

## COMMENT

### DETERMINATION OF THE RELEVANT PRODUCT MARKET

#### I. INTRODUCTION

A central issue in modern antitrust litigation has been a determination of the relevant market. It has only been during the last two decades that market definition has come to the fore. In that period a substantial number of cases focused upon a determination of the relevant market and such determination was often critical to the court's decision.

The term "market" does not appear in any of the antitrust laws: it is solely a term of judicial construction. The market concept was originally developed by the courts in cases concerning whether a particular business concentration was a monopoly under section 2 of the Sherman Act.<sup>1</sup> In order to determine whether monopoly power for purposes of section 2 exists, a definition of the market within which it is to be measured is essential, for the distinction between competition and monopoly turns on power in a relevant market, *i.e.*, the market within which the monopoly is alleged to operate.<sup>2</sup> A leading case on market definition under section 2 has concluded, "The ultimate consideration in such a determination [whether section 2 has been violated] is whether the defendants control the price and competition in *the market* for such part of trade or commerce as they are charged with monopolizing."<sup>3</sup>

The area of primary importance today in market determination is that of mergers or the acquisition by one corporation of another. Section 7 of the Clayton Act, as amended, applies to such acquisitions of stock or assets of another corporation where "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly . . . in any line of commerce in any

---

<sup>1</sup> Section 2 provides:

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, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

26 Stat. 209 (1890), 15 U.S.C. § 2 (1953).

<sup>2</sup> Att'y Gen. Nat'l Comm. Antitrust Rep. 44 (1955).

<sup>3</sup> United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 380 (1956). (Emphasis added.)

section of the country.”<sup>4</sup> The legal effects of the merger or acquisition must be tested in some sort of market—“an area of effective competition.”<sup>5</sup> The courts must define “in any line of commerce” (the product market) and “in any section of the country” (the geographic market). The Supreme Court has declared, “Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’”<sup>6</sup> The role of the relevant market in a section 7 case is thus to determine where the competitive effects shall be evaluated and to determine whether the identifiable competitive effects are substantial enough to produce a significant lessening of competition.<sup>7</sup>

The relevant market has three significant dimensions<sup>8</sup>—a product dimension, a geographic dimension, and a time dimension. The scope of the present article will be limited to the product aspects of the market.<sup>9</sup> It will also be primarily limited to an analysis of the product market in cases arising under section 2 of the Sherman Act and section 7 of the Clayton Act. While these two sections are the ones of major importance, it should be noted here that there may also be market definition problems in other areas of the anti-trust laws, such as section 1 of the Sherman Act,<sup>10</sup> the Miller-

<sup>4</sup> 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958). The relevant portion of section 7 provides that:

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.

<sup>5</sup> See S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950); “Hearings on H.R. 2734 Before a Subcommittee of the House Committee on the Judiciary,” 81st Cong., 1st & 2d Sess. 36-46, 66-76, 81-83, 144, 306 (1948-1950).

<sup>6</sup> United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

<sup>7</sup> See Barnes, “The Primacy of Competition and the Brown Shoe Decision,” 51 Geo. L. J. 706, 726-27 (1963).

<sup>8</sup> There are five dimensions listed in Bock, *Mergers and Markets* 90 (3d ed. 1964): 1) product, 2) geographic, 3) functional, 4) time, and 5) unit-of-measurement. Barnes also states there are five essential dimensions of the relevant market: 1) product, 2) geographic, 3) time, 4) buyers, and 5) sellers, Barnes, *supra* note 7, at 728.

<sup>9</sup> For discussions on the geographic market see Bock, *op. cit. supra* note 8, at 111; Colwell, Amended Section Seven of the Clayton Act, Conglomerate Mergers, and Preventive Antitrust Policy 422 (1963); Phillips & Hall, “Merger Litigation, 1951-1960,” 6 Antitrust Bull. 19, 30 (1961); Note, 54 Colum. L. Rev. 580, 594-602 (1954).

For treatment of the time dimension see Bock, *op. cit. supra* at 134.

<sup>10</sup> Section 1 declares as illegal, “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.” 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

Tydings Amendment to section 1,<sup>11</sup> the McGuire Act,<sup>12</sup> the Robinson-Patman Act,<sup>13</sup> and, in an area closely related to section 7,

---

Conspiracies to restrain trade under section 1 involve such transactions as the fixing of prices, the allocation of markets, and boycotts, and such practices do not require any examination of competitive effects. Hence, there is no need for market determination. See Massel, *Competition and Monopoly* 262 (1962). However, the Government may also challenge combinations or mergers as being in restraint of trade. In such situations a determination of the market similar to that involved under section 2 of the Sherman Act and section 7 of the Clayton Act will be required. See, *e.g.*, *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964), discussed later in this article.

<sup>11</sup> 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958).

<sup>12</sup> 66 Stat. 631 (1952), 15 U.S.C. § 45 (1958). The Miller-Tydings Amendment and the McGuire Act permit resale price maintenance by sellers whose products are "in free and open competition with commodities of the same general class produced or distributed by others." Hence, the validity of the price-fixing may turn upon what products are found to be in the same market with the price-fixed product. See Note, 54 *Colum. L. Rev.* 580, 583 (1954). The outstanding example of the market problem in this area is *Eastman Kodak Co. v. FTC*, 158 F.2d 592 (2d Cir. 1952), *cert. denied*, 330 U.S. 828 (1947). In that case the Kodak Company entered into resale price maintenance agreements covering Kodachrome color films. The issue was whether or not the agreements were protected by the Miller-Tydings Amendment and this in turn depended upon whether Kodachrome was "in free and open competition with commodities of the same general class." Kodachrome was color film and there was no other color film to compete with it. Kodak argued that Kodachrome and black and white films were in the same market and competed with each other. The court concluded color film was in a market by itself and did not compete with black and white film. Therefore, Kodachrome was not in "free and open competition" with products of the same class and Kodak could not invoke the protection of the Miller-Tydings Amendment.

<sup>13</sup> The relevant portion of the Robinson-Patman Act provides:

It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

Although this part of the Robinson-Patman Act includes the phrase "in any line of commerce," its application "has not involved substantial consideration of market definition." Massel, *Competition and Monopoly* 269 (1962). The main reason for this appears to be a refusal on the part of the Federal Trade Commission and the courts to embark on a substantial consideration of competitive effects.

By and large, the concept of injury to competition under the act has been less complicated—perhaps less meaningful—than the concepts applied in other antitrust fields. There has been little economic inquiry into effects on competition, either past or potential. For the most part, it was presumed that any price discrimination would injure competition. . . . Given this orientation, there has been no need to struggle with market concepts.

*Id.* at 269. Compare Note, 54 *Colum. L. Rev.* 580, 583 (1954).

section 3 of the Clayton Act.<sup>14</sup>

<sup>14</sup> The pertinent portion of § 3 of the Clayton Act reads as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of . . . competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding 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).

The section thus condemns "exclusive dealing" arrangements when there is a lessening of competition or a tendency toward monopoly "in any line of commerce." Hence, it would seem that a definition of a relevant market, *i.e.*, the "line of commerce," and an analysis of the competitive effects in that market would be vital in a § 3 case. However, the early Supreme Court decisions did not emphasize the determination of a well-defined relevant market and did not undertake extensive examination of the competitive effects in the "line of commerce." Note, 54 Colum. L. Rev. 580, 583 (1954). See *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936); *International Business Machs. Corp. v. United States*, 298 U.S. 131 (1936); *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). For an individual treatment of these cases see generally Note, "Exclusive Dealing Arrangements Under the Anti-trust Laws," 47 Va. L. Rev. 675 (1961).

In 1961 the Supreme Court for the first time emphasized the importance of the relevant market in a § 3 case, especially in regard to the geographic market. In *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Court's determination that a requirements contract did not violate section 3 turned on a definition of the relevant geographical market. The contract provided that a coal company would supply all the fuel (coal) requirements of a new generating plant of an electric utility company for a period of twenty years. The Court held that competitive effects were to be measured within a relevant market and broadly defined the geographical market so that less than 1% of the market was foreclosed by the contract in question. The Court emphasized the importance of both the product and geographic markets in § 3 cases when it stated that two of the three determinations vital to finding a violation of the section are: "*First*, the line of commerce. . . . *Second*, the area of effective competition.

. . ." 365 U.S. 320, 327. The Court criticized the lower courts for not considering the relevant market and went on to hold that "the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided." 365 U.S. at 329. Thus it appears that both the product and geographical dimensions of the relevant market will be increasingly important in § 3 cases.

For more detailed discussions of § 3 and *Tampa Electric* see generally Martin, *Mergers and the Clayton Act* 273 (1959); Massel, *Competition and Monopoly* 270 (1962); Bok, "The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act," 1961 Sup. Ct. Rev. 267 (1961); Handler, "Annual Review of Antitrust Developments," 16 Record of N.Y.C.B.A. 385, 393 (1961);

The importance of determining the product market reached a peak in 1964 with the *United States v. Aluminum Co. of America*<sup>15</sup> and the *United States v. Continental Can Co.*<sup>16</sup> decisions. Both cases were brought under section 7 and both used a product market definition to find violations of the section. In order to appreciate the significance of these recent cases, it will be necessary to explore the prior developments concerning product market definition under both the Sherman and Clayton Acts.

## II. THE SHERMAN ACT

### A. *The production flexibility doctrine*

One of the earliest cases in which the Supreme Court had the occasion extensively to consider product market determination was *United States v. Columbia Steel Co.*,<sup>17</sup> decided in 1948. This was a merger case in which a sharply divided Court upheld the challenged acquisition as not being violative of sections 1 and 2 of the Sherman Act. United States Steel, a producer of rolled steel products, acquired Consolidated Steel, a fabricator of certain rolled steel products. There are several types of rolled steel products, such as steel plates, shapes, sheets, bars, etc. Consolidated was mainly engaged in purchasing steel plates and shapes and fabricating them into finished steel products. It appeared from the evidence that one of U. S. Steel's purposes in purchasing Consolidated was to assure a market for the plates and shapes produced by one of its plants.<sup>18</sup> The Government attacked this vertical aspect<sup>19</sup> of the merger upon the theory that it would restrain trade by precluding competitors

---

Palley, "Antitrust Pitfalls in Exclusive Dealing—Recent Developments Under the Sherman, Clayton and FTC Acts," 37 Notre Dame Law. 499 (1962); "The Supreme Court, 1960 Term," 75 Harv. L. Rev. 80, 202 (1961); Comment, 59 Mich. L. Rev. 1236 (1961); Casenotes, 30 Fordham L. Rev. 493 (1962); 22 La. L. Rev. 270 (1961), 39 Texas L. Rev. 913 (1961); 15 Vand. L. Rev. 617 (1962).

<sup>15</sup> 377 U.S. 271 (1964) [hereinafter referred to as *Alcoa-Rome Cable*.]

<sup>16</sup> 378 U.S. 441 (1964).

<sup>17</sup> 334 U.S. 495 (1948).

<sup>18</sup> *Id.* at 506.

<sup>19</sup> There are generally considered to be three types of mergers: horizontal, vertical, and conglomerate. A horizontal merger is one between two competing companies. A vertical merger is one "between companies standing in a supplier-customer relationship." *United States v. Brown Shoe Co.*, 370 U.S. 321, 323. "Conglomerate merger" is rather difficult to define but has generally been thought to refer to a merger between two companies engaged in dissimilar businesses. For more complete definitions see Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N.C.L. Rev. 511, 517-20 (1964).

There were also horizontal aspects to the *Columbia Steel* decision since both Consolidated and U.S. Steel were involved in structural steel fabrication and in the manufacture of pipe. 334 U.S. at 527.

of U. S. Steel from supplying Consolidated's needs of plates and shapes. The Government argued that the relevant product market in which to analyze the effects of this merger should consist of only plates and shapes while the defendants maintained that the market should encompass all rolled steel products. This issue was a crucial one, for if plates and shapes were the product market Consolidated would account for thirteen per cent of the consumption of products in the relevant geographical market and this substantial share of the market would be foreclosed to the competitors of U. S. Steel by the challenged acquisition. If, on the other hand, the product market were to consist of all rolled steel products, Consolidated's share of this market would be three per cent and only a minor market foreclosure would occur. Mr. Justice Reed, writing for the 5-4 majority, held the relevant product market consisted of all rolled steel products. Justice Reed's market definition was a producer-oriented one. He relied upon evidence that it was possible for rolled steel producers to make other products interchangeably with plates and shapes and, therefore, "the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products."<sup>20</sup> The record did not show any actual production shifts by rolled steel producers and Justice Reed apparently based his determinations on the technological feasibility of such shifts.<sup>21</sup> Mr. Justice Douglas for the dissenters felt that a better market definition would be one that considered "the actual business of which competitors will be deprived,"<sup>22</sup> *i.e.*, Consolidated's purchases of plates and shapes.

Justice Reed's production flexibility concept has not received wide acceptance as a reasonable product market test.<sup>23</sup> The major criticism of this concept is that in *Columbia Steel* the Court considered only the technological possibility of production shifts rather than whether such shifts occurred in actual practice. A second major criticism is that this test focuses upon the producers and

---

<sup>20</sup> 334 U.S. at 510.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.* at 538-39. Douglas, joined by Justices Black, Murphy, and Rutledge, launched an attack on the problem of bigness. He felt that "size in steel is the measure of the power of a handful of men over our economy." *Id.* at 536. The interesting facet of this dissent is that in 1948 Justice Douglas was foreshadowing what was to become the majority view of the Supreme Court in the 1960's—bigness is bad. "The least I can say is that a company that has . . . tremendous leverage on our economy is big enough." *Id.* at 540.

<sup>23</sup> See Bock, *op. cit. supra* note 8; Note, 110 U. Pa. L. Rev. 861 (1962). *Contra*, Mann & Lewyn, "The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views," 47 Va. L. Rev. 1014 (1961).

ignores the consumers. The validity of this second criticism of course depends upon whether the interests to be protected by the antitrust laws are those of the competitors or those of the consumers. It has been suggested that if the protection of competitors is to be the goal in preventing vertical mergers, then considering production flexibility would appear to be justifiable.<sup>24</sup> It should also be noted that even if protection of competitors is the desired objective, the production flexibility doctrine may still be criticized as not providing enough protection since the competitors will be forced into producing new lines and entering new markets.

The production flexibility test as developed in *Columbia Steel* has been rejected by the lower courts in at least four cases arising under section 7 of the Clayton Act.<sup>25</sup> These courts indicated production flexibility was not a proper test in a section 7 proceeding and rejected it on the basis that no actual shifts in production were shown. It was also condemned as a test considering only the sellers and ignoring the buyers.<sup>26</sup> It seems questionable whether the production flexibility doctrine would be accepted in a Sherman Act case today.

Although production flexibility seems now to be rejected as a market test in and of itself, it still may have some significance when

---

<sup>24</sup> Mann & Lewyn, *supra* at 1027. The authors also indicate production flexibility is relevant in horizontal mergers where an injury-to-competition standard is employed. "The fact that there are many firms who could produce and market a product (without significant cost disadvantages) may indicate a significant possibility of potential competition. . . . Potential competition may . . . so overhang the market that the merging companies' power to effect prices or output would be severely restricted." *Id.* at 1029.

<sup>25</sup> Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962); Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961); Brown Shoe Co. v. United States, 179 F. Supp. 721 (E. D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D. N.Y. 1958).

<sup>26</sup> The best illustration of the lower courts' rejection of production flexibility is the *Bethlehem Steel* decision, *supra* note 25. The court held that several iron and steel products were separate lines of commerce, refusing to accept the defendants' contentions that the ability of producers to shift from one product to another should be considered. Judge Weinfeld rejected this concept on the basis that a "definition . . . which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." 168 F. Supp. at 592. He went on to find that defendants' contentions were "pure theory" since there was little evidence of any production shifts. *Ibid.* Finally, Judge Weinfeld concluded: "It does not follow that the production flexibility recognized in a vertical integration case under § 1 of the Sherman Act, like *Columbia Steel*, is controlling in a horizontal case under § 7 of the Clayton Act." *Id.* at 592 n.34.

The *Crown Zellerbach* decision, *supra*, followed *Bethlehem Steel* in rejecting this test where no actual production shifts are shown. For a detailed discussion of this case in a production flexibility setting, see Mann & Lewyn, *supra* note 23.

used in conjunction with other market tests.<sup>27</sup> In addition, it should be noted that at least two Justices of the Supreme Court still regard the test as being a proper one.<sup>28</sup>

*B. Reasonable interchangeability and cross-elasticity of demand*

A significant majority of the recent Sherman Act cases discussing the matter have defined the product market in terms of the consumer—the relevant product market is composed of all products that are reasonable substitutes for each other and for which there exists a cross-elasticity of demand on the part of the buying public. It was not until the mid-1950's that this concept became prevalent in the Sherman Act cases. The earlier decisions, while sometimes talking about interchangeability of products, usually defined the market narrowly to consist of only physically indistinguishable products.<sup>29</sup> The first mention of the interchangeability test ap-

---

<sup>27</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). In this important product market determination case the Court stated the general market test and then concluded: "The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed." *Id.* at 325 n. 42.

<sup>28</sup> Justice Harlan, concurring in *Brown Shoe*, *supra* at 367, stated that an accurate analysis of the product market would take into account "the interchangeability of production." He emphasized production flexibility as the primary market test and felt it to be a more "realistic gauge of the possible anticompetitive effects" than the district court's test, which placed primary emphasis on the buying public in defining the market.

Justice Stewart, dissenting in the *Alcoa-Rome Cable* decision, *supra* note 15, at 283, concluded that the basic economic concept was to define the market in terms of the substitutability of either products or production facilities. He justified the combining of insulated aluminum conductor and insulated copper conductor into one product market because of the "manufacturing interchangeability between copper and aluminum." *Id.* at 285.

<sup>29</sup> See, *e.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-73 (1948) (existence of monopoly in motion picture exhibition determined as to first-run business in individual cities and towns, excluding data on subsequent run substitutes from consideration); *United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947) (control of the market for new taxicabs in four large cities held to constitute violation of Sherman Act, and cab markets in other cities were excluded); *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934) (advertising market for farm journals limited to certain regions rather than to farm journal advertising generally); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 422-23 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952) (hydraulic pump held to be in a market distinct from rod pump and other types); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (particular produce building held to constitute a monopoly even though alternative selling sites existed); *United States v. National City Lines, Inc.*, 186 F.2d 562, 567-68 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (purchases by one customer of petroleum products, buses, and tires held to constitute a separate market from total purchases of such



pears to have been by Judge Learned Hand in *United States v. Corn Prods. Ref. Co.*,<sup>30</sup> decided in 1916. After formulating the test, Judge Hand delimited the relevant market narrowly to include starch and syrup made from corn and exclude the physically distinct products of starch and syrup made from other raw materials. In 1945, Judge Hand again had the opportunity to apply the interchangeability rule to a Sherman Act case and again the market was narrowly defined to exclude physically distinct products. In *United States v. Aluminum Co. of America*<sup>31</sup> he intimated that virgin aluminum ingot constituted a market separate from secondary aluminum ingot—ingot made from aluminum scrap.

In 1953, the Supreme Court in *Times-Picayune Publishing Co. v. United States*<sup>32</sup> indicated a willingness to recognize that two physically distinguishable products which are considered by their consumers to be substitutes for each other may be included within the same product market. Two newspapers, Times-Picayune and the States were owned by the same company, the former being a morning newspaper and the latter an evening edition. The States was in competition with the Item for evening newspaper sales, while the Times-Picayune was the only morning paper in the city. Defendant publishing company had a policy that any advertisers desiring space in the morning Times-Picayune also had to advertise in the evening States. The Government contended this tying ar-

---

products); Fashion Originators' Guild v. FTC, 114 F.2d 80, 85 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941) (certain dress designs held to constitute a market distinct from other dress designs); Cape Cod Food Prods. Inc. v. National Cranberry Ass'n, 119 F. Supp. 900, 908 (D. Mass. 1954) (processed cranberries found to be separate market from raw cranberries); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 33 (D. Minn. 1945) (linen rugs were held to be a distinct product market from other floor coverings).

See generally MacDonald, "Product Competition in the Relevant Market Under the Sherman Act," 53 Mich. L. Rev. 69 (1954).

<sup>30</sup> 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed on appellant's motion*, 249 U.S. 621 (1919). According to Professor Turner, Judge Hand set out two basic guides for defining the relevant product market in terms of substitutes. "First, substitutes should be disregarded, even if indistinguishable in character, use, or consumer preference, whenever their cost of production substantially exceeds that of the product allegedly monopolized. . . . Second, whether one should include physically distinguishable substitutes depends on comparative consumer preferences and comparative costs of production." Turner, "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281, 288 (1956). Turner further suggests that the consideration of substitutes here may have been because this was a "combination" case under § 2 of the Sherman Act rather than an "attempt" or "conspiracy" case. He points out that in the "attempt" and "conspiracy" cases the courts excluded all "physically distinct substitutes" from the product market. *Id.* at 289.

<sup>31</sup> 148 F.2d 416 (1945).

<sup>32</sup> 345 U.S. 594 (1953).

rangement violated sections 1 and 2 of the Sherman Act. An important issue in the case was a determination of the relevant product market. The defendants contended that the relevant market should include all forms of mass advertising media in competition with newspapers, such as radio, television, magazines, billboards, direct mail, etc.<sup>33</sup> The Government contended the relevant market should include only the morning newspaper.<sup>34</sup> The Court,<sup>35</sup> through Mr. Justice Clark, rejected both contentions and held that the relevant market consisted of advertising readership sold by all three newspapers.

While the Court refused to include other advertising media in the product market with newspapers, it did recognize the doctrine of reasonable interchangeability and cross-elasticity of demand. The significant market language was contained in a footnote which stated:

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small. Useful to that determination is, among other things, the trade's own characterization of the products involved. The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media.<sup>36</sup>

The Court thus indicated the beginning of a new trend in market determination.<sup>37</sup>

---

<sup>33</sup> Brief for Appellant, *Times-Picayune Publishing Co.*, p. 79, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

<sup>34</sup> Brief for Appellant, *United States of America*, pp. 28-29, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

<sup>35</sup> This was a 5-4 decision. Mr. Justice Burton dissented, joined by Justices Black, Douglas, and Minton.

<sup>36</sup> 345 U.S. at 612 n.31.

<sup>37</sup> See Maseritz, "The Relevant Market—A Case Study of the *Du Pont-General Motors* Decision," 6 *Antitrust Bull.* 487, 497 (1961). Maseritz suggests three reasons why the *Times-Picayune* case marked a turning point in market definition. First, the concept of cross-elasticity of demand was introduced as a quantitative measure of substitute products. Second, it was made apparent that the product market was not to be limited to physically indistinguishable products. Third, the Court relied on actual market conditions in determining the market and introduced a new factor in the trade's own characterization of the products.

For a more extensive analysis of the *Times-Picayune* decision see Note "Definition of the Market in Tying Arrangements: Another Aspect of *Times-Picayune*," 63 *Yale L. J.* 389 (1954).

In 1956, the Supreme Court fully developed the interchangeability test in *United States v. E. I. du Pont de Nemours & Co.*<sup>38</sup> This case established that market definition is not a matter of conventionally classifying industries or products, but is an economic problem to be analyzed by an empirical observation of substitution. An injunction was sought to restrain du Pont from monopolizing or attempting to monopolize interstate trade in cellophane. Du Pont produced almost seventy-five per cent of the cellophane sold in the United States. The important issue was a determination of the relevant product market. Du Pont argued the market should consist of all flexible packaging materials,<sup>39</sup> of which cellophane constituted less than twenty per cent, while the Government contended that cellophane was the appropriate product market.<sup>40</sup> The Court, through Mr. Justice Reed, considered the available substitutes for cellophane and the cross-elasticity of demand between cellophane and other wrappings and found a broad relevant market including all flexible packaging material, which resulted in clearing du Pont of any Sherman Act violation.<sup>41</sup> Justice Reed developed the reasonable interchangeability test as follows:

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize

---

<sup>38</sup> 351 U.S. 377 (1956) [hereinafter referred to as the *Cellophane* case].

<sup>39</sup> *Id.* at 394.

<sup>40</sup> *Id.* at 380.

<sup>41</sup> The *Cellophane* case was concerned only with the actual monopolization of cellophane. The Government on appeal did not raise any issue of an "attempt to monopolize" or a conspiracy to monopolize under section 2. *Id.* at 379. The reasonable interchangeability concept, however, was later extended to attempts and conspiracies. In *International Boxing Club v. United States*, 358 U.S. 242 (1959), discussed later in this article, the Court applied the *Cellophane* test in a case involving conspiracy as well as monopolization under the Sherman Act. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), upheld against alleged Sherman Act violations an exclusive contract for the marketing of Packard cars in Baltimore. The theory of illegality was that the exclusive contract constituted both an unreasonable restraint under § 1 and an unlawful attempt or conspiracy to monopolize trade in Packard cars under § 2. However, the Court applied the interchangeability test and held the relevant market to consist of all other cars that were reasonably interchangeable with Packard cars. See also *United States v. Ohio Crankshaft Co.*, 19 F.R.D. 368 (N.D. Ohio 1956).

cellophane when that product has the competition and interchangeability with other wrappings that this record shows.<sup>42</sup>

The Court found reasonable interchangeability between cellophane and other wrapping materials even though cellophane was two or three times as expensive as its chief competitors in the flexible wrapping market and even though cellophane's prices could change independently from other materials'.<sup>43</sup> The Court also admitted that "cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of the other wrapping materials."<sup>44</sup> The Court emphasized that despite cellophane's advantages it had to meet competition from other materials and "except as to permeability to gases, cellophane has no qualities that are not possessed by a number of other materials."<sup>45</sup> Also emphasized was the fact that there was certain "responsiveness of the sales of one product to price changes of the other."<sup>46</sup>

Chief Justice Warren, joined by Justices Black and Douglas, dissented on the ground that cellophane was the relevant market and du Pont had monopoly control in that market. He analyzed the physical properties of the various wrapping materials and concluded they were not "the self-same products" as cellophane.<sup>47</sup> The dissenters did not feel that "buyers, practical businessmen, would have bought cellophane in increasing amounts over a quarter of a

---

<sup>42</sup> 351 U.S. at 404.

<sup>43</sup> *Id.* at 401. Cellophane's two principal competitors were glassine and greaseproof papers. The price of moistureproof cellophane per pound was 47.8¢. The price of bleached glassine was 17.8¢ per pound, while the price of bleached greaseproof paper was 15.8¢ per pound. Expressed in terms of price per 1,000 square feet (in cents), moistureproof cellophane was 2.3, bleached glassine 1.0, and bleached greaseproof .9. See Appendix C, *id.* at 412. Other flexible packaging materials were much more expensive than cellophane. Polyethylene for example was 81.0¢ per pound and Saran was 99.0¢ per pound. *Ibid.*

As to the independence of cellophane's price, Stocking and Mueller conclude, "Apparently du Pont could ignore the prices of rival papers in setting its own prices." Stocking & Mueller, "The Cellophane Case and New Competition," 45 *Amer. Econ. Rev.* 29, 50 (1955). The authors pointed to large reductions in cellophane prices over a period of years while the prices of other products remained relatively stable.

<sup>44</sup> 351 U.S. at 398. According to Appendix B of the Court's opinion, *id.* at 411, cellophane is highly transparent and has a high bursting strength. Glassine, one of cellophane's chief competitors, while cheaper, has a low bursting strength and is commercially transparent to opaque. The only other product which is highly transparent and has a high bursting point is Saran, but it is twice as expensive as cellophane.

<sup>45</sup> *Id.* at 399. See Appendix B to the opinion of the Court, *id.* at 411. While cellophane has excellent resistance to grease and oils, so does aluminum foil, cellulose acetate, Pliofilm, Saran, and Cry-O-Rap. Similarly, while cellophane is highly transparent, so is cellulose acetate, Pliofilm, and Saran.

<sup>46</sup> *Id.* at 400.

<sup>47</sup> *Id.* at 414 (dissenting opinion).

century if close substitutes were available at from one-seventh to one-half cellophane's price."<sup>48</sup>

The *Cellophane* decision caused alarm among advocates of a strong antitrust policy and is still often considered today as a questionable decision.<sup>49</sup> In 1964, Emanuel Celler stated, "I do not believe that the cellophane case, in which it was held that a \$100,000,000 industry could not be monopolized, was good law either in an economic or anti-trust sense."<sup>50</sup> The major criticism levied on the *Cellophane* decision is that the Court considered only the technical possibilities of substitution and ignored the significant price differences and the independent price behavior of cellophane.<sup>51</sup> This objection to the broad market as developed in *Cellophane* seems justified and, as indicated below, although subsequent cases have used the interchangeability test they have emphasized its limitation of "price, use and qualities considered" to delineate a narrower relevant market.

Before leaving *Cellophane*, it is interesting to note that the Court reaffirmed the statements in earlier cases that under the present test the product market could not be stretched to include "the interindustry competition emphasized by some economists."<sup>52</sup> This concept appeared in the cases before and after *Cellophane*, but is now dead under the *Continental Can*<sup>53</sup> doctrine discussed below.

---

<sup>48</sup> *Id.* at 417 (dissenting opinion).

<sup>49</sup> See, e.g., Barnes, "The Primacy of Competition and the Brown Shoe Decision," 51 *Geo. L. J.* 706, 731 (1963); Celler, "The Celler-Kefauver Act and the Quest for Market Certainty," 50 *A.B.A.J.* 559 (1964); Stocking, "Economic Change and the Sherman Act: Some Reflections on 'Workable Competition,'" 44 *Va. L. Rev.* 537, 567-72 (1958); Comment, 3 *Wayne L. Rev.* 43 (1956).

<sup>50</sup> Celler, *supra* note 49, at 559.

<sup>51</sup> See Hall, "Market Definition and Antitrust Policy," 20 *Wash. & Lee L. Rev.* 47 (1963); Stocking & Mueller, *supra* note 43. Citing *Cellophane* as an example, Hall states, "Those decisions in which judicial attention focused primarily on technical substitution have been the ones most criticized by economists." Hall, *supra* at 63. Price relationships as well as technical possibilities of substitution must be considered. *Ibid.* There is also some authority questioning the Court's failure to analyze the differences in production costs among the various wrapping materials. Turner, "Antitrust Policy and the Cellophane Case," 70 *Harv. L. Rev.* 281 (1956). Turner concludes that the product market test must involve a determination of costs so that substitutes "will be excluded where the Government shows that at prices producing a high cross-elasticity the alleged monopolist has a substantial cost advantage." *Id.* at 309. He continues, "the alleged monopolist [should] carry the burden of proving that the competition of substitutes is on a par in terms of cost as well as price, use, and qualities." *Id.* at 318.

<sup>52</sup> 351 U.S. at 393.

<sup>53</sup> *Supra* note 16. The Court actually only paid lip service to this concept in *Cellophane*. Justice Reed stated that brick would not be placed in the same market with steel or wood or cement or stone, but in almost the same breath put plain grease-proof paper and aluminum foil in a common product market. 351 U.S. at 393.

In 1959, the Supreme Court went a long way toward dispelling the fears of those who felt that the *Cellophane* case had precluded effective administration of the antitrust laws under section 2 of the Sherman Act by its broad definition of the product market. In *International Boxing Club v. United States*,<sup>54</sup> the Court applied the *Cellophane* test and came up with a narrow market definition which resulted in a Sherman Act violation. Defendants were charged with a combination and conspiracy in restraint of trade in the promotion of professional boxing matches and with a conspiracy to monopolize and a monopolization of the same in violation of both sections 1 and 2 of the Act. The product market issue was whether the market should include all professional boxing contests or only championship contests. As in *Cellophane*, defendants were arguing for a broad market definition which would include all professional bouts and the Government was again contending for a narrow definition. Mr. Justice Clark,<sup>55</sup> for the Court, upheld the Government's contention and, after stating the *Cellophane* test, concluded that nonchampionship and championship fights were not interchangeable.

Although applying the *Cellophane* test, the Court emphasized the limitation in that test, *i.e.*, "price, use and qualities considered."<sup>56</sup> The Court recognized there were significant price differentials and a significant difference in consumer preference between championship and nonchampionship fights. The Court also recognized a "particular and special demand"<sup>57</sup> for championship contests among radio broadcasting and telecasting companies. Both *Cellophane* and the present case emphasized a consumer-based definition of the market, but in *Cellophane* the Court emphasized technical possibilities of substitution despite the fact that significant price differentials existed, while the Court in *International Boxing Club* did recognize the actualities of cost or price.<sup>58</sup>

---

<sup>54</sup> 358 U.S. 242 (1959). For a more detailed analysis of *International Boxing Club*, see 33 St. John's L. Rev. 374 (1959); 33 Tul. L. Rev. 710 (1959).

<sup>55</sup> Justice Clark took no part in the consideration of the *Cellophane* case. *United States v. E. I. du Pont de Nemours & Co.*, *supra* note 38, at 404.

<sup>56</sup> *Ibid.*

<sup>57</sup> 358 U.S. at 251.

<sup>58</sup> The price differentials existing between championship and nonchampionship fights were illustrated in terms of defendants' revenue. For example, television rights to one championship fight brought in \$100,000 in contrast to \$45,000 in revenue from such rights to a nontitle fight seven months later between the same two boxers. *Id.* at 250. It was also noted that spectators pay "substantially more" for tickets to championship fights than for nonchampionship contests. *Ibid.* Thus both television networks and spectators had to pay a significantly higher price if they desired to substitute a championship fight for a nontitle bout.

It is also interesting to note that although the Court in *International Boxing Club* applied the *Cellophane* test of the relevant market, it stated that "the case which most squarely governs this case is *United States v. Paramount Pictures*, (1948) 334 U.S. 495."<sup>59</sup> In that case the district court had confined the relevant market to that for nationwide movie distribution and the Supreme Court remanded to the District Court for consideration of the charges after holding that the relevant market was first-run movies in certain designated geographical areas. *Paramount Pictures* was the same case which the dissenters in *Cellophane* felt had been disregarded by the majority.<sup>60</sup>

The Court also noted in *International Boxing Club* that the relevant market met the "peculiar characteristics and uses" test as developed by cases under section 7 of the Clayton Act and discussed later in this article.<sup>61</sup>

Although other tests have sometimes been suggested under the Sherman Act cases, it appears from the above discussion that the two most important are production flexibility, a test defined in terms of producers and today somewhat disregarded,<sup>62</sup> and reasonable interchangeability, a test defined in terms of consumers, which could be further divided into potential or technical interchangeability and actual interchangeability. These tests should be kept in mind for a comparison with the Clayton Act cases discussed below.

### III. THE CLAYTON ACT

It is under section 7, the anti-merger provision of the Clayton Act as amended in 1950, that most of the important relevant market cases are decided today. As stated above, section 7 prohibits stock or asset acquisitions where the effect of such acquisition is substantially to lessen competition or to tend to create a monopoly "in

---

<sup>59</sup> *Id.* at 251.

<sup>60</sup> *United States v. E. I. du Pont de Nemours & Co.*, *supra* note 38, at 423. This reliance upon *Paramount Pictures* by the majority in *International Boxing Club* and the dissenters in *Cellophane* emphasizes the Court's change of position in the application of the reasonable interchangeability test. In this connection it is also important to recognize the significant change in the Court's membership between 1956 and 1959. Of the four Justices who comprised the majority in *Cellophane*, only Mr. Justice Frankfurter remained when the *International Boxing Club* decision was rendered. On the other hand, all three of the *Cellophane* dissenters (Chief Justice Warren and Justices Black and Douglas) remained in 1959 and still remain today. This may have been a strong factor in the change from a broad product market in *Cellophane* to the narrower market of *International Boxing Club*.

<sup>61</sup> 358 U.S. at 252 n.8.

<sup>62</sup> *But see* notes 27 & 28 *supra*.

any line of commerce in any section of the country.”<sup>63</sup> The phrase “in any line of commerce” refers to the product market and it has received substantial analysis by the courts in recent years.

For clarity of discussion, the development of section 7 tests can be divided into four distinct periods: (1) the period before the landmark case of *Brown Shoe Co. v. United States*;<sup>64</sup> (2) the *Brown Shoe* decision itself; (3) the application of *Brown Shoe* before *Continental Can* and *Alcoa-Rome Cable*; (4) the *Continental Can* and *Alcoa-Rome Cable* decisions of 1964.

#### A. Pre-Brown Shoe

Before 1950 and the Celler-Kefauver Amendment to section 7, product market definition was important in two old section 7 cases, in both of which the market was narrowly defined. In *FTC v. Thatcher Mfg. Co.*,<sup>65</sup> defendant Thatcher, a manufacturer of milk bottles, was accused of violating section 7 by the acquisition of Woodbury Glass Company, primarily a manufacturer of condiment and whiskey bottles. Woodbury also manufactured a very small amount of milk bottles—less than one percent of its total production.<sup>66</sup> Thatcher did not compete with Woodbury in any line except milk bottles. Woodbury was considering abandonment of milk bottle production and the acquisition by Thatcher resulted in such abandonment. In determining whether this merger substantially lessened competition, Judge Wooley looked only to a product market consisting of milk bottles and held that since Woodbury produced such an insignificant amount there would be no violation of section 7.<sup>67</sup>

In *International Shoe Co. v. FTC*,<sup>68</sup> the Supreme Court in defining the product market separated the shoes manufactured by the acquired company from those manufactured by the acquiring company. The shoes of one company “were better finished, more attractive and modern in appearance, and appealed especially to city trade.”<sup>69</sup> The shoes of the other company were of a “better wearing quality”<sup>70</sup> but were not of the dress type. The narrow market construction in this case, as in *Thatcher*, resulted in validat-

---

<sup>63</sup> 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

<sup>64</sup> 370 U.S. 294 (1962).

<sup>65</sup> 5 F.2d 615 (3d Cir. 1925), *modified sub nom.* *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

<sup>66</sup> Its annual production of milk bottles was only about 8,000 gross out of a total production of over 1,000,000 gross. 5 F.2d at 622.

<sup>67</sup> *Ibid.*

<sup>68</sup> 280 U.S. 291 (1930).

<sup>69</sup> *Id.* at 295.

<sup>70</sup> *Ibid.*



ing the merger. The markets in both of these cases were as narrow or narrower than the markets of Sherman Act cases of a similar period.<sup>71</sup>

The legislative history of the 1950 amendment is not indicative of whether the market under new section 7 (or the similarly defined section 3 market) was intended to differ from the market definition under the Sherman Act cases or under the 1914 version of the Clayton Act. Several commentators have stated that Congress did not intend a new definition of the product market under the 1950 amendments.<sup>72</sup>

The most significant case of this period is *United States v. E. I. du Pont de Nemours & Co.*<sup>73</sup> Although interpreting "old" section 7 of the Clayton Act, the Supreme Court provided a useful guideline for determining the relevant product market and this guideline was followed in subsequent "new" section 7 cases. The Government filed its complaint in June 1949, alleging that du Pont had violated sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act as the result of the purchase of a twenty-three per cent stock interest in General Motors during the years 1917-1919.<sup>74</sup> Du Pont was supplying General Motors with substantial amounts of finishes and fabrics and the issue was whether this was the result of du Pont's control over General Motors and if so whether there was a substantial lessening of competition.<sup>75</sup> The determination of the relevant product market was a crucial issue. There were three

---

<sup>71</sup> See Comment, 110 U. Pa. L. Rev. 861, 865 (1962). See also *supra* note 29.

<sup>72</sup> See Martin, *Mergers and the Clayton Act* 20-56 (1959); Mann & Lewyn, "Relevant Market under Section 7 of the Clayton Act: Two New Cases—Two Different Views," 47 Va. L. Rev. 1014 (1961); Comment, 110 U. Pa. L. Rev. 861 (1962).

<sup>73</sup> 353 U.S. 586 (1957) [hereinafter referred to as *du Pont-General Motors*].

<sup>74</sup> *Id.* at 588.

<sup>75</sup> The Court held that du Pont's position was obtained by its control over General Motors rather than by competitive merit. *Id.* at 605. There were also two other significant holdings in this case which are not relevant for the purposes of this paper. First, the Court made it clear that section 7 applied to vertical as well as horizontal mergers. Secondly, the Court held that the relevant date for examining the acquisition was at the time of the suit, rather than at the date of the acquisition. Even though there was no violation at the time of acquisition in 1919, if there was one at the time of suit in 1949, appropriate action could be maintained. Even when the purchase of stock is "solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to bring about or in attempting to bring about the substantial lessening of competition." *Id.* at 597-98. For a more detailed discussion of these issues see Barnes, "Competitive Mores and Legal Tests in Merger Cases: The Du Pont-General Motors Decision," 46 Geo. L.J. 564, 602 (1958); Dirlam & Stelzer, "The Du Pont-General Motors Decision: In the Antitrust Grain," 58 Colum. L. Rev. 24 (1958); Rogers, "United States v. du Pont-General Motors—A Judicial Revision of Section 7," 2 Antitrust Bull. 577 (1957).

possible market alternatives—a conglomerate market consisting of all products purchased by du Pont from General Motors, a broad all-industry market consisting of finishes and fabrics, or a narrow market consisting of automobile finishes and products.<sup>76</sup> Du Pont argued that the relevant market should consist of all finishes and fabrics since judged in this light du Pont's sales to General Motors would be an insubstantial share of the market. In 1947 du Pont's sales of finishes to General Motors comprised 3.5 per cent of all sales of finishes to industrial users while its fabric sales to General Motors constituted only 1.6 per cent of the total market.<sup>77</sup> If, on the other hand, the relevant product market were considered to be limited to automotive finishes and fabrics, a different picture would develop. General Motors' requirements for automotive finishes and fabrics represented approximately 50 per cent of the total market for such fabrics.<sup>78</sup> Du Pont supplied 67 per cent of General Motors' requirements for finishes in 1946 and 68 per cent in 1947, and it supplied 52.3 per cent of General Motors' fabric requirements in 1946 and 38.5 per cent in 1947.<sup>79</sup> Thus du Pont controlled approximately 34 per cent of the automotive finishes market and approximately 19 per cent of the automotive fabric market in those years.

Mr. Justice Brennan, speaking for the majority in a 4-2 decision, rejected du Pont's bid for a broad product market, held the relevant market to be automotive finishes and fabrics and went on to find a violation of section 7. In defining the product market Justice Brennan developed what has come to be known as the "peculiar characteristics and uses" test. He concluded:

The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. . . . Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.<sup>80</sup>

Mr. Justice Burton, joined by Mr. Justice Frankfurter, dissented and one of his grounds was that the record did not show that automotive finishes and fabrics possessed sufficient peculiar characteristics and uses to distinguish them from other finishes and

---

<sup>76</sup> See Barnes, *supra* note 75, at 608.

<sup>77</sup> 353 U.S. at 593.

<sup>78</sup> *Id.* at 596.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Id.* at 593.

fabrics.<sup>81</sup> He pointed out that the district court did not reach the question of the relevant market and the record did not contain any findings of fact dealing with this issue.<sup>82</sup>

As the dissenters pointed out,<sup>83</sup> Justice Brennan in adopting the "peculiar characteristics and uses" test did not go into an extensive analysis of what these distinguishing characteristics and uses were. His discussion of that matter is relegated to a footnote wherein he mentions that one type of finish supplied to General Motors by du Pont was a significant advance in automobile finishing and that, since there are no standard prices for automobile fabrics as there are in other industries, bids are submitted on them.<sup>84</sup> Needless to say, such observations do little for justifying a separation of automotive finishes and fabrics into a distinct market.<sup>85</sup> It has been

---

<sup>81</sup> *Id.* at 650 (dissenting opinion).

<sup>82</sup> *Id.* at 649 n.30 (dissenting opinion). Because of this, Justice Burton believed that the Court should remand the case to the district court so that the district judge, who had a greater degree of familiarity with the case, could review the record, and "entertain argument with respect to the substantiality of the share of the relevant market affected by the foreclosure which the Court finds to exist. By declining to remand, the Court necessitates a scrutinizing here of this huge record for a determination of an essentially factual question not passed on by the District Court, and not thoroughly briefed or argued by the parties." *Ibid.*

<sup>83</sup> *Id.* at 650 (dissenting opinion).

<sup>84</sup> *Id.* at 594 n.12.

<sup>85</sup> Although Justice Brennan excluded an analytical examination of finishes and fabrics to support his conclusion that automotive finishes and fabrics possessed sufficient peculiar characteristics and uses, an excellent analysis of the finishes market appears in Maseritz, "The Relevant Market—A Case Study of the Du Pont-General Motors Decision," 6 *Antitrust Bull.* 487, 508 (1961). Maseritz analyses the finishes market in terms of classification, end-uses (including an analysis of technical and chemical properties), and expert evaluation of the market. He concludes that there are three distinguishing characteristics of automotive finishes: "(1) a finish with excellent color, gloss, and durability; (2) rapid application and drying of the finish; and (3) a finish capable of achieving certain chemical and physical properties at the lowest cost possible." *Id.* at 527-28.

Maseritz believes the main justification for giving automotive finishes a separate market category is "because of the concentration of its users and the resulting economics of large scale production." *Id.* at 528. The buyer side of the market is composed solely of three or four large companies. In order for a firm producing automotive finishes to survive, it must "gain a foothold in the sales to one of the major firms." *Id.* at 529. Hence, there are a small number of sellers. In addition, large-scale, speedy production necessitates the production of a finish with special characteristics, such as rapid application and drying.

Maseritz also makes an interesting distinction between the relationship of cellophane to the flexible wrappings market (*Cellophane* case) and of automotive finishes to the total finishes market. Here again, it is the structure of the automobile industry that provides the distinction. "Qualitatively, automotive finishes are as much a part of the finishes market as cellophane is of the wrappings market. Similarly, the functional distinction between appliance and automotive finishes is no greater than the

suggested that the evidence supporting the distinctive characteristics was supplied by the defense in attempting to justify the course of trade between du Pont and General Motors as being based on competitive merit.<sup>86</sup> The defense contended that the justification for this course of trade was because the du Pont products were especially suited to the General Motors requirements.<sup>87</sup> The lack of factual analysis of the products in issue has drawn criticism from several commentators.<sup>88</sup>

It should be noted that the *du Pont-General Motors* case came only one year after the *Cellophane* case in which the Supreme Court found a broad relevant product market by use of the reasonable interchangeability test. What accounted for the different tests in these two cases? Some authors feel the difference is the result of one case's being a Sherman Act case and the other a Clayton Act section 7 case,<sup>89</sup> while others believe there is no difference in the two tests.<sup>90</sup> Further discussion of this matter is left until later in this article when the Sherman and Clayton tests are compared. However, it is interesting to note here a change in the personnel of the Supreme Court between the two cases, which may be one plausible reason for the different approaches.<sup>91</sup> In the *Cellophane* case, Justice

---

difference between cellophane and aluminum foil." *Id.* at 530. However, the users of cellophane are "multifarious, ranging from candy to cigar manufacturers," while the use of automotive finishes "is restricted to a handful of manufacturers." *Id.* at 524.

<sup>86</sup> See Barnes, *supra* note 75, at 611.

<sup>87</sup> Brief for Appellee, p. 23, *United States v. E. I. du Pont & de Nemours*, 353 U.S. 586 (1957).

<sup>88</sup> See, *e.g.*, Adelman, "The Du Pont-General Motors Decision," 43 Va. L. Rev. 873, 877 (1957); Handler, "Annual Review of Recent Antitrust Developments," 12 The Record 411, 417 (1957); Markham, "The Du Pont-General Motors Decision," 43 Va. L. Rev. 881, 887 (1957). Markham concludes that the four major products which the Court included in the automotive finishes and fabrics market were Duco, Dulux, imitation leather, and coated fabrics. He points out that a more extensive factual analysis would have considered the following facts: that Dulux, which the Court included in the automotive market, was used on refrigerators and other appliances but not on cars; that 51.5% of all Duco sales were made outside the automotive industry in 1947; and that 80% of du Pont's output of imitation leather and coated fabrics of the type used in the automobile industry was sold to manufacturers of other products such as luggage, brief cases, etc. Markham therefore concludes that the market of automotive finishes and fabrics was drawn too narrowly.

<sup>89</sup> See, *e.g.*, Bock, *Mergers and Markets* 87, 102-03 (1964); Dirlam & Stelzer, "The Du Pont-General Motors Decision: In the Antitrust Grain," *supra* note 75, at 40; Comment, 110 U. Pa. L. Rev. 861, 875 (1962).

<sup>90</sup> See, *e.g.*, Hall, *supra* note 51; Hander & Robinson, "A Decade of Administration of the Celler-Kefauver Antimerger Act," 61 Colum. L. Rev. 629 (1961).

<sup>91</sup> The difference between the two cases is explained upon this ground in Steele, "Decade of the Celler-Kefauver Antimerger Act," 14 Vand. L. Rev. 1049, 1058 (1961); See also Markham, *supra* note 88, at 885.

Reed wrote the opinion for the majority, composed of Justices Burton, Minton, Frankfurter, and himself. Justice Warren, Black, and Douglas dissented, while Justices Harlan and Clark took no part in the decision. The following year in the *du Pont-General Motors* decision, Justice Brennan wrote the opinion for the majority and was joined by the dissenters in the *Cellophane* case—Warren, Black, and Douglas. Justices Burton and Frankfurter, majority justices in *Cellophane*, dissented. Justices Clark, Harlan, and Whittaker abstained. The liberal coalition on the Court was thrown into the position of a majority.<sup>92</sup>

Subsequent to *du Pont-General Motors* and prior to the *Brown Shoe* decision, the “peculiar characteristics and uses” test was involved by the lower courts in three section 7 cases: *United States v. Bethlehem Steel Corp.*,<sup>93</sup> *Crown Zellerbach Corp. v. FTC*,<sup>94</sup> and *A. G. Spalding & Bros. v. FTC*.<sup>95</sup>

In the *Bethlehem Steel* decision Judge Weinfeld gave added weight to the restrictive approach taken by the Court in *du Pont-General Motors*. This was a proceeding by the Government to enjoin a proposed merger between the second and sixth largest steel corporations on the grounds that it would substantially lessen competition within the meaning of section 7 of the Clayton Act. The defendants defended this charge on the ground that the competition between them was *de minimis*.<sup>96</sup> The parties were in significant conflict over what the relevant product market should be and over what tests should be invoked. The Government urged a broad line of commerce consisting of the entire iron and steel industry and several narrow lines of commerce consisting of various steel products—hot rolled sheets, cold rolled sheets, hot rolled bars, etc. It contended these products all had sufficient peculiar characteristics and uses to constitute them separate lines of commerce within the *du Pont-General Motors* test.<sup>97</sup> The defendants rejected all of the Government’s lines of commerce and also challenged the validity of the “peculiar characteristics and uses” test.<sup>98</sup> Instead,

---

<sup>92</sup> See Time, July 1, 1957, pp. 12-13. It has been suggested that if Justices Clark, Harlan, and Whittaker had taken part in the decision, the result would have been 5-4 in favor of defendants. See Rogers, *supra* note 75, at 581.

<sup>93</sup> 168 F. Supp. 576 (S.D.N.Y. 1958).

<sup>94</sup> 296 F.2d 800 (9th Cir. 1961).

<sup>95</sup> 301 F.2d 585 (3d Cir. 1962).

<sup>96</sup> *Supra* note 93, at 581. For a more detailed discussion of the *Bethlehem Steel* decision see Notes, 45 Cornell L.Q. 96 (1959); 28 Fordham L. Rev. 147 (1959); 37 Texas L. Rev. 766 (1959); 1959 U. Ill. L.F. 686.

<sup>97</sup> 168 F. Supp. at 589.

<sup>98</sup> The defendants sought to distinguish the “peculiar characteristics and uses” of the *du Pont-General Motors* case on the basis that there was no evidence of production flexibility in that case. *Id.* at 592 n.34.

they invoked the Sherman Act tests of production flexibility and reasonable interchangeability as appropriate for determining the relevant lines of commerce.<sup>99</sup> The defendants urged a broad line of commerce consisting of "common finished steel products" and several narrow lines of commerce based on mill product lines. Thus the parties had urged upon the court all three of the prior judicially developed tests. Judge Weinfeld rejected the defendants' contentions and upheld the Government's, stating that the lines of commerce it urged possessed sufficient peculiar characteristics and uses to constitute separate product markets.<sup>100</sup> In rejecting the reasonable interchangeability test Judge Weinfeld indicated it was not an appropriate test for a section 7 case when he concluded, "There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes."<sup>101</sup> The production flexibility concept was rejected on two grounds: because it was a test which focused on producers and ignored consumers,<sup>102</sup> and because it was pure theory where no actual shifts in production were shown.<sup>103</sup> After defining the relevant product market, Judge Weinfeld went on to find a substantial lessening of competition and a violation of section 7.

In the *Crown Zellerbach*<sup>104</sup> decision the court of appeals for the Ninth Circuit also had the opportunity to apply the "peculiar characteristics and uses" test. This case involved the merger of two paper companies. The acquired company, St. Helens Pulp and

---

<sup>99</sup> *Id.* at 589.

<sup>100</sup> *Id.* at 592-94. One writer criticizes Judge Weinfeld for applying the "peculiar characteristics and uses" test to determine the broad product market of iron and steel in general. Comment, 58 Colum. L. Rev. 1269, 1275-76 (1958). The argument is that this test should be used only in determining narrow lines of commerce as was the case in *du Pont-General Motors* and as was true of the narrow product markets in the instant case.

<sup>101</sup> *Id.* at 593-94 n.36. For a strong criticism of the court's rejection of reasonable interchangeability and acceptance of "peculiar characteristics and uses" see Adelman, "Economic Aspects of the Bethlehem Opinion," 45 Va. L. Rev. 684 (1959). In speaking of the "peculiar characteristics and uses" test Adelman concludes, "As a general conclusory remark in the court of last resort it may be suitable, but as grounds for defining a line of commerce or market, it has little or no meaning except as a battle-cry or slogan for those who wish to see profound and exciting contradictions between *du Pont-Cellophane* and *du Pont-General Motors*." *Id.* at 689.

<sup>102</sup> "Production flexibility did not imply buyer flexibility." Maseritz, *supra* note 85, at 533.

<sup>103</sup> 168 F. Supp. at 592. See note 26 *supra*. Judge Weinfeld in a footnote further indicated that "it does not follow that the production flexibility recognized in a vertical integration case under § 1 of the Sherman Act, like *Columbia Steel*, is controlling in a horizontal case under § 7 of the Clayton Act." 168 F. Supp. at 592 n.34.

<sup>104</sup> 296 F.2d 800 (9th Cir. 1961).

Paper, was a producer of coarse papers, while the acquiring company, Crown Zellerbach Corporation, produced and sold a complete line of paper products. The relevant product market issue revolved around what type of papers should be included. The Bureau of Census listed various types of coarse paper categories, one of which was Census coarse paper.<sup>105</sup> Eighty-four per cent of St. Helens' production was of coarse paper in that category and the Federal Trade Commission determined that this category was the relevant product market. The defendants challenged this finding on the ground that there was a great degree of interchangeability between Census coarse papers and other trade coarse papers and hence the market should be all trade coarse papers.<sup>106</sup> They also invoked the production flexibility concept in support of this market since one machine by simple adjustment could produce any type of coarse paper.<sup>107</sup> Judge Pope, speaking for the court, followed the approach of the *Bethlehem Steel* decision and rejected defendants' contentions on the basis that the proper test was the "peculiar characteristics and uses" test. Judge Pope justified defining the product market in terms of Census coarse paper on the ground that such paper served different purposes, had different physical characteristics, was composed of different quality paper, and had different end uses than other trade coarse papers.<sup>108</sup> Defendants' production flexibility argument was rejected as being pure theory since no actual production shifts were shown.<sup>109</sup> Judge Pope also rejected

---

<sup>105</sup> This category constituted less than 20% of all coarse papers. *Id.* at 805.

<sup>106</sup> *Id.* at 807.

<sup>107</sup> *Id.* at 812.

<sup>108</sup> *Id.* at 813. In the instant case, as in the *du Pont-General Motors* case, there is no appreciable discussion of what the peculiar characteristics and uses that distinguished Census coarse papers from other trade coarse paper were. One distinguishing characteristic was the fact that the papers were composed of different quality paper. As to peculiar uses, the court points out that flexible wrapping paper, a type of Census coarse paper, is used for wrapping merchandise for delivery to customers, while paperboard, a non-Census coarse paper, was used for boxes and cartons in the crate type container market. However, looking at the various types of papers included in Census coarse papers and comparing them with other trade papers, it appears that there were substantial peculiar characteristics and uses possessed by Census coarse papers. For example, Census coarse paper includes wrapping paper, bag paper, envelope paper, gumming paper, etc., and these papers certainly have peculiar characteristics and uses when compared to other trade coarse papers such as toilet tissue stock, corrugating material, cardboard, facial tissue stock, etc.

<sup>109</sup> *Id.* at 812-13. As pointed out earlier in this article, "production flexibility" was originally developed in a vertical merger case, the *Columbia Steel* decision. When analyzing the competitive effects of a vertical merger the courts have looked at the market foreclosed to competitors of the acquiring company. Hence, if protection of competitors is the aim then their ability to switch from one product to another will be relevant. However, in considering a horizontal merger, as was the

the reasonable interchangeability test, citing *Bethlehem Steel* for the proposition that such a test is not applicable in a section 7 proceeding.<sup>110</sup> In the relevant market defined by the court, the merging companies produced seventy-six per cent of the total production and hence a violation of section 7 was found.

The court made two other significant pronouncements concerning the product market in *Crown Zellerbach*. First, the court made the rather novel conclusion that when considering the relevant product market it is permissible to confine such consideration "to those products which were mainly and principally the products sold by the absorbed company."<sup>111</sup> While this may have some relevance in a vertical merger where the competitive effects are considered in light of what market is foreclosed to the competitors of the acquiring company, *i.e.*, the product market of the acquired company, it seems to have no place in an analysis of the market in a horizontal merger. Secondly, the court emphasized as a primary consideration in distinguishing the two types of coarse papers the fact of industry recognition of Census coarse papers as a separate product line.<sup>112</sup> This concept was to reappear later in the *Brown Shoe* case.

In *Spalding*,<sup>113</sup> the court was faced with the acquisition of Rawlings Mfg. Co. by Spalding & Bros., both manufacturers of athletic goods. The court of appeals found that the relevant market consisted of athletic goods as a whole, and within that market, of higher and lower price categories of individual athletic goods, such as footballs and baseballs. The court used both the "peculiar characteristics and uses" and interchangeability tests in distinguishing higher priced from lower priced athletic goods. The court stated:

Those peculiar characteristics and uses were found to be in the superior raw materials and labor with which those products were constructed as distinguished from the low priced ones; in their particular suitability for use in organized competitive games and in that they were not interchangeable with low priced items for the purposes of their purchasers in the market. The Commission

---

case in *Bethlehem Steel* and the instant case, the emphasis is ordinarily placed on the consumers and the production flexibility concept has little usefulness. Hence the court in the instant case may have been justified in not relying on production flexibility.

<sup>110</sup> *Id.* at 814. As noted above the emphasis in horizontal mergers is usually placed on consumers. Why then reject the consumer-based reasonable interchangeability test? One suggestion has been that the court failed to distinguish between concepts used in vertical and horizontal mergers. See Mann & Lewyn, *supra* note 72, at 1026. This article contains an extensive examination of the *Crown Zellerbach* case and a well developed criticism of the court's market determination.

<sup>111</sup> 296 F.2d at 811.

<sup>112</sup> *Id.* at 813.

<sup>113</sup> *Supra* note 95.



found that these higher priced products constituted a distinct area of effective competition.<sup>114</sup>

As the *Spalding* case suggests there have been section 7 cases which have followed the reasonable interchangeability test of *Cellophane* rather than the "peculiar characteristics and uses" test of *du Pont-General Motors*, even though the former test was developed in a section 2 Sherman Act case while the latter was adopted in a section 7 case. One such case was *American Crystal Sugar Co. v. Cuban-American Sugar Co.*<sup>115</sup> Cuban-American owned twenty-one per cent of the stock of American Crystal and an injunction was sought to keep Cuban-American from gaining control. Crystal manufactured beet sugar and Cuban-American manufactured cane sugar. Cane sugar is more expensive than beet sugar and is used primarily by households, while beet sugar is used by industrial customers. The defendants sought to place the companies in different markets by having beet and cane sugar separated into different product markets. Under the *du Pont-General Motors* test it would seem that the two products would be placed in different markets since each had its own characteristics, prices, and buyer demands. However, the court considered the fact that the products had substantially the same end uses and were sensitive to each other's price changes and held that the product market should include both beet and cane sugar because there was a "high degree of interchangeability."<sup>116</sup>

In 1960, the same district court that decided the *Bethlehem Steel* decision one year earlier had another chance to consider the relevant product market in *United States v. Columbia Pictures Corp.*<sup>117</sup> The Government contended that an agreement between Universal Pictures and Screen Gems, a subsidiary of Columbia, whereby Screen Gems obtained for a fourteen-year period control over the distribution of six hundred feature films for television substantially lessened competition under section 7.<sup>118</sup> The Government contended that the relevant product market should be limited

---

<sup>114</sup> 301 F.2d at 602.

<sup>115</sup> 152 F. Supp. 387 (S.D.N.Y. 1957).

<sup>116</sup> *Id.* at 398. It should be noted here that the district court probably did not have access to the *du Pont-General Motors* decision since it was decided on June 6, 1957. For a more detailed discussion of the instant case see Comment, 58 Colum. L. Rev. 1269, 1271-80 (1958).

<sup>117</sup> 189 F. Supp. 153 (S.D.N.Y. 1960).

<sup>118</sup> There was also a § 1 Sherman Act charge which was dismissed. This agreement was brought under § 7 by a holding that the exclusive distribution rights received by Screen Gems constituted the acquisition of an asset within § 7. *Id.* at 181-83.

to feature films for television. It also contended that the "peculiar characteristics and uses" test was the only proper one in a section 7 case.<sup>119</sup> However, the court held that the product market should consist of all television programming material and, viewed within that market, there was no substantial lessening of competition. In reaching the market determination, Judge Herlands recognized both the *Cellophane* test of reasonable interchangeability and the *du Pont-General Motors* test of "peculiar characteristics and uses" and concluded that they were "but different verbalizations of the same criterion."<sup>120</sup> In determining the relevant product market the court considered a number of factors, such as means by which the products were sold, characteristics and uses of the products, prices, and the degree of interchangeability. Thus, the same court that rejected the reasonable interchangeability test in *Bethlehem Steel* was readopting it in *Columbia Pictures* and holding that there was no inconsistency between the two major tests.<sup>121</sup>

A third section 7 case which accepted the reasonable interchangeability concept of *Cellophane* was *Erie Sand & Gravel Co. v. FTC*.<sup>122</sup> A sand dredging company had merged with its principal competitor and the Commission found that this substantially lessened competition in the lake sand business in an area consisting of a twelve-mile strip of land bordering on Lake Erie. On appeal, Judge Hastie held that the Commission had erred in determining the relevant product market. The merging firms were in competition in supplying concrete sand, of which there were two principal types in the Lake Erie area: bank sand and lake sand. The Commission restricted the product market to lake sand. Judge Hastie concluded that the two types of sand should be in the same market since bank sand "has proved interchangeable with lake sand."<sup>123</sup> The *Cellophane* case was cited with approval.<sup>124</sup>

---

<sup>119</sup> *Id.* at 185.

<sup>120</sup> *Id.* at 184.

<sup>121</sup> It is interesting to note the development of the product market test in the district court for the southern district of New York. In 1957, Judge Dawson held in the *American Crystal Sugar* case that the reasonable interchangeability test was proper in a § 7 case. In 1959, Judge Weinfeld rejected reasonable interchangeability as a § 7 test in *Bethlehem Steel* and held that "peculiar characteristics and uses" was the true test. In 1960, Judge Herlands held the two tests were actually "different verbalizations of the same criterion" and a proper market determination involved consideration of both interchangeability and characteristics and uses. These three cases represent the struggle of the lower courts to apply the proper market test before *Brown Shoe*.

<sup>122</sup> 291 F.2d 279 (3d Cir. 1961).

<sup>123</sup> *Id.* at 281.

<sup>124</sup> *Ibid.* For a more detailed discussion of the instant case, including discussion of the significant geographical market concept involved, see Mann & Lewyn, "The

The above cases indicate that between 1957 and 1962 the lower courts were struggling to apply the proper tests as handed down by the Supreme Court in its three major cases—*Columbia Steel*, *Cellophane*, and *du Pont-General Motors*.<sup>125</sup> However, about the only consistent pattern to emerge from these cases was a pattern of inconsistency. Of the six cases discussed, two rejected interchangeability and relied on “peculiar characteristics and uses,”<sup>126</sup> two relied solely on interchangeability,<sup>127</sup> while the remaining two recognized both tests and applied them as consistent with each other.<sup>128</sup> One consistent note was the rejection of production flexibility by the two courts that considered that test.<sup>129</sup>

### B. *Brown Shoe Co. v. United States*

In 1962, the relevant market concept underwent its most significant refinement to date in *Brown Shoe Co. v. United States*.<sup>130</sup> For the first time the Supreme Court passed on the scope of amended section 7. The Government sought to enjoin a proposed merger between the defendants Brown Shoe Co. and G. R. Kinney Co. on the ground that the merger would violate section 7. Brown was the third largest seller of shoes by dollar volume in the United

---

Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views,” 47 Va. L. Rev. 1014 (1961).

<sup>125</sup> For a significant lower court opinion considering the product market under the Sherman Act during this period see *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957). In that case defendants were charged with the monopolization of the importation and sale of certain trademarked perfumes under § 2 of the act. The defendants argued that under the *Cellophane* test the product market would consist of all perfumes since they were reasonably interchangeable with each other. The court stated the *Cellophane* test but came up with narrow product markets consisting of single brands of perfumes. The perfume market was held to be not characterized by cross-elasticity of demand or consumer sensitivity to price changes. This case might be considered a forerunner to the *International Boxing Club* case where the Supreme Court applied the *Cellophane* test to define the market narrowly. See notes 54-60 *supra*, and accompanying text. For a more detailed analysis of the *Guerlain* case see Note, 43 Va. L. Rev. 1123 (1957).

For two other lower court Sherman Act cases concerning the relevant product market in this period see *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957), and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D.Md. 1956), *aff'd per curiam* 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

<sup>126</sup> *Crown Zellerbach Corp. v. FTC*, *supra* note 94; *United States v. Bethlehem Steel Corp.*, *supra* note 93.

<sup>127</sup> *A. G. Spalding & Bros. v. FTC*, *supra* note 95; *United States v. Columbia Pictures Corp.*, *supra* note 117.

<sup>128</sup> *Eric Sand & Gravel Co. v. FTC*, *supra* note 122; *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, *supra* note 115.

<sup>129</sup> *Supra* note 125.

<sup>130</sup> 370 U.S. 294 (1962).

States and Kinney was the eighth largest. Kinney had an extensive chain of retail outlets throughout the country. The Government contended that the effect of the merger "may be substantially to lessen competition or to tend to create a monopoly" by eliminating competition in the distributions of shoes and in the retail sales of shoes.<sup>131</sup> The Government's motion for a preliminary injunction was denied and the companies were permitted to merge on the stipulation that their assets be kept separately identifiable. After trial, the district court found that the merger might substantially lessen competition and ordered Brown to dispose of its presently owned Kinney stock.<sup>132</sup> On appeal, the Supreme Court affirmed.

The Government contended that the relevant product market consisted of shoes generally, or alternatively, men's, women's, and children's shoes considered separately.<sup>133</sup> The defendants contended that in determining the relevant product market one must consider not only age and sex differences, but also grades, qualities, prices, and uses of shoes.<sup>134</sup> Defendants were contending that the medium-priced shoes of Brown were in a product market different from the low-priced shoes of Kinney. The district court found that the relevant lines of commerce were men's, women's, and children's shoes, and the Supreme Court agreed.

Mr. Chief Justice Warren, speaking for the Court, adopted a new definition of the product market which seems to combine the interchangeability test, the "peculiar characteristics and uses" test, and possibly even the production flexibility test. Chief Justice Warren used the interchangeability test to determine the outer boundaries of the product market, but went on to hold that within this broad product market several submarkets may exist and their boundaries are to be determined by certain practical indicia including the product's peculiar characteristics and uses.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However,

---

<sup>131</sup> There were both vertical and horizontal aspects to the merger here. The vertical aspect was that Brown was a major manufacturer of shoes and Kinney a major retailer and that the merger would give Brown another retail outlet for its shoes through the Kinney retail stores. The Government contended this vertical aspect foreclosed other manufacturers from the market represented by Kinney's retail outlets, thus substantially lessening competition in manufacturers' distribution of shoes. The horizontal aspects of the merger related to the fact that in many areas both Brown and Kinney were retailing shoes and were in direct competition with each other.

<sup>132</sup> *United States v. Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959).

<sup>133</sup> 370 U.S. at 297.

<sup>134</sup> *Id.* at 298.

within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. [Citing the *du Pont-General Motors* case]. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.<sup>135</sup>

Applying these tests in the instant case, the Chief Justice concluded that the relevant lines of commerce were men's, women's, and children's shoes since these product lines are recognized by the public, manufactured in separate plants, have characteristics peculiar to themselves, and have distinct classes of customers. He refused to further subdivide the markets by the use of the price/quality and age/sex distinctions urged by defendants. In reply to Brown's contention that its medium-priced shoes should not be in the same market as Kinney's low-priced shoes, the Chief Justice answered that these two classes competed with each other and the market boundaries must be drawn "to recognize competition where, in fact, competition exists."<sup>136</sup> The age/sex distinction was rejected because the further division would not aid in analyzing the merger's effects.<sup>137</sup> After defining the market the Court went on to find that the merger violated section 7.<sup>138</sup>

---

<sup>135</sup> *Id.* at 325.

<sup>136</sup> *Id.* at 326.

<sup>137</sup> *Id.* at 327. Brown was arguing that the product markets should be further subdivided to make infants' and babies' shoes, misses' and children's shoes, and youths' and boys' shoes each separate lines of commerce. The Court assumed arguendo that little boys' shoes may have sufficient peculiar characteristics and uses to make them a separate submarket but stated this finer division would not help in analyzing the merger or be of any advantage to Brown. The two companies produced and sold approximately the same percentages of the Court's market as they did of the finer markets urged by Brown.

<sup>138</sup> The Court pointed to the fact that there was a significant trend toward vertical integration in the shoe industry and that Brown had a policy of forcing its shoes on its retail outlets. It was felt this "may foreclose competition from a substantial share of the markets . . . without producing any countervailing competitive, economic, or social advantages." For a more detailed discussion of the facts and analysis of other issues presented see Symposium, "The Meaning and Impact of *Brown Shoe Co. v. United States*," 1963 Wash. U.L.Q. 153; Notes, 4 B.C. Ind. & Com. L. Rev. 159 (1963); 31 Fordham L. Rev. 361 (1962); 10 U.C.L.A.L. Rev. 637 (1963). An excellent discussion of the case appears in Barnes, "The Primacy of Competition and the *Brown Shoe* Decision," 51 Geo. L.J. 706 (1963).

Mr. Justice Clark, concurring, and Mr. Justice Harlan, dissenting in part and concurring in part, felt that a more reasonable product market would consist of shoes in general. Both Justices emphasized defining the market from the manufacturer's viewpoint, Justice Clark emphasizing the marketing aspect and Justice Harlan the production aspect.<sup>139</sup>

The Supreme Court in *Brown Shoe* thus seemed to make the interchangeability test as developed by the *Cellophane* case merely an initial determination in a process of defining the product market, rather than a complete determination in and of itself. As Judge Burger stated in *Reynolds Metals Co. v. FTC*,<sup>140</sup> "It is now clear [after *Brown Shoe*] that mere potential interchangeability . . . may be insufficient to mark the legally pertinent limits of a 'relevant line of commerce.'" <sup>141</sup> It is also apparent that the *du Pont-General Motors* test of "peculiar characteristics and uses" was relegated to being only one of the several factors to be considered in defining the relevant submarkets.

It can be further argued that the Court recognized and revived the old production flexibility test as developed by the *Columbia Steel* decision. The Court at least recognized this test in determining the "outer boundaries of a product market" in a vertical merger case. In a footnote, citing *Columbia Steel*, the Court stated:

The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed. . . . However, the District Court made but limited findings concerning the feasibility of interchanging equipment in the manufacture of nonrubber footwear. At the same time, the record supports the court's conclusion that individual plants generally produced shoes in only one of the product lines the court found relevant.<sup>142</sup>

---

<sup>139</sup> See Comment, 6 B.C. Ind. & Com. L. Rev. 254, 274 (1965).

<sup>140</sup> 309 F.2d 223 (D.C. Cir. 1962).

<sup>141</sup> *Id.* at 226. *But see* Hall, "Market Definition and Antitrust Policy," 20 Wash. & Lee L. Rev. 47, 61 (1963). Hall feels that interchangeability may or may not be sufficient to mark the "legally pertinent limits" of a relevant product market in future § 7 cases. He feels that market definition is an economic problem and the relevant product market should be defined as it was by Adelman, "The Antimerger Act, 1950-1960," 51 Amer. Econ. Rev. 236, 237 (1961), to be the "locus of the supply—demand forces that determine price." Hall concludes, therefore, that "only one rule can be valid in any specific case; either some submarket is the locus of the forces and the functional interchangeability rule is irrelevant or the outer limits encompass the forces and the peculiar characteristics and uses doctrine [a submarket practical indicia] does not apply."

<sup>142</sup> 370 U.S. at 325 n.42. Justice Harlan in his opinion clearly advocated a production flexibility test. In contending that the product market should be shoes in general he emphasizes the fact that shoe manufacturers' can easily shift from one type

In outlining the practical indicia to be used in delineating the relevant submarkets, Chief Justice Warren was merely gathering together factors that had been used or suggested in earlier cases or Federal Trade Commission decisions involving market determination. For almost every indicium listed there is a case or decision which used such a factor in determining a product market before *Brown Shoe*.<sup>143</sup>

The significance of the *Brown Shoe* decision lies in the Court's flexible and multi-dimensional approach to product market definition. Rather than rely on a single test, as was done in the *Cellophane* and *du Pont-General Motors* decisions, the Court enumerated a number of factors or tests to be considered and attempted to set out a procedure whereby market determination would be made in terms of competitive realities. While the case was criticized as giving the courts unlimited authority to choose a market as they saw fit,<sup>144</sup> it was also justified as a reasonable approach to defining the market by a competitive analysis which allowed the courts to reject those factors which were not economically relevant to the

---

of shoe to another. He concludes, "because of this flexibility of manufacture, the product market with respect to the merger between Brown's manufacturing facilities and Kinney's retail outlets might more accurately be defined as the complete wearing-apparel shoe market." *Id.* at 367 (Harlan, J. dissenting in part and concurring in part). See note 28 *supra*.

<sup>143</sup> A far from exhaustive list of the cases and decisions which used one of the "practical indicia" would be as follows:

- (1) Public or industry recognition of the submarket as a separate economic entity. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *A. G. Spalding & Bros. v. FTC*, 301 F.2d 585 (3d Cir. 1962); *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800 (9th Cir. 1961); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); *Union Carbide Corp.*, 59 F.T.C. 614 (1961).
- (2) Peculiar characteristics and uses. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *A. G. Spalding & Bros. v. FTC*, *supra*; *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960); *Union Carbide Corp.*, *supra*.
- (3) Distinct customers. *A. G. Spalding & Bros. v. FTC*, *supra*.
- (4) Distinct prices. *Union Carbide Corp.*, *supra*.
- (5) Sensitivity to price changes. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957).

For a consideration of each of the indicia and a brief discussion of the cases before and after *Brown Shoe* using these indicia see Bock, *Mergers and Markets* 98-110 (3d ed. 1964).

<sup>144</sup> Hall & Phillips, "Antimerger Criteria: Power Concentration, Foreclosure and Size," 9 Vill. L. Rev. 211 (1964); Lewyn & Mann, "Some Thoughts on Policy and Enforcement of Section 7 of the Clayton Act," 50 A.B.A.J. 154 (1964). (Lewyn and Mann believe *Brown Shoe* has given the Justice Department unlimited authority to pick a market which will reflect the highest percentage of occupancy just because this is easiest way to win a case).

situation and to adopt those which were relevant.<sup>145</sup> Although both views were supportable by extension of the Court's decision at the time of *Brown Shoe*, subsequent Supreme Court cases have indicated that the fears of those who felt that the courts would have unlimited discretion in market determination were well-founded.

### C. *Post-Brown Shoe*

Between the time of the *Brown Shoe* decision and the *Alcoa-Rome Cable* and *Continental Can* decisions, several important cases concerning the relevant product market were decided. The only Supreme Court cases decided during this period which shed any light on product market determination were two bank merger cases: *United States v. Philadelphia National Bank*<sup>146</sup> and *United States v. First National Bank & Trust Co. of Lexington*.<sup>147</sup> The *Philadelphia Bank* case condemned a bank merger under section 7 of the Clayton Act and the *Lexington Bank* case condemned such a merger under section 1 of the Sherman Act.

In the *Philadelphia Bank* case, the Government contended in the district court that the appropriate lines of commerce were commercial banking, commercial and industrial loans, installment lending to individuals, single payment loans to individuals, real estate loans, personal trusts, etc.<sup>148</sup> The Government argued that the appropriate test was the *du Pont-General Motors* doctrine of "peculiar characteristics and uses." The defendants urged the district court to follow the *Cellophane* test of interchangeability and hold that, since the services of other financial institutions are interchangeable with those of commercial banks, the relevant product market should include the services of all financial institutions.<sup>149</sup> The district court, in a decision rendered before *Brown Shoe*, referred to the interchangeability and "peculiar characteristics and uses" tests as "nothing more than expressions of the same rule in different language."<sup>150</sup> Judge Clary felt that if a product had sufficient peculiar characteristics and uses to constitute it sufficiently distinct from all other products, then it could not be reasonably interchanged with such other products. He went on to hold that commercial banking, viewed collectively, was the relevant product market and that it had "sufficient peculiar characteristics which negate reasonable interchangeability."<sup>151</sup> Thus, on the eve of the

---

<sup>145</sup> Barnes, *supra* note 138, at 710.

<sup>146</sup> 374 U.S. 321 (1963).

<sup>147</sup> 376 U.S. 665 (1964).

<sup>148</sup> *United States v. Philadelphia National Bank*, 201 F. Supp. 348, 361 (1962).

<sup>149</sup> *Ibid.*

<sup>150</sup> *Id.* at 362.

<sup>151</sup> *Id.* at 363.



*Brown Shoe* decision a district court was holding that there was no inconsistency between the two primary, judicially-developed tests.

After *Brown Shoe*, the Supreme Court upheld the district court's determination that commercial banking was the relevant product market. Mr. Justice Brennan, for the majority, referred to the fact that the services of commercial banks are distinctive when compared to those of other financial institutions and that many of these services are "insulated . . . from substitutes furnished by other institutions."<sup>152</sup> In other words, commercial banking services have peculiar characteristics and uses when compared to the services of other financial institutions, and the services of such other financial institutions are not reasonably interchangeable with commercial banking services. Two propositions may thus be derived from the district and Supreme Court's opinions in the *Philadelphia Bank* case:<sup>153</sup> first, *Brown Shoe* did not destroy the validity of either the reasonable interchangeability test or the "peculiar characteristics and uses" test; second, the two tests are not necessarily inconsistent.

Less than one year after the *Philadelphia Bank* case, the Supreme Court again had the opportunity to consider a bank merger and the relevant product market. This time the charge was a violation of section 1 of the Sherman Act.<sup>154</sup> In the *Lexington Bank* case, the Court also held the relevant product market was commercial banking services. In a brief discussion of the market, Justice Douglas<sup>155</sup> based his determination upon the fact that there

---

<sup>152</sup> 374 U.S. at 356.

<sup>153</sup> For discussion of the other issues involved in the case see Comment, 62 Mich. L. Rev. 990 (1964); Notes, 1964 Duke L.J. 139; 58 Nw. U.L. Rev. 835 (1963); 18 Rutgers L. Rev. 668 (1963); 16 Vand. L. Rev. 1217 (1963).

<sup>154</sup> The apparent reason that this case was brought under the Sherman Act rather than under § 7 was because the action was commenced before the decision in the *Philadelphia Bank* case and up to that time it was thought that § 7 was not applicable to bank mergers.

<sup>155</sup> Justice Douglas established a rather significant test for judging the validity of a merger in this Sherman Act case. He held that where the two merging companies "are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of § 1 of the Sherman Act." 376 U.S. at 671-72. Justice Douglas seems to have adopted a test under which it is easier to show the invalidity of a merger under § 1 than under § 7 of the Clayton Act where competitive effects outside of the merged companies are determinative. This holding may very well lead to a significant increase in merger cases brought under the Sherman Act. When the dissent of Douglas condemning bigness in *Columbia Steel* is recalled, it is not surprising he has opted for this new test. See note 22 *supra*.

For an excellent comparison of the *Lexington Bank* case and the *Columbia Steel* decision, see Note, 53 Ill. B.J. 238 (1964).

were several characteristics in which commercial banking differed from other financial institutions. Hence, within a year's time the Supreme Court was presented with similar factual patterns in a Sherman Act case and a Clayton Act case and the relevant product market was held to be identical in the two cases.<sup>156</sup>

The most significant lower court decision during this period which applied the *Brown Shoe* concept to the relevant product market was *Reynolds Metals Co. v. FTC.*<sup>157</sup> *Reynolds* was charged with violating section 7 by the purchase of Arrow Brands, Inc. Reynolds was the world's largest producer of aluminum foil. Arrow was one of eight companies engaged in converting aluminum foil and selling it nationally to wholesale florist supply houses. The relevant market issue was whether the market should be composed of aluminum foil generally, decorative foil, or florist foil. The Federal Trade Commission held and the court of appeals agreed that the relevant line of commerce was florist foil and in this line of commerce there would be a substantial lessening of competition by the acquisition.

The court embarked upon a brief discussion of the history of relevant market definitions and concluded that before *Brown Shoe* the "established test" for determining the relevant market necessitated examining the interchangeability of products and the cross-elasticities of demand between the product and its substitutes. Judge Burger quoted the *Cellophane* test as the pre-*Brown Shoe* test. It is interesting to note that Judge Burger stated the supposedly Sherman Act test of interchangeability and made no mention of the *du Pont-General Motors* test of "peculiar characteristics and uses." In discussing the *Cellophane* test after *Brown Shoe*, he stated:

However, in the very recent case [of] *Brown Shoe Co. v. United States* . . . the concepts of interchangeability of use and cross-elasticity of demand underwent certain important qualifications and development. It is now clear that mere potential interchangeability or cross-elasticity may be insufficient to mark the legally

---

<sup>156</sup> The bank merger problem was also considered by a district court in a § 7 case, *United States v. Crocker-Anglo National Bank*, 223 F. Supp. 849 (N.D. Cal. 1963). However, the court did not determine the relevant product market for, even assuming the Government's contention that the market was commercial banking was correct, the court found no substantial lessening of competition.

<sup>157</sup> 309 F.2d 223 (D.C. Cir. 1962). *Reynolds Metals* is selected as an example of how the lower courts treated the product market concept after *Brown Shoe* and before 1964. For other significant lower court and Federal Trade Commission decisions during this period see *United States v. Bliss & Laughlin Inc.*, 1963 Trade Cases ¶ 70, 734 (S.D. Cal. 1963); *United States v. Lever Bros.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *Brillo Manufacturing Co.*, Trade Reg. Rep. ¶ 16,543 (FTC Dkt. 6557, 1963); *Luria Bros., Inc.*, Trade Reg. Rep. ¶ 16,183 (FTC Dkt. 6156, 1962).

pertinent limits of a "relevant line of commerce." The "outer limits" of a general market may be thus determined, but sharply distinct submarkets can exist within these outer limits which may henceforth be the focal point of administrative and judicial inquiry under Section 7.<sup>158</sup>

Applying the *Brown Shoe* doctrine to the case before him Judge Burger concluded that florist foil was the relevant line of commerce because of public and industrial recognition of it as a separate economic entity, its distinct customers, and its distinct prices. These three practical indicia as outlined by *Brown Shoe* allowed the florist foil market to be separated from aluminum foil markets generally, and especially from the decorative foil market.

It is evident from the court's opinion that other decorative foil might have been used interchangeably with florist foil if the producers and consumers had so desired. Florist foil was held to be one type of decorative foil. Judge Burger notes there is "little affirmative basis for assuming any marked difference between the characteristics of . . . florist foil and the remainder . . . of decorative foil. . . ." <sup>159</sup> He further concludes:

[O]n the basis of the *use and quality* of the products displayed on the record, we would have difficulty in affirming the Commission's determination that the florist foil converting industry is a line of commerce distinctly separable from the considerably larger decorative foil industry viewed in the aggregate.<sup>160</sup>

Although there thus appeared to be a good possibility that florist foil was interchangeable with other decorative foil, the court dismissed this possibility because consumers did not actually interchange or substitute decorative foil for florist foil or vice versa. The court thus seemed to establish an *actual* interchangeability concept as distinguished from the old *reasonable* interchangeability concept.

*Reynolds Metals* also emphasized "the election of other decorative foil converters not to serve the florist industry"<sup>161</sup> as a factor in distinguishing florist foil from other decorative foil. It appears that the producers could shift from producing other decorative foil to florist foil, but did not do so. This then is a rejection of the production flexibility concept as developed by the *Columbia Steel* decision. The court refused to consider technical possibilities of production shifts in the absence of any actual shifts.

---

<sup>158</sup> 309 F.2d at 226.

<sup>159</sup> *Id.* at 227-28.

<sup>160</sup> *Id.* at 228.

<sup>161</sup> *Id.* at 229.

From the preceding discussion of post-*Brown Shoe* decisions, it is evident that *Brown Shoe* did not fix the definition of the relevant product market. It tried to reconcile the earlier cases and set up practical guides for the future, and while mainly succeeding in this objective during this period, the subsequent cases discussed above indicate there remained great flexibility in defining the relevant product market with each particular factual situation that arose.

D. 1964—*Continental Can and Alcoa-Rome Cable*

As the year 1964 approached, the antitrust lawyer had a wealth of material concerning a definition of the relevant product market and was busily attempting to fit all of it together. On the one hand he had the Sherman Act cases which espoused the reasonable interchangeability test and on the other he had the "peculiar characteristic and uses" test which was developed primarily under the Clayton Act cases. In addition, he had analyzed *Brown Shoe* and found in it an attempt to reconcile the various tests and provide a workable solution. He also had access to subsequent cases which applied and refined the *Brown Shoe* doctrine. As of that date it appeared that while no simple definition of the relevant product market could be formulated there was a genuine attempt on the part of the courts to portray as fairly as possible an economically meaningful area in which to measure the competitive effects of each case. While the definition could result in either a broad or a narrow product market, the courts did not go to extremes in either direction. Just as the product market definitions were beginning to show some semblance of an organized approach, the Supreme Court delivered its remarkable decisions in *United States v. Aluminum Co. of America*<sup>162</sup> and *United States v. Continental Can Company*.<sup>163</sup> The relevant market concept was stretched to its limit and possibly beyond in both directions—the *Alcoa-Rome Cable* case resulting in a narrow product market and the *Continental Can* case resulting in an extremely broad one.

In the *Alcoa-Rome Cable* case, the acquisition by Alcoa of the stock and assets of the Rome Cable Corporation was challenged as violating section 7. The important products involved in the case were aluminum and copper wire and cable. Aluminum and copper are the only two materials utilized commercially to produce conductors for the transmission of electricity. There are two kinds of conductors, bare and insulated. Rome produced both copper conductor and aluminum conductor, but over 90 per cent of its production was in insulated copper products. It produced only 0.3

---

<sup>162</sup> 377 U.S. 271 (1964).

<sup>163</sup> 378 U.S. 441 (1964).

per cent of the total industry production of bare aluminum conductor, 4.7 per cent of insulated aluminum conductor and 1.3 per cent of aluminum conductor (a composite of bare and insulated aluminum conductor). Alcoa, on the other hand, produced no copper conductor but controlled large shares of total industry production in aluminum conductor. It produced 32.5 per cent of the bare aluminum conductor, 11.6 per cent of insulated aluminum conductor and 27.8 per cent of the broader aluminum conductor line.

Electrical transmission and distribution lines are placed both overhead and underground. Overhead, aluminum has virtually displaced copper since the lines are bare or not heavily insulated. Underground, where only heavily insulated conductor is used, copper is virtually the only conductor utilized.

In the district court, the parties agreed that conductor was the broad product market and that insulated conductor and bare aluminum were relevant submarkets.<sup>164</sup> Chief Judge Brennan refused to consider insulated copper and insulated aluminum conductor as separate submarkets, finding that, although there was a distinct price difference, the two could be produced interchangeably, were not considered in the industry as two separate economic entities, did not have distinct customers, and were used for the same purpose by the same customers.<sup>165</sup> In other words, the district court used the practical indicia outlined in *Brown Shoe* and by applying them to these products concluded they constituted one line of commerce. Of the indicia, the market failed to meet only two, the prices of the products were different and there was not common sensitivity to price changes. The aluminum conductor line, composed of bare and insulated aluminum, was held not to constitute a separate line of commerce, since bare and insulated aluminum were not each separate lines of commerce. Judge Brennan stated:

To find that Item 1 [aluminum conductor] is a line of commerce extends the outer boundaries of the market beyond its legal limits because covered [insulated] copper wire and cable is interchangeable in use and there is cross-elasticity of the demand therefor between insulated or covered aluminum and copper.<sup>166</sup>

The district court went on to hold there was no violation of section 7 and dismissed the complaint.

Mr. Justice Douglas, for a 6-3 majority, reversed the lower court. The reason for the reversal was that Justice Douglas rede-

---

<sup>164</sup> *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 509 (1963). The Government urged that there were ten separate product markets, of which the important ones were conductor in general, aluminum conductor, bare aluminum cable, insulated aluminum wire and cable, and insulated conductor.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Id.* at 510.

fined the relevant product market and Alcoa's share of such market was so large as to make the merger presumptively anticompetitive under the *Philadelphia Bank* test.<sup>167</sup> This case is an excellent example of the result in a section 7 proceeding turning on how the market is defined.

Justice Douglas found that the relevant product submarket was aluminum conductor by holding insulated aluminum was a distinct market from insulated copper and then combining bare and insulated aluminum into one market. He admitted there was competition between insulated aluminum and its copper counterpart, and held this was enough to justify grouping them together in a single product market. However, this competition was held not to "preclude their division for purposes of §7 into separate submarkets. . . ." <sup>168</sup> In making this division Justice Douglas emphasized that insulated aluminum was intrinsically inferior to insulated copper and had little consumer acceptance in most instances, except in overhead distribution, where it had decisive advantages. He also relied heavily on the fact that "the price of most insulated aluminum conductors is . . . only 50 per cent to 65 per cent of the price of their copper counterparts. . . ." <sup>169</sup> It was recognized that there was some interchangeability between aluminum and copper in certain uses, such as overhead distribution where "each does the job equally well." <sup>170</sup> However, the prevailing price differential was held to be the vital factor in the division of the two insulated conductors into separate submarkets. Justice Douglas concluded *Brown Shoe* was not authority for ignoring price, and in distinguishing the two cases stated:

A purchaser of shoes buys with an eye to his budget, to style, and to quality as well as to price. But here, where insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.<sup>171</sup>

---

<sup>167</sup> The *Philadelphia Bank* test is that where "a merger . . . produces a firm controlling an undue percentage share of the relevant market [30% in the bank merger case], and results in a significant increase in the concentration of firms in that market, [it] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963). The merger in the instant case would have produced a firm controlling 29.1% of the relevant product market.

<sup>168</sup> 377 U.S. at 275.

<sup>169</sup> *Id.* at 276.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

After Justice Douglas had determined that insulated aluminum conductor and insulated copper conductor were separable into distinct lines of commerce, he found little difficulty in combining bare and insulated aluminum into one market, aluminum conductor. This combination was justified by one sentence in the opinion and in a footnote. The sentence reads, "Both types are used for the purpose of conducting electricity and are sold to the same customers, electrical utilities."<sup>172</sup> The reasoning of the footnote is that since the district court found and the parties agreed that bare aluminum conductor and conductor generally constituted separate lines of commerce, and since Justice Douglas found insulated aluminum and insulated copper to be separate markets, then "the conclusion that aluminum conductor (bare and insulated) is a line of commerce is a logical extension of the District Court's findings."<sup>173</sup>

It is thus apparent that two significant determinations were made in arriving at aluminum conductor as the relevant product market. First, Justice Douglas separated insulated aluminum conductor from insulated copper conductor and determined they were separate lines of commerce. Secondly, he combined bare aluminum conductor and insulated aluminum conductor into the broader submarket of aluminum conductor. Neither determination is economically convincing, but the first seems easier to justify than the second. Insulated aluminum was separated from insulated copper in the face of district court determinations (which Justice Douglas does not question) that they are not recognized in the industry as separate entities; that they both perform the same functions and are generally competitive with each other; that they may be produced interchangeably using the same facilities; and that there are no distinct customers or specialized vendors for insulated aluminum conductor.<sup>174</sup> The district court was thus attempting to apply the submarket practical indicia as outlined in the *Brown Shoe* decision.

The overruling of these determinations was sharply criticized by Mr. Justice Stewart (joined by Justices Harlan and Goldberg) in his dissenting opinion. After summarizing the holdings of the district court, Justice Stewart states:

Yet this Court overrules its decision with little more than a wave of the hand. On the basis of two assertions, that the record shows

---

<sup>172</sup> *Id.* at 277.

<sup>173</sup> *Id.* at 277 n.4.

<sup>174</sup> 214 F. Supp. 501, 509.

"fabricators of insulated copper conductor are powerless to eliminate the price disadvantage under which they labor and thus can do little to make their product competitive," and that the difference in price between aluminum and copper conductors is "the single, most important, practical factor in the business," both of which are contrary to the explicit findings of the District Court, the Court summarily concludes that aluminum conductor is "for purposes of §7 a line of commerce."<sup>175</sup>

Although Justice Douglas did lightly treat the district court's determinations, he did have on his side the factor of a significant price differential between insulated aluminum and insulated copper which tended to make insulated aluminum available for some uses for which it was not economically feasible to use copper. He seems to be on solid ground in recognizing that *Brown Shoe* was not authority for disregarding price differentials. Although price was not determinative in *Brown Shoe*, the Court did state that "distinct prices" was one of the indicia to be considered. It should also be noted that both before and after *Brown Shoe*, several lower courts and the FTC had emphasized price as being an important factor in market definition.<sup>176</sup> The issue becomes one of balancing a significant price differential against several other practical indicia tending to show the products belong to the same market. This is a matter of placing emphasis, and both the majority and minority views of the Court can be supported in this respect.

While the separation of insulated aluminum from insulated copper may be justified, the combining of bare and insulated aluminum into one product market seems questionable. As indicated above, Justice Douglas supports this combination only by referring to the fact that both products are used for conducting electricity and are sold to electrical utilities, and by reasoning that since both products are separate lines of commerce as distinguished from their copper counterparts they can be combined into one market. This reasoning does not seem to be enough to establish a product market under any previous test. As Justice Stewart points out, all electrical conductors are used for conducting electricity and are sold to electrical utilities. Insulated copper and bare aluminum are both used for conducting electricity and are both sold to electrical utilities, but certainly Justice Douglas would not contend this placed them in the same relevant market. How then can such reasoning justify placing bare and insulated aluminum in the same market? In addi-

---

<sup>175</sup> 377 U.S. at 284-85 (dissenting opinion).

<sup>176</sup> See, e.g., *Reynolds Metals Co. v. FTC*, *supra* note 157; *A. G. Spalding & Bros. v. FTC*, 301 F.2d 585 (3d Cir. 1962); *Union Carbide Corp.*, 59 F.T.C. 614 (1961).



tion, the mere fact that bare and insulated aluminum are separate lines of commerce certainly does not justify their inclusion in a common market. This combination could have been justified by showing the products were reasonably interchangeable, or had the same peculiar characteristics and uses, or were in competition with each other; however, the Court made no attempt so to justify the combination and in fact could not have done so. As Justice Stewart points out in his dissent:

Even the Government does not claim that the two are competitive; different equipment and engineering skills are required for their manufacture and sale; and as the District Court found, the combination of bare and insulated aluminum conductors is not generally "recognized in the industry as a separate economic entity" or sub-market.<sup>177</sup>

In addition, the evidence indicates an almost total lack of interchangeability between the two products. Therefore, it is very difficult to see how bare and insulated aluminum could be combined into one market on any economically significant basis.

While the *Alcoa-Rome Cable* case presented a controversial market definition, an even more controversial definition was promulgated in the *Continental Can* case. In 1956 the Continental Can Company, the second largest producer of metal containers with thirty-three per cent of the domestic market, acquired all of the assets of Hazel-Atlas Glass Company, the third largest producer of glass containers with ten per cent of the domestic market. The Government charged that the acquisition violated section 7 and asked for divestiture. Here, as in *Alcoa-Rome Cable*, the determination of the relevant market was vital to the outcome of the case. The district court found the lines of commerce to be metal containers, glass containers, and metal and glass beer containers and held that the Government had failed to prove reasonable probability of anticompetitive effects in any of the three lines of commerce.<sup>178</sup> The Supreme Court, in a 7-2 decision, reversed, finding that the relevant markets consisted of a broad product market including both glass and metal containers and several end-use product submarkets, such as containers for the soft drink industry, the beer industry, and the canning industry. Six firms with 70.1 per cent of the business would dominate the combined metal and glass container product market. Continental would rank second, and Hazel-Atlas sixth, and the share of the combined firm would be twenty-five per cent. The Court held such a combination in a highly concentrated industry might substantially lessen competition.

---

<sup>177</sup> 377 U.S. at 286 (dissenting opinion).

<sup>178</sup> *United States v. Continental Can Co.*, 217 F. Supp. 761, 806 (1963).

Production in both the glass and can industries is highly concentrated and dominated by a few firms. Continental produced no glass containers and Hazel-Atlas produced no cans. Continental also produced plastic containers, but Hazel-Atlas did not.

In the district court, the defendants contended that the metal container industry and the glass container industry were each separate lines of commerce. In addition to these lines of commerce, the Government proposed a broad packaging industry market and seven submarkets including containers for the beer industry, containers for the soft drink industry, containers for the canning industry, containers for the toiletries and cosmetic industry, containers for the medicine and health industry, and containers for the household and chemical industry.<sup>179</sup> The Government made no contention that the combined can and glass industry was a relevant line of commerce. The Government sought to include within its packaging industry metal cans, glass containers, glassware, corrugated shipping cartons, steel pails, and plastic containers. In denying that this wide range of products constituted a relevant line of commerce, the district court stated that the broadest use of the reasonable interchangeability and "cross-elasticity of demand" test "could not possibly encompass this wide diversity of products."<sup>180</sup> In denying submarket treatment to all end-use containers categories, except beer containers, the court found they did not meet the practical indicia of *Brown Shoe* and included diverse products which were not interchangeable.

In reversing the district court and redefining the product markets to include the combined glass and metal container industries and all end uses for which they compete, Justice White, for the Court, relied almost exclusively on the proposition that one "must recognize meaningful competition where it is found to exist."<sup>181</sup> He may even have gone so far as to conclude, as the dissent contends he does, "that whenever 'meaningful competition' exists, a 'line of commerce' is to be found."<sup>182</sup> Justice White admitted that glass and metal containers have different characteristics and uses; that the machinery necessary to pack in glass and in cans is different; that particular users of can or glass may pack in only one container and not shift from time to time "as price and other factors might make desirable"; and that interindustry competition between metal and glass containers is different from the intraindustry competition between the metal container companies and the

---

<sup>179</sup> *Id.* at 778-79.

<sup>180</sup> *Id.* at 788.

<sup>181</sup> 378 U.S. at 449.

<sup>182</sup> *Id.* at 468 (dissenting opinion).

intraindustry competition between the glass companies.<sup>183</sup> However, he concluded that while these factors were "relevant and important considerations" they were "not sufficient to obscure the competitive relationships" which the record "so compellingly" revealed.<sup>184</sup> It was also noted that price differentials might exist between the two products and that the demand for one might not be responsive to price changes of the other, but Justice White referred to these factors as "relevant matters but not determinative of the product market issue."<sup>185</sup> The real test was "the existence of a large area of effective competition between the makers of cans and the makers of glass containers."<sup>186</sup>

As indicated above, not even the Government contended that the combined glass and metal container industries should be a separate relevant product market. However, this did not deter Justice White: he concluded that there was nothing to prevent the Court "from reaching the question of its prima facie existence at this stage of the case."<sup>187</sup> It is interesting to note here that he referred to the "prima facie existence" of this line of commerce. Justice Goldberg concurred in the decision on the ground that the Court was only holding there was a prima facie inference that glass and metal containers were in the same market and that on remand the defendants could rebut this inference.

One of the most difficult arguments which had to be met was that the combined metal and glass containers line of commerce disregarded other containers competing for the same business, such as plastic, paper, and foil. Justice White sought to meet this argument under a *Brown Shoe* approach which would classify cans and glass together as a "well-defined submarket" existing within the broader market of metal, glass, and other competing containers. It is very difficult to conceive how metal and glass containers can be a "well-defined submarket" under the practical indicia of *Brown Shoe*. In a bitter dissent, Mr. Justice Harlan, joined by Mr. Justice Stewart, accuses the Court of using *Brown Shoe* as a "bootstrap."<sup>188</sup> This criticism seems well deserved since the practical indicia of *Brown Shoe* provide no basis for separating metal and glass from plastic and other containers. When compared with other containers, metal and glass together are certainly not recognized as a separate economic entity and they do not possess peculiar characteristics

---

<sup>183</sup> *Id.* at 450.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Id.* at 455.

<sup>186</sup> *Id.* at 456.

<sup>187</sup> *Id.* at 457.

<sup>188</sup> *Id.* at 472 (dissenting opinion).

and uses, distinct customers, or distinct prices. As Justice Harlan points out:

While many of these factors weigh *against* the Court's conclusion that metal and glass containers should be combined in a single line of commerce, not one of them speaks for the Court's conclusion that they should be segregated from all other containers and together form a separate line of commerce.<sup>189</sup>

When analyzing the market definition approach taken in *Continental Can* in light of the previous tests promulgated by the Supreme Court, it seems that a new test has been adopted. The Court definitely did not follow the old guard "peculiar characteristics and uses" test as developed by *du Pont-General Motors* and refined by *Brown Shoe*. The Court admitted that "glass and metal containers have different characteristics which may disqualify one or the other . . . from this or that particular use. . . ." <sup>190</sup> It is also apparent, as indicated above, that the Court did not adhere to the practical indicia concepts of a submarket as outlined in *Brown Shoe*. These indicia do not justify the combination of metal and glass containers into one submarket, nor do they provide a basis for separating glass and metal containers from other containers. A plausible argument can be made that what the Court did was to pick up the old Sherman Act test of reasonable interchangeability and cross-elasticity of demand and stretch it to its limits—even further than it was stretched in the often criticized *Cellophane* case. Mr. Justice White may have indicated that he was doing just this when he stated:

Though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within §7's competition-preserving proscriptions.<sup>191</sup>

However, rather than accuse the Court of readopting and broadening the old reasonable interchangeability test, it seems more reasonable to suggest that the Court has adopted a new approach.

---

<sup>189</sup> *Id.* at 472 n.8 (dissenting opinion). It should be noted here that the probable reason the Court did not consider plastic and other containers was because of lack of evidence. If Mr. Justice Goldberg is right in concluding that the Court has not finally decided the relevant line of commerce, then on remand the district court may be able to include plastic and other containers in the product market if the evidence so warrants. Even if this be the case, the Court's talk about metal and glass containers being a "well-defined" submarket is very questionable.

<sup>190</sup> *Id.* at 450.

<sup>191</sup> *Id.* at 455.

The Court examined the record for evidence of competition between metal and glass containers, found such competition existed and would be substantially lessened by the acquisition in question, and then defined the relevant product market so as to reflect the projected anticompetitive effects. In other words, the Court has adopted a result-oriented approach and whether or not this "reads the 'line of commerce' element out of §7" as Justice Harlan suggests,<sup>192</sup> will remain for future cases to decide.

In examining the *Alcoa-Rome Cable* and *Continental Can* cases together, what conclusions can be suggested? First of all there seems to be a rather significantly different approach taken by the Court in the two cases. In *Alcoa-Rome Cable*, there was an acquisition by an aluminum company of an essentially copper-producing company. While recognizing that competition exists between copper and aluminum, the Court defined the product market narrowly to include only aluminum conductor. In *Continental Can*, there was an acquisition by a can company of a glass company and the Court broadly defined the market to include both metal and glass containers. The Court also emphasized different factors as being determinative of the relevant market in the two cases. The Court in *Alcoa-Rome Cable*, when separating insulated aluminum from insulated copper, recognized that competition existed between the two products, but separated them on the basis of price differentials. On the other hand, in *Continental Can*, when combining metal and glass containers, the Court recognized price differentials existed, but combined the products because they were highly competitive.

These inconsistencies indicate that the Court did not follow the same market definition in the two cases. While price differentials were emphasized in *Alcoa-Rome Cable*, competition was the test in *Continental Can*. As previously shown, in neither case did the Court stick to the earlier tests as developed from the *du Pont* cases through *Brown Shoe*. What the Court appears to have done in both instances was to determine that there had been a violation of section 7 and then define the product markets in terms of this intuitive conclusion.

It is not the purpose of this paper to indicate whether or not the results reached in *Alcoa-Rome Cable* and *Continental Can* are justifiable. The 1950 amendment of section 7 was intended to cope with monopolistic tendencies "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."<sup>193</sup> It is directed against economic concentration, and when two companies in highly concentrated industries merge (*Con-*

---

<sup>192</sup> *Id.* at 468 (dissenting opinion).

<sup>193</sup> S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); see also H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949).

*tinental Can*) or when the leader in a concentrated industry with a history of mergers acquires a competitor (*Alcoa*), there is a good possibility that section 7 has been violated. However, in reaching possibly justifiable decisions, the Court has disregarded a carefully articulated market definition. The market is formulated only after the illegality of the acquisition has been determined and the reasons given to support the market delineation are inadequate and unconvincing. It may be that the Court is suggesting a per se rule that mergers between large corporations which are or may be competitors violate section 7. If such a rule is to be adopted, once actual or potential competition is shown, there will be no need to define the relevant market.

It is significant to note that in both of these cases the Court defined the product markets in terms which brought the mergers into the conventional horizontal merger category. It would seem that both of these mergers, especially the one in *Continental Can*, could be classified as conglomerate. The Court's approach in this respect may be an attempt to disguise its apparent philosophy that bigness is bad, since if these cases were treated as conglomerate mergers, power solely in the financial sense would be what was being condemned.<sup>194</sup> By treating these mergers as horizontal and by redefining the market to fit its purposes the Court has been able to portray that picture of power and lessening of competition in a line of commerce which the language of section 7 requires.

#### IV. COMPARISON OF THE MARKET DEFINITION UNDER THE SHERMAN ACT AND THE CLAYTON ACT

One of the most debated issues in this area is whether or not the market tests under the Sherman Act are the same as those under the Clayton Act. The writers on this issue are divided into two groups: those who suggest the tests are different, relying mainly on the alleged inconsistencies between the two *du Pont* cases,<sup>195</sup> and those who suggest the tests are the same under both acts.<sup>196</sup>

---

<sup>194</sup> For a detailed discussion of conglomerate mergers and the problem of bigness see Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N.C.L. Rev. 511 (1964).

<sup>195</sup> See, e.g., Bock, *Mergers and Markets* 87 (3d ed. 1964); Hall & Phillips, *Bank Mergers & Regulatory Agencies* (Appendix B) 239-55 (1964); Dirlam & Stelzer, "The Du Pont-General Motors Decision: In the Antitrust Grain," 58 Colum. L. Rev. 24, 40 (1958); Comment, 110 U. Pa. L. Rev. 861, 875 (1962).

<sup>196</sup> See, e.g., Adelman, "Economic Aspects of the Bethlehem Opinion," 45 Va. L. Rev. 684, 689 (1959); Barnes, "The Primacy of Competition and the Brown Shoe Decision," 51 Geo. L.J. 706, 728 (1963); Hall, "Market Definition and Antitrust Policy," 20 Wash. & Lee L. Rev. 47 (1963); Handler, "Fifteenth Annual Review of Antitrust Developments," 17 The Record 411, 434-35 (1962); Handler & Robinson, "A Decade of Administration of the Celler-Kefauver Antimerger Act," 61 Colum.

In contending that the two tests are different, one would begin with a comparison of the *du Pont-General Motors* and the *du Pont-Cellophane* cases. We have seen that the *Cellophane* Sherman Act case developed the reasonable interchangeability test, while the *General Motors* Clayton Act case espoused the "peculiar characteristics and uses" theory. In *Cellophane* the reasonable interchangeability test resulted in a very broad market, while in *du Pont-General Motors* the "peculiar characteristics and uses" test resulted in a narrow market. Since these cases were only a year apart and the majority in *General Motors* failed to cite *Cellophane*, while the dissent relied upon it, it might seem that two different tests were developed by these two cases.

The major case authority that there are two distinct tests comes from the *Bethlehem Steel* case. Judge Weinfeld stated, "there can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes."<sup>197</sup> This was a section 7 case and the court seemed to reject the reasonable interchangeability test. However, it must be remembered that the court did look for substitutes and found none to exist. A similar case was the *Crown Zellerbach* case where the court of appeals in the Ninth Circuit refused to apply the *Cellophane* case to a section 7 acquisition. In referring to *Cellophane* and section 2 of the Sherman Act the court stated, "The problem which arises in a case involving §7 of the Clayton Act is a very different one."<sup>198</sup> It was also true there, however, as it was in the *Bethlehem* case, that the court found no substitutes to be present for the relevant product.

Those who contend there are separate tests for each act usually so contend because of a belief that there are inherent differences in the acts.<sup>199</sup> The argument runs as follows:

The Sherman Act is aimed at accomplished conditions: the *Cellophane* charge was that monopolization had taken place. The Clayton Act is aimed at curtailing incipient monopolistic forces: the *du Pont-General Motors* charge was that the relationship would probably tend to lessen competition or create a monopoly. Accordingly, a Clayton Act charge that is aimed at incipiency may make it appropriate to follow a narrower concept of the market than a Sherman Act case.<sup>200</sup>

---

L. Rev. 629, 643 (1961); Hogan & Koebler, "Determination of the Market for Anti-trust Purposes: Difficulties and Problems," 39 U. Det. L.J. 519 (1962).

<sup>197</sup> United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 593 n.36 (S.D.N.Y. 1958).

<sup>198</sup> Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 814 (9th Cir. 1961).

<sup>199</sup> See Dirlam & Stelzer, *supra* note 195, at 40; Comment, 110 U. Pa. L. Rev. 861 (1962).

<sup>200</sup> Massel, Competition and Monopoly 273-74 (1962).

Although there is authority to the contrary, the better view today seems to be that there is no basic difference between the test applied in the Sherman Act cases and the one applied in the Clayton Act cases.<sup>201</sup> It is quite possible that if the *Cellophane* and *du Pont-General Motors* cases were examined in a vacuum one would conclude there were separate tests applied under the two acts. However, the recent case trend has been away from such a distinction.

The Supreme Court suggested in *International Boxing Club*<sup>202</sup> that the market definition was the same under both acts. The Court in that case (a section 2 case) applied the *Cellophane* test of reasonable interchangeability to establish a narrow product market consisting of championship boxing contests as distinguished from boxing contests in general. Moreover, it stated that "by analogy," championship boxing "bears those sufficiently 'peculiar characteristics' found in automobile fabrics and finishes such as to bring them within the Clayton Act's 'line of commerce.'"<sup>203</sup> Hence, the Supreme Court was recognizing that the market would be the same under either test. It should also be remembered here that a significant change in Court membership occurred between the time of the *Cellophane* decision and *International Boxing Club*.<sup>204</sup> The new Court may have been indicating that the Sherman Act test was to become an easier one for the Government to meet, as the Court was indicating in the cases involving the Clayton Act test subsequent to the *Cellophane* decision. In other words, the Sherman Act test as applied in *Cellophane* was being changed to correspond to the prevailing "peculiar characteristics and uses" test as developed under the Clayton Act.

A significant lower court case during this period which indicated the tests were the same under both acts was *United States v. Columbia Picture Corp.*<sup>205</sup> In rejecting the Government's argument that there was a violation of section 7, Judge Herlands commented on the interchangeability and "peculiar characteristics and uses" tests as follows:

To determine whether or not there is a reasonable probability of a substantial lessening of competition, Section 7 of the Clayton Act demands an examination into economic realities. All competition must be considered, including competition faced by the product in question from other products.

---

<sup>201</sup> See note 196 *supra*.

<sup>202</sup> *International Boxing Club v. United States*, 358 U.S. 242 (1959).

<sup>203</sup> *Id.* at 252 n.8.

<sup>204</sup> See note 60 *supra*.

<sup>205</sup> 189 F. Supp. 153 (S.D.N.Y. 1960).



The tests enunciated by the authorities are consistent. Effectively, the test "reasonable interchangeability for the purposes for which (the products) are produced—price, use and qualities considered," [citing *Cellophane*] and the test "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct . . . to make them a 'line of commerce' within the meaning of the Clayton Act" [citing *General Motors*] are but different verbalizations of the same criterion.

They require the same accumulation and scrutiny of facts and application of judgment. The task is to find the area of effective competition. The "characteristics and uses" formulation does not limit the court's inquiry to physical attributes and foreclose inquiry into the competitive situation.<sup>206</sup>

Thus, the district court equated the two standard tests that were once thought to be distinct. As noted above the district court in the *Philadelphia Bank* case also held the two tests to be identical as Judge Clary stated that they were "nothing more than expressions of the same rule in different language."<sup>207</sup> That court's market determination was then affirmed by the Supreme Court.

This recent case trend, indicating that the test for market definition is essentially the same under the Clayton and Sherman Acts, was not altered by the *Brown Shoe* decision.<sup>208</sup> The Court recognized both reasonable interchangeability and peculiar characteristics and uses in analyzing a section 7 acquisition. It merely allocated "interchangeability" to determine the outer limits of the product market and the "peculiar characteristics and uses" to a position among the practical indicia for determining submarkets. That this may result in the courts' emphasizing "peculiar characteristics and uses" since a submarket determination will usually be more vital than a broad market determination (as was the case in

---

<sup>206</sup> *Id.* at 183-84. [The court's footnotes are omitted.]

<sup>207</sup> *United States v. Philadelphia National Bank*, 201 F. Supp. 348, 362 (E.D. Pa. 1962).

<sup>208</sup> One noted author cites *Brown Shoe* for the proposition that the two acts have the same tests. Writing before *Brown Shoe*, Professor Milton Handler stated, "The legal test governing product market definition is essentially the same under the Sherman and Clayton Acts." Handler & Robinson, *supra* note 196, at 643. After *Brown Shoe*, the same author concluded in analyzing the case that

One of the burning issues in the pre-*Brown Shoe* era . . . was whether the relevant product market varied with the nature of the antitrust complaint. We now have the answer. Markets are defined "for antitrust purposes" generally. They are not defined differently under Section 7 of the Clayton Act and Section 2 of the Sherman Act. In either event there may be an outer market and one or more inner submarkets within which competitive effects are to be appraised.

Handler, *supra* note 196, at 434-35.

*Reynolds Metals*) is no support for the contention that *Brown Shoe* has reemphasized the supposed Sherman and Clayton test distinctions. This is especially true when one recalls that in 1964 the Court used "peculiar characteristics and uses" language in a Sherman Act case (*Lexington Bank*) and talked extensively about interchangeability in a Clayton Act case (*Continental Can*). The results seem to be the same no matter which language is used. All the Court did in *Brown Shoe* was to recognize that no one test is controlling, but that several factors are necessary to a true market determination.<sup>209</sup>

In 1964 the Supreme Court removed any doubt about different market tests under the Clayton Act and the Sherman Act as far as section 1 of the Sherman Act is concerned. In the *Lexington Bank* case the Court applied to section 1 the same market test that was applied to an almost identical factual situation presented one year earlier under the section 7 *Philadelphia Bank* case. Both cases involved bank mergers and both held commercial banking services to be the relevant product market in the face of strong contentions by the defendants that the product market should be the services of all financial institutions. Not only was the market definition under section 1 held to be uniform with that under section 7, but the incipency doctrine and the anti-bigness concept of section 7 were brought across into section 1 through the declaration of a new test of illegality by Justice Douglas whereby a violation will occur when the two merging firms are major competitive factors in the market and the merger will substantially lessen competition between them.<sup>210</sup>

As indicated above, a major argument of those claiming a difference in tests under section 7 of the Clayton Act and section 2 of the Sherman Act is that under section 2 accomplished conditions must be shown, while only an incipient condition is needed under section 7. However, this should not necessarily result in a different approach to market determination. It is only after the market has been determined that the differences in the two acts become important, *i.e.*, in determining the degree of control or power in the market that is necessary to constitute a violation.<sup>211</sup>

---

<sup>209</sup> It should be noted here that before *Brown Shoe* the district court in the *Philadelphia National Bank* case had determined a relevant product market after deciding that no difference existed between "reasonable interchangeability" and "peculiar characteristics and uses." *Supra* note 207. After *Brown Shoe* the Supreme Court upheld this product market determination. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1962).

<sup>210</sup> See note 155 *supra*.

<sup>211</sup> See Hall, *supra* note 196, at 62.

In summary, it is apparent that since the *Cellophane* decision both the Supreme Court and the lower courts have tended to treat the market definition as involving the same considerations regardless of whether a Sherman Act or Clayton Act violation is the charge.<sup>212</sup> The *International Boxing Club* case brought the *Cellophane* test into line with the *du Pont-General Motors* test and since that time the supposed distinction between the two tests has disappeared. The market may be drawn broadly or narrowly under either act and a case-by-case study supports the conclusion that the supposed Clayton Act test of "peculiar characteristics and uses" and the supposed Sherman Act test of "reasonable interchangeability" are "but different verbalizations of the same criterion."<sup>213</sup> As far as mergers are concerned, the *Lexington Bank* case conclusively establishes that the market definition will be the same under both acts. The two recent cases of *Continental Can* and *Alcoa-Rome Cable* do not indicate any departure from the recent trend of uniform market treatment under the acts but rather are indicative of the Supreme Court's recent result-oriented approach to market definition.

## V. CONCLUSION

Ever since the relevant product market problem became important in 1948 with the *Columbia Steel* decision the Supreme Court has been struggling to develop proper tests for market determination. During the period from 1948 to 1959 the Court attempted to define the market in terms of a single test such as "production flexibility," "peculiar characteristics and uses," or "reasonable interchangeability." This led to a period of hopeless confusion in the lower courts which was characterized by some courts adopting one test, some adopting another, and still others adopting a combination of the tests. In 1962 the Court in the *Brown Shoe* decision made a valiant attempt to provide a workable solution for determining the product market. It abandoned the old single-formula approach by bringing together the various market

---

<sup>212</sup> Further support for this view can be obtained from a recent case involving § 3 of the Clayton Act. In *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), a product market determination was held to be important under § 3. See note 14 *supra*. In holding that the product market under § 3 had to be found "on the basis of the facts peculiar to the case," the Sherman Act case of *International Boxing Club* was cited as authority. In addition, another Sherman Act case, *Columbia Steel*, was discussed in determining the geographic market. See Handler & Robinson, *supra* note 196, at 646 n.100.

<sup>213</sup> *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 184 (S.D.N.Y. 1960).

tests and molding them into a new multi-dimensional test. No longer was there to be one key definition, but the courts were to be given a chance to examine all of the factors that were relevant to a particular factual situation. The true purpose of the relevant market is to define the area of effective competition within which the alleged anticompetitive effects of the transaction may be judged. The flexible *Brown Shoe* formula seemed to be an appropriate approach for such an economic determination.

Although *Brown Shoe* could have been viewed as a practical guide to market determination in 1962, its present usefulness for that purpose is negligible. In both the *Continental Can* and *Alcoa-Rome Cable* cases the district courts had conducted detailed and extensive examinations of the product markets and had religiously applied the practical indicia of *Brown Shoe*. However, the Supreme Court dismissed these determinations "with little more than a wave of the hand"<sup>214</sup> and established its own markets and submarkets, which often ignored the *Brown Shoe* tests. If *Brown Shoe* has any significance left after these two cases it is in providing the Court with a stepping stone for unlimited authority in choosing a product market.<sup>215</sup>

This recent market approach by the Supreme Court seems to go hand-in-hand with its recent philosophy of anti-bigness. Beginning with the *Philadelphia Bank* case the Court has been tending toward the adoption of a per se doctrine condemning any acquisition by a big firm in a concentrated industry. During this emphasis on the "curse of bigness" an economically meaningful market determination has suffered considerably. When the Court is presented with an acquisition in a concentrated industry by a large company, it seems to predetermine the illegality of the transaction and then define the product market in terms which will show the greatest degree of market control.<sup>216</sup> This "gerrymandering of the market makes a mockery of the assertion that 'determination of the rel-

---

<sup>214</sup> *United States v. Aluminum Co. of America*, 377 U.S. 271, 284 (1964) (dissenting opinion).

<sup>215</sup> It was suggested that *Brown Shoe* gave the courts such authority even before the *Alcoa-Rome Cable* and *Continental Can* cases. See Hall & Phillips, "Antimerger Criteria: Power, Concentration, Foreclosure and Size," 9 Vill. L. Rev. 211, 219 (1964).

<sup>216</sup> Cf. Steele, "A Decade of the Celler-Kefauver Antimerger Act," 14 Vand. L. Rev. 1049 (1961). Steele concludes that "the disappearance of a fair-sized competitor from the industry as a whole . . . is a factor to which great weight is given in today's practical anti-trust world. If that is present, lines of commerce in which competition may be adversely affected will be found." *Id.* at 1062.

evant market is a necessary predicate to a finding of a violation of the Clayton Act.' ”<sup>217</sup>

As noted above, the legislative purpose of section 7 was to curb anticompetitive tendencies in their incipiency and the Court's recent attack on bigness may be justified in terms of this social purpose. However, in carrying out this legislative aim the Court has controverted the express wording of section 7. The language of section 7 precludes the finding of a violation until there is a finding of the forbidden anticompetitive effects in a "line of commerce." The Court's approach of determining anticompetitive effects and then defining the market, when combined with its anti-bigness philosophy could lead to disastrous consequences. Conceivably a merger between the smallest of firms could be condemned under such an approach. Any merger is a trend toward bigness, especially if there are other mergers being consummated within the industry or if the industry is already somewhat concentrated. It would also always be possible for the Court so to define the market to encompass some small area where competition would be lessened. Hence, the Court could decide this was a trend toward bigness and then gerrymander the market boundaries around a small segment of the commerce involved to show a lessening of competition. It is hoped that when the Court is presented with a merger not involving a giant of the industry it will return to an economically significant market determination within the framework of the *Brown Shoe* decision which will give the merger a fair chance of survival. Otherwise all mergers except those involving failing companies will fall under the unreasoning axe of anti-bigness.

*Robert W. Werth.*

---

<sup>217</sup> Handler & Robinson, *supra* note 196, at 650. These authors also point out that some of the blame for this recent market approach should be placed on the Department of Justice. They conclude:

Government trial counsel of late have been increasingly frank about their manipulations of market data. In one case, when it suits their purpose to narrow the market, they will argue that the doctrine of reasonable interchangeability is immaterial. In another, when they desire to broaden the market to transmute what appears to be a conglomerate diversification into a horizontal acquisition between competitors, they do not hesitate to rely on the very same doctrine.

*Id.* at 649. For another article criticizing the Government's approach in this respect see Lewyn & Mann, "Some Thoughts on Policy and Enforcement of Section 7 of the Clayton Act," 50 A.B.A.J. 154 (1964). Those authors state, "The fact is that the Government has not been averse to shifting its market theories from case to case, seemingly with little justification other than making the relevant percentages more favorable to its cause." *Id.* at 156.