

# Antitrust--Clayton Act--Section 7 Restrictions Held Applicable to Joint Ventures (United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964))

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## RECENT DECISIONS

ANTITRUST — CLAYTON ACT — SECTION 7 RESTRICTIONS HELD APPLICABLE TO JOINT VENTURES.—In 1957 Olin Mathieson Chemical Corporation and Pennsalt Chemicals Corporation executed a sales agreement whereby Pennsalt would produce sodium chlorate and Olin would serve as its exclusive selling agent. In 1960 these two corporations extended their relationship by forming a joint venture,<sup>1</sup> Penn-Olin Chemical Company, for the production of sodium chlorate in the southeastern United States. As a result of this combination, Penn-Olin's share of the market in 1962 rose from Pennsalt's original 8.9 per cent to 27.6 per cent. The United States brought an action to dissolve the joint venture, claiming that the combination was violative of Section 7 of the Clayton Act.<sup>2</sup> In this case of first impression a divided Supreme Court vacated the district court's judgment for the defendant<sup>3</sup> and *held* the restrictions of Section 7 of the Clayton Act applicable to joint ventures. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

The joint venture has been used in the past as an effective method by which two or more individuals or corporations could combine their assets in order to achieve a common goal. "[T]he joint venture originated as a commercial or maritime enterprise used for trading purposes."<sup>4</sup> Thus it was used by the Hanseatic League and the Dutch for overseas trade and colonization.<sup>5</sup>

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<sup>1</sup> "Joint venture is an association of two or more natural or juridical persons to carry on as co-owners an enterprise . . . for the duration of that particular transaction or series of transactions or for a limited time." Taubman, *What Constitutes A Joint Venture*, 41 CORNELL L.Q. 640, 641 (1956).

<sup>2</sup> Section 7 provides: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation *engaged also in commerce*, where 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." 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914). (Emphasis added.)

<sup>3</sup> *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963).

<sup>4</sup> Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U.L. REV. 1, 2 (1960).

<sup>5</sup> *Ibid.* The joint venture has been used, more recently, in the discovery and development of fissionable materials, the exploitation of oil and other

Throughout this time the joint venture had possessed an identifiable economic character. However, it was not until the latter half of the nineteenth century that the courts began to "clothe the joint venture with certain [legal] attributes."<sup>6</sup> And "it was not until the decision in *Ross v. Willett*<sup>7</sup> that the courts began to refer unequivocally to a joint adventure as a legal relationship. But the development since that case has been phenomenal."<sup>8</sup>

The joint venture is legally and economically similar to a partnership<sup>9</sup> and has been said to have the form of a quasi-merger.<sup>10</sup> Since it has proven peculiarly adaptable to the increasingly complex enterprise of the space age,<sup>11</sup> it has been used widely by United States industry in "an effort to distribute the risk, maximize the use of investment capital and divide heavy costs of construction and operation. . . ."<sup>12</sup> Because of these basic attributes, and since joint ventures had not been considered violative of the restrictions of the Clayton Act, they were often used in preference to other more strictly controlled forms of business combination.

In 1914 the Government's antitrust jurisdiction was extended by the passage of the Clayton Act.<sup>13</sup> In the original act, section 7 prohibited the acquisition of the *stock* of one company by another "engaged in commerce."<sup>14</sup> It soon became clear that since this section did not proscribe the acquisition of the *assets* of one company by another, mergers effected by such a combination would be exempt from Clayton Act restrictions. In 1950 this loophole was eliminated by the Celler-Kefauver Amendment<sup>15</sup> which broadened the scope of federal antitrust jurisdiction. It authorizes the Government to enjoin the acquisition of the assets of one company engaged in commerce by another engaged in that same line of commerce if such acquisition might "substantially . . . lessen competition or . . . tend to create a monopoly."<sup>16</sup> By reducing the opportunity to create monopolies, the restrictions of the Clayton Act were in-

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mineral resources, and the construction and operation of power reactors. *Id.* at 1. For a further description of the uses to which joint ventures have been put, see Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 AM. U.L. REV. 111, 117-27 (1960).

<sup>6</sup> Jaeger, *supra* note 4.

<sup>7</sup> 76 Hun 211, 27 N.Y. Supp. 785 (App. Div. 1894).

<sup>8</sup> *State v. Stokke*, 65 S.D. 207, 213, 272 N.W. 811, 818 (1937).

<sup>9</sup> Jaeger, *supra* note 4, at 2-3.

<sup>10</sup> KAYSER & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 136-41 (1959).

<sup>11</sup> Jaeger, *supra* note 4, at 1.

<sup>12</sup> Broden & Scanlan, *The Legal Status of Joint Venture Corporations*, 11 VAND. L. REV. 673, 674 (1958).

<sup>13</sup> 38 Stat. 730 (1914).

<sup>14</sup> The type of restriction imposed by section 7 was not new; its generic equivalent existed long before the Industrial Revolution. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 3-5 (1963).

<sup>15</sup> 64 Stat. 1125 (1950).

<sup>16</sup> *Ibid.*

tended to preserve and promote competition.<sup>17</sup> This differs from the approach taken by other antitrust legislation, since it was designed to preclude any anti-competitive practices from arising, rather than to eliminate any already existing practices.<sup>18</sup> Thus, the act tends to stifle those forms of business combination which might possibly discourage competition.

The amended act was intended to have "broad application to acquisitions that are economically significant."<sup>19</sup> Although it was clear that "the purpose of the . . . bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions,"<sup>20</sup> concentrations effected by a joint venture arrangement were not considered violative of section 7. The wording of the statute itself was responsible for this new loophole. Section 7 requires that both the acquiring and acquired corporations be "engaged in commerce" at the time of acquisition. It was reasoned that there could be no foreclosure of competition unless these two parties were competitors.<sup>21</sup> The 1950 amendment, however, seems to make explicit that the competition foreclosed need not have been between the acquired and the acquiring. By deleting the requirement that competition be substantially lessened "between the corporation whose stock is so acquired and the corporation making the acquisition"<sup>22</sup> the Congress "hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."<sup>23</sup>

This line of reasoning can be applied to a joint venture combination, the formation of which forecloses any potential competition between the parent companies and between each parent and the progeny joint venture. It was this premise that motivated the Supreme Court to answer affirmatively the query of whether section 7 was applicable to joint ventures.

In applying section 7 to Penn-Olin in the instant case, the Court did not deem overriding the requirement that both the acquired and the acquiring company be "engaged in commerce"

<sup>17</sup> "The Clayton Act's objective is the same as that of the Sherman Act, namely, to preserve competition. . . ." VAN CISE, *op. cit. supra* note 14, at 42.

<sup>18</sup> "Section 7 . . . is designed to arrest potential restraints in their incipience and requires findings not of actual anti-competitive effects, but merely of a reasonable probability of a substantial lessening of competition or a tendency toward monopoly." Note, *Joint Ventures and Section 7 of the Clayton Act*, 14 STAN. L. REV. 777, 789 (1962).

<sup>19</sup> S. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950).

<sup>20</sup> 2 U.S. CODE CONG. SERV. 4295 (1950).

<sup>21</sup> Note, *supra* note 18, at 779.

<sup>22</sup> 38 Stat. 730, 732 (1914).

<sup>23</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

when the acquisition is made, since this conclusion might have precluded the application of section 7. Clearly a joint venture does not fulfill this seemingly necessary condition as there is no acquisition in the technical sense. Since there is the formation of a new entity, rather than the acquisition of one already "engaged in commerce," the Court could not literally apply the statute. This difficulty was overcome by the declaration that the implications of the phrase "engaging in commerce" are satisfied by the fact that the *joint venture* was engaged in commerce at the time the suit was instituted. In so holding, the majority relied on the earlier case of *United States v. E. I. duPont de Nemours & Co.*,<sup>24</sup> wherein it had been held that the competitive effects of an acquisition were to be tested at the time of trial rather than at the time of acquisition.<sup>25</sup>

In giving great weight to the manifest congressional intent which permeated the 1950 amendment, the Court indicated that section 7 was to be broadly applied, stating that "the test of the section is the effect of the acquisition."<sup>26</sup> This liberal interpretation stemmed from the Court's conviction that to construe section 7 in any other way "would create a large loophole in a statute designed to close a loophole."<sup>27</sup>

Although the Supreme Court was "plowing new ground," in that it had never previously considered the question of whether section 7 was applicable to joint ventures, there is some precedent to support the majority opinion. In an earlier decision the Court had concluded that

if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.<sup>28</sup>

In addition, "the dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."<sup>29</sup> If, in the instant case, the joint venture had not been dissolved, the sodium chlorate market in the southeastern United States might have become so highly concentrated that there would have been little possibility for deconcentration.<sup>30</sup>

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<sup>24</sup> 353 U.S. 586 (1957).

<sup>25</sup> *Id.* at 607.

<sup>26</sup> *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

<sup>27</sup> *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 343 (1963).

<sup>28</sup> *Id.* at 365 n.42.

<sup>29</sup> *Brown Shoe Co. v. United States*, *supra* note 23, at 315.

<sup>30</sup> The sodium chlorate market in the southeastern United States was composed of four competitors when this suit was commenced. The possibility of Penn-Olin's parent corporations' entering this market was then quite remote, whereas before the joint venture both had been, in the words of Mr.

The Court also analogized to a previous antitrust case, decided under Section 1 of the Sherman Act,<sup>31</sup> wherein it had held that "arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."<sup>32</sup> In that case the Government had brought an action charging Associated Press with monopolistic practices violative of the Sherman Act. Associated Press was a cooperative association engaged in the gathering and distributing of news, but the fact that it was merely a cooperative did not exempt it from the restrictions of the Sherman Act. Similarly, the Court in the principal case refused to exempt joint ventures from the restrictions of the Clayton Act.

Since the *Penn-Olin* case is one of first impression, and since only some aspects of the problem could be found in prior cases, the Court's decision to broadly apply Section 7 of the Clayton Act is based more on policy than on precedent. Although the anti-monopoly policy of the Court is laudable, the wording of section 7 is almost totally ignored to achieve this admittedly worthwhile end. The Court itself indicates that its present tendency is to more liberally interpret the Clayton Act and, perhaps, all anti-monopoly statutes. By virtue of this judicial attitude, exemplified by the Court's statement that the "test of the section is the effect of the acquisition," it appears that all anti-competitive combinations will be vulnerable to governmental restriction under Section 7 of the Clayton Act.

Consequently, *Penn-Olin* will adversely affect the use of joint ventures. Since this form of enterprise is now, by virtue of this decision, subject to the strictures of section 7 (whereas formerly it was subject only to Section 1 of the Sherman Act)<sup>33</sup> its usefulness has diminished. The joint venture had been "a convenient means for providing great *concentration* of financial resources, knowledge and skill. . . ."<sup>34</sup> Since the Court has applied the same standards to the joint venture as had been applied to the merger,

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Justice Douglas, "on the eve of competitive projects in the southeastern market. . . ." *United States v. Penn-Olin Chem. Co.*, *supra* note 26, at 180. (dissenting opinion).

<sup>31</sup> Section 1 of the Sherman Act provides:

"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 declared to be illegal. . . ." 69 Stat. 282, 15 U.S.C. § 1 (1958), amending 26 Stat. 209 (1890).

<sup>32</sup> *Associated Press v. United States*, 326 U.S. 1, 19 (1945).

<sup>33</sup> "It is settled that joint manufacturing ventures, even in domestic markets, are not made unlawful *per se* by the Sherman Act, but become unlawful only if their purpose or their effect is to restrain trade or to monopolize." *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504, 557 (S.D.N.Y. 1951).

<sup>34</sup> Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U.L. REV. 1 (1960). (Emphasis added.)

the joint venture will now be less able to provide large scale industry with a means to effect the concentration of large amounts of capital and the concurrent reduction of competition. Since it might no longer be possible to concentrate capital to the degree that was hitherto permissible, the joint venture will now be less able to reduce financial risk and aid in the achievement of economies of scale.<sup>35</sup> And since prior to this decision this type of enterprise was subject only to the restrictions of Section 1 of the Sherman Act, the joint venture will now be less able to minimize the risk of governmental interference with anti-competitive activities. Now, although different in form and organization, the merger and the joint venture will be subject to similar control. Hence, a corporation will undoubtedly prefer to merge with an already established corporation, rather than to form an entirely new one via a joint venture.

Moreover, it appears that this decision will have a restrictive effect upon *all* types of business combinations regardless of whether they were formerly subject to section 7. By stating that "the test of the section is the effect of the acquisition," the Court appears to be requiring only an anti-competitive potential in order to apply the restrictions of the Clayton Act. Thus, the *Penn-Olin* decision apparently tolls the death knell for any combination that might restrict competition, irrespective of the organizational attributes of the enterprise.



CONSTITUTIONAL LAW — SUBVERSIVE ACTIVITIES CONTROL ACT — SECTION 6 HELD INVALID AS INFRINGEMENT OF FIFTH AMENDMENT GUARANTEE OF RIGHT TO TRAVEL. — Appellants' passports were revoked by the Department of State because it was believed that their use of the passports would violate Section 6 of the Subversive Activities Control Act.<sup>1</sup>

This statute makes it unlawful for a member of any organization required to register with the Subversive Activities Control Board to (1) make application for a passport or the renewal

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<sup>35</sup> Economies of scale are found in industries where technical conditions may lead to increasing returns to scale, *i.e.*, where output is expanded average costs of production fall. The reasons for this situation are (1) the advantage of increased specialization, *e.g.*, assembly line technique, and (2) technical indivisibility of input, *e.g.*, feasibility of making large scale capital investment only where there is a large scale capacity. SNIDER, *ECONOMICS, PRINCIPLES AND ISSUES* 409-14 (1962).

<sup>1</sup> 64 Stat. 993 (1950), as amended, 68 Stat. 778, 50 U.S.C. § 785 (1954).