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# Antitrust--Clayton Act--Merger Found to Lessen Competition Within the Meaning of Amended Section 7 (Brown Shoe Co. v. United States, 370 U.S. 294 (1962))

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# RECENT DECISIONS

ANTITRUST — CLAYTON ACT — MERGER FOUND TO LESSEN COMPETITION WITHIN THE MEANING OF AMENDED SECTION 7.— Defendant, Brown Shoe Company, appealed from a decision of the United States District Court[1] which held that a merger between the defendant and G. R. Kinny Company, Inc. was a violation of Section 7 of the Clayton Act as it was amended in 1950.[2] At the time of the merger, Brown was the nation's fourth largest shoe manufacturer (producing 4% of the nation's shoes) and the third largest seller of shoes by dollar volume. Kinney, the nation's twelfth largest shoe manufacturer (0.5%) was also the eighth largest retailer of shoes by dollar volume (1.2%). In affirming the district court's decision, the Supreme Court *held* that the merger would (1) prevent those manufacturers who competed with Brown from selling to Kinney's retail outlets, and (2) would tend to substantially lessen competition in the retailing of men's, women's and children's shoes. *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962).

Section 7, as amended, provides that:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the . . . stock or other share capital and no corporation . . . shall acquire . . . the assets of another corporation . . . 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.[3]

The amendment made two changes in the original section 7.[4] First, the original section did not prohibit the acquisition of assets. Second, the lessening of competition in original section 7 referred only to the competition between the parties to the merger. Thus, amended section 7 provided a new standard as well as a new prohibition.

To determine whether an alleged anti-competitive act will have an undesirable effect upon competition, a court must define the

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1 179 F. Supp. 721 (E.D. Mo. 1959). This case went directly to the Supreme Court from the district court under § 2 of the Expediting Act, 63 Stat. 107 (1949), 15 U.S.C. § 28 (1958), amending 32 Stat. 823 (1903).

2 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

3 64 Stat. 1125-26 (1950), 15 U.S.C. § 18 (1958).

4 38 Stat. 731 (1914); see MARTIN, MERGERS AND THE CLAYTON ACT (1959), for a discussion of these changes.

relevant market and the standard of illegality. It must define the relevant market because the effect of the merger upon competition must be "*within* the area of effective competition." [5] (Relevant market.) A standard of illegality must be established because that standard must have been violated for the act to be branded illegal.

In attempting to ascertain the limits of the relevant market and the standard of illegality, different courts have used different methods of approach. The *Brown Shoe* decision was significant because it represented the Supreme Court's first attempt to apply these existing methods to amended section 7.[6]

The relevant market consists of both the product market ("line of commerce") and the geographic market ("section of the country"). In *United States v. E. I. du Pont de Nemours & Co.*,[7] the Court's determination of the product market was the key to its decision. Although the defendant produced 75% of the nation's cellophane, the Court held that it was not monopolizing interstate commerce within the meaning of Section 2 of the Sherman Act [8] because buyers often substituted different flexible packing materials for cellophane. Also, the price of cellophane responded quickly to increases and decreases in the prices of other materials. The product market, therefore, was found to consist of all flexible packing materials. Thus, the Court utilized first, product interchangeability and second, cross-elasticity of demand (price responsiveness) to define the market. It must be noted, however, that the relationship of product interchangeability to the product market was qualified. Before permitting one product to be substituted for another, a court had to be convinced that the characteristics and uses of the products were similar. Thus, bricks could not be substituted for steel simply because both were building materials.[9]

In the following year, du Pont was again before the Supreme Court.[10] Its acquisition of General Motors stock was deemed to be a violation of the original Section 7 of the Clayton Act since,

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[5] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957). (Emphasis added.)

[6] Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) and Jerrold Electronics Corp. v. United States, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961) were based, in part, on § 7. However, the Supreme Court, in deciding the issues, did not discuss the scope and purposes of the 1950 amendment.

[7] 351 U.S. 377 (1956).

[8] "Every . . . combination . . . in restraint of trade or commerce . . . is hereby declared to be illegal. . . ." 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

[9] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956).

[10] United States v. E. I. du Point de Nemours & Co., *supra* note 5.

as a result of the acquisition, du Pont provided General Motors with 67% of its automobile finishes requirements. Here again the decision was based to a great extent upon the product market. However, instead of emphasizing the concept of interchangeability as it had done in *The Cellophane Case,* the Court stressed the fact that "automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics. . . ."[11] Thus, the product market was a narrow one.

As a result of the *du Pont-General Motors* decision, government prosecutors urged that the product market in section 7 cases should consist of only the products manufactured by the merging companies; that product interchangeability and cross-elasticity of demand were not relevant.[12] This contention was rejected by the Third Circuit in *Erie Sand & Gravel Company v. FTC,*[13] an amended section 7 proceeding. There, the defendant and the corporation whose stock it had acquired both marketed lake sand (dredged from Lake Erie). Instead of limiting the product market to lake sand, the Court utilized interchangeability and found the market to consist of lake sand as well as bank sand (dredged from river banks).

Another concept of production flexibility[14] is analogous to product interchangeability, both in meaning and in the varying degrees to which courts have used it in determining the limits of the product market. Its meaning may be illustrated where a vertical merger between manufacturer and retailer has taken place. Because of the merger, other manufacturers may no longer be able to sell product X to the retailer. However, if they are able to produce product Y instead of X without inconvenience and expense, the effect of the merger will no longer be considered harmful. Production flexibility was an important factor in *United*

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[11] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593-94 (1957).

[12] See Handler & Robinson, *A Decade Of Administration Of The Celler-Kefauver Antimerger Act,* 61 COLUM. L. REV. 629, 645 (1961).

[13] 291 F.2d 279 (3d Cir. 1961); see International Boxing Club, Inc. v. United States, 358 U.S. 242 (1959), a case arising under the Sherman Act in which both the *du Pont-Cellophane* and the *du Pont-General Motors* cases were cited. From this the inference may be drawn that the Court would use either the *du Pont-Cellophane* or the *du Pont-General Motors* conception of product market in a Sherman Act or Clayton Act situation. See also United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960) where the product market consisted of all television programs as opposed to only movies shown on television. See Handler & Robinson, *supra* note 12, at 645.

[14] For a comprehensive treatment of production flexibility see Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two New Views,* 47 VA. L. REV. 1014 (1961).

*States v. Columbia Steel Co.*[15] where the product market was held to consist of all rolled steel products rather than any individual product. It was found that steel factories could produce any rolled steel product with little additional expense. However, in *United States v. Bethlehem Steel Corp.*,[16] an amended section 7 proceeding, the district court dismissed production flexibility as "indeed pure theory." [17]

As indicated previously, the geographic market must also be defined in order to ascertain the relevant market. Here too, courts vary in determining the weight to be given to different factors which comprise the geographic market, although all of the factors are not always employed. Those elements which have been used to establish the boundaries of the geographic market are: (1) transportation costs; [18] (2) the areas in which competing manufacturers market their products [19] as opposed to the area in which a buyer may be located;[20] (3) the areas in which the parties to the merger compete; [21] and (4) the qualities or characteristics of the products involved.[22] One problem that may exist with regard to the application of these factors is illustrated in the *Erie Sand & Gravel* case. Although the product market was found to consist of lake sand and bank sand, the government urged that bank sand had to be excluded from the geographic market. Because the cost of shipping sand was high, it would be difficult for one who dredged lake sand to sell to a buyer whose location was close to one who dredged bank sand. For this reason, little or no competition existed between those who sold each type of sand.

Upon completing its determination of the relevant market, the court must turn its attention to the standard of illegality. In an amended section 7 proceeding, this requires an understanding of the statutory words: "where . . . the effect . . . *may* be *substantially* to lessen competition, or to *tend* to create a monopoly." [23]

In the Clayton Act, the language of section 7 is similar to that of section 3,[24] making it necessary to examine the meanings

[15] 334 U.S. 495 (1948).
[16] 168 F. Supp. 576 (S.D.N.Y. 1958).
[17] *Id.* at 592.
[18] Erie Sand & Gravel Co. v. FTC, 291 F.2d 279 (3d Cir. 1961).
[19] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).
[20] United States v. Columbia Steel Co., 334 U.S. 495 (1948).
[21] American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958); *cf.* Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), *aff'd,* 206 F.2d 738 (2d Cir. 1953).
[22] International Shoe Co. v. FTC, 280 U.S. 291 (1930).
[23] 64 Stat. 1125-26 (1950), 15 U.S.C. § 18 (1958). (Emphasis added.)
[24] "[I]t shall be unlawful . . . to . . . make a sale or contract for sale of goods . . . on the condition . . . that the . . . purchaser thereof shall not use . . . the goods . . . of a competitor . . . where the effect . . .

that have been attached to these words in section 3 proceedings.[25] In *Standard Fashion Co. v. Margrane-Houston Co.*,[26] a contract between the petitioner and respondent provided that the respondent would sell only the petitioner's fashion patterns to its customers. In deciding whether this contract violated Section 3 of the Clayton Act, the Supreme Court felt that this Act was designed to reach a trend toward monopoly in its incipiency. On the other hand, the Sherman Act could only be applied to antitrust practices *after* they reached monopoly proportions. Nevertheless, the defendant's contract with the plaintiff did not violate section 3. In reaching this conclusion, the Court reasoned that the meaning of "may be to substantially lessen" was more than the "mere possibility" that competition would lessen. It meant that the contract must "probably lessen" competition.[27]

More recently, however, in *Standard Oil Co. of California v. United States*,[28] Mr. Justice Frankfurter took a different approach. The market for gasoline and automobile accessories in a seven state geographical market was a large one. Through requirement contracts with retailers, Standard Oil controlled 6.7% of this market. This meant that a considerable part of a large market had been foreclosed to the defendant's competitors — that competitive activity had already substantially lessened. It then became unnecessary to consider what future effects on competition Standard Oil's requirement contracts might have. Thus, on the basis of this purely quantitative standard of illegality, the defendant was found to have violated section 3.

Cases which have arisen under original Section 7 of the Clayton Act also reflect divergent interpretations of the standard of illegality. *International Shoe Co. v. FTC*[29] employed two means for ascertaining the standard. First, it examined the effect of the

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*may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*" 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). (Emphasis added.)

[25] Although Handler & Robinson in *A Decade Of Administration Of The Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 671-74 (1961) feel that Congress did not intend that § 7 should be interpreted in the light of § 3, the Supreme Court in the *Brown Shoe* case indicated otherwise. The Court stated: "Congress not only indicated that 'the tests of illegality [under § 7] are intended to be similar to those . . . applied in interpreting . . . other sections of the Clayton Act,' but also chose for § 7 language virtually identical to that of § 3. . . ." Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962).

[26] 258 U.S. 346 (1922).

[27] *But see* International Salt Co. v. United States, 332 U.S. 392, 396 (1947) where the Court emphasized the fact that it made no difference whether the trend "is a creeping one rather than one that proceeds at full gallop. . . ."

[28] 337 U.S. 293 (1949).

[29] 280 U.S. 291 (1930).

merger on the industry as a whole rather than on the competition that existed solely between the two parties to the merger. It concluded that "mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden. . . ." [30] Second, the intent of the parties to the merger was considered. The Court assumed that when a failing company was acquired by a successful one, the latter did not make the acquisition solely to increase its competitive advantage.[31]

In the *du Pont - General Motors* [32] case, however, the Court bypassed *International Shoe* and used a quantitative standard similar to that of *Standard Oil.*[33] It reasoned that the automobile market was a large one and that General Motors held a substantial share of that market. Through its holdings of General Motors stock, du Pont supplied most of General Motors' requirements in automobile fabrics and finishes. Therefore du Pont competitors were per se foreclosed from a substantial share of a substantial market.

However, in a recent determination of the standard of illegality of Section 3 of the Clayton Act, the Court in *Tampa Electric Co. v. Nashville Coal Co.*[34] once again reversed its course. It rejected the quantitative test and urged that consideration be given to the "relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition." [35]

In deciding the *Brown Shoe* case, the Supreme Court assessed the relevancy of the many factors that have been used to define the market and the standard of illegality. Through an exhaustive analysis of the legislative history of section 7, the Court drew several conclusions which served as its frame of reference. It felt that Congress feared corporate concentration and wished to preserve small business.[36] To accomplish this aim, section 7 would have to arrest trends toward concentration in their incipiency.[37] Thus, as determined in *Standard Fashions,* the Court here decided that a broader test than that used under the Sherman Act was necessary. In the Court's view, the words "may tend sub-

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30 International Shoe Co. v. FTC, 280 U.S. 291, 298 (1930).
31 *Id.* at 301.
32 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).
33 Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).
34 365 U.S. 320 (1961).
35 *Id.* at 329.
36 Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).
37 *Id.* at 317-18.

stantially" referred to "probabilities, not certainties. . . . Mergers with a probable anticompetitive effect were to be proscribed. . . ." [38]

The Court also examined the condition of the shoe industry. It found that two trends had gained momentum since 1950. First, manufacturers were rapidly acquiring retail outlets, and second, parent manufacturers were forcing these acquired retailers to sell their shoes in increasing quantities.[39]

Against this frame of reference, consisting of congressional intent and the existing trends of the shoe industry, the Court weighed the vertical aspects of the merger (manufacturer to retailer). It began with a determination of the relevant market, composed of the product market and of the geographic market.

Product interchangeability and cross-elasticity of demand were only relevant in determining the "outer boundaries" of the product market. However, within these boundaries were more narrow submarkets which, for section 7 purposes, could constitute separate product markets or "lines of commerce." [40] Because men's, women's and children's shoes were each recognized by the public and were sufficiently distinct from one another, they comprised three separate product markets.[41]

The geographic market of the vertical aspects of the merger was the nation as a whole. It was evident that there was nationwide distribution of shoes because of consumer demand and the ease with which shoes could be shipped from one area to another.[42]

After defining the relevant market, the Court dealt with the standard of illegality. Contrary to the *du Pont - General Motors* and *Standard Oil* cases, it was stated, with respect to the vertical aspects, that "the percentage of the market foreclosed" from manufacturers who competed with Brown for Kinney's market was *not* a decisive factor.[43] It then reasoned that Congress intended to halt trends toward concentration in their incipiency and to protect small business. Therefore the intent of the parties to the merger and the trend in the shoe industry toward concentration were of prime importance.[44] It was felt that Brown's purpose was to introduce its shoes into Kinney stores. This intent, com-

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[38] *Id.* at 323.

[39] *Id.* at 301.

[40] *Id.* at 325.

[41] The defendant voiced strong objection to these "lines of commerce." It contended that since it produced medium-priced shoes and that Kinney marketed low-priced shoes that it was incorrect to ignore these distinctions by placing medium and low-priced shoes into the broader category of men's shoes. However, the Court maintained that it was unrealistic to assume that men's shoes priced below $8.99 occupied a different market from those priced above $9.00. *Id.* at 326-28.

[42] *Id.* at 328.

[43] *Id.* at 329.

[44] *Id.* at 332-33.

bined with the fact that Kinney was not a "failing company" and with the fact that there was a trend toward vertical integration in the industry, caused the merger to be proscribed. For if the trend remained unchecked, there would be a substantial lessening of competition.

The Court then examined the horizontal aspects of the merger (retailer to retailer).[45] Men's, women's and children's shoes were again found to be separate "lines of commerce." However, the relevant geographic market consisted of all cities with minimum populations of ten thousand in which both Brown and Kinney had retail outlets. "[J]ust as a product submarket may have section 7 significance as the proper 'line of commerce' so may a geographic submarket be considered the appropriate 'section of the country.' "[46] The geographic market simply had to be commercially realistic and economically significant.

After making these observations, the Court weighed the effects of the horizontal aspects of the merger to determine whether or not the standard of illegality had been violated. Once more, the trend toward concentration was an important factor in the Court's mind. In addition, great consideration was given to the share of the market controlled by Brown-Kinney. Their control ranged from 5% of the children's shoes sold in Detroit to 57.7% of the women's shoes sold in Dodge City, Kansas.[47] However, the Court indicated that even if control in every city was only 5%, it might still be forced to dissolve the merger. Otherwise, the trend toward concentration would result in an oligopoly. Finally, because Brown was a national retail chain with integrated manufacturing operations, it could "market [its] own brands at prices below those of competing independent retailers."[48] Thus competition might be substantially lessened.

It is evident that the *Brown Shoe* decision has injected tremendous breadth into section 7. The Court has served notice that corporations which control relatively small portions of a competitive industry are not immune to section 7. Brown manufactured 4% of the nation's shoes and was only one of 970 manufacturers. It will be possible to apply section 7 to situations similar to Brown-Kinney because courts will devote as much attention to any trend toward oligopoly as they will to defining the relevant market and standard of illegality.

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[45] The merger of Brown, the manufacturer, with Kinney, the manufacturer, was also a horizontal aspect of the merger. However, it was found that the effects upon competition of this aspect were too insignificant to be prohibited by § 7. Therefore, only the retailer to retailer effects were considered.

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

[47] *Id.* at 347, 351.

[48] *Id.* at 344.

Nevertheless, a relevant market must be determined. It is important to note that the Court mentioned such factors as interchangeability and cross-elasticity, but also ruled that submarkets were appropriate "lines of commerce." Furthermore, the concept of the geographic market was a flexible one consisting first of the nation as a whole, and then of cities with populations of ten thousand or over.

The standard of illegality was also flexible, for in assessing the effect of the vertical aspects, the Court felt that the share of the market foreclosed "will seldom be determinative."[49] Yet in assessing the effects of the horizontal aspects it was stated that "the market share which companies may control . . . is one of the most important factors to be considered. . . ."[50]

Application of *Brown Shoe* to mergers between *small* companies in industries in which there is competition may have harmful effects. It may be that size and strength are necessary for corporations to survive in some industries.[51] A strict application may prevent this development.

Whether or not *Brown Shoe* has brought a degree of stability to antitrust litigation is clearly open to question. It cannot even be stated with certainty that *Standard Oil's* quantitative standard has been laid to rest. However, one aspect of the decision is apparent. In the hands of one who fears that business concentration is unhealthy, *Brown Shoe* can be a most effective weapon.

CRIMINAL PROCEDURE — EVIDENCE — POST-ARRAIGNMENT INCRIMINATORY STATEMENTS HELD INADMISSIBLE WHERE DEFENDANT'S RIGHT TO COUNSEL WAS NOT OBSERVED. — Defendant was arraigned on charges of first degree robbery, second degree assault and petit larceny. After arraignment and before indictment, defendant in the absence of counsel — whose presence he had not requested — made certain voluntary, unsolicited, inculpatory statements to the arresting officer. These statements were received into evidence at trial over defendant's objection. The Appellate Division reversed the conviction and the Court of Appeals, in a 4-3 decision, affirming the reversal, *held* that "any statement made by an accused after arraignment not in the presence of counsel . . . is inadmissible." *People v. Meyer*, 11 N.Y.2d 162, 165, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 429 (1962).

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[49] *Id.* at 328.
[50] *Id.* at 343.
[51] See Business Week, June 30, 1962, p. 160.