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Anti-Trust--1914 Clayton Act Construed to Bar Vertical Stock Acquisitions

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Recent Decisions

ANTI-TRUST — 1914 CLAYTON ACT CONSTRUED TO BAR VERTICAL STOCK ACQUISITIONS

During the 1917-19 period DuPont acquired 23% of the outstanding capital stock of General Motors. Thirty years later the government brought an action contending that such interest enabled DuPont to achieve a commanding[1] position as General Motors' chief supplier of automotive finishes and fabrics. The Supreme Court in a 4 to 2 decision,[2] affirmed the government's contention, and declared the acquisition a violation of section 7 of the Clayton Act.[3] Justice Brennan, speaking for the court, stated that the Clayton Act was designed to "arrest . . . monopolies in their incipiency and before consummation,"[4] — "incipiency" denoting, not the time when the stock was acquired (1917-19), but when the acquisition threatens to ripen into the prohibited effects (1947-57).[5] The Act was construed to be applicable to vertical as well as horizontal acquisitions.[6] In arriving at this determination the court relied heavily upon Congressional intent and the 1950 Clayton Act amendment.[7]

Prior to determining whether an acquisition may reasonably effect a substantial restraint in a particular market, the court must determine the extent of that market. In this case the court narrowly limited the relevant market to automobile finishes and fabrics. Next the court determined that the restraint in the relevant market was "substantial,"

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[1] In 1947 General Motors purchased 68.4% of its automotive finish and 38.5% of its fabrics from DuPont.

[2] United States v. E.I. DuPont De Nemours and Co., 353 U.S. 586 (1957).

[3] "No corporation . . . shall acquire . . . the whole or any part of the stock . . . of another corporation . . . 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. . . ." 38 STAT. 731 (1914), 15 U.S.C. § 18 (1946). Note: This action is governed by the 1914 Clayton Act since the 1950 amendment does not relate back to prior acquisitions.

[4] S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914).

[5] Transamerica Corp. v. Board of Governors, 206 F.2d 163, 166 (3rd Cir. 1953).

[6] Vertical integration is the bringing together of various stages of production and/or distribution under unified control. See HOAGLAND, CORPORATION FINANCE 620 (1947).

[7] House reports state that it is thought by *some* that the 1914 Act applied only to horizontal mergers and therefore the purpose of the amendment was to make it clear that § 7 applied to all types of acquisitions. H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949).

referring to the *Standard Stations*[8] case as the basis for its decision. This reference is significant, for *Standard Stations,* a section 3 Clayton Act case, is considered to have established the test of "quantitative substantiality" which heretofore had never been applied in a section 7 case. This test, in effect, provides that if the court determines that a substantial quantity of the market is affected there is a presumption that a substantial lessening of competition must result.[9] If this test is determinative the government no longer appears to have the burden of showing the *actual* restraint of competition affected by the stock acquisition.

Justice Burton, with whom Justice Frankfurter joined, dissented vigorously to the application of section 7 to a verical acquisition. His position is supported by forty years of administrative practices and prior judicial interpretations holding that prohibited acquisitions must occur between *competing* companies.[10] Also questioned is the validity of permitting the government to bring this action thirty years after the stock acquisition occurred. Prior section 7 violations were never prosecuted more than four years after the date of procurement.[11] To the statute which provides that "no corporation . . . *shall acquire* . . ." the court adds *"or continue to hold."*[12] The dissent further asserts that mere proof that DuPont sales of finishes and fabrics to General Motors were large in volume and that General Motors was the leading manufacturer of automobiles does not justify the finding of reasonable probability of

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[8] Agreements by which Standard Oil obligated gasoline station operators to supply their full requirements from Standard Oil were held as violating § 3 of the Clayton Act. Control of 6.7% of the gasoline market, within the area of effective competition, was held sufficient to meet the substantialiy test. United States v. Standard Oil Co. of Cal., 78 F. Supp. 850 (S.D. Cal. 1948).

[9] For a discussion of "quantitative substantiality" see Handler, *Quantitative Substantiality and the Celler-Kefauver Act — A Look at the Record,* 7 MERCER L. REV. 279 (1956).

[10] Int'l Shoe v. Federal Trade Comm'n, 280 U.S. 291 (1930); Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554 (1926). For the one case holding § 7 applicable to vertical acquisitions see *Ozdoba v. Verney Brunswick Mills, Inc.,* 152 F. Supp. 136 (S.D.N.Y. 1946).

[11] Int'l Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291 (1930); Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3rd Cir. 1953); V. Vivaudou, Inc. v. Federal Trade Comm'n, 54 F.2d 273 (2d Cir. 1931); Federal Trade Comm'n v. Western Meat Co. 5 F. 2d 615 (3rd Cir. 1925); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935); *In re* Vanadium-Alloys Steel Co., 18 F.T.C. 194 (1934).

[12] United States v. E.I. DuPont De Nemours and Co. 353 U.S. 586, 620 (1957). Yet a similar interpretation was implied as early as 1926; In *Federal Trade Comm'n v. Western Meat Co.,* 272 U.S. 554, 561 (1926) the acquiring company also acquired their competitor's assets. The court holding that the act (§ 7 Clayton) was inapplicable to acquisition of assets and therefore the divesture of stock would serve no practical purpose stated "The purpose of the act was to prevent *continued holding* of stock and the peculiar evils incident thereto." (Emphasis added).

substantial restraint of trade. Thus it is apparent that the minority is unwilling to assume a *per se* restraint based solely upon a determination that a substantial portion of the market is affected by the stock acquisition.

The concept underlying antitrust regulations is the desire to insure free competition. The Sherman Act[13] serves as the antitrust constitution describing in general terms the prohibited evils. The cases under the Act show no favoritism to vertical integration.[14] The Clayton Act aims at arresting in their incipiency those business practices which might ripen into a violation of the Sherman Act.[15] But, like the Internal Revenue Code, the Clayton Act is not without weasel words and loopholes[16] which tend to frustrate the legislative intent to give its words the same inclusive scope as the Sherman Act.[17] The court therefore has extended the Clayton Act to overcome Congressional oversights and fulfill the Sherman Act objectives. It adopts the civil law doctrine of judging each case upon its merits with minimum emphasis on precedent. The conclusion is obvious. If the facts indicate that the General Motors' acquisition will, within reasonable probability culminate in condemned activity, then under the Clayton Act, such culmination is to be prevented.

Precedent[18] and past administrative policies[19] exist indicating that section 7 of the 1914 Clayton Act is not applicable to vertical acquisitions. Outweighing such precedent and policy, however, is prior court construction that similarly worded section 2 of the Clayton Act is applicable to vertical integration.[20] Also, Congressional intent in the

[13] 26 STAT. 209 (1890), 15 U.S.C. §§ 1 and 2 (1952).

[14] United States v. Paramount Pictures, 334 U.S. 131 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947); United States v. Swift and Co., 286 U.S. 106 (1932); United States v. Lehigh Valley R.R., 254 U.S. 255 (1920).

[15] S. REP. NO. 698, 63rd Cong., 2d Sess. 1 (1914). Transamerica Corp. v. Board of Governors, 206 F. 2d 163, 166 (3rd Cir. 1953); United States v. United Shoe Machinery Co., 264 F. 138, 162 (E.D. Miss. 1920).

[16] Typical is the "asset loophole" which made actions under § 7 of the Clayton Act (before 1950 amendment) ineffective when the merger resulted in acquisition of assets. See United States v. Columbia Steel Co., 334 U.S. 495 (1918); and Justice Brandeis' dissent in *Federal Trade Comm'n v. Western Meat Co.*, 272 U.S. 554 (1926).

[17] In United States v. Standard Oil Co. of Cal., 78 F. Supp. 850, 867 (S.D. Cal. 1948) the court pointed out that "what, *in its result,* is an unreasonable restraint under the Sherman Act is, *in its beginning,* a subsantial restraint under the Clayton Act if *it is of a nature likely* to achieve such result." (Emphasis supplied).

[18] See note 10 *supra.*

[19] F.T.C. Report on Corporate Mergers and Acquisitions as cited in United States v. E.I. DuPont De Nemours and Co., 353 U.S. 616 (1957).

[20] Price discrimination, a type of vertical integration, was held to be a violation of § 2 of the Clayton Act in George Van Camp and Sons Co. v. American Can Co., 278 U.S. 245 (1929).