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THE FAILING COMPANY DOCTRINE REVISITED

*RICHARD E. LOW**

The conclusion seems inescapable that the failing company doctrine has no logical basis as it is usually stated . . . the interpretation and application of any doctrine becomes difficult indeed in the absence of a rational basis for it. It is impossible to determine whether any particular factor fits into the doctrine's purpose if that purpose is not known.[1]

I. INTRODUCTION

IN the two years since the above statement appeared in this Review, the failing company defense in merger cases has received more significant judicial and administrative interpretation than in the 37 years since its formulation. In the past year both the Supreme Court[2] and the Federal Trade Commission (FTC) have considered its scope and apparently have limited its application. The FTC, in both its majority and minority opinions in *United States Steel Corp.*,[3] moved toward a more rational application of the doctrine. Unfortunately, however, Mr. Justice Douglas' majority opinion in *Citizen Publishing Co. v. United States*[4] was so weak logically that it seemed to support some of the recent adverse views on the antitrust record of the Warren Court.[5] Simply stated, the doctrine is that the merger of a "failing company" under certain conditions does not violate Section 7 of the Clayton Act.[6]

The recent narrowing of the applicability of the failing company doctrine may actually result in its more frequent acceptance by the courts.

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1. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,981 n.13 (FTC 1969) quoting Low, The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act, 35 Fordham L. Rev. 425, 430 (1967).

2. Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). Mr. Justice Harlan concurred in a way which disassociated himself from the majority's views on the failing company doctrine; Mr. Justice Stewart dissented; Mr. Justice Fortas did not participate.

3. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,974 (FTC 1969). Chairman Dixon and Commissioner Jones were in the majority; Commissioner Elman dissented; Commissioners MacIntyre and Nicholson did not participate.

4. 394 U.S. 131 (1969).

5. E.g., Kauper, The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism, 67 Mich. L. Rev. 325 (1968). "[I]f, as has been suggested, the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time." Kurland, Earl Warren, The "Warren Court," And the Warren Myths, 67 Mich. L. Rev. 353, 357 (1968).

6. 15 U.S.C. § 18 (1964). The doctrine was first laid down by the Supreme Court in International Shoe Co. v. FTC, 280 U.S. 291 (1930). Neither the meaning of "failing" nor the certain circumstances concerned were defined.

To date the doctrine has won very few judicial victories.[7] Its main triumphs have been in winning FTC or Justice Department approval of mergers under the advance clearance programs of those agencies.[8] But it may well be that the hitherto very broad definitions of the doctrine have made courts reluctant to apply it in today's antimerger judicial atmosphere. A stricter definition may thus result in more frequent judicial, though fewer administrative victories for the doctrine.

Two years ago there were three major areas of confusion concerning the failing company doctrine. The first involved whether it was necessary to demonstrate the absence of a preferable prospective purchaser before a merger could be approved under the doctrine. This problem has been resolved in the affirmative. In the light of this resolution, however, the subsidiary question of proving the unavailability of such a purchaser has become more important and, how to answer it, more uncertain.

The second major area of confusion, the reason for the doctrine, and thus the objective around which subsidiary questions could be argued, has advanced in clarity at the FTC, but retreated disastrously at the Supreme Court.

The third major area of confusion, how to decide whether a company is actually "failing", has had relatively little clarification.

II. The No Other Prospective Purchaser Requirement

In *International Shoe Co. v. FTC*[9] the Supreme Court found that no other prospective purchaser of the failing company existed. The Court, however, did not indicate whether this factor was vital to its decision. Consequently, as of two years ago there was still uncertainty as to whether this was a necessary condition of the failing company doctrine,[10] although there was a tendency for commentators to assume that it was.[11] This question was apparently settled in *Citizen*. In deciding that the doctrine's requirements had not been met, the Court stated that:

> The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or

7. "Many have tried this defense but with almost total lack of success." Robinson, Antitrust—Horizontal and Vertical Mergers Under the Sherman and Clayton Acts, 36 U. Mo. (K.C.) L. Rev. 75, 82 (1968).

8. See Hale and Hale, Failing Firms and the Merger Provisions of the Antitrust Laws, 52 Ky. L.J. 597 (1964); Comment, The Impact of the "Failing Company Doctrine" in the Federal Trade Commission's Premerger Clearance Program, 19 Syracuse L. Rev. 911 (1968).

9. 280 U.S. 291, 302 (1930).

10. See Low, supra note 1, at 432-34.

11. See, e.g., Thomas, Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy, 36 Fordham L. Rev. 461, 548 (1968).

brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power.[12]

But beyond this preliminary resolution, no other related problems were solved. How was the absence of another prospective purchaser to be shown? Where more than one prospective purchaser existed, was the failing company doctrine inapplicable or only applicable to one of the prospective purchasers, presumably the one whose purchase would have the least anticompetitive effect? And how would the least anticompetitive effect be proven?

The majority and minority in *Citizen* primarily disputed the type of proof that a defendant had to offer to establish a failing company defense. According to Mr. Justice Stewart's dissent:[13]

Today's decision for the first time lays down the blanket rule that the failing company defense is forfeited by a company which cannot show that it made substantial affirmative efforts to sell to a noncompetitor.[14]

The majority, by stressing the need for "substantial affirmative efforts to sell," seemed to follow a view of the Department of Justice which argued in a recent case that failure to retain a broker for selling or failure to advertise for sale demonstrated that a firm had not really sought an alternative purchaser.[15] This argument was maintained in the face of

12. 394 U.S. at 138. In Citizen the two firms concerned were the only two newspapers in Tucson, Arizona. If any other prospective purchaser existed, it would have had to be an outsider. Many times, however, this is not the case. Beyond Citizen's particular facts, Mr. Justice Douglas' second sentence above is a complete non sequitur.

The Justice Department's 1968 guidelines also endorse the need for "good faith efforts . . . to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7 . . . ." Merger Guidelines, 1 Trade Reg. Rep. ¶ 4430, at 6684 (Dep't Justice 1968).

13. Justice Stewart, like the majority, accepted the necessity of showing that no other prospective purchaser exists. 394 U.S. at 143. His major objection to the Court's holding, however, was that being new, it was retroactive. He argued that it should be applied only prospectively. Id.

Both Justice Stewart and the majority overstated the desirability of a conglomerate purchaser. While it is certainly likely that a conglomerate merger would be less anticompetitive than a horizontal one, such a conclusion is by no means automatic, and may run counter, in many cases, to the alleged dangers of conglomerate mergers. See, e.g., FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). Both Justices Douglas and Stewart incorrectly assumed that this conglomerate twist to the "no other prospective purchaser" requirement was the law at that time.

14. 394 U.S. at 143. The burden of bringing forth the evidence, however severe that burden, is of course on the defendant since the failing company doctrine is an affirmative defense.

15. Proposed Findings of Fact and Conclusions of Law Regarding Defendant's Failing Company Defense by the United States at 10, United States v. Pabst Brewing Co., 296 F. Supp. 944 (E.D. Wis. 1969).

considerable evidence of other attempts to sell, and despite the argument that too much publicity regarding the desire to sell would bring down creditors like hawks, and alienate customers interested in long term business relationships.[16]

A literal reading of the Supreme Court's decision in *Citizen* gives the impression, therefore, that the existence of another prospective purchaser destroys the defense rather than raises the question of which purchase would have the least anticompetitive effect. There seems to be no reason, however, for the court to have concluded that the failing company doctrine was inapplicable merely because more than one prospective purchaser existed, unless the Court had fallen into the logical error of assuming that the presence of such multiple prospective purchasers means that the firm is not failing.[17] Any illumination by reference does not exist, for the Court, in a footnote,[18] referred to only two lower court decisions in which this doctrine was applied. In one of these cases, the lower court ignored the entire "no other prospective purchaser" requirement,[19] and in the other, it applied the natural monopoly[20] rather than the failing company defense. Hopefully the Court has been misread in this matter, for such a requirement as an absolute makes no sense at all. As one evidentiary consideration among others it would be more rational.

The FTC, however, fell into no such error. Both the majority and minority opinions in *United States Steel Corp.* went to the other extreme. They maintained that though the failing firm turned down other bids and borrowed money through the influence of the ultimate purchaser in an attempt to remain independent, its failing status was not affected in the absence of evidence that it really had not tried to remain independent.[21]

The present law concerning the "no other prospective purchaser" requirement appears to be, therefore, that such a requirement does exist, whatever its form, and that the failing company must make strong affirmative efforts to attract other prospective purchasers. These efforts must be made irrespective of the harmful effects on the company's business prospects, on its chances to survive or sell, and regardless of the wasted effort these attempts may involve. The existence of other prospective purchasers means either that the defense fails—a position with no

16. Reply Brief for Defendant at 25-26, United States v. Pabst Brewing Co., 296 F. Supp. 994 (E.D. Wis. 1969).

17. See Low, supra note 1, at 434.

18. 394 U.S. at 136 n.2.

19. United States v. Maryland & Va. Milk Producers' Ass'n, 167 F. Supp. 799, 808 (D.D.C. 1958), aff'd, 362 U.S. 458 (1960).

20. Union Leader Corp. v. Newspapers, 284 F.2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961). See Low, supra note 1, at 431.

21. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,974 (FTC 1969).

logic, but some authority—or that the purchaser whose acquisition would have the least anticompetitive effect must be chosen. How to determine which purchaser would have the least anticompetitive effect, or whether a minimum purchase price is required, is unclear. And conglomerate purchasers seem to be preferred, absolutely by authority and presumptively by logic.

III. THE LOGICAL BASES OF THE DOCTRINE

The quotation opening this article makes the obvious, but often overlooked, point that particular problems concerning legal doctrines cannot be resolved logically if the purpose of the doctrine is unknown. I have suggested two possible underlying bases of the failing company doctrine.[22] Both have undergone startling changes in the last two years. These bases were that the merger of a failing company could not have the adverse impact on competition necessary to violate Section 7 of the Clayton Act, and the historic fact that Congress, in amending Section 7 in 1950, clearly incorporated a failing company exception into the meaning (although not into the language) of the statute itself.

According to the FTC:

> In reviewing the opinions of the lower courts and other agencies, and legal articles published since the Supreme Court's statement in *International Shoe*, we have noted a reliance on an unexplained proposition that the acquisition of a failing company could not possibly substantially injure competition. Such holdings have led one commentator to observe: "[T]he defense is no stronger than the validity of that presumed lack of impact, and, in the author's view, the presumption is seldom, if ever, valid. Yet, customarily, whenever a reason for the doctrine is demanded, this invalid basis is presented as truth. . . . It is difficult to refute an argument whose advocates advance no logical reason in support of it."[23]

The FTC then proceeded to list a long series of situations in which the merger of a failing company may substantially lessen competition. These included instances where a shortage of capital prevents a company from developing valuable patents or know-how, or where a "dominant" firm is able through buying a failing one to meet orders it could not fill if dependent on the slow process of internal expansion (both examples from horizontal mergers); where the purchases of the failing firm are foreclosed by the buyer or where the acquiring firm achieves an integrated advantage over its nonintegrated rivals (both examples from vertical mergers).[24]

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22. Low, supra note 1, at 427-30.

23. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,982 (FTC 1969), quoting Low, supra note 1, at 428.

24. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,982 (FTC 1969).

The FTC diplomatically omitted the Supreme Court from the list of those who have endorsed the fallacious argument that the merger of a failing firm cannot substantially lessen competition. But Mr. Chief Justice Warren himself once endorsed this argument[25] and Mr. Justice Douglas, in the *Citizen* case, cited with apparent approval a district court opinion which applied the failing company doctrine and justified it through this fallacious reasoning.[26]

Nevertheless, it now seems that this particular "logical" basis for the doctrine is dead. It is not repeated in *Citizen,* and FTC Commissioner Elman's dissent in *United States Steel Corp.* repudiates it as sharply as does the majority opinion.[27] Its absurdity, therefore, is probably now clear to all. Indeed, if it were true that the merger of a failing company could not substantially lessen competition, there would not be any need for a failing company doctrine since such a merger would not violate Section 7.

The elimination of this inaccurate basis leaves the field to congressional intent, a much stronger substructure since logic is not needed to sustain it. Logic is necessary, however, to interpret it. The question of the reason for this congressional intent now becomes of prime importance, since any interpretation of the doctrine depends on the nature of the now supreme congressional purpose.

This problem, however, is completely ignored by the Supreme Court in *Citizen,* where Justice Douglas classified the failing company defense as a "judicially created doctrine".[28] The fact that Congress endorsed it in 1949-50 was completely ignored.[29] And, of course, what the Court can create, the Court can change or annul. Yet the Court in *Citizen* did not even bother to exploit this assumption of authority by considering its judicial purpose in creating the doctrine, although there was a reference to its great depression origins.[30] In fact, *International Shoe* was decided before that depression became severe and concerned a firm which failed in the 1920 recession.[31] But this apparent misinterpretation of the doctrine's judicial origins makes little difference since *Citizen* ignored the whole problem of the doctrine's purpose, judicial or congressional.

The FTC, however, both majority and minority, not only acknowl-

25. Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).
26. See notes 18-19 supra.
27. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,990 (FTC 1969).
28. 394 U.S. at 136.
29. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950).
30. 394 U.S. at 138.
31. See Low, supra note 1, at 427.

edged the congressional, and thus powerful, basis of the doctrine[32] but also, as discussed later, used such purpose correctly as the basis for interpreting the doctrine. It is to be hoped that the Supreme Court will not continue to ignore unquestioned fact. Fortunately the congressional endorsement of the doctrine has been admitted by the Court in the past.[33]

As long as the presumed lack of effect on competition is the major logical basis of the doctrine, the defense is naturally absolute. But, with congressional incorporation now predominate as the basis, it can be argued that the defense is merely relative (*i.e.*, rebuttable) if that were the congressional intent. In effect, the absolute view is an illustration (if not a completely logical one) of the common law ancillary rule of reason—that which makes a restraint of trade legal where it is necessary for and subordinate to an otherwise valid contract.[34]

If the failing company doctrine, however, is viewed as relative rather than as absolute, the ancillary rule (or simply exemption by congressional fiat) gives way to the balancing rule of reason, under which the advantages and disadvantages of a merger must be weighed and the decision given according to the net advantage or disadvantage. This approach is now embraced by the FTC majority,[35] but presents some severe interpretive problems. Two are especially outstanding: reconciling the record with congressional support for a balancing, relative approach, and deciding what weight to accord the fact that one firm in a merger is failing.

The first problem is logically insolvable. The record shows clearly that Congress intended the failing company doctrine to be an absolute defense. The only evidence to the contrary that the Commission has presented is irrelevant. It quotes a statement by Congressman Wright Patman (D. Tex.) supporting a relative approach to the failing company defense.[36] But Congressman Patman neither is nor was a member of the House Judiciary Committee nor its Antitrust Subcommittee, and the statement was made not in floor debate on the Celler-Kefauver Act but as testimony before the Senate committee. Thus, it is no more relevant than any other statement made by a witness prior to the drafting of the bill and the committee report by the Senate committee. In addition, as Commissioner Elman pointed out in his dissent, the FTC itself until recently "has

32. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,977-80 (majority opinion), 20,991-94 (dissenting opinion) (FTC 1969).

33. Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).

34. R. Low, The Economics of Antitrust 16 (1968). One could argue that the failing firm's obligations to its creditors and stockholders are incorporated into the merger "contract" and that the protection of these interests is the failing company's primary motive for entering into that contract.

35. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,981 (FTC 1969).

36. Id. at 20,980 n.10.

regularly granted premerger clearances in cases where the mergers would be clear violations of law under the views now expressed [by it]."[37]

But we cannot stop there. The relative approach, although unsupported by the congressional record, is now the approach of the FTC. And the Supreme Court itself has been known to interpret congressional intent in the antitrust field in ways that would seem equally unsupported by the record.[38] Thus we must proceed to the next question, that of determining how much weight to accord the fact that one firm in a merger is failing in striking a balance either for or against that merger.

We are advised by one legal study to weigh the effects upon competition of a merger by a failing firm "according to the laws of economics."[39] Such an appeal must warm the heart of a lawyer-economist. But unfortunately, the "laws" of economics are sometimes no better interpreted than those of Congress. Moreover, we are faced with the additional problem that some factors favoring a merger by a failing firm may be irrelevant to the concept of competition, and, in a theoretical sense, perhaps completely outside of economic considerations.

In *United States v. Philadelphia National Bank*,[40] the Supreme Court held that *some* lessening of competition in *some* market makes a merger violative of Section 7, irrespective of how much it may increase competition in other ways in the same market, or in any way in other markets. Since then, the illogical position sometimes prevails that where such a subsidiary adverse impact on competition can be shown, any favorable effect on competition is a question not of "competition" but of the public interest aside from competition. If that sentence does not sound logical, neither is that view of the law. But it is so prevalent that even great benefits to competition arising from mergers are brushed aside as being only in the public interest, and thus, not legally relevant to Section 7 which does not mention such a consideration.[41]

Note, however, that even this illogical position breaks down when considering the failing company doctrine, for Congress specifically included the public interest in preventing bankruptcies as a consideration in that defense. The now dominant view seems to be that protection of stockholder, creditor, employee, and community interests against bankruptcy

37. Id. at 20,992 n.15 (dissenting opinion).

38. An example of the Supreme Court's action is seen in giving the FTC the power to seek preliminary injunctions in merger cases after it had admitted for decades that Congress had not given it that power. FTC v. Dean Foods Co., 384 U.S. 597 (1966). This case is probably one of the worst of the "Warren Court's" antitrust decisions. Justices Fortas, Harlan, Stewart and White dissented.

39. Comment, supra note 8, at 920.

40. 374 U.S. 321 (1963).

41. See, e.g., Robinson, supra note 7, at 80.

is the major reason for congressional endorsement of the failing company doctrine.[42] Thus, considerations aside from the lessening of competition appear to be permitted when the failing company defense is raised.

The view that the failing company doctrine provides only a relative defense would have two possible effects. First, it would probably make possible the consideration of such noncompetitive factors as the needs of "[c]reditors, owners, employees—all [of whom] could have an interest in avoiding a total collapse or in realizing as high a selling price as possible."[43] And second, it should certainly make relevant such pro-competitive factors favoring mergers as the need to provide a method of exit for failing firms in order to encourage both risk by existing firms and the entry of new firms with a high possibility of failure. It has been argued that bankruptcy as the economic penalty for failure is necessary to promote the best economic allocation of resources.[44] This viewpoint, however, confuses the need for eliminating inefficient or unsuccessful firms with the need for some "moral, economic" penalty. The former is indisputable; the latter is indefensible. Indeed, this is one area where the judicial view is furthest removed from economic reality. The courts have so completely failed to see that opportunities for nondisastrous exit are necessary to encourage entry that at times they even list the number of withdrawals as proof of declining competition instead of as evidence of vigorous competition.[45]

My view remains what it was, namely, that the failing company defense should be a relative rather than an absolute one.[46] But I agree with Commissioner Elman that congressional intent was otherwise, and that, except on constitutional issues, only Congress can change what Congress decrees.

The Supreme Court in *Citizen* did not address itself directly to the problem of whether the failing company doctrine was an absolute or a relative defense. One statement, however, lended itself to the interpretation that the protection of stockholder or of creditor interests, if a factor at all, was merely a relative one. Consequently, the partial or complete

42. United States v. Third Nat'l Bank, 390 U.S. 171, 187 (1968); United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,981, 20,977, 20,982, 20,987, 20,989 (FTC 1969).

43. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 340 (1960), quoted in United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,996 (FTC 1969) (dissenting opinion).

44. Miller, Concentration, Competition and Monopoly: A Guideline Proposal for Horizontal Merger Policy, 12 Antitrust Bull. 881, 882 (1967).

45. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966). See also Low, Ease of Entry: A Fundamental Economic Defense in Merger Cases, 36 Geo. Wash. L. Rev. 515, 528-29 (1968).

46. Low, supra note 1, at 444.

destruction of these interests in the absence of a merger was apparently not enough to invoke the doctrine:

[W]e know from the broad experience of the business community since 1930, the year when the *International 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 to be dim or nonexistent to make the failing company doctrine applicable to this case.[47]

Here again Mr. Justice Douglas enunciated a statement contrary to the whole history of the doctrine, ignored its 1950 incorporation by Congress into the meaning of the statute, and ignored as well the multiple problems raised by his own remarks. Are creditor and stockholder interests now irrelevant or simply not, for some reason, important enough in this case? Are employee and community interests of greater importance? Presumably employee and community interests may be served better by reorganization than creditor and stockholder interests. Must a company show unsuccessful "affirmative" efforts to reorganize as well as similar efforts to corral other prospective purchasers?

It seems significant to note here that the FTC majority in *United States Steel Corp.* held, under its relative approach, that larger stockholder interests held by fewer stockholders were less important in the balance than smaller stockholder interests held by more stockholders.[48] This distinction seems to be a clear case of political preferences translated into legal standards. Certainly no legal justification for such a peculiar view was given.

IV. The Meaning of "Failing"

As of two years ago, a wide variety of financial conditions which might qualify a company for a "failing" status under the doctrine had been considered by the courts. The strictest was bankruptcy, but few viewpoints were that severe.[49] Even the Supreme Court, in *Citizen,* quoted the *International Shoe* statement that the failing firm in that case was facing "the grave probability of a business failure,"[50] surely a less desperate state than bankruptcy or even insolvency. Yet, as the above quotation[51] on reorganization shows, even bankruptcy itself may not be enough today. There may be a new test of "failing" requiring, under some, or possibly under all circumstances, the absence of a likely prospect that the firm has any future at all, before or after bankruptcy. This test has a

47. 394 U.S. at 138.
48. See United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,989 (FTC 1969).
49. See Low, supra note 1, at 437-42.
50. 394 U.S. at 137. See Merger Guidelines, supra note 12, at 6684.
51. See text accompanying note 47 supra.

certain facile similarity to a requirement that a plea of justifiable or excusable homicide can only be valid where the victim was dead, or sure to die, before the homicide.

Since majority, minority, and hearing examiner in *United States Steel Corp.* all agreed that Certified Industries was a failing company, that case has not clarified the FTC's meaning of "failing". The major factor seemed to be that Certified did not have sufficient access to working capital to remain independent.[52] Moreover, a recent FTC advisory opinion reverted to the intellectually weak "existence of profit" test, rather than the far more logical "rate of profit" test.[53] Apparently any profit, therefore, no matter how insufficient to attract necessary funds, is considered by both the FTC and the Supreme Court[54] as a strong factor against a failing status.

In a recent case decided under the Bank Merger Act of 1966,[55] the Supreme Court rejected a lower court's finding that inadequate management qualified a firm as failing. At least the majority was not convinced that adequate management could not have been recruited.[56] Mr. Justice Harlan, dissenting in part, did find adequate evidence to sustain the lower court's holding.[57] Lack of adequate management, or of much prospect of adequate management, therefore, may or may not offer an acceptable argument for failing in non-bank cases. Since 1963 the Supreme Court has recognized that a greater public interest in safe banking might lead to a less stringent standard of "failing" for banks than for other firms.[58] And it is interesting to note that the Pabst Brewing Company made the very practical argument that new management may be hard to recruit in some companies, including itself, because "there is a slightly undesirable social stigma connected with the industry."[59]

The meaning of "failure", therefore, has not received much clarification recently. Nevertheless, the wide variety of definitions which have developed may prove more useful than confusing if a relative view of this

52. United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626, at 20,976, 20,977.

53. Advisory Opinion Digest No. 291, 3 Trade Reg. Rep. ¶ 18,528, at 20,880-81 (FTC 1968).

54. See United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). And the Justice Department even rejects loss "for a period of time" as proof of a "failing" status. See Merger Guidelines, supra note 12, at 6684.

55. 12 U.S.C. § 1828 (Supp. 1966).

56. United States v. Third Nat'l Bank, 390 U.S. 171, 190-91 (1968).

57. Id. at 194-95 (dissenting opinion).

58. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 n.46 (1963).

59. Reply Brief for Defendant, supra note 16, at 21. In the lastest round of this case, the district court held against both the failing company defense and the challenged merger with Blatz.

defense becomes dominant. Different definitions may then show, not confusion, but different degrees or likelihood of failure.

V. Conclusions

The failing company doctrine, despite its recent stricter interpretation, remains by far the most widely accepted and argued defense in merger cases. Indeed, in the future it may be even more dominant. If the preference for conglomerate purchasers for failing firms continues, the present large number of conglomerate mergers and interest in developing the law of conglomerate mergers may greatly increase the instances in which it is pleaded.[60] Further, if the view that it is a relative defense becomes dominant, a "partially failing" status may be argued as a "partial defense" (along with others), thus making it even more prevalent. But if this growing importance develops without further clarification of the doctrine, its increased application may save some mergers without making the standard of which mergers should be legal any more logical.

Whether or not Schiller was right in remarking that the gods themselves battle in vain against stupidity, it is very difficult for us mortals to do so. Too much attention has been given to the rule of reason as a legal "gimmick"; too little attention to it as the means of dividing economically desirable from undesirable business practices, in this instance, desirable from undesirable mergers. It is very hard to believe that questioning whether a firm advertised sufficiently for other purchasers, or requiring the counting of the number of stockholders, are rules having much to do with creating a logical dividing line. But the progress made toward a rational failing company doctrine in merger cases has been so great in a mere two years that there is reason to hope that what may be too hard for the gods or for us mortals may be within the ability of the courts and the FTC. A rational law of mergers may yet develop.

60. The Justice Department's Merger Guidelines set somewhat easier concentration standards for accepting a failing company plea in a conglomerate merger. See Merger Guidelines, supra note 12, at 6689.