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Antitrust Law--Mergers--Section 7 of the Clayton Act Violated by Potential Threat to Competition (United States v. Von's Grocery Co., 384 U.S. 270 (1966))

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from access to the market was a "per se" offense. Moreover, it was indicated that any elimination by conspiracy or combination is equivalent to a conspiracy or combination to restrain price competition, a goal illegal "per se." Thus, if it is illegal to conspire to a particular end, it would seem illegal to contract to that same end.

It should be pointed out that General Motors might also encounter "conspiratorial" difficulties in attempting unilateral enforcement of the provision. In *Patterson v. United States*,[40] the court, when confronted with a conspiracy in restraint of trade on the part of the officers and agents of a corporation, held that Section 1 of the Sherman Act "includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor." [41]

If there is an unreasonable restraint on interstate commerce, it may result just as readily from a conspiracy on the part of those associated under common ownership as from a conspiracy on the part of those unassociated.[42] Thus, if the location clause, in and of itself, were found to be the product of a conspiracy within the corporate structure, it is conceivable that it would be violative of the Sherman Act.

There can be little doubt that the instant decision is in line with and controlled by *Parke, Davis & Co.* Mr. Justice Harlan concedes this in his concurring opinion, but claims that that case "represents basically unsound antitrust doctrine. . . ." [43] because that opinion for practical purposes eliminated the manufacturer's right to prescribe, in advance, the conditions upon which he will refuse to sell.[44] The instant decision, however, seems to be within the spirit of the antitrust laws and of the Sherman Act in particular, "whose purpose was . . . to make . . . so far as Congress could under our dual system, a competitive business economy." [45]

ANTITRUST LAW — MERGERS — SECTION 7 OF THE CLAYTON ACT VIOLATED BY POTENTIAL THREAT TO COMPETITION.—In an antitrust action, the United States charged that the merger of two competing grocery companies, creating the second largest chain in

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[40] 222 Fed. 599 (6th Cir. 1915).
[41] *Id.* at 618.
[42] United States v. Yellow Cab Co., 332 U.S. 218 (1947).
[43] United States v. General Motors, 384 U.S. 127, 148 (1966).
[44] See Mr. Justice Harlan's dissent in United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960).
[45] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 559 (1944).

the locality, violated Section 7 of the Clayton Act. There had been a trend indicating a decline in the number of single store owners in this particular locality and a corresponding increase in the number of chains of two or more stores. The Supreme Court, in reversing the district court's decision, *held* that the elimination of one of the largest competitors, coupled with increased concentration of the industry, necessarily resulted in an adverse effect on competition and constituted a violation of the Clayton Act. *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966).

In order to stem the concentration of big industry and forestall its adverse effect on the commercial market when it reaches monopolistic proportions, Congress in 1890 enacted the Sherman Act.[1] As with most initial attempts at regulation, the Sherman Act was too broad and judicial interpretation became the only means of effective administration. This legislation contained no provisions restricting the gradual, piecemeal formation of monopolies; the only situation where it could succesfully apply was a merger which created an outright monopoly.[2] A clear example of such an outright monopoly occurred when eighteen of twenty-one competing railroads entered into a price-fixing agreement. In holding the agreement illegal, the Court looked exclusively at whether the given merger had an immediate effect on interstate commerce, and would not consider any tendencies toward future monopolization.[3]

In an attempt to remedy this deficiency, Congress, in 1914, enacted Section 7 of the Clayton Act[4] which included provisions for such factors as the relevant market conditions and the trend toward monopolistic concentration. Unfortunately, its authority was limited exclusively to instances of concentration through stock acquisition. Subsequent cases interpreting section 7 did not expand on the express language of the statute and held that monopolistic formations through the acquisition of assets of another com-

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[1] 26 Stat. 209 (1890). The relevant part of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

[2] See Van Cise, Understanding the Antitrust Laws 20-24 (1963).

[3] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[4] 38 Stat. 730 (1914), 15 U.S.C. § 18 (1964). Section 7 of the Clayton Act as it was originally enacted provided "that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

pany did not violate the statute.[5] In order to effectuate broader coverage, the Celler-Kefauver Amendment of 1950[6] was enacted whereby stocks and assets were placed on an equal footing and disproportionate acquisitions of either were forbidden.

Under this amendment, a merger is a violation if "in any *line of commerce* in any *section of the country,* the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[7] To ascertain the line of commerce of an item, a determination must be made as to whether the product under consideration has such peculiar characteristics[8] and uses that it can be distinguished from competitors, and whether the product can be adequately replaced by another competing product.[9] A separate determination is required concerning the locality in which the merger will have an impact,[10] both economically and commercially.[11] The relevant market of a particular product is then discovered by combining the above determinations.

In reviewing the cases in which relevant market is defined, it seems that the definitions presented are often unpredictably implemented. Thus, in *United States v. Continental Can Co.,*[12] the Court found that glass and metal containers were not functionally interchangeable. Nonetheless, it held that since the two types of containers sometimes competed with each other, they constituted a single line of commerce despite the fact that there were other materials which could also conceivably compete with glass and metal. The Court's apparently illogical application of these definitions is illustrated by comparing *Continental Can Co.* with the decision in *United States v. Aluminum Co. of America.*[13] In the latter case, although aluminum and copper were virtually interchangeable as conductors and there was competition between them, the Court held that the two products were in separate lines of commerce because there was a price difference between the two materials. With this kind of rationale, the Court has demonstrated a susceptibility for making a finding of a relevant market antagonistic to the challenged merger.

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[5] *E.g.,* Arrow-Hart & Hegeman Elec. v. FTC, 291 U.S. 589 (1934); Western Meat Co. v. FTC, 272 U.S. 554 (1926).

[6] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

[7] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). (Emphasis added.)

[8] United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

[9] See Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[10] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (the relevant geographic market was defined as the four county area rather than the whole northeastern section of the country).

[11] Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

[12] *Supra* note 8.

[13] *Supra* note 8.

When the threshold question of relevant market is answered, and the proposed merger is found to be capable of having adverse effects on competition, it has been the practice of the courts to require proof that such adverse effects have resulted or will result. This proof has, in the past, been found through the application of various tests designed to determine whether the acquisition or merger would have a "reasonable probability" [14] of substantially lessening competition.

The degree of concentration resulting from the merger in the market involved has been an important factor in deciding whether such a merger violates section 7. Perhaps the most important issue to be considered in this test is the number of competitors within the relevant market. In *United States v. Bethlehem Steel Corp.*,[15] the combination led to the concentration of eighty-three per cent of the industry among eleven competitors instead of the original twelve. Where a merger contributes to this kind of undue concentration, the courts have held it to be illegal and have ordered divestiture.[16]

Closely related to the degree of concentration test is the market share foreclosure test. The market share of the two merging companies is important because the closer the market share approaches monopolistic proportions, the more likely it will adversely affect competition. In 1963, the Supreme Court, in *United States v. Philadelphia Nat'l Bank*,[17] prescribed a presumption of illegality when the market share foreclosure is approximately thirty per cent. Subsequent cases have generally adhered to this guideline.[18] The market share foreclosure test is usually considered with other competitive factors such as the static or dynamic nature of the market. In a static market, where the competition and the number and identity of the competitors have remained in a constant equilibrium for some time, anticompetitive effect has been found for even comparatively slight acquisitions increasing market share.[19] In addi-

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[14] The words "may be" in the statute have been construed to mean "reasonable probability" rather than a "mere possibility." International Shoe Co. v. FTC, 280 U.S. 291 (1930); Pennsylvania R.R. v. ICC, 66 F.2d 37 (3d Cir. 1933), *aff'd*, 291 U.S. 651 (1934).

[15] 168 F. Supp. 576 (S.D.N.Y. 1958).

[16] *Ibid. But see* E. L. Bruce Co. v. Empire Millwork Corp., 164 F. Supp. 446 (S.D.N.Y. 1958) (here the industry leader's [8%] acquisition of a competitor [5%] was held not to be a violation where there were 170 competitors in the field).

[17] *Supra* note 10 at 364.

[18] United States v. Continental Can Co., *supra* note 8 (25% market share foreclosure); United States v. Aluminum Co. of America, *supra* note 8 (29.1% market share foreclosure).

[19] United States v. Bethlehem Steel Corp., *supra* note 15; American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); Pillsbury Mills, Inc., Trade Reg. Rep. ¶ 29277, at 37617 (FTC Order Dec. 16, 1960).

tion, it has been held that the elimination of a *potential* competitor, without regard to percentage increases, can be illegal.[20] In an industry which is dynamic and where entry into the industry is relatively easy, mergers would be less prone to cause violations[21] since a new entrant can replace the acquired company. The new entrant must, of course, be a competitive threat and be able to replace the competition lost through the merger.[22]

In recognizing the fact that merely using the quantitative tests outlined above may not be sufficient to implement the legislative intent behind Section 7 of the Clayton Act, the Court in *Brown Shoe Co. v. United States*[23] formulated the incipiency doctrine. This doctrine applies to situations wherein the merger itself may not constitute a violation, but may indicate a trend toward eventual monopolistic concentration. Once such a trend has been substantiated, the fact that competition remains vigorous, even after the merger, is not important. In such cases, it is not the immediate but rather the long-range effect on the market that is of primary importance.

In the *Brown Shoe* case, the Court recognized certain instances where section 7 would not be applicable, even though, when examined with respect to the various tests outlined above, the challenged merger would seem to be a violation of the statute. One instance of non-applicability usually involves a balancing of interests, *i.e.*, the preservation of competition balanced against other social, economic or competitive interests.[24] Often a merger which would appear to violate section 7, has, at the same time, countervailing benefits which outweigh the adverse effects on competition. A merger may be allowed when it is demonstrated that small companies must combine to enable them to compete more meaningfully with those dominating the field. This defense, however, has usually not been accepted because it leads to upward competition and tends toward an oligopoly.[25]

Perhaps the most commonly accepted defense is the "failing company" doctrine.[26] This defense is valid even if the acquisition concentrates an undue proportion of the market in the acquiring company.[27] *International Shoe Co. v. FTC*[28] relied on three con-

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[20] United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[21] United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960).

[22] Crown Zellerbach Corp., TRADE REG. REP. ¶ 26923, at 36457 (FTC Order Dec. 26, 1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961).

[23] *Supra* note 9.

[24] *Supra* note 9, at 331.

[25] Singer, *Concept of Relative Concentration in Antitrust Law*, 52 A.B.A.J. 246, 248 (1966).

[26] Note, *The ABC's of Clayton 7*, 10 VILL. L. REV. 734, 783 (1965).

[27] United States v. Lever Bros. Co., 216 F. Supp. 887 (S.D.N.Y. 1963).

[28] 280 U.S. 291 (1930).

ditions which were present in holding this defense to be operative: (1) the acquired company was on the verge of total business failure; (2) there was no other available purchaser; and (3) the purpose of the acquisition was not to lessen competition but rather to help the failing company. The situation must be so serious that had the merger or acquisition not occurred there would be a reasonable probability of insolvency.[29] The reason given is that the preservation of a company in business for the benefits which it can provide the community is more important than the elimination of possible adverse effects on competition.

In the application of these various tests and defenses, the Court has usually not given controlling importance to the result of any one given test. Rather, it has attempted an analysis of the entire economic picture and tried to use several tests together in order to determine whether there is a "reasonable probability" that the challenged merger will be detrimental to competition.

In the instant case, the Court found that the merger brought about a decrease in the number of competitors in a market which had a history of increasing concentration. During a ten-year period prior to the merger, single proprietorships had decreased from 5,365 to 3,818 and the number of chain stores had increased from 96 to 150. Also during a similar period, 9 of the top 20 chains acquired 126 stores from smaller competitors.

After viewing the history of antitrust legislation, the majority concluded that the facts of the instant case presented precisely the threatening trend toward concentration which Congress wanted to halt. Although competition was vigorous before and after the merger, the Court reasoned that section 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future. . . ."[30]

In a vigorous dissent, Mr. Justice Stewart pointed out that the district court, which made the findings of fact, did not hold that the merger was anticompetitive in nature. He stated that the majority based its holding on the sole factor that the number of individual competitors in the market had decreased over the years. He claimed that other economic factors should have been considered, *i.e.*, "the economic concentration of the market, the level of competition in the market, or the potential adverse effect of the merger on that competition."[31] In his view, the majority had done away with the criterion of "reasonable probability" in evaluating the results of the various tests.

If one were to study the standards for "reasonable probability" as set down by prior cases, it might be concluded that the instant

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[29] *Id.* at 302.
[30] United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966).
[31] *Id.* at 283.

case has dealt a death blow to this concept. In applying the incipiency doctrine, the majority implied that merely a trend toward a decrease in the number of competitors, prima facie, constitutes a violation. It did not require proof that such a trend had a "reasonable probability" of substantially lessening competition.

The ease of entry test was completely ignored in the majority opinion. The dissent showed that although there was an increase from ten to twenty-four chains of ten or more stores during the decade prior to the merger, seven of those twenty-four chains were not even in existence in 1953. In view of the facts that the market appears to be highly dynamic and there are about 150 competitors, the slight increase in market share among the top eight competitors, from 40.9 per cent in 1958 to 44 per cent in 1960, when the merger occurred, would probably not be illegal under the standards of "reasonable probability" as defined by the prior decisions. As was pointed out earlier, *United States v. Philadelphia Nat'l Bank* [32] and other cases [33] have made a presumption of illegality when the percentage of market share foreclosed by the merging companies amounted to about 30 per cent. In the instant case, the market share foreclosed was only 7.5 per cent.[34]

If one were to apply the elimination of a substantial competitor test, there would be some question as to the status of Shopping Bag, the acquired company, as a substantial competitor. Both the majority and dissenting opinions recognized that, although it did not qualify as a failing company under the criteria adopted by the *International Shoe Co. v. FTC* [35] case, nonetheless, the competition that it could afford is questionable. Further proof may be necessary to establish this conclusively, but it seems doubtful that the elimination of Shopping Bag as a competitor necessarily had a reasonably probable adverse effect on competition.

Although the Court, in the instant case, has probably not discarded the "reasonable probability" standard, its interpretation goes far beyond prior decisions. It appears that this standard has been greatly broadened and criteria supporting illegality have been created where none had existed before. The decision is dangerous in that under the principles expounded, theoretically, any merger might be illegal. As a consequence, the practitioner has been stripped of many of the guidelines formerly utilized in advising

[32] *Supra* note 10, at 321.

[33] *Supra* note 18.

[34] See United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 932 (S.D.N.Y. 1965) (the court held that 13.8% market share foreclosure could not constitute a presumption of illegality). There is a trend in Supreme Court decisions which has resulted in a systematic decrease of threshold percentage of market foreclosure. In a very recent case, *United States v. Pabst Brewing Co.*, 34 U.S.L. WEEK 4516 (U.S. June 13, 1966), the market share foreclosure was 4.49%.

[35] 280 U.S. 291 (1930).

his clients. The incipiency doctrine and the test dealing with elimination of substantial competitors have been made presumptions of illegality rather than aids in determining whether there is a "reasonable probability" of adverse effects on competition. Undoubtedly, the Court will not allow the rationale of the instant case to be extended ad infinitum, but in the meantime, absent further clarification, the law has become doubtful. Perhaps the fault of this decision lies in the fact that it should have been tempered with considerations of other relevant economic factors.

The history of litigation under the Celler-Kefauver Amendment to Section 7 of the Clayton Act has demonstrated an increasingly antagonistic attitude on the part of the Supreme Court toward mergers and acquisitions which may have anticompetitive characteristics. The instant case led Mr. Justice Stewart to say in his dissent that the only underlying principle of the majority opinion must be that "in litigation under § 7, the Government always wins." [36]

CONSTITUTIONAL LAW — VOTING RIGHTS ACT OF 1965 — PROVISIONS INVOLVED HELD CONSTITUTIONAL AS APPROPRIATE MEANS FOR IMPLEMENTING FIFTEENTH AMENDMENT. — The State of South Carolina brought an action to enjoin the United States Attorney General from enforcing the provisions of the Voting Rights Act of 1965 [1] which deal with the suspension of eligibility tests, the appointment of federal examiners, and the review of proposed changes in state voting qualifications. The Supreme Court, upholding the constitutionality of the provisions of the act before it, *held* that they were appropriate means for carrying out congressional responsibilities under the fifteenth amendment, and were consonant with all other relevant constitutional requirements. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

A major responsibility of Congress is to provide appropriate implementation of the guarantees of the fifteenth amendment. Adopted in 1870, this amendment provides that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." [2] In May 1870, immediately after ratification of the fifteenth amendment, a statute was enacted to enforce the right to vote in federal

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[36] *Supra* note 30, at 301.

[1] 79 Stat. 437, 42 U.S.C. §§ 1973-75 (hereinafter cited as Voting Rights Act of 1965).

[2] U.S. CONST. amend. XV, § 1.