



1968

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B. J. Linder, *Horizontal Merger between Two Newspapers Involving Potential Competition Prohibited under Section 7 of the Clayton Act*, 22 Sw L.J. 300 (1968)
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HORIZONTAL MERGER BETWEEN TWO NEWSPAPERS INVOLVING POTENTIAL COMPETITION PROHIBITED UNDER SECTION 7 OF THE CLAYTON ACT

by

B. J. Linder*

THE 1950 amendment to section 7 of the Clayton Act sought to strengthen the Act to apply to any merger, whether a stock or asset acquisition, which might have the effect of substantially lessening competition.¹ The new section 7 was to apply to horizontal, vertical, and conglomerate mergers² which had the specified effect of substantially lessening competition.³ The Act itself was not limited to present damage to competition, but by its language included future damage to competition and anticompetitive effects in their incipiency.⁴ Although Congress did provide guidelines for the use of section 7,⁵ it remained for the courts to give substantive development to the section.

One of the first clear statements of the standards to be used in the determination of anticompetitive effects came in *Brown Shoe Co. v. United States*.⁶ In *Brown Shoe* the Court set forth the general standard that the relevant product can be determined by the economic concept of elasticity of demand,⁷ although within this broad market there may be relevant submarkets, and that the effect of the merger must be viewed functionally within the context of the industry.⁸ Since this first general statement of section 7 standards of illegality the Court has seen fit to develop additional standards with greater specificity.

In *United States v. Philadelphia National Bank*⁹ the Court held that when a merger involves a given market share that merger is inherently damaging to competition and is therefore a violation of section 7. The Court in *Philadelphia National Bank*, while not specifying the smallest market share which would be damaging, stated that a merger which results in the new firm controlling thirty per cent of the relevant market

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¹ *Hearings on H.R. 515 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 4 (1947). For a definitive discussion of Supreme Court cases in this area, see Phillips, *Some Implications of the Supreme Court's Antimerger Decisions*, 21 Sw. L.J. 429 (1967).

² A merger may be classified as horizontal if it combines the assets or stock of companies competing in the same market, vertical if the merged companies were in a buyer-seller relationship, and conglomerate if the parties to the merger did not compete in the same market, do business in the same product, nor stand in a buyer-seller relationship. See B. BOCK, *MERGERS AND MARKETS* 49, 100, 140 (5th ed. 1966).

³ See also HOUSE COMM. ON THE JUDICIARY, AMENDING AN ACT APPROVED OCT. 15, 1914, H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949).

⁴ SENATE COMM. ON THE JUDICIARY, AMENDING AN ACT APPROVED OCT. 15, 1914 (38 STAT. 730), S. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950).

⁵ See D. MARTIN, *MERGERS AND THE CLAYTON ACT 260-67* (1959).

⁶ 370 U.S. 294 (1962).

⁷ Elasticity of demand is usually defined as the ratio of the percentage change in the quantity demanded of one product to the percentage change in the price of a second good.

⁸ 370 U.S. at 317-22.

⁹ 374 U.S. 321 (1963).

does pose a threat to competition and is a violation of section 7.¹⁰ The Court, in addition, declared that it was the duty of the courts to simplify the tests of a merger's illegality in the interests of sound and practical administration.¹¹ This definite market share standard of illegality has been further refined by the Court in *United States v. Continental Can Co.*¹² and *United States v. Aluminum Co. of America*¹³ until the standard now approximates twenty-five per cent of the relevant market. Up to this point the standards have been primarily concerned with actual damage to competition. However, in recent decisions the effects of mergers upon future competition have grown in importance.

Market concentration and growth of concentration have been refined by the Court as an appropriate standard of illegality. This standard was an important influence in the *Philadelphia National Bank* case.¹⁴ The recent decision in *United States v. Von's Grocery Co.*¹⁵ was the Court's clearest statement on use of the growth of concentration in a market as a standard to determine illegality. In *Von's* the Court held that the growth of concentration must be stopped in its incipiency.¹⁶ There is an important shift here as the Court is concerned with arresting a trend toward competition in its incipiency; thus present competition in the market is reduced to a secondary position.¹⁷

Damage to potential competition has been used by the Court to determine the competitive effects of a merger. In *United States v. El Paso Natural Gas Co.*¹⁸ the Court made its initial use of the standard, stating that potential competition is relevant under the Clayton Act and damage to future competition is a violation of the Act.¹⁹ The *Von's* decision echoed the Court's concern with future competition when it was held that the courts must look to the future effect of a merger.²⁰

Finally, in the recent *Procter & Gamble*²¹ case the Court has held that any merger, regardless of its form,²² must be tested by the standards of probable damage to competition.²³ Even if the two products are merely complementary this is not considered a barrier to section 7 if the merger has the anticompetitive effect.²⁴

These standards and others²⁵ have been developed by the courts in an

¹⁰ *Id.* at 364.

¹¹ *Id.* at 362. For a detailed discussion of the forms the standards of illegality might take for day-to-day policing of the market, see Edwards, *Test of Probable Effect Under the Clayton Act*, 9 ANTITRUST BULL. 369 (1964).

¹² 378 U.S. 441 (1964).

¹³ 377 U.S. 271 (1964).

¹⁴ 374 U.S. 321, 367 (1963).

¹⁵ 384 U.S. 270 (1966).

¹⁶ *Id.* at 276-77.

¹⁷ *Id.*

¹⁸ 376 U.S. 651 (1964).

¹⁹ *Id.* at 660.

²⁰ 384 U.S. 270, 276-77 (1966).

²¹ *FTC v. Procter & Gamble*, 386 U.S. 568 (1967).

²² See HOUSE COMM. ON THE JUDICIARY, AMENDING AN ACT APPROVED OCT. 15, 1914, H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949).

²³ 386 U.S. at 577.

²⁴ *Id.*

²⁵ B. BOCK, *MERGERS AND MARKETS* 153-324 (5th ed. 1966).

effort to aid sound judicial administration²⁶ and apply relevant economic theory to the problem of determination of probable damage to competition. The economic model most appropriate for usage is that of workable competition. In contrast to the pure competitive model²⁷ workable competition is concerned both with the number of sellers and the quality of the sellers.²⁸ The concept is also concerned with the deterioration of the market in terms of the number and quality of competitors; the incipency doctrine fits well into the workable competition model.²⁹

The recent decision in *United States v. Times Mirror Co.*³⁰ shows a further development of several key standards, but its significance lies primarily in its concern with future competition, damage to future competition, and the quality of the parties to the merger. The Times Mirror Company, publisher of the *Los Angeles Times*, California, acquired all the capital stock of the Sun Company, the largest independent daily publisher of newspapers in Southern California.³¹ The Government challenged the merger under section 1 of the Sherman Act³² and section 7 of the Clayton Act.³³ The district court found that the merger violated section 7.³⁴ In a market which is becoming concentrated, the merger of two powerful firms which may not be presently competing but have the potential to compete, is sufficient to violate the Clayton Act.³⁵

In keeping with its concern for incipient damage the district court found that the question of whether or not the *Los Angeles Times* did or did not presently compete with the *San Bernardino Sun* was not the significant issue. It was the impact of the merger that was significant.³⁶ And, therefore, damage to future competition must be the standard used. Eventual foreclosure of the market which involves potential entrants becomes involved. It was claimed by the defendant that the *Times* did not compete with the *Sun*, but that the two papers were complementary to one another and there could be no future competition. This again was held to be no barrier to

²⁶ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

²⁷ The pure competitive model contains a number of assumptions, the most vital to this examination being the large number of sellers, such that each has no effect upon the market.

²⁸ See ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS, REPORT 12 (1955) for an excellent presentation of this aspect of workable competition.

²⁹ *Id.* at 326-27.

³⁰ 274 F. Supp. 606 (C.D. Cal. 1967).

³¹ The merger between these two newspapers could either be classified as horizontal or market extension depending upon the definition given the relevant product and market. A market extension involves the same product, but expansion into a different market; there is an implication that no direct competition exists between the parties to the merger. A horizontal merger involves parties both present in the same product and geographic market with the implication there is competition between the parties.

³² 15 U.S.C. § 1 (1955): "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 shall be illegal . . ."

³³ 15 U.S.C. § 18 (1950): "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 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."

³⁴ *United States v. Times Mirror Co.*, 274 F. Supp. 606 (C.D. Calif. 1967). As the district court held for the Government on the basis of the Clayton Act, there was no discussion of Sherman Act implications.

³⁵ *Id.* at 616.

³⁶ *Id.*

section 7's application if the anticompetitive effect were present.³⁷

The district court was concerned with the quality of the parties to the merger. This is a significant aspect of the case and may do much to reduce the fears of those troubled by the court's seemingly great emphasis on mere numbers.³⁸ Although the *Times* is published in Los Angeles it is home-delivered throughout southern California. At the time of the acquisition the Sun Company was the largest independent newspaper publishing company in southern California. The *Sun* was published in San Bernardino and dominated that county in terms of circulation.³⁹ There had been a general decline of independent competitors in the market and the acquisition of the Sun Company by Times Mirror was particularly anticompetitive because it eliminated one of the few remaining independent papers.

The district court's decision is well founded in the standards of illegality developed previously and is fully justified by economic considerations. The incipency doctrine is well established, yet only recently has the importance of future competition been emphasized. The *Times Mirror* decision carries forward this concern for the viability of future competition. Although this standard puts an added emphasis upon prediction, the *Times Mirror* case is an excellent example of the need for expanded use of the standard. After the Times Mirror-Sun merger a series of additional mergers followed in that particular market which eliminated two previously independent newspapers and caused two additional independent newspapers to close publication. As a result of this series of acquisitions, beginning with that of the Sun by the Times Mirror, a barrier to entry into the San Bernardino market has been raised, effectively closing it to new entrants.

If the antitrust laws are to be effective the Government must be able to step into a case when the market is still competitive. To do this requires the use of damage to future competition as an effective section 7 standard. The economic issue at hand is the preservation of competition; the competition obviously need not be that of the purely competitive market. Yet economic theory cannot provide a dividing line between a competitive market and an oligopolistic market. There is a continuum of competition, ranging from highly competitive to monopoly, along which a market can move. Any given merger itself may move a market only slightly toward less competition; yet a series of such mergers will result in a completely different market. Which merger is responsible or which merger has the anticompetitive effect and is therefore illegal? In the instant case the acquisition triggered a chain of mergers which transformed the character of the particular market.

The *Times Mirror* case represents another advancement in the use of section 7 to preserve competition. The case is in keeping with previously developed standards of illegality and further refines the use of potential competition as an appropriate standard.

³⁷ *Id.* For a complete statement regarding complementary goods, see *FTC v. Procter & Gamble*, 386 U.S. 568, 580 (1967).

³⁸ The *Von's* decision, 384 U.S. 270 (1966), brought about concern with the Supreme Court's reliance upon the number of competitors in the market to the neglect of the quality of the competitors in the view of some commentators. This interpretation is subject to serious criticism.

³⁹ 274 F. Supp. at 619.

Southwestern Law Journal

VOLUME 22

Spring 1968

NUMBER 2

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