2. Representing, directly or by implication, on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

4. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb."

5. Failing to set forth the term "natural" as part of the information required to be disclosed on an invoice under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

6. Failing to disclose that such fur product contains or is composed of "Second-hand" used fur.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KAPLAN-SIMON CO., TRADING AS TAFFETA CO. OF AMERICA ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE WOOL PRODUCTS LABELING AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1458. Complaint, Nov. 21, 1968—Decision, Nov. 21, 1968

Consent order requiring a Boston, Mass., jobber of interlining fabrics to cease misbranding its wool and textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile

Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kaplan-Simon Co., a corporation, trading as Taffeta Co. of America, and George Kaplan, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kaplan-Simon Co. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts. Respondent Kaplan-Simon Co. trades, among others, under the name of Taffeta Co. of America with its office and principal place of business located at 65–75 Kneeland Street, Boston, Massachusetts.

Respondent George Kaplan is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondent.

Respondents are engaged in the jobbing to the garment industry of trimmings, threads and related sundries and are also converters and jobbers of interfacings, linings and quilted interlining fabrics.

PAR. 2. Respondents now, and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilted interlining fabrics, stamped, tagged, labeled, or otherwise identified by respondents as "70% Acrylic Orlon" and "30% Other Fibers," whereas in truth and in fact, said products contained woolen fibers together with substantially different fibers and amounts of fiber than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely fabric, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above in Paragraphs Three and Four were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices, in commerce within the meaning of the Federal Trade Commission Act.

PAR. 6. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 7. Certain of the textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified to show each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were lining fabrics without labels.

PAR. 8. The acts and practices of respondents, as set forth in Paragraph Seven were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Kaplan-Simon Co. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 65–75 Kneeland Street, Boston, Massachusetts. Said firm trades as Taffeta Co. of America.

Respondent George Kaplan is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Kaplan-Simon Co., a corporation, trading as Taffeta Co. of America or under any other name, and its officers, and George Kaplan, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Kaplan-Simon Co., a corporation, trading as Taffeta Co. of America or under any other name, and its officers, and George Kaplan, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER

MARVIN FURS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C–1459. Complaint, Nov. 21, 1968—Decision, Nov. 21, 1968

Consent order requiring a New York City manufacturing furrier to cease misbranding, deceptively invoicing, and falsely guaranteeing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Marvin Furs, Inc., a corporation, and Constantinos Mavrovitis, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Marvin Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Constantinos Mavrovitis is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 333 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now and for some time last past have been, engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

PAR. 7. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guarantied would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Marvin Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 333 Seventh Avenue, New York, New York.

Respondent Constantinos Mavrovitis is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents Marvin Furs, Inc., a corporation, and its officers, and Constantinos Mavrovitis, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing, directly or by implication, on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on invoices that the fur contained in the fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents the Marvin Furs, Inc., a corporation, and Constantinos Mavrovitis, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WESTERN UNION ASSURANCE COMPANY ALSO KNOWN AS LINCOLN LIFE INSURANCE COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8756. Complaint, Feb. 19, 1968—Decision, Nov. 27, 1968

Order requiring two affiliated Phoenix, Ariz., insurance companies to cease misrepresenting the terms of policies offered armed service personnel, failing to disclaim approval by the Federal Government, and issuing policies prior to any indication of acceptance by the insured.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15 U.S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Western Union Assurance Company, a corporation, also known as Lincoln Life Insurance Company, Electro-Data Enterprises, Inc., a corporation and Jack P. Stewart, Gordon D. Rutledge and Mercier C. Willard, individually and as officers and directors of Western Union Assurance Company and/or Electro-Data Enterprises, Inc., and Elmo Matthews, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Western Union Assurance Company by amendment of its articles of incorporation on April 20, 1966, changed its corporate name to Lincoln Life Insurance Company. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 800 North Central Avenue, city of Phoenix, State of Arizona.

Respondent Electro-Data Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 1610 North 7th Street, city of Phoenix, State of Arizona.

Respondent Jack P. Stewart is an officer and director of Western Union Assurance Company and Electro-Data Enterprises, Inc., and also an agent for Lincoln Life Insurance Company. He assists in formulating, directing and controlling the acts and practices of corporate respondents named herein, including the acts and practices hereinafter set forth. His address is 86 East Country Club Drive, Phoenix, Arizona.

Respondent Gordon D. Rutledge is an officer and director of Western Union Assurance Company and was an officer and director of Electro-Data Enterprises, Inc. He assists in formulating, directing and controlling the acts and practices of corporate respondents named herein, including the acts and practices hereinafter set forth. His address is 698 South Catalina, Gilbert, Arizona.

Respondent Mercier C. Willard, Jr., is an officer and director of Electro-Data Enterprises, Inc. He assists in formulating, directing and controlling the acts and practices of said corporate respondent named herein, including the acts and practices hereinafter set forth. His address is 32 West 9th Place, Mesa, Arizona.

Respondent Elmo Matthews is an independent contractor for Western Union Assurance Company. He formulates, composes and disseminates materials in connection with the acts and practices of the said corporate respondent herein named as hereinafter set forth. His address is 3124 North 7th Avenue, Phoenix, Arizona.

PAR. 2. Respondents are now, and for some time last past have been, engaged as insurers and solicitors of insurance in the business of insurance in commerce as "commerce" is defined in the Federal Trade Commission Act. As part of said business in "commerce," said respondents Electro-Data Enterprises, Inc., and Elmo Matthews, individually, formulate and solicit insurance contracts for respondent Western Union Assurance Company, as insurer to insureds located in various States of the United States other than the State of Arizona in which States the business of insurance is not regulated by State law to the extent of regulating the practices of said respondents alleged in this complaint to be illegal.

PAR. 3. Respondents, in conducting the aforesaid business, have sent and transmitted, by means of the United States mails and by various other means letters, application forms, contracts, checks and other papers and documents of a commercial and solicitous nature from their place of business in the State of Arizona to prospective purchasers located in various other States of the United States and have thus maintained a substantial course of trade in said insurance contracts, policies and other papers and documents of a commercial and solicitous nature in commerce between and among the several States of the United States.

PAR. 4. Respondent Western Union Assurance Company, also known as Lincoln Life Insurance Company is licensed, as provided by State law, to conduct business only in the State of Arizona. Respondent Electro-Data Enterprises, Inc., is licensed, as provided by State law, to conduct business only in the State of Arizona. Said respondents are not now, and for some time last past, have not been licensed as provided by State law to conduct the business of insurance in any State other than the State designated in this paragraph.

PAR. 5. Respondents have solicited business by mail in various States of the United States in addition to the States named in Paragraph Four above. As a result thereof they solicited and entered into insurance contracts with insureds located in many States in which they are not licensed to do business. Said respondents' business practices are, therefore, not regulated by State law in any of those States in which said respondents are not licensed to do business as they are not subject to the jurisdiction of such States.

PAR. 6. In the course and conduct of said business, and for the purpose of inducing the purchase of said policies, said respondents have made, and are now continuing to make, numerous statements and representations concerning said policies by means of circular letters, policy forms, ownership certificates, and other advertising material disseminated throughout various States of the United States. Said materials are the same for both corporate respondents in that Electro-Data Enterprises, Inc., acting under an Agreement with Western Union Assurance Company, formulates and distributes these same materials for Western Union. The original mailing of said advertising materials consists of a transmittal window envelope with the name and address of the beneficiary as printed on the policy form plainly visible shown as follows:*

The envelope described and pictured above contains a "Dear Parent" form letter, what purports to be a valid complete insurance policy, an ownership certificate and a postage paid self-addressed envelope as shown below:**

The form letter is addressed to the parents or other relatives of newly inducted servicemen. The name of the serviceman appears as the "insured" on the face of the policy form, together with the name and address of the beneficiary, policy number, dispatch data, face amount of the policy, and signatures and titles of two company officers. The parents or other recipients fill out, sign and return the ownership certificate together with the initial premium payment.

The second mailing does not involve the use of a completed policy form but did include a transmittal and a return envelope, a "Dear Parent" form letter, ownership certificate with a statement or question pertaining to health, and a printed folder titled "Western Union Assurance Company's Servicemen Life Plan," shown as follows:**

The "Test" and the Elmo Matthews mailings contained the same basic materials as the first mailing but substituted in lieu of a completed policy form and ownership certificate, an Ownership Application card to be completed and returned requesting information including duty status and assignment of the insured serviceman. The two mailings differed in that the "Test" mailing included a printed folder describing Western Union's Serviceman Life Plan whereas the Matthews mailing did not, only the Matthews mailing contained a printed IBM machine mailing insert on which the name and the address of the beneficiary is typed and there is a slight variation in the form letter, all shown as follows:**

PAR. 7. By and through the use of these materials with aforementioned acts and practices, statements and representations

* Pictorial envelope omitted in printing.

** Pictorial mailing material omitted in printing.

and others of a similar import, respondents have represented, directly or by implication:

1. That the insurance offered for sale by respondents was initiated by the serviceman named as the "insured" therein or was issued with his knowledge and consent.

2. That the insurance offered for sale by respondents will be issued regardless of the occupation, military status or duty assignment of the insured in peace or war.

3. That in connection with the sale or solicitation of its insurance policies the respondents received the names and/or addresses of proposed insureds and beneficiaries from or with the approval of the Armed Forces, Department of Defense or other government agencies.

PAR. 8. In truth and in fact:

1. The insurance offered for sale was not initiated by the serviceman named as the "insured" therein and it was not issued with his knowledge or consent.

2. Applications for issuance of policies and applications for reinstatement of lapsed policies were declined by respondents because of insured's military occupation, status and duty assignment.

3. The Armed Forces, Department of Defense or any governmental agency neither gave nor approved nor has given approval for the dissemination of the names and addresses of servicemen, parents of servicemen, or members of servicemen's families to any private insurance company or sales organization other than those selected under P-L 89-214, of which, respondents are not participating members.

Therefore, the statements and representations as set forth in Paragraphs Six and Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same general kind and nature as that sold by the respondents.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the buying public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' policies by reason of said erroneous and mistaken belief.

PAR. 11. The aforementioned acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Thomas H. Link and *Mr. William J. Kelly* supporting the complaint.

No appearance for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER
MAY 9, 1968

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on February 19, 1968, issued its complaint charging the respondents with unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. The notice of the complaint set the hearing date for 10:00 a.m., April 8, 1968, at the Federal Trade Commission Offices, The 1101 Building, 11th Street and Pennsylvania Avenue, NW., Washington D.C.

Service of the complaint upon respondent Elmo Matthews, individually, was not obtained at least thirty (30) days in advance of the time of hearing set in the notice of the complaint as provided for in Section 3.11(4) of the Federal Trade Commission Rules of Practice, and the hearing examiner on April 2, 1968, entered an order which cancelled the said time and place of hearing and set a prehearing conference in lieu thereof for April 29, 1968.

A letter with attachments dated April 3, 1968, and addressed to the Office of the Secretary of the Federal Trade Commission by the individual respondent Elmo Matthews was received in said office on April 5, 1968, and stamped Treated as Answer. A further letter dated April 25, 1968, with relation to his letter of April 3, 1968, was received in said office from the individual respondent Elmo Matthews on April 29, 1968, and stamped Treated as a Motion. This latter letter asked that the complaint be dismissed against the individual respondent Elmo Matthews without prejudice. Complaint counsel on May 1, 1968, filed a reply to Mr. Matthews' letter of April 25, 1968. In the light of this reply the complaint is being dismissed as to said respondent, individually, without prejudice.[1]

All respondents were served with the order of the hearing examiner setting the prehearing conference for April 29, 1968, but none appeared at the said time and place. All respondents, other than Elmo Matthews, following service of the complaint have failed to file answer thereto as is required by Section 3.12(c) Default of the aforesaid Rules of Practice which provides that failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the hearing examiner, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

FINDINGS OF FACT

1. Respondent Western Union Assurance Company by amendment of its articles of incorporation on April 20, 1966, changed its corporate name to Lincoln Life Insurance Company. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 800 North Central Avenue, city of Phoenix, State of Arizona.

Respondent Electro-Data Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 1610 North 7th Street, city of Phoenix, State of Arizona.

Respondent Jack P. Stewart is an officer and director of Western Union Assurance Company and Electro-Data Enterprises, Inc., and also an agent for Lincoln Life Insurance Company. He assists in formulating, directing and controlling the acts and practices of corporate respondents named herein, including the acts and practices hereinafter set forth. His address is 86 East Country Club Drive, Phoenix, Arizona.

[1] "REPLY TO THE MOTION OF RESPONDENT ELMO G. MATTHEWS DATED APRIL 25, 1968.

"COME NOW Complaint Counsel and say that:

"It appearing that Elmo G. Matthews stands in relation to all other respondents in this matter as an independent contractor, and that all other said respondents are in default in the premises, and that great public expense would be incurred in further adjudication of the complaint against Elmo G. Matthews, and that Elmo G. Matthews is not now engaged in the business of selling insurance by mail; That Complaint Counsel do not oppose any action that will cause the dismissal, *without prejudice*, of said Elmo G. Matthews as a party to this proceeding."

(Signatures)

Respondent Gordon D. Rutledge is an officer and director of Western Union Assurance Company and was an officer and director of Electro-Data Enterprises, Inc. He assists in formulating, directing and controlling the acts and practices of corporate respondents named herein, including the acts and practices hereinafter set forth. His address is 698 South Catalina, Gilbert, Arizona.

Respondent Mercier C. Willard, Jr., is an officer and director of Electro-Data Enterprises, Inc. He assists in formulating, directing and controlling the acts and practices of said corporate respondent named herein, including the acts and practices hereinafter set forth. His address is 32 West 9th Place, Mesa, Arizona.

Respondent Elmo Matthews is an independent contractor for Western Union Assurance Company. He formulates, composes and disseminates materials in connection with the acts and practices of the said corporate respondent herein named as hereinafter set forth. His address is 3124 North 7th Avenue, Phoenix, Arizona.

2. Respondents are now, and for some time last past have been, engaged as insurers and solicitors of insurance in the business of insurance in commerce as "commerce" is defined in the Federal Trade Commission Act. As part of said business in "commerce," said respondents Electro-Data Enterprises, Inc., and Elmo Matthews, individually, formulate and solicit insurance contracts for respondent Western Union Assurance Company, as insurer to insureds located in various States of the United States other than the State of Arizona in which States the business of insurance is not regulated by State law to the extent of regulating the practices of said respondents alleged in this complaint to be illegal.

3. Respondents, in conducting the aforesaid business, have sent and transmitted, by means of the United States mails and by various other means letters, application forms, contracts, checks and other papers and documents of a commercial and solicitous nature from their place of business in the State of Arizona to prospective purchasers located in various other States of the United States and have thus maintained a substantial course of trade in said insurance contracts, policies and other papers and documents of a commercial and solicitous nature in commerce between and among the several States of the United States.

4. Respondent Western Union Assurance Company, also known as Lincoln Life Insurance Company is licensed, as provided by

State law, to conduct business only in the State of Arizona. Respondent Electro-Data Enterprises, Inc., is licensed, as provided by State law, to conduct business only in the State of Arizona. Said respondents are not now, and for some time last past, have not been licensed as provided by State law to conduct the business of insurance in any State other than the State designated in this paragraph.

5. Respondents have solicited business by mail in various States of the United States in addition to the States named in Paragraph 4 above. As a result thereof they solicited and entered into insurance contracts with insureds located in many States in which they are not licensed to do business. Said respondents' business practices are, therefore, not regulated by State law in any of those States in which said respondents are not licensed to do business as they are not subject to the jurisdiction of such States.

6. In the course and conduct of said business, and for the purpose of inducing the purchase of said policies, said respondents have made, and are now continuing to make, numerous statements and representations concerning said policies by means of circular letters, policy forms, ownership certificates, and other advertising material disseminated throughout various States of the United States. Said materials are the same for both corporate respondents in that Electro-Data Enterprises, Inc., acting under an Agreement with Western Union Assurance Company, formulates and distributes these same materials for Western Union. The original mailing of said advertising materials consists of a transmittal window envelope with the name and address of the beneficiary as printed on the policy form plainly visible shown as follows:*

The envelope described and pictured above contains a "Dear Parent" form letter, what purports to be a valid complete insurance policy, an ownership certificate and a postage paid self-addressed envelope as shown below:**

The form letter is addressed to the parents or other relatives of newly inducted servicemen. The name of the serviceman appears as the "insured" on the face of the policy form, together with the name and address of the beneficiary, policy number, dispatch data, face amount of the policy, and signatures and titles of two company officers. The parents or other recipients fill out, sign and return the ownership certificate, together with the initial premium payment.

* Pictorial envelope omitted in printing.

** Pictorial mailing materials omitted in printing.

The second mailing does not involve the use of a completed policy form but did include a transmittal and a return envelope, a "Dear Parent" form letter, ownership certificate with a statement or question pertaining to health, and a printed folder titled "Western Union Assurance Company's Servicemen Life Plan," shown as follows:**

The "Test" and the Elmo Matthews mailings contained the same basic materials as the first mailing but substituted in lieu of a completed policy form and ownership certificate, an Ownership Application card to be completed and returned requesting information including duty status and assignment of the insured serviceman. The two mailings differed in that the "Test" mailing included a printed folder describing Western Union's Serviceman Life Plan, whereas the Matthews mailing did not, only the Matthews mailing contained a printed IBM machine mailing insert on which the name and the address of the beneficiary is typed and there is a slight variation in the form letter, all shown as follows:**

7. By and through the use of these materials with aforementioned acts and practices, statements and representations and others of a similar import, respondents have represented, directly or by implication:

1. That the insurance offered for sale by respondents was initiated by the serviceman named as the "insured" therein or was issued with his knowledge and consent.

2. That the insurance offered for sale by respondents will be issued regardless of the occupation, military status or duty assignment of the insured in peace or war.

3. That in connection with the sale or solicitation of its insurance policies the respondents received the names and/or addresses of proposed insureds and beneficiaries from or with the approval of the Armed Forces, Department of Defense or other government agencies.

8. In truth and in fact:

1. The insurance offered for sale was not initiated by the serviceman named as the "insured" therein and it was not issued with his knowledge or consent.

2. Applications for issuance of policies and applications for reinstatement of lapsed policies were declined by respondents

** Pictorial mailing materials omitted in printing.

because of insured's military occupation, status and duty assignment.

3. The Armed Forces, Department of Defense or any governmental agency neither gave nor approved nor has given approval for the dissemination of the names and addresses of servicemen, parents of servicemen, or members of servicemen's families to any private insurance company or sales organization other than those selected under P.L. 89–214, of which respondents are not participating members.

Therefore, the statements and representations as set forth in Paragraphs 6 and 7 hereof were, and are, false, misleading and deceptive.

9. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same general kind and nature as that sold by the respondents.

10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the buying public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' policies by reason of said erroneous and mistaken belief.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over the respondents.

2. The complaint herein states a cause of action and the proceeding is in the public interest.

3. The aforesaid acts and practices of the respondents as found in the foregoing Findings of Fact were and are to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents Western Union Assurance Company, a corporation, also known as Lincoln Life Insurance Compan, and its officers, Electro-Data Enterprises, Inc., a corporation, and its officers, and Jack P. Stewart, Gordon D. Rutledge, Mercier C. Willard, Jr., individually and as officers and directors of

Western Union Assurance Company and/or Electro-Data Enterprises, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any insurance policy or policies, in commerce, as "commerce" is defined in the Federal Trade Commission Act, except in those states where respondents are licensed and regulated by State law to conduct the business of insurance, do forthwith cease and desist from:

1. Using the expressions "No Military Restrictions," "No War Clause" or any other words or terms of similar import or meaning, or representing in any other manner that the insurance offered for sale by respondents will be issued regardless of the occupation, military status or duty assignment of the insured in peace or war.

2. Using any letter or other solicitation material in contacting members of the Armed Forces of the United States or their parents or other relatives, which does not reveal in a prominent place, in clear language and in type at least as large as the largest type used on said material; (a) that said insurance is being offered without the knowledge or consent of the serviceman who appears as the insured therein; and (b) that no Department or Agency of the Federal Government either gave or approved the dissemination of the names and/or addresses of any insured or beneficiary of the insured to the respondents.

3. Using any policy form or similar document, prior to the receipt by respondents of the required premium, which contains the name of the insured, designation of the beneficiary, policy number, or signature of any representative of respondents; or which contains any indicia of a policy issued with prior approval of the insured.

4. Representing, directly or by implication, that the insurance offered for sale by respondents has been issued with the knowledge or consent of, the serviceman who appears as the insured therein; or that any Department or Agency of the Federal Government either gave or approved the dissemination of the names and addresses of any insured or beneficiary of the insured to the respondents.

5. Misrepresenting in any manner the conditions or circumstances under which such insurance was initiated or issued.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the respondent Elmo Matthews, individually, without prejudice.

FINAL ORDER

The Commission having stayed the effective date of the initial decision of the hearing examiner by its order of May 31, 1968, so that service of said initial decision could be perfected as to all respondents, and

The Commission now being satisfied that all respondents were properly served with said initial decision on or before July 18, 1968, and

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner, shall, on the 27th day of November, 1968, become the decision of the Commission.

It is further ordered, That Western Union Assurance Company, a corporation, also known as Lincoln Life Insurance Company, and Electro-Data Enterprises, Inc., a corporation and Jack P. Stewart, Gordon D. Rutledge, and Mercier C. Willard, Jr., individually and as officers and directors of Western Union Assurance Company, and/or Electro-Data Enterprises, Inc., shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

UNITED STATES STEEL CORPORATION*

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8655. Complaint, Jan. 22, 1965—Decision, Dec. 2, 1968

Order requiring the Nation's largest steel company to divest itself, within one year, of a Hicksville, N.Y., producer of ready-mixed concrete, ac-

* See joint Initial Decision *In the Matter of National Portland Cement Company*, Docket No. 8654, 71 F.T.C. 395.

quired in April 1964, and not to acquire such a firm for the next 10 years without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission has reason to believe that United States Steel Corporation through its subsidiary New Providence Corporation has acquired the stock and assets of Certified Industries Incorporated, a corporation, in violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18) as amended, and therefore, pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

I

Definitions

1. For the purpose of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry cement nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central mixed concrete, shrink-mixed concrete and trans-mixed concrete.

c. "The New York City metropolitan area" consists of the five boroughs of the City of New York and the New York counties of Nassau, Suffolk and Westchester.

II

United States Steel Corporation

2. United States Steel Corporation, respondent herein, is a corporation organized and existing under the laws of the State of New Jersey with its general office located at 71 Broadway, New York, New York.

3. United States Steel Corporation is and for many years has been the largest steel producer in the United States and a major integrated producer of raw materials for the production of steel and steel products. Through its Universal Atlas Cement division, the company is also one of the four largest portland cement producers in the United States. In 1963, United States Steel had sales of $3,637,173,138, assets of $5,033,528,582, and net income of $203,549,338.

4. Universal Atlas Cement division of United States Steel Corporation operates ten portland cement plants in the United States with a total annual capacity of approximately 30,900,000 barrels. Universal Atlas also has a portland cement manufacturing plant under construction on Grand Bahama Island which will be capable of serving major east coast metropolitan markets.

5. The New York City metropolitan area is one of the principal markets for portland cement manufactured at Universal Atlas' plants at Hudson, New York, and Northampton, Pennsylvania. In 1963, the total shipments of portland cement by these two plants amounted to 5,274,486 barrels. About 973,119 barrels or approximately 18 percent of the total portland cement shipped by these plants, was shipped to consumers located in the New York City metropolitan area.

6. At all times relevant herein, United States Steel Corporation was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

III

Certified Industries Inc.

7. Prior to May 1, 1964, Certified Industries Inc., was a corporation organized and existing under the laws of the State of Delaware with its principal office located at 201 Park Avenue, Hicksville, Long Island, New York.

8. At the time of the acquisition, Certified was, and for many years had been, engaged in the production and sale of ready-mixed concrete and mineral aggregates (sand and gravel) in the New York City metropolitan area. For the fiscal year ending June 30, 1963, Certified had sales of $14,325,991, assets of $11,147,419, and a net loss of $655,850.

9. Certified operated ten ready-mixed concrete plants in the New York City metropolitan area. Certified is one of the four largest producers of ready-mixed concrete, and one of the four largest consumers of portland cement in the New York City metropolitan area. During 1963, Certified consumed 1,054,072 barrels of portland cement and sold approximately 772,241 cubic yards of ready-mixed concrete.

10. At all times relevant herein Certified Industries Inc., was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

Acquisition

11. On or about May 1, 1964, United States Steel, through its subsidiary New Providence Corporation, acquired all the assets and outstanding capital stock of Certified Industries Inc., by assumption of liabilities of an undetermined amount and payment in cash of $1,026,000.

V

The Nature of Trade and Commerce

12. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is the essential ingredient in the manufacture of ready-mixed concrete. There is no practicable substitute for portland cement in the manufacture of concrete.

13. The portland cement industry in the United States is substantial. In 1963, there were about 51 cement companies in the United States operating approximately 182 plants. Total shipments of portland cement in that year amounted to 349,321,000 barrels having a value of $1,116,555,000.

14. On a national basis, approximately 57 percent of all portland cement is shipped to companies engaged in the production of ready-mixed concrete. In the heavily populated metropolitan areas, the percentage of portland cement consumed by ready-mixed concrete companies is generally higher. Ready-mixed concrete producers are the only businesses engaged in the sale of concrete as a commodity.

15. Due to such factors as transportation costs and the necessity of supplying competitive delivery service to consumers, the effective market area of portland cement production and distribution facilities is limited. Similar considerations limit the market area for ready-mix companies.

16. Cement producers sell their portland cement to consumers, such as ready-mixed concrete companies, manufacturers of concrete products, contractors and building materials dealers. In the past such consumers, in general, have not been integrated or affiliated with portland cement producers.

17. In recent years there has been a trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan areas in various portions of the United States have become integrated with portland cement companies. As ready-mix

companies have been acquired by producers of cement, competing cement producers have sought to acquire other cement consumers in order to protect their markets against the actual or expected foreclosure caused by these acquisitions, and to prevent additional foreclosure of their markets as a result of future such acquisitions by their competitors. Thus each acquisition by a cement producer of a substantial consumer of portland cement forms an integral part of a chain reaction of acquisitions—contributing both to the share of the market already foreclosed by acquisitions, and to the impetus for further such acquisitions.

18. Three of the five largest ready-mixed concrete producers in the New York City metropolitan area have, since 1960, become integrated, through acquisition, with portland cement companies.

VI

Violation of Section 7

19. The effect of the acquisition of Certified by United States Steel Corporation, both in itself and by aggravating the trend towards vertical integration between suppliers and consumers of portland cement, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the New York City metropolitan area, in adjoining markets, or in the United States as a whole, in the following ways, among others:

a. Competitors of respondent may have been or may be foreclosed from a substantial share of the market for portland cement.

b. The entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented.

c. The ability of non-integrated competitors of respondent effectively to compete in the sale of portland cement may be substantially impaired.

d. As an integrated manufacturer and seller of portland cement, ready-mixed concrete and other construction materials respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, or ready-mixed concrete.

e. The production of ready-mixed concrete, now a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few producers of portland cement.

Now, therefore, the acquisition of Certified by United States

Steel Corporation, as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

OPINION OF THE COMMISSION

DECEMBER 2, 1968

By DIXON, *Commissioner*:

This matter is before the Commission on the appeal of complaint counsel from an initial decision by Hearing Examiner John Lewis dismissing as unsustained a complaint charging respondent with violation of Section 7 of the Clayton Act, as amended.

The Commission issued its complaint against respondent on January 22, 1965. The gravamen of the action is respondent's acquisition, through a subsidiary, of Certified Industries, Inc., a New York corporation engaged in the production and sale of ready-mixed concrete.

The examiner, upon the culmination of extensive hearings, dismissed the complaint primarily on the basis that the acquired company's "failing condition" at the time of its acquisition immunized the transaction from Section 7 challenge. In the alternative, the examiner held that the merger in question did not have the tendency to substantially lessen competition or to create a monopoly in any line of commerce in any section of the country. We disagree, finding that the challenged acquisition was anticompetitive within the test of Section 7 and holding that the acquisition was not exempted because the acquired company was in a failing condition. Accordingly, we reverse the initial decision and order divestiture, finding such remedy appropriate after consideration of all the circumstances.

I

Respondent, United States Steel Corporation, is the country's largest manufacturer of steel and a major integrated producer of raw materials for the production of steel and steel products. In 1965, it achieved sales of $4,129,352,578. In the same year, respondent's net income amounted to $236,785,114; and it listed assets of $5,206,119,000. According to a national periodical which annually ranks American companies with respect to size, respondent, in 1966, was the nation's seventh largest industrial corporation.[1]

[1] *Fortune*, July 15, 1966, p. 232.

Respondent is also one of the four largest manufacturers of portland cement in the United States, producing and distributing this product through an unincorporated business entity, Universal Atlas Cement Division (UAC). Its eleven operating cement plants have an aggregate annual capacity of over 30 million barrels and enable respondent to serve cement purchasers located in thirty-seven states.

Respondent's acquisition of Certified Industries, Inc., was consummated on April 30, 1964, through means of a U.S. Steel subsidiary, New Providence Corporation. At the time of the merger, Certified ranked as one of the four largest producers of ready-mixed concrete within its marketing region, the New York Metropolitan Area. At the same time and within the same area, Certified was the second largest consumer of portland cement among ready-mixed concrete producers.

Certified purchased a portion of its cement requirements from UAC prior to its acquisition. The amount of such purchases increased very significantly in 1963 when U.S. Steel assisted Certified in obtaining a long-term loan, and the trend continued until 1964 when the company was acquired by U.S. Steel. Set forth below is a table reflecting the amount and proportion of Certified's cement purchases from UAC between 1961 and 1964:

	Certified's Cement Purchases from UAC (Bbl.)	*Proportion of total cement purchases (percent)*
1961	36,675	8.4
1962	123,731	14.9
1963	567,470	53.8
1964	701,151	88.4

II

The acquisition of Certified was, therefore, vertical in nature—the merger of a supplier with one of its customers. Such acquisitions contravene Section 7 of the Clayton Act when their effect may be substantially to lessen competition within a particular product market in a relevant area of the country. A judgment of this question "is concerned with probabilities not certainties [for] the force of § 7 is still in probabilities not in what later transpired * * * for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger." *Federal Trade Commission* v. *Consolidated Foods,* 380 U.S. 592, 598 (1965).

The material facts in this matter are mainly without dispute.

The product markets are conceded to be portland cement and ready-mixed concrete. The geographic market was found by the examiner to be the New York Metropolitan Area and this finding has been accepted by both sides on appeal.

The principal factual dispute concerns the viability, financially and otherwise, of Certified Industries, Inc. It is from this question that respondent and complaint counsel proceed to their arguments concerning the conclusions that must be drawn from the record. The issues evolving from these arguments may be phrased as follows:

(1) Whether the challenged merger did not and cannot have any anticompetitive effect as the acquired company was in a "failing condition" at the time of acquisition; and

(2) Whether, in any event, the fact that the acquired firm was a "failing company" within the confines of the "defense" outlined in *International Shoe* v. *Federal Trade Commission* [2] immunized respondent's acquisition from condemnation under Section 7 (or, in other words, the failing company defense is absolute not relative in nature).

III

The basic issues of this matter, therefore, involve the "failing company" defense and its effect upon a Section 7 proceeding. However, before we reach these issues, we must first decide whether the record supports the hearing examiner's factual conclusion that Certified Industries was in fact a "failing company."

The following facts concerning Certified's financial condition, as found by the hearing examiner, are fully supported by the record:

For some years prior to its acquisition by U.S. Steel, Certified was a thinly capitalized company, with a relatively heavy debt structure in relation to net worth. This thin financial structure was aggravated by the firm's acquisition in 1961 of other ready-mixed concrete companies. During 1961 and 1962 Certified attempted to raise additional capital to improve its financial situation, but these efforts were generally unsuccessful. Its net working capital declined from approximately $388,000 in 1961 to $220,500 in 1962.

In the fall of 1961 Certified, in order to receive the cash discount on its cement purchases, negotiated extended credit arrangements, totalling $350,000, with four of its cement suppliers. In

[2] 280 U.S. 291 (1930).

addition, it issued a 12-month note for $150,000 to respondent's United Atlas Cement Division to secure its obligation for cement purchases. By October 31, 1962, Certified owed $1.5 million to its suppliers. In early December it notified respondent that it would have difficulty in paying the $150,000 note and respondent agreed to extend the term of the note from February 15 to April 30, 1963. Respondent also recommended at that time that Certified give consideration to trying to arrange some long-term financing. Since Certified had previously been unsuccessful in obtaining additional capital, respondent arranged a meeting between Certified and Bankers Trust Company of New York, where respondent was a depositor.

Negotiations between Certified and Bankers Trust Company were carried on between January and March 1963, and were concluded with an agreement dated March 15, 1963, under which the bank loaned Certified $3.3 million for a period of ten years, at a rate of interest of 7/8% above the bank's prime commercial loan rate, with the first installment of interest to become due July 1, 1964. Under the terms of the loan agreement, Certified agreed that it would not permit its net current assets to be less than $600,000 for a period of three years from June 30, 1963, and not less than certain stated sums in excess of that figure for the period therafter. The agreement also set a limit of $1.6 million on the amount of Certified's accounts receivable loans.

Despite this new capital, Certified's financial condition continued to deteriorate. In the spring of 1963, its accounts receivable loans increased beyond the $1.6 million limitation set forth in the loan agreement and its net current assets were $120,000 short of the loan requirement of $600,000. By June 30 of that year, Certified had suffered a loss of $655,850 and had a working capital deficit of approximately $200,000 below that required under the agreement.

Certified continued to suffer from a capital and cash deficiency. It was unable to make payment on notes due in October and December 1963, or to pay to its suppliers amounts due totalling approximately $675,000. It was also in arrears on taxes amounting to $40,000. According to Certified's financial statement of December 31, 1963, the firm lost $928,444 during the last six months of that year, or approximately $155,000 a month. It had a deficit of over $70,000 in net working capital or net current assets, compared to net current assets of approximately $375,000 at the end of September. Its financial statement for the seven months ending January 31, 1964, revealed that its rate of loss had accelerated in the latter months of 1963. By the end of January 1964, it had a deficit in net working capital of $279,000. For the four months ending April 30, 1964 (when it was acquired by respondent), Certified sustained a loss of $871,518, or a loss rate of $218,000 a month.

Complaint counsel do not seriously dispute the finding that when Certified was actually acquired by respondent there was a reasonable probability of its failing within the near future. The following conclusion by the examiner concerning the financial condition of the company at the time of its acquisition has not been challenged:

[Certified] had been losing money, in substantial amounts and at an increasing rate, for a period of about a year and a half, and there was no visible improvement in the trend of its earnings. * By January 1964 it had no working capital, since its current liabilities exceeded its current assets by almost $300,000, and it had a deficit in retained earnings of over $1 million. It was unable to meet overdue obligations in excess of $600,000, with some of its creditors threatening to discontinue further credit and to institute legal action. According to the uncontradicted and credited testimony of the only expert witness to testify on the subject (Harry F. Tappen, in charge of the loan administration division of the Bankers Trust Company), by the end of 1963 and early 1964 Certified was in a "failing" condition.

* Set forth below is a table reflecting Certified's losses and the monthly rate of loss during the period in question.

Certified's Losses and Rate of loss

	12 mos. end 6/30/63	*6 mos. end 12/31/63*	*7 mos. end 1/31/64*	*4 mos. end 4/30/64*
Total Amount	$655,850	$928,400	$1,141,000	$871,500
Monthly Rate	54,650	154,730	163,000	271,900

Complaint counsel claim, however, that the proper time to judge the financial prospects of Certified is not the date of the acquisition, but approximately 14 months prior thereto, January 1963, when Certified, with the assistance of respondent, obtained the long-term loan commitment from Bankers Trust Company of New York. They contend that at that time Certified was not in fact in such a debilitated financial condition as to warrant invoking the "failing company" doctrine. According to complaint counsel, this loan was instrumental in inducing Certified to reject a purchase offer made in December 1962 by Bangor & Aroostock, a diversified firm, and later, in 1963, caused Certified to reject an offer from American Cement Corporation who was unable to obtain financing for Certified on such favorable terms. Consequently, complaint counsel argue, respondent's financial involvement with Certified as of January 1963, preventing the latter from being acquired by other potential purchasers and thus effectively "tied" Certified to respondent.

Since there was no evidence that in obtaining the Bankers Trust loan Certified was not making a good faith effort to rehabilitate itself, complaint counsel are in effect contending that it would be preferable for a company in need of financial assistance, but not in a failing condition, to be acquired as part of a vertically integrated operation than to secure financing which may enable it to retain its independence.[3] In ruling on this argument, the examiner concluded as follows:

> In the opinion of the examiner, the fact that U.S. Steel had assisted Certified financially in January 1963, does not establish the availability of other purchasers, nor does it establish that U.S. Steel knowingly contributed to the lack of availability of other purchasers, as complaint counsel suggest at another point (CB, at p. 31). The fact that Certified chose to accept U.S. Steel's financial assistance in January 1963, rather than the Bangor & Aroostock offer, is no reason to fault either Certified or U.S. Steel. As far as Certified is concerned, it made a business judgment that it preferred to continue its independent existence, rather than become part of a vertically integrated operation with National Portland Cement Company, controlled by Bangor & Aroostock. Had its optimistic hopes been realized, its independent existence would have been preserved. This was certainly preferable, from the point of view of maintaining competition in the market, to its becoming the outright property of another company controlling a cement company. There is not the slightest evidence that U.S. Steel was aware of the Bangor & Aroostock offer, or that it arranged for the Bankers Trust loan in order to head off Certified's acceptance of that offer.

We agree with this conclusion. Complaint counsel's argument on this point is therefore rejected.

IV

While we believe the examiner was correct in finding that Certified was failing, we do not agree with his holding that, because the company was in a failing condition, its acquisition by U.S. Steel could not violate Section 7 of the Clayton Act.

Respondent argued successfully before the examiner that whatever the consequences upon competition of U.S. Steel's acquisition of Certified, the merger is immune from antitrust challenge under the "failing company" doctrine enunciated by the Supreme Court in *International Shoe, supra.* In other words, the failing nature of Certified at the time of respondent's acquisition con-

[3] Bangor & Aroostock had planned to acquire both National Portland Cement Company, a cement manufacturer, and Certified and to operate the two companies on an integrated basis. American Cement Corporation was, of course, a producer of cement.

fers an absolute defense to any challenge by the government under the Clayton Act.

On the other hand, complaint counsel have contended that the court's *dictum* in *International Shoe,* even when viewed in the light of subsequent comment by the court, decisions of lower courts, and the statements of those instrumental in the enactment of the Celler-Kefauver Act, does not confer upon those who would acquire a failing company an absolute defense to remedial enforcement in the public interest under Section 7. Instead, complaint counsel have maintained, the "failing company" defense is relative in nature, requiring a balancing by the deciding tribunal of the adverse interests involved. In essence, they argue that in those cases in which the failing nature of the acquired company served as a defense, either no defense was needed, in that there was no adverse competitive effect flowing from the merger, or that the ultimate question of adverse competitive impact was a close one in which the prospect of economic harm to individuals and to the public that might result from a bankruptcy was decisive.

As set forth in the initial decision, the failing company doctrine was enunciated the first time in a Clayton Act proceeding in *International Shoe, supra.* After holding in that case that there was in fact no substantial competition between the acquired and acquiring corporations and, therefore, no basis for the finding of a substantial lessening of competition, the court addressed itself to the issue of whether "at the time of the acquisition and financial condition of the McElwain Company [the acquired company] was such as to necessitate liquidation or sale, and, therefore, the prospect for future competition or restraint was entirely eliminated." Finding that the corporation was "in failing circumstances" the court arrived at the following conclusion, which has come to be known as the "failing company" 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 possibility of a business failure with a 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. (280 U.S. at 302–303.)

There has been considerable disagreement and uncertainty as to the meaning and scope of the doctrine thus announced by the court. While acknowledging that the decision is not free from ambiguity, the hearing examiner deemed the basic holding of the court to be that the acquisition of a company in a failing condition "does not substantially lessen competition or restrain commerce within the intent of the Clayton Act." Stated somewhat differently, it is the hearing examiner's position that the showing that an acquired company is "failing" provides an absolute defense to a Section 7 proceeding.

The net effect of the examiner's ruling, however, is to read out of the *International Shoe* decision the court's lengthy discussion of the circumstances surrounding the challenged acquisition and the various factors specifically mentioned by the court in formulating the "failing company" doctrine. The factors regarded by the examiner as surplusage are the injury to stockholders and to the communities which may be affected by the demise of the acquired company, the fact that there were no other purchasers, and the purpose of the acquisition. The examiner reasoned, in this connection, that these factors related only to the question of public interest in allowing the acquisition to stand but that the "absence or presence of prejudice to the public interest" are "Sherman Act criteria which, although recognized at the time of *International Shoe* to be applicable to a Clayton Act case, have been eliminated by the 1950 amendment to Section 7." Consequently, according to the examiner, we can now disregard "the public interest test" considered by the Court. The examiner specifically held in this connection:

> The additional factors referred to by the Court, *viz*, that there was "no other prospective purchaser," and that the acquisition was made "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 [*i.e.*, to 'stockholders' and to the 'communities'] otherwise probable," relate not to the question of competitive impact, but to the question of the public interest in allowing the acquisition to stand, the Court concluding from the latter factors that the acquisition "is not in contemplation of law prejudicial to the public." The Court apparently assumed that the acquisition of a failing company could not, as a matter of law, injure competition. However, it also had to consider the "absence or presence of prejudice to the public interest" which, while Sherman Act criteria, were recognized to be applicable to a Clayton Act case. * * * One of the purposes of the amendment to Section 7 was to eliminate the so-called "rule of reason" or "public interest" test, which had crept into the interpretation of that section. *Brown Shoe Co.* v. *United States*, *supra*, at 317, n. 30. (Initial Decision, pp. 70, 71) [71 F.T.C. 395, 465].

We are in complete disagreement with this reasoning. In the first place, we do not read the opinion in *International Shoe* as drawing a distinction between the "question of competitive impact" and the "question of the public interest in allowing the acquisition to stand." While the court differentiated between acquisitions which may result in a lessening of competition and those which may result in a lessening of competition "to a substantial degree," it did not hold that the public interest in prohibiting an acquisition turned on factors having nothing to do with the impact of that acquisition on competition.[4]

Moreover, there can be no doubt that all factors considered by the court, including the determination of whether there was another prospective purchaser and whether the purpose of the acquisition was to lessen competition, are as meaningful today as they were prior to the 1950 amendment. In any case involving the acquisition of a failing company, evidence bearing on the availability of a purchaser other than the acquiring corporation, as well as evidence relating to the acquiring firm's purpose in making the acquisition, is clearly relevant.

In *United States* v. *Diebold,* 369 U.S. 654, the court held that it was improper to grant summary judgment to a defendant asserting the "failing company" defense when there was a "genuine issue as to the ultimate facts material" to the ruling in *International Shoe Co.* v. *Federal Trade Commission.* And as the hearing examiner himself points out, the factual issue in that post-1950 amendment decision was whether the defendant was the only prospective purchaser.

The Supreme Court has also commented at length on the significance of the acquiring corporation's purpose in making an acquisition under amended Section 7. Contrary to the examiner's statement that the purpose of an acquisition does not relate to

---

[4] The court specifically held: "Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In *Standard Oil Co.* v. *Federal Trade Commission,* 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade. . . .

"Mere acquisition by one corporation of the stock of a competitor, even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashions Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, 357; that is to say, to such a degree as will injuriously affect the public. Obviously, such acquisition will not produce the forbidden result if there be no pre-existing sustantial competition to be affected; for the public interest is not concerned in the lessening of competition, which to begin with, is itself without real substance." 280 U.S. at 297, 298.

the question of competitive impact and is therefore irrelevant, the court observed in *Brown Shoe* [5] that in vertical arrangements in which market share foreclosure is neither of monopoly nor *de minimis* proportions, a "most important factor" to examine in order to determine whether the arrangement is of the type Congress sought to proscribe "is the very nature and purpose of the arrangement." It stated, in this connection, that "Congress not only indicated that 'the tests of illegality [under § 7] are intended to be similar to those that the courts have applied in interpreting the same language as used in other sections of the Clayton Act,' but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act, 15 U.S.C. § 14, which had been interpreted by this Court to require an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement." [6] And the court further observed "Although it is 'unnecessary for the Government to speculate as to what is in the "back of the minds" of those who promote a merger,' * * * evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." [7]

The examiner has also relied on certain statements in the House and Senate Reports on the 1950 amendment to Section 7, and particularly on the following statement from the Senate Report, as support for his argument that Congress intended to exempt from this provision of the statute the acquisition of a "failing company" regardless of the effect of that acquisition on competition:

Companies in a failing or bankrupt condition

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 committee 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 committee, 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, 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 prob-

[5] 370 U.S. 294 (1962).
[6] *Id.* at 329.
[7] *Id.*, n. 48.

ability that bankruptcy will ensue. On this specific point the Supreme Court, in the case of *International Shoe Co.* v. *Federal Trade Commission* (280 U.S. 281) said: [quoting the pertinent portion of the *International Shoe* opinion].

* * * * * * *

It is expected that, in the administration of the act, full consideration will be given to all matters bearing on the maintenance of competition, including the circumstances giving rise to the acquisition.[8]

Referring to this portion of the Senate Report, the initial decision states:

It is clear that what the Senate Committee was saying was that in determining whether competition would be affected, it assumed that those administering the Act would consider "the circumstances giving rise to the acquisition" which, under the *International Shoe* decision cited by the Report, meant that it assumed consideration would be given to whether the acquired company was in failing condition. If it was, then, in the language of the Report, "the Clayton Act does not apply." (Initial Decision, pp. 72, 73.) [71 F.T.C. 395, 467].

We do not agree that the above quoted language from the Senate Report or any other statement contained in the legislative history of the amendment clearly indicates that Congress intended to exclude from the statute's coverage the acquisition of a company in failing condition.[9] While there are statements in the Senate and House Reports, as well as comments made during debate, which indicate the prevailing view to be that the acquisition of a failing company probably would not result in substantial injury to competition and thus would not be prohibited by the amendment, none of these statements indicate that such an acquisition should be exempted regardless of the effect it may have on competition. To the contrary, statements by proponents of the amendment indicate quite clearly that the statute would be applicable to such mergers.[10] Moreover, no attempt

[8] Sen. Rep. No. 1775, 81st Cong., 2d Sess. (1950).

[9] The statement in the Report that it is expected that "full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition" may certainly be interpreted to mean that the fact that the company is failing is a factor to be considered in determining whether the effect of the acquisition will be anticompetitive. The examiner, however, has ruled that inquiry should first be made as to whether the acquired corporation is in failing condition, and, if it is, no further consideration should be given to other matters bearing on the maintenance of competition.

[10] See, for example, the following responses by Representative Patman to inquiries concerning the legality of the sale of a small failing business to a large national concern:

"Senator Donnell. If you will take some case in which you and the chairman of this committee and I were to invest all of our money, you gentlemen put up $199,500 and me $500, which would be about the right proportions, suppose we had done that and after we had been in business for 2 or 3 years we were firmly convinced that the business was doomed, although at that time it had not actually gone down, and we wanted to sell our assets out to some very large corporation, and it was the only one that was interested in buying it. Do you think that was made to add a proviso to the bill specifically exempting the acquisition of a failing company, nor did Congress attempt to articulate in failing company doctrine differing in any material respect from the *International Shoe* doctrine. Consequently, we are of the opinion that although Congress obviously intended to preserve the failing company doctrine of *International Shoe*,[11] it did not intend to go beyond that doctrine.

The precise issue before us, therefore, is what is the "failing company" doctrine of *International Shoe*. The cases decided subsequent to that decision have not amplified this defense to any significant degree. "It is abundantly clear that none of the cases have adequately undertaken a thorough examination of the conceptual elements contained in the 'failing company' defense, or of the appropriate criteria to be used in testing a particular factual situation. Since the facts in these decisions were either extremely favorable or unfavorable to the interposition of the defense, there was no need to explore critically the gray area in determining the scope of its application." [12] Another commentator has stated more bluntly: "The conclusion seems inescapable that the failing company doctrine has no logical basis as it is usually stated" and that " . . . 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." [13]

The question that has not yet been resolved is why should an acquisition which would otherwise be unlawful under Section 7 be permitted solely because the acquired company was in a failing condition. In certain of the cases in which the defense has been allowed the determination that the acquisition did not violate

---

it would be just to us to say that we just have to sit there and let our business be ruined by gradual diminution in our assets over the next few years?

"Representative Patman. I am not conceding it would happen just the way you say, but I repeat, if it is against the public interest for us to sell out that way, I would say that we should not be allowed to sell against the public. That public interest should come first, and I think we would go into business with that knowledge all of the time. That is, the public interest be served first.

"Senator Donnell. So that you would feel that there would be no injustice done to us.

"Representative Patman. Possibly financial injustice, but in the long run the public interest will be served that way." (Hearings on H.R. 2734 before a Subcomm. of the Senate Comm. on the Judiciary, 81st Cong., 1st and 2nd Sess. 135 (1950).)

[11] As stated by the court in *Brown Shoe*, "The importance which Congress attached to economic purpose is further demonstrated by the Senate and House Reports on H.R. 2734, which evince an intention to preserve the 'failing company' doctrine of *International Shoe* * * *" 370 U.S. at 331.

[12] Comment, 61 Mich. L. Rev. 566, 576 (1963).

[13] Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act*, 35 Fordham L. Rev. 425, 430 (1967).

Section 7 was based on the assumption that the acquisition of a company in failing condition could not cause competitive injury. In *United States* v. *Maryland & Va. Milk Producers Assn.*, 167 F. Supp. 799 (D.D.C. 1958), the court ruled that Section 7 had not been violated "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." In *United States* v. *Diebold, Inc., supra*, the district court having found that the acquired corporation was failing, held that the merger "did not threaten or actually cause a lessening of competition within the meaning of Section 7. . . ." As indicated below, however, we do not agree that the assumption of no competitive injury is a valid one. Injury to competition may in fact occur even though the acquired company is in a failing condition.

We are of the opinion, however, that the failing company doctrine does provide a true exception to Section 7, an exception which may immunize an acquisition having the prescribed effect on competition. But we agree with counsel supporting the complaint that this defense is not created automatically by the mere showing that the acquired company was in a failing condition.

It seems reasonably clear from the opinion in *International Shoe* that in enunciating the so-called "failing company" doctrine the court was concerned principally with the protection of "stockholders" of the failing corporation and the "communities" in which its plants were located. Since the acquisition in that matter had this salutary effect and since it was not made for the purpose of injuring competition, the court apparently was willing to condone it even though it may have had an adverse competitive effect. While the court reached this conclusion in the factual situation with which it was confronted, it did not suggest that in all future cases involving the acquisition of a failing corporation protection of the interests of private individuals should necessarily be paramount to the preservation of competition. We believe the court did no more than balance the probable injury to competition against injury to stockholders and other third persons and, in the circumstances of that case, decided that the prevention of the latter was of greater importance.[14] We agree with counsel supporting the complaint, therefore, that to be consistent with *International Shoe* and with the legislative intent expressed in the

[14] See *Erie Sand & Gravel Co.* v. *F.T.C.*, 291 F. 2d 279, 280-281 (3rd Cir. 1961), where the court pointed out that "The *International Shoe* opinion itself describes the situation before the Court" and that "It was in such circumstances that a merger was viewed as likely to be less harmful in its possible adverse effect on competition than obviously advantageous in saving creditors, owners and employees of the failing business from serious impending loss."

amendment of Section 7, in 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.

V

The examiner viewed the question of Certified's failing condition as the threshold issue in this case. After reviewing the Supreme Court's holding in *International Shoe*, he observed: "Although the decision is not free from ambiguity, the examiner considers the basic holding of the Court to be that the acquisition of a company in failing condition 'does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.'" Thus, he apparently accepted the proposition, now urged upon us by respondent, that the challenged merger must be conclusively presumed as neutral with regard to competitive effect because of Certified's condition at the time of acquisition. We reject this proposition. 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.

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.[15] 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." [16]

Clearly there may be situations in which the horizontal acquisi-

[15] See *United States* v. *Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799 (D.D.C. 1958), *aff'd*, 362 U.S. 458 (1960); United-Capital Merger, C.A.B., Dkt. No. 11699 (1961). Aviation Law Rep. 1960-64 Cas. ¶21, 132; Von Kalinowski, *Section 7 and Competitive Effects*, 48 Va. L. Rev. 827, 841 (1962).

[16] Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of The Clayton Act*, 35 Ford. L. Rev. 425, 528 (1967).

tion of a debilitated firm could not have the requisite anticompetitive consequences. On the other hand, it is also clear to us, that the horizontal acquisition of a "failing company" can be, at times, capable of substantial anticompetitive impact. Consider a situation where a firm, possessed of valuable "know-how" patents, is failing because of a severe dificiency in capital. Because of contractual commitments or because of its debt structure, its sale as an operating concern is realistically feasible only through contract with an industry giant. Or consider a situation where a dominant firm purchased the assets of a dying firm thereby increasing capacity to satisfy orders which it would have been otherwise unable to accept; the acquisition thus foreclosing competing firms from handling the surplus of business that would have resulted absent the acquisition.[17] Still again, the acquisition of a failing company by a substantial market factor could remove productive facilities from a market and therefore forestall new entry through the fear of swelling total productive capability at a time when the statistics of supply and demand argued against such an increase.[18]

With respect to vertical acquisitions, the situations in which the acquisition of a failing company by an industry giant may have an adverse competitive impact are readily visualized after a review of the possible anticompetitive consequences of a vertical coalition.

The possible anticompetitive effects of a vertical acquisition are varied. "The primary vice of a vertical * * * is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog upon competition' * * * which 'deprive[s] * * * rivals of a fair opportunity to compete.' "[19] A substantial share of custom in a market may be obtained by a supplier through contractual exclusivity, not through competition based on offerings of price, quality or service. Competitors of the acquiring supplier may be competitively disadvantaged through permanent foreclosure of custom once open to competitive bidding. Competitors of the acquired firm may be competitively weakened by the reality of competition with an integrated firm whose market position is already secured by contract and whose size and previous market activity in other fields portends a form of competition which would not necessarily flow from market entry achieved through internal expansion.

[17] Comment, 61 Mich. L. Rev. 566, 577 (1963).
[18] *Id.* at 578.
[19] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323-24 (1962).

In still other ways, a vertical merger may contribute to the erosion of competition. The control of a substantial share of a market, through market entry achieved by acquisition, may retard or prevent any future increase in the number of sellers within the market, depending upon the strength of the acquiring firm and the condition of competition at the time of acquisition. Again, a vertical merger consummated during a trend toward concentration in the relevant market may have the effect of aggravating market diminution and/or contributing to realignment of product competition from a situation where many small firms compete in many geographic markets to one in which the same large firms confront one another in each of these markets throughout the country.

In sum, under Section 7 we are concerned with vertical acquisitions that result in substantial foreclosure of trade in one or more markets; which abruptly inject powerful corporations into markets populated by small, localized sellers; which disadvantage smaller sellers within a market and substantially impair their ability to compete; which raise barriers to entry to one or more markets or which contribute to a trend toward vertical concentration of markets. Given a situation wherein a company is a substantial customer for the product of a heavily concentrated market, and enjoys a substantial portion of a concentrated market of small, localized sellers which is in the throes of a movement toward vertical integration, its acquisition by a leading supplier who possesses oligopoly power in a number of diverse fields, will predictably have adverse competitive impact upon at least one relevant market no matter what the financial condition of the company at the time of its acquisition. The fact is that once the merger has been consummated one or two markets will no longer be the same. Market forces will be disrupted. Market share will be foreclosed not through competition but through contract. Barriers to market entry will be considerably heightened. The trend toward vertical concentration through contract will be accelerated.

In their briefs and arguments, complaint counsel all but conceded the failing nature of Certified at the time of its acquisition. They have primarily focused on the failing company defense, asserting that the defense is a relative and not an absolute one. Drawing our attention to the legislative history of amended Section 7 bearing upon the *International Shoe* decision, they argue that the Commission, in its administration of the Clayton Act and evaluation of a "failing company" defense, must give full consideration to all matters bearing upon the maintenance of competition. To this end, they urge that we first analyze the acquisition's impact upon competition within the relevant markets of cement and ready-mixed concrete in the NYMA before approaching the application of the defense urged by respondent, United States Steel.

The examiner, after holding that the failing company defense was absolute in nature, ruled upon complaint counsel's request for findings concerning the possible effects of the merger in the event "that the Commission may disagree with the examiner's conclusions as to the scope of the protection afforded by the failing company defense * * *." [20] Thus, the examiner put the cart before the horse. Unlike the court in *International Shoe,* he relegated the basic standard of the statute to an afterthought.

The examiner held that the merger did not possess the requisite tendency to lessen competition substantially within either relevant product market. In our opinion, however, his evaluation of this, the primary issue in a Section 7 proceeding, was distorted by his premature decision concerning the scope of the failing company defense. Accordingly, we reject *in toto* his conclusions concerning the impact of the acquisition on competition and consider the question *de novo.*

Essentially, the complaint charges that respondent's acquisition of Certified Industries may or has resulted in the anticompetitive propensities of vertical acquisitions outlined above. Specifically, it is charged that as a result of the merger:

(1) Respondent's competitors may have been foreclosed from a substantial share of the market for portland cement;

(2) Market entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented;

(3) The ability of non-integrated cement producers may be substantially impaired;

(4) Respondent may have achieved a decisive competitive advantage over its competitors;

(5) The trend toward vertical concentration in the production and sale of cement and concrete has been aggravated; and

(6) A decentralized, locally controlled small business industry —ready-mixed concrete—may become concentrated in the hands of a relatively few producers of cement.

Foreclosure in the Sale of Cement

The national market for portland cement is highly concentrated.

[20] Initial Decision, p. 85 [71 F.T.C. 395, 478].

It encompasses fifty-one sellers, with the four and twenty largest accounting for 32 and 78 percent of total shipments respectively in 1958.

One of the most important, if not *the* most important geographical submarket for portland cement, is the New York Metropolitan Area (NYMA). In 1964, this market could be described as being oligopolistic in nature. Then, the four largest sellers controlled 53.4% of sales while the eight largest accounted for 70.8%.

Two years prior to the 1964 acquisition of Certified, respondent United States Steel was one of the four largest sellers of cement in the nation. At this point in time, however, it was only the sixth largest supplier of cement within the NYMA. Immediately subsequent to its assistance in obtaining financing for Certified, respondent's sales of cement within the NYMA increased rapidly. The increase was almost wholly accounted for by patronage from Certified. Principally as a result of its acquisition of Certified, United States Steel became the second largest supplier of cement to the NYMA market.

At the time of the challenged acquisition, there were over fifty ready-mixed concrete companies serving the NYMA. Four of these companies, however, accounted for 73% of the ready-mix market's purchases of cement. Certified was one of the four. In 1963, it was the second largest purchaser of portland cement operating within the relevant geographical market. Its sales of ready-mixed concrete had more than tripled in the period from 1960 to 1963. Its consumption of cement immediately prior to the acquisition placed it among the ten largest consumers of cement in the entire Northeastern area of the country. Moreover, the record shows that there were only 5 to 10 consumers of cement within this broad area that consummated annual purchases, as did Certified, of over 750,000 barrels.

In *Brown Shoe, supra*, the Supreme Court held that a vertical acquisition foreclosing less than one-half of one percent of the relevant market violated Section 7 of the Clayton Act. Of course, the court did not consider increased market share as alone decisive, but, as in all Section 7 proceedings, viewed it in the light of other applicable factors such as (1) the significance of the resultant foreclosure, *i.e.*, whether the foreclosure was one of the largest that could be achieved through merger; and (2) the presence or absence of market movement toward concentration.

We find that the market foreclosure resulting from U.S. Steel's acquisition of Certified was extremely significant. Within the

NYMA, only one company, Colonial Sand and Gravel, purchased more cement than Certified. The former is a vertically integrated operation, having integrated backward into cement production through internal expansion. Accordingly, the foreclosure resulting from Certified's acquisition by United States Steel was the largest market foreclosure within the relevant market as could be achieved by any single acquisition. Moreover, the acquisition occurred in the context of a strong trend toward concentration through merger in the sale of cement and ready-mixed concrete. We address ourselves to this point below.

The examiner recognized that as a result of the merger "access to Certified's volume of cement purchases will be substantially closed to other cement companies. . . ." However, he concluded his consideration of this market change by observing that "given Certified's financial condition, such volume would have been foreclosed in any event upon Certified's demise." The latter statement is correct as far as it goes. It does not go far enough, however, for the purposes of the Celler-Kefauver Act. The statute draws a line between market foreclosure achieved through competition and that accomplished by acquisition.

It is clear that the examiner believed that Certified's customers would all turn to Colonial Sand and Gravel, the largest supplier of cement and ready-mixed concrete within the NYMA. The record will not support this supposition. Undoubtedly Colonial would have bid for the business, but as the testimony shows it would have experienced the competition of other ready-mix concerns. Moreover, Colonial, because of plant location and sales policy, was not a strong competitor within Nassau and Suffolk counties, the principal sales areas of Certified at the time of the merger.

Impact Upon Competition in the Sale of Ready-Mixed Concrete

In 1962, Certified was the fourth largest consumer of cement and seller of ready-mixed concrete within the NYMA. By 1963, largely as a result of acquisitions and aggressive pricing, it ranked second in both categories. Although its consumption of cement dropped in 1964, Certified, at the time of the merger, was still second in cement purchases and concrete sales to the vertically integrated market leader, Colonial Sand and Gravel. At that time, it consumed 9.8% of the cement sold to ready-mix firms, some 2.6% more than the third ranking firm, and more than three times the purchases of the market's sixth largest seller.

The merger of United States Steel and Certified effectuated the entry into the NYMA ready-mixed concrete market of a very large conglomerate company. Five years prior to the merger, the market had been characterized exclusively by small companies whose sales efforts were principally, if not exclusively, devoted to sales of concrete. In the ensuing years prior to the acquisition three instances of vertical integration occurred. One company, Colonial Sand and Gravel, had integrated backward into cement production and had retained its position as the market leader, a position to which Certified was the runner-up. Another company, M. F. Hickey, the fifth largest ready-mix seller was acquired by a supplier, the American Cement Corporation. Finally, less than a year prior to the U.S. Steel-Certified merger, the market's fourth largest seller was acquired by the National Portland Cement Company.[21]

The Hickey-American Cement Corporation merger was cancelled by a Commission consent order.[22] Hence, at the time of respondent's merger with Certified there were only two vertically integrated companies operating within the market. The leading seller of these two firms, Colonial, possessed assets of $47,539,462. United States Steel, upon its entry into the market, possessed assets of $1,673,914,946 or thirty-five times more than the market's leading seller and over a thousand times more than the market's leading non-integrated seller.

The entry of United Sttes Steel into the NYMA ready-mix market placed all market members at a competitive disadvantage —particularly the non-integrated firms within the market. With reference to the latter sector, respondent enjoys significant cost advantages. Cement manufacturers are subjected to certain fixed costs in operation of their productive facilities regardless of whether such facilities are running at full or partial capacity. A producer that owns a ready-mix outlet or enjoys a guaranteed outlet for its product can increase utilization of his production facilities and reduce unit costs. At the same time, it incurs no additional expense in the way of sales effort and other administrative costs. Moreover, as the examiner has also found, it may combine or integrate delivery and storage facilities with those of its ready-mix outlets.

With respect to all members operating within the NYMA market, respondent also enjoys the advantages that flow to a com-

[21] This merger involving Ryan Ready Mixed Concrete was challenged by a Commission complaint issued on January 22, 1965. Concurrent with his decision herein, the examiner, on May 20, 1966, dismissed the complaint against National Portland. On March 28, 1967 [71 F.T.C. 395], the Commission vacated the initial decision and dismissed the complaint on the ground that the proceeding was rendered moot by National Portland's subsequent divestiture of Ryan.

[22] *American Cement Corp.*, Docket C–681, Commission Order of January 20, 1964 [64 F.T.C. 316].

pany that is a massive supplier of a number of products to all aspects of the building and construction trades. The testimony shows that "contacts" or acquaintances with architects, builders, contractors and political figures are very important in the sale of ready-mixed concrete. Certified's management, which was retained by respondent after the merger, have excellent contacts. United States Steel, with its heavy involvement in the building and construction industries, "knows" as one competitor put it "more people than Certified."

Finally, there are the advantages flowing from the fact that United States Steel is a large conglomerate corporation, one of the nation's largest corporations, and the possessor of great strength in markets other than that involved directly in the instant matter.

A conglomerate corporation, as Professor Corwin Edwards has pointed out, has strength and access to competitive strategy that hurdles the discipline of any particular market.[23] The conglomerate corporation "operates in a series of different markets, in each of which it encounters different competitors and different conditions of demand and supply and thus may be able to charge different prices and make different profits." [24] Here, for instance, as one competitor explained, United States Steel, unlike other market entities, can offer at least two essential products to the building and construction trade, steel and concrete. Its position in one field can dictate its range in the other.

The overall size and financial strength of respondent creates an advantage in respect to pricing and the extension of credit. Respondent, with a pocket immensely deeper than that of its competitors within the market, can outlast and out-extend any price warfare and credit offerings.

Again, there is the advantage stemming from the well-circulated and well-documented reputation of respondent for strength in other markets. If we may adjust our expression in *Procter and Gamble Company*:

> Even if such strength has not been proved to reach the level at which monopoly profits or other fruits of great market power are forthcoming, it is relevant to the psychological response of the members of the * * * [ready-mixed Concrete market] to [United States Steel] as a competitor. To the extent that [United States Steel] is thought by them to be not only a large and affluent firm, but also a powerful firm, in terms of market

[23] Testimony of Corwin D. Edwards, *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1 at 36 (1964–65).

[24] *Id.* at 38.

power enjoyed in related markets and possibly transferable into the [concrete] market, its prowess as a competitor gains an added and even sinister dimension in the eyes of its [ready-mix] rivals—a factor of considerable importance to the impact of the merger on competition in the . . . industry.[25]

The examiner dismissed complaint counsel's arguments that the entry through acquisition of United States Steel into the NYMA ready-mix market poses a threat to the viability of at least the small firms operating within that market. Considering the fact of the disadvantage faced by small ready-mix companies in competing with one of the nation's largest corporations, the examiner concluded: "It is sufficient to observe that this frequently occurs when a large, multi-product, conglomerate company enters a market." As he saw it, the arguments of complaint counsel were "speculative" and their acceptance required a holding that size is *per se* illegal.

Again, the examiner's observations are correct to a degree. Again, however, they either do not go far enough or else demonstrate a misunderstanding of the basic purpose of Section 7 and the duties of one who is to make the initial evaluation of a Section 7 complaint.

It is true, of course, that the competitive disadvantages faced by the small entities within the market as a result of the Certified/United States Steel merger frequently do occur, although perhaps not to the same degree, when any large conglomerate enters a market such as that under review. However, this observation ignores the distinction made by Congress between market entry through internal expansion and that achieved through acquisition. Here we have advantage added to advantage—size added to size—market power added to market power—advantage, size and power unburdened by the tasks, costs and uncertainty of market entry achieved through internal expansion.

It is true, of course, that the size *per se* of an acquiring firm has no conclusive bearing upon the adjudication of a Section 7 proceeding. Efficiencies and resulting benefits to competition can come from size. Neither this Commission, nor any antitrust arbiter has as its mission the shielding of competitors from the rigors of competition. We are, however, concerned with protecting competition. The Clayton Act has a prophylactic purpose. Its function is to prevent monopolization in its incipiency.[26] To this end, the Commission is under the duty to scrutinize acquisitions for their

[25] *The Procter & Gamble Co.*, Docket 6901, 63 F.T.C. 1465, 1579.

[26] *Brown Shoe Co.*, *supra*, at 317.

"capacity or potentiality to lessen competition." [27] In such an evaluation, we are bound to seriously consider the "factor" of the acquiring company's size for frequently, as the courts have observed and economic theory holds, the capacity or potentiality of a merger to lessen competition within the relevant market stems from the size and the strength of the acquiring firm in other markets.[28]

As the examiner observed, consideration of complaint counsel's arguments concerning the adverse impact of the challenged acquisition requires a speculative judgment. The analysis of any Section 7 matter requires speculation, if one understands speculation to mean an informed projection of future events from a basis of market realities. This "speculation" is not of the crystal ball variety but instead one based upon facts and experience.

For instance, complaint counsel argue that respondent has the capability to adversely affect price competition within the relevant ready-mix market. After briefly considering the argument that respondent could afford to incur short-term losses by "dumping" excess capacity product to the disadvantage of independent sellers who could not afford such losses, the examiner concluded, "[w]hile this is possible there is nothing in the record of the pricing practices of United States Steel's UAC [Universal Atlas Cement] Division to suggest that this is likely to occur." We are not prepared to adopt even this limited view. Nevertheless, we are convinced that upon scrutiny of the record as a whole, and evaluation of all factors bearing upon competition within the market, a finding that respondent has the capacity or potential to adversely affect price competition is warranted.

Immediately prior to the challenged acquisition, competition within the NYMA ready-mix market was characterized by aggressive price competition. Because of a decline in demand, no one was "holding the line." Jobs were being bid away from initially successful applicants through after-the-contract solicitation. In the opinion of certain industry members, below-cost selling was utilized at times. To these firms, it was a question of staying power. On the latter point, the record reveals that a number of sellers were required to retrench and to seek out further efficiencies in order to remain viable.

[27] *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223, 230 (D.C. Cir. 1962).

[28] *F.T.C.* v. *Procter & Gamble Company*, 386 U.S. 573 (1967); *F.T.C.* v. *Consolidated Foods*, 380 U.S. 592 (1965); *Reynolds Metals Co., supra* at 229; *General Foods Corporation*, Docket 8600, 69 F.T.C. 380; Edwards, *Conglomerate Bigness as a Source of Power, in Business Concentration and Price Policy* (National Bureau of Econ. Research ed. 1955); Blair, *The Conglomerate Merger in Economics and Law*, 46 Geo. L.J. 672 (1958).

The record also reveals that the most aggressive competitor in the way of price prior to the acquisition was Certified Industries. It obtained the bitterly contested business. It principally contributed to the competitive situation in Suffolk and Nassau counties that led the market leader, Colonial, to avoid these areas because of "the pricing situation." But while Certified secured the business it did so from an undercapitalized position. It lacked the deep pocket of United States Steel.

While acknowledging the possibility of decisive pricing power by respondent, the examiner apparently relied solely upon respondent's pricing practices in the sale of cement to reject complaint counsel's arguments. The record reveals that unlike concrete, prices for cement were relatively stable. All sellers sold at the same price. Whatever divergence there was came through discounts ostensibly granted to meet competition. Therefore, the examiner concluded, "[i]f one were to hazard a guess" the probable effect of the acquisition "would be that Certified's pricing policy will likely become more conservative."

Of course, it will be in the interest of respondent to adopt a conservative pricing policy for Certified. The point is, however, that United States Steel has the capacity to bring about such a policy and still maintain Certified's market share. It can sell low until others tire or perish. It can then engage in parallel pricing or price leadership, breaking ranks only to discipline price mavericks. In sum, as any strongly capitalized company with a significant share of a concentrated market, its interest should be price stability. It possesses the potential for imposing such stability upon the relevant market. It offers the capacity for adversely affecting price competition within a market characterized by aggressive price competition. Certified, under the conditions obtaining in the market at the time of the acquisition, presents a probable vehicle for such action.

Barriers to Market Entry

Prior to Certified's acquisition, the barriers to entry into supplying cement to the NYMA market were formidable. While the technological requirements were minimal, the financial requisites were immense and concentration or market foreclosure was high. With respect to the former, the sole new entry into the Northeastern market for cement during recent years had to invest some sixty-four million dollars to achieve initial access. With respect to the matter of available customers, prior to the challenged merger about 70.8% of the market had been captured by eight sellers.

Capital requirements for the sale of ready-mixed concrete were also relatively high. According to industry members, an expenditure of from 3 to 5 million dollars was required. Additionally, a prospective new entrant would have to face the fact that 50.1% of the market was enjoyed by a vertically integrated company and 4 sellers accounted for 73.6% of the total sales of ready-mixed concrete within the NYMA.

After the U.S. Steel/Certified coalition, the ante for entry into the sale of cement was raised. Immediately after the merger, 46.3% of the entire cement market in the NYMA and 66.3% of the cement sales to ready-mixed concrete producers were foreclosed by 3 vertically integrated sellers. In regard to the sale of ready-mixed concrete, the prospective entrant through internal expansion or initial entry, had to not only risk a considerable cash outlay to compete for a greatly restricted portion of the market, but also had to assume the risk of competing against the nation's seventh largest corporation in a market where price competition was fierce and the ability to withstand losses could be decisive.

Trends Toward Concentration and Vertical Integration Through Merger

As emphasized above, Section 7 is meant to deal with monopoly in its incipiency. Accordingly, in assessing an acquisition's effect on the future course of competition, consideration must be given to the stage of development of market power within the relevant industry or industries and market or markets at the time of the merger, and to the likelihood that the merger will give impetus to further concentration of such power.[20] In other words, and for example, did the merger occur in the context of a trend toward concentration in a relevant market? Did it occur in the context of a trend toward vertical integration through acquisition? Is there a basis for viewing the acquisition as offering a potential for stimulating the continuance of a movement toward concentration of market power?

By 1964, the year of respondent's acquisition of Certified, there was an evident nationwide movement on the part of cement companies toward vertical integration into ready-mixed concrete production through merger. The history of the two industries shows

[20] See *Brown Shoe, supra* at 1527; *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 279-80 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 (1963); *United States* v. *Von's Grocery Company*, 384 U.S. 276, 277 (1966).

only four instances of such integration prior to 1959. During the period from 1959 to 1965, however, some 30 acquisitions of ready-mix producers were consummated by cement companies.

The record also reveals that there was a definite trend toward vertical integration by acquisition in the NYMA market for ready-mixed concrete. Prior to 1960, there had been no marked instances of vertical integration achieved through merger. In the four years leading up to the U.S. Steel-Certified merger, the fourth and fifth largest ready-mix sellers had been acquired by cement producers. Less than a year after the challenged acquisition, the seventh largest concrete producer was acquired by the Marquette Cement Manufacturing Company.

At the time of the challenged merger, the cement industry was experiencing a strong movement toward concentration. The number of producers had been reduced from 62 in 1958 to 51 in 1963. The reduction in industry membership may largely be attributed to the foreclosure of markets by acquisitions of purchasers, for as the examiner has found, vertical integration, "affords a cement company a captive market which is not subject to challenge by competing cement companies * * *."

On the basis of the record before us, we are of the opinion that United States Steel's acquisition of Certified has the potential for stimulating further concentration of market power in the sale of cement and ready-mixed concrete within the NYMA. Several of the witnesses representing the ready-mix market testified that, as a result of the recent moves toward vertical integration within their marketing area, they had either approached cement suppliers about selling-out or had, themselves, been approached by suppliers on the same question. According to the examiner, several cement companies although "opposed to vertical integration * * * indicated that they might have to acquire a ready-mix company in order to protect their market." As one cement supplier explained, given the present condition of the market, it might have to "capture" an outlet for its product. Still another supplier, Marquette, following on the heels of respondent's acquisition of Certified captured the seventh largest ready-mix concern within the market. Furthermore, Alpha Portland Cement closed its terminal at Port Washington, Long Island, in 1964 and for all intents and purposes withdrew from the NYMA market. According to the examiner, "[t]his terminal was closed because the decline in Alpha's volume in the NYMA, resulting from the loss of one of its largest customers in the area, Certified, no longer justified the expense of maintaining a terminal."

VI

Respondent's argument that there can be no adverse impact flowing from its acquisition of Certified because of the latter's failing condition, clashes with respondent's purpose for making the acquisition and with another argument raised by its counsel.

There can be no doubt as to why United States Steel purchased the second largest ready-mix concern in the NYMA. It made the acquisition in order to protect for itself a sizable portion of an important market.

While Certified, during the period from 1962 to 1963, was experiencing losses, it continued to gain customers. As far as this record shows, it experienced no difficulty in maintaining the goodwill of its customers or in making timely delivery of satisfactory product. Through aggressive pricing, it built its market share from 6% of the total consumption of cement in the NYMA in 1962 to 8.2% in 1963. Its problem, however, was a very basic one in a market characterized by vigorous price warfare. It was under-capitalized. It lacked a deep pocket.

When United States Steel told Banker's Trust that it would guarantee the early 1963 loan to Certified, it, understandably, was not acting as an eleemosynary institution. It expected loyal patronage in return for its services. Within the competitive turmoil of the NYMA markets for cement and ready-mixed concrete, price was relatively stable in the former and credit extensions constituted the major competitive weapon. Thus, immediately after the loan was extended to Certified, U.S. Steel suggested a further agreement to the borrower. According to this proposal, Certified would agree to purchase a minimum of sixty-five percent of its cement requirements from U.S. Steel. Certified's officials balked at executing the agreement. Finally, it remained unexecuted. Nevertheless, Certified's purchases from respondent's Universal Atlas Cement Division experienced a very noticeable reversal. Certified increased its purchases from respondent from 14.9 percent of its requirement in 1962 to 53.8 percent in 1963. In 1964, Certified was buying 88.4% of its cement from respondent.

At the time of acquisition, Certified's share of the market for ready-mixed concrete in the NYMA had slipped. It still, however, was the second largest purchaser of cement within the market, accounting for 6.8%. It still enjoyed the goodwill of its customers and the contacts of its executives. It occupied such a position in the relevant market that the executive vice president in charge of production for United States Steel's Universal Atlas Cement Division, in urging Certified's acquisition, explained, in part, to respondent's board of directors:

> If Certified ceases operations, Universal Cement would suffer an irreplaceable loss in its present market for its Hudson [plant] product and be seriously embarrassed commercially in one of its major markets during the last sixty years.

The record clearly spells out the rise in market power achieved by U.S. Steel as a result of first, its loan arrangements with Certified, and, finally, its acquisition of Certified's assets. As found by the examiner, respondent, in 1962, had declined from a 1960 market share of 7.6% to a 5.2% share in 1962—making it the sixth largest supplier in the market. In the year of the loan, respondent became the fourth largest supplier within the relevant market, accounting for 7.6% of market volume. As found by the examiner, "[i]n 1964, the year in which U.S. Steel acquired Certified, UAC's share increased to 11.4%, and it became the second largest supplier of cement in the area."

Contrary to their argument about the total absence of adverse competitive effect flowing from the acquisition of a failing company, respondent has continually stressed in this proceeding that if U.S. Steel had not acquired Certified the latter's business would have been gained by the market leader, Colonial Sand and Gravel, the ready-mix company which had vertically integrated through internal expansion. But even assuming the validity of this contention, we find ourselves not favorably impressed with it, but, instead, concerned with its inherent admission. It has as its major premise the belief that when threatened by loss of customers through competition one is free to foreclose a substantial portion of a market through acquisition. Again, we are required to point out that which should be beyond cavil. The end result of competition is a degree of market foreclosure. The market-foreclosing competition encouraged by the Celler-Kefauver Act, however, is that generated by fair offerings of price, quality and service. The Act does not sanction the fencing-off through contract of a competitor's threatened market. Instead, it proscribes such action, whether defensive or aggressive, when its effect may be to lessen substantially, competition within a relevant market.

In any event, we cannot, on the basis of this record, find that had Certified gone out of business its volume would have *ipso facto* accrued to Colonial. The latter market leader, as ecomomic theory and empirical experience would suggest, and this record confirms, is not enamored with the concept of price competition. Yet, Certified's principal areas of success were within the counties of Nassau and Suffolk on Long Island—areas of fierce price competition. As the record indicates, these areas were explosive in nature in regard to home development and school building, major sources for concrete purchases and cement consumption. Within this very large area, Colonial operates only four ready-mix plants; and, as the record also shows, a ready-mix plant has an effective supply radius of only fifteen miles. Within the highly concentrated NYMA markets for cement and ready-mixed concrete, Colonial has refrained from aggressive solicitation in Nassau and Suffolk counties because of the "pricing situation" in these areas.

The sum of it is, as respondent's counsel conceded in argument before the examiner, United States Steel greatly increased its share of the relevant market for cement largely as a result of the acquisition. As the record reveals, it has achieved the largest possible vertical foreclosure in the relevant market through acquisition. And, through acquisition, it has projected itself into a market long characterized by small, local sellers at a time when size and the ability to withstand losses could have an extremely powerful impact, both psychologically and directly, upon the competitive strategies and actual competitive responses of existing market members. Despite the failing condition of Certified, the market for ready-mixed concrete within the NYMA has been drastically changed by the challenged acquisition. Into that rarity of heavily concentrated markets, one engrossed with price competition, has entered a company certainly possessed of the resources to withstand and discipline such competition and to eventually, as the examiner predicted, engage in a "more conservative" pricing policy, or, in other words, stabilize and rigidify product pricing. Barriers to market entry, already high prior to the acquisition, have been raised to prohibitive dimensions. Small ready-mix concerns, the predominant make-up of the relevant concrete market prior to the challenged merger, and the exclusive complement of the market prior to its present trend toward concentration, are no longer competing with an aggressive, but rapidly weakening, nonintegrated number two seller, but instead face the feasible opportunities for market maneuvers available to an integrated company which is also the nation's seventh largest industrial corporation. The ability of any member of the ready-mix market in the New York Metropolitan Area to engage in predatory pricing practices—to foster price stabilization in the long-run—has not been checked but rather enhanced. The trend toward market concentration, and the trend toward vertical integration through acquisition, have not been reduced or halted. They have been, on the basis of this record, decidedly stimulated.

We are not, therefore, dealing here, as the court in *International Shoe,* with a situation in which a large company acquired a non-competitor whose market relevance over immediate prior years has diminished to a *de minimis* point. We are not dealing with a respondent who has acquired productive facilities for the mere purpose of increasing product capacity but instead, we review a merger that forecloses an appreciable segment of a market already highly concentrated. Again contrary to International Shoe, we are dealing with an acquisition in which the purchasing corporation has acted with the purpose of fencing-off competition.

Moreover, we would be remiss in the implementation of our Congressionally delegated duty to consider all challenged mergers in the light of all factors bearing upon competition, if we did not consider the economic setting of the nation at the time of the merger. Unlike the time-span in which the International Shoe matter was considered, today's economy is not in a depressed or stagnant condition. It is dynamic in nature—although if the relevant markets surveyed by this record may serve as examples, in danger of stagnating through the continued concentration of market power achieved through mergers.

Finally, there is nothing in the record to suggest that the acquisition prevented or mitigated such serious economic harm to creditors, stockholders, or employees of Certified that it should be permitted regardless of the anti-competitive consequences found above. There is no evidence indicating possible harm to either creditors or employees of Certified or to the economic well being of the community in which Certified was located. Furthermore, the evidence shows that 70% of Certified's stock was owned by only five shareholders.[30] While there can be no doubt that these individuals fared better financially by having their company purchased by respondent, this fact is of little significance when weighed against the possible adverse competitive effects of the merger.

The appeal of counsel supporting the complaint is granted and our order providing for appropriate modification of the initial decision is issuing herewith.

[30] RX 58(e).

Commissioner Elman dissented and filed an opinion.

Commissioner MacIntyre did not participate.

Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

DISSENTING OPINION

DECEMBER 2, 1968

BY ELMAN, *Commissioner*:

In this case, the Commission is required to interpret and apply the "failing company" defense announced in the Supreme Court's *International Shoe* [1] decision and carried forward into the amended merger law when Congress passed the Celler-Kefauver amendments to Section 7 of the Clayton Act in 1950. Under *International Shoe,* proof that a company acquired in a merger or other transaction subject to Section 7 was in "failing circumstances" constitutes a defense to the charge that the transaction was illegal. In my opinion, the defense is clearly applicable to the facts of this case as found by the hearing examiner and adopted or modified by the Commission. The Commission's conclusion that the merger violates Section 7, even though the acquired company was failing and no other purchaser was available, distorts and, to a large extent, nullifies the failing company defense.

I

There is no dispute concerning the basic facts in this case, which are adequately set out in the Commission's opinion and need not be repeated at length here. For the most part, the Commission's findings of fact are essentially the same as those made by the examiner.

At the time of the acquisition, respondent United States Steel Corporation was one of the four largest manufacturers of portland cement in the United States [2] and one of the principal suppliers serving the New York Metropolitan area.[3] The ac-

[1] *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930). The doctrine found its genesis in earlier decisions under the Sherman Act. See *United States* v. *United States Steel Corp.*, 251 U.S. 417, 446-47 (1920); *American Press Ass'n* v. *United States*, 245 Fed. 91, 93-94 (7th Cir. 1917); see generally, Comment, *Federal Antitrust Law—Mergers—An Updating of the "Failing Company" Doctrine in the Amended Section 7 Setting*, 61 Mich. L. Rev. 566, 567-71 (1963); Wiley, *The "Failing Company" A Real Defense in Horizontal Merger Cases*, 41 B.U.L. Rev. 495, 497-99 (1961).

[2] As is well known, respondent is also the largest steel producer in the United States. Majority opinion at 1275; initial decision 9 [71 F.T.C. 395, 407, 408].

[3] Majority opinion at 1292; initial decision 33 [71 F.T.C., at 430, 431]. United States Steel operated its cement business through its Universal Atlas Cement Division.

quired company, Certified Industries, Inc., was one of the four largest producers of ready-mixed concrete in the New York Metropolitan area and the second largest consumer of portland cement among ready-mixed concrete producers, purchasing over one million barrels in 1963 and almost 800,000 barrels in 1964. Prior to the acquisition, Certified purchased cement from a number of suppliers, including Universal Atlas. However, in 1963, when respondent assisted Certified in obtaining long-term financing and guaranteed certain of Certified's obligations, the percentage of Certified's cement requirements supplied by respondent more than tripled, from 14.9 percent to almost 54 percent. In 1964, the year of the merger, that figure increased to over 88 percent.[4]

The other facts relevant to a *prima facie* showing that this vertical merger violated Section 7 are set out in the majority opinion. It is unnecessary, in the circumstances here presented, to deal at length with the question whether, in the absence of a failing company defense, United States Steel's acquisition of Certified would violate Section 7. For present purposes, it can be assumed that a *prima facie* showing has been made that the merger would probably violate Section 7 were Certified not a failing company at the time of the acquisition.

There is no question, however, that Certified *was* a failing company. The Commission adopts the examiner's findings on this question and rejects complaint counsel's arguments to the contrary. Certainly, there is no merit in the suggestion that Certified should have rejected respondent's financial assistance in January 1963 and should instead have accepted a merger offer made by one of respondent's competitors. There is nothing in the record to indicate that this transaction was merely a ploy, the first step in a preconceived merger plan, or that Certified's management did not reasonably believe that the loan agreement would help put the company back on its feet, preserving its status as an independent competitor.[5] As the Commission finds, on this record it must be concluded that Certified was a failing company and

[4] Majority opinion at 1276; initial decision 11-12 [71 F.T.C., at 409-411].

[5] It has been suggested that before a company can be considered failing it must have made unsuccessful attempts to borrow money in an effort to save itself by measures short of merger. See Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Law*, 52 Ky. L.J. 597, 601; Wiley, *supra* note 1, 41 B.U.L. Rev. at 506-7; Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 326 (1955) (testimony of Assistant Attorney General Barnes) [hereinafter cited as 1955 Hearings]; *cf. United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 661 (1964); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800, 832 (9th Cir. 1961), *cert, denied*, 370 U.S. 937 (1962).

that no other purchaser was available.[6] The question for decision is, therefore, what is the legal significance of that finding?

II

Consideration of the failing company doctrine must begin with the *International Shoe* case. The merger in that case involved two of the largest shoe manufacturers in the world. International Shoe Company was, at the time of the merger, "engaged in manufacturing leather shoes of various kinds. It had a large number of tanneries and factories and sales houses located in several states. Its business was extensive, and its products were shipped and sold to purchasers practically throughout the United States." [7] International Shoe had acquired the stock of the W. H. McElwain Company, a substantial New England-based shoe manufacturing firm which had factories capable of producing 38,000 to 40,000 pairs of shoes daily.

The record disclosed that McElwain was the victim of falling prices for shoes, had an excessive inventory of new shoes, overextended itself in making commitments to purchase hides, and was unable to raise money to pay off its substantial debts:

New orders were not coming in; losses during 1920 amounted to over $6,000,000; a surplus in May, 1920, of about $4,000,000, not only was exhausted, but within a year had been turned into a deficit of $4,382,136.70. In the spring of 1921 the company owed approximately $15,000,000 to some sixty or seventy banks and trust companies, and, in addition, nearly $2,000,000 on current account. Its factories, which had a capacity of 38,000 to 40,000 pairs of shoes per day, in 1921 were producing only 6,000 or 7,000 pairs.[8]

The company was, according to the Court, faced with but two alternatives: "liquidation through a receiver or an outright sale." [9]

Finding that McElwain was in "failing circumstances," the Court stated:

---

[6] A number of criteria have been utilized by the Commission and the courts in determining whether a company is indeed failing. See, *e.g.*, Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act*, 35 Ford. L. Rev. 425, 437-42 (1967); Hale & Hale, *supra* note 5; Wiley, *supra* note 1, 41 B.U.L. Rev. at 502-12; cf. Marcus, *The "Failing Industry" and the "Failing Management" Doctrines in Antitrust*, 11 Antitrust Bull. 833 (1966); *United States* v. *Third National Bank*, 390 U.S. 171, 183 (1968). In view of the theory on which this case has been argued to the Commission, complaint counsel virtually conceding that Certified was failing at the time of the acquisition, its is unnecessary in this opinion to explore further the question of what standards are to be applied.

[7] 280 U.S. at 295.

[8] *Id.* at 299–300; *cf. United States* v. *Continental Oil Co.*, 37 U.S.L. Week 3150 (U.S. October 22, 1968) (the facts are set out in the first opinion of the District Court, 1965 Trade Cases, ¶ 71,557 (D.N.M. 1965)); *United States* v. *Third National Bank*, 390 U.S. 171, 183 (1968) (failing company doctrine inapplicable where acquired firm continued to be profitable and absolute size of its business increased although its percentage share of the market did not).

[9] 280 U.S. at 299.

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 pubilc 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. United States Steel Corp. 251 U.S. 417, 446, 447 * * * would 'seem a distempered view of purchase and result.' See also American Press Asso. v. United States * * * 245 Fed. 91, 93, 94.[10]

As the Commission points out, legal purists might regard the above statement as dictum because the Court had earlier concluded that the merger did not lessen competition between McElwain and International Shoe, an essential element of the violation under Section 7 which, as it then existed, was considerably narrower and more parochial than the amended version. Whatever may be concluded as to the continuing validity or vitality of the market definition adopted by the Court in reaching its conclusion that the two firms were not in competition,[11] it is clear that the Court's alternative conclusion—that the failing company doctrine immunized the merger under Section 7—has survived and is applicable under the amended statute. As the Commission acknowledges, both the Senate and House Reports on the Celler-Kefauver amendments specifically cited the *International Shoe* decision, including the language just quoted, with approval and expressed the view that despite the absence of a reference to the failing company doctrine in amended Section 7 the doctrine would continue to apply; the failing company portion of the *International Shoe* decision, interpreting former Section 7 which also made no explicit mention of a failing company exception, was carried over intact into the amended statute.[12] "The doctrine

[10] *Id.* at 302–03.

[11] For example, compare with definition there adopted, the market definition adopted in *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *duPont*, 351 U.S. 377 (1956).

[12] See S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950); H.R. Rep. No. 596, 80th Cong., 1st Sess. 6–7 (1947); Hearings on H.R. 2734 Before a Subcommittee of Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 79–81 (1950) [hereinafter cited as 1950 Senate Hearings]; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 & n. 34, 346 (1962); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 339–41 (1960); Low, *supra* note 6, 35 Ford. L. Rev. at 426–27; Comment, *supra* note 1, 61 Mich. L. Rev. at 571–72; *cf. United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277 & n. 13 (1966); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964). But see. Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 Geo. L.J. 84 (1961).

could thus be deemed a legislatively approved judicial exception to the statute, codification of which Congress regarded unnecessary, probably because it felt failing-company mergers could not work substantial injury to competition." [13]

The Commission purports not to dispute the continuing vitality of the failing company doctrine announced in *International Shoe*. However, starting with the premise that in *International Shoe* and other cases in which the "failing nature of the acquired company served as a defense, either no defense was needed, in that there was no adverse competitive effect flowing from the merger, or * * * the ultimate question of adverse competitive impact was a close one in which the prospect of economic harm to individuals and to the public that might result from a bankruptcy was decisive," [14] the Commission concludes that:

> The court did no more than balance the probable injury to competition against injury to stockholders and other third persons and, in the circumstances of that case, decided that the prevention of the latter was of greater importance. We agree with counsel supporting the complaint, therefore, that to be consistent with *International Shoe* and with the legislative intent expressed in the amendment of Section 7, in 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.[15]

III

How valid is the premise on which this argument is based? Were the anticompetitive effects of the merger in the *Interna-*

[13] Comment, "*Substantially to Lessen Competition * * **": *Current Problems of Horizontal Mergers*, 68 Yale L.J. 1627, 1664 (1959); see, *e.g.*, Hearings on H.R. 988, 1240, 2006, 2734 Before a Subcommittee of the House Committee on the Judiciary, 81st Cong., 1st Sess. 30–31 (1949).

[14] Majority opinion at 1280–1281.

[15] *Id.* at 17–18 (footnote omitted). It is instructive to note that the principal section of the legislative history of the Celler-Kefauver Act cited by the Commission to support its view is a statement made by Representative Patman, in testimony given during Senate hearings on the bill. The Commission's apparent belief that Representative Patman's views accurately reflect the intention of Congress in passing the Celler-Kefauver Amendments, is recently come by; the Commission has regularly granted premerger clearances in cases where the mergers would be clear violations of law under the views now expressed by the Commission in the instant case. See, *e.g.*, advisory opinion digests numbers 176, 177, 179, 180, 182, 184, 185, 296, 297. Compare 1950 Senate Hearings at 136:

"Representative Patman. I think you would have no trouble getting [an advisory opinion]. The facts themselves would be so apparent that you probably would not want to go to the FTC. You would know whether or not you were in violation. If this [failing company] is the only ice-cream company in Dothan, Ala., and you are buying it out for Borden Co., why, you would know that is a violation of the law. You would not have to go to the FTC about it." See *id.* at 134. But see *id.* at 101.

tional Shoe case in fact minimal and does the decision hold that the Commission should engage in a complex and elaborate "public interest" inquiry—which does not fall within its area of expertise and which it is not particularly well equipped to make—into the degree of "serious and substantial" injury to "innocent" employees, stockholders, and the communities in which a failing firm does business?

The merger attacked by the Commission in the *International Shoe* case was not, as the Commission now implies, one involving small firms or one in which the adverse competitive impact of the merger was slight. On the contrary, the record in that case disclosed that McElwain was the largest shoe manufacturer in New England and one of the four largest in the United States; its gross sales in the year prior to the merger were almost $50 million and International's exceeded $75 million.[16] McElwain's tangible and intangible assets early in 1921 exceeded $31 million,[17] and its tangible assets included ten shoe factories capable of producing 40,000 pairs of shoes per day; International Shoe had 32 shoe factories with a daily capacity in excess of 70,000 or 80,000 pairs.[18] McElwain was sold as a going concern, a factor that of course increased its value to International Shoe. Nor is there any suggestion in the case that McElwain's assets had somehow lost their value, or that the firm's plant and equipment were obsolete.

In brief, *International Shoe* was a horizontal merger which united a firm that in 1920, immediately before the merger, "made more pairs of men's, women's, and children's shoes than any other manufacturer in the world" with a firm that in the same year "made more pairs of men's and boys' street and dress welt shoes than any other manufacturer in the world," establishing a firm having net tangible assets in excess of $40 million with "the largest purchasing power in the world for the best hides, leather, and other materials," creating "the largest agency for the manufacture and distribution of shoes in the world." [19]

In view of these facts concerning the merger, it seems clear that the *International Shoe* case did not involve a merger having no anticompetitive impact, or that its impact was so dubious or so remotely discernible as to be outweighed by the "economic

[16] Docket No. 1023, Commission's Ex. 1.

[17] *Id.*, Respondent's Ex. 25; see also *id.*, Respondent's Ex. 32, 33.

[18] *Id.*, Commission's Ex. 1; Respondent's Ex. 26.

[19] *Id.*, Commission's Ex. 2; Respondent's Ex. 26. The merged firm's combined manufacturing capacity was also the largest in the world. *Ibid.*

harm to individuals and to the public that might result from a bankruptcy." Neither the Court's finding, based on an extremely narrow definition of the relevant market, that McElwain and International had not competed with each other, nor quibbles concerning the structure of the Court's opinion—which parts of it are holding and which dictum—should be permitted to obscure the net effect of the decision. The Court clearly assumed, for purposes of its analysis of the failing company issue, that the merger would have violated Section 7 were McElwain not a failing company. Otherwise it would have had no occasion to rule on the question. The Court of Appeals had dealt with the failing company issue and, applying a stringent test to determine whether McElwain was failing, held that the evidence was insufficient to show that but for the merger the company would have gone out of business. The Supreme Court did not let this precedent stand and instead announced a more expansive test. The Court excused the merger, despite its manifest anticompetitive tendencies and effects, because McElwain was a failing company and injury to stockholders, employees and others would be avoided by the merger. There is no indication in the opinion that the Court endeavored to balance these injuries against the anticompetitive effects of the merger. Its rationale was simple and clear: McElwain was failing; if the merger were forbidden, these injuries would ensue; therefore, the merger was not illegal. Moreover, Mr. Justice Stone, in his dissenting opinion concurred in by Justices Holmes and Brandeis, did not dispute that the failing company doctrine, if applicable, would be a complete defense to the charge that the merger violated Section 7; instead, he took issue with the finding that McElwain was failing [20] and questioned the Court's conclusion that McElwain and International did not compete.

In short, the probability of competitive injury in that case was so great that, as one commentator has suggested, the scales were "about as heavily weighted in favor of preventing merger as possible." [21] That the Court nevertheless held the merger not to be illegal indicates that the failing company doctrine is a complete defense.[22]

A more recent case, *United States* v. *Maryland & Virginia*

---

[20] 280 U.S. at 306.

[21] Comment, *supra* note 1, 61 Mich. L. Rev. at 583.

[22] See, *id.*, at 578: "In short, it must be realized that the doctrine represents a valid exception to section 7, and, *but for* the exception, the transaction would be illegal as violative of the antitrust laws."

Milk Producers Ass'n,[23] confirms this view. The defendant in that case was an association of milk producers charged, insofar as is here relevant, with having violated Section 7 by purchasing the stock of the Richfield-Wakefield dairies. The acquisition had both vertical and horizontal aspects. The evidence indicated that the merger eliminated one of a few remaining substantial purchasers of milk that might be open to a supplier competitor of the respondent [24] and that the merger would substantially increase concentration among milk dealers in the Washington, D.C., area by joining the fifth or sixth largest seller with the fourth largest in a relatively concentrated market where the top four firms in the year before the merger had a market share of almost 70 percent, which was increased to approximately 76 percent by the merger.[25] In the absence of the failing company defense, the merger would clearly have violated Section 7.[26] Yet, the court held that since the acquired company was "on the brink of bankruptcy," [27] the merger did not violate Section 7. "The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act." [28]

It seems to me that here, as in the *Maryland & Virginia Milk Producers* case, the failing company doctrine of the *International Shoe* case requires dismissal of the Section 7 complaint. I do not challenge the Commission's finding that United States Steel's acquisition of Certified has had and may continue to have an anticompetitive impact in the New York Marketing area.[29] However, it is not clear that these competitive effects are any worse than the substantial adverse effects, described in part above, to be expected from the International-McElwain horizontal merger. As I have already noted, International acquired McElwain as a going concern; McElwain's plant and equipment

---

[23] 167 F. Supp. 799 (D.D.C. 1958), *rev'd on other grounds*, 362 U.S. 458 (1960).

[24] See, *e.g.*, Civ. A. No. 4482–56 (D.D.C. 1958), Plaintiff's Exs. 92, 93, 120A–J.

[25] See, *e.g.*, *id.*, Plaintiff's Ex. 120, Tables N, O, S, T.

[26] *Cf.* Department of Justice, Merger Guidelines 9, 16 (1968).

[27] 167 F. Supp. at 808.

[28] *Ibid.*

[29] But see Liebeler, *Toward a Consumer's Antitrust Law: The Federal Trade Commission and Vertical Mergers in the Cement Industry*, 15 U.C.L.A.L. Rev. 1153 (1968); Comment, *supra* note 1, 61 Mich. L. Rev. at 572:

"The strength of the acquiring company's business position may, in several respects, justify a court in sustaining the defense. First, it indicates a legitimate need for the capacity, which negates the claim that the motive for acquisition was illegal; and, secondly, the sound financial condition of the acquirer tends to insure that the injury which the courts wish to prevent will, at least, be mitigated by keeping the facilities in operation and avoiding financial collapse." (Footnotes omitted.)

came to International in good working order, they were not obsolete or unusually expensive to run, and they increased International's already substantial manufacturing capacity by over 50 percent. International was also able to "maintain the continuity and the good will and the management of [McElwain]." [30] "By the acquisition of the stock or share capital of W. H. McElwain Company, the respondent gained control of the largest manufacturer of street and dress welt shoes for men and boys, and eliminated from the field of competition respondent's largest competitor in the sale of men's dress shoes, and secured immediate entrance into the sales territory of the New England States, and accomplished a nationwide distribution of its products." [31]

By contrast, in the instant case the merger is vertical, not horizontal, it may involve economic efficiencies that the antitrust laws are intended to encourage,[32] and it may permit respondent to compete more effectively with the dominant firm in the New York market [33]—a consideration that might not excuse an otherwise illegal merger but that is surely relevant if, as the Commission holds, this case is to be decided by a "public interest" balancing process.[34] Indeed, disapproving this merger may, as the examiner found, invite even more injurious consequences than

---

[30] F.T.C. Docket No. 1023, Commission's Ex. 1.

[31] *International Shoe Company*, 9 F.T.C. 441, 452–53 (1925).

[32] See Liebeler, *supra* note 29; Comment, *supra* note 1, 61 Mich. L. Rev. at 579–80; Comment, *supra* note 13, 68 Yale L. J. at 1663. But cf., Federal Trade Commission, Staff Report on Mergers and Vertical Integration in the Cement Industry 101–04 (1966) (rejecting the argument that vertical integration in the cement industry is attributable to the search for economic efficiency); Wilk, *Vertical Integration in Cement Revisited: A Comment on Peck and McGowan*, 13 Antitrust Bull., 619 (1968).

[33] See initial decision 64–67 [71 F.T.C., at 459–462]; Low, *supra* note 6, 35 Ford. L. Rev. at 430 & n. 41; Hale & Hale, *supra* note 5, 52 Ky. L.J. at 600; von Kalinowski, *Section 7 and Competitive Effects*, 48 Va. L. Rev. 827, 857–59 (1962); cf. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

[34] *Cf.* Bok, *supra* note 12, 74 Harv. L. Rev. at 343–44:

"Imperfections in our knowledge lead to uncertainty concerning the significance of many acquisitions. We have urged that such uncertainty be resolved against the merging parties in framing rules under section 7, and it seems inevitable that the same process must take place even under the flexible approach of the Trade Commission, for otherwise the statute cannot have much real significance apart from the Sherman Act. Once rules and precedents are made strict in this sense, however, the danger arises that they will come to be considered as facts, endowed with greater validity than they actually possess. While such a process may be harmless in the usual case under section 7, a measure of unfairness may be introduced in cases involving a failing enterprise. In such a case, doubts cannot be resolved against the defendant, for we are no longer simply concerned with fulfilling the single overriding purpose of preserving competition. For the same reason, we cannot accurately assess the danger to competition on the basis of rules and precedents in which doubts have been resolved in this manner. Instead, it is necessary to bear clearly in mind that many of the mergers which would seem seriously anticompetitive in terms of existing rules are in fact of very problematical signifithose anticipated from the merger. The examiner found that had this merger not occurred, Certified's business might well have gone to the leading firm in the New York market, further enhancing its already dominant position.[35] In any event, if the failing company defense is not to be distorted, disregarded, or read out of the merger law, this case is virtually an *a fortiori* one after *International Shoe*. The competitive effects likely in that case were at least as injurious to competition as those predictable here.[36] More to the point since the merger in that case was approved despite its obvious anticompetitive potential, the *International Shoe* decision suggests that the Commission's "public interest" weighing of anticompetitive impact against the injury to be suffered if Certified had gone out of business is neither required nor permitted once it is determined that Certified was a failing company [37]—an inescapable conclusion on this record.

Nor is there any real doubt that the other requirements set out in the *International Shoe* decision have been met. The Commission does not find, and the record does not indicate, that this merger was consummated "with a purpose to lessen competition * * * [rather than] to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable * * *." [38]

There has also been no showing that other prospective purchasers, whose acquisition of Certified might have been more desirable from an antitrust viewpoint, were available. Indeed, the Commission expressly adopts the hearing examiner's finding that:

---

cance. It may well be, therefore, that many mergers which would normally be prohibited should be freely allowed where there is a substantial likelihood that the acquired firm cannot survive independently, even though its failure cannot reliably be described as probable."

[35] Initial decision at 87 [71 F.T.C., at 479–480]. The examiner also suggested that had Certified gone bankrupt, U. S. Steel, as its major creditor, could have been expected to acquire Certified's assets and that this "purchase would not have been subject to attack under Section 7, despite the foreclosure which would have resulted." *Ibid.*

[36] It is certainly arguable that under the *International Shoe* decision, Certified's acquisition by the dominant firm in the New York market would not have offended Section 7 if it could be shown that no other more desirable purchaser was available. See Low, *supra* note 6, 35 Ford. L. Rev. at 430; 1955 Hearings at 326 (statement of Assistant Attorney General Barnes); *cf. United-Capital Merger Case*, CAB Docket No. 11699 (1961), Aviation L. Rep. 1960–64 Cas. ¶ 21, 132. However, it would not be easy in the hypothesized case, and in most others where the failing company doctrine might be invoked by a dominant firm, to make the requisite showing that no other purchaser was available. See, *e.g.*, *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); Bok, *supra* note 12, 74 Harv. L. Rev. at 344–47; Low, *supra* note 6, 35 Ford. L. Rev. at 432–34; Marcus, *supra* note 6; Wiley, *supra* note 1, 41 B.U.L. Rev. at 509–12; Comment, *supra* note 13, 68 Yale L. J. at 1666–68 (1959). But cf. von Kalinowski, *supra* note 33, 48 Va. L. Rev. at 844.

[37] Compare Bok, *supra* note 12, 74 Harv. L. Rev. at 343, where it is suggested that "as the magnitude of the acquisition increases, a graver likelihood of business failure seems necessary to justify the exception if we are to give expression to all of the interests of concern to Congress."

[38] 280 U.S. at 302; see initial decision 64–67 [71 F.T.C., at 459–462].

* * * the fact that U.S. Steel had assisted Certified financially in January 1963, does not establish the availability of other purchasers, nor does it establish that U.S. Steel knowingly contributed to the lack of availability of other purchasers, as complaint counsel suggest at another point (CB, at p. 31). * * * There is not the slightest evidence that U.S. Steel was aware of the Bangor & Aroostock offer, or that it arranged for the Bankers Trust loan in order to head off Certified's acceptance of that offer." [39]

The record amply supports the examiner's conclusion that Certified was a failing company, that through no fault of respondent no other prospective purchaser was available, and that "the requirements of the failing company defense have been met." [40] The Commission does not modify or reverse these findings. The Commission finds that Certified was failing and it virtually concedes that the other elements of the defense, lack of an illegal purpose and no alternative purchaser, have been proven. The Commission does not hold the merger illegal on the ground that there has been a failure of proof of the elements of the failing company defense.

IV

This is not the first case in which the Commission has declared a merger to be illegal despite the assertion of a failing company defense. However, in all previous cases the Commission has held that some key element of the defense, usually evidence that the acquired company was failing, was lacking.[41] This is the first instance in which the Commission has found that a company was in fact failing, and that no prospective purchasers other than the respondent were available but that the merger was illegal. In a novel decision, the Commission now holds that the failing company doctrine does not constitute a complete defense to a Section 7 complaint.[42]

---

[39] Initial decision [71 F.T.C., at 474]; majority opinion at 1280.

[40] Initial decision 84–85 [71 F.T.C., at 477–478].

[41] See, *e.g.*, *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962) (acquired company not failing); *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279 (3rd Cir. 1961) (acquired company not failing); *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1407–10 (1960) (acquired company not failing; alternative purchasers available); *Farm Journal, Inc.*, 53 F.T.C. 26, 47–48 (1956) (acquired company not failing; alternative purchasers available; illegal motive for acquisition).

[42] But *cf. Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1409 (1960) (dictum). The Commission purports to find support for its view in *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279, 280–81 (3rd Cir. 1961). The court held only that the acquired firm in that case was not failing. Moreover, the court's dictum to the effect that "It was in * * * [the circumstances described in *International Shoe*] that a merger was viewed as likely to be less harmful in its possible adverse effect on competition than obviously advantageous in saving creditors,

Underlying the Commission's conclusion that the failing company defense requires an elaborate "public interest" inquiry into the socially undesirable effects that the merger avoids and a balancing of these effects against the antitrust injury perceded to flow from the merger, is its notion that the defense rests on the proposition "that the acquisition of a failing company could not possibly substantially injure competition." [43] A few commentators and dicta in some opinions have suggested that "the assumption underlying the defense is that when a 'failing firm' is acquired, there can be no violation of Section 7, since the firm's ultimate elimination precludes the possibility of future competition from it or of restraint by the acquiring firm." [44] Were the failing company doctrine premised solely on the bare assumption that acquisition of a failing firm could never injure competition, there would be strong grounds for questioning the rationality and logic of the defense and for limiting its scope.

It is clear that the acquisition of a failing company by a substantial rival, or even by a large conglomerate firm not previously involved in the failing firm's market, may have important anticompetitive effects. As the Supreme Court pointed out in the *International Shoe* opinion, such a merger can strengthen the acquiring firm's position or increase its dominance by permitting it immediately to acquire facilities it would otherwise have to build.[45] Acquisition by a dominant company of a failing firm that owned a desirable asset, for example a patent, but lacked adequate funds to take advantage of its resources, would surely have an impact on competition.[46] Acquisition by a dominant

owners and employees of the failing business from serious impending loss" relied on by the Commission does not carry the weight or impact the Commission gives to it (majority opinion at 1287). First, if the statement is interpreted as the Commission suggests, it is inconsistent with the court's earlier correct statement that the failing company "doctrine, as its name suggests, makes Section 7 inapplicable to the acquisition of a competitor which is in such straits that the termination of the enterprise and the dispersal of its assets seems inevitable unless a rival proprietor shall acquire and continue the business." There is, moreover, no indication in the *International Shoe* opinion that the Court weighed the presumed injury to stockholders and others against the anti-competitive effects of the merger. In addition, as we have seen, the facts before the Court in *International Shoe* "were about as heavily weighted in favor of preventing merger as possible" (Comment, *supra* note 1, 61 Mich. L. Rev. at 583), and yet the Court, hypothesizing injury to stockholders and communities where McElwain's factories were located, upheld the merger. If the supposed balancing test favored the merger in that case, it should here as well.

[43] Majority opinion at 1288.

[44] Note, *Horizontal Mergers and the "Failing Firm" Defense Under Section 7 of the Clayton Act: A Caveat*, 45 Va. L. Rev. 421, 425 (1959); see *United States* v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958); Connor, *supra* note 12, 49 Geo. L.J. at 92; Hale & Hale, *supra* note 5, 52 Ky. L.J. at 598; von Kalinowski, *supra* note 33, 48 Va. L. Rev. at 841; Comment, *supra* note 13, 68 Yale L.J. at 1663–64.

[45] 280 U.S. at 301; see Comment, *supra* note 1, 61 Mich. L. Rev. at 577.

[46] See, *e.g.*, Low, *supra*, note 6, 35 Ford. L. Rev. at 428–29.

company may also serve as a means for forestalling new entry since, as a result of the merger, a prospective new entrant would have to build new facilities which might expand the total productive capacity of the market without any increase in demand.[47] Similarly, vertical acquisitions involving a failing company may, as the Commission finds in this case, have serious anticompetitive effects. Even this partial list makes clear that a merger involving a failing company may have substantial adverse effects on competition.[48]

Acknowledging that a merger involving a failing company is not always defensible on the ground that it has no impact on competition does not indicate that the failing company doctrine is based on false premises. On the contrary, it suggests that there may be other considerations, some related to antitrust policy and some not, underlying the failing company defense. The Supreme Court set out some of those considerations in the *International Shoe* case when it held that the "seriously injurious consequences" which would ensue if the merger was not permitted—*i.e.*, "loss to [McElwain's] stockholders and injury to the communities where its plants were operated"—excused the merger. The prevention of bankruptcy "precludes or minimizes losses to stockholders and creditors of the 'failing firm' and thus prevents adverse repercussions throughout the economy." [49]

Congress was not specific in defining its reasons for carrying the failing company doctrine forward into amended Section 7. However, in view of the Court's concern expressed in *International Shoe* and in view of "the rather obvious legislative bias in favor of small businessmen and tradespeople" apparent in the legislative history of Section 7,[50] it is perhaps true that "the strongest reasons" for the failing company doctrine "stemmed from a legislative concern over the various interests involved in the life of a failing enterprise. Creditors, owners, employees—all could have an interest in avoiding a total collapse or in realizing as high a selling price as possible." [51] Small businessmen were

[47] See generally, Bain, *Barriers to New Competition*, 13, 52–56, *passim* (1956).

[48] See Low, *supra* note 6, 35 Ford. L. Rev. at 428; Comment, *supra* note 1, 61 Mich. L. Rev. at 577–78; *cf.* Comment, *supra* note 13, 68 Yale L.J. at 1662–68.

[49] Note, *supra* note 44, 45 Va. L. Rev. at 425.

[50] Bok, *supra* note 12, 74 Harv. L. Rev. at 340; see, *e.g.*, 1950 Senate Hearings at 70, 99–105, 115, 198.

[51] Bok, *supra* note 12, 74 Harv. L. Rev. at 340 (footnote omitted); see Wiley, *supra* note 1, 42 B.U.L. Rev. at 511; Hearings on H.R. 988, 1240, 2006, 2734, Before a Subcommittee of the House Committee on the Judiciary, 81st Cong., 1st Sess. 30 (1949); *cf.* Hearings on H.R. 515 Before a Subcommittee of the House Committee on the Judiciary, 80th Cong., 1st Sess. 10–11 (1947) (then Representative Kefauver stated that *International Shoe* is a "very definite precedent to protect the public and the owner"). But *cf.* 1950 Senate Hearings 134–36 (remarks of Representative Patman).

not to be required to sell their firms and their assets in a forced sale at distressed prices; their savings and their property were not to be sacrificed to antitrust policy. A contrary decision by Congress would have added to the already considerable risks confronting new or small business enterprises and might have seriously impeded the flow of capital into such firms.[52] Finally, it has also been argued that the failing company doctrine is justifiable on strict antitrust grounds as a means for facilitating the withdrawal from the market of seriously inefficient firms.[53]

Whatever the merits of each of these contentions concerning the basis for the doctrine, it is clear both that the failing company doctrine is not premised solely on the simplistic notion that mergers involving a failing firm can never affect competition and that the doctrine is not based only on antitrust considerations. On the contrary, 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.

Certainly, if this is the policy involved, it is better served by Certified's sale as a going concern than by sale of its assets in bankruptcy.[54] Sale as a going concern helps minimize the impact on stockholders, creditors, employees, and the communities in which Certified's facilities are located. Continued operation by Certified will, of course, protect its employees and the community and simultaneously affords shareholders and creditors an opportunity to salvage a greater proportion of their investment.[55]

It may be that the line should be drawn somewhat differently in defining what constitutes "failure" [56] and that the availability of alternative purchasers should be examined carefully before a merger is approved on failing company grounds.[57] Perhaps, in

[52] See, *e.g.*, 1950 Senate Hearings at 102–05, 115–16; Note, *supra* note 44, 45 Va. L. Rev. at 426; *cf.* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts, from Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 363–64 (1968).

[53] See Comment, *supra* note 13, 68 Yale L.J. at 1663; *cf.* Bok, *supra* note 12, 74 Harv. L. Rev. at 340; Low, *supra* note 6, at 431. But *cf.* Hale & Hale, *supra* note 5, 52 Ky. L.J. at 599.

[54] The examiner suggested that failure to allow the merger would enable United States Steel, which was Certified's major creditor and which had secured much of its outstanding loan with mortgages on Certified's assets, to acquire Certified's assets in bankruptcy. Initial decision 87 [71 F.T.C., at 480].

[55] See Comment, *supra* note 1, 61 Mich. L. Rev. at 579; Low, *supra* note 6, 35 Ford. L. Rev. at 440.

[56] See authorities cited, *supra* note 6; Bok, *supra* note 12, 74 Harv. L. Rev. at 342–45.

[57] See authorities cited, *supra* note 36.

view of the large number of cases involving failing company issues disposed of informally by the antitrust agencies,[58] a reappraisal of the doctrine's effect on antitrust enforcement may be in order. However, regardless of what shortcomings or undesirable effects the failing company doctrine is thought to have, the Commission is bound to implement it—and not merely, as we have been doing, in unreviewed advisory opinions issued *ex parte*. We are not free to amend the defense, dilute it, or circumvent its purpose by treating the fact that an acquired firm was failing as merely one factor to be considered in assessing the "public interest" impact of the merger. Nor does the Commission's expertise equip it to make the elaborate inquiry necessary to deal with the complex problem of determining in each case what weight to assign to the injuries that might be suffered by employees, stockholders and others, and then to balance such injuries against the anticompetitive effects foreseen from the merger. In the past, merely ascertaining and evaluating such anticompetitive effects, a function that the Commission was created to perform, has proven to be a difficult and time-consuming task. Moreover, any test such as the Commission proposes would virtually preclude a large firm from acquiring a failing company, even if, as in the instant case, no other purchaser was available. To limit the defense to mergers in which the acquiring company is "relatively or absolutely small * * * amounts almost to an elimination of the exception." [59]

Until such time as the law is changed by Congress, the Commission is not free to rewrite or limit the failing company doctrine in this way. It seems to me that the Commission is constrained to hold that regardless of the impact of a merger on competition, if the acquired company was in fact failing and the other requirements of the doctrine are met, Section 7 is not violated. The failing company defense is just that, a defense to the charge that a particular merger—otherwise anticompetitive—offends Section 7.

FINAL ORDER

The hearing examiner having filed his initial decision in this proceeding dismissing the complaint charging respondent with having violated Section 7 of the Clayton Act, as amended, by its

[58] See, *e.g.*, Federal Trade Commission advisory opinions nos. 165–169, 175–180, 182, 184–189, 296, 297; Low, *supra* note 6, 35 Ford. L. Rev. at 430 and nn. 40, 41; Comment, *supra* note 13, 68 Yale L.J. at 1667.

[59] Hale & Hale, *supra* note 5, 52 Ky. L.J. at 606; see Wiley, *supra* note 1, 41 B.U.L. Rev. at 511.

acquisition of the assets and outstanding capital stock of Certified Industries, Inc.; and

Counsel supporting the complaint having appealed from the initial decision assigning as error the hearing examiner's holding as to the scope of the protection afforded by the failing company defense to a proceeding under Section 7 of the amended Clayton Act and the hearing examiner's holding that the evidence fails to establish that the effect of the acquisition of Certified Industries, Inc., by respondent may be substantially to lessen competition or tend to create a monopoly in any line of commerce; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the appeal of counsel supporting the complaint should be granted and that the initial decision should be modified by striking therefrom the conclusions pertaining to the failing company defense, the conclusions pertaining to the competitive effect of said acquisition, and the order dismissing the complaint:

It is ordered, That the hearing examiner's initial decision be modified by striking therefrom the conclusions beginning on page 59 [71 F.T.C. 395, 455] with the words "V. Competitive Effect" and ending on page 92 [71 F.T.C. 395, 485] thereof and substituting therefor the findings and conclusions contained in the accompanying opinion.

It is further ordered, That the initial decision be modified by striking therefrom the order dismissing the complaint and substituting therefor the following:

I

It is ordered, That respondent, United States Steel Corporation, divest all stock and/or assets acquired by United States Steel Corporation as the result of its acquisition of Certified Industries, Inc., together with all additions thereto and replacements thereof, to a purchaser approved by the Federal Trade Commission who shall operate said assets as a going concern in the ready-mixed concrete industry. It is further ordered that United States Steel Corporation begin to make good faith efforts to divest said stock and/or assets promptly after the effective date of this Order, and that it continue such efforts to the end that the divestiture thereof be accomplished within one (1) year.

II

It is further ordered, That, pending divestiture, United

States Steel Corporation not make any changes in any of the aforesaid stock and/or assets which would impair their present capacity for the production and sale of ready-mixed concrete, or other products produced, or their market value.

III

It is further ordered, That, in the aforesaid divestiture, none of the stock and/or assets be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee, or agent of, or under the control or direction of, United States Steel Corporation or any of its subsidiaries or affiliates, or to any person who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of United States Steel Corporation or any of its subsidiaries or affiliates.

IV

It is further ordered, That United States Steel Corporation, for a period of ten (10) years from the date this Order becomes final, cease and desist from acquiring, directly or indirectly, by any device or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in the production and/or sale of ready-mixed concrete without the prior approval of the Federal Trade Commission.

V

It is further ordered, That United States Steel Corporation, within sixty (60) days from the effective date of this Order, and every sixty (60) days thereafter until it has fully complied with the provisions of this Order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this Order. All compliance reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this Order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

Commissioner Elman dissented and filed an opinion. Commissioner MacIntyre did not participate. Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

IN THE MATTER OF

STATESMAN LIFE INSURANCE COMPANY [1]

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8686. Complaint, May 23, 1966—Decision, Dec. 2, 1968

Order terminating a proceeding charging a Houston, Texas, mail-order insurance company with using deceptive means of selling its insurance policies.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Statesman Life Insurance Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Statesman Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3603 Montrose Boulevard in the city of Houston, State of Texas.

PAR. 2. Respondent is now, and for some time last past, has been engaged as insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act. As a part of said business in "commerce," respondent enters into insurance contracts with insureds located in various States of the United States other than the State of Texas in which

[1] Now known as Statesman National Life Insurance Company.

States the business of insurance is not regulated by State law to the extent of regulating the practices of respondent alleged in this complaint to be illegal.

PAR. 3. Respondent, in conducting the business aforesaid, has sent and transmitted and has caused to be sent and transmitted, by means of the United States mails and by various other means, letters, application forms, contracts, checks and other papers and documents of a commercial nature from its place of business in the State of Texas to purchasers and prospective purchasers located in various other States of the United States and has thus maintained a substantial course of trade in said insurance contracts or policies in commerce between and among the several States of the United States.

PAR. 4. Respondent is licensed, as provided by State law, to conduct the business of insurance only in the State of Texas. Respondent is not now, and for some time last past has not been, licensed as provided by State law to conduct the business of insurance in any State other than the State of Texas.

PAR. 5. Respondent solicits business by mail in various States of the United States in addition to the State named in Paragraph Four above. As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business as it is not subject to the jurisdiction of such States.

PAR. 6. In the course and conduct of said business, and for the purpose of inducing the purchase of said policies, respondent has made, and is now making, numerous statements and representations concerning said policies by means of circulars, folders and other advertising material disseminated throughout various States of the United States. The original mailing of said advertising consists of a sealed brown-colored window envelope 7 and 5/8 inches long and 3 and ½ inches wide containing a printed return address and a postage permit as follows.[2]

The envelope described and pictured above contains a form letter (and an application form) stating in part as follows:

Dear Veteran:

This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify for insurance can now buy up to $10,000 maximum life insurance at the same low basic rates used by the V.A. under the G.I. insurance program of World War II.

[2] Pictorial envelope omitted in printing.

When the Government stopped selling insurance to military personnel in 1956 this company began issuing life insurance to service men throughout the United States at these rates. The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides $10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely Yours,

Veterans Insurance Division
Statesman Life Ins. Co.

PAR. 7. By and through the use of the aforementioned statements and representations, and others of similar import, respondent has represented, directly or by implication, that the insurance offered for sale by respondent is the same as, or is equal to, the insurance formerly made available to servicemen by the United States Government during World War II.

PAR. 8. In truth and in fact, in at least one respect the insurance offered by respondent differs from insurance made available to servicemen by the United States Government during World War II. The net cost of the government insurance is substantially lower than respondent's insurance by reason of the fact that a large amount of the premiums paid on said government policies is returned in the form of dividends.

Therefore, the statements and representations as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. By and through the use of the aforementioned trade name and style "Veterans Insurance Division," by the means and in the manner aforesaid and otherwise, respondent has suggested and represented to recipients of such advertising that it has been mailed by, and that the insurance referred to therein is offered, approved, endorsed or recommended by the Veterans Administration or some other office or agency of the U.S. Government.

PAR. 10. In truth and in fact the advertising referred to in Paragraph Nine has not been mailed by, nor is the insurance referred to therein offered, approved, endorsed or recommended by, the Veterans Administration or any other office or agency of the U.S. Government.

Therefore, the statements and representations, including the use of the trade name and style "Veterans Insurance Division" as set forth in Paragraphs Six and Nine hereof, were and are false, misleading and deceptive.

PAR. 11. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same general kind and nature as that sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's policies by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Edward F. Downs and *Mr. Robert A. Mattina* supporting the complaint.

Mr. A. Alvis Layne and *Mr. Walter T. Evans,* Washington, D.C., for the respondents.

INITIAL DECISION BY ANDREW G. GOODHOPE, HEARING EXAMINER

DECEMBER 8, 1967

The Federal Trade Commission issued its complaint against respondent on May 23, 1966, charging it with violations of Section 5 of the Federal Trade Commission Act. The respondent filed an answer in which it admitted certain allegations of the complaint but denied it had violated Section 5 of the Federal Trade Commission Act. The complaint alleged that the respondent had made certain representations in commerce pertaining to its insurance policies. The complaint alleged that these representations were false and misleading since they claimed that the insurance offered for sale by the respondent is the same as or is equal to the insurance made available to servicemen by the United States Government during World War II, and further that this insurance is offered, approved, endorsed or recommended by the Veterans Administration or some other office or agency of the United States Government.

In its answer respondent admitted its corporate existence, that it is licensed to conduct the business of insurance only in the State of Texas and in no other States. The answer further alleged that the Federal Trade Commission has no jurisdiction over the respondent.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence, the proposed findings of fact and conclusions and briefs filed by counsel for the respondent and counsel in support of the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACTS

1. Respondent Statesman Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3603 Montrose Boulevard, Houston, Texas. In May 1967 the name of the company was changed to Statesman National Life Insurance Company (Tr. 150; Resp. Ans., Para. 1).

2. The respondent is now and has been engaged as an insurer in the business of selling insurance in various States of the United States. In conducting its insurance business the respondent has sent and transmitted and has caused to be sent and transmitted, by means of the United States mails and by various other means, letters, application forms, contracts, checks and other papers and documents of a commercial nature from its place of business in the State of Texas to purchasers and prospective purchasers located in various other States of the United States and has thus maintained a substantial course of trade in said insurance contracts or policies in commerce between and among the several States of the United States (Tr. 169, 176–179; CX 12, 13; see also Appendix A attached hereto).

3. Respondent is licensed, as provided by State law, to conduct the business of insurance only in the State of Texas. Respondent is not now, and has not been, licensed as provided by State law to conduct the business of insurance in any State other than the State of Texas (Resp. Ans., Par. 4).

4. Respondent solicits business by purchasing newspaper advertising space and by mail in various States of the United

States in addition to the State of Texas. As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business and it is not, therefore, subject to the jurisdiction of such States.[1] (CX 12, 13; Appendix A; see complaint, Par. Five.)

5. Respondent advertises its policy by means of newspaper ads and direct mail pieces.[2] The initial mailing consists of a sales letter and application card enclosed within a window envelope (Tr. 213, 262). The mailings are sent to men whose names and addresses have been obtained from telephone directories (Tr. 252, 311–12). Respondent does not use mailing lists made up exclusively of veterans or servicemen and does not know at the time of mailing whether the prospect is a veteran (Tr. 252, 311–12). If interested in the policy, the prospect then completes the application and returns it to the respondent and an acknowledgment is mailed by the respondent (CX 8). Respondent later mails, at intervals, two medical follow-up letters reminding the prospect that he must take a physical examination in order to qualify for the policy (Tr. 202–04; CX 4 B, 4 E; RX 22). If the prospect passes the physical examination, a letter (CX 6) is mailed along with a completed policy form (CX 13) and a return addressed envelope (CX 7 C) is mailed with the letter. The return addressed envelope (CX 7 C) enables the prospect to send his initial premium, and thereafter, if the prospect fails to submit the initial premium, respondent makes three further mailings, at intervals, reminding the prospect to send the premiums (Tr. 205–07, 427; CX 4 G, 4 H, 4 F; RX 23).

6. In 1964, respondent mailed to the States of Indiana, Colorado and California (Tr. 157) and has mailed to additional States since 1964 (CX 14 A–B). Mailings are used in the State of Texas but after a prospect completes the application and returns it to the respondent, further dealings with the prospect are made through company agents. Respondent's application blanks filled out by a prospect do not call for information as to whether the

[1] Prior to hearings, respondent made a motion to dismiss the complaint for lack of jurisdiction of the subject matter of the complaint by the Commission. This motion was denied by the hearing examiner. This issue is not again raised in the proposed findings or briefs and, therefore, will not again be treated here. Counsel for respondent have, however, reserved the right to present such issue to the Commission on appeal from this initial decision.

[2] Attached hereto as Appendix A and made a part of this initial decision are copies of two of respondent's newspaper ads (CX 36, 37) and a number of respondent's mailing pieces (CX 4A–H, 6, 7A–C, 10, 17, 38, 39).

prospect is a veteran or not (Tr. 312). The record is not clear as to whether the policy will be sold to anyone whether a veteran or not, but the indication is that the policy is available to anyone whether a veteran or not.

7. At present respondent has in effect approximately 2,500 life insurance policies throughout the United States in States other than Texas, and approximately 2,250 such policies in the State of Texas (Tr. 251). During 1967 respondent commenced the sale of health and accident insurance, but such sales are not involved in this proceeding.

8. The first charge in the complaint is that the respondent's newspaper advertising and mail solicitations are false and misleading in that they claim that the respondent is offering for sale insurance that is the same as or is equal to the insurance formerly made available to servicemen by the United States Government during World War II. In such newspaper ads and mail solicitations, such phrases as "at the same low basic rates used by the V.A. under the G.I. insurance program of World War II" (CX 4A, 6, 17, 35, 37); "the policy is the same type policy issued by the Veterans Administration to millions of servicemen during World War II" (CX 4G, 4H, 6, 35); "at low G.I. rates" (CX 4B, 4C, 4D, 4E, 4F, 4G, 6, 10, 17, 36, 37); and "the same basic plan" (CX 22) are constantly repeated. The constant repetition of these and similar statements throughout all of this literature leaves no doubt as to their purpose. The clear import of these phrases is that the $10,000 life insurance policy sold by respondent was the same as a veteran had had during World War II under the National Service Life Insurance (NSLI) program of the Veterans Administration.

9. Counsel for respondent contend that its mailings and newspaper ads, first, never claimed that the respondent's policy was the same as that provided by the NSLI program, and secondly, that respondent's insurance, in fact, is generally the same insurance plan as the NSLI program (Resp. Prop. Findings, pp. 14, *et seq.*, pp. 18, *et seq.*). Both of these contentions must be rejected. As found above, the clear import of respondent's claims is that respondent's policy is the same as that provided by the NSLI program during and after World War II. There are also substantial differences in both the cost of, and the coverage provided by respondent's policy when compared with the NSLI program (Tr. 379, *et seq.*).

10. The principal difference is the rate charged by Statesman as compared to the rate charged for NSLI. This difference

arises from the fact that the Veterans Administration has regularly returned dividends to the NSLI policyholders over the years since World War II. These payments have been substantial and reduce the actual cost of the NSLI to a much lower cost than the insurance offered by respondent. An official of the Veterans Administration, Mr. Thomas Kiernan, appeared and testified and enumerated a considerable number of differences between the respondent's insurance policy (CX 11) and the coverage provided by the NSLI program (CX 16). The return of premiums to holders of the National Service Life Insurance has been approximately 80 to 85% of the total premiums paid at younger ages (Tr. 379, *et seq.*). As a veteran gets older a smaller proportion of the premium is returned, but these returns still amount to a substantial reduction in the cost of NSLI. The respondent has never paid any dividends on any of its policies (Tr. 189, 191).

11. Respondent asserts that in a number of its mailing pieces it uses the language "not counting dividends" when making its claims as to the cost of its insurance. (See Appendix A.) However, the whole emphasis in such mailing pieces is that the cost of the respondent's insurance is the same as that of NSLI and the fact that respondent in some instances inserts this disclaimer is at best confusing and therefore deceptive. The examiner finds, in view of the substantial differences in the costs of the two policies, that any comparison of the two policies which would indicate any similarity in cost must be considered to be false and deceptive (Tr. 379–383).

12. There are a number of other substantial differences in the coverage given by respondent's policy and the NSLI policy:

(A) The Statesman policy provides at least a 3 year waiting period for the payment of dividends. There is no such waiting period in the NSLI policy.

(B) NSLI pays in the event of death as a result of suicide. Respondent's policy has no such provision and will return only premiums in the event of death by suicide within 2 years of the effective date of the policy (Tr. 388).

(C) Dividends may be left in the NSLI fund to draw interest and may be used to prevent lapse of policy. Respondent's policy contains no such option (Tr. 388).

(D) Respondent's life insurance income provision for payment to beneficiaries provides a smaller monthly provision than does NSLI income provision (Tr. 390).

(E) In other than cash settlements under the NSLI policy, payments to beneficiaries are the same regardless of sex. Under the Statesman policy, female beneficiaries receive less than male beneficiaries (Tr. 390–391).

(F) The waiver of premium provision in the event of total disability is an automatic part of the NSLI policy. There is no option to grant it. Statesman reserves the right to refuse to grant it (Tr. 391–392, 170–171).

(G) NSLI provides waiver of premium for total disability up to the 65th birthday. Statesman provides it only to the 60th birthday for males and the 55th birthday for females (Tr. 392).

(H) The Statesman policy excludes total disability resulting from willfully or intentionally self-inflicted injury. The NSLI policy covers total disability arising from such injuries (Tr. 393).

(I) The Statesman policy does not allow for total disability based on loss of feet, loss of hearing, or loss of a hand and an eye or a foot and an eye. The NSLI policy does (Tr. 393).

(J) In total disability matters the Statesman policy requires amputation or severance of both hands. NSLI only requires loss of use of both hands (Tr. 394).

(K) The Statesman premium waiver for total disability does not apply to such disability arising from service in the military, navy, air force, other country, or civilian noncombatant, serving with such forces or resulting from an act of war declared or undeclared, or while committing or attempting to commit an assault or felony. NSLI does not exclude total disability arising under these situations (Tr. 395–396).

13. The second charge in the complaint is that respondent has claimed that its life insurance policies have been approved by the Veterans Administration or some other Government agency. Counsel in support of the complaint offered evidence that established that respondent has frequently made use in its mailings of the words "Veterans Insurance Division." This has been used on respondent's envelopes in which its mailing pieces have been sent as a part of the return address. It has also been used on the letterheads and as a part of the signature of such mailing pieces (CX 4A–4H, 7A–7C, 10, 17). Respondent also makes frequent use of the terms "Veterans Insurance Information" and "For Veterans Only" and similar phrases on its envelopes and mailing pieces (CX 4A, 17, 38). Respondent is not connected in any way with the Veterans Administration (Tr. 399).

14. In addition, counsel in support of the complaint offered evidence that respondent has designed and used envelopes and

enclosures in such envelopes so that they will closely resemble those of an official Government agency. (Compare CX 18, 19, 22, 23 with CX 25, 26, 27, 28, 29, 30, 31, 32.)

15. Counsel in support of the complaint also called as witnesses four consumer witnesses (Tr. 323–352). The testimony of one of these witnesses was stricken (Tr. 331). The testimony of the other three witnesses was vague and uncertain and in the examiner's opinion of doubtful credence (Tr. 333, *et seq.*, 337, *et seq.*, 346, *et seq.*). Consequently, no reliance or weight is given to this testimony in this initial decision.

16. Considered separately, the somewhat similar appearance of respondent's mailing pieces and application forms to that of official Government mail would be entitled to very little weight as establishing the charge of claiming to be connected with or approved by the Veterans Administration or some other Government agency. However, this similarity, the constant use of the titles "Veterans Insurance Division," "Veterans Insurance Information," "For Veterans Only" and the other contents of the advertising and mailing pieces, as found above, must be considered to be capable of, at least, giving rise to confusion in the recipient's or reader's mind. In affirming the Commission in a very similar situation, the Court in *Rhodes Pharmacal Co., Inc.* v. *F.T.C.*, 208 F. 2d 382 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955), stated:

> The important question to be resolved is the impression given by an advertisement as a whole. Advertisements which are capable of two meanings, one of which is false, are misleading. Advertisements which create a false impression, although literally true, may be prohibited. The Federal Trade Commission Act provides, "* * * and in determining whether any advertisement is misleading, there shall be taken into account * * * representations made or suggested * * *" [citations omitted].

In the same fashion, the documentary evidence here involved can cause confusion and is open to the suggestion that it originates with the Veterans Administration. Consequently, these mailing pieces are found to be false and deceptive since they indirectly represent or suggest that such insurance is offered, approved or recommended by the Veterans Administration.

17. In the conduct of its business, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same kind and nature as that sold by respondent (Tr. 194–195, 313–314, 399–400).

18. Counsel for respondent's contentions that respondent was

denied an opportunity for voluntary compliance in this matter and that respondent has abandoned the acts and practices charged are rejected. The fact that respondent may have abandoned its use of "Veterans Insurance Division" after considerable prodding from the Texas Insurance Commission does not warrant the dismissal of this proceeding (CX 65, 66, 67). Also rejected are counsel for respondent's claims that they were denied something to which they were entitled under the Jencks Act. In all instances where such statements existed, they were produced. Only after detailed and lengthy study by the examiner, who specifically made findings on the record that counsel for respondent were not entitled to such documents since they did not qualify for production under the Jencks Act, were other documents kept from respondent's counsel (Tr. 97, *et seq.*, 442, *et seq.*).

CONCLUSIONS

1. Respondent's newspaper ads and mailing pieces used as found above are false and misleading in that they claim that the insurance sold by respondent is the same as or equal to the insurance made available by the Veterans Administration during World War II.

2. Respondent's mailing pieces used as found above are false and misleading in that they have the tendency and capacity to lead the reader thereof to believe that the insurance sold by respondent is or may be offered, approved, or recommended by the Veterans Administration or some other Government agency.

3. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's policies by reason of said erroneous and mistaken belief.

4. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent Statesman National Life Insurance Company (named "Statesman Life Insurance Company" in the Complaint), a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any insurance policy or policies, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the expression "Veterans Insurance Division" or any other words or terms of similar import or meaning.

2. Representing in any manner, directly or by implication, that the literature mailed or sent to prospective purchasers is being sent to them by the Veterans Administration or any other office or agency of the United States Government.

3. Representing, directly or by implication, that respondent is, or respondent's business is, connected in any manner with the United States Government.

4. Representing, directly or by implication, that the insurance offered for sale by respondent is or has been approved, endorsed, or recommended by the United States Government.

5. Representing, directly or by implication, that the net cost of the insurance sold by respondent is the same as or equal to the insurance made available to servicemen by the United States Government during World War II, or otherwise misrepresenting in any manner the cost of the insurance offered for sale by respondent.

6. Representing, directly or by implication, that the coverage of the insurance offered for sale by respondent is the same as or equal to the coverage of the insurance made available to servicemen by the Veterans Administration during World War II.

7. Misrepresenting in any manner the cost, coverage or benefits of the insurance offered for sale by respondent.

APPENDIX A

COMMISSION EXHIBIT NO. 4 A

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify for insurance can now buy up to $10,000 maximum life insurance at the same low basic rates used by the V.A. under the G.I. insurance program of World War II.

When the Government stopped selling insurance to military personnel

APPENDIX A—CONTINUED

in 1956 this company began issuing life insurance to service men throughout the United States at these rates.

The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides $10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely Yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GX:bg
Encl.

P.S. ONLY VETERANS ARE ELIGIBLE.

COMMISSION EXHIBIT NO. 4 B

This is a final reminder that if you would like to obtain life insurance similar to your old G.I. policy *at low G.I. rates*, we must receive the medical information within the next few days.

Many veterans have taken advantage of this opportunity and are delighted with their policies at such low rates. If you will take the enclosed medical form to a doctor of your choice, chances are good that you too can have this low priced protection for your loved ones.

Make an appointment and have it taken care of this week.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Divisions,
Statesman Life Ins. Co.

GFS:gg

COMMISSION EXHIBIT NO. 4 C

Have you seen your doctor yet for the medical examination that may enable you to obtain life insurance at low G.I. rates?

We find that we can issue policies for a high percentage of those who are examined, but we do need the medical information before we can proceed to send you your policy.

Don't miss this opportunity! Remember the policy is the same type plan you had when you were in the service—$10,000 unrestricted coverage in peace or war—*and at low G.I. rates.*

Take the medical form this week to a doctor of your choice, so that you may have this vital protection for your family.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GFS:gg

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 4 D

Have you seen your doctor yet for the medical examination that may enable you to obtain life insurance *at low G.I. rates?*

We find that we can issue policies for a high percentage of those who are examined, but we do need the medical information before we can proceed to send you your policy.

Don't miss this opportunity! Remember the policy is the same type plan you had when you were in the service—$10,000 unrestricted coverage in peace or war—and at low G.I. rates.

Take the medical form this week to a doctor of your choice, so that you may have this vital protection for your family.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GFS:gg

COMMISSION EXHIBIT NO. 4 E

This is a reminder that you still have the opportunity to obtain life insurance at low G.I. Insurance rates.

Before we can issue your policy, however, we need the medical information requested. We recognize that it is sometimes difficult to find a convenient doctor. You might check physicians in the yellow pages of the phone book to find a convenient doctor's office. The Company will pay the fee.

Do not delay—go to a doctor today so that you can obtain this valuable protection for your family.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GFS:gg

COMMISSION EXHIBIT NO. 4 F

We have not yet received the first premium that would automatically put into force the life insurance policy we sent for your consideration a short time ago.

Don't let this opportunity pass you by. You have taken the trouble to be examined, and you know that right now you can qualify for this insurance. Now only one more step is needed to put it into force.

Millions of veterans dropped their G.I. Insurance after World War II, and wish that they had kept it. Here is a chance that may not come again, to replace that policy with similar type coverage at low G.I. rates.

APPENDIX A—CONTINUED

Mail your check TODAY with the enclosed notice. Your policy will become effective immediately.

Sincerely yours,

G. L. GRAVES
Veterans Insurance Division,
Statesman Life Ins. Co.

GLG:lb
Encl.

COMMISSION EXHIBIT NO. 4 G

Have you read the life insurance policy that we recently mailed to you? Notice that it is the same type policy issued by the Veterans Administration to millions of servicemen during World War II.

It gives you unrestricted coverage in peace or war, and at low G.I. rates.

Your coverage becomes effective as soon as you mail the first premium. Right now you know your health is good enough to qualify for this insurance. This may not always be so.

If you have not already done so, mail your check today and have the satisfaction of knowing you have provided more security for your family.

Sincerely yours,

G. L. GRAVES
Veterans Insurance Division,
Statesman Life Ins. Co.

GLG:lb

COMMISSION EXHIBIT NO. 4 H

Enclosed is another premium notice for your insurance policy recently mailed to you.

It is urgent that you return the premium within 30 days of the due date in order for your policy to become effective. Send in a money order or your check today. The enclosed premium notice can be used as a convenient check form if you desire.

Remember that you have the same basic policy issued by the Veterans Administration to millions of servicemen and at the same low rate schedule as G.I. insurance. Be sure to obtain this valuable protection for your family by mailing in your premium now.

Sincerely yours,

G. L. GRAVES
Veterans Insurance Division,
Statesman Life Ins. Co.

GLG:lb
Encl.

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 6

STATESMAN LIFE INSURANCE COMPANY
3603 Montrose, Houston, Texas 77006

DEAR POLICYHOLDER: We are happy to enclose your life insurance policy issued at the same rate as the G.I. Insurance program administered by the Veterans Administration during and following World War II. This Company is not associated with the V.A. or other government agency but is an Old Line Legal Reserve Life Insurance Company which specializes in serving military personnel and veterans.

The enclosed policy is a five year renewable and convertible plan which is guaranteed renewable on the same plan or convertible to your choice of any of the Company's cash value plans. It also contains a dividend provision. Dividends depend upon mortality and should not be expected during the first few years.

After World War II many veterans "dropped" their G.I. Insurance, later realizing that this was a serious mistake. With the enclosed policy you now have very valuable protection for your family. Prompt premium payments will assure you of continued protection at the same low G.I. Insurance rates.

Please let us know at any time that we can be of service to you.

Sincerely yours,

JAMES L. GUEST,
President.

JLG:gg
encl.

An Old Line Legal Reserve Company Specializing in Service to Military Personnel and Veterans

COMMISSION EXHIBIT NO. 7 A

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 Montrose Blvd.
Houston, Texas 77006

COMMISSION EXHIBIT NO. 7 B

FROM ______________________

____

____

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 7 C

Postage
Will Be Paid
by
Addressee

No
Postage Stamp
Necessary
If Mailed in the
United States

BUSINESS REPLY MAIL

First Class Permit No. 8868 Houston, Texas

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

COMMISSION EXHIBIT NO. 10

Postage
Will be Paid
by
Addressee

No
Postage Stamp
Necessary
If Mailed in the
United States

BUSINESS REPLY MAIL

First Class Permit No. 8868 Houston, Texas

STATESMAN LIFE INSURANCE COMPANY
VETERANS DIVISION
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

YES, I WOULD LIKE MORE IMFORMATION ABOUT
LIFE INSURANCE AT LOW G.I. RATES *

I AM NOW ______ YEARS OLD. MY BRANCH OF SERVICE WAS ________________

For Men Who Have Been in the Military Service, Reserves or National Guard.

* Since G.I. rates may be withdrawn at any time, mail this card today!!—No obligation, of course.

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 17

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance. The Veteran whose health is still good enough to qualify can now buy up to $10,000 maximum life insurance—and at the same low basic rates charged by the V.A. for G.I. Insurance of World War II not counting dividends.

After the Government stopped selling insurance to military personnel this company began issuing life insurance to service men throughout the United States at these rates.

The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides $10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. Insurance, act immediately while this program is still available—Mail the enclosed card today.

Sincerely yours,

G. L. GRAVES,
Veterans Insurance Division,
Statesman Life Ins. Co.

P.S. The V.A. has re-opened G.I. Insurance to veterans with a service-connected disability but not to veterans in good health. Veterans in good health are eligible with this company, as explained above. MAIL THE CARD TODAY!! ONLY VETERANS ARE ELIGIBLE.

COMMISSION EXHIBIT NO. 35

VETERAN DID YOU DROP YOUR GI INSURANCE?
HERE IS GOOD NEWS!

[Picture of Veteran]

You can now buy up to $10,000 insurance
at the same basic low rates used by the
VA under the GI Insurance Program of
World War II, exclusive of dividends.

Policy is the same basic plan issued to
millions of servicemen during World War II.

$10,000 world-wide, unrestricted coverage
in peace or war.

APPENDIX A—CONTINUED

Exhibit No. 35—continued

YES I WANT LIFE INSURANCE AT LOW GI RATES.
For Men Who have Been in Military Service, Reserves or National Guard
Monthly Rate for $10,000 Policy (Same as G.I. Insurance, exclusive of dividends.)

Age		Age		Age	
17	$6.40	29	$7.00	41	$8.70
18	6.40	30	7.10	42	8.90
19	6.50	31	7.20	43	9.20
20	6.50	32	7.30	44	9.50
21	6.50	33	7.40	45	9.90
22	6.60	34	7.50	46	10.30
23	6.60	35	7.60	47	10.80
24	6.70	36	7.70	48	11.40
25	6.70	37	7.90	49	12.00
26	6.80	38	8.10	Older Age	
27	6.90	39	8.30	Rates Upon	
28	6.90	40	8.50	Request	

Send No Money * * * No Agent Will Call

Mail This Coupon Now!

APPLICATION FOR $10,000* LIFE INSURANCE

TO STATESMAN LIFE INSURANCE COMPANY,
3603 MONTROSE BLVD., HOUSTON, TEXAS
FOR RENEWABLE AND CONVERTIBLE 5-YEAR TERM INSURANCE

Do not send money with this application. No agent will call. Date of birth ____________ Amount of insurance applied for (Check one) [ ] $10,000 or [ ] $5,000 Height ________ Weight ________
Name of Beneficiary ____________ Relationship ____________
Do you know of any impairment now existing in your health or physical condition? ☐ No ☐ Yes
Have you consulted a physician for any illness during the past three years? ☐ No ☐ Yes
If yes to either question give particulars, including name and address of physician, date and reason ____________
Name and Address of Applicant
____

I HEREBY APPLY FOR THE INSURANCE ABOVE, Information in this application is given to obtain this insurance, and is true and complete to the best of my knowledge and belief. The Company shall incur no obligation because of this application unless and until the first premium is received subsequent to a billing therefor while the health or other conditions affecting the insurability of the Applicant are as described in this application. I hereby authorize any physician to disclose to the Company medical information relating to this application.

Date ________ Signature of Applicant ____________

* Since This Offer May Be Withdrawn at Any Time —Mail This Coupon Today

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 36

VETERANS!
Did you drop your G. I. Insurance?
Here is good news

Same basic policy now available at the same low rates, exclusive of dividends. Tear out this ad and mail it with your name, address and date of birth for free information.

No salesman will call!

Statesman National Life
Insurance Company
3603 Montrose, Houston, Texas
Name ______________________________ Date of birth____________
Address ____
City ____________________________________ State ____________

COMMISSION EXHIBIT NO. 37

NOW "G.I. INSURANCE" TYPE POLICY
FOR ANYONE IN GOOD HEALTH!

[Picture of Veteran]

You can now buy up to $10,000 insurance
or more at the same low premium rates
used by the V.A. under the G.I. Insurance
Program of World War II, exclusive of dividends.

Policy is the same type issued to millions
of servicemen during World War II.

Worldwide, unrestricted coverage, in peace or war.
Yes, I want life insurance at Low G.I. Rates—Same as V.A. rates
for G.I. Insurance of World War II, exclusive of dividends
Monthly Rate for $10,000 Policy

Age		Age		Age	
17	$6.40	32	$7.30	46	$10.30
18	6.40	33	7.40	47	10.80
19	6.50	34	7.50	48	11.40
20	6.50	35	7.60	49	12.00
21	6.50	36	7.70	50	12.70
22	6.60	37	7.90	51	13.50
23	6.60	38	8.10	52	14.40
24	6.70	39	8.30	53	15.40
25	6.70	40	8.50	54	16.50
26	6.80	41	8.70	55	17.70
27	6.90	42	8.90	56	19.00
28	6.90	43	9.20	57	20.50
29	7.00	44	9.50	58	22.10
30	7.10	45	9.90	59	24.00
31	7.20				

APPENDIX A—CONTINUED

Exhibit No. 37 continued

Send No Money No Agent Will Call

GUARANTEE: Policy sent on 10-day approval.
Don't pay unless it is just what you expect it to be!

Mail This Coupon Now!

PLEASE PRINT

APPLICATION FOR $10,000 LIFE INSURANCE

STATESMAN LIFE INSURANCE COMPANY,
3603 MONTROSE BLVD., HOUSTON, TEXAS
RENEWABLE AND CONVERTIBLE 5-YEAR TERM INSURANCE

DO NOT SEND MONEY WITH THIS APPLICATION. NO AGENT WILL CALL. Date of birth ____________ ____

Amount of Insurance applied for (Check One) ☐ $10,000 or ☐ $__________

Height ___________ Weight ____________

Name of Beneficiary __________________ Relationship ____________________

Do you know of any impairment now eixsting in your health or physical condition? ☐ No Yes ☐

Have you consulted a physician for any illness during the past three years? ☐ No Yes ☐

If yes to either question give particulars, including name and address of physician, date and reason.

Name ________________________________ ________________________________

Street ________________________________

City _________________State __________ ________________________________

I HEREBY APPLY FOR THE INSURANCE ABOVE. Information in this application is given to obtain this insurance and is true and complete to the best of my knowledge and belief. The Company shall incur no obligation of this application unless and until the first premium is received subsequent to a billing therefor while the health or other conditions affecting the insurability of the Applicant are as described in this application. I hereby authorize any physician to disclose to the Company medical information relating to this application.

Date ______________ Signature of Applicant _____________________________

COMMISSION EXHIBIT NO. 38

STATESMAN LIFE INSURANCE COMPANY
3603 Montrose, Houston, Texas 77006

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify can now buy up to $10,000 maximum life insurance—and at the same low basic rates charged by the V.A. for G.I. Insurance of World War II, not counting dividends.

APPENDIX A—CONTINUED

After the Government stopped selling insurance to military personnel this company began issuing life insurance to servicemen throughout the United States at these low rates.

The success of this program for servicemen made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of servicemen during World War II. It provides $10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. Insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely yours,

J. L. GUEST,

President.

P.S. Only Veterans Are Eligible—apply now before these low rates are withdrawn—mail the card NOW.

OPINION OF THE COMMISSION*

DECEMBER 2, 1968

BY NICHOLSON, *Commissioner:*

This matter is before the Commission on the appeal of respondent from an initial decision of the hearing examiner holding that respondent has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in various unfair methods of competition and unfair and deceptive acts and practices in commerce in connection with the sale of insurance.

Respondent is a croporation organized and existing under the laws of the State of Texas, with its principal place of business located in Houston, Texas. Respondent is licensed to conduct the business of insurance only in that State, and it has not for sometime past been licensed to conduct such business in any State other than Texas.[1]

Statesman operates as a typical mail order insurer with respect to the business it does outside of Texas. All such business is sought by postal solicitations or local newspaper advertising.[2] Respondent has no offices, agents or brokers in any State but Texas, and all application forms, contracts, payments and other insurance papers are transmitted by means of the United States

* Respondent's name was changed in May 1967 to Statesman National Life Insurance Company. (Tr. 150–151.)

[1] Resp. Ans. paras. 1, 4.

[2] Tr. 169: See, *e.g.*, CX 4a–h, 6, 7a–c, 17, 36–39.

mails from and to its Texas offices. Mailings are also used to make initial contact with Texas residents, but once an application from such a prospect is received, all further dealings are handled through company agents.[3]

Respondent reported to the Commissioner of Insurance of the State of Texas that in 1966 it had policy holders in 36 States plus the District of Columbia.[4] The record also shows that respondent mailed solicitations to, or placed newspaper advertisements from August 1963 to July 1964 in, California, Colorado, Indiana, Kansas, Missouri, Oklahoma and Washington. From March through July 1967, it advertised in Arizona, North Carolina, New Mexico, Kansas, Florida and New York.[5] In 1966, insureds located outside the State of Texas paid respondent \$209,778.98, compared to the \$239,330.43 received from insureds resident in that State.[6] Mr. James Guest, the president and principal stockholder of Statesman, testified that as of June 30, 1967, the company had 4,807 policyholders, 53% of whom resided outside the State of Texas.[7]

The complaint which issued against respondent was concerned essentially with certain features of Statesman's advertising which were alleged to falsely imply, suggest or claim that the life insurance it offers is the same as or equal to that offered to military personnel by the Federal Government during World War II, and that the Veterans Administration or some other agency of government has approved, offered or recommended this particular insurance. The only specific difference alleged in the complaint between the policy offered by Statesman and that which had been offered through the government's National Service Life Insurance program (NSLI) concerned the net cost of each to the insured, although evidence was introduced comparing coverage, conditions of liability and other features.[8] The hearing examiner concluded that the charges were sustained and issued an order appropriate to his findings.

In urging us to reverse the examiner, respondent argues that

[3] The remainder of this opinion will concern itself only with the interstate aspects of respondent's business. See Part I *infra*.

[4] Respondent reported insureds in the following States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington and West Virginia. (CX 42, p. 45.)

[5] CX 12 Tr. 172, 258–9.

[6] CX 42, p. 45.

[7] Tr. 251.

[8] See I.D., Finding No. 12.

that McCarran Act removes it from FTC jurisdiction; that the Commission abused its administrative discretion by initiating formal adjudicatory proceedings without affording it the opportunity to informally dispose of the matter under § 2.21 of the Rules; that its right to defend against the charges was wrongly limited by the examiner's refusal to exercise his responsibilities under the "Jencks" rule; that the record does not establish any violation on the merits; and, finally, that respondent has abandoned the bulk of the advertising challenged here and relied upon by the examiner.

I

The parties to this proceeding do not agree on the proper interpretation and application of the McCarran-Ferguson Act phrase "regulated by State law."[9] Respondent has continually maintained that the Commission is without jurisdiction in this matter, because the States have adopted comprehensive legislation to oversee and control insurance practices within their borders. Complaint counsel, on the other hand, have argued that the mere adoption of regulatory legislation by the States does not satisfy the statute, since legislation must be "effective" to constitute regulation and that is presently not the case with respect to the application of these laws to Statesman.

On May 19, 1967, the hearing examiner ruled on a motion filed by respondent to dismiss the complaint insofar as it related to the 18 States which had enacted the Uniform Unauthorized Insurers False Advertising Process Act[10] or one in effect similar thereto.[11] Respondent had urged that the adoption of this legis-

[9] 59 Stat. 33, 34 (1945), 15 U.S.C.A. §§ 1011–15 (1965). Hereafter, the statute will be referred to as the McCarran Act.

[10] The purpose of this act is to subject mail order insurers to the jurisdiction of the State courts and State insurance commissioners in those States where they are doing business without having secured a license. It provides that in the case of certain misrepresentations the commissioner, through notice to the offending insurer and the commissioner in the insurer's State of domicile shall give 30 days for cessation of a challenged practice, whereupon, if not stopped, he may proceed formally against the insurer pursuant to the terms of the model Unfair Trade Practices Act for the Insurance Industry. The latter Act has been adopted in some form in all 50 States. For the text of these Acts, see CX 68 and 69.

[11] According to respondent's motion, the following States have such a law: California (West's Ann. Calif. Code, § 1620 of Ins. Code); Illinois (Smith-Hurd Ill. Ann. Stats. Chapter 73, § 725.1); Indiana (Burn's Ind. Stats. 39–5701, *et seq.*); Kansas (Kan. Stats. Ann. 40–2415, *et seq.*); Louisiana (West's La. Rev. Stats. 1231, *et seq.* (1966 Supp.)); Maine (Me. Rev. Stats. Ann. Title 24, § 271–275); Maryland (Ann. Code of Md. Article 48A, § 235, *et seq.*); Minnesota (Minn. Stats. Ann. § 72.41, *et seq.* (1966 Supp.)); Nebraska (Neb. Rev. Stats. § 44–1801, *et seq.* (1965 Cumulative Supp.)); Nevada (Rev. Nev. Stats. § 686.480); New Hampshire (N.H. Rev. Stats. Ann. § 406A:1 (1965 Supp.)); North Carolina (N.C. Gen. Stats. § 58–54.14 (1965 Supp.)); North Dakota (N.D. Century Code § 26–09A–01, *et seq.*); Ohio (Page's Ohio Rev. Code Ann. § 3901.24, *et seq.* (1965 Supp.)); South Dakota (S.D. Ins. Laws. Chapter 13, § 25); Texas (Vernon's Tex. Civil Stats. Article 21.21–1 of Ins. Code); Utah (Utah Code Ann. § 31–36–1); Wisconsin (Wis. Ins. Code § 201.42(1) *et seq.*).

lation subjects the practices of an unauthorized foreign mail order insurer to the jurisdiction of the State insurance commissioner and State courts and thereby removed such practices from FTC jurisdiction. On the basis of *Travelers Health Ass'n* v. *Federal Trade Commission*, 298 F. 2d 820 (8th Cir. 1962), the examiner held that the motion was without merit and must be denied.

The examiner's ruling was treated as the definitive statement of his position, and the jurisdictional question was not again seriously urged before him. Employing the language of the Commission's complaint, he found in his initial decision that:

> Respondent solicits business by purchasing newspaper advertising space and by mail in various States of the United States in addition to the State of Texas [the only State in which it is licensed]. *As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business and it is not, therefore, subject to the jurisdiction of such States.*[12]

The language italicized above, appearing both in the complaint (Par. 5) and the examiner's finding, and the nature of the evidence adduced by complaint counsel at hearings clearly indicate reliance on a theory of jurisdiction which, assuming interstate commerce, looks to the simple question of whether or not a foreign mail order insurer has submitted itself to the licensing procedures of each State in which it solicits or secures business. The validity of such a theory, and, indeed, the entire question of its jurisdiction under the McCarran Act, are matters which have not received extensive Commission consideration for several years. Respondent's challenge now compels a review and restatement of our understanding of the law.

Prior to the decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the issuing of a policy of insurance was not deemed "a transaction of commerce," and, hence, the insurance business was not subject to the commerce powers of the Federal Government. *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Hooper* v. *California*, 155 U.S. 648 (1895); *New York Life Ins. Co.* v. *Cravens*, 178 U.S. 389 (1900); *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U.S. 495 (1913). Over the years, state regulation grew up in response to the peculiar problems which insurance presents, and the industry

[12] I.D., Finding No. 4 (emphasis added).

shaped its activities with regard to purely local public control.[13] It was feared that *South-Eastern Underwriters,* which declared that insurance practices crossing state lines fell under the Commerce Clause, and, thus, were subject to whatever federal regulations as might apply to interstate business, would bring chaos to the industry by overturning the traditional regulatory structure. Upon the urging of the insurance industry, Congress, in the next year, passed the McCarran Act.

The Act, known also as Public Law 15, was a statement of federal policy—in an area where federal authority is supreme—that the continued State regulation and taxation of the insurance business was in the public interest and that Congressional silence should not be construed to impose a barrier to such regulation or taxation. The regulatory framework is set forth in § 2(a)-(b) which states in relevant part:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation of taxation of such business * * *. Provided that * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance *to the extent that such business is not regulated by State law.* (Emphasis added.)

It is clear that in the Congressional scheme the States are empowered to preempt the Federal Government in controlling the activities of insurers, but to the extent that any regulatory vacuum is left by the States, federal control is to fill the void.[14] We believe the overriding policy of the Federal Government, relative to the business of insurance, is that that business is too affected with public interest to be permitted to operate free of public scrutiny and control.

The first Commission case to reach the United States Supreme

[13] Historically, insurance has probably been more pervasively regulated than any other business save the public utilities. For a general treatment of the reasons for and history of governmental regulation of this business, see Patterson, *Essentials of Insurance Law* 1–61 (2d ed. 1957); Hanson and Obenberger, *Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business,* 50 Marq. L. Rev. 175, 182–191 (1966). See also German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).

[14] The arrangement was described by former Michigan Insurance Commissioner Mayerson as follows: "The federal government moves into a vacuum. Federal government can't displace effective state regulation, but it can displace poor or ineffective state regulation." Address to the National Ass'n of Independent Insurers Convention, Nov. 16–19, 1964, p. 14, quoted in Hanson and Obenberger, *supra* note 13, at 180.

This apparently accords with President Roosevelt's understanding of the bill at the time he signed it into law, for he said, "[T]he antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved." Mimeographed White House release, March 10, 1945, as quoted in Thomerson, *Federal Trade Commission Surveys State Insurance Laws,* 1950 Ins. L. J. 333, 335.

Court involving the impact of the McCarran Act on its jurisdiction was *Federal Trade Commission* v. *National Casulaty Co.*[15] There the Commission had issued an order against the respondent which sought to proscribe activities within the boundaries of States that had their own statutes prohibiting unfair and deceptive insurance practices. National was licensed to sell policies in all States. The company solicited business through agents working on a commission basis. Only an insubstantial amount of advertising was sent by mail directly to the public, and none was placed in the mass media. Nearly all of respondent's advertising materials were shipped in bulk by it to the agents for distribution locally.

The Commission argued in *National Casualty* that the general prohibition in the "Model Unfair Trade Practices Bill for Insurance," which had been adopted by about all the States in which respondent did business, was "too 'inchoate' to be 'regulation' until that prohibition has been crystalized into 'administrative elaboration of these standards and application in individual cases.'" 357 U.S. at 564. The Court, in a pre curiam opinion, said that assuming "there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation,' nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner." 357 U.S. at 565. Thus, while the Commission did argue that legislation in the form of unarticulated and undefined standards is ineffective and is not "regulation" under § 2(b) of the Act, the Court only ruled that the specific distinctions drawn were not contemplated by the statute.

The fact that in the ordinary and customary way of doing business of both National Casualty Company and American Hospital Company nearly all of their advertising was distributed by resident agents was of controlling significance in leading the Court to the conclusion that the States had "ample means" to regulate their advertising, for it said:

> Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries. *Cf., e.g., Robertson* v. *California*, 328 U.S. 440, 445, n. 6, 461.[16]

Moreover, the Court emphasized the importance of the resident agents by directing attention to *Robertson* v. *California,* where

[15] 357 U.S. 560 (1958), *affirming Nationcl Casualty* v. *F.T.C.* 245 F. 2d 883 (6th Cir. 1957), and *American Hospital and Life Ins. Co.* v. *F.T.C.*, 243 F. 2d 719 (5th Cir. 1957).

[16] 357 U.S. at 564.

it upheld the power of a State to punish the unlicensed agent of an unlicensed foreign insurer, without reliance upon the McCarran Act, on the ground that inherent in the State's police power is the power to protect its residents against unlicensed out-of-State insurers, until Congress denies such power.

We therefore do not agree with respondents here that *National Casualty* enunciates the broad doctrine that "it is the existence of State regulatory legislation, and not the effectiveness of such regulation, that is the controlling factor."[17] On the contrary, we believe the case decides little more than that the Commission is precluded from acting against the activity of resident agents of an insurer licensed to do business in the States where it operates when those States have passed legislation (conceded to be effective) to oversee insurance practices therein.[18]

In the only other Commission McCarran Act case to reach the Supreme Court, *Federal Trade Commission* v. *Travelers Health Ass'n.*, 362 U.S. 293 (1960), the respondent operated an interstate mail order insurance business with residents of every State. All business was carried on by direct mail from respondent's Omaha, Nebraska, office. Nebraska, the domiciliary and licensing state, had a statute prohibiting unfair or deceptive practices in the insurance business in that State or in any other State. The Court of Appeals had ruled that "with every activity of the [respondent], in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the [respondent's] practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law." 262 F. 2d 241, 244 (8th Cir. 1959). In that court's view, there was no controlling distinction between the case there at bar and *Federal Trade Commission* v. *National Casualty Co.*, *supra,* and the Commission's order was vacated.

The Supreme Court, seizing upon Judge Vogel's dissent that it was "impractical and ineffective" to "force the citizens of other States to rely upon Nebraska's regulation of the long distance

[17] Resp. Br. 16.

[18] We recognize that our reading of National Casualty is contrary to that set forth in Justice Harlan's dissent in *F.T.C.* v. *Travelers Health Ass'n*, 362 U.S. 293, 305 n. 4 (1960). However, we believe that we are being consistent with the position taken in our Brief to the Court in that case, where we said, "The case is not controlled by the holding in *F.T.C.* v. *National Casualty Co.*, 357 U.S. 560, that there is state regulation which ousts the Federal Trade Commission from jurisdiction if the states in which a company is doing business have enacted legislation proscribing unfair insurance advertising *and have ample means to regulate this advertising 'within their respective boundaries.'* " (p. 1348.) (Emphasis added.)

advertising practices [of respondent]" (362 U.S. at 296), reversed. The Court distinguished *National Casualty* as presenting a quite different question. That case involved "the effect of State laws regulating the advertising practices of insurance companies which were licensed to do business within the States and which were engaged in advertising programs requiring distribution of material by local agents." 362 U.S. at 297. "In those circumstances," the Court said, "[we] found there was 'no question but that the States possess ample means to regulate this advertising within their respective boundaries.' 357 U.S. at 564." In the *Travelers* situation, however, the Court said there is no regulation by the States where respondent is not licensed, but "in which the deception is practiced and has its impact." Therefore, the Court ruled that that Commission's authority had not been supplanted and concluded:

> [W]hen Congress provided that the Federal Trade Commission Act would be displaced to the extent that the insurance business was "regulated" by State law, it referred only to regulation by the State where the business activities have their operative force.[19]

The Supreme Court's decision in *Travelers* left open the question of whether there could be regulation by State law, within the meaning of the McCarran Act, by States in which an insurer was not licensed and had no agents, place of business or other reachable assets. 362 U.S. at 298 n.4. On remand, however, Travelers argued that in fact there did exist in each of the States in which it did business legislative provision for local control, "with means for effective enforcement thereof," over any improper advertising material sent into such States, and so the Eighth Circuit Court of Appeals addressed itself to the issue.

To begin, the court said, it must be recognized that the Commission has jurisdiction over respondent with regard to any sending of advertising into other States, for soliciting purposes, "except in the case of such states as have 'regulated' the situation—that is, have adopted legislative provisions which are in legal concept sufficient in their form and in their enforceability to be capable of controlling the mailing of deceptive or other unfair soliciting material by the Association into the state." [20]

The court had no problem with the sufficiency of the statutes of the 48 States in which respondent operated on an unauthorized basis to protect the public interest as to unfair or deceptive insurance practices of firms licensed and with agents resident

[19] 362 U.S. 301–302.

[20] 298 F. 2d 820, 822 (1962).

therein. It was the prospect of enforcement difficulties with respect to situations where an insurer, like Travelers, was not licensed in a particular State and did not operate through resident agents that troubled the court. The court noted that "such states are able to engage in enforcement of their regulatory provisions only by means of reach against [such insurers] outside their own borders," and this circumstance raised in the court's mind the "crucial" question of whether these States are able to "exercise such fullness of compulsion" as to legally provide them with local control.[21]

The problem, the court said, was not that a State would be unable on Constitutional grounds to subject an unauthorized insurer like Travelers to its judicial jurisdiction or to provide adequate notice of proceedings through proper service of process. The Supreme Court's decisions in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957), and *Travelers Health Ass'n.* v. *Virginia,* 339 U.S. 643 (1950), would seem to eliminate such concern, but there still remained the practical inability of the State to subject the unauthorized insurer to legal processes beyond that point. The court said:

> Processive means for exerting pressure against person or through property to effectuate orders, decrees and judgments which have been rendered are inherently a part of the legal concept of control. If they do not exist, or if they are not capable of being given exercise and application so that the element of legal compulsion can be provided by them, there is not conceptually present such power on the part of a state to effect control as to entitle it to be declared that [Travelers'] situation in the state is "regulated by State law." [22]

While in *National Casualty,* the court said, States could look to a "[c]ompany's license to do business, its agency structure, its accounts and balances . . . and the fact that the agents themselves were the persons who were making distribution of the advertising material" as affording means of effectuating orders (298 F. 2d at 824), in the circumstances of the *Travelers* case, the States had no "ample means" for exercising the necessary control. Therefore, the Commission's authority to act was not displaced.

It is apparent to us from this review of the case law that the Commission's jurisdiction over respondent can be limited or supplanted only by State regulatory machinery which is capable of controlling Statesman's promotional practices through its own devices and without resort to the enforcement apparatus of

[21] *Id.* at 823.
[22] *Id.* at 824.

another State. We would concede that no Constitutional barrier stands to the regulation of foreign mail order insurers like respondent by the States in which such firms solicit and secure business. See *Ministers Life and Casualty Union* v. *Haase,* 30 Wis. 2d 339, 141 N.W. 2d 287, *appeal dismissed,* 385 U.S. 205 (1966), and *People* v. *United National Life Ins. Co.,* 58 Calif. Rptr. 599, 427 P. 2d 197, *appeal dismissed,* 389 U.S. 330 (1967). However, despite such jurisdiction, if an insurer, like Statesman, is not present in a State through agents or attachable assets, and if it has not submitted voluntarily to the State's licensing procedures,[23] enforcement of a statute prohibiting deceptive advertising against it is likely to depend upon the willingness of a State of domicile to lend its powers of compulsion for the protection of another State's citizens. Because it is problematical whether such assistance will be forthcoming, the Supreme Court has favored provisions whereby citizens are not deprived of protection by the governmental institutions which are politically responsible to them. Compare *F.T.C.* v. *Travelers, supra,* with *Travelers* v. *Virginia,* 339 U.S. 643, 649 (1950), and *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 223 (1957).[24]

To demonstrate that a severe problem of enforcement exists and that this particular respondent is generally not being regulated, one need only look to the fact that Statesman persists in operating on an unauthorized basis whenever it does business outside of Texas. To so operate violates the compulsory licensing laws which respondent tells us exist in all states,[25] and yet respondent generally feels no compulsion or compunction to conform to these State statutory demands.

---

[23] The license to conduct an insurance business within the boundaries of a given State is viewed as a discretionary franchise enabling the State to exercise a maximum of control over an insurer's operations therein by virtue of the power to revoke or to refuse renewal of the certificate. As Prof. Patterson has written, "Control of the state over insurers is exercised *chiefly* through the licensing power." *Supra* note 13, at 19 (emphasis added). Commonly, the ground for revocation or renewal refusal is the insurer's violation of some aspect of the insurance code, including, of course, fraud and deception.

[24] For a discussion of the barriers to effective enforcement of decrees and judgments against foreign mail order insurers, see Dean, *The Foreign Unauthorized Insurer: A State Regulatory Gap,* 32 Ins. Counsel J. 432, 440–445 (1965); Note, 64 Harv. L. Rev. 482 (1951); Hanson and Obenberger, *supra* note 13, at 272–311.

[25] Resp. Br. 18. See, *e.g.,* § 700 of the California Insurance Code which states in relevant part:

"A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State * * *."

The application of this law to foreign mail order insurers was ruled Constitutional in *People* v. *United National, supra* 12.

It must be acknowledged that respondent does claim to have a sufficient respect for the regulatory capacities of California and Wisconsin to presently refrain from mailing into those States. The Attorney General of California secured a default judgment against Statesman permanently enjoining it from engaging in the insurance business there by mail or otherwise unless and until a license is obtained.[26] As to its reasons for not mailing into Wisconsin, respondent's president testified:

> We never have mailed in the State of Wisconsin because of the Wisconsin type of legislation they have had for several years there. I understand that has been adopted in Colorado. We will not mail into that state nor will we mail into any other state that adopts this type of legislation.[27]

However, whether one could say, in the case of Statesman, that these two States are effectively regulating it so as to remove from FTC jurisdiction its activities in those States is academic. So long as respondent continues to solicit no business there, it does nothing in those States which would concern the Commission. If it commences to seek business there again in violation of an injunction or compulsory licensing law, this contemptuous or casual disregard of the States' regulatory machinery would stand as persuasive evidence that the machinery is too defective for McCarran Act purposes to supplant the Federal Trade Commission.

In any event, to suggest, as respondent does, that the Commission's jurisdiction over an unauthorized mail order insurer is displaced by local regulatory measures which, as a practical matter, are unenforceable and, hence, incapable of effecting compliance therewith, is to suggest that such an insurer be left to operate free of public scrutiny and control. This, we believe, is not what Congress had in mind when it passed the McCarran Act. We therefore decline respondent's invitation to remove from the protection of the Federal Trade Commission Act the citizens of those States where a particular mail order insurer has no permanent agents or reachable assets and which have not succeeded in submitting the insurer to their licensing procedures.

[26] Tr. 253; RX 21.

[27] Tr. 255. The Wisconsin insurance code is examined in depth in Hanson and Obenberger, *supra* note 13, and its Constitutionality with respect to its application to unauthorized mail order insurers was sustained in Ministers Life & Casualty Union v. Haase, *supra*. Legislative developments in various States since the passage of Wisconsin's code are discussed in Manders, *Ministers Life & Casualty Union* v. *Haase: The New Trend in State Regulation of Unauthorized Mail-Order Insurance Companies*, 43 Notre Dame Lawyer 157, 178–180 (1967). Possibly, the solution to the whole problem of what must be done by the States to effectively assume the task of regulating foreign mail order insurers lies with the adoption of a program like Wisconsin's.

II

The Commission is sensitive to its great responsibilities under the statutes which it administers and under the Constitution. In administering the various statutes, we endeavor to conform our official acts to the demands of fundamental fairness, to base the exercise of our authority on reason and to purge our processes of the arbitrary and the capricious. We believe, in the words of Justice Frankfurter, that, "The history of liberty has largely been the history of observance of procedural safeguards." [28] In the case before us, however, respondent argues that we have fallen short of the standard.

Respondent calls into question the right of the Commission to institute formal, adjudicatory proceedings without having offered it the opportunity to modify its practices on a voluntary basis pursuant to Section 2.21 of the Rules of Nonadjudicative Procedures,[29] because of the fact that the FTC had in the past closed an investigation of its predecessor (Cosmopolitan Mutual) involving the same representations without seeking corrective action. According to respondent's counsel, Statesman has been "plainly entrapped" by the Commission into continuing the use of the advertising in question, and the decision to issue a complaint in place of an invitation to settle the matter informally constituted an abuse of discretion.

Complaint counsel, while pointing out that respondent was given every opportunity to enter into a formal consent settlement and that protracted consent negotiations were indeed conducted, reply that nothing in the Administrative Procedure Act [30] requires an agency to accept a settlement when it believes that such action will not insure future compliance with the law. Respondent, as complaint counsel correctly demonstrate, have cited no remotely persuasive authority for the position it advances.

It must be clear to anyone who reads the cited sections that under no stretch of the imagination can § 5(b) of the Procedure

[28] *McNabb* v. *United States*, 318 U.S. 332, 347 (1943).

[29] This section, entitled "Voluntary Compliance," provides in part:

"(a) The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a lew administered by it, *and if it deems the public interest will be fully safeguarded thereby*, may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis." (Emphasis added.)

[30] Section 5(b) of this Act, 60 Stat. 239; 5 U.S.C. 554, provides a basis for the Commission's voluntary compliance procedure. It requires the agencies to make available opportunities for such settlements "where time, the nature of the proceeding, *and the public interest permit*." (Emphasis added.)

Act or § 2.21 of the Commission's Rules be construed to deprive the Commission of the power to institute formal proceedings when it appears that the public interest so requires. (In issuing its complaint in this docket the Commission clearly stated its determination that this proceeding was in the public interest.) Moreover, there are a host of reasons not involving the merits of a given case which would lead to the Commission's administrative decision to take no further action at the time with respect to a pending investigation. Budgetary considerations, policy and planning determinations, manpower allotments, incomplete or faulty factual information in hand, and the prospects of remedial action coming at the instance of another governmental agency are but a few examples.

So that no business firm subject to an investigation will have reason to conclude that the Commission's decision to take no further action against it at that time does not constitute a judgment with res judicata effect, such firms are specifically apprised that the Commission may take whatever action in the future that the public interest might require. Statesman's predecessor was so informed.[31]

While respondent's counsel does not suggest that the closing of the investigation in question had res judicata effect, it does in essence urge that the Commission is completely estopped from exercising its power to make a judgment that the public interest will only be served by the institution of formal proceedings. It is not surprising that counsel can direct our attention to no case supporting such a rule, for, were that the law, the agency would become indistinguishable from a court. Each matter that was presented to it would, for all practical purposes, necessitate a judgment on the merits. Bereft in this manner of its prosecutory discretion, the Commission would be powerless to choose its cases, plan its operations or allocate its resources. It would no longer administer; it would only adjudge. Therefore, seeing no merit in law, fact or reason in respondent's challenge, we are not persuaded by it.

Respondent raises a related argument that the Commission has denied it "equal protection" by choosing to institute formal proceedings against it, while having accepted informal assurances of voluntary compliance from other mail order insurers. However, it is settled law that so long as the Commission's decision to seek a formal order is not patently arbitrary or capricious,

[31] Admission of counsel at oral argument (May 15, 1968; Tr. 24).

the exercise of its discretion to so proceed is within the legitimate scope of its authority.[32]

Respondent's challenge, we believe, falters at the starting gate, for the practices of only one of the firms listed (Resp. Br. 34) bears even a remote relationship to the allegations of the complaint here. Indeed, we find as somewhat astonishing the contention that the Commission must deal on the same basis with every member of a given industry with respect to wholly dissimilar practices. While respondent has not been able to set forth any facts in support of its argument, we are of the opinion that the gravity of the particular misrepresentations alleged in the complaint and their central relationship to Statesman's entire promotional program provide a reasonable basis for the deliberate decision to proceed formally.

III

Respondent's final procedural objections relate to the hearing examiner's performance of the duties imposed upon him by the Jencks rule.[33] Specifically, respondent contends that the examiner (1) failed to inspect a memorandum prepared by complaint counsel reporting on a conference held with three representatives of the Veterans Administration, one of whom, Thomas Kiernan, appeared as a government witness, and (2) incorrectly refused to recall the same witness after the close of trial to permit a determination of whether he, Mr. Kiernan, had adopted or approved any statement contained on a piece of paper bearing notes jotted down by a Commission trial attorney regarding a different meeting (held on August 18, 1966) with Kiernan and his associates and which was not discovered by complaint counsel until after the close of the record, but voluntarily submitted to the examiner shortly thereafter. Neither objection will demand lengthy treatment, for the requirements of the Jencks rule in the circumstances of each incident presented in the appeal are clear.

To begin with respondent's second objection, the record

[32] *Cf., e.g., Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *Rabiner & Jontow, Inc.* v. *Federal Trade Commission*, 386 F. 2d 667 (2d Cir. 1967); *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952; *R. H. Macy & Co.*, Docket 8650 (Interlocutory opinion of September 30, 1965), 68 F.T.C. 1179.

[33] Essentially, the Jencks rule requires that upon proper demand defense counsel is entitled to inspect, for the purposes of aiding his cross-examination, all the written statements of government witness in the possession of the prosecution, made, signed or otherwise adopted or approved by the witness, or any recording thereof which is a substantially verbatim recital of an oral statement. See the Jencks Act, 18 U.S.C. 3500; *Jencks* v. *United States*, 353 U.S. 657 (1957). The Commission has spoken at length on the applicability of the Jencks rule to its proceedings. See *Inter-State Builders, Inc.*, Docket No. 8624 69 F.T.C. 1152; and *L. G. Balfour Co.*, Docket No. 8435 (Interlocutory Orders of April 22, 1966), 69 F.T.C. 1118.

shows that after the examiner received word from complaint counsel of the existance of the notes on the August 18, 1966, conference, he called counsel for both sides together and inspected the piece of paper.[34]

In his judgment, the status of everything in the notes under the Jencks rule was clear. He had no doubts that the notes were devoid of anything which might be within the rule, and he decided that he would not recall Mr. Kiernan for assistance in making the determination.[35] We hold that where the examiner finds that he is "able to determine from its face" that nothing in a writing could be within the coverage of the Jencks rule, he has no duty to inquire further by conducting voir dire of the witness involved, and the simple refusal to do so does not constitute error.[36]

Moving to respondent's first objection, we note that the examiner entertained respondent's request for production of any statements covered by the Jencks rule during a prehearing conference.[37] At a later conference, while respondent was being provided with such statements, complaint counsel indicated that he had a memorandum of an interview with Messrs. Moore, Kiernan and Ogle, which complaint counsel denied was a Jencks statement after inquiry by respondent's counsel.[38] The examiner declined to examine the statement.

The record indicates that respondent's counsel, complaint counsel and the examiner had reached an understanding that all Jencks statements were to be furnished respondent's counsel by virtue of a general demand prior to commencement of hearings.[39] The adoption of such a procedure by agreement of the parties can facilitate the conduct of the hearings, and is not beyond the discretion of complaint counsel. In such event, a respondent has the right to have the examiner himself inspect all purported Jencks statements so that an informed determination may be made. *Cf. Ernest Mark High,* 56 F.T.C. 625, 633 (1959). The examiner may not delegate his ultimate responsibilities under the Jencks rule to complaint counsel, and we therefore find that the memorandum in question should have been inspected by the

[34] See Tr. 442–444.

[35] While the notes in question were not examined until after the close of trial, complaint counsel's typewritten interview report of the August 18, 1966, meeting was inspected by the examiner at a prehearing conference. He found no Jencks statements in that memorandum. See Tr. 120–129.

[36] *Cf. Inter-State Builders, supra; Palermo* v. *United States,* 360 U.S. 343, 354-355 (1959).

[37] See Tr. 30–31, 35–39.

[38] Tr. 111.

[39] Tr. 35–39.

examiner.

Mr. Kiernan's testimony was that of an expert, and it is crucial to complaint counsel's case. Ordinarily, a determination that the examiner has committed error of the sort involved here would lead the Commission to remand the case for appropriate action to cure the procedural defect. It is possible that the examiner in this case would find, after inspecting the memorandum, that it contained absolutely nothing which should be produced under the Jencks rule, and we would then be free to use the Kiernan testimony without further delay. However, because of the disposition we make in the following section, we have decided against a remand.

IV

In approaching respondent's advertising and sales solicitation program, as it is set forth in this record, we believe that the important question to be resolved concerns the impression which is created as a whole.[40] While respondent has, at the insistence of the Texas Insurance Commissioner, discontinued using the phrase "Veterans Insurance Division,"[41] it continues to direct its appeal to veterans or to those who are aware of the fact that a very attractive insurance policy was offered to servicemen and veterans by the Federal Government. The sales letter in use at the time of trial[42] is addressed, "Dear Veteran" even though the addressee's name was probably picked out of a telephone book.[43] (None of respondent's application forms inquire whether the applicant is indeed a veteran.[44]) It asks, "Did you drop your G.I. Insurance?", and then informs the recipient that he "can now buy up to $10,000 maximum life insurance—and at the same low basic rates charged by the V.A. for G.I. Insurance of World War II, not counting dividends. * * * The policy is the same basic plan issued to millions of servicemen during World War II."[45]

[40] *Cf., e.g., Charles of the Ritz Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (2d Cir. 1944). *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F. 2d 382, 387 (7th Cir. 1953) *aff'd.*, 348 U.S. 940 (1955); *Spiegel, Inc.*, Docket No. 8708, Commission opinion p. 12 (July 15, 1968) [p. 211 herein].

[41] See CX 66–67.

[42] RX 12; Tr. 232. See also RX 9–10, which are white window envelopes bearing in the upper left corner "Veterans Insurance Information" and "For Veterans Only" in the same blue print and type face as used by various federal branches and agencies.

[43] Tr. 252.

[44] Tr. 312.

[45] Newspaper advertisements used by respondent in 1967 had the same approach. A soldier is depicted, and the reader is asked if he dropped his G.I. Insurance. He is told, "You can now buy up to $10,000 insurance at the same basic low rates used by the VA under the G.I. Insurance Program of World War II, exclusive of dividends. Policy is the same basic plan issued to millions of servicemen during World War II" (CX 34; Tr. 260).

We find that the total impression created by representations and statements of this nature is that Statesman offers the prospective purchaser a policy that is the same as, or equal to, the World War II NSLI policy of the Federal Government. It appears to us that respondent has tried to come as close to saying that its policy and the VA's were equivalents as it possibly could, without using those words. We think it has tripped over the edge.[46]

The question has now become whether the Statesman policy is in fact the same as, or equal to, the one offered by the government. Here the testimony of Mr. Kiernan would be invaluable. To assay its worth, one need only look at the complete reliance placed upon that witness by the examiner in his findings relative to this issue.[47]

The principal difference in the policies, as alleged in the complaint, is the net cost of the insurance. Complaint counsel attempted to demonstrate on the record that the dividends paid out to policy holders under the NSLI program are substantial in relation to the amount of the premium.[48] Statesman has never paid a dividend on its policy,[49] and so even if its premiums are the same as those which are required by the government, the net cost to the insured is materially different.

Respondent argues that its advertising is perfectly clear in representing only that the premium amounts, and not the dividends, are the same as those of the NSLI policy. Typically, its material will contain a statement that its insurance is available "at the same low basic rates charged by the V.A. for G.I. Insurance of World War II, not counting dividends," or "at the same basic low rates . . . , exclusive of dividends." [50] Respondent placed in evidence a letter of April 28, 1964, from the Texas Commissioner of Insurance approving its addition of the phrase "not counting dividends" to its advertising and expressing the opinion that "this change will eliminate any possible basis of confusion" regarding the two insurance programs.[51]

On the basis of our own examination of respondent's material, we believe that this very crucial difference in the two policies is not adequately disclosed. The simple insertion of "not counting

[46] Compare *Bristol-Myers Co.,* Docket No. 8726, Commission opinion pp. 6–7 (Order Vacating Initial Decision, September 23, 1968) [p. 780 herein].

[47] See I.D., Finding Nos. 10–12. Mr. Kiernan's testimony appears at Tr. pp. 352–415.

[48] Relying on Mr. Kiernan's testimony, the examiner found that NSLI insureds at younger ages received 80 to 85% of total premiums paid in dividends (I.D. pp. 1328–1329).

[49] Tr. 189.

[50] See, *e.g.,* RX 12; CX 34.

[51] RX 13.

dividends" into the promotional material does not strike us as sufficient to overcome the total effect or impact of the advertising. The total impression, we believe, is that if a person buys the Statesman policy, he will be in essentially the same position relative to insurance as he would be under the plan "issued to millions of servicemen during World War II." If Mr. Kiernan's testimony were properly in this record, we could find that this is a substantial misrepresentation.

With regard to the differences in coverage between the policies, we think that there is a serious question as to whether respondent can continue to represent that it sells the "same basic plan" as the government did with the NSLI program. Mr. Kiernan listed numerous areas where Statesman's policy gives less protection,[52] and we believe that a careful review of the entire Statesman "G.I. Insurance" plan is warranted.[53]

Throughout these proceedings, respondent's counsel have endevored to impress upon the Commission the fact that Statesman has cooperated and wants to cooperate in curing its operation of anything which might be illegal. According to counsel, respondent has fully cooperated with this Commission, the Texas Insurance Board, and the Insurance Commissioners of all States. The record does show some voluntary abandonment or modifications of challenged practices by respondent.

The Office of the Commissioner of Insurance of the State of Texas is an effective one. It seems to be concerned with the character of insurance advertising that flows out of its State with its apparent approval. We think the Commissioner should be provided with a copy of the initial decision and the opinion in this case. As we noted earlier, respondent does do a substantial amount of business with Texas citizens, and the Commissioner will undoubtedly want to insure that they are not induced to purchase insurance through deception.

We believe that changes are required in respondent's promotional materials, and we believe that this record, upon the curing of the Jencks problem, would clearly support an order to cease and desist. To a greater extent than was true in *Bristol-Myers*,

[52] Tr. 388–396.

[53] We note our essential concurrence in the examiner's findings that Statesman's advertising materials have at times been so similar to government materials as to be likely to create confusion regarding their origin. (See *e.g.*, CX 7a, 15, 18, 19, 29 and 32.) The steps taken by respondent to eliminate the possible confusion have not been great. (See CX 7a, 15, 66–67; RX 6–8.) However, we do not believe that there is a significant danger that materials shown by the record to be current will lead a reader thereof to believe the insurance sold by respondent is or may be offered, approved, or recommended by the Veterans Administration or some other Government agency.

supra note 47, this respondent has tried to tip-toe on the edge of illegality. However, we are willing to see whether the necessary changes can be made in Statesman's veterans insurance program without the compulsion of an order by this Commission.

Therefore, rather than remanding the case, we shall vacate the examiner's order and strike everything in his initial decision that is inconsistent with this opinion. From time to time, the Commission, through its staff, will seek to review Statesman's promotional material so that a determination might be made as to whether further action is necessary.

An appropriate order will issue.

Commissioner Elman concurs in the result. Chairman Dixon approves the findings and conclusions contained in the foregoing opinion but would have preferred the issuance of an order to cease and desist. Commissioner MacIntyre does not concur.

ORDER TERMINATING PROCEEDING

Upon consideration of the appeal of respondent from the initial decision filed on December 8, 1967, and for the reasons stated in the opinion accompanying this order,

It is ordered, That the order to cease and desist issued by the hearing examiner be, and it hereby is, stricken, and that the proceeding be, and it hereby is, terminated.

Commissioner Elman concurs in the result. Chairman Dixon approves the findings and conclusions contained in the opinion but would have preferred the issuance of an order to cease and desist. Commissioner MacIntyre does not concur.

IN THE MATTER OF

LEON A. TASHOF TRADING AS NEW YORK JEWELRY COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8714. Complaint, Sept. 29, 1966—Decision, Dec. 2, 1968

Order requiring a Washington, D.C., retailer of eyeglasses, watches, jewelry and other merchandise to cease using bait and switch tactics, falsely advertising its eyeglasses at "bargain" prices, failing to disclose all details of financing and credit charges, and misusing "easy credit" solicitation of customers.