[Boston College Law Review](https://lawdigitalcommons.bc.edu/bclr)

Volume 16
Issue 1 *Number 1*

Article 2

11-1-1974

# The Failing Company Doctrine

Marc P. Blum

Follow this and additional works at: https://lawdigitalcommons.bc.edu/bclr

Part of the Antitrust and Trade Regulation Commons

## Recommended Citation

Marc P. Blum, *The Failing Company Doctrine*, 16 B.C. L. Rev. 75 (1974),
https://lawdigitalcommons.bc.edu/bclr/vol16/iss1/2

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

# THE FAILING COMPANY DOCTRINE

MARC P. BLUM*

## INTRODUCTION

The failing company doctrine, an antitrust defense, has never shaken free of the quirks surrounding its creation. Essentially, the doctrine allows a company in grave probability of business failure to complete an otherwise illegal merger, provided no alternate good faith purchaser exists. The doctrine's impending demise has been perceived for a generation; yet conclusions drawn from a remarkable legal history and explored in the first section of this article demonstrate the doctrine's viability.

The application of this defense enhances fluidity of capital markets. As one factor in minimizing investment losses, it spurs competition by aiding market entry of new business ventures. Moreover, antitrust abuses perceived to be connected with the doctrine are shown to be insubstantial.

Following the discussion of the judicial development of the doctrine, the last two sections of the article provide a foundation for a new and vigorous role for the failing company doctrine. A procedure for the prediction of business failure is presented. A model based on publicly available accounting and market data from 230 businesses is shown by computerized validation tests to be approximately 94% accurate in predicting business failure. Finally a decision framework is outlined that could be used to connect the model of business failure to failing company doctrine decisions. The decision framework yields a novel perspective of the nature of the concept "failing." This perspective resolves the doctrine's congenital puzzle by defining explicitly that level of probability of business failure which is sufficiently "grave" to justify allowing the failing company defense.

## I. LEGAL HISTORY AND FUTURE DEVELOPMENT

### A. *The Original Litigation*

*International Shoe v. FTC*[1] is not only the case of origin of the failing company doctrine, but is also a landmark decision which has been neither significantly improved upon nor rejected despite a half century of endeavors in both directions. A review of the factual setting of this case will: (1) aid resolution of contemporary issues concerning the doctrine's status as an absolute defense; (2) suggest a possible redefinition of failure; (3) demonstrate the importance of proving absence of alternate, good faith purchasers; and (4) indicate

* B.A., Yale University, 1964; LL.B., Columbia University, 1967; Ph.D., Columbia University, 1969; Certified Public Accountant; Associate, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, Baltimore Md.

[1] 280 U.S. 291 (1930).

the nature of economic purposes served, as compared with antitrust abuses risked by the application of the doctrine.

The merger of International Shoe with the W. H. McElwain Company on May 11, 1921, accomplished by International Shoe's purchase of McElwain's stock, combined the largest and sixth largest shoe manufacturers in the United States. The Supreme Court upheld the merger on two alternative grounds: the corporations were found not to be in "substantial competition,"[2] an acceptable defense under the pre-1950 formulation of the Clayton Act;[3] and existing competition would have been eliminated without the merger since McElwain was failing.[4]

The Clayton Act had been construed to apply only to sales of stock and not to sales of assets. Nevertheless, International Shoe's president, Frank C. Rand, arguing that the form of a transaction should not be determinative, sought to persuade the Federal Trade Commission (FTC) that application of the Clayton Act to International Shoe's purchase of McElwain's stock was unreasonable. International Shoe chose not to follow the legally acceptable route of a purchase of assets because of ostensibly human considerations. In his testimony, Rand declared "a further and bigger purpose of saving something for a group of fine men, that we had known very pleasantly for years, and not have the whole crowd and group turn out dead broke, without a single cent. . . ."[5] He therefore rejected a purchase of assets because it would "break the morale of the organization"[6] and he could not hope to run McElwain in association with a "broke and helpless" management.[7] Because of this beneficent gesture, the FTC was asked to overlook the "technical" violation of the Clayton Act.

What was the advantage to McElwain's management of a purchase of stock rather than assets? McElwain's net equity, or total assets minus total liabilities, was, at book value, $9,923,087.75 on April 30, and $8,710,763.30 on May 31, 1921, with book values exceeding realizable values by more than $2,000,000.00.[8] The merger occurred on May 11. Capital structure included $6,993,100

[2] Id. at 298-99.

[3] Clayton Act § 7, ch. 323, § 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1970).

[4] Questions have been raised as to whether *International Shoe* rests on two independent holdings, or whether the first holding converts the second into dictum. The majority, however, clearly intended more than a single holding: "Since, in our opinion, these grounds are determinative, we find it unnecessary to consider . . . other contentions . . . . For the reasons appearing under each of the two foregoing heads of this opinion, the judgment below must be reversed." 280 U.S. at 303. Contra, United States Steel Corp., 74 F.T.C. 1270, 1281, 1308 (1968) (dissenting opinion).

[5] Record at 47, International Shoe v. FTC, 280 U.S. 291 (1930).

[6] Id.

[7] Id. at 46-52, 82, 299.

[8] Id. at 81, 209, 313.

par value of first preferred stock (publicly held), $2,600,000 in second preferred (owned by McElwain employees and management), and $3,494,800 in common stock (mainly held by McElwain management).[9] Since preferred stock claims had priority for $9,600,000 plus dividend arrearages, McElwain's losses had clearly eliminated common stockholders' equity. A reorganization might have removed their last vestige of ownership rights. McElwain's management thought publication of financial statements for the fiscal year ending May 31, 1921, would so increase creditors' pressure that first preferred dividends would have to be omitted,[10] which would have given control to owners of first preferred.[11] International Shoe bailed out McElwain's management by requiring its $9,464,837.50 payment to be allocated among the three classes of stock—17½% of par was sacrificed by first preferred ($1,220,000) and 25% by second preferred ($650,000), leaving common with 50% of par value.[12] Thus the landmark case which first recognized the failing company defense arose out of connivance and coincidence. Had International Shoe chosen to purchase McElwain's assets, rather than its management-owned common stock, no judicial initiative would have been required to sanction the merger.

Interpretation of the issues presented by *International Shoe* changed as litigation proceeded. The initial contention relied on at the Federal Trade Commission hearing was that International Shoe had freed itself of the taint of purchasing McElwain's stock by means of a sale with Bennett Limited, a Canadian Corporation, whereby Bennett bought McElwain's stock, immediately resold the assets to International Shoe and made no profit on the deal.[13]

Skirting perjury, International Shoe and McElwain executives admitted that the purpose of the above subterfuge was to show that International Shoe had never been interested in owning McElwain's stock, but merely sought to own all of its operating assets and save the wealth of its management.[14] The essence of their argument was

[9] International Shoe v. FTC, 29 F.2d 518, 521, 523 (1st Cir. 1928); Record, supra note 5, at 527 (FTC findings).

[10] Record, supra note 5, at 293.

[11] See generally Moody's Manual (1921).

[12] 29 F.2d at 521, 523.

> The common stock then had the voting power and was held mostly by the executive forces; the purchaser wanted, for obvious business reasons, to retain the effective managerial forces of this concern in good courage and friendly attitude, when undertaking long-distance management of the McElwain Company's great business. *The motives on both sides to put through a merger so advantageous to voters in the selling company are obvious.*

Id. at 523 (emphasis added).

[13] Record, supra note 5 at 46-52, 119-20, 127.

[14] 280 U.S. at 301; Record, supra note 5, at 72, 109, 231, 237, 242, 275-76, 280, 282, 336, and 541 (FTC's opinion). See also 9 F.T.C. 441, 461 (1925). Contra, International Shoe v. FTC, 29 F.2d at 523. The Supreme Court supported International Shoe:

that the Clayton Act was so openly evaded by sales of assets that enforcement was unfair since it depended merely on the form of transactions.[15]

The next defense was that International Shoe and McElwain were not "in substantial competition." International Shoe was the largest shoe manufacturer in the country; McElwain was the sixth largest nationally and the largest in New England, a regional market not heavily penetrated by International Shoe.[16] The Supreme Court had evolved a rule that if no substantial competition had occurred between merging companies, competition in general could not be substantially lessened by allowing the merger.[17]

However flawed the assumption be that merger of non-competitors could not lessen competition, its invocation could save the International Shoe-McElwain merger only if the Supreme Court made independent factual findings and reversed the FTC's finding. The agency, affirmed by the First Circuit,[18] had held that International Shoe and McElwain were in substantial competition.[19] To support its conclusion that the companies were not in substantial competition, the Supreme Court relied exclusively upon the opinion of McElwain's management:[20]

> [T]he officers, stockholders and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, after much consideration, felt compelled to choose the alternative of sale to International. *There is no reason to doubt that in so doing they exercised a judgment which was both honest and well-informed; and if aid be needed to fortify their conclusion, it may be found in the familiar*

---

> The transaction took the form of a sale of stock instead of the assets, not, as the evidence clearly establishes, because of any desire or intention to thereby affect competition, but because by that means the personnel and organization of the McElwain factories could be retained, which for reasons that seem satisfactory, was regarded as vitally important. It is perfectly plain from all the evidence that the controlling purpose of International in making the purchase in question was to secure additional factories, which it could not itself build with sufficient speed to meet the pressing requirements of its business.

280 U.S. at 301.

[15] See Record, supra note 5, passim.

[16] Id. at 353, 376.

[17] 280 U.S. at 297-98. In addition, in *International Shoe,* the Court read the "rule of reason," earlier inserted into the Sherman Act, into § 7 of the Clayton Act. The Clayton Act was thereby held to bar a lessening of competition in a substantial degree, "that is to say, to such a degree as will injuriously affect the public . . . . [T]he public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance." 280 U.S. at 298. See note 44 infra for a discussion of the "rule of reason."

[18] 29 F.2d 518 (1st Cir. 1928), aff'g International Shoe Co., 9 F.T.C. 441 (1914).

[19] 9 F.T.C. 441, 453 (1914).

[20] 280 U.S. at 297, citing FTC v. Curtis Co., 260 U.S. 568 (1923).

*presumption of rightfulness which attaches to human conduct in general.*[21]

Perhaps to bolster this conclusion because the substantial competition issue had been resolved by a de novo appellate finding of fact, the majority added an alternative holding—that even had substantial competition been present, it would have ended with the failure of McElwain.[22] This argument had been asserted throughout all stages of the litigation, but solely as a secondary line of defense.

The three dissenting justices argued that the FTC's inferences concerning the presence of substantial competition and the failure of McElwain in the sense that it was about to go out of existence were reasonable.[23]

> [McElwain's business,] conducted either through a receivership or a reorganized company, would probably continue to compete with that of [International. . . . McElwain's going concern value was sufficiently high to prevent its being dismantled and, anyhow] there was evidence that the depression in the shoe trade in 1920-1921 was then a passing phase of the business.[24]

The Court did not reverse the FTC's finding that McElwain was solvent under the Federal Bankruptcy Act test.[25] Rather, McElwain was found to be "in failing circumstances,"[26] as revealed by analysis of financial and economic factors beyond those disclosed on the corporate balance sheet for the years 1920-21. These factors were: a severe decline in shoe prices from the 1920 high; cancellation of old, and a dearth of new orders; losses of about $8,000,000 during the fiscal year ending May 31, 1921, an amount twice the book value of common equity on May 31, 1920; increasing debt—totaling $15,000,000 owed to 63 bank and trust companies on May 11, 1921, or about 60% of total assets at book value; production reduced to 15-20% of capacity; omission of dividends on second preferred and on common stock; and testimony of McElwain's officers proclaiming inability to meet near-future debts.[27] The Supreme Court's emphasis contrasts with that of the Court of Appeals for the First Circuit,

[21] 280 U.S. at 302 (emphasis added). The dissent felt that the five-member majority should not have based reversal on the self-serving testimony of officers of International Shoe and McElwain. Id. at 304-06. The majority had felt that this testimony was sound "since there is no . . . doubting the accuracy of observation or credibility of the witnesses . . . . Id. at 299.

[22] Id. at 301-02.

[23] 280 U.S. at 303.

[24] Id. at 306.

[25] 11 U.S.C. § 1(19) (1970).

[26] 280 U.S. at 301.

[27] Record, supra note 5, at 105, 313, 318, and 524 (FTC findings).

which had stated that "[w]hile . . . McElwain . . . had suffered substantial losses . . . , there is no foundation whatever for [International Shoe's] contention that (except for this purchase) the concern would have gone out of existence. . . ."[28]

Under the Supreme Court's holding, which constituted the initial judicial formulation of the failing company doctrine, a company need not be insolvent or certain to go out of existence. It need be in a slightly less serious, but ambiguous, plight—"in failing circumstances," where "recovery . . . to a normal condition was, to say the least, in gravest doubt. . . ."[29] In addition, the competitor merging with the failing company must be "the only available purchaser."[30]

The First Circuit had found three alternatives to allowing the McElwain merger. Bank creditors could have continued to carry the failing company. Between 1920 and 1922, banks were carrying other businesses and there existed "practically a conceded moratorium"[31] as to many business loans. Had McElwain gone into receivership, competition would have been preserved and probably intensified.[32] If bankruptcy had occurred, owners of one or both classes of preferred stock "would in their own interest have taken over the property, kept it in active operation, and therefore in competition."[33]

The First Circuit opinion here supports the FTC's conclusion that since McElwain was worth so much more as a going concern than as scrap, the owners of its preferred stock would have kept the company in the market:

> To hold . . . that the [FTC] was bound to draw the inference that the McElwain Company's financial condition was such that it would have ceased to be a competitor of the International in the shoe business, would be for the court, ultra vires, to substitute a highly speculative prophecy for the commission's fair and soundly-grounded contrary inference.[34]

The Supreme Court noted the suggestions, but dismissed them as "lying wholly within the realm of speculation."[35] The idea that banks might carry McElwain was equated with further borrowing that might have been crushing.[36] The Court went on to note that as

[28] 29 F.2d at 521.
[29] 280 U.S. at 301.
[30] Id..
[31] 29 F.2d at 522.
[32] Id.
[33] Id.
[34] Id.
[35] 280 U.S. at 301-02.
[36] Id. at 301.

to McElwain's survival, one guess was as good as another.[37] Receivership was not absolutely certain to lead to McElwain's recovery; and upon bankruptcy, owners of the preferred might have liquidated rather than continued the business.[38]

From the difference in approach between the First Circuit and the Supreme Court, the failing company doctrine emerges with deceiving concreteness: a merger otherwise illegal because of anticompetitive effects is allowable if one of the merging companies was failing and if there was no other good faith purchaser. The Supreme Court articulated this thought in language that has become the hallmark of the doctrine:

> In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this court suggested in *United States v. U.S. Steel Corp.*, . . . would seem a distempered view of purchase and result.[39]

*International Shoe* is commonly cited as the point of origin of the failing company doctrine. Earlier traces can be found in the two decisions relied on by the Court, but these cases in turn cite no precedent.

*American Press Association v. United States*,[40] presented a duopoly, a market consisting of only two firms, American Press Association and Western Newspaper Union. The plate business of

[37] Id.

[38] Id. at 301-02.

[39] 280 U.S. at 302-03. The usual wording of the quote is grave "probability," although "possibility" is used by at least one printing of Lawyer's Edition, 74 L.Ed. 431, 443 (1930), and by the FTC, Pillsbury Mills, Inc., 57 F.T.C. 1274, 1409 (1960); United States Steel Corp., 74 F.T.C. 1270, 1281 (1968). The distinction is that "possibility" is an event that can happen; "probability" is the likelihood of the event. Thus, the possibility of business failure is by definition grave, and is ever-present, no matter how unlikely. The context would seem to imply correctness of the usual wording, "probability," as would FTC v. Morton Salt Co., 334 U.S. 37, 56 (1948).

[40] 245 F. 91 (7th Cir. 1917).

American Press Association, apparently once its principal source of income, was sustaining such steadily increasing losses that any improvement of prospects was precluded.[41] Its directors had decided to dispose of its plate plant for scrap value if the court held its sale as a going concern to Western Newspaper Union illegal.[42]

The Seventh Circuit applied the Sherman Act[43] as "measured by the rule of reason"[44] to allow the sale of assets and business by American Press. The court concluded that the purpose of the Sherman Act was to prevent injury to the public and that this "joinder of competing business"[45] would probably not injure the public because even if the sale were disallowed, Western would still survive as a monopolist capable of buying up the plant piecemeal.[46] Scrapping the plant would add to Western's cost of reorganizing American's former business, a task which would have been undertaken in any event. A refusal to approve the sale would have: (1) left newspapers serviced by American in an inconvenient position and prey to losses; (2) reduced the recovery value of the plant to American's shareholders; and (3) injured "the public [by] the destruction of a usable and useful plant."[47]

> [A] law designed to shield the public from injury should not be construed to compel the public to suffer an injury. . . . [T]he Sherman Law . . . does not require the stockholders of a company . . . to sustain a loss in 1917 arising with wrongdoing, if that loss can be prevented without injury to the public.[48]

The majority in *International Shoe* also relied on the 4-3 deci-

---

[41] Id. at 93.

[42] Id.

[43] 15 U.S.C. §§ 1-7 (1970).

[44] 245 F. at 93. The birth of the rule of reason is usually credited to Standard Oil v. United States, 221 U.S. 1 (1911), but it was foreshadowed in earlier decisions and has been subject to various interpretations. M. Handler, Trade Regulation 92 n.7, 99 n.11 (3d ed. 1960). The essence of the sometimes nefarious rule of reason is that "only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law . . . ." United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927), citing Standard Oil and United States v. American Tobacco Co., 221 U.S. 106 (1911). Its effect is to vitiate the Sherman Act's literal proscription of "restraints of trade" by using the common law definition of that term to conclude that only unreasonable restraints are proscribed. By introducing this subjective standard, the courts freed themselves from the strict statutory language to become the arbiters of each antitrust case. While the origin of the rule of reason appears traceable to a desire "to expand the grounds on which antitrust charges may be defended . . ., [the rule] also reflects a justifiable fear of irrational results from too extensive a per se approach, a fear which those who want an effective antitrust policy might well share." C. Kaysen & D. Turner, Antitrust Policy 241 (1965).

[45] 245 F. at 73.

[46] Id.

[47] Id.

[48] Id. at 93-94.

sion rendered in *United States v. United States Steel Corp.*[49] There the government failed in an attempt to dissolve U.S. Steel in a Sherman Act prosecution. In particular, U.S. Steel's acquisition of Tennessee Coal & Iron was upheld as wholly in the public interest because the latter was a failing company.[50] U.S. Steel's operation of the Tennessee Company was the sole means of bringing value to its property and preventing it from becoming entirely worthless to shareholders, financial institutions, and the communities in which it was situated.[51] By the defendant's development of the property—as opposed to allowing it to decay—"there would be profit to the Corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of the law."[52]

A third case, *Shawnee Compress Co. v. Anderson*[53] was cited in International Shoe's brief before the FTC.[54] In this case the Supreme Court affirmed a judgment of the Oklahoma Territory Supreme Court[55] in favor of minority stockholders of failing Shawnee Compress, who had sued to cancel a lease of the corporation's entire property. No violation of a specific law (*e.g.*, common law, territorial antitrust act, or Sherman Act) was claimed by plaintiffs.[56] Presumably *Shawnee* was cited because, absent anticompetitive covenants, a failing firm would have been allowed to lease its business to a competitor.

The decision in *International Shoe* marked the birth of the failing company doctrine. Although the subsequent development of the doctrine has been neither rapid nor radical, changes have

---

[49] 251 U.S. 417 (1920).

[50] Id. at 446-47.

[51] Id.

[52] Id. at 447. "[President Roosevelt's] approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment." Id. at 446.

[53] 209 U.S. 423 (1907).

[54] Record, supra note 5, at 557.

[55] 17 Okla. 231 (1906).

[56] The territorial court upheld Shawnee's right to lease its entire business because it could not "profitably continue operations." 209 U.S. at 433. But because of added anticompetitive features Shawnee's lease was held cancellable:

> It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however . . . went out of the field of competition; it covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. . . . [The lease] presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. . . . It presents acts in aid of a scheme of monopoly.

Id. at 433-34.

evolved. In order to appreciate their significance, it would be helpful to first examine the purposes of the doctrine.

### B. *Purposes of the Doctrine*

In essence the doctrine serves two purposes: (1) granting mercy, that is, avoiding needless injury while foregoing merely insubstantial benefits to competition; and (2) spurring competition by aiding market entry of small business and smoothing market exit for inefficient businesses.

#### 1. *Mercy*

The mercy function of the failing company doctrine has the effect of avoiding needless injury with minimal anticompetitive effects. *International Shoe*'s consideration of the possible harm that would befall communities, employees, owners, and creditors associated with McElwain were it to go out of business, illustrates the nature and significance of the mercy function. If McElwain had liquidated and first preferred shareholders had received an indicated 25% of par value, second preferred and common would have received nothing.[57] Second preferred consisted of the life savings of many of McElwain's employees as well as investments by management. Although International Shoe Company went to extraordinary lengths to protect McElwain's management, there is no indication that the Court was predominantly concerned with losses to any individual—manager, creditor, employee, or public investor. Losses to these people were only a part of the potential harm.

Had McElwain merely entered a bankruptcy proceeding, many banks would have faced the prospect of heavy loss, a consideration which could have been a factor in triggering a bank panic at a time of already severe economic depression. Besides $2,000,000 owed to trade creditors, McElwain owed $15,000,000 to about 63 bank and trust companies in New England, New York, Philadelphia, Cleveland, and Chicago.[58]

The possibility of further price declines and employee layoffs in the shoe industry, particularly in depressed New England where McElwain's production facilities were concentrated, constituted another element of potential harm. A dozen factories, with 6000 employees, might have been closed in New Hampshire. McElwain was the largest employer in Newport and Merrimack, and the second largest in Manchester, Nashua, and Claremont, and thus

---

[57] Record at 76-78, 105-06, 580 (Exhibit), International Shoe v. FTC, 280 U.S. 291 (1930).

[58] Id. at 295.

accounted for the direct livelihood of about 20% of the inhabitants of these cities.[59]

The argument which can be made in behalf of the failing company doctrine on the basis of its mercy function is complemented by the fact that needless injury is avoided without substantially reducing competition. *International Shoe* demonstrated that merger of a failing firm would not have a substantially adverse anticompetitive effect because the firm would soon cease being a competitor altogether. The Court did not say that there would be no adverse competitive effect following the merger. Rather, the merger "[w]as not in contemplation of law prejudicial to the public and did not substantially lessen competition or restrain commerce within the intent of the Clayton Act."[60]

Merger of a failing firm would be expected to have no anticompetitive effect only if the relevant market were that of a classic duopoly and barriers to entry were high.[61] However, in the usual market structure the effect of merger of a failing firm with a competitor is unclear. When compared to having the failing firm die in solitude, it is beyond controversy that competition might be adversely affected by a failing company merger. Nevertheless, it is difficult to hypothesize examples of net adverse effect from a failing company merger. One attempt to find such examples does not focus precisely on the question of net adverse effect.[62] Rather, the examples that are imagined without difficulty illustrate only general anti-competitive effects that might arise from a failing company merger.[63] The effects noted are: swift and cheap movement by the acquiring firm into a new market; increased production capacity of the acquiring firm; postponement of market entry by new competitors who might face the increased costs of construction of new facilities; acquisition of more of the business of the failing firm by merger while the failing firm was a going concern than would be available after collapse of the failing company; and, possible increase in horizontal or vertical economic power.[64] These effects are

[59] Id.

[60] 280 U.S. 291, 302-03 (1930).

[61] G. Malanos, Intermediate Economic Theory 447-84 (1962). This is not a frequent situation, though it may possibly have been that present in American Press Ass'n v. United States, 245 F. 91 (7th Cir. 1917).

Even were the remaining "duopolist" not vulnerable to any antitrust prosecution, it would face the unusual risk of a classical monopolist—regulation as a public utility. Malanos, supra, at 452.

[62] Comment, 61 Mich. L. Rev. 566 (1963).

[63] Id. at 577-78. The examples of overstated anticompetitive effect have been uncritically followed. Low, The Failing Company Doctrine Revisited, 38 Fordham L. Rev. 23, 27 (1969). See United States Steel Corp., 74 F.T.C. 1270, 1316-17 (1968); Dean Foods, 70 F.T.C. 1146, 1282-85 (1966).

[64] Comment, supra note 62, at 577-78.

not compared with anticompetitive effects that would ensue if the failing company merger were disallowed. Therefore, no explicit judgment can be made of the net benefit which might accrue to competition by permitting the failing companies to go out of business.

Furthermore, one could question the importance of net adverse effect sounded by the three principal themes of the examples.[65] The first theme is that the major competitor would be delayed in acquiring the failing company's desirable assets, such as production facilities, patents, or managerial personnel. It may be fairly suggested that such a delay, measured by the interval between imminent failure and bankruptcy action, is of no substantial benefit to competition. The second theme is that failing company mergers would enable the major competitor to take over more of the failing firm's business than might otherwise be acquired if other competitors had competed for the business. It then would be necessary to explain why these other competitors were not alternate bidders for the failing company. If other purchasers did exist, the doctrine would not have allowed merger with the major competitor.[66] The third theme is that the merger with a failing firm is part of a preconceived plan to lessen competition, for instance by forestalling entry to the market. This net adverse effect can be avoided by applying the doctrine in its traditional form, which explicitly excludes the failing company defense in such a case.[67]

The most illuminating question to ask concerning examples of allegedly adverse effects of failing company mergers, is how competition will be benefited in any substantial manner by disallowing the merger of a failing company with a major competitor when that competitor is the only possible merging partner. If the merger is disallowed in such a situation, the winning, and perhaps, the only bidder at the forced auction for the failing firm's assets will usually be the very same major competitor. This is exactly what happened to Cleveland Metal Products when its merger with Alcoa was disallowed,[68] and exactly what the courts wanted to prevent in *American Press Association,*[69] *United States Steel,*[70] and *International Shoe.*[71]

Of course one would expect substantial net adverse effects of failing company mergers to result generally in situations where the

[65] Id.
[66] See text at note 39 supra.
[67] International Shoe v. FTC, 280 U.S. 291, 302-03 (1930).
[68] See note 82 infra.
[69] 245 F. 91 (7th Cir. 1917).
[70] 251 U.S. 417 (1920).
[71] 280 U.S. 291 (1930).

failing company defense is inappropriately recognized by the court, such as where alternate good faith purchasers might have been found. Difficult questions associated with proving absence of good faith purchasers relate to the issue of how the doctrine should be implemented, not to the issue of whether abuses would be sanctioned if the doctrine were properly implemented. Resolution of these questions requires the establishment of standards for "good faith" offers of purchase, assessment of the relative anticompetitive impact of prospective purchases, and, in order to produce a predictable set of rules, the definition of guidelines which encompass these two criteria and their interrelationship. Assuming that such an implementation procedure is followed, proper application of the failing company defense should not have net adverse effects on competition.

2. *Spurring Competition*

Legislative concern for the preservation of the failing company doctrine was expressed during hearings on the Celler-Kefauver Act.[72] This concern implies a judgment by Congress that the doctrine not only does more good than harm, but also that the good is done for small business.[73] By assisting small business other antitrust policies could be furthered. In particular, the probability of offering competition to bigger businesses would be increased. Contrary to contentions that bigness is inevitable as well as more efficient,[74] agglomeration may in some cases stifle innovation, and not merely routinize it. This is not to say that small firms as a class are better in some sense than the class of large firms. Rather, each class may have a different role, and in certain industries part of the role of the class of smaller firms may be offering competition and inducing innovation beyond that which would be expected of the class of larger firms acting alone.

Thus, the failing company doctrine might be justified either as an aid to small business itself, or as an aid to small business as a means of encouraging competition among big businesses. In either case, it aids in reducing risk of loss of capital, thereby facilitating "the flow of capital into such firms;"[75] in other words, market entry is promoted by easing market exit.

[72] Act of Dec. 29, 1950, Pub. L. No. 899, 64 Stat. 1125, amending 15 U.S.C. § 18 (1946). See note 87 infra.

[73] United States Steel Corp., 74 F.T.C. 1270, 1316-17 (1968).

[74] E.g., J. Galbraith, The New Industrial State 324 (1967); J. Galbraith, The Affluent Society 8, 9, 18, 19 (1958).

[75] United States Steel Corp., 74 F.T.C. 1270, 1318 n.52 (1968). B. Bock, The Failing Company Justification for a Merger, The Conference Board Record 26, 31 (1969). Low, The Failing Company Doctrine Revisited, 38 Fordham L. Rev. 23, 31 (1969).

The doctrine's role in facilitating market exit has expediting effects on withdrawal of extremely inefficient firms from the market.[76] This reason is certainly not controlling if one views economic efficiency as but one dimension in the antitrust goal structure.[77] Nevertheless, it would have weight in conjunction with previously discussed reasons[78] justifying the use of the doctrine as an antitrust defense.

### C. *Subsequent History*

#### 1. *Stagnation:* 1930–1950

After *International Shoe* and prior to 1950 the failing company doctrine figured in only four cases and received no judicial development clarifying its original formulation. *In re Pressed Steel Car Co.*[79] added nothing to *International Shoe; United States v. Republic Steel Corp.*[80] noted economic efficiencies accruing from merger of a company whose business relatives were failing; *Beegle v. Thomson*[81] allowed the failing company doctrine as a defense to a Sherman Act prosecution; and the Alcoa litigation[82] showed the

---

[76] Bok, Section Seven of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 340 (1966); cf. United States v. Republic Steel, Corp., 11 F. Supp. 117 (N.D. Ohio 1935).

[77] See Bork & Bowman, The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 363 (1965). Long-run economic efficiency might be injured by mergers favoring efficiency in the short-run. Long-run efficiency itself may be weighed against social considerations or preserving "smallness" or political goals of preventing concentration of economic power because of non-economic ramifications.

[78] See text at notes 62-75 supra. In addition, underlying and reinforcing the previously mentioned purposes of the doctrine, there is a constitutional aspect to the injury described by the majority in *International Shoe*. The constitutional argument is that failing company mergers are usually of very problematical significance. Although preventing such combinations may benefit competition to some degree, this benefit is not substantial enough to outweigh damage of constitutional proportion—the uncompensated taking of private proprietors' failing companies to further public antitrust policy.

[79] 16 F. Supp. 329 (W.D. Pa. 1936). This case concerned a company already in bankruptcy rather than one about to fail. Additionally, the merger was upheld because of a lack of competition between the merging companies. Id. at 338-39. Consequently the holding of this case did not rely on the failing company doctrine.

[80] 11 F. Supp. 117 (N.D. Ohio 1935). In this case, Corrigan, McKinney Steel Co., the twelfth largest steel company in the United States, and Republic Steel, the third largest, were permitted to merge because the government failed to prove that competition would be lessened and that the interests of the public would be injured by a merger. Yet, while Corrigan's subsidiaries and holding companies might have been failing, it was found as fact that Corrigan itself was not failing. Id. at 119. Thus, *International Shoe* could be relied upon only for its first holding and not for the failing company doctrine.

[81] 138 F.2d 875 (7th Cir. 1943), cert. denied, 322 U.S. 743 (1944). This case held a merger not illegal since no competition existed between the merging companies. Noting that the acquired company was in a "failing condition," the Seventh Circuit added: "Furthermore, as we pointed out in American Press Ass'n v. U.S. . . . a firm closing out its business because of financial difficulties may sell its plant even to a competitor without violating the Antitrust Law." Id. at 881.

[82] United States v. Aluminum Co. of America, 44 F. Supp. 97, 187-88, 190 (S.D.N.Y.

futility of prohibiting the use of the failing company doctrine as a defense. In that case, Cleveland Metal Products was not allowed to merge with Alcoa, but after failure Alcoa was allowed to pick up all the marbles at a bankruptcy auction.[83]

2. *Legislative Blessing*

The failing company doctrine received legislative sanction upon passage of the Celler-Kefauver Act,[84] which strengthened the Clayton Act. Old defenses to antitrust prosecutions, such as the purchasing of assets rather than stock[85] or a judicial finding of non-competition between merging partners[86]—were eliminated. Legislative history clearly shows an intention to exempt the failing company doctrine from the elimination of antitrust defenses affected by the statute.

> 1. Would the bill prevent a corporation in failing or bankrupt condition from selling its assets to a competitor? The argument that a corporation in bankrupt or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the case of *International Shoe v. F.T.C.* . . . the Supreme Court went much further. . . .[87]

1941), modified as to other points, 148 F.2d 416 (2d Cir. 1945). Standard Aluminum Company was found to be in financial distress, and Bremer-Waltz's St. Louis sheet-rolling mill did not prosper. Nevertheless, the failing company doctrine was not specifically invoked with reference to these two companies. However, Alcoa's association with the Cleveland Metal Products Company was upheld on the basis of the doctrine:

> [I]n a case arising under the Clayton Act, the Supreme Court has held that the purchase of a failing business is not unlawful, for the reason that it does not deprive anyone of the opportunity to compete. [International Shoe Co. v. FTC]. It would seem equally that in the case at bar, under the Sherman Act, the acquisition of the Cleveland Company or its property by Alcoa did not constitute a violation, because it did not lessen competition.

44 F. Supp. at 190.

In a prior phase of litigation, Alcoa had been ordered to divest itself of stock that had resulted from an association with Cleveland Metal Products, despite a strong dissent that Cleveland Metal Products was a failing company. Aluminum Co. of America v. FTC, 284 F. 401, 410 (3d Cir. 1922). The majority might have felt that Alcoa's price setting tactics had a significant causal relation to Cleveland Metal Products' eventual withdrawal from competition with Alcoa. After divestiture Alcoa, as the major creditor, was allowed to foreclose on its debt and buy up the assets once controlled by Cleveland Metal Products. Aluminum Co. of America v. FTC, 299 F. 361 (3d Cir. 1924); see United States v. Aluminum Co. of America, 44 F. Supp. 97, 189 (S.D.N.Y. 1941).

[83] See United States v. Aluminum Co. of America, 44 F. Supp. 97, 189 (S.D.N.Y. 1941).

[84] Act of Dec. 29, 1950, Pub. L. No. 899, 64 Stat. 1125, amending 15 U.S.C. § 18 (1946).

[85] H.R. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).

[86] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4, 5 (1949).

[87] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949).

The Senate Committee on the Judiciary rendered a similar report:

Economic efficiency and effectiveness against industry giants were later cited as factors in favor of allowing failing auto manufacturers to merge.[88]

Congress has recently expanded the failing company doctrine by overruling a recent Supreme Court case[89] in order to permit mergers to rescue failing newspapers.[90] The legislative history limits the expansion to newspaper joint operating agreements, with no intent to alter the failing company doctrine for other markets. However, a broader definition of failing than that of *International Shoe*[91] where the test applied appeared to be "a grave probability of a business failure" is also endorsed: a "failing newspaper" is defined in terms of "probable danger of financial failure."[92]

### 3. *Post-1950 Case Treatment of the Condition "Failing"*

Since 1950 the failing company doctrine has been litigated with frequency. Routine denials[93] of the defense have been interspersed

---

> The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.
>
> The Committees are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The Committees, however, do not believe that the proposed bill will prevent sales of this type.
>
> The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section [§ 7], that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue. On this specific point the Supreme Court, in the case of [*International Shoe*] said: "It is expected that, in the administration of the act, full consideration will be given to all matters, bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."

S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950), quoting *International Shoe*, 280 U.S. at 301.

Judicial and law review commentary, indicating that legislative history to the 1950 amendment of § 7 of the Clayton Act "casts doubt" on *International Shoe*, refers to the first holding of that case and not to the failing company doctrine. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 741 (2d Cir. 1953) affirming 114 F. Supp. 307 (D. Conn. 1953); Note, Section 7 of the Clayton Act: A Legislative History, 52 Colum. L. Rev. 766, 772-73 (1952); Note, 64 Harv. L. Rev. 1212, 1213 (1951).

[88] S. Rep. No. 132, 85th Cong., 1st Sess. 41-42 (1957). This Senate Report, a staff study by the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, also discussed the failing company doctrine with emphasis on the making of a "good faith effort" to sell the acquired company to someone other than the acquiring competitor in order to comply with the "no other buyer available" condition of *International Shoe*. Id. at 42.

[89] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

[90] Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970); H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 3547.

[91] See notes 39, 87 supra and note 153 infra.

[92] 15 U.S.C. § 1802(5) (1970).

[93] See Continental Oil Co. v. United States, 393 U.S. 79 (1968); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Crown Zellerback Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961), cert. denied, 370 U.S.

with outright approvals,[94] oblique approvals,[95] and a summary judgment squabble.[96] Factual variations among the denials, ranging

937 (1962). In *Crown Zellerback,* the court declared: "The circumstances would permit a finding that the directors wanted to quit; but the record does not compel a finding that St. Helens was in a failing or near bankrupt condition. Quite the contrary." 296 F.2d at 831. The court then examined the findings of the FTC (showing substantial net worth, and consistent earnings and dividends by St. Helens) and found them to be supported in the record:

> There are no facts in this record to clearly indicate that St. Helens would have been unable to complete its modernization program. We are of the opinion that St. Helens had been and was at the time of the acquisition an effective competitor, and that there is no sufficient reason to believe that it was in a failing or bankrupt condition.

Id. at 832.

[94] See Maryland & Va. Milk Producers Ass'n v. United States, 167 F. Supp. 799 (D.D.C. 1958), modifying 167 F. Supp. 45 (D.D.C. 1958). See also United States v. Maryland & Va. Milk Producers Ass'n, 168 F. Supp. 880 (D.D.C. 1959), affirmed, 362 U.S. 458 (1960); see cases cited in note 102 infra and Occidental Petroleum Corp., [1967-1970 Transfer Binder] Trade Reg. Rep. 21,135, 21,203 (F.T.C. 1969). In *Maryland & Va. Milk Producers Ass'n* the court stated:

> The evidence establishes without contradiction that at the time when the capital stock of these two corporations [Richfield and Simpson Brothers, operators of the Wakefield Dairy] was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000, for unpaid milk bills. The Wakefield Dairy was in fact on the brink of bankruptcy.
>
> The acquisitions of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in [*International Shoe*].

167 F. Supp. at 803.

[95] See Northwest Airlines, Inc. v. CAB, 303 F.2d 395 (D.C. Cir. 1962), where United Airlines was allowed to merge with Capital Airlines in order to restore "a new and hearty competitor [to a market where an erstwhile hearty competitor in a vast area was about to collapse and pass from the picture. The market then] had more competition and thus less monopoly" than before. Id. at 401. The antitrust law at issue was § 408(b) (the first proviso) of the Federal Aviation Act, 49 U.S.C. § 1378 (1970). Unlike the CAB, the court declined to rest its holdings on the failing company doctrine:

> Counsel argue this point in terms of the "failing business doctrine" and the International Shoe case. We think we need not try to fit this problem as we have it, into ready-made doctrinaire styles or sizes; the matter is clear enough on the face of the facts and the statute [the Federal Aviation Act of 1958] without intermediate measurements.

Id. at 402. See also cases at notes 102, 112 infra. See Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 587 (1st Cir. 1960); United States v. Gimbel Bros. Inc., 202 F. Supp. 779, 780 (E.D. Wis. 1962); United States v. Ling-Temco Electronics, Inc., 1961 Trade Cas. 78,621, 78,639-40 (N.D. Tex. 1961); Crown Cork & Seal Co., 74 F.T.C. 251 (1968).

[96] See United States v. Diebold, Inc., 369 U.S. 654 (1962). In *Diebold,* the Supreme Court reversed a summary judgment which had upheld Diebold's acquisition of the assets of Herring-Hall-Marvin Safe Company (HHM) against a challenge brought under § 7 of the Clayton Act:

> In determining that the acquisition of the assets of [HHM] was not a violation of § 7, the District Court acted upon its findings that "HHM was hopelessly insolvent and faced with imminent receivership" and that "Diebold was the only bona fide prospective purchaser for HHM's business." The latter finding represents at least in part the resolution of a head-on factual controversy as revealed by the materials before

from a voluntary liquidation[97] and voluntary depletion of a rare resource[98] to failing personal health,[99] suggest that managerial discretion—in terminating an endeavor, in pursuing a project of limited probability, or in retaining ill executives—cannot be determinative of whether a firm is "failing."

However, certain of the oblique approvals suggest that the doctrine is developing singular characteristics in four lines of enterprise. Either because of the nature of the enterprise or because of institutionalized regulation in the name of the public, three of the lines are associated with a concept of the "public interest" more concretely defined than is usual for industrial and commercial activities. Failing banks are eligible for expansive interpretation of the doctrine.[100] Likewise, more fully regulated industries may be eligi-

> the District Court of whether other offers for HHM's assets or business were actually made. In any event both findings represent a choice of inference to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n,* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment.

Id. at 655. *Diebold's* significance was clarified in White Motor Co. v. United States, 372 U.S. 253 (1963), where the court, citing *Diebold,* stated:

> There is an analogy from the merger field that leads us to conclude that a trial should be had. A merger that would otherwise offend the antitrust laws because of a substantial lessening of competition had been given immunity where the acquired company was a failing one. See [*International Shoe*]. But in such a case, as in cases involving the questions whether a particular merger will tend "substantially to lessen competition" a trial rather than the use of the summary judgment is normally necessary.

Id. at 263-64.

[97] See, e.g., United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1258 (C.D. Cal. 1973). In Erie Sand & Gravel Co. v. FTC, 291 F.2d 279 (3d Cir. 1961), Erie Sand & Gravel became the dominant lake sand producer on Lake Erie by buying its competitor, the Sandusky Division of the Kelly Island Co., after the directors of Kelly Island had voted to liquidate their corporation: "This fact . . . is said to show that Erie would have been relieved of the Sandusky competition whether or not it purchased the Sandusky business." Id. at 280.

The Court held against Erie. First, there were several alternative purchasers who made "substantial offers." Secondly, decision by owners to liquidate "is not enough to create a 'failing company' situation." Id.

[98] See United States v. Pennzoil, 252 F. Supp. 962, 978-79 (W.D. Pa. 1965), where potential depleting of a rare resource, reserves of Penn Grade crude, was held not to constitute presently healthy Kendall Refining Co. "failing."

[99] See Ekco Products Co., 65 F.T.C. 1163, 1221 (1964), where the failing health of an owner/manager did not cause the business to be characterized as failing.

[100] In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court in dictum proposed that the failing company doctrine "might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures." Id. at 372 n.46. See Kintner & Hansen, A Review of the Law of Bank Mergers, 14 B.C. Ind. & Com. L. Rev. 213, 226 (1972).

ble in proceedings before their regulatory agencies, as illustrated in *Northwest Airlines, Inc. v. CAB.*[101] Newspapers initially received favorable judicial treatment,[102] which was later reversed,[103] and the reversal was then legislatively overruled. The consequence was that the newspaper industry is now entitled to the most expansive protection ever accorded by the doctrine.[104]

Finally, multi-industry enterprises may be treated specially. Proposed mergers of their failing subsidiaries,[105] divisions,[106] products,[107] or even parents[108] must be scrutinized more carefully

The criterion under the 1966 Bank Merger Act, 12 U.S.C. § 1828 (c)(5)(B) (1970), of "the convenience and needs of the community to be served is related, though perhaps remotely, [to] . . . the failing-company doctrine . . . ." United States v. First City Nat'l Bank, 386 U.S. 361, 369 (1967). Cf. United States v. Third Nat'l Bank, 390 U.S. 171, 183 (1968).

Despite *Citizen Publishing,* 394 U.S. 131 (1969), the larger contours of the failing company doctrine concerning banks were upheld on summary judgment. Granader v. Public Bank, 417 F.2d 75, 81, 83-84 (6th Cir. 1969), cert. denied, 397 U.S. 1065 (1970). For a discussion of *Citizen Publishing* see text at note 89 supra. There a bank "on the brink of bankruptcy with no possibility of recovery," Granader v. Public Bank, 281 F. Supp. 120, 175 (E.D. Mich. 1967), was purchased by "the only realistic" purchaser. 417 F.2d at 83.

[101] 303 F.2d 395 (D.C. Cir. 1962). See note 95 supra.

[102] Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960). See Citizen Publishing Co. v. United States, 394 U.S. 131, 136 n.2 (1969).

[103] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

[104] See text at notes 88-91 supra.

[105] See Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D. Cal. 1972) (subsidiary was not proven to be failing and alternative good faith purchasers were deliberately not sought after the best available purchaser became interested); United States v. Reed Roller Bit Co., 274 F. Supp. 573, 584 n.1 (W.D. Okla. 1967) (sale of a failing subsidiary was supported by way of dictum).

[106] See Farm Journal, Inc., 53 F.T.C. 26 (1956). The failing company defense by Farm Journal was rejected with regard to its purchase of its only major competitor, Country Gentlemen, a division of Curtis Publishing Company, since Curtis could have continued with Country Gentlemen or could have sold it to another farm publication. If it would not have done either, Farm Journal had only to wait for Country Gentlemen's demise, saving it the assumption of millions of dollars of obligations: "The record does not show that Curtis had to sell, or that it had no other . . . feasible alternative. Rather it shows an uncompelled decision to sell at what certainly cannot be regarded as a distress consideration." Id. at 26, 30, 48. Cf. Dean Foods Co., 70 F.T.C. 1146, 1272-76 (1966), where non-failing Bowman Dairy Co. was found financially capable of rehabilitating its possibly failing Chicago market dairy operations and its consistently money-losing Cleveland ice cream plant.

[107] United States v. Lever Bros. Co., 216 F. Supp. 887, 891-92 (S.D.N.Y. 1963). This case involved a failing product, Monsanto's "All." A "product" is not a sub-category of a business corporation significantly different from a "division." Yet Monsanto's transfer of "All" to Lever Bros. was upheld largely because Monsanto was no longer competing effectively, while Lever Bros. could compete "by virtue of [its] experience, expertise and substantial financial position . . . ." Id. at 898. Monsanto's forte did not involve "developing and marketing consumer products," and it probably did not have access to the advertising economies of its giant conglomerate competitors, since it spent only $17,000,000 in 1955 (of which $12,000,000 was for "All" and $5,000,000 was for about 500 other products). The court felt that antitrust purposes were better served by having three healthy competitors in the low sudsing detergent market—Procter and Gamble, Colgate, and Lever Brothers—than by two strong giants and an about-to-exit Monsanto, with Lever Brothers hardly in the wings. Lever Brothers had previously tried to break into the market but failed to produce a salable product and had lost over $36,000,000. Id. at 896.

The distinction between *Farm Journal* and *Lever Brothers* is that parent Curtis was held

than an entire failing company because of management's broad powers to shape intra-entity accounts.[109] On the other hand acquisition of failing companies (or parts thereof) by multi-industry enterprises, not theretofore competitors, may be more widely sheltered by the doctrine than competitors' acquisitions.[110] For example, in *United States v. Lever Brothers Company,*[111] one of the reasons why Lever Brothers was allowed to acquire "All" from Monsanto was that Lever Brothers was not a present competitor in "All's" low-sudsing detergent market. Inasmuch as the antitrust consequences of conglomerate mergers still present an unresolved issue of antitrust policy, it may be that such mergers would be favored in the future as opposed to mergers of competitors, which involve more clearly perceived antitrust aspects.[112] Where antitrust abuses of such a merger are clearly perceived, for instance when an economic giant seeks to acquire a failing company in an industry of small competitors, there would be no reason to favor conglomerate mergers.

4. *Contemporary Issues*

Recent legal evolution has focused upon the absoluteness of the failing company defense, redefinition of failure, and the burden of proving absence of alternate good faith purchasers.

a. *Absolute or Relative Defense*—Throughout most of the history of the failing company doctrine, the absoluteness of the defense was assumed. Once a company was found to be failing and no alternate good faith purchasers existed, an otherwise illegal merger would be allowed. In the original *International Shoe* litigation, the FTC and the First Circuit conducted a public interest inquiry and concluded that McElwain should go into reorganization proceedings; the Supreme Court changed the legal rule, struck its own

capable of restoring Country Gentlemen to an active competitive role, whereas parent Monsanto was not able to do the same for "All." Further, "All" was sold to a company that was judged neither a present competitor in the relevant market nor a likely potential competitor.

[108] United States v. Pabst Brewing Co., 233 F. Supp. 475, 478 n.2, 495 (E.D. Wis. 1964), rev'd on other grounds, 384 U.S. 546, 552-53 (1966). Pabst, in serious straits, acquired Blatz in large part to obtain the services of Blatz' management. On remand, the district court reversed its original findings and concluded that although the failing company doctrine applies to failing parents, Pabst had not proven Blatz was failing or that Pabst was the only available good faith purchaser. 296 F. Supp. 994, 1001-03 (E.D. Wis. 1969).

[109] See Department of Justice, Merger Guidelines (May 30, 1968), quoted in part at note 146 infra.

[110] See United States v. Ling-Temco Electronics, Inc., 1961 Trade Cas. 78,621 (N.D. Tex. 1961).

[111] United States v. Lever Bros. Co., 216 F. Supp. 887 (S.D.N.Y. 1963). See discussion in note 107 supra.

[112] The importance of maintaining competition in the failing company's industry may outweigh possible antitrust abuses of conglomerate mergers, just as this criterion has justified merger of failing competitors. See notes 90, 95 supra and text following note 168 infra.

public interest balance, and concluded that reorganization should not be countenanced.[113] For the next generation the failing company doctrine was assumed to be an absolute defense.

Recent merger activity has, however, occasioned thoughts of public interest balances: "[I]n cases where the likelihood of business failure is more questionable, the failing firm defense should not be sustained without considering the magnitude of the merger and the market context in which it takes place."[114]

This view is consonant with the FTC's dictum in *Pillsbury Mills, Inc.*[115] to the effect that the condition "failing" presents one ingredient for a public interest balance.[116] This approach was subsequently clarified in *United States Steel Corp.*[117] in which U.S. Steel, the nation's fourth largest producer of portland cement, acquired Certified Industries, Inc., one of the four largest producers of ready-mixed concrete in the New York City market, after extending financial support to Certified in return for assuring future cement sales to Certified. After finding that Certified was failing,[118] that U.S. Steel was the only good faith purchaser,[119] that no other good faith purchaser would have had "lesser anticompetitive effect,"[120] and that U.S. Steel's loan was neither a tie-in nor part of a step transaction conspiracy,[121] the FTC nonetheless ordered

[113] 280 U.S. 291, 301-02 (1930).

[114] Bok, Section Seven of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 343 (1960).

[115] 57 F.T.C. 1274 (1960), vacated on other grounds sub nom. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

[116] In *Pillsbury Mills,* the FTC found no grave probability of a business failure but at most a profitable enterprise under some financial pressure. 57 F.T.C. at 1409. Moreover, there was an alternative purchaser for Ballard and Ballard Company, the company acquired by Pillsbury.

The FTC refused to follow Pillsbury's interpretation of *International Shoe*—that trends should be viewed as determinative of "failing." The FTC declined to agree that Ballard's three-year declining trend in ratio of net worth to total debt, net earnings, and profit per sales dollar would continue. Pillsbury had argued that if the trends continued and if additional working capital could not be acquired, Ballard would fail in the near future. Id.

The FTC went further and added that *International Shoe* did not present an absolute defense to a prosecution under § 7 of the Clayton Act. *International Shoe* "merely [establishes] the imminent insolvency as one of the relevant factors in assessing the competitive effect . . . ." Id.

[117] 74 F.T.C. 1270 (1968).

[118] See National Portland Cement Co., 71 F.T.C. 395, 471-74 (1967), in which the FTC made its findings of fact regarding the Certified-U.S. Steel merger.

[119] Id. at 475.

[120] Id. at 478-82.

[121] Id. at 476-77.

A "tie-in" is a seller's requirement that a buyer purchase one product (the "tied" product) in order for the buyer to be able to purchase one or more of the seller's other products ("tieing" product or products). M. Handler, Trade Regulation 307 (3d ed. 1960).

The "step transaction" approach requires a series of steps to be viewed as all part of one transaction, regardless of their formal nature. The effect of a step transaction approach is to compare the substance of a situation before a series of steps with that at the end of the series.

divestiture,[122] holding the failing company doctrine not to be an absolute defense:

> [I]n any case involving the acquisition of a failing company we must determine whether the acquisition may result in a substantial lessening of competition and, if so, the acquisition must be declared illegal in the absence of probable harm to innocent individuals so serious and substantial that the public interest requires that the acquisition nevertheless be permitted. . . . The fact that a firm was "failing" at the time of acquisition does not necessarily create a presumption, conclusive or otherwise, that its purchase was without potential or actual detrimental competitive effect within one or more markets.[123]

The Commission omitted an explicit balancing of interests. Yet it concluded that "nothing in the record" suggested that the anticompetitive effects of the transaction are *outweighed* by other considerations, such as harm to creditors, stockholders, employees, or communities.[124]

The dissent of Commissioner Elman questioned whether "the Commission should engage in a complex and elaborate 'public interest' inquiry . . . into the degree of 'serious and substantial' injury to 'innocent' employees, stockholders, and the communities in which a failing firm does business."[125] Further, a challenge was made to the majority's premise that the justification for the failing company doctrine is solely that merger of a failing firm cannot result in injury to competition.[126] Indeed the possibility of important anticompetitive effects was acknowledged.[127] According to Commissioner Elman, other considerations underlying the failing company defense are: (1) minimizing the losses to employees, owners, creditors, and communities associated with the failing company that the court set forth in *International Shoe;* (2) removing one of the risks facing small or new businesses and thus not impeding their quest for

The step transaction approach is most popularly known in the income tax context, particularly that of corporate reorganizations. See Walter S. Heller, 2 T.C. 371, 383 (1943). However, the theme of this approach—substance over form—applies particularly well to other areas of government regulation of business.

[122] "Divestiture" is the removal of one or more of an entity's business activities from its control in order to avoid violation of antitrust law. It is a remedy applied, judicially or administratively, to prevent an antitrust violator from enjoying the results of its violations, as well as ending the violations. International Boxing Club v. United States, 358 U.S. 242, 253 (1959).

[123] 74 F.T.C. at 1288. Cf. Northwest Airlines v. CAB, 303 F.2d 395 (D.C. Cir. 1962).

[124] 74 F.T.C. at 1304.

[125] Id. at 1310 (dissenting opinion).

[126] Id. at 1309-14 (dissenting opinion).

[127] Id. at 1316 (dissenting opinion).

capital; (3) providing a ready means for "withdrawal from the market of seriously inefficient firms;" and (4)

> due process, the fundamental principle that private property may be taken for a public use only if just and equitable compensation is paid, may underlie the Court's concern in *International Shoe,* shared by Congress, that small businessmen and investors not be forced to sacrifice their assets, lose their equity, and suffer bankruptcy, in the interest of antitrust policy.[128]

Commissioner Elman concluded that treating failing as one element in a public interest balancing would dilute and perhaps eliminate the defense whenever the acquiring firm is large.[129] Furthermore, he did not think the FTC is competent to "deal with the complex problem of determining in each case what weight to assign to the injuries against the anticompetitive effects foreseen from the merger."[130]

On appeal, the Court of Appeals for the Sixth Circuit deftly remanded for further findings of fact:

> [The] very theoretical conflict which we have here —whether "failing company" status is to immunize an acquisition or is merely to be a factor to be weighed in determining whether the acquisition is in the "public interest" . . . need not [be resolved here] because . . . U.S. Steel has failed to prove the "ultimate facts material to the rule of *International Shoe*. . . .[131]

Noting the affirmation and narrowing of the doctrine by the Supreme Court,[132] the Sixth Circuit pursued the *Citizen Publishing* dictum which redefined failure as the inability to emerge from reorganization as a competitive unit.[133] The court rested its holding partly on implications from "the ultimate facts" of *International Shoe*—that McElwain's possibility of being reorganized had been dismissed after thorough consideration "as lying wholly within the realm of speculation:[134]

> U.S. Steel and the [FTC] have devoted insufficient consideration to the prospects of reorganizing Certified into a

[128] Id. at 1317-18 (dissenting opinion).
[129] Id. at 1319 (dissenting opinion).
[130] Id. (dissenting opinion).
[131] United States Steel Corp. v. FTC, 426 F.2d 592, 607 (6th Cir. 1970).
[132] Id. at 607-09.
[133] Id. at 609.
[134] Id. at 608.

> vital, competitive company. The record, however, is replete with evidence . . . [to] suggest the possibility that Certified may have been split into several going concern packages in a receivership proceeding.[135]

The case was also remanded to determine the extent "that Certified's cement demands occurred as a result of the [pre-merger] financial arrangement."[136]

Essentially, the second leg of the Sixth Circuit's holding is that U.S. Steel's original loans and subsequent acquisition were anti-competitively motivated, while the first leg is compatible with a gloss on the good faith purchaser rationale—that a combination of good faith purchasers must be considered, and *not* simply a single purchaser, in either of two cases: (1) when the single purchaser is an economic giant relative to the failing company's competitors; or (2) when the merger appears to be obviously destabilizing for a given market. Thus, the court's opinion advances the traditional concept of the failing company doctrine and avoids falling into the quagmire of a public interest inquiry.

The latest lower court development[137] concerning an admittedly failing company, indicates that failure is already being redefined and also demonstrates the impracticality of case-by-case, public interest balances. There the public interest inquiry was not followed with either a balancing or even an unsupported conclusion; instead, the failing company merger was simply disallowed: "If Associated fails, we are not certain whether the effect on competition would be more detrimental than if Associated leaves the competitive field by merger. . . . The possible effect on competition if Associated's brands are lost to the marketplace has not been explored."[138]

The real issue then, is whether the courts will apply a single public interest balancing to all failing company doctrine cases or individual public interest balances to each case. There is also a middle path, implicit in the finding of wider contours for the failing company doctrine in certain lines of enterprise,[139] of striking a public interest balance for each major market—such as public utilities, banks, newspapers, brewing or steel by geographic region. Pursuit of such a middle route would involve setting certain public

---

[135] Id. at 609.

[136] Id. at 610.

[137] United States v. Heileman Brewing Co., 345 F. Supp. 117 (E.D. Mich. 1972).

[138] Id. at 123.

[139] See notes 100-12 supra. Legislative support for different standards in different markets is also implicit in the exception for the newspaper industry, discussed in text at notes 90-92 supra.

interest standards in each market area; it would not require public interest balancing for every failing company case arising within each market. Such major market public interest balancing would also result in different levels of probability constituting that level which is sufficiently "grave" to justify failing company mergers in different industries.[140] Thus, for instance, the doctrine's wider ambit for banks[141] would operationally mean that the public interest in preventing bank failures is greater than that which exists for an ordinary commercial failure. Hence, a failing bank would qualify for the failing company defense with a lower probability of failure than would an ordinary business.

The advantage of a public interest inquiry is completeness; its disadvantages in this context are its difficulty of accomplishment and its failure to provide failing companies with a predictable rule to guide selection of possible merging partners.[142] In *Heileman Brewing,* for example, an ambitious public interest inquiry was only attempted, with no report of a balancing of public interests, and the court even neglected to buttress its holding by stating the conclusion to its public interest inquiry.[143]

In regard to the future development of the failing company doctrine, the absolute defense versus the public interest inquiry issue, as well as the redefinition of failure question, might profitably be viewed in the context of strengthening the good faith purchaser concept, with the recognition that even the absolute defense approach entails an elemental public-interest balance.

b. *Redefinition of Failure*.—If a company can be failing, "failure" must have an operational meaning. Unfortunately the concept of "failure" has not been concretely developed since the failing company defense received its initial judicial recognition in *International Shoe.*[144] Usually reference is made to "bankruptcy," but no differentiation is made as to type of bankruptcy-receiverships under aegis of preferred stockholders or creditors, formal reorganization, or a Chapter X[145] proceeding likely to end in dismantlement. Cases

---

[140] See notes 100-12 supra and text at notes 90-92 supra.

[141] See note 100 supra.

[142] United States Steel Corp., 74 F.T.C. 1270, 1316-18 (1968). See Bok, Section Seven of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 346 (1960); Low, The Failing Company Doctrine Revisited, 38 Fordham L. Rev. 23, 31 (1969).

[143] United States v. Heileman Brewing Co., 345 F. Supp. 117, 123 (E.D. Mich. 1972).

[144] But see Note, 68 Yale L.J. 1627, 1664 n.195 (1959). Definitions of failure less stringent than that of *International Shoe* also have meaning in a business context. For example, inability to earn a competitive rate of return on investment may be personally baneful for management and owners, and eventually employees and communities, but is not itself sufficient to constitute failure in the failing company doctrine context. Omission of a preferred dividend is usually something of a financial disaster but since McElwain had done just that on second preferred, this criterion falls short of "failure."

[145] 11 U.S.C. §§ 501-676 (1970).

subsequent to *International Shoe* do not develop the concept of "failing;" they usually do no more than repeat the original formulation. Even the Antitrust Division ventures little more in its guidelines.[146]

The latest development concerning the condition "failing" is a hint of a redefinition of failure. The Supreme Court in *International Shoe* had been chary of predicting the outcome of bankruptcy proceedings.[147] Moreover, the Court may have inferred that preservation of going concern value usually depends on merger before bankruptcy proceedings are announced. However, dictum of the majority opinion in *Citizen Publishing Co. v. United States*[148] has disclosed a willingness, identical to that of the FTC,[149] First Circuit,[150] and the dissent in *International Shoe*,[151] to consider the outcome of bankruptcy proceedings:

> Moreover, we know from the broad experience of the business community since 1930, the year when the *Interna-*

---

[146] A merger which the Department would otherwise challenge will ordinarily not be challenged if (i) the resources of one of the merging firms are so depleted and its prospects for rehabilitation so remote that the firm faces the clear probability of a business failure, and (ii) good faith efforts by the failing firm have failed to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7 by a firm which intends to keep the failing firm in the market. The Department regards as failing only those firms with no reasonable prospect of remaining viable; it does not regard a firm as failing merely because the firm has been unprofitable for a period of time, has lost market position in some other respect, has poor management, or has not fully explored the possibility of overcoming its difficulties through "self-help."

Department of Justice, Merger Guidelines 11, 12, 19 (May 30, 1968). To failing subsidiaries or divisions a stricter test is applied:

> In determining the applicability of the above standard to the acquisition of a failing division of a multi-market company, such factors as the difficulty in assessing the viability of a portion of a company, the possibility of arbitrary, accounting practices, and the likelihood that an otherwise healthy company can rehabilitate one of its parts, will lead the Department to apply this standard only in the clearest of circumstances.

Id. at 12. For conglomerate mergers marginally offensive to the guidelines and involving a failing company, "the Department may deem it inappropriate to sue under Section 7 even though the acquired firm is not 'failing' in the strict sense." Id. at 26-27.

[147] International Shoe v. FTC, 280 U.S. 291, 302 (1930).

[148] 394 U.S. 131 (1969). *Citizen Publishing* presents a newspaper joint operating agreement whereby the only two newspapers in Tucson merged all their business operations except their news and editorial departments. The Citizen, which was failing, executed the agreement with the Star in 1940, for 25 years. In 1953 the agreement was extended to 1990.

The majority, per Mr. Justice Douglas, held that although the Citizen was failing in 1940, its owners had made no effort to find alternate purchasers. Id. at 138. Mr. Justice Harlan concurred in the majority's result but proposed that the critical event for determining applicability of the failing company doctrine was the 1953 extension of the agreement. From 1940 to 1953 the joint venture had been consistently profitable, and the failing company doctrine would not have justified extension. Id. at 142.

[149] International Shoe Co., 9 F.T.C. 441 (1914).

[150] International Shoe Co. v. FTC, 29 F.2d 518 (1st Cir. 1928).

[151] 280 U.S. at 303 (dissenting opinion).

> *tional Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. *The prospects of reorganization of the Citizen in 1940 would have had to be dim or nonexistent to make the failing company doctrine applicable to this case.*[152]

*Citizen Publishing* in effect requires two separate judgments of probability. The first is the probability that a business will go into receivership or reorganization proceedings, and the second, given reorganization, is the probability that a business will not emerge as a competitive factor. The ultimate facts of *International Shoe* do not support the *Citizen Publishing* position.[153] *International Shoe* focused on recovery of business "to a normal condition,"[154] not on recovery of a reorganized business as some type of competitive factor. The clear divergence between the approaches of the First Circuit[155] and the FTC[156] in considering the probability of reorganization, and the Supreme Court's refusal to do so, marked the birth of the failing company doctrine. The Supreme Court created the doctrine by refusing to consider the probability of reorganization because of its conclusion that an attempt to assess the probability of reorganization would be wholly within the realm of speculation."[157] Some sort of conclusion is needed here. Should *Citizen Publishing* be followed in the future, despite the lack of support from *International Shoe?*

Before examining further judicial development of the redefinition of failure implicit in the *Citizen Publishing* dictum, the consequences of changing that definition should be considered in the context of strengthening the good faith purchaser requirement, also emphasized in *Citizen Publishing.* A more stringent definition of failure—and the highly qualitative burden of proof entailed in establishing that a bankrupt company will not be reorganized as a competitive force—will inevitably increase the hardship and losses attendant upon business failures. On the other hand, a stronger good faith purchaser requirement might minimize harm to failing businesses as well as prevent antitrust abuses.

c. *Good Faith Purchasers*—Since the heart of objections to the doctrine must go to the identity of the failing company's merging

[152] Citizen Publishing Co. v. United States, 394 U.S. at 138 (emphasis added).

[153] But see United States Steel Corp. v. FTC, 426 F.2d 592, 609 (6th Cir. 1970).

[154] 280 U.S. at 301.

[155] International Shoe Co. v. FTC, 29 F.2d 518, 521 (1st Cir. 1928).

[156] International Shoe Co., 9 F.T.C. 441 (1914).

[157] 280 U.S. at 301-02, 306. Contra, United States Steel Corp. v. FTC, 426 F.2d 592, 608 (6th Cir. 1970), indicating the Supreme Court's view that the forecasting of business failure was more appropriately within the ken of the merging parties than that of the FTC and the court.

partner, and since this identity is the key to the most obvious adverse competitive effects of failing company mergers, attention should be given to the manner in which the existence of one and only one good faith purchaser is ascertained. *International Shoe* specifies that there must be "no other prospective purchaser" for an otherwise illegal merger to be allowed.[158] This formulation has never been supplemented by any guidance as to how the absence of other purchasers is to be determined.

The search for alternate good faith purchasers in *International Shoe* was listless; McElwain's management thought that *International Shoe* would be the only interested party financially capable of making the purchase.[159] The sole effort to contact anyone else was an approach to Endicott Johnson which was not followed up because Mr. Wendell Endicott was away hunting in the Canadian woods![160]

*Citizen Publishing* put new emphasis on merging partners' carrying their burden of proof that no alternate good faith purchasers existed.[161] The Supreme Court reiterated this position in *United States v. Greater Buffalo Press,*[162] where only the two most likely purchasers were considered and other possibilities were not explored.

It would seem that a detailed showing of efforts to find alternate good faith purchasers should be required. The report of a merger-broker or investment banker acting in that capacity might provide objective evidence to supplement the opinions of the failing firm's management. It has also been suggested that public bidding should be required for failing companies.[163] Advantages of a more exhaustive requirement are that the chances of finding alternate purchasers will be increased, as will the confidence that any purchaser alleged to be the only one available is in fact the only one available. Other purchasers need not have offers as lucrative as that of the largest competitor; the difference between good faith offers would be a measure of the value of monopoly power. The antitrust regulator could then grant letters of clearance or litigate on the basis of which purchaser should be chosen to minimize anticompetitive impact. For instance, merger with a relatively small competitor,

[158] 280 U.S. at 302.

[159] Record at 295, International Shoe v. FTC, 280 U.S. 291 (1930).

[160] Id. at 356.

[161] 394 U.S. at 138.

[162] 402 U.S. 549, 555-56 (1971). Judicial development, springing from *Citizen Publishing* and *Greater Buffalo Press,* is already beginning to proceed along these lines. See United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1259-60 (C.D. Cal. 1973), where the court emphasized the lack of exploration for alternate good faith mergers with a less adverse competitive impact.

[163] Note, 68 Yale L.J. 1627, 1666-68 (1959).

with a potential entrant, or with a large conglomerate would usually have less adverse expected results than merger with the industry leader. The antitrust decision of how to minimize anticompetitive effect would involve determining the parameters of market structure, which are more explicit and quantifiable than the elements of a public interest inquiry.

To assure thoroughness of search, guidelines could be published by antitrust agencies detailing the type of search and objective verification that would be persuasive for granting letters of clearance. If litigation ensued, the report of the search would provide information more specific than that which is usually available. Absence of a report would be persuasive evidence that the search was not thorough; the opportunity of rebuttal would be allowed for the rare case of such swift developments that compliance with the guidelines was not possible.

The only alleged drawback of a strengthened good faith purchaser requirement is implicit in the FTC's holding in *United States Steel.*[164] There the FTC concluded that United States Steel was the only possible good faith purchaser for Certified,[165] and further, that any purchaser would have had no "lesser anticompetitive effect,"[166] a seemingly incredible finding in view of the predominant economic position of United States Steel as compared with that of Certified's competitors in the cement market.

Another allegedly anticompetitive failing company purchase, albeit less obviously so than the Certified-U.S. Steel merger, was Heileman Brewing Company's plan to purchase the midwestern brewing plants of Associated Brewing Company and thereby increase its midwestern market share from 7.4% to 12.9%.[167] In *Heileman,* as previously noted,[168] the "anticompetitive" finding was wholly unsupported in the court's opinion.

There is one obvious route to rectifying market distortions alleged in both *U.S. Steel* and *Heileman Brewing.* This route would not require either a complex public interest inquiry or redefinition of failure (with its attendant assessment of dual probabilities—the probability of business failure and the conditional probability, given failure, of successful reorganization as a competitive factor). The alternate route is to strengthen the good faith purchaser concept by a requirement that, whenever a single good faith purchaser would otherwise acquire unreasonable market power, a group of good faith

[164] United States Steel Corp., 74 F.T.C. 1270, 1304 (1968).
[165] See note 119 supra.
[166] See note 120 supra.
[167] See United States v. Heileman Brewing Co., 345 F. Supp. 117 (E.D. Mich. 1972).
[168] See text at note 143 supra.

purchasers must be considered. This solution would have been particularly appropriate for the cases of Certified Cement and Associated Breweries because each of these failing companies was failing partially as a result of rapid, undigested horizontal acquisitions, which could have been spun off to a combination of several good faith purchasers.[169]

### D. *Conclusions*

#### 1. *Allowable Defense*

The rationale and history of the failing company doctrine should qualify it as an allowable defense in any antitrust context. The doctrine was born in a Clayton section 7 case and it was reinforced by the legislative history of the Celler-Kefauver amendment to the Clayton Act in 1950. However, its roots clearly lie in Sherman Act cases and its vitality as a Sherman Act defense has been affirmed by the Supreme Court.[170] In addition the doctrine is more liberally applied to bank mergers.[171] The Federal Communications Commission allows the defense.[172] Further, the Civil Aeronautics Board has allowed the defense in a suit brought under the Federal Aviation Act, though the affirming District of Columbia Circuit shied away from the nomenclature.[173] Insofar as the still viable *Shawnee Compress*[174] case might be considered a parallel, if forgotten, development, one might argue for the availability of the defense in any antitrust action.

#### 2. *Absoluteness of the Defense*

Whether the failing company doctrine should be an absolute defense is a question that requires a preliminary resolution of the issue of applying a public interest balance. There are three possible balancing methods under which: (1) a single public interest balance would apply to all cases; (2) every case would give rise to its own individual public interest balance; or (3) public interest balances would be set for major markets. This matter is discussed further at the end of the last section of this article.

[169] See *United States Steel*, 426 F.2d at 607; *Heileman Brewing*, 345 F. Supp. at 123. See also Occidental Petroleum Corp., [1969-1970 Transfer Binder] Trade Reg. Rep. 21,135 (F.T.C. 1969), indicating that the FTC has thought about "piecemeal" good faith purchases. A variant of the "piecemeal" approach already exists in the allowance of sales of failing subsidiaries, divisions, and products. International Shoe v. FTC, 280 U.S. at 301-02.

[170] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

[171] See note 100 supra.

[172] See Channel 2 Corp., 3 F.C.C. 2d 69, 71 (1966). There, a multiple TV station owner was allowed to buy a failing independent TV station, after all efforts to sell the independent to non-multiple owners failed. Cf. Specialized Common Carrier Servs., 29 F.C.C. 2d 870, 923 (1971); ABC-ITT Merger, 9 F.C.C. 2d 546, 568 (1967).

[173] Northwest Airlines, Inc. v. CAB, 303 F.2d 395 (D.C. Cir. 1962).

[174] 209 U.S. 423 (1908). The *Shawnee* case is discussed in the text at notes 53-56 supra.

3. *Definitions of Failing and Failure*

Failing is a high, but unspecified, probability of failure. The definition of failure has never been explicitly stated in a judicial opinion. It clearly includes bankruptcy and excludes omission of preferred dividends. However, *Citizen Publishing* hints that dismantlement may be included in a future redefinition of failure.[175]

4. *Purposes*

The doctrine serves the purposes of: moderating the operation of the law by incorporating the objective of mercy as a factor in applying the antitrust laws and thereby allowing mergers with some anticompetitive effect, while preventing losses attendant on liquidations; and spurring competition by aiding market entry of new businesses and smoothing market exit of failing firms. Moreover, in the entire history of the failing company doctrine, the possible anticompetitive effects of allowing failing company mergers have been misconstrued. The only clear advantages to competition in forcing failing companies to liquidate instead of allowing merger with a competitor are measured by two criteria—the decrease in failed company asset value caused by liquidation, and the delay incurred by the competitor in acquiring such assets.

5. *Alternative Good Faith Purchaser*

The most exciting possibility is that an interrelationship could be developed between the requirements of "failing" and "good faith purchaser." If an allegedly failing company is not failing, alternate purchasers are likely to exist, and the "failing" issue need be considered only after proof of absence of alternative good faith purchasers. Implicit in the concept "good faith" is the purchaser's intention to operate the failing company and not merely to harvest tax losses.

Nevertheless, the precise nature of the burden of proof concerning the existence of alternate bidders has not yet been defined.[176] If antitrust agencies develop guidelines concerning fulfillment of the "no alternate good faith purchaser" requirement, the worst abuse regarding the doctrine may be curbed, *i.e.*, its potential for inadequate implementation by too ready an assumption that an industry leader is the sole available purchaser.

Finding alternative mergers is not usually a matter of primary incentive to failing companies because the failing companies are usually worth less to purchasers other than a major competitor; and the difference is measured by the value of monopoly power. But the

---

[175] 394 U.S. 131, 138 (1969).

[176] See United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555-56 (1971); Note, 68 Yale L.J. 1627, 1666-68 (1959).

antitrust defendant now clearly carries the burden of proving the absence of alternate purchasers and this allocation of the burden should facilitate objective inquiry as to the existence of such purchasers. Therefore, development of the "good faith purchaser" requirement could remove pressure from the requirement of "failing" because the burden of proving no alternative purchasers would have to be carried before contesting "failing" issue. Since failing company mergers with the sole available good faith purchaser have never been shown to result in substantially greater anticompetitive effect than allowing the failing company to fail,[177] this development would also diminish any hypothesized need for individual-case public interest inquiries.

## II. Research Design and Results

The last two sections of the article propose a model for business failure, the Failing Company Model; a means of a statistical validation of the Model's predictive accuracy; and a decision framework for using the Model to aid in deciding failing company doctrine cases. The object of the proposed framework is to illustrate the steps used by the Antitrust Division in deciding whether to grant a letter of clearance for a failing company merger.

### A. *Definitions of Failing and Failure*

The Failing Company Model has been developed to predict failure as it was defined in *International Shoe.* Failing is considered to be a grave probability of failure. However, the courts have never stated the probability of failure, *e.g.*, 90% or 95%, which constitutes "failing."

Nevertheless, with regard to research design, the critical point is not the meaning of the word "grave." A model can be built to estimate probabilities between zero and 100%, and the level of "grave" probability can be decided afterwards. The critical element of the Model is the definition of failure, which is the event to be predicted. The operational definition of failure is based on the criteria of *International Shoe,* where failure was seen as evidenced by *an inability to pay debts as they come due,* indicated by entrance into a bankruptcy proceeding or an explicit agreement with creditors to reduce debts.[178]

[177] Note, 61 Mich. L. Rev. 566 (1963). This conclusion assumes satisfaction of the requirement that the sole purchaser had no anticompetitive intent, see text at note 39 supra, as contrasted, for example, with evidence that the purchaser caused its prospective purchase to become "failing," see discussion in note 82 supra, or foreclosed, by its pre-merger arrangements, other offerors. See United States Steel Corp. v. FTC, 426 F.2d 592, 610 (6th Cir. 1970).

[178] By contrast, forty years after *International Shoe, Citizen Publishing* hinted that mere

## B. *The Failing Company Model*

Selection of variables for the Failing Company Model is based on a theory of the various ways that impending failure might be symptomized by accounting and market data. The Failing Company Model, summarized at Table 1, differs from models previously discussed in the financial literature. In two senses the Model is more

TABLE 1. THE FAILING COMPANY MODEL

| | | | |
|---|---|---|---|
| I. | Liquidity: | | |
| | A. Short-Run Liquidity | | |
| | Flow: | 1. | The "30-day flow" ratio[179] |
| | Position: | 2. | Net quick assets/inventory |
| | B. Long-Run Liquidity | | |
| | Flow: | 3. | Cash flow/total liabilities |
| | Position: | 4. | Net worth at fair market value/total liabilities[180] |
| | | 5. | Net worth at book value/total liabilities |
| II. | Profitability: | 6. | Rate of return to common stockholders who invest for a minimum of three years[181] |
| III. | Variability | 7. | Standard deviation of net income over a period |
| | | 8. | Trend breaks for net income[182] |
| | | 9. | Slope for net income[183] |
| | | 10-12. | Standard deviation, trend breaks, and slope of the ratio, net quick assets to inventory; variables 10, 11, and 12 are only used at the first and second year before failure. |

entrance to such proceedings may not suffice. 394 U.S. at 138. Definitions of failure may be placed on a continuum, for example, ranging from a declining share of sales in major markets, through omission of preferred dividends, to total dismantlement during liquidation proceedings. On such a scale bankruptcy is not the most extreme point because the possibility of restoring the firm is not precluded. The impact of foreseeable changes in the legal definition of failure would be a shift in weights assigned to the Failing Company Model variables, not a change in the theoretical foundation. Of the failed firms studied, 90% filed petitions under the Federal Bankruptcy Act. Private arrangements comprise the other 10%; state liquidations were excluded for lack of data.

[179] Cash + Notes Receivable + Market Securities + (Annual Sales ÷ 12) ÷ ((Cost of goods sold − Depreciation Expense + Selling and Administrative Expense + Interest) ÷ 12).

[180] Fair market value was measured by the harmonic mean of the bounds to the range of stock prices during a year. The implicit weighting system of the harmonic mean is inverse to the size of the observation (the reciprocal of the arithmetic average of reciprocals). Thus speculative upsurges in market value will not be as influential as in the case of the arithmetic mean.

[181] The market rate of return accrues to a common stockholder who bought his shares at an average price at the beginning of a given time span (e.g., from the fifth to the first year before failure) and sold them at an average price during the last year of the span. The rate of return is based on the stockholder's gain or loss and cash dividends received, all adjusted for temporal location by present-value analysis.

The internal rate of return to an investor and all variables using net worth at fair market value were adjusted for capital changes. To compare entities more nearly similar, shares issued in mergers or offered to the public were added to prior totals of shares outstanding, with adjustments for stock splits and dividends.

[182] A trend break is defined as any performance by a variable less favorable in one year than in the preceding year, such as a decline in income from $10,000 to $1,000 from year 5 to year 4 before failure.

[183] Slope of a "trend" line fitted to the group of observations by the method of least squares.

dynamic than its predecessors: most of the variables incorporate change over time, such as an investor's profit from selling a security six years after purchase, and variability of accounting data, as represented, for instance, by the standard deviation of net income.

### C. *Discriminant Analysis and Data Collection*

Discriminant analysis is the statistical technique for testing the hypothesis that the Failing Company Model can distinguish between failing and non-failing firms.[184] This statistical technique is used to compute an index and a cut-off point on the index.

The index is derived from the financial model by computing the values of each of the variables for each company studied. When the variables for one company are standardized and added together, their sum is that company's index score. A critical score exists and is defined to be that index score which results in a minimum of misclassification. If all companies with index scores above the critical score are predicted to succeed and all companies with scores below are predicted to fail, erroneous predictions will be minimized.

Data drawn from financial statements and stock market prices for a consecutive period of at least three years was gathered for all one hundred and fifteen industrial firms which: (1) failed during the years 1954-1968; (2) had full sets of data available; and (3) had a minimum of $1,000,000 in liabilities at date of failure. The one hundred and fifteen failed firms were paired with one hundred and fifteen firms which did not fail, on the basis of four criteria—industry, sales, employees and fiscal year. Pairing on such a stratified, random basis eliminated an upward tendency in predictive accuracy by excluding firms, such as General Motors or Alcoa, which are unlikely to fail because of their size or industry.

### D. *Results*

The model distinguished failing from nonfailing firms with an accuracy of approximately 94 percent when failure occurred within one year from the date of prediction, 80 percent for failure two years into the future, and 70 percent for failure three, four and five years distant.[185]

---

[184] The Failing Company Model and the technique of discriminant analysis are also explained in Blum, Failing Company Discriminant Analysis, 12 J. of Accounting Research—(Scheduled to be published in 1974); Blum, The Failing Company Doctrine (1969) (unpublished Ph.D. dissertation, Columbia University, Graduate School of Business. The dissertation topic was suggested by Edwin M. Zimmerman, then First Assistant to the Assistant Attorney General, Antitrust Division.)

[185] There are two reasons for considering the Failing Company Model reliable. First, the choices of each of its variables are justified on the basis of financial theory, and, second the aforementioned results are the product of a rigorous validation procedure. A discriminant function was computed from the data of one half of the sample and tested on the other, or

## III. A Decision Process

### A. *The Antitrust Decision*

This section relates the Failing Company Model to an explicit decision process, illustrated by the Antitrust Division's decision whether to grant a letter of clearance,[186] thereby clarifying ambiguities that otherwise enshroud the apparently simple rule of the doctrine. In particular, the nature of a "grave" probability of failure will be clarified.

### B. *Design of a Decision Rule*

The Failing Company Model results in a probability of success or failure which then is subject to revision if additional information is available. For example, if a probability of failure of 90% is assigned by the model, it would be necessary to inquire whether additional factors are present. For example, an unimpeachable report by management consultants may expose details of the firm's production line and market conditions that may incline the decision-maker to revise the probability of failure. Or, an extraordinary event, such as an uninsured fire loss may have occurred since the last published financial statements.

Once the probability of failure has been estimated, a decision may be made on the following basis:[187]

$$\text{If } \frac{P(F)}{P(NF)} \times LR \text{ is greater than } \frac{L(F/NF)}{L(NF/F)}, \text{ predict failure;}$$

otherwise predict nonfailure.

#### 1. *Definition of P(F) and P(NF)*

P(F) is the probability that a firm will fail; P(NF) is the probability that it will not. P(F) might be very small in the total population, *e.g.*, 1/1000. An estimate of P(F) must be made for every kind

---

"fresh," half. The secondary or "validation" sample provides a means for correcting sampling error. It also provides a means for correcting the tendency of any statistic to be more accurate in classifying the sample from which the statistic itself is derived (the primary sample) than in classifying an untested, random sample. The computer program used was Duhammel, Massy, and Morrison's adaptation of the Biomedical package program, BMD05M, developed at Stanford University in 1964. See W. Dixon, BMD, Biomedical Computer Programs (1968).

[186] A letter of clearance informs companies proposing to merge that the Antitrust Division has no present intention to prosecute the merger.

[187] Beaver, Financial Ratios as Preditors of Failure, Empirical Research in Accounting: Selected Studies, 1966, J. of Accounting Research 71, 116-17, 124 (1967) (discussion after the article); cf. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971). In the latter article, the importance of a sound "prior" probability, which in the above context is the probability assigned by the Failing Company Model before revision based on additional date, is emphasized. Tribe, supra, 84 Harv. L. Rev. at 1358-59.

of decision. Bankers making unsecured loans might face a P(F) of 1/1000. The Antitrust Division might have a P(F) of 1/5, that is, one out of every five invocations of the failing company doctrine might be made by a genuinely failing firm.

2. *Definition of the Loss Ratio*

The ratio on the right side of the inequality is the loss associated with Type II error (prediction of failure for a nonfailing company) to the loss associated with error of Type I (prediction of success for a failing company), or the relative structure of the costs of error.

The legal literature has neglected these two types of errors. It has emphasized the question of the net benefits of the failing company doctrine, *i.e.,* the plus and minuses of allowing failing companies to complete otherwise illegal mergers. Thus, the cost of Type I error has been addressed only briefly, by focusing on the avoidance of harm to failing companies by allowing the failing company defense. The cost of Type II error has not been addressed directly in the context of failing company doctrine literature. It is difficult to quantify the true costs of error in every decision context. The decision rule, though, does not depend on a complete quantification of the cost of each type of error, but merely depends upon an assignment of relative costs, such as "Type II error is twice as bad as Type I."

3. *LR as a Ratio of Probabilities*

LR is the likelihood ratio in favor of failure. More specifically, it is the ratio of the probability, as revised by any other available information, that a given discriminant "Z" score (the index score) will be associated with a failing company to the probability that the "Z" will be associated with a nonfailing company. Algebraically, LR = P(Z/F) ÷ P(Z/NF). "LR*" is the critical value of LR that must be exceeded for failure to be predicted, once P(F) and the loss ratio are given.

4. *Illustration*

To illustrate the decision, let us assume that the loss ratio is 2:1; one-fifth of the population of failing company doctrine applicants is truly failing; the Failing Company Model predicted failure within the next year for a certain applicant; Company X; and further information does not result in revision of the probability assigned by the Failing Company Model.

The critical value of the likelihood ratio is then:

$$LR^* = \frac{L(F/NF)}{L(NF/F)} \div \frac{P(F)}{P(NF)} = \frac{2}{1} \div \frac{1/5}{4/5} = 8$$

If the likelihood ratio for Company X is greater than 8, failure should be predicted and X should be allowed to invoke the failing company doctrine. Since the Failing Company Model predicted Company X to fail, let us assign the expected probability of Type I found by the Model. Type I accuracy (predicting failing firms to fail, P(Z/F)) was 95%.[188] The likelihood ratio of Company X ($LR_x$) is then:

$$LR_x = \frac{P(Z/F)}{P(Z/NF)} = \frac{.95}{.05} = 19$$

Since $LR_x$ [19] is greater than LR* [8], Company X should be predicted to fail and the failing company doctrine should be allowed.

If it is assumed that Company X was predicted not to fail within one year, but it was predicted to fail within two years with a probability of Type II error of 25%, LR* remains the same. However, the new likelihood ratio for Company X ($LR_x$) is:

$$LR^1_x = \frac{P(Z(F))}{P(Z(NF))} = \frac{.75}{.25} = 3$$

This is less than LR* and the failing company doctrine would not be allowed.[189]

In summary, here are the main steps in the decision process proposed for the Antitrust Division:

1. Ascertain the frequency of failed firms in the population of applicants for the failing company doctrine (assumed in the example above to be 1/5). This statistic would require revision from time to time, but not for any particular applicant.
2. Estimate the loss ratio: the relative cost of Type II error

[188] The overall accuracy (94%) of the model, the combination of Type I and II, was reported in text at note 185 supra.

[189] To illustrate the nature of the decision rule further, let us consider the decision of a financier of accounts receivable who faces a P(F) of 1/21 and a relative cost of error of 1:10. Then

$$LR^* = \frac{1}{10} \times \frac{20/21}{1/21} = 2.$$

Assume that he has no information other than that of the Failing Company Model, and that P(Z/F) equals .6 and LR equals .6/.4, or 1.50. The financier will make the loan. He could compute the probability of failure which has to be exceeded in order to disqualify for a loan as: P(Z/F) ÷ 2; P(Z/F) + P(Z/NF) = 1; (P(Z/F) = 2/3 = 67%.

(assumed in the example to be 2:1). This statistic could be revised from time to time if antitrust policies change, and it could also be revised for individual cases.

3. Since steps one and two suffice to determine the critical likelihood ratio (LR*), which in effect determines the cut-off point for "grave" probability of failure, all that remains is to evaluate the likelihood ratio for a particular applicant for the defense (such as $LR_x$ for Company X above). The first step in this evaluation is to find the probability assigned by the Failing Company Model. The second step is to revise this probability on the basis of additional information not focused upon by the model.

### C. *Explicit Recognition of the "Grave" Probability*

In view of this probabilistic decision-rule a novel definition of "failing" can be advanced to show not only the complexity of the concept "failing," but also the steps required to achieve a complete definition.

It is unnecessary to decide, for instance, whether .90 or .99 is the cut-off point constituting "grave" probability. One could instead estimate values for the two parameters—relative frequency of failing companies and relative cost of error—since they suffice to determine the critical value of the likelihood ratio. The two parameters may be difficult to ascertain, but the analysis can be approached explicitly, avoiding undiscussed assumptions:

(1) The relative frequency of failing companies among the population of cases of applicants for the failing company doctrine could be estimated by an empirical investigation. Some approximation could be arrived at, for instance, either a relative frequency of 10% or an estimate of a range—such as 5% to 15%.

(2) Relative costs of error, while more challenging, are assessed every day in the legal environment as "public-interest balances" and in economics as "cost-benefit" analyses.[190]

### D. *Conclusion*

The explicit nature of the decision-rule emphasizes the complexity of the concept—"grave" probability of failure. Furthermore, it shows for the first time in what way a thorough assessment of "grave" probability can be made. This emphasis should not daunt decision-makers, because the difficulties it focuses upon exist in all decisions regarding public policy.[191]

The failing company doctrine throughout its history to date has

---

[190] G. Taylor, Managerial and Engineering Economy 386-392 (1964). See also W. Baumol, Economic Theory and Operations Analysis 479-490 (2d ed. 1965).

[191] See, C. Churchman, Theory of Experimental Interference 265-87 (1948).

been interpreted as an absolute defense, and application of the doctrine has implicitly required a public interest balance, that is, a single balance applied to all failing company cases. The FTC and recent lower court decisions have experimented with requiring individual public-interest balances for each case, a most exhausting endeavor which would undoubtedly be difficult of fulfillment in the usual case. A middle approach, for which there is some foundation in current case development, would establish different public-interest balances for different markets.[192]

To be of practical value in guiding failing company mergers, and thus obviating litigation, a set of predictable rules should be established.[193] This is not possible with the FTC's approach. It is possible with regard to the other two above approaches, but only if antitrust agencies publish guidelines with explicit, quantified public-interest standards. In conjunction with such standards, concrete guidelines should also be issued in order to define the steps required to prove absence of alternative good faith purchasers. These guidelines would assist in accomplishing the purposes of the failing company doctrine: aiding market exit and entry; and granting mercy to failing companies—without significant risk of antitrust abuses and without the need to litigate in all but the most unusual cases.[194]

---

[192] See notes 100-14 supra. Legislative support for different standards in different markets is also implicit in the exception for the newspaper industry. See text at notes 89-92 supra.

[193] See note 142 supra and discussion following note 71 supra.

[194] See note 177 supra.

# BOSTON COLLEGE
# INDUSTRIAL AND COMMERCIAL
# LAW REVIEW

VOLUME XVI | NOVEMBER 1974 | NUMBER 1



BOARD OF EDITORS

THOMAS J. FLAHERTY
*Editor in Chief*

LARRY E. BERGMANN
*Articles Editor*
ALLAN H. CARLIN
*Articles Editor*
RANDOLPH H. ELKINS
*Executive Editor*
ELLEN SEGAL HUVELLE
*Articles Editor*
STEPHEN J. KIELY
*Articles Editor*
JAMES R. MCGUIRK
*Business and Managing Editor*
JOHN P. MESSINA
*Articles Editor*
PETER E. MOLL
*Articles Editor*
PHILIP E. MURRAY, JR.
*U.C.C. Reporter Digest and Articles Editor*

JEAN S. PERWIN
*Articles Editor*
KENNETH S. PRINCE
*Articles Editor*
WILLIAM B. ROBERTS
*Articles Editor*
WILLIAM P. ROBINSON, III
*Topics and Solicitations Editor*
KATHLEEN E. SHANNON
*Articles Editor*
DONNA M. SHERRY
*Articles Editor*
MICHAEL J. VARTAIN
*Executive Editor*
JAMES M. WHALEN
*Articles Editor*
HARRY H. WISE, III
*Articles Editor*

CONTRIBUTING EDITORS

MICHAEL JOSEPH BETCHER
MARC R. K. BUNGEROTH
ROBERT B. CARPENTER
JAMES ANTHONY FRIEDEN
SUSAN KAGAN LANGE
RONALD E. LASKY
MARSHALL F. NEWMAN
KEVIN P. PHILLIPS
DONNA VITTER PLOTT
HELEN S. RAKOVE
DAVID STRAUSS
JOSEPH H. WALSH

SECOND YEAR STAFF

CALUM ANDERSON
LUCY WEST BEHYMER
KENNETH BOUCHARD
BARBARA BRUCE
ROGER J. BRUNELLE
THOMAS J. CANAVAN
SUSAN CHAMPION
MICHAEL A. DEANGELIS
TUCKER DRUMMOND
DANIEL ENGELSTEIN
FRANCIS E. GIBERSON
MARC D. GREENBAUM
W. THOMAS HAYNES
JILL LANDSBERG
BARRY LARMAN
STEVEN LENKOWSKY
MARION KATZ LITTMAN
DEBORAH M. LODGE
ROBERT LOMBARDI
RICHARD F. MCQUAID
PAUL D. MOORE
JANET S. PAINTER
JOSEPH D. PIZZURRO
ALAN POLACKWICH
ROBERT RASKOPF
REGINA STRAZZULLA ROCKEFELLER
ROBERT L. ROSSI
VINCENT SACCHETTI
RONNA GREFF SCHNEIDER
JUDITH SCOLNICK
RICHARD J. SHEA
JEFFREY B. STORER
BETTY WAXMAN

FACULTY COMMITTEE ON PUBLICATIONS

PAUL R. MCDANIEL
*Chairman of the Faculty Committee on Publications and Faculty Advisor to the Law Review*

MARSHA HEARN
*Administrative Secretary*

MARY LANNIGAN
*Administrative Secretary*