

COMMENT

JOINT VENTURES AND ANTITRUST POLICY

NATURE AND USE OF JOINT VENTURES

The corporate joint venture is a business entity created and owned by two or more corporate partners who desire to engage jointly in a business activity in which they have common interests.¹ Joint ventures were used by the railroads in the 1880's² and successfully employed in industry before World War II.³ Since World War II the joint venture has experienced its greatest growth in popularity;⁴ a growth marked by a commensurate increase in the Government's interest in this form of business association.⁵ The Government's interest recently culminated in the Supreme Court's holding in *United States v. Penn-Olin Chem. Co.*⁶ that section 7 of the Clayton Act applies to joint ventures.

Since joint ventures can serve many purposes in the production process, it is convenient to classify them according to function as vertical, horizontal, or conglomerate joint ventures. In a vertical orientation, the joint venture may operate in research; may serve as a source of raw materials, a producer of a component part, a fabricator, or a distributor.⁷ The backward-vertical venture is used as a

¹ The corporate joint venture will be referred to throughout this paper simply as "joint venture." The joint venture is also known as the "jointly-owned subsidiary," the "fifty-fifty corporation," the "business co-operative," and the "corporate partnership." See Dixon, "Joint Ventures: What is their Impact on Competition?" 7 *Antitrust Bull.* 397 (1962).

² Dixon, *supra* note 1, at 398.

³ Handler, "Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures," 49 *Va. L. Rev.* 433, 441 (1963).

⁴ In 1957, the 1,000 largest corporations in the United States had formed approximately 345 joint ventures which operated at various levels of the production process. Martini & Berman, "Expansion Via Joint Subsidiaries," in *American Management Association, Mergers and Acquisitions* 83 (1957). In 1961, seventy joint ventures were formed in the United States and Canada. Handler, *supra* note 3, at 441.

⁵ The F.T.C. has sent questionnaires to the 1,000 largest corporations in an attempt to discover which corporations are involved in joint ventures, how many are so involved, and what effect the joint venture has had on the American economy. Dixon, *supra* note 1, at 409.

⁶ 378 U.S. 158 (1964). For discussion of *Penn-Olin*, see text accompanying notes 49-70 *infra*.

⁷ Eaton, "Joint Ventures," in *How to Comply with the Antitrust Laws* 245 (Van Cise & Dunn ed. 1954).

source of supply in the production of raw materials.⁸ Forward integration, another form of the vertical arrangement, functions in marketing and product distribution and is probably most common in the oil industry, where joint ventures are formed by producers to operate pipelines.⁹ A horizontal joint venture involves identical processing of the same product or item as either or both of the parent corporations.¹⁰ Generally the horizontal venture is employed to exploit new geographic markets.¹¹ The conglomerate joint venture engages in a line of commerce distinct from the line currently occupied by its parents.¹² Diversification is thereby accomplished not by the traditional techniques of internal expansion or merger, but by creation of a jointly-owned corporation.

In an address to the Economic Club of Detroit, Paul R. Dixon, Chairman of the FTC, outlined four basic reasons why joint ventures are formed: (1) to spread the risk of new industrial developments, (2) to accumulate large amounts of capital, (3) to establish one joint facility for greater economy, and (4) to undertake programs too vast for individual companies to handle.¹³ Another advantage of joint ventures is that they facilitate sharing technological knowledge, managerial skills, and experience in production and marketing.

⁸ An example is the Erie Mining Co., a \$350,000,000 creation of four steel producers, designed to obtain iron ore from taconite, a low-grade ore-bearing material. Handler, *supra* note 3, at 441.

⁹ In the oil industry such arrangements are the rule, not the exception. For example, the Sun Oil Co. joined with Standard Oil of Ohio to build a twenty-two inch pipeline from Longview, Texas, to Lima, Ohio. With its own capital, Sun could have built only a twelve inch pipeline. The large pipeline saved Sun one-half the shipping cost that it would have incurred with the smaller line. A.B.A. Section of Antitrust Law, Two Panel Discussions: New Frontiers in Section 7 Enforcement and Joint Ventures and the Sherman Act 32 (1963) (remarks of Mr. Freund); Handler, *supra* note 3, at 442 n.31.

¹⁰ Tractenberg, "Joint Ventures on the Domestic Front: A Study in Uncertainty," 8 Antitrust Bull. 797, 798 (1963). An example of a horizontal joint venture can be found in *United States v. Pan Am. World Airways, Inc.*, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd*, 371 U.S. 296 (1963), where Pan American and W. R. Grace Co. formed Panagra Airlines to operate along the west coast of Central America. For discussion of this case see text accompanying notes 41-44 *infra*.

¹¹ Such horizontal mergers are classified by the Federal Trade Commission as "market-extension" mergers. Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N.C.L. Rev. 511, 518 (1964). See generally Comment, "The Corporate Joint Venture Under the Antitrust Laws," 37 N.Y.U.L. Rev. 712 (1962).

¹² Current examples of conglomerate joint ventures are Astrodyne, Inc., and Goodrich-Gulf Chemicals, Inc. The former corporation was formed when Phillips Petroleum pooled its knowledge of solid propellants with North American Aviation's techniques in missiles to produce rocket fuel. Goodrich Rubber and Gulf Oil formed Goodrich-Gulf Chemicals to develop an improved petroleum-based synthetic rubber. See A.B.A. Section of Antitrust Law, *op. cit. supra* note 9, at 32.

¹³ Dixon, *supra* note 1, at 399.

Moreover, joint ventures may further increase profit from investment and development of foreign markets; and they may serve to prevent local dissatisfaction with absentee control of a business operation, particularly in foreign markets.¹⁴ There are several obvious disadvantages to joint ventures: The most significant is, of course, the ever-present danger of antitrust law infringement. Other problems can occur within the partner-corporations, for example, in harmonizing business philosophies and long-range objectives, formulating business policy, and reducing day-to-day internal friction caused by common management by the partners.¹⁵

While the economic advantages and associational disadvantages are evident, the primary problem confronting both business and the Government is to determine when joint ventures cease to be economically justifiable. One commentator¹⁶ believes that the primary motive in forming joint ventures is to avoid competition, and that any alleged technical or economic motive is but a subterfuge in most cases to achieve this end. This tendency of joint ventures to lessen competition and the efficacy of decisions like *Penn-Olin* in limiting it provides the focus of this comment.

THE LEGALITY OF JOINT VENTURES UNDER THE ANTITRUST LAWS

Effect on Competition

Joint ventures have obvious direct and indirect effects on competition. The very existence of the joint venture provides a common meeting place for the officers and directors of otherwise separate corporations, thus creating a potential forum for illegal collusion.¹⁷ Also, due to the existence of common management, joint ventures foster networks of interlocking directorates¹⁸ which can lead to collusive agreements such as reciprocal trading arrangements con-

¹⁴ Boyle, "The Joint Subsidiary: An Economic Appraisal," 5 Antitrust Bull. 303 (1960); Handler, "Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures," 49 Va. L. Rev. 433 (1963); Tractenberg, "Joint Ventures on the Domestic Front: A Study in Uncertainty," 8 Antitrust Bull. 797 (1963).

¹⁵ Tractenberg, *supra* note 14, at 807-08.

¹⁶ Berghoff, "Antitrust Aspects of Joint Ventures," 9 Antitrust Bull. 231 (1964).

¹⁷ The common meeting place may be considered as weighing on the probability of illegal behavior. In *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925), it was held not to be illegal per se. See generally Berghoff, *supra* note 16, at 236; Boyle, *supra* note 14; Hale, "Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws," 42 Va. L. Rev. 927 (1956).

¹⁸ The Government is increasing its attack on illegal interlocking directorates, which are subject to the provisions of § 8 of the Clayton Act. For example, the FTC has installed an electronic computer to be used to trace interlocking directorates. See Day, "Developments in Antitrust During the Past Year," 25 A.B.A. Section of Antitrust Law 3, 90 (1964).

cerning other products.¹⁹ Another overall effect of joint ventures is their tendency to create concentrations of economic wealth.²⁰ The competitive advantage dependent upon deep pockets gained through merger has been subject to close scrutiny by the Government,²¹ and the pocket gained through the joint venture is potentially as deep.

In the case of vertical joint ventures, competition is naturally foreclosed to other companies who ordinarily would serve as the suppliers or marketing agents of the partners.²² Where conglomerate and horizontal joint ventures are created, competition can be effected in several ways. First, it is likely that competition will be restrained between the parents and the joint venture to protect the markets available to the joint venture. Secondly, the parents will certainly curb the natural business growth of the joint venture to avoid overlap into their own markets.²³ Further, competition between the parents themselves may be lessened. For example, where the parents jointly expand their common product into a new geographic market or where the parents jointly enter a new industry, it is possible that the partners have, in effect, agreed not to compete with each other by creating a division of territories.²⁴

It appears that joint ventures effect competition in much the same manner as do mergers, and for this reason they are often referred to as quasi-mergers.²⁵ Although joint ventures may substantially effect *actual* competition, they are more likely to effect *potential* competition²⁶ than are mergers. However, since the partner-corporations are adding a new competitor to the market place instead of eliminating an old one, the joint venture on its face would appear more capable of enhancing competition than are mergers. More precisely, there appear to be situations where joint ventures are justified, for example, in cases of small parent companies engaging in or attempting to enter highly concentrated markets, or in cases where the purpose of the joint venture is to pioneer a new field, explore new resources and markets, or increase business efficiency for the ultimate benefit of the public.²⁷

¹⁹ Reciprocal trading has also attracted the attention of the Government. See Hausman, "Reciprocal Dealing and the Antitrust Laws," 77 Harv. L. Rev. 873 (1964).

²⁰ Berghoff, *supra* note 16, at 235.

²¹ See Day, *supra* note 11, at 539.

²² For discussion of the foreclosure theory, see Hale, *supra* note 17.

²³ Brewster, Antitrust and American Business Abroad 202 (1958).

²⁴ Tractenberg, "Joint Ventures on the Domestic Front: A Study in Uncertainty," 8 Antitrust Bull. 797 (1963).

²⁵ Kaysen & Turner, Antitrust Policy 136 (1959).

²⁶ For discussion of the doctrine of potential competition see text accompanying notes 73-97 *infra*.

²⁷ A.B.A. Section of Antitrust Law, *op. cit. supra* note 9, at 31-33; Hale, *supra* note 17.

Given the joint ventures' obvious potential for deleterious direct and indirect impact on competition, both real and emergent, and its equally clear potential for providing a flexible form of organization capable of creating competition, the Government is confronted with the perplexing problem of when and how to attack the legality of joint ventures under the existing antitrust laws. Consequently, the Government's use of the Sherman Act and, more recently, section 7 of the Clayton Act has been attended by conflicting theories of purpose and statutory application.

The Sherman Act

The relatively early cases in which joint ventures were found illegal involved situations where the joint venture was clearly used to produce anticompetitive results. While using the label "joint venture," the business associations usually involved other factors which in themselves were antitrust violations. *Timken Roller Bearing Co. v. United States*²⁸ involved a network of pricing agreements and territorial allocations among Timken, a third party, and their jointly-owned British and French subsidiaries. The Supreme Court held that the purpose of the agreement was to avoid competition and that such agreements could not "be justified by labeling the project a 'joint venture.'"²⁹ In *United States v. Paramount Pictures, Inc.*,³⁰ the Court struck down the joint ownership of movie theaters by motion picture distributors and exhibitors. The facts showed monopolistic and conspiratorial conduct by the owners in restricting distribution of their films to theaters of their choice. The Court ignored the form of the arrangement, examining only its substance. *United States v. Minnesota Mining & Mfg. Co.*³¹ involved an arrangement whereby major abrasive manufacturers in the United States agreed to establish joint manufacturing companies in certain foreign countries. Each joint owner agreed not to compete with the joint ventures in each foreign country.³² In striking down the arrangement Judge Wyzanski indicated that such associations are illegal *per se* by stating in dictum that "joint foreign factories like joint domestic price-fixing would be invalid *per se* because they eliminate or restrain competition in the American domestic mar-

²⁸ 341 U.S. 593 (1951).

²⁹ *Id.* at 598.

³⁰ 334 U.S. 131 (1948).

³¹ 92 F. Supp. 947 (D. Mass. 1950).

³² By this agreement to restrict business in the foreign countries to the jointly owned firms, 80% of the United States export trade in the abrasives industry was cut off. The only justification presented by the defendants was that they could make higher profits by selling through foreign subsidiaries. See Tractenberg, *supra* note 10, at 801.

ket".³³ Although joint ventures were employed in the above cases, the courts avoided direct confrontation with the question of their legality, thereby leaving few guidelines for courts to consider when that question was later raised. From these cases have emerged two conflicting theories of illegality: the per se rule and the rule of reason.

While the per se rule generally has been rejected, it is theoretically tenable, because virtually all joint ventures result in an avoidance of competition, actual or potential.³⁴ Since vertical joint ventures invariably foreclose some competition,³⁵ and the very existence of the conglomerate and horizontal joint venture implies at least a limited agreement not to compete,³⁶ strict application of the antitrust ethic would effectively eliminate virtually all joint ventures. Another factor tending to support a per se rule is that every joint venture involves price fixing and territorial allocation among the parents and the venture. These agreements would be collusive, conspiratorial per se violations of the Sherman Act should the Government disregard the separate corporate entity of the joint venture.³⁷

Despite this theoretical viability, the per se rule has not been accepted because it does not consider the economic and business realities which often justify the presence of joint ventures in the economy. The result has been a general acceptance of the rule of reason—a test which balances the economic justification for the joint venture against its actual or potential effect on competition.³⁸ The rule of reason renders illegal any joint venture creating unreasonable restraints on trade. Generally, the cases have appeared

³³ 92 F. Supp. at 963.

³⁴ Boyle, *supra* note 14, at 307; Hale, *supra* note 17, at 931; Tractenberg, *supra* note 10, at 811.

³⁵ Strict application of the foreclosure test as applied in *United States v. National City Lines, Inc.*, 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951), would invalidate all joint ventures. See Hale, *supra* note 17, at 931. The soundness of this argument is doubtful in view of the prevailing notion that vertical arrangements are not inherently bad. See Hale, *supra* at 933-34. For further discussion of vertical integration see Singer, "Vertical Integration and Economic Growth," 50 A.B.A.J. 555 (1964).

³⁶ It is arguable that the first joint venture cases were premised on the agreement-not-to-compete concept, thus rendering joint ventures illegal per se. See *Timken Roller Bearing Co. v. United States*, *supra* note 28; *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. Minnesota Mining & Mfg. Co.*, *supra* note 31; Hale, *supra* note 17, at 933.

³⁷ Berghoff, *supra* note 16, at 233.

³⁸ Brewster, *op. cit. supra* note 23, at 206, says: "The legality of joint ventures will depend on the purpose and nature of the enterprise, the situation of the partners, and their place in the market. In short, we assume that illegality turns on unreasonableness and is well outside the area of per se violations."

to support the rule of reason. In *United States v. Imperial Chem. Indus.*,³⁹ the court, although striking down a joint venture, stated that "joint manufacturing ventures, even in domestic markets, are not made unlawful *per se* by the Sherman Act but become unlawful only if their purpose or effect is to restrain trade or to monopolize."⁴⁰ Moreover, the Supreme Court in *Pan Am. World Airways, Inc. v. United States*⁴¹ by-passed an opportunity to hold joint ventures illegal *per se*. In that case Pan American and W. R. Grace formed a joint venture, Panagra Airlines, to operate along the western coast of Central and South America. Panagra then attempted to expand its authorized routes northward, which would have brought it into competition with its parent, Pan American. Pan American attempted to block this extension. A district court held that the creation of the joint venture and the territorial agreements between the venture and its parents were neither unreasonable restraints of trade nor *per se* antitrust violations;⁴² however, the court held that Pan American's attempt to block Panagra's natural business expansion violated section 2 of the Sherman Act.⁴³ The Supreme Court did not disturb the reasoning of the district court on the antitrust matters, but reversed on jurisdictional grounds.⁴⁴

Since it is evident that the courts will not follow a *per se* rule in applying the Sherman Act,⁴⁵ it is crucial to determine what factors the courts will deem relevant in attempting to find a particular joint venture an unreasonable restraint of trade. Some of the factors that the courts may consider are the size of the parent corporations, the relative size of the joint venture, the degree of competition existing in the relevant market, the size of the market entered, the relation of the parties to each other (*i.e.*, whether competitors or not), the function of the joint venture in relation to its parents, the degree of managerial control of the new entity by the parents, the nature of the product involved, the relative ease or difficulty in entering that market individually, the relative amount of competition foreclosed, the motives of the parties in creating the new entity, and the history of the venture's evolution.⁴⁶

³⁹ 100 F. Supp. 504 (S.D.N.Y. 1951).

⁴⁰ *Id.* at 557; *cf.* *United States v. Columbia Steel Co.*, 334 U.S. 495 (1958).

⁴¹ 371 U.S. 296 (1963), *reversing* 193 F. Supp. 18 (S.D.N.Y. 1961).

⁴² *United States v. Pan Am. World Airways, Inc.*, 193 F. Supp. 18, 32-36 (S.D.N.Y. 1961).

⁴³ *Id.* at 36.

⁴⁴ 371 U.S. 296 (1963), *reversing* 193 F. Supp. 18 (S.D.N.Y. 1961). The Court reversed on the ground that the decisions made by the district court were for the CAB.

⁴⁵ It has been observed that the Government's attitude has been not to push for a *per se* rule, see Brewster, *op. cit. supra* note 23, at 210; indeed, such an effort would be totally inconsistent with the Government's willingness to permit joint ventures under some circumstances by modifying consent decrees, Berghoff, *supra* note 16, at 234 & n.8.

⁴⁶ See A.B.A. Section of Antitrust Law, *op. cit. supra* note 9, at 30 (remarks of

From these factors and applicable economic data, the courts must decide whether the agreement to form the joint venture or the existence of the joint venture itself constitutes an agreement by the parents not to compete or an illegal allocation of territories, or whether the association in any other manner unreasonably restrains trade. To sustain a violation of the Sherman Act, there must be a finding that the parties intended to or did create an actual restraint of trade.⁴⁷ The test of illegality under the Sherman Act, therefore, provides the joint venture with an opportunity to operate in the market before its actual effects on competition can be determined, unless the parents' agreements in relation to its creation can be successfully attacked as conspiratorial under section 1.

Due to the strictness of the Government's burden of proof under the Sherman Act and because joint ventures can result in the same anticompetitive effects as mergers, it is not surprising that the Government has sought to arrest illegal joint ventures in their incipiency by invoking section 7, the anti-merger provision of the Clayton Act.⁴⁸

Section 7 of the Clayton Act

In *United States v. Penn-Olin Chem. Co.*,⁴⁹ the first case to litigate the question of the applicability of section 7 to joint ventures, the Government was successful. Olin Mathieson Chemical Corp. and Pennsalt Chemicals Co. jointly established Penn-Olin Chemical Co. to produce and sell sodium chlorate in the Southeastern United States market, with each corporation acquiring fifty per cent of the new company's stock. Pennsalt produced sodium chlorate on the west coast and was interested in expanding to the Southeastern

Mr. Ward); Berghoff, *supra* note 16, at 233; Boyle, *supra* note 14, at 308-09; Hale, *supra* note 17; Tractenberg, *supra* note 14, at 811-12, 820-27; Comment, "The Corporate Joint Venture Under the Antitrust Laws," 37 N.Y.U.L. Rev. 712, 725, 730 (1962). In remanding to the district court, the Supreme Court in *Penn-Olin* listed various factors for the district court to consider in determining whether section 7 was violated. 378 U.S. 158, 177 (1964).

⁴⁷ Sherman Act §§ 1, 2, 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1958). *But see* discussion of *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964), *infra* notes 104-08 and accompanying text.

⁴⁸ Clayton Act § 7, 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958) states:

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.

⁴⁹ 378 U.S. 158 (1964).

market. Olin did not produce sodium chlorate but used it in the production of other products.⁵⁰ When Penn-Olin was formed, two other companies accounted for about ninety per cent of the sodium chlorate production in the Southeastern market.⁵¹ Although Olin and Pennsalt were not competitors in sodium chlorate production, they did compete in the production of other products.

The Government's complaint alleged that Olin and Pennsalt competed with each other and that their acquisition of Penn-Olin stock might substantially lessen competition or tend to create a monopoly in the production and sale of sodium chlorate in violation of section 7. The complaint charged that the joint venture foreclosed potential competition between Pennsalt and Olin Mathieson in the production of sodium chlorate, that it substantially lessened actual and potential competition between Olin and Pennsalt in the production and sale of other chemicals, that it created a barrier to entry into the market by other prospective competitors, that it eliminated Olin Mathieson as a customer for sodium chlorate produced by Pennsalt's competitors, and that it encouraged other competitors in the chemical and other industries to participate in joint ventures as a means of avoiding and lessening competition. The district court dismissed the complaint, holding that the evidence was insufficient to establish a violation of section 7. The court evaded the question of the applicability of section 7.⁵²

The Supreme Court remanded, holding that section 7 applies to joint ventures.⁵³ The Court stated that the district court erred in finding that the evidence failed to show a reasonable probability that both parents would have entered the Southeastern market but for the joint venture: further, the lower court should have made a finding as to the reasonable probability that one of the partners would have entered the market.⁵⁴ The Supreme Court said that to

⁵⁰ The history of the formation of Penn-Olin is as follows: Pennsalt made independent studies of the Southeastern market beginning in 1951 with continuing interest in the proposed expansion. In 1957 Pennsalt decided to explore the possibilities of joint entry with Olin, who had also been studying the prospects of building a plant in the southeastern market. In 1957 the two corporations decided to test the market by an agreement which established Olin as the selling agent of Pennsalt for sodium chlorate in the market. The parties agreed to keep each other informed of their intentions regarding independent expansion and of business conditions in the relevant market. The parties then negotiated to form a joint venture which was organized on February 25, 1960.

⁵¹ Hooker Chemical Corp. and American Potash and Chemical Corp. held about 90% of the market share of the Southeastern sodium chlorate industry, and Pennsalt held the rest. The industry had expanded rapidly since the early 1950's. Another corporation, Pittsburgh Glass, had recently entered the relevant market.

⁵² *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963).

⁵³ 378 U.S. at 167-68.

⁵⁴ 378 U.S. at 175-76.

determine whether a joint venture might substantially lessen competition one must consider whether both parent companies would probably have entered the market, whether one would probably have entered alone, and also whether the joint venture eliminated the potential competition of a company that might have stayed at the edge of the market, threatening to enter.⁵⁵

In its desire to advance the prevailing national antitrust policy, the Court faced an initial conceptual problem in applying a merger statute to joint ventures: Mergers result in the removal of a competitive entity from the market, but the joint venture creates a new competitor.⁵⁶ This crucial distinction would be ignored by treating every joint venture as a merger. The Court in *Penn-Olin* recognized the conceptual differences between mergers and joint ventures by stating that while joint ventures can result in the same anticompetitive effects as mergers, different criteria may control.⁵⁷ The Court, however, predicated its decision on the applicability of section 7 upon the overall policy considerations behind the section.⁵⁸

Although the legislative history of section 7 does not indicate that Congress specifically had joint ventures in mind at the time of the 1950 amendments,⁵⁹ the policy announced and promoted by Congress demands the inclusion of joint ventures within the section.⁶⁰

Brown Shoe Co. v. United States,⁶¹ one of the first merger cases to be decided under section 7 as amended in 1950, discussed in detail Congress' purpose in enacting the amendments. The Court stated that:

the dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses.⁶²

⁵⁵ *Id.* at 174.

⁵⁶ Moreover, at least one commentator has noticed that the reasons for forming joint ventures are often different from those which encourage mergers. Note, "Joint Ventures and Section 7 of the Clayton Act," 14 *Stan. L. Rev.* 777, 796 (1962).

⁵⁷ 378 U.S. at 169-70.

⁵⁸ *Id.* at 170-72.

⁵⁹ Berghoff, *supra* note 16, at 244.

⁶⁰ See *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁶¹ 370 U.S. 294 (1962).

⁶² *Id.* at 315-16. *Cf.* *United States v. Aluminum Co. of America*, 148 F.2d 416

With this congressional policy in mind, the Court in *Brown Shoe* gave a sweeping interpretation to amended section 7. The Court's policy of liberal interpretation was carried forward in *United States v. Philadelphia Nat'l Bank*,⁶³ where the Court concluded that the purpose of the 1950 amendment was to strengthen the original section 7 by broadening its scope to cover "the entire range of corporate amalgamations."⁶⁴ It is clear that joint ventures involving large corporations may foster the very situation that the antitrust laws attempt to prevent—economic concentration to the detriment of small business. It is equally clear, then, that the Court in *Penn-Olin* was again giving effect to the national policy behind the 1950 amendment by interpreting section 7 to include joint ventures.⁶⁵

In addition to the conceptual problem in applying section 7 to joint ventures, the Court in *Penn-Olin* was also confronted with a language barrier. Section 7 applies only where the corporation whose assets are being acquired is "engaged in commerce."⁶⁶ In the case of joint ventures the assets of the new corporation are acquired at its inception—when the new corporation is not engaged in commerce.⁶⁷ The Court hurdled the language barrier easily.⁶⁸ First, the Court looked to the substance and effect of the joint association. In this vein the Court said that the obvious reduction in competition between the parents, coupled with the fact that *Penn-Olin* was organized to engage in commerce to further the business of its parents, who were already in commerce, should bring it within the coverage of section 7. Ultimately, the Court noted that *Penn-Olin* was engaged in commerce long before the trial and applied the delayed-timing rule announced in *United States v. E. I. du Pont de Nemours & Co.*⁶⁹ This rule states that the economic effect of an acquisition

(2d Cir. 1945), in which Judge Hand wrote, "one of their [antitrust statutes'] purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* at 429.

⁶³ 374 U.S. 321 (1963).

⁶⁴ *Id.* at 342.

⁶⁵ The Court in *Penn-Olin* stated: "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy." 378 U.S. at 170.

⁶⁶ Sec § 7 of the Clayton Act, quoted *supra* note 48.

⁶⁷ This problem is discussed in Berghoff, "Antitrust Aspects of Joint Ventures," 9 Antitrust Bull. 231, 242-45 (1964).

⁶⁸ 378 U.S. at 167-68.

⁶⁹ 353 U.S. 586 (1957). At least one notator suggests that the illegality of the joint venture should be determined at the time of its creation rather than at the time of trial in order to reduce the uncertainty confronting businessmen in trying to predict future injuries to competition. Note, 37 Colo. L. Rev. 135, 138 (1964).

is to be measured at the time of trial, not at the time the acquisition is made. Following this rule the Court concluded that *Penn-Olin* was engaged in commerce within the meaning of section 7.⁷⁰ In overcoming the conceptual and technical difficulties in applying section 7 to joint ventures, it is evident that the statute's policy and purpose have been given great weight. By giving effect to overall policy considerations through liberal interpretation, the Court has effectively plugged a potential loophole in the antitrust laws, thus avoiding further legislative repairs.

Unlike the Sherman Act, which requires a finding of actual injury to competition, section 7, designed to arrest threats to competition in their incipiency, requires only a reasonable probability that the acquisition will have anticompetitive effects.⁷¹ Actual restraints on competition need not be shown. Although the incipiency theory does not require a finding of actual competitive injury, it nevertheless involves complex economic determinations in finding a "tendency" or "reasonable likelihood" of a substantial lessening of competition. The Supreme Court has recognized this difficulty in merger cases:

Clearly, this [whether the effect of the merger may be substantially to lessen competition] is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that § 7 was intended to arrest anticompetitive tendencies in their "incipiency." . . . Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive.⁷²

The economic considerations would appear to be even more complex and, as a result, a finding of a tendency to lessen competition even more difficult to support in joint venture than in merger cases. This is true because mergers tend to foreclose competition in the present since the companies involved are currently engaged in commerce, whereas joint ventures at their creation tend to foreclose only future competition. The economic data in joint venture cases must therefore be projected into the future to determine the extent of the lessening of potential competition. Because of the purpose of section 7 to arrest anticompetitive tendencies in their incipiency

⁷⁰ The Court also noted that the technicality could be avoided by filing an amended complaint at the time of trial, but that this would be a useless formality. 378 U.S. at 168.

⁷¹ *Brown Shoe Co. v. United States*, *supra* note 60, at 323; *United States v. E. I. du Pont de Nemours & Co.*, *supra* note 69, at 592.

⁷² *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

and because of the nature of the joint venture as a new entity, *Penn-Olin* apparently is one of the first cases to rely solely upon restrictions of *potential* competition as violative of an antitrust law.

Potential Competition

A recent Supreme Court decision, *United States v. El Paso Natural Gas Co.*,⁷³ is the first case relying solely on the concept of potential competition.⁷⁴ In that case, El Paso was the sole out-of-state supplier of natural gas in California. Pacific Northwest Pipeline Corp. was a large corporation serving the Rocky Mountain area. Pacific was interested in gaining a large contract to supply gas to southern California, a contract which El Paso ultimately obtained. Pacific continued to attempt to break into the California market until negotiations between El Paso and Pacific resulted in the acquisition of 99.8 per cent of Pacific's stock by El Paso. The Government's merger suit under section 7 was sustained. The Court held that although Pacific had not gained entry into the California market, its effect as a potential supplier made it a substantial competitive factor in that market. In discussing the potential competitive importance of Pacific, Mr. Justice Douglas noted that the California market was rapidly expanding and that, given the nature of the market, Pacific's loss of the contract to El Paso did not eliminate it as an influential potential competitor because Pacific was both willing and able to enter the market at the first opportunity.⁷⁵ Therefore the merger violated section 7 by eliminating this potential competition.

In an attempt to establish some guidelines for future application of the potential competition concept. Mr. Justice Douglas stated:

The effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on.⁷⁶

⁷³ 376 U.S. 651 (1964).

⁷⁴ However, it appears that potential competition was relied on in *Aluminum Co. of America v. FTC*, 284 Fed. 401 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923), which was decided under old § 7. In that case, Alcoa acquired a newly formed company not yet engaged in business, and transferred to it the mill of a competitor. The potential competition that had been eliminated was so close to actual competition that the court quite properly treated potential competition as actual competition.

⁷⁵ 376 U.S. at 659.

⁷⁶ 376 U.S. at 658.

It is significant that the Supreme Court was unanimous in its conclusion that potential competition alone was sufficient to sustain a section 7 violation.⁷⁷

Even though *El Paso* represents another instance of liberal interpretation of section 7, the result is not surprising in view of the history of the potential competition theory. Out of twenty-eight merger cases filed from 1950 to 1958, twenty-three of them alleged injury to potential competition, though none seemed to rest on that theory alone.⁷⁸ For example, in *United States v. Columbia Steel Co.*,⁷⁹ a merger case under the Sherman Act, the Court agreed that the probable restraint of potential competition might be considered in weighing the effect of any acquisition of assets, but indicated that the evidence of injury to potential competition in that case was "highly speculative."⁸⁰ A district court in *Transamerica Corp. v. Board of Governors*⁸¹ recognized potential competition as an alternative theory, but held that the evidence failed to support it. These cases seem to establish the permissibility of treating foreclosure of potential competition as an antitrust violation; however, they also indicate that relatively strong proof is required to sustain such a theory.⁸²

Use of the concept of potential competition by *El Paso* and *Penn-Olin* required substituting potential competition for actual competition. The term "potential competition" so used can be defined as an existing positive competitive force supplied by the immediate threat of new entry by an identified firm.⁸³ The theory is based on the economic reality that potential competition may "keep power in check."⁸⁴ As the Court in *Penn-Olin* stated, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial

⁷⁷ Mr. Justice Harlan, the lone dissenter, objected only to the Court's order of divestiture without delay, preferring remand to the lower court to grant relief, as is the customary practice. Mr. Justice Douglas' view in *El Paso* regarding the Supreme Court's position in reversing, instead of remanding to the lower court for proper relief, is consistent with his dissent in *Penn-Olin*, in which he would have reversed and ordered divestiture. 378 U.S. at 182 (dissenting opinion).

⁷⁸ Markham, "Merger Policy Under the New Section 7: A Six-year Appraisal," 43 Va. L. Rev. 489, 519 (1957).

⁷⁹ 334 U.S. 495 (1948).

⁸⁰ *Id.* at 528.

⁸¹ 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953).

⁸² See Note, 11 U.C.L.A.L. Rev. 393, 402 n.44 (1964).

⁸³ See Rahl, "Applicability of the Clayton Act to Potential Competition," 12 A.B.A. Section of Antitrust Law Proceedings 128, 132 (1958).

⁸⁴ *Ibid.*

incentive to competition which cannot be underestimated.”⁸⁵ Potential competition may restrain producers from overcharging those to whom they sell or from underpaying those from whom they buy, but this potential competition, this continuing threat of market entry, is lost when the potential entrant combines with other potential entrants or existing competitors and extrudes a single entrant.

It was felt that the Government in *Penn-Olin* was attempting to establish a per se rule as to potential competition under section 7. In the district court, the Government appeared to argue that where two parents *could* enter a market separately, the joint venture would be illegal.⁸⁶ Effectively such an interpretation would have resulted in a per se rule because there are very few instances where would-be venturers cannot obtain the necessary financing to enter a market alone.⁸⁷ The district court found no legal or logical support for the Government’s position:

[The Government] would substitute a conclusive presumption that *any* combination specified in Section 7 between companies having the overall capability to go into business alone has a pernicious effect on competition and lacks any redeeming virtue; it would make *any* such combination illegal *per se*.⁸⁸

Further, the possibility that a per se rule might eventuate seems to have been disposed of by the Supreme Court in *Penn-Olin* and *El Paso*, and by the district court in *United States v. Crocker-Anglo Nat’l Bank*⁸⁹ which stated that:

We think it is plain that before a merger may be condemned merely because its effect may be to lessen *potential* competition it must be ascertained that the potential competition is a reality, that is to say, that there is a reasonable probability of such potential competition.⁹⁰

On the other hand, Mr. Justice Douglas appears to prefer a per se rule based on the division-of-territories concept, which would subject joint ventures to the Sherman Act.⁹¹ In his *Penn-Olin* dissent, Mr. Justice Douglas wrote:

⁸⁵ 378 U.S. at 174.

⁸⁶ *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110, 130 (D. Del. 1963).

⁸⁷ A.B.A. Section of Antitrust Law, Two Panel Discussions: New Frontiers in Section 7 Enforcement and Joint Ventures and the Sherman Act 38 (1963) (remarks of Mr. Freund).

⁸⁸ 217 F. Supp. at 124.

⁸⁹ 223 F. Supp. 849 (N.D. Cal. 1963).

⁹⁰ *Id.* at 855-56. (Emphasis added.)

⁹¹ Agreements to divide territories were held illegal under § 1 of the Sherman Act in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). Such agree-

In principle the case is no different from one where Pennsalt and Olin decide to divide the southeastern market as was done in *Addyston Pipe* and in the other division-of-markets cases already summarized. Through the "joint venture" they do indeed divide it fifty-fifty. That division through the device of the "joint venture" is as plain and precise as though made in more formal agreements.⁹²

However, those who advocate the application of the per se rule to joint ventures are in the minority at the present and it is reasonable to conclude that, until the Government can convince a majority of the Supreme Court that the effect of all joint ventures is presumptively anticompetitive, the Court will continue to reject the per se rule and will demand complex economic investigation and proof at trial.

Besides certainty in the law, a major concern of the per se advocates is the desire to eliminate long trials and the attendant voluminous records crammed with economic data.⁹³ While the Court may not quite be willing to sacrifice flexibility in favor of certainty in antitrust law, it has indicated its willingness to accept a prima facie test of illegality—at least in merger cases.⁹⁴ Whether or not the Court, having rejected a per se approach, adopts the prima facie test in joint venture cases is immaterial to the quantity and complexity of the evidence produced at trial, for such evidence must be produced whether the Government is required to prove its case or the defendants must rebut the presumption of illegality.

In dealing with injuries to potential competition the burden of proof will be even more stringent than in the ordinary merger case. Since the Clayton Act is designed to protect competition, and potential competition is substituted for actual competition in joint venture cases, there should be a requirement that the evidence establish that the potential competition is substantial enough to come under the statutory protection, *i.e.*, that potential competition is as potent as actual competition.⁹⁵ The proof must establish (1) that there was a reasonable probability that one or both of the companies would have entered the relevant market but for the

ments are considered illegal per se. See Van Cise, "The Future of Per Se in Antitrust Law," 50 Va. L. Rev. 1165, 1167 (1964). See generally Rifkind, "Division of Territories," in Hoffman's Antitrust Law and Techniques 49 (1963).

⁹² 378 U.S. at 180 (dissenting opinion). This division-of-territories analysis is more appealing in cases where both parent companies are entrants.

⁹³ See generally Van Cise, "The Future of Per Se in Antitrust law," 50 Va. L. Rev. 1165 (1964).

⁹⁴ *Id.* at 1176. See generally Comment, "The Joint Venture Meets Section 7 of the Clayton Act: Technical Capability, Reasonable Probability and Business Reality," 38 So. Cal. L. Rev. 104 (1965).

⁹⁵ See Rahl, *supra* note 83, at 132-38.

joint venture, and (2) that even though the existence of the joint venture will increase competition within the relevant market, such increase is likely to be substantially less than would have been created had both parent companies entered the market or had one company entered while the other remained on the edge of the market threatening to enter.⁹⁶ As to the second requirement, the evidence must be projected into the future to determine the probable injury to potential competition. Regarding the requirement of proof, both of the recent potential competition cases, *El Paso* and *Penn-Olin*, were strong on the facts. The prior agreements and relations between the parent companies, the rapidly expanding markets, the readily identifiable potential competitors, the eagerness of the potential competitors to enter the markets, and the size of the parents and their probable impact on the relevant markets were important factors well sustained by the evidence in each case. One can see, then, that precise economic conditions in the relevant market and the relative position of the parties to that market and to each other are of prime significance. Unless conditions substantially similar to those in *El Paso* and *Penn-Olin* are present it is likely for the present that the courts will consider any injury to potential competition a "mere possibility."⁹⁷

Merger Policy and Joint Ventures

Because joint ventures can result in the same anticompetitive effects as mergers, it is reasonable to rely on the recent merger cases as guides in attempting to determine the legality of joint ventures. This is not to say that joint ventures should be treated exactly like mergers, for the inherent usefulness of joint ventures for bona fide endeavors warrants further consideration of other criteria that may tend to justify joint ventures under certain conditions where mergers would be condemned. Nevertheless, the criteria of the merger cases are at least relevant in joint venture cases in determining the degree of anticompetitive effect required to establish a prima facie violation. As an indication that the Government is not attempting to apply merger principles to joint ventures without qualification, it has been stated that the Government is not interested in prohibiting joint ventures between small companies.⁹⁸ However, whether this is true merely because of a lack of governmental facilities to warrant interest in small joint ventures, or whether the Government is conceding that joint ventures between relatively small companies

⁹⁶ Comment, *supra* note 94, at 111.

⁹⁷ See *United States v. Crocker-Anglo Nat'l Bank*, *supra* note 89, at 856.

⁹⁸ Dixon, "Joint Ventures: What Is Their Impact on Competition?" 7 *Antitrust Bull.* 397, 406 (1962).

do not substantially lessen actual or potential competition is open to question.

It is realistic to assume that merger policy as announced in recent Supreme Court decisions will eventually be applied to joint ventures, at least where one of the partners involved is among the leaders in the particular industry. Since section 7 is concerned with probabilities and tendencies towards concentration, it is likely that the courts will carefully examine the relevant market shares of the partners and the reduction of market shares of the existing competitors resulting from the joint venture. The courts will undoubtedly note the degree of concentration in the relevant market. Following the rule of *United States v. Aluminum Co. of America*,⁹⁹ a minimal increase in market share of a dominating corporate-parent could be condemned where the history of the industry is one of concentration. Also, where one joint venture, though minimal in size, could perpetuate an existing trend of concentration in the industry by encouraging other joint ventures, the joint venture could be struck down.¹⁰⁰ Under the rule of *Philadelphia Bank* a presumption of illegality could be invoked if one or both parent-corporations are relatively large.¹⁰¹ Therefore, since the anticompetitive consequences of mergers and joint ventures are similar, the current interpretation of section 7 found in the merger cases probably will apply with equal force to joint ventures in determining prima facie illegality. Moreover, it is likely that the concept of potential competition will gain new impetus in all antitrust cases as a result of future joint venture litigation. The overall result will be an expansion of the sphere of competition subject to elimination, and thus a widening of the coverage of the antitrust laws.¹⁰²

It is evident that were the Government compelled to rely solely on the Sherman Act, many joint ventures would flourish before their adverse effects could be remedied. This contention is exem-

⁹⁹ 377 U.S. 271 (1964) [*Alcoa-Rome Cable*]. In that case, Alcoa acquired Rome Cable Corp., thereby adding 1.3% to Alcoa's share of the aluminum conductor market. The Supreme Court held that, given the oligopolistic framework of the industry, the acquisition would result in a substantial lessening of competition. Alcoa's monopoly of the industry was successfully attacked in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), but the deconcentration in the industry since that time had occurred as a result of governmental intervention and not from normal competitive action.

¹⁰⁰ Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁰¹ Cf. *Continental Can Co. v. United States*, 378 U.S. 441 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). In the *Philadelphia Bank* case the merger in question resulted in an increase of 30% in market share for the respondent bank. The Court held that large mergers in this degree are inherently suspect, creating a rebuttable presumption of illegality.

¹⁰² See Rahl, *supra* note 83, at 131-32.

plified by the fact that in *Penn-Olin* the Court found no violation of section 1 of the Sherman Act because of the lack of proof of intent to use Penn-Olin as a device to eliminate competition.¹⁰³ However, the quality and quantity of proof required to find a Sherman Act violation is now subject to re-examination in light of *United States v. First Nat'l Bank & Trust Co. of Lexington*.¹⁰⁴ That case suggests that there is very little difference in the tests of illegality under the Sherman Act and section 7. The merger between the First National Bank and the Security Trust Co. of Lexington resulted in the control of 79.62% of the trust accounts in the Lexington area. In holding that the merger violated the Sherman Act, Mr. Justice Douglas, speaking for the majority, relied heavily on the testimony of competitive banks that the respondent's size in the trust area would *tend* to foreclose competition over the years among the various banks.¹⁰⁵ As the dissenters pointed out, the majority ignored the economic factor involved in the consolidation and based its decision on "bigness."¹⁰⁶ The test thus evolved and used was strikingly similar to the test applied in *Philadelphia Bank* under section 7. If the approach taken by the Court in *Lexington Bank* becomes established, the Government, in joint venture cases involving large, industry-dominating companies, will be able to prove violations of the Sherman Act with the same relative ease that characterizes section 7 cases.¹⁰⁷ This result would be important in cases where injury to potential competition could not be established, but other forms of injury to competition or restraints of trade could be shown. However, should the views of Mr. Justice Douglas prevail, it appears that the Court would eventually find *per se* violations of both section 7 and the Sherman Act based on agreements between the corporate partners to divide territories and not to compete with each other. At least the holding in *Lexington Bank*

¹⁰³ 378 U.S. at 176. It is not the proof of intent to restrain trade that hinders the finding of Sherman Act violations, but the requirement of proof of actual anticompetitive effects. The intent to restrain trade is often presumed. See *United States v. Masonite Corp.*, 316 U.S. 265 (1945). The court in *Spears Free Clinic & Hosp. v. Cleere*, 197 F.2d 125 (10th Cir. 1952), held that specific intent to restrain trade or to create monopoly need not be shown, rather it is sufficient if a restraint or monopoly results in consequence of defendant's conduct.

¹⁰⁴ 376 U.S. 665 (1964).

¹⁰⁵ *Id.* at 669. The district court had characterized this testimony as "based merely upon surmise and . . . lacking in factual support." *United States v. First Nat'l Bank & Trust Co. of Lexington*, 208 F. Supp. 457, 460 (E.D. Ky. 1964).

¹⁰⁶ 376 U.S. at 680 (dissenting opinion).

¹⁰⁷ My suggestion is, of course, that had the *Penn-Olin* Court followed the theory of proof of *Lexington Bank*—a presumption of illegality based on size—the Government might have prevailed in *Penn-Olin* on its charge of Sherman Act violations.

and Mr. Justice Douglas' dissent in *Penn-Olin*, when read together, suggest this possibility.

CONCLUSION

The real significance of *Penn-Olin* is its use of potential competition as a substitute for actual competition, *i.e.*, the vision of potential competition as an existing competitive force, the elimination of which is an antitrust violation. Potential competition in this sense must be distinguished from the concept of potential competition as an element of market analysis. In the latter sense, the concept is not itself an ultimate theory of violation, but is used to describe a condition of freedom of entry into the relevant market.¹⁰⁸ Therefore, potential competition in this sense is only another factor in determining the *probable* consequences of a merger with respect to *actual* competition in the industry. On the other hand, potential competition as used in *Penn-Olin* and *El Paso*, when coupled with the incipency theory, focuses section 7 on the probable injury to potential competition,¹⁰⁹ thus adding a second inference to the incipency theory. This removes still further from reality the injury sought to be enjoined.

In broadening the coverage of section 7 to include joint ventures and potential competition, the Court in *Penn-Olin* and *El Paso* has perpetuated the trend of liberal statutory interpretation designed to effectuate the national policy of deconcentration. This trend is also exemplified by such recent decisions as *Brown Shoe*, the *Alcoa-Rome Cable* case, *Philadelphia Bank*, and the *Lexington Bank* case. These recent decisions are characterized by the great weight given to congressional intent and general national policy and by a general lack of credible precedent.¹¹⁰ It is also apparent that the Supreme Court's more liberal element, headed by Mr. Justice Douglas, has launched an all-out attack on bigness per se, as exemplified by *Philadelphia Bank's* rebuttable presumption, *Lexington Bank's* Clayton-like approach to a Sherman case, and *Alcoa-Rome Cable's* promotion of the tendency and relevant-market-history approach.

Assuming that the current trend of statutory interpretation continues, the bigness-is-bad concept will, in all probability, eventually apply with equal force to joint ventures. Thus it is possible that many joint ventures which might promote competition could

¹⁰⁸ Rahl, *supra* note 83, at 132-35.

¹⁰⁹ Day, "Conglomerate Mergers and 'The Curse of Bigness,'" 42 N.C.L. Rev. 511, 534 (1964).

¹¹⁰ See *United States v. First Nat'l Bank & Trust Co. of Lexington*, *supra* note 104, at 673 (Harlan, J., dissenting).

be struck down. Even small joint ventures could be invalidated where the industry is leaning toward oligopoly and the resulting elimination of potential competition tends to promote that trend. Also, the social benefits of new markets, new products, and increased business efficiency could be increasingly outweighed by the Court's deepening-of-the-pockets or bigness-is-bad logic. It is submitted that unqualified application of merger policy to joint ventures would work to the detriment of the public welfare. Therefore, in determining the legality of joint ventures, it is hoped that the Supreme Court goes no further than the test of the *Penn-Olin* case, keeping in mind the inherent advantages of joint ventures in promoting workable competition.

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