideas.

To begin with, what are the facts on industrial concentration? It is widely stated in connection with the consideration of antitrust matters that concentration in American industry has been steadily increasing, so that more and more of the market is shared by fewer and fewer companies. Let's see how well founded this picture really is.

If you have followed the proceedings of the Senate Anti-Monopoly Subcommittee beginning last year, you will have noticed that economists have the greatest difficulty in agreeing on whether concentration has been increasing or not, and even on how it is to be measured. Some figures were presented suggesting an over-all increase in concentration in manufacturing generally. Such figures are subject to many questions. But even if we accepted them at face value, they would not be too relevant to the question of competition, which must be judged primarily on an industry-by-industry basis.

Even when you study one industry at a time, there is no really satisfactory yardstick for the measurement of concentration. One basic reason for this, as everybody knows who has attempted such an analysis, is that you cannot define the extent of a particular industry, or of a market within which all producers are in competition with each other, without making some pretty arbitrary assumptions which very much oversimplify the actual workings of the market.

However, certain rough indications can be made. One of the most authoritative of these is a recent analysis of Census of Manufacturers' data made by the United States Census Bureau. This study covered the period 1947 to 1958. For each industry studied, the Census Bureau calculated what per cent of the value of all shipments in that industry were made by the four leading firms. Out of 139 industries that were measured in this way, concentration rose between 1947 and 1958 in 61 industries, was unchanged in 12, and declined in 66. Certainly this shows no strong trend toward concentration.

But even figures such as these can overstate the so-called "rising tide" of concentration. For one thing, the "big four" in any industry do not necessarily remain the same. In fact, the Census Bureau reported that 80 per cent of the industries it had studied showed a change in the list of the top four companies over the eleven-year period.

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in many new merchandising methods.

Co. (Indiana), 1964 Trade Cas. ¶ 79841,

As a result, in the last fifteen years private branders as a group have substantially increased their share of the market. They now sell about 23 per cent of the gasoline marketed in the United States, and they have achieved this position in the face of competition from the "big powerful companies."

If we look overseas, where the most rapid oil industry growth has been taking place, we find a similar picture. At least 75 American companies have entered oil producing outside the United States and Canada since the early 1950s. They account for nearly a tenth of all the crude oil produced in this huge area. Many of them are active in refining and marketing as well, and they are continuing to grow in the keenest competition.

Mind you, all this has taken place in an industry which numbers among its members some of the largest companies in the world. And some of it has taken place in countries that have little or nothing in the way of antitrust laws.

Of course the oil industry is not in any sense exceptional in this respect. It is a common fact of experience, over the whole range of American industry, that smaller businesses manage to stay very much alive and prosperous—and indeed new ones are established every day —in the presence of larger competitors. One may argue that it can't be done because of the so-called "power of life and death of big business"—just as experts in aerodynamics are said to have proved that a bee cannot fly. The bee flies all the same, and the small businessman prospers, in spite of theories to the contrary.

There is also the idea that small business constitutes an "economic way of life" that is somehow inherently better than that in large firms, and hence should be preserved even at the cost of less efficiency. As Mr. Justice Harlan said in his dissenting opinion in the *Lexington Bank* case, this amounts to "a presumption that in the antitrust field good things come usually, if not always, in small packages."[7]

I have already stated my own belief that there is an enduring place in our economy and our society for small business as well as big. To me, it seems a mistake to oversimplify the world by supposing that good things come always in small packages, large packages, or any size package.

However, in view of what appears to be the present emphasis in antitrust circles, it might be helpful if I list some of the positive economic and social values that go with bigness.

[7] United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 673-74 (1964).

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I have dwelt on this matter of bigness because I believe that only against this background can we realistically gauge the true economic and social meaning of that area which has recently been at the center of the antitrust stage—namely, mergers and acquisitions involving large firms. Such mergers are widely asserted to be harmful to the economy in a number of ways, and I would like to comment on these assertions.

First, it is said that a merger between two competitors reduces the consumer's range of choice. This is not necessarily so. It obviously reduces the *number* of competitors, but the range of products and services which the merged firm offers the consumer may be—and often is—wider than those of the two preceding firms. Moreover, the merged firms can often serve a wider geographic market area, thus extending consumer choice in another way.

Second, it is said that growth by merger adds nothing to the economy in the way of new investment, whereas so-called "grass roots" growth does add in this way. This, too, is not necessarily so. In many cases, a company has the available capital and several other ingredients of success for a new venture, but can only get some missing ingredient—such as qualified technical manpower—by acquiring another company. In such a case the merging of two companies means a new investment which would not have taken place by the "grass roots" method.

Such a situation often leads to a so-called "conglomerate merger," in which a company diversifies by acquiring a firm in a new line of business. My lawyer friends tell me that the law on this subject has not developed far enough to show any clear trend. But some economic assumptions have appeared in writings on this subject, and in Congressional testimony, which are quite disturbing.

For instance, it is asserted that a diversified company will use profits from one line of endeavor to subsidize its new venture, and thereby undersell and drive out of business its smaller competitors. This assertion shows a poor knowledge of business methods. If a businessman sells below cost for an extended period of time, he will simply lose money—and he will get little consolation from having driven some other firm from the field. If, on the other hand, after putting his competitors out of business he raises prices and sits back to enjoy his monopoly, new competitors will very quickly come into the market under the "umbrella" of his high prices.

Such tactics, therefore, are self-defeating. A good businessman will not diversify into a new field, by merger or otherwise, until careful

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Before I conclude, let me look at this whole subject for a moment in a longer historical perspective.

When the Sherman Act became law 75 years ago, there was genuine alarm in this country because of rapidly growing concentrations of industrial and financial power such as had never been seen before in history. This new power was virtually unhampered by legal restraints. There was no corporate or personal income tax, no regulation of the stock market, no publication of annual reports, no strong labor movement, little legal protection for employees, and only the early beginning of any sort of governmental regulation of any industry. One of the main fears across the nation was not just that monopolies would charge high prices, but that they would become new centers of unfettered political power—big enough, perhaps, to overshadow the government itself.

Even today, in some minds, this kind of fear seems to linger. But the reality behind it disappeared generations ago. The bigness of American industry today is hemmed about by big government and big labor; by taxes, regulation, legislation, judicial decrees, and unremitting publicity. Its size is no more than proportionate to the growth in size of all our national institutions—and of our national responsibilities abroad. Far from being a threat to freedom, bigness is one of the practical conditions of freedom in the modern world.

It seems to me thoroughly unrealistic to look at our nation, our population, the size of our government, the increase in consumer buying power, the forward sweep of our technology, the size and complexity of all our national and international problems, and not expect to see our business corporations—which are as vital to our American society and economy and national strength as any other factor—also growing and expanding greatly.

At the outset of these remarks I suggested that, to bring the law into harmony with modern business realities, especially in the field of mergers and acquisitions, this whole segment of our antitrust laws needs a new look. The perspective of history, I believe, supports this idea. During these same 75 years, many of our American concepts in other matters of great consequence, such as social welfare and civil rights, have changed and developed. What was progressive yester-

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