COMMENT

RELEVANT GEOGRAPHIC MARKET DELINEATION: THE INTERCHANGEABILITY OF STANDARDS IN CASES ARISING UNDER SECTION 2 OF THE SHERMAN ACT AND SECTION 7 OF THE CLAYTON ACT

The avowed purpose of the antitrust laws is the promotion of competition in open markets.[1] Injury to competition is not easily measured, and in order to assess the harmful effects of a particular practice the courts make several determinations. These commonly include the market structure and the actual or potential market power of the business in question.[2] The significance of these particular determinations is nowhere more apparent than in cases brought under the antimonopoly provisions of section 2 of the Sherman Act[3] and the antimerger provisions of section 7 of the Clayton Act.[4] In a case arising under either

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THE FOLLOWING CITATIONS WILL BE USED IN THIS COMMENT:

S. REP. NO. 1775, 81st Cong., 2d Sess. (1950), *reprinted in* [1950] U.S. CODE CONG. SERV. 4293 [hereinafter cited as S. REP. NO. 1775];

H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949) [hereinafter cited as H.R. REP. NO. 1191];

Upshaw, *The Relevant Market in Merger Decisions: Antitrust Concept or Antitrust Device?*, 60 NW. U.L. REV. 424 (1965) [hereinafter cited as Upshaw].

1. U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955). *But cf.* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (questioning the viability of the promotion-of-competition purpose and suggesting that the exclusive goal be that of maximizing consumer welfare).

2. II P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 500, at 321 (1978).

3. 15 U.S.C. § 2 (1976) 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 felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

4. 15 U.S.C. § 18 (1976) provides in pertinent part:

> 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

statute, market structure can be determined without too much trouble; however, a direct determination of market power is much more difficult.[5] Consequently, the courts have created the concept of "relevant markets,"[6] and use market share within a relevant market as an indirect indication of market power.[7]

Regardless of whether a case is brought pursuant to section 2 or section 7, the relevant market has two dimensions: the relevant product market and the relevant geographic market.[8] The importance of properly defining the scope of either dimension cannot be overemphasized. An antitrust violation is much more likely to be found under a narrow market definition selectively focused on an area of the industry in which the defendant has a relatively large market share than under a market definition encompassing a broader area of business.[9] Since the choice of the relevant market is so important, the standards governing market definition must be chosen and applied with care.

Unfortunately, the application of distinct, well-defined relevant market standards is complicated by the fact that relevant markets are considered in at least two different contexts—section 2 of the Sherman Act and section 7 of the Clayton Act.[10] It is clear that market power

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section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

5. *See* 11 P. AREEDA & D. TURNER, *supra* note 2, ¶¶ 507-16.

6. *See* Upshaw 428-45.

7. *See* United States v. Grinnell Corp., 384 U.S 563, 571 (1966) (a Sherman Act section 2 case); Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38, 343-44 (1962) (a Clayton Act section 7 case).

8. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) (Clayton Act case); Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 279 (1934) (Sherman Act case).

One author has suggested that there are four market dimensions; to the accepted geographic and product dimensions, he adds time and function:

> Products available at different times are generally not economically substitutable and therefore cannot be considered part of one and the same market. Where there is price differentiation between two or more classes of customers for the same product—e.g., functional discounts—we speak of the functional dimension of the market.

J. AARTS, ANTITRUST POLICY VERSUS ECONOMIC POWER 41 (1975).

9. For example, company *A* might sell ninety percent of all the widgets sold in Pennsylvania, while selling only seven percent of all the widgets sold nationwide. Company *A* obviously possesses no market power if the geographic market is defined to be the nation; on the other hand, if the relevant market is narrowed to include only Pennsylvania, Company *A*'s power is certainly monopolistic. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U S. 377, 379-80 (1956). *But see* United States v. Continental Can Co., 217 F. Supp. 761, 782 (S.D.N.Y. 1963) (merger case in which defendant argued in favor of a narrower market definition in order to show that the two merging companies did not compete in the same market), *rev'd*, 378 U.S. 441 (1964).

10. Section 2 proscribes actual market—or "monopoly"—power. *See* United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391 (1956) (market power—or "monopoly power"—defined as "the power to control prices or exclude competition"). Section 7, on the other

must be determined for actions brought pursuant to either statute, but it is also clear that the degree and level of market power necessary for finding a violation under each differs. However, it is uncertain whether the standards for determining the relevant geographic and product markets are the same under each statute, and, hence, interchangeable. Examination of the case law and commentary on this point reveals a great deal of confusion.[11]

Much of the confusion can be traced to dicta in the 1966 Supreme Court decision of *United States v. Grinnell Corp.*,[12] suggesting that the standards for determining the relevant *product* market for both statutes are completely interchangeable.[13] While some lower courts have adopted this suggestion,[14] at least one court has explicitly found it unpersuasive.[15] That court has been joined by several other lower courts

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hand, attempts to check incipient trends toward market power. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) (although the Court spoke in terms of "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency," it is nevertheless clear that the Court was discussing the need to arrest the growth of undue market power).

11. *Compare* United States v. Grinnell Corp., 384 U.S. 563, 573 (1966) ("We see no reason to differentiate between [relevant product market standards for purposes] of the Clayton Act and [those] for purposes of the Sherman Act") *with* Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 814 (9th Cir. 1961) ("the [relevant market] issue under [§ 7 of the Clayton] Act here . . . is quite different from that arising under § 2 of the Sherman Act"), *cert. denied*, 370 U.S. 937 (1962) *and* United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 588 (S.D.N.Y. 1958) ("the section 7 market is [not necessarily] the same as the market for purposes of other sections of the antitrust laws") *and* Schlade, *Proposed Relevant Product Market Criteria Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 35 U. CIN. L. REV. 376, 378 (1966) ("While a determination of the relevant product market is absolutely essential under both section 2 . . . and section 7 . . . it would be erroneous to conclude that the definitions of the market are, or should be, identical regardless of statutory context. Such definitions cannot be identical because the legislative policies of the two acts diverge") *and* Upshaw 485 ("prior to 1964, no court in an actual decision on the merits (as distinguished from use of dicta) had ever held that a 'line of commerce' and 'section of the country' for section 7 purposes might be something different from a relevant competitive market for Sherman Act purposes"). *Cf.* Note, *The Market: A Concept in Anti-trust*, 54 COLUM. L. REV. 580, 582 (1954) ("It is not clear how much stricter [the Clayton Act] test is than the test of monopoly imposed by the Sherman Act . . .").

12. 384 U.S. 563 (1966).

13. *Id.* at 573 ("We see no reason to differentiate between [relevant product market standards as defined by] 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act").

14. *See, e.g.*, Greyhound Computer Corp. v. IBM, 559 F.2d 488, 494 n.7 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975); H.L. Moore Drug Exch. v. Eli Lilly & Co., 1978-1 Trade Cas. ¶ 62,082, at 74,710 n.1 (S.D.N.Y. 1978); SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1114-15 n.20 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 500 (E.D. Pa. 1972); Gottesman v. General Motors Corp., 279 F. Supp. 361, 369 n.16 (S.D.N.Y. 1967), *rev'd on other grounds*, 414 F.2d 956 (2d Cir. 1969).

15. *See* United States v. Mrs. Smith's Pie Co., 440 F. Supp. 220 (E.D. Pa. 1976). That court stated:

that remain silent on the validity of the *Grinnell* dictum but nevertheless recognize distinctions between relevant product market standards under section 2 and section 7.[16]

Even less settled than the question of interchangeable standards for determining the relevant product market is the question of interchangeable standards for determining the relevant geographic market. This Comment addresses the latter issue. In order to determine whether any distinction should be drawn between the standards for defining relevant geographic market as applied under the respective statutes, this Comment will briefly outline the standards that courts have developed under each statute and will analyze points at which they diverge and converge. In this regard, several relevant product market cases will be considered, since many similarities exist between relevant product market and relevant geographic market delineation criteria, and since arguments that relevant product market standards are interchangeable may also apply to the contention that relevant geographic market standards are interchangeable. Finally, after examining the cases and the legislative history underlying section 7 of the Clayton Act, this Comment will conclude that, because of the different purposes of the statutes, at least some section 7 relevant market standards should not be applied in Sherman Act cases.

> There is no indication that the [*Grinnell*] Court intended to state a general rule for all situations. Rather, the Court was noting that in the particular circumstances before it, a Clayton Act case was an appropriate precedent, even though the Court was deciding a Sherman Act question. Although Sherman Act cases certainly are relevant and are entitled to some weight in defining a "line of commerce" under the Clayton Act, we believe that cases decided under the Clayton Act, are stronger precedents, *since the tests may differ somewhat under each act.*

Id. at 230 (emphasis added).

16. *See, e.g.*, Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1302 n.3 (9th Cir. 1978) (case involving both section 2 and section 7 issues in which the court stressed that a submarket "may constitute a product market *under the Clayton Act*" and made no mention of the Sherman Act) (emphasis added); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 343 n.16 (E.D. La. 1968) (court refused to extend the relevant market analysis of a Sherman Act case to a Clayton Act case); Luria Bros., 62 F.T.C. 243, 604 n.14 (1962) (opinion) ("The statute writers use different terms to describe the relevant market" in the Sherman and Clayton Acts), *aff'd sub nom.* Luria Bros. v. FTC, 389 F.2d 847 (3d Cir.), *cert denied*, 393 U.S. 829 (1968). *Cf.* Telex Corp. v. IBM, 367 F. Supp. 258, 336 (N.D. Okla. 1973) ("in my opinion, while there may be a possible differentiation between a 'part of commerce' and a 'line of commerce' in the solution of some problems that might arise under the respective acts, no practical distinction would be justified in the context of the present case"), *aff'd in part and rev'd in part per curiam*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), *quoted in* Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. ¶ 75,054, at 96,735 (D. Utah 1974), *aff'd in part and rev'd in part*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); American Brake Shoe Co., 73 F.T.C. 610, 640 (1968) (initial decision) ("There is a basic distinction between § 2 of the Sherman Act and § 7 of the Clayton Act") (quoting United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 593-94 n.36 (S.D.N.Y. 1958)), *modified on other grounds sub nom.* ABEX Corp. v. FTC, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

I. JUDICIAL DEVELOPMENT OF STANDARDS FOR DELINEATION OF RELEVANT GEOGRAPHIC MARKETS

In contrast to section 2, which deals with actual monopolization as the ultimate question of fact,[17] section 7 concerns monopolization in its incipient stages. The fundamental purpose of the 1950 amendment to section 7 of the Clayton Act[18] was "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[19] The statutes are therefore similar because each addresses monopolization, but dissimilar because each addresses monopolistic conduct at a different stage of development. Given the underlying similarity, it might be expected that the courts would find certain basic concepts about defining the relevant market applicable to cases arising in either context. This indeed is what the courts have done.[20] Nevertheless, because of the different thresholds of illegality, the interchangeability of the standards cannot be complete. The necessity for distinguishing between the market definitions applied in cases brought under the two statutes becomes apparent when the case law and statutory amendments are placed in their proper legal, legislative, and historical contexts.

A. *Standards for Determining Relevant Geographic Market Under Section 2 of the Sherman Act.*

The concept of a relevant market within which to measure the market share and market power of the defendant in a Sherman Act section 2 case evolved slowly.[21] This is not surprising. Sherman Act standards of illegality themselves developed slowly[22] as did the concept of a "relevant market."[23] During the early decades of this century, Sherman Act cases placed virtually no emphasis upon assessment of

17. *See* United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 380 (1956).

18. Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1976)) (amending Clayton Act § 7, ch. 323, § 7, 38 Stat. 730 (1914)). The 1950 amendment is commonly known as and hereinafter referred to as the "Celler-Kefauver Amendment."

19. S. REP. No. 1775, at 4-5, *reprinted in* [1950] U.S. CODE CONG. SERV. 4296. Accordingly, section 7 condemns those mergers the effect of which "*may* be substantially to lessen competition, or to *tend* to create a monopoly." 15 U.S.C. § 18 (1976) (emphasis added).

20. See notes 68, 70, 74, & 79-85 *infra* and text accompanying notes 67-85 *infra*.

21. Upshaw 428.

22. Upshaw 428-29. *See generally* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT (1966); H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947).

23. Upshaw 428.

market control.[24] Then, after a lull in prosecutions during the Great Depression, the current era in Sherman Act analysis began.[25] Increasingly concerned with market power and its anticompetitive effects, courts and the antitrust bar began to realize that more sophisticated techniques for assessing market power were needed.[26] It was within this context that the present concepts of market analysis and relevant markets emerged as major elements in the proof of Sherman Act violations.[27]

In theory at least, the Sherman Act standards for delineating relevant markets are straightforward. Section 2 proscribes monopolization of "any part of the trade or commerce among the several States, or with foreign nations . . . ."[28] The quoted phrase is generally construed as referring to the relevant market.[29] The geographic dimension of the

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24. *Id.* 430. This was true despite the Supreme Court's implicit recognition of relevant markets in 1911 in Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911). Indeed, upon examining three significant Supreme Court Sherman Act cases of the 1920s, United States v. Southern Pac. Co., 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); United States v. United States Steel Corp., 251 U.S. 417 (1920), one commentator observed that "no particular nexus had [yet] been established between economic control of a particular market area and illegality under the Sherman Act. One consequence was that the Court did not find it necessary to develop guidelines to aid in assessing the degree of economic power possessed by antitrust defendants." Upshaw 432.

25. Upshaw 432-33 (tracing the origins of the revitalization of Sherman Act standards to the "growing conviction that a chief cause of the Great Depression had been the rigidity of industrial prices in the face of drastically declining demand due to monopolistic control of many basic industries"). *See generally* Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1354-57 (describing the three "generations" of antitrust ideology, concluding that after United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), "the concept of market power rather than abusive conduct served as the main theme in determining illegality").

26. Upshaw 439.

27. *Id.* 439-45.

28. 15 U.S.C. § 2 (1976).

29. *See* Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911). *See generally* Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 278-79 (1934).

Two commentators assert that, in a more technical sense, the relevant geographic market requirement "flows from the very concept of monopoly . . . ; it does not rest upon the language of Section 2 of the Sherman Act." G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT § 3.7, at 116 (1958) (footnote omitted). The reasoning supporting this assertion is that

> the concept of "the market" is not brought into the antitrust laws by the words "any part" in Section 2; rather it is integral to the basic concept of "monopolization," and the ideas of competition and monopoly on which it rests. Thus, Section 2 of the Sherman Act deals with monopolization affecting *markets* which constitute "any part" of the trade or commerce covered by the Act. To be sure, an appreciable amount of commerce is a "part" of commerce, but control over an appreciable amount of commerce does not necessarily mean control over an identifiable market which constitutes an appreciable "part" of commerce.

U.S. DEP'T OF JUSTICE, *supra* note 1, at 47 (emphasis in original). *See also* Note, *supra* note 11, at 580.

relevant market is often defined as the geographic area over which the products in question are traded[30] and effectively compete.[31] A more complete definition takes into consideration the realities of the marketplace.[32] According to Professor Sullivan:

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price or volume. If sufficient supply would promptly enter from other geographic areas, then the "defined market" is not wide enough in geographic terms . . . . A "relevant market," then, is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.[33]

Section 2 cases often speak in terms of "economic significance" and "area of effective competition" when defining a relevant geographic market.[34] Thus, the courts agree that the section 2 relevant

30. *Cf.* Marnell v. United Parcel Serv., 1971 Trade Cas. ¶ 73,761, at 91,214 (N.D. Cal. 1971) (defining the relevant geographic market as coextensive with UPS's service area).

31. J. VON KALINOWSKI, 16 BUSINESS ORGANIZATIONS (ANTITRUST LAWS AND TRADE REGULATION) § 8.02[2], at 8-13 to -15 (1979); *see* United States v. Grinnell Corp., 384 U.S. 563, 575-76 (1966); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1203 (2d Cir. 1978) (a section 7 case); TV Signal Co. v. AT&T, 462 F.2d 1256, 1260 (8th Cir. 1972). *See generally* Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293, 299-300 n.5 (1949); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295 & n.15 (7th Cir. 1974); U.S. DEP'T OF JUSTICE, *supra* note 1, at 44-45.

32. *See* United States v. Grinnell Corp., 384 U.S. 563, 576 (1966).

33. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 12, at 41 (1977). *See generally* II P. AREEDA & D. TURNER, *supra* note 2, ¶¶ 517-36.

34. *See, e.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 988 (D.C. Cir. 1977) (finding the relevant geographic market to be " 'the area of effective competition,' the area 'in which the seller operates, and to which the purchaser can practicably turn for supplies' "), *cert. denied*, 436 U.S. 956 (1978); Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 918 (8th Cir. 1976) (speaking in terms of the "area in which the defendant effectively competes with other individuals or businesses for the distribution of the relevant product"); Structure Probe, Inc. v. The Franklin Inst., 450 F. Supp. 1272, 1283 (E.D. Pa. 1978) (recognizing that "a geographic market must correspond to the 'commercial realities' of the market for [the relevant product] and must be an economically significant market area"), *aff'd*, 595 F.2d 1214 (3d Cir. 1979); United States v. Dairymen, Inc., 1978-1 Trade Cas. ¶ 62,053, at 74,539 (W.D. Ky.) (stating that "the relevant geographic market is the market in which competitors effectively compete, and in which the seller supplies and to which the purchaser can practically turn for supplies"), *modified*, 1978-2 Trade Cas. ¶ 62,186 (W.D. Ky.), *modified*, 1979-1 Trade Cas. ¶ 62,493 (W.D. Ky. 1978); Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co., 1972 Trade Cas. ¶ 73,955, at 92,004 (W.D. Tenn. 1972) (speaking in terms of area of "effective competition"); Cal Distrib. Co. v. Bay Distribs., Inc., 337 F. Supp. 1154, 1158 (M.D. Fla. 1971) (looking to economically significant factors).

On the other hand, some section 2 cases have adopted the more lax criteria announced by the Supreme Court in the section 7 case of United States v. Pabst Brewing Co., 384 U.S. 546 (1966). In that case, the Court held that the relevant geographic language of section 7 "requires merely

market need not be nationwide,[35] and that the area of effective competition may be so small as to justify a relevant geographic market no larger than a section of a city.[36] Furthermore, it has been suggested that certain barriers to entry into a particular geographic area require that such an area be designated the relevant geographic market, even though the product is actually distributed more widely.[37]

B. *Standards for Determining Relevant Geographic Market Under Section 7 of the Clayton Act.*

In cases brought pursuant to section 7 of the Clayton Act,[38] courts apply relevant market criteria somewhat similar to those set forth in section 2 case law.[39] The standards are not identical, however. The nature of the Clayton Act itself provides the basis for distinguishing its relevant market standards from those that have developed in the sec-

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that the Government prove the merger may have a substantial anticompetitive effect *somewhere* in the United States . . . ." *Id.* at 549 (emphasis added).

35. Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293, 299-300 n.5 (1949). In United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Supreme Court stated that

> the Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area.

Id. at 519.

36. *See* William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945) (downtown theatre district held to be relevant geographic market), *cert. denied*, 334 U.S. 811 (1948). *See also* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (relevant geographic market defined as New Orleans); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (city of Lorain, Ohio held to be relevant geographic market).

37. *See generally* Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973).

38. 15 U.S.C. § 18 (1976). Section 7 of the Clayton Act proscribes those mergers "where in *any* line of commerce in *any* section of the country, the effect . . . *may* be substantially to lessen competition, or . . . *tend* to create a monopoly." 15 U.S.C. § 18 (1976) (emphasis added). The phrase "any line of commerce" refers to the relevant product market. Similarly, "any section of the country" denotes the geographic dimension of the relevant market. Brown Shoe v. United States, 370 U.S. 294, 324 (1966).

39. *See* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 552 n.7 (1st Cir. 1974) ("cases . . . decided under . . . the Clayton Act . . . offer *guidance* to market definition under Sherman Act claims") (emphasis added), *cert. denied*, 421 U.S. 1004 (1975); United States v. Mrs. Smith's Pie Co., 440 F. Supp. 220, 230 (E.D. Pa. 1976) ("Although Sherman Act cases certainly are relevant and are entitled to some weight in defining a 'line of commerce' under the Clayton Act, we believe that cases decided under the Clayton Act, are stronger precedents, since the tests may differ somewhat under each Act").

On the other hand, some cases have held that the analogy is absolute and the standards are completely interchangeable. *See, e.g.*, Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454 (9th Cir. 1966), *cert. denied*, 387 U.S. 932 (as to section 2 issues), *rev'd on other grounds*, 389 U.S. 384 (1967); SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1116 (E.D. Pa. 1976) (applying section 7 submarket analysis to a section 2 case), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

tion 2 case law. The purpose of section 7 of the Clayton Act—couched in terms of "may," "tend," and "any"—is to check restraints of trade in their formative stages, well before they have attained such large-scale effects as would justify a Sherman Act proceeding.[40] This purpose is manifested throughout the entire statute, and the section 7 treatment of relevant markets is particularly important to its accomplishment. Section 7 codifies the relevant market concept in a manner that gives the courts great freedom in selecting a relevant market. In terms more explicit than those found in section 2,[41] the relevant product market is described as "*any* line of commerce,"[42] and the relevant geographic market requirement is described as "*any* section of the country."[43]

Given this broad, sweeping language, it is not surprising that courts adjudicating cases brought pursuant to the amended section 7[44] slowly developed approaches to relevant market definition that were more flexible than those that had theretofore been used in section 2 cases. This trend finally culminated in the landmark Supreme Court decision of *Brown Shoe Co. v. United States*,[45] in which the innovative concept of relevant "*sub*markets" was adopted.[46] For the most part, *Brown Shoe* is a relevant product market case, although the Court also made some important observations regarding relevant geographic markets.

After considering the section 2 approach of establishing a single relevant product market on the basis of the "reasonable interchangeability" test,[47] the Court found the utility of that approach in a section 7

40. FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967); Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962).

41. See notes 28-29 *supra* and accompanying text.

42. 15 U.S.C. § 18 (1976) (emphasis added). *See* United States v. Continental Can Co., 378 U.S. 441, 469 n.4 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

43. 15 U.S.C. § 18 (1976) (emphasis added). *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 620 n.18 (1974); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

44. 15 U.S.C. § 18 (1976) (Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914), *as amended by* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125).

45. 370 U.S. 294 (1962).

46. *Id.* at 325 (emphasis added).

47. In the landmark decision of United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377 (1956), the Supreme Court laid down economic guidelines for delineating relevant product markets in section 2 cases along the lines of reasonable interchangeability of products:

> When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot . . . give "that infinite range" to the definition of substitutes. Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.
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> But where there are market alternatives that buyers may readily use for their pur-

context to be limited solely to establishing the "outer boundaries of a product market [within which] well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[48] The Court did not depart from the section 2 approach without good reason; the submarket concept resulted directly from the very language of section 7 itself:

> Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce," . . . it is necessary to examine the effects of a merger in each *economically significant* submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.[49]

The Court did not restrict itself to relevant product market delineation, but went even further in dictum, extending the submarket concept to relevant geographic market delineations as well:

> The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . . Moreover, just as a product submarket may have § 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." . . . [Section 7] speaks of "any . . . section of the country," and if anticompetitive effects of a merger are probable in "any" significant market, the merger—at least to that extent—is proscribed.[50]

Significantly, the *Brown Shoe* Court did not read the word "any" literally. As with product markets and submarkets, the Court cautioned that geographic markets and submarkets should not be chosen arbitrarily, but rather should be economically significant and correspond to the commercial realities of the industry.[51] The Court had little more to say about the determination of relevant geographic markets in *Brown Shoe*, however, since that issue was not in dispute.[52]

Since *Brown Shoe*, the Supreme Court has had several opportunities to establish section 7 relevant geographic market standards. The

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> poses, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. . . . What is called for is an appraisal of the "cross-elasticity" of demand in the trade. . . . The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities *reasonably interchangeable* by consumers for the same purposes make up that [relevant market], monopolization of which may be illegal.

Id. at 394-95 (footnote omitted) (emphasis added).

48. 370 U.S. at 325 (emphasis added). *See* J. AARTS, *supra* note 8, at 336-37.

49. 370 U.S. at 325 (emphasis added to "economically significant").

50. *Id.* at 336-37 (footnote omitted).

51. *Id.*

52. *Id.* at 337.

opinions, however, are not totally consistent.[53] *United States v. Pabst Brewing Co.*[54] is probably the most controversial post-*Brown Shoe* opinion dealing with relevant geographic market definition criteria for merger cases.[55] The district court had dismissed that case, finding that the government had failed to introduce sufficient evidence in support of its delineation of a relevant geographic market.[56] The Supreme Court reversed, finding that section 7 requirements had been met since the evidence showed a trend toward concentration[57] in the three areas alleged by the government to be the relevant geographic markets.[58] The Court asserted that the relevant geographic market for an alleged section 7 violation need not be delineated by metes and bounds,[59] and concluded that "[t]he language of [section 7] requires merely that the Government prove the merger may have a substantial effect *somewhere* in the United States—'in *any* section' of the United States."[60]

The *Pabst* Court used the *Brown Shoe* relevant geographic submarket concept,[61] yet cited the earlier decision only once, and then only

53. In fact, all of the Court's attempts to apply *Brown Shoe* geographic and product market standards have been characterized by Professor Posner as "aberrant." R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 130 (1976).

54. 384 U.S. 546 (1966) (a section 7 case challenging Pabst's acquisition of Blatz Brewing Company).

55. Notably, *Pabst* was issued concurrently with *Grinnell*, which itself sparked controversy regarding the proper section 2 relevant geographic market standards. See text accompanying notes 12-16 *supra* and 69-71 *infra*.

56. United States v. Pabst Brewing Co., 233 F. Supp. 475, 487-88, 495 (E.D. Wis. 1964), *rev'd*, 384 U.S. 546 (1966).

57. 384 U.S. at 550-52. *Cf.* United States v. Von's Grocery Co., 384 U.S. 270 (1966) (a section 7 case that, like *Pabst*, involved evidence of a steady trend toward economic concentration deduced from the decline in the number of competitors and not on the basis of market share alone).

58. The relevant geographic markets and submarkets proposed by the government were the entire United States, a three-state area, and Wisconsin. 384 U.S. at 548. *See* United States v. Pabst Brewing Co., 233 F. Supp. at 477.

59. 384 U.S. at 549. *See id.* (It is not necessary "to show a 'relevant geographic market' in the same way the corpus delecti must be proved in a crime [or] to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market . . .") *But cf.* SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1115 (E.D. Pa. 1976) (citing Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 500 (E.D. Pa. 1974), for the proposition that "[a]n inquiry as to the metes and bounds of the relevant product market *is necessitated by . . . section two of the Sherman Act*") (emphasis added), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

60. 384 U.S. at 549 (emphasis added to "somewhere"). The Court elaborated, stating that

> all that need be proven in order to sustain a section 7 violation is [1] that there has been a merger between two corporations engaged in commerce and [2] that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce "*in any section of the country.*"

Id. (emphasis in original).

61. Brown Shoe Co. v. United States, 370 U.S. at 336-37. See text accompanying notes 50-51 *supra*. Even though the *Pabst* Court never mentioned the term "submarket," it clearly had the

for purposes of general reference.[62] Because the *Pabst* Court seemed to ignore the "economic significance" and "commercial realities" requirements,[63] the case has been read as abolishing the necessity of delineating a relevant market at all.[64] Primarily for this reason, the decision has been the subject of severe criticism,[65] although it is still the law.[66]

C. *The Amalgamation of Section 7 and Section 2 Relevant Geographic Market Standards.*

When the Supreme Court handed down its decision in *Brown Shoe* in 1962, there was no indication that the relevant market and submarket standards announced there were applicable to any cases except those arising under section 7. Nevertheless, courts slowly began citing the standards developed under one statute in cases that arose under the other statute, and vice versa. Eventually, most courts neglected to recognize any distinctions at all between the statutes' respective relevant geographic market standards. The failure to make the distinction was due, in part, to the fact that standards developed under one statute are applicable *by analogy* to the other.[67] Many courts, however, have gone beyond analogical applications and have applied the case law as if the standards were completely interchangeable.[68]

The Supreme Court dictum in *Grinnell* to the effect that relevant product market standards were interchangeable fathered most of this confusion.[69] While that dictum was specifically directed at relevant *product* market analysis, courts have subsequently interpreted it as

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Brown Shoe concept in mind. Three relevant geographic markets were found: Wisconsin was a submarket of a larger three-state area that, in turn, was a submarket of the entire United States, 384 U.S. at 548, 551-52.

62. 384 U.S. at 551 n.4 (stating that *Brown Shoe* and other cases generally supported the Court's finding of a section 7 violation in each of the three proposed relevant geographic markets).

63. See text accompanying note 51 *supra*.

64. *See* Hale & Hale, *Delineating the Geographic Market: A Problem in Merger Cases*, 61 NW. U.L. REV. 538, 540 (1966); Comment, *"Relevant Market" Under the Sherman and Clayton Acts as Affected by Recent Decisions of the Supreme Court*, 1966 U. ILL. L.F. 1094, 1105.

65. Professor Posner, for instance, has characterized the opinion as being born in "a fit of nonsense." R. POSNER, *supra* note 53, at 130.

66. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 621 n.20 (1974) (implicitly admitting the validity of *Pabst*, although attempting to distinguish it in dictum).

67. See note 15 *supra*.

68. For the most part, the influence has been unidirectional, with the more pervasive standards of section 7 cases being applied in the section 2 context. *But cf.* note 15 *supra* (describing a section 7 case where the government unsuccessfully attempted to apply section 2 standards). This trend is consistent with the prosecutorial aims of the government. Only the government is in a position to effectuate a coherent, unified antitrust policy. Since the government's avowed goal is promoting competition, it understandably prefers wider use of flexible section 7 standards—which broaden the scope of the antitrust laws—to the more limited section 2 standards. See note 9 *supra*.

69. See text accompanying notes 12-16 *supra*.

equally applicable to *geographic* market analysis.[70] This interpretation is especially troublesome in light of the contemporaneous liberalization of section 7 relevant geographic market standards under *Pabst*.[71]

An early example of the mixing of section 7 and section 2 relevant market criteria occurred in *Case-Swayne Co. v. Sunkist Growers, Inc.*,[72] a Ninth Circuit case decided in 1966. The action sought treble damages for alleged violations of sections 1 and 2 of the Sherman Act. Before analyzing the product and geographic dimensions of the relevant market, the court remarked that "it is clear that the same determination must be made regarding the relevant market in actions for violation of section 2 of the Sherman Act" as is made in actions for violation of section 7 of the Clayton Act.[73] Consequently, in its determination of the relevant geographic market, the court relied heavily on the section 7 criteria articulated in *Brown Shoe* and *Pabst*,[74] concluding that both an outer geographic market and several inner submarkets are appropriate for a section 2 action: "[I]t is clear from the recent case of United States v. Pabst Brewing Company . . . that . . . the relevant market may *at the same time* be national, regional, and statewide in area."[75] In spite of this observation, and although there is some language in the opinion indicating that other markets might have been considered,[76] the court defined a single, narrow market.[77] This is as it should be, since multiple market definitions involving the submarket approach have no place in section 2 analysis.[78] Moreover, the court's

70. *E.g.*, Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1305 (5th Cir. 1971) (reading words into the *Grinnell* dictum that actually are not there by stating that "section 7's use of 'any section of the country' [was] equated [by the *Grinnell* Court] to section 2's 'any part of the trade or commerce among the several states' "), *cert. denied*, 404 U.S. 1047 (1972). *Accord*, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir. 1975) ("The area of effective competition is defined in terms of a product market and a geographic market. . . . The same inquiries regarding the relevant market must. . . be undertaken in actions charging violation of § 2 of the Sherman Act" as in actions charging violation of § 7 of the Clayton Act); Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454 (9th Cir. 1966) (citing the *Grinnell* dictum as a rule for relevant market definition in general, instead of citing it under the relevant product market heading), *cert. denied*, 387 U.S. 932 (as to section 2 issues), *rev'd on other grounds*, 389 U.S. 384 (1967).

71. See text accompanying notes 53-66 *supra*.

72. 369 F.2d 449 (9th Cir. 1966), *cert. denied*, 387 U.S. 932 (as to section 2 issues), *rev'd on other grounds*, 389 U.S. 384 (1967).

73. 369 F.2d at 454.

74. The court explicitly justified its use of relevant *product* market standards enunciated in section 7 cases by citing the *Grinnell* dictum. *See id.* In its use of section 7 cases to determine the relevant geographic market, however, the court neither offered, nor could offer, similar justification. *See id.* at 455-58.

75. *Id.* at 457 (footnote omitted) (emphasis added).

76. The court did *allude* to market shares in a national market. *Id.* at 452.

77. *Id.* at 454-58.

78. See text accompanying notes 174-75 *infra*.

narrow market definition seems to be fortuitously correct, even in light of section 2 standards.[79] The accuracy of the market definition in *Case-Swayne*, however, does not lessen the harm to section 2 analysis inflicted by the notion that there may be geographic submarkets within the "outer boundary"[80] of the relevant geographic market as determined by the traditional section 2 criteria.[81]

Following the Ninth Circuit's lead in *Case-Swayne*, other courts began assuming that standards for determining relevant geographic market developed under section 2 and section 7 were freely interchangeable.[82] Some section 2 cases have gone so far as to cite *Pabst* for the proposition that the relevant geographic market need not be defined with any specificity whatsoever,[83] while others seem to adhere to

79. The relevant product market was defined as oranges, which, for all practical purposes, could only be transported to buyers within a relatively small geographic area. Thus, *Case-Swayne* is an excellent example of market definition along the lines of transportation barriers. *See generally* II P. AREEDA & D. TURNER, *supra* note 2, ¶ 523 (discussing transportation barriers as factors in relevant geographic market delineation).

80. *Cf.* Brown Shoe Co. v. United States, 370 U.S. at 325 (submarket analysis within "outer boundaries" necessary under section 7 to determine if merger will lessen competition).

81. It has been argued, however, that the *Case-Swayne* relevant geographic submarket approach does not signify a new test for determining the relevant geographic market for purposes of section 2 of the Sherman Act, but rather that it merely emphasizes the well-established rule that while under certain circumstances the relevant market may encompass the entire country, it may in other circumstances be limited to a much more narrow area—a relevant geographic "submarket." J. VON KALINOWSKI, *supra* note 31, § 8.02[2]. The problem is that the meaning of the word "submarket," which first arose in *Brown Shoe* as a term of art, has degenerated to a point where, in many cases, it might be used to indicate only a market that is less than broad. In such a situation, the term "submarket" does not necessarily imply an acceptance of the relevant market standards of section 7 cases, just as citation to section 7 cases in actions brought under section 2 does not necessarily imply a complete approval of the section 7 rationale. For this reason, legal arguments using the word "submarket" should be carefully scrutinized.

82. *See, e.g.*, Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 45-46 (5th Cir. 1974) (section 2 case dispensing with the need for a definite market definition by citing *Pabst*), *cert. denied*, 419 U.S. 1110 (1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 502 (E.D. Pa. 1972) (section 2 case relying on *Pabst* and *Brown Shoe*); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 789 (S.D. Tex. 1971) (section 2 case relying on *Case-Swayne* for proposition that it "is settled that the same criteria used in determining relevant market under one provision must be used in determining relevant market under the other"), *aff'd*, 476 F.2d 989 (5th Cir. 1973).

83. An example is Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974). There, the district court had granted the defendants' motion to dismiss the antitrust claims for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). On appeal, the Fifth Circuit found that a section 2 claim was adequately stated in spite of mere conclusory allegations establishing a relevant geographic market. 493 F.2d at 45-46. In support of its holding, the court found *Pabst* controlling:

> Although there might be some limited excursions outside the territorial boundaries of the state in performing the obligations under the insurance contracts, the perimeters of the "exact spot" of a relevant market need not be outlined. *It is enough to show a relevant area in which the defendants might exclude competition.*

Id. at 46 (emphasis added).

section 2 criteria but with a cavalier attitude.[84] Most cases, however, are similar to *Case-Swayne* and do not go to such extremes; they merely recite the relevant geographic market criteria from the other line of case law, and either use those criteria for purposes of analogy or apply them so as to reach a result consistent with the traditional relevant market standards developed under the particular statute involved.[85]

One recent case, however, has explicitly held that the standards set out in *Pabst* and *Brown Shoe* are inapplicable to a Sherman Act proceeding. That case, *United States v. Dairymen, Inc.*,[86] involved an action against an agricultural cooperative marketing association of dairy farmers, alleging attempted monopolization of the sale of milk in the southeastern United States.[87] Crucial to the court's decision, and in much dispute, was the determination of the relevant geographic market.[88] The record showed that the member-producers and the marketing facilities of Dairymen were located throughout the Southeast.[89] In approximately one-half of the states in that area the sale of milk was regulated by the states, and in the remainder milk sales were regulated

84. *See, e.g.*, Coleman Motor Co. v. Chrysler Corp., 376 F. Supp. 546, 562 (W.D. Pa. 1974) (commenting that a local area "will serve" as a relevant geographic market when "by [the] nature of the business involved, it is uneconomical to operate on a national scale (though the defendants may operate in many locations throughout the nation)"), *vacated*, 525 F.2d 1338 (3d Cir. 1975).

85. In addition to *Case-Swayne*, an interesting example is Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (a section 2 case). After the traditional reiteration of the *Grinnell* dictum regarding the interchangeability of section 7 and section 2 relevant product market standards that had become commonplace in post-*Grinnell* decisions, the district court determined that the relevant product market was major league professional hockey. *Id.* at 500-02. The relevant geographic market delineation followed similar lines. *Id.* at 502. The record established that the teams comprising the National Hockey League, which are located solely in the United States and Canada, historically turned to amateur league teams in those two countries as a source of supply of new talent. The defendants asserted, however, that Europe was also a potentially large source of supply of professional players. *Id.*

In spite of the fact that this case arose under section 2 of the Sherman Act, the court relied exclusively on the principles set forth in the section 7 market definition cases of *Brown Shoe* and *Pabst*. Consequently, the district court found the relevant geographic market to be the United States and Canada, sidestepping the issue of whether the market should include Europe by citing the section 7 cases and stating that the "language of the Sherman Act itself does not require a monopolization of *all* the trade or commerce, but rather *any part* of the trade or commerce among the several states or with foreign nations." *Id.* (emphasis in original).

In this situation, however, no egregious error was committed. The mere allegation that Europe was a *potential* source of supply, alone, is not enough to establish a larger relevant geographic market. Thus, without more facts, the court seems to have correctly defined the market, albeit by the improper means of submarket analysis.

86. 1978-1 Trade Cas. ¶ 62,053, at 74,535 (W.D. Ky.), *modified*, 1978-2 Trade Cas. ¶ 62,186 (W.D. Ky.), *modified*, 1979-1 Trade Cas. ¶ 62,493 (W.D. Ky. 1978).

87. 1978-1 Trade Cas. at 74,536.

88. *Id.* at 74,538.

89. *Id.* at 74,537.

by Federal Milk Marketing Orders.[90] Consequently, the government admitted that the relevant geographic market was the Southeast, but contended that that area only represented the "outer boundary" of two smaller geographic submarkets delineated on the basis of state or federal milk sales regulation.[91]

The district court recognized the long-established definition of the relevant geographic market as "the market in which competitors effectively compete, and in which the seller supplies and to which the purchaser can practically turn for supplies."[92] Applying this rule, the district court found the relevant market to be the southeastern area of the United States with the exception of Florida. The *Dairymen* court rejected the government's claim that the defendant dominated a relevant geographic submarket comprised of the areas affected by the Federal Milk Marketing Orders, and found that the Clayton Act cases that the government relied upon in support of its submarket claim[93] were of no assistance in delineating a relevant geographic market in a section 2 case.[94] The court emphasized that those cases were brought pursuant to section 7 of the Clayton Act,[95] "which refers specifically to lessening of competition in *any part* of the country. Under that very broad statute, the concept of relevant geographic submarkets has been developed."[96] On the basis of terminology and purpose alone, the court found section 7 to differ significantly from section 2:

> It would seem that [section 7] was enacted to prevent the anticompetitive effect of mergers which would *in any way* diminish competition substantially in *any part* of the country, whereas the sections of the Sherman and Clayton Acts, upon which [the government] relies, are not couched in such local and pragmatic terms.[97]

The court also provided a second rationale for rejecting the government's submarket theory. It reasoned that the unwieldy nature of a section 2 case would be intensified if further analysis of submarkets were required:

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90. *Id.*

91. *Id.* at 74,538-39.

92. *Id.* at 74,539.

93. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293 (1949).

94. 1978-1 Trade Cas. at 74,539-40.

95. However, the *Standard Oil* case was actually brought pursuant to section 3 of the Clayton Act and section 1 of the Sherman Act. The Court based its decision on its interpretation of section 3 of the Clayton Act and did not reach, therefore, the Sherman Act question. 337 U.S. at 314.

96. 1978-1 Trade Cas. at 74,540 (emphasis added). The court stated that it could find no cases in which the section 7 submarket approach had been applied to section 2 cases. However, there do seem to be several such cases. See notes 72-85 *supra* and accompanying text. But see note 81 *supra*.

97. 1978-1 Trade Cas. at 74,540 (emphasis added).

> [L]ogic would require that the Court examine in detail the market statistics in each and every geographic subdivision in which defendant competes, and might even require the establishment of many relevant geographic submarkets which could be as small as the city limits of a municipality or the boundaries of a county. While such a result would be acceptable in a suit brought under . . . [section 7 of the Clayton Act], we do not believe that it would follow that it is acceptable here.[98]

Having defined the market to be the entire southeastern United States, except Florida, and having found Dairymen's share in that market to be small, the court held that Dairymen had not violated the provisions of the Sherman Act.[99]

The *Dairymen* decision currently stands alone among relevant geographic market cases in holding that geographic submarket analysis is inapplicable to section 2 cases.[100] In fact, no other court has squarely addressed the issue.[101] Perhaps the question of interchangeability was never brought to the attention of other courts.[102] Nonetheless, this is not a sufficient reason for disregarding the district court's holding in *Dairymen*. Since the *Dairymen* court's reasoning in support of its holding is not extensive, however, more analysis of the pertinent case law and legislative histories is necessary.

II. THE INTERCHANGEABILITY OF METHODS FOR DETERMINING RELEVANT GEOGRAPHIC MARKET

The Supreme Court indicated in dictum in *United States v. Grinnell Corp.*[103] that relevant product market standards under section 2 and section 7 are similar, if not completely interchangeable: there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."[104] In *Brown Shoe Co. v. United States*,[105] the Court noted, again in dictum, that criteria for determining relevant product markets and relevant geographic markets are generally similar; the Court concluded that because the relevant product market may be divided into sub-

98. *Id.*

99. *Id.* at 74,547.

100. Some cases dealing with the relevant *product* market have so held. See cases cited in notes 15-16 *supra*.

101. See notes 72-85 *supra* and accompanying text.

102. To be sure, even the defendants in *Dairymen* did not suggest the theory ultimately adopted by the court in that case. *See* Post-Trial Brief for Defendant, United States v. Dairymen, Inc., 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky.) *modified*, 1978-2 Trade Cas. ¶ 62,186 (W.D. Ky.), *modified*, 1979-1 Trade Cas. ¶ 62,493 (W.D. Ky. 1978).

103. 384 U.S. 563 (1966).

104. *Id.* at 573.

105. 370 U.S. 294 (1962).

markets for purposes of section 7, the relevant geographic market may also be so divided.[106] Taken together, the dicta of the Court in *Brown Shoe* and *Grinnell* could be construed as follows: since there are relevant product submarkets under section 7, there are relevant product submarkets under section 2; and since similarities exist between relevant product and geographic market criteria, there must also be relevant geographic submarkets under section 2. Analysis along these lines would indicate that all relevant market standards are interchangeable. This conclusion is simply not warranted.

As previously discussed, breaking relevant markets into smaller submarkets can be traced at least as far back as *Brown Shoe*.[107] In *Brown Shoe* the Court obviously departed from the traditional section 2 threshold question[108] of what single relevant market should be defined for evaluating the ultimate question of monopoly[109] in favor of a buckshot approach[110] allowing the potential or actual anticompetitive effects of a merger to be evaluated concurrently on several different levels. The opinion stands for the proposition that a broad relevant market's constituent submarkets are just as appropriate to the section 7 analysis as the broad market itself.[111] Thus, a merger can be condemned if substantial lessening of competition occurs only in a submarket and not in the broader market itself.[112]

The *Brown Shoe* Court's analysis of relevant markets was detailed. Although it discussed many contingencies and variations with no direct application to the facts of the case, the Court did not consider the extent to which its holding should affect section 2 relevant market delineation.

A. *The Congressional Intent to Maintain Certain Distinctions Between the Approaches to Relevant Geographic Market Delineation Under Section 2 and Section 7.*

The relationship between the approaches to defining relevant geographic market under section 2 and section 7 can be clarified through

106. *Id.* at 336-37.

107. See text accompanying notes 44-52 *supra*.

108. *See* Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978) ("defining the relevant product and geographic markets is a threshold requirement under § 2"), *cert. denied*, 440 U.S. 939 (1979).

109. See text accompanying note 174 *infra*.

110. Indeed, "buckshot tactics" are advocated by the statutory language of section 7 that applies the statute to "*any* line of commerce in *any* section of the country." 15 U.S.C. § 18 (1976) (emphasis added). To be sure, section 7 markets are generally more numerous and narrower than those that would be chosen for section 2 purposes. *See* J. AARTS, *supra* note 8, at 237-49.

111. 370 U.S. at 325.

112. J. AARTS, *supra* note 8, at 245.

an examination of the legislative history underlying both the original enactment of the Clayton Act in 1914[113] and the Celler-Kefauver Amendment,[114] which amended section 7 in 1950. Careful scrutiny of the congressional intent not only reveals strong support for the submarket approach outlined in *Brown Shoe* and *Pabst*, but also suggests that the Clayton Act relevant geographic market standards were intended to be more probing and flexible than those that had developed in the section 2 case law.

1. *The Clayton Act of 1914.* The Clayton Act was passed in order to "supplement the purpose and effect of other antitrust legislation, principally the Sherman Act of 1890."[115] The antimerger provisions of the original version of the bill as passed by the House proscribed those stock acquisitions whose effect was "to eliminate or substantially lessen competition . . . , or to create a monopoly of any line of trade in any section or community."[116] There is no clue in the legislative history as to the origin of the phrase "any line of trade in any section or community." It is highly probable that the phrase originated in *Standard Oil Co. v. United States*,[117] a major Supreme Court decision interpreting the antimonopoly provisions of section 2 of the Sherman Act. In that case, the Court noted that the clause in section 2 of the Sherman Act referring to monopolization of "any part of the trade or commerce" had "both a geographical and a distributive significance."[118] This was the first time the Court had ever spoken in such terms. Indeed, *Standard Oil* is commonly recognized as expressing the original formulation of the current relevant market concept.[119] The similarities between the language of *Standard Oil* and the Clayton bill are significant: "any line of trade" clearly speaks to the "distributive" aspect of a market, while "in any section or community" is addressed to the "geographical" aspect. Given the prominence of the *Standard Oil* case,[120] it is very probable that the phrase "any line of trade in any section or com-

113. Ch. 323, 38 Stat. 730 (1914).

114. Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1976)).

115. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922). *Accord*, S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914); 51 CONG. REC. 9068 (1914) (remarks of Rep. Webb).

116. H.R. 15,657, 63d Cong., 2d Sess. § 8 (1914), *reprinted in* S. DOC. No. 584, 63d Cong., 2d Sess. 8-9 (1914).

117. 221 U.S. 1 (1911).

118. *Id.* at 61.

119. *See* Upshaw 438-39.

120. *Standard Oil* was one of the first cases to establish the "rule of reason" standard for Sherman Act cases. Furthermore, it was constantly referred to during the floor debates on the Clayton Act. *See, e.g.*, 51 CONG. REC. 13,901 (1914) (remarks of Sen. Cummins); 51 CONG. REC. 9553 (1914) (remarks of Rep. Barkley).

munity" was based upon the concepts expressed by the Court in that decision.[121]

Not only does it appear that Congress adopted a geographic market concept like that formulated by the *Standard Oil* Court, but it is also evident that Congress intended to adopt a statute whose application would be more geographically probing than that of section 2 of the Sherman Act.[122] At the time of the passage of the Clayton Act in 1914, the Sherman Act was only twenty-four years old, but many cases had already been litigated under it. No Sherman Act case brought before the Supreme Court prior to 1914, however, was concerned with a geographic market narrower than the entire United States.[123] Thus, Congress' Clayton Act reference to "any section or community" takes on special significance. Why would the draftsmen of the bill have used such terms if they had not wanted to indicate a geographical focus that could be narrower than that of the Sherman Act?

Examination of the floor debate provides some insight. After passing the House, the Clayton bill was sent to the Senate Committee on the Judiciary where the language in question was entirely deleted.[124] Senator Culberson, the Chairman of the Committee, outlined the rationale for the deletion during the floor debate: "[Some Committee members feared] that the [phrase] . . . was intended to apply to a local transaction and would be a regulation of intrastate commerce rather than interstate commerce, and therefore void."[125] However, several Senators felt that this construction was not justified and urged that the phrase be left in. For instance, Senator Reed reasoned that

> the House bill [was] distinctly aimed at the creation of a *localized monopoly* or a *localized restraint*, as distinguished from a *general restraint* or a *general monopoly*. [I am] . . . very much in favor of

121. *Cf.* 51 CONG. REC. 14,460 (1914) (remarks of Rep. Shields) ("The policy of putting [section 7] in the bill was in keeping with that outlined by [the two political parties and the President], after the decisions in the cases of the Standard Oil Co. and the American Tobacco Co.").

122. Note, however, that the concept of relevant geographic market as a judicial tool for monopolization cases was in its incipiency. See notes 21-27 *supra* and accompanying text. Nevertheless, it is significant that courts of that time did have a conception of area of effective competition. Indeed, many cases spoke in terms of controlling a certain percentage of the trade in the United States. See cases cited at note 123 *infra* and accompanying text.

123. *See, e.g.*, Straus v. American Publishers' Ass'n, 231 U.S. 222 (1913); United States v. Winslow, 227 U.S. 202 (1913); United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227 (1909); United States v. E.C. Knight Co., 156 U.S. 1 (1895). *Cf.* 51 CONG. REC. 16,059 (1914) (remarks of Sen. Clapp) (expressing the opinion that, unless restricted by statute, monopolies of a local market were immune to prosecution; concluding that the only monopolies that could be prosecuted were those of national or world-wide markets).

124. S. REP. NO. 698, *supra* note 115, at 46.

125. 51 CONG. REC. 14,419 (1914) (remarks of Sen. Culberson).

> retaining the phrase "in any section or community," because I believe we will be able in some instances to reach a condition which probably cannot be reached under the Sherman Anti-trust Act.
>
> I do not agree that the bill is susceptible of the construction suggested by the chairman, . . . as we are legislating only with reference to interstate commerce this language would be construed to apply to the creation of a local restraint by someone engaged in interstate commerce . . . .[126]

Senator Reed and the Senators referred to by Senator Culberson differed only on the question of whether intrastate commerce would be unconstitutionally affected if the phrase "any section or community" were left in the bill. No one disputed Senator Reed's observation that the phrase would make the antimerger provisions of the Clayton Act much more proscriptive than section 2 of the Sherman Act by rendering the geographic scope of the former more flexible and probing than that of the latter. Nonetheless, the bill passed the Senate with the Judiciary Committee's deletion intact.[127]

Apparently, the fears of unconstitutionality expressed by Senator Culberson were not shared by the conference committee. Called to resolve the discrepancies in the bill as reported by each house,[128] that committee recognized the value of making section 7 more proscriptive than section 2 and reinstated the relevant geographic market phrase.[129] Congress later reaffirmed its desire to create different standards for sec-

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126. *Id.* (remarks of Sen. Reed) (emphasis added).

Many Senators feared that the deletion of the phrase "any section or community" from the bill would simply mark a retreat to the Sherman Act standards. *See, e.g., id.* 14,316 (remarks of Sen. Cummins).

127. *Id.* 14,319.

128. *See* S. DOC. NO. 584, *supra* note 116, at 8-9 (1914) (a section-by-section comparison of the Senate, House, and conference committee versions of the Clayton Act). Portions of this document are reprinted in 51 CONG. REC. 15,790 (1914).

129. The conference committee met and reported the bill with the phrase "any section or community" no longer modifying both the restraint of commerce and monopoly clauses, see quotation in text accompanying note 126 *supra*, but instead modifying the restraint of commerce clause alone. S. DOC. NO. 584, *supra* note 116, at 8. The alteration was inconsequential, and was only made because the phrase was perceived to be superfluous in modifying the monopoly clause. 51 CONG. REC. 16,047-48 (1914) (remarks of Sen. Chilton). Reasoning that a monopoly was self-defining and could not operate on several geographical levels at the same time for purposes of a section 2 prosecution, Senator Chilton, a member of the six-man conference committee, stated that "a monopoly is a monopoly anywhere and everywhere. . . . It is a monopoly or it is not a monopoly." *Id.* The Senator further reasoned that

> If it is a monopoly in interstate commerce, that is what we have power to deal with, and to put in the words "in any section or community" would simply becloud the definition and make it, possibly, inconsistent with itself and with everything else. A monopoly in interstate commerce is a monopoly in interstate commerce; you can not qualify it; you can not limit it; you can not extend it. If it is not a monopoly, it is not one; and it was the deliberate judgment of the Judiciary Committee . . . itself that the words "in any section or community" were either meaningless [modifying the monopoly clause] or else a restriction that might destroy the law, and therefore should be stricken out . . . .

tion 7 and section 2 when it amended section 7 in 1950.[130]

2. *The 1950 Celler-Kefauver Amendment to Section 7 of the Clayton Act.* The legislative history of the 1950 Celler-Kefauver Amendment to section 7 is even more sparse than that of the original Act. Prior to 1950, section 7 proved so unwieldy as an antimerger provision[131] that anticompetitive mergers were prosecuted under section 1 of the Sherman Act.[132] Section 1 antimerger actions were often impractical,[133] and the 1950 amendment was passed in reaction to what was perceived as a "rising tide of economic concentration in the American economy"[134] beyond the practical reach of the Sherman Act.[135]

Id. 16,048.

Thus, the alteration represents Congress' perception that monopolies cannot be viewed piece by piece; rather they must be viewed as a whole. It is significant that the conference committee retained the phrase "any section or community" as applied to the restraint of commerce clause. Therefore, Senator Reed's original recital of the congressional intent behind the relevant market phrase, quoted in text accompanying note 126 *supra*, is in no way altered. Truly, then, the geographic scope of an action brought under the original Clayton Act was intended to be narrower and more probing than that of an action under the Sherman Act.

130. Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1976)) (amending Clayton Act § 7, ch. 323, § 7, 38 Stat. 730 (1914)).

131. S. REP. NO. 1775, at 3-4, *reprinted in* [1950] U.S. CODE CONG. SERV. 4295-96; *Investigation of Concentration of Economic Power—Federal Trade Commission Report on Monopolistic Practices in Industries: Hearings Before the Temporary National Economic Comm.*, pt. 5-A, 76th Cong., 1st Sess. 2361 (1934). *See id.* 2361-72 (summarizing cases brought pursuant to the original section 7).

132. Section 1 provides, in pertinent part: "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, is declared to be illegal." 15 U.S.C. § 1 (1976). Thus, section 1 requires two or more firms acting in concert to restrain trade. Not all restraints of trade are proscribed—only those that are unreasonable are illegal. Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911). Certain restraints of trade are categorized as being unreasonable per se. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-23 (1940). *See generally* L. SULLIVAN, *supra* note 33, §§ 63-67.

133. Interestingly enough, one of the opponents to the 1950 amendment lent support to this observation. Asserting that any amendment to the Clayton Act was unnecessary, Senator Donnell outlined the applicability of section 1 as an antimerger statute in his minority views accompanying the Senate Report on the Celler-Kefauver Amendment. While demonstrating that *some* mergers are vulnerable to a section 1 action, the Senator only succeeded in highlighting the difficulties that would be encountered in attacking anticompetitive mergers under the "rule of reason" approach of section 1. *See* S. REP. NO. 1775, at 14-16 (minority views of Sen. Donnell).

134. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962); *accord*, S. REP. NO. 1775, at 3, *reprinted in* [1950] U.S. CODE CONG. SERV. 4295.

135. *See* 96 CONG. REC. 16,501-03 (1950) (remarks of Sen. Kefauver); S. REP. NO. 1775, at 3-4, *reprinted in* [1950] U.S. CODE CONG. SERV. 4295-96. *But see* S. REP. NO. 1775, at 11-23 (minority views of Sen. Donnell).

Particularly instrumental in providing incentive for passage of the 1950 amendment was the Supreme Court's decision in United States v. Columbia Steel Co., 334 U.S. 495 (1948), which indicated that the old version of section 7 was "inadequate to prevent mergers that had substantially lessened competition in a section of the country, but which, nevertheless, had not risen to the level of those restraints of trade or monopoly prohibited by the Sherman Act." Brown Shoe Co. v.

Among other changes, the statute was amended to proscribe those acquisitions in which "in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[136] The modification of the phrase referring to the relevant geographic market is of interest: "in any section *or community*" in the original Act was changed to read "in any section *of the country*."[137] The Senate Committee on the Judiciary recommended deletion of the word "community" because it might be interpreted as preventing "any local enterprise in a *small town* from buying up another local enterprise in the same town."[138] The House Committee on the Judiciary approached the matter differently, interpreting not what the old Act might have provided but rather what the revised wording did provide:

> The test of substantial lessening of competition or tending to create a monopoly is *not* intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in *each* section of the country.[139]

Thus, while it is clear that Congress sought to avoid problems associated with overly literal readings of the old Act, it is not clear whether Congress intended by the change of terms to enlarge and—at the same time—sharpen the focus of section 7 so as to make relevant geographic market standards under the statute coextensive with those of section 2. The House Report did state that the standards to be applied in adjudicating the amended section 7 were to be similar to those that had developed under other sections of the Clayton Act.[140] Similarly, the Senate Report embraced the "area of effective competition" relevant geographic market standard enunciated in the Clayton Act section 3[141] case of *Standard Oil Co. v. United States (Standard Sta-*

United States, 370 U.S. 294, 318 n.33 (1962) (citing 96 CONG. REC. 16,502 (1950)); *see* H.R. REP. No. 1191, at 10-11.

136. Pub. L. No. 81-899, 64 Stat. 1125 (1950) (amending 15 U.S.C. § 18 (1946)).

137. Unlike the relevant geographic market phrase in the old Act, the new phrase modified both the monopoly clause and the restraint of commerce clause. See note 129 *supra*. *See* S. REP. No. 1775, at 5, *reprinted in* [1950] U.S. CODE CONG. SERV. 4297.

138. S. REP. No. 1775, at 4, *reprinted in* [1950] U.S. CODE CONG. SERV. 4296 (emphasis added). *Cf.* H.R. REP. No. 1191, at 7 ("The Supreme Court and the Federal courts have not applied the present strict language of section 7, even in cases of stock acquisition, so as to prevent a small corporation from selling its business or of merging with another small business. The Supreme Court has only applied the present language of section 7, even in the case of stock acquisitions, to large transactions which would substantially lessen competition, or tend to create a monopoly").

139. H.R. REP. No. 1191, at 8 (emphasis added).

140. *Id.*, *quoted in* Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962); Upshaw 456.

141. 15 U.S.C. § 14 (1976).

tions).[142] While it is clear that Congress intended that Clayton Act section 3 standards be applied to section 7 cases, the House and Senate reports failed to mention the standards developed under Sherman Act section 2. This might indicate that Congress did not intend the courts to apply the standards developed under that Act as well. *Expressio unius est exclusio alterius*.[143]

In *Brown Shoe Co. v. United States*,[144] the Supreme Court conducted an extensive review of the legislative history underlying the current version of section 7.[145] In comparing the fundamental purposes of the Sherman and Clayton Acts, the Court observed:

> Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.[146]

This particular observation of the Court alone might be persuasive in drawing a distinction between the relevant market standards under the respective statutes; however, it is only persuasive to a certain extent since it is possible that the Court was merely calling attention to the fact that the scope of section 7 was, in general, much broader than that of section 2. If that is the case, the Court may not have intended to suggest that the contrast in purposes of the statutes required different market standards. Consequently, proper analysis of possible distinctions in standards for determining relevant markets requires further examination of the 1950 legislative history.

Congress perceived the Sherman Act as inadequate to combat those anticompetitive mergers clearly beyond the scope of the 1914 version of the Clayton Act.[147] Thus, in order to broaden the scope of section 7 to make it more effective, more flexible and proscriptive tests were needed than those used in Sherman Act cases.[148] Hence, the Senate Report on the 1950 amendment noted that "it [is] clear that the bill

142. 337 U.S. 293 (1949), *cited in* S. REP. No. 1775, at 6, *reprinted in* [1950] U.S. CODE CONG. SERV. 4298.

143. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

144. 370 U.S. 294 (1962).

145. *Id.* at 311-23.

146. *Id.* at 318 (footnote omitted).

147. See notes 130-35 *supra* and accompanying text.

148. This was expressly stated in the House Report on the Celler-Kefauver Amendment's antecedent in the prior Congress, H.R. REP. No. 596, 80th Cong., 1st Sess. 7 (1947), *cited in* Brown Shoe Co. v. United States, 370 U.S. at 318 n.33, and reiterated in the Senate Report accompanying H.R. 2734, 81st Cong., 1st Sess. (the Celler bill). S. REP. No. 1775, at 4-5, *reprinted in* [1950] U.S. CODE CONG. SERV. 4296-97, *cited in* Brown Shoe Co. v. United States, 370 U.S. at 318-19 n.33.

is not intended to revert to the Sherman Act test."[149] The question arises, however, how the tests were to be fashioned in order to make section 7 different from and more proscriptive than the Sherman Act. Was the critical difference to be found in the judgment of the incipiency or actuality of a monopoly, using section 2 relevant geographic market tests? Or was the crucial distinction to be additional breadth and flexibility in relevant market delineation itself? Both possibilities are plausible,[150] and indeed both are in line with the desires of Congress.

During the Senate floor debate on the bill, Senator O'Conor, the Chairman of the committee that reported it, discussed the bill's scope and the manner in which its goals were to be effectuated:

> Had [the original Act] been rigidly interpreted, it would have had the effect of preventing any company from buying the stock of *any* competitor, since the acquisition by one firm of a competitor not only "substantially lessens" but completely eliminates the competition which had formerly existed between them.
>
> In the bill before us this stringent prohibition has been completely deleted. Instead of making the test of the law the effect of an acquisition on competition between the acquired and the acquiring companies, *the proposed bill substitutes the more general test of the effect on competition generally in any line of commerce in any section of the country.*[151]

More simply stated, Senator O'Conor's critical "test of the law" for section 7 is the effect of the merger on competition *in a relevant market.* On its face, this seems to be a mere restatement of the Sherman Act test that Congress thought too lax. It follows, then, that if the Clayton Act is to be given a more proscriptive interpretation than the Sherman Act, and if the "test of the law" for section 7 is "the effect on competition in a relevant market," the Clayton Act's goals must be effectuated through market definition standards more flexible and probing than those of the Sherman Act.

Subsequent to the enactment of the Celler-Kefauver Amendment, some courts have failed to differentiate between the criteria for determining the relevant product market under the Clayton Act and the

149. S. REP. NO. 1775, at 4, *reprinted in* [1950] U.S. CODE CONG. SERV. 4296.

150. An entirely plausible interpretation could be that the underlying broad purposes of section 7 were to be effectuated solely by the liberalization of standards other than those for defining the relevant market. Nevertheless, the fact that fulfillment of the distinctive purpose of section 7 alone does not require a different approach to the relevant market problems that developed in section 2 cases does not foreclose further investigation into the possibility that Congress did intend that new relevant market standards be developed. Indeed, the distinction noted by the Court actually invites further scrutiny of this possibility.

151. 96 CONG. REC. 16,436 (1950) (remarks of Sen. O'Conor) (emphasis added).

Sherman Act.[152] Indeed, Congress itself did not seem to be very concerned about the uncertainty inherent in defining the phrase, "any line of commerce," which denoted the relevant product market.[153] Neither committee report discussed the phrase at length,[154] nor was it given more than summary treatment in the floor debates. Congress merely acted as if any clarification would have been superfluous. It simply cannot be determined whether or not Congress implicitly accepted the prevailing Sherman Act relevant product market standards.

On the other hand, the phrase "any section of the country," referring to the relevant geographic market, was the subject of extended discussion. Senator Donnell attacked the inclusion of the phrase on the ground that it was ambiguous.[155] But the Senate Report, in explaining the phrase, at least attempted to offer some guidelines for geographic market delineation. It cited a section 3 case[156] for the proposition that the geographic market must cover the "area of effective competition."[157] The House Report outlined its own set of standards for relevant geographic market delineation.[158] These reports indicate that Congress intended that market standards narrower and more flexible than those of the Sherman Act be the avenue for effectuating the goals of the 1950 amendment.[159] Congress' exclusive concern with the rele-

152. See text accompanying notes 67-102 *supra*.

153. *But see* S. REP. NO. 1775, at 19-20 (minority views of Sen. Donnell).

154. *See* H.R. REP. NO. 1191; S. REP. NO. 1775, *reprinted in* [1950] U.S. CODE CONG. SERV. 4293.

155. Most telling is the Senator's quote of Representative Celler's reaction to a similar phrase in an almost identical bill during the previous Congress:

> The phrase "to restrain commerce in any section of the country" is new phraseology. I have not heard that before in any antitrust legislation or in any Federal Trade Commission legislation. It would give rise to all manner of questions, of controversies, and of disputes; there would be nothing but confusion. It would mean a field day for the lawyers. I am a lawyer and I would like to have a field day, but I do not think we should on the floor of this House, willy-nilly pass legislation without mature reflection and deliberation, that we should not accept words that would make for confusion, words which have not been passed upon by the courts.

95 CONG. REC. 9061 (1949) (remarks of Rep. Celler), *quoted in* S. REP. NO. 1775, at 20 (minority views of Sen. Donnell).

Nevertheless, Representative Celler later incorporated similar language into his own bill. Apparently, he was content to leave the interpretation of any indefinite terms up to the courts. *See* 95 CONG. REC. 11,487 (1949) (remarks of Rep. Goodwin).

156. Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293 (1949), *cited in* S. REP. NO. 1775, at 6, *reprinted in* [1950] U.S. CODE CONG. SERV. 4298.

157. The Senate Report went on to say:

> It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition *in any other section of the country as well.*

S. REP. NO. 1775, at 6, *reprinted in* [1950] U.S. CODE CONG. SERV. 4298 (emphasis added).

158. *See* H.R. REP. NO. 1191, at 5-6, 8-9.

159. See notes 147-51 *supra* and accompanying text.

vant geographic market indicates that the relevant geographic market was its particular tool.

B. *Other Considerations Requiring the Maintenance of Distinctions Between Approaches to Relevant Geographic Market Delineation Under Section 7 and Section 2.*

Several conceptual and practical considerations further reinforce the necessity for drawing certain distinctions between the approaches to relevant geographic market delineation under the respective statutes. The first of these considerations arises as a result of the uncertainty that surrounds relevant geographic market delineation under section 7. In this regard, two Supreme Court opinions mark the limits of a spectrum, with one end represented by *Brown Shoe Co. v. United States*[160] and the other by *United States v. Pabst Brewing Co.*[161]

In *Brown Shoe*, the Court established that geographic markets and submarkets are appropriate only if they " 'correspond to the commercial realities' of the industry and [are] economically significant."[162] Subsequent cases generally followed this principle until 1966, when, in what Professor Posner characterizes as a "fit of nonsense,"[163] the Court rendered its decision in *Pabst*. There, the Court indicated—contrary to its decision in *Brown Shoe*—that the relevant geographic market and submarkets may be defined as narrowly or broadly as a court finds necessary, without reference to any standard of "economic significance."[164]

These two cases and their progeny are so dissimilar that it is difficult to ascertain the exact state of the law with respect to section 7 relevant geographic market definition. Thus, private parties cannot be certain whether a particular merger or acquisition violates section 7 until they are dragged into court and the relevant geographic market is determined. Ultimately, this ambiguity could needlessly stifle legal business activities. The encroachment of these stifling effects on other areas of the law should not be nurtured—especially in section 2 cases where litigation could be avoided by effective self-imposed compliance

160. 370 U.S. 294 (1962).

161. 384 U.S. 546 (1966).

162. 370 U.S. at 336-37 (footnote omitted).

163. R. POSNER, *supra* note 53, at 130.

164. This conclusion follows from the Court's statement:

> [W]hen the Government brings an action under § 7 it must, according to the language of the statute, prove no more than . . . that the effect of [a] merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce "*in any section of the country*." . . . The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States—"in *any* section" of the United States.

384 U.S. at 549 (emphasis in original).

provisions of section 2—for which there is no counterpart in section 7[171]—would be applied to an increasing number of cases. Furthermore, since the section 7 case law permits more flexibility, the criminal sanctions of section 2 would not be imposed uniformly.[172] This would lead the courts to be reluctant to enforce the antimonopolization provisions of the Sherman Act strictly, which, in turn, might eventually erode the efficacy of the statute.[173]

171. *Compare* 15 U.S.C. § 2 (1976) *with* 15 U.S.C. § 18 (1976).

172. This result could open section 2 to an attack for unconstitutional vagueness. A complete examination of such an argument is beyond the scope of this Comment. However, a brief outline of the approach that might be taken is in order.

In Winters v. New York, 333 U.S. 507 (1948), the Supreme Court stated: "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.'" *Id.* at 515 (citation omitted). Thus, cases brought pursuant to section 2 should not be allowed as much flexibility and uncertainty as cases brought under section 7.

Section 2 case law has not recently addressed any problems of uncertainty, and the Supreme Court's decision in Nash v. United States, 229 U.S. 373 (1913), upholding the constitutionality of the Sherman Act in the face of a void for vagueness challenge, *id.* at 37-78, remains intact. Nonetheless, *Nash* could be reconsidered in light of two recent developments. First, since 1913, section 2 violations have been changed from misdemeanors to felonies. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (amending 15 U.S.C. § 2 (1970)). Consequently, any uncertainty now has a more pronounced effect. *But cf.* United States v. Jack Foley Realty, Inc., 1977-2 Trade Cas. ¶ 61,678, at 72,791 (D. Md. 1977) (a section 1 price-fixing case in which the court rejected an argument that the statute was unconstitutionally vague in light of increased penalties), *aff'd*, 598 F.2d 1323 (4th Cir. 1979). The second development that could lead to a reevaluation of *Nash* is the encroachment of the more flexible and uncertain section 7 relevant geographical market standards into section 2 case law. As fewer distinctions between the two statutes are observed, the more arbitrary will be the application of section 2, increasing the probability that an attack for unconstitutional vagueness would succeed. Such an attack could be thwarted by maintaining separate standards — especially with regard to the section 7 submarket approach.

173. While flexibility and ambiguity may be the hallmarks of section 7 market analysis that ultimately lead to the conclusion of inapplicability of section 7 relevant market standards to section 2 cases, it is important to realize that section 2 case law is not without its own ambiguities. Significant in this respect is United States v. Grinnell Corp., 384 U.S. 563 (1966). There, the Supreme Court was faced with an alleged violation of section 2 of the Sherman Act in several localized metropolitan markets. 236 F. Supp. 244, 248-51 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966). Ignoring the fact that a buyer in one area did not turn to another area as an alternative source of supply, the Supreme Court held that the relevant geographic market was the entire nation:

> [T]he record amply supports the conclusion that the business of providing such a service is operated on a national level. There is national planning. The agreements we have discussed covered activities in many States. The inspection, certification and rate-making is largely by national insurers. [One of the defendants] has a national schedule of prices, rates, and terms, though the rates may be varied to meet local conditions. It deals with multi-state businesses on the basis of nationwide contracts. . . .
>
> As the District Court found, the relevant market for determining whether the defendants have monopoly power is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business.

Id. at 575-76.

The difficulties with the opinion arise from the fact that the Court, while paying lip-service to

Another problem with refusing to observe distinctions between the section 7 and section 2 approaches to relevant geographic market delineation is that the submarket approach is inconsistent with the concept of monopolization. "Because the relevant market provides the framework against which economic power can be measured, defining the product and geographic markets is a threshold requirement under § 2."[174] The extent of economic power in the relevant market indicates the presence or absence of a monopoly. More than one relevant geographic market would signify the existence of more than one monopoly, and vice versa. A single monopoly cannot be defined by several relevant geographic markets, any more than several monopolies can be defined by a single relevant geographic market. Absolute parity between relevant geographic markets and monopolies must exist. Use of the submarket approach undermines this parity since by definition a monopoly is just as extensive as its market—not more extensive, not less extensive. Section 7 submarket analysis has no place in section 2 case law.

An equally compelling argument can be made that the market definition criteria of section 2 do not belong in section 7 cases. At least one court has accepted such an argument in the context of defining relevant *product* market. In *United States v. Mrs. Smith's Pie Co.*,[175] the district court found that the section 2 relevant product market crite-

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"economic significance," totally disregarded the customer-supplier relationships. As Mr. Justice Fortas stated in his dissenting opinion:

> The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.

Id. at 589 (Fortas, J., dissenting).

The Court's failure to investigate the customer-supplier relationships, however, was inconsequential. *Grinnell* involved an obvious monopoly as judged by any standard. Indeed, as Professor Sullivan has noted in his treatise on the subject, *Grinnell* signals that administrative convenience has perhaps become an important guide in choosing a market. L. SULLIVAN, *supra* note 33, § 18, at 69-70.

Putting aside any argument supporting a theory of administrative convenience, perhaps the opinion in *Grinnell* represents the state of the law with respect to the relevant geographic market definition under section 2 of the Sherman Act. *Grinnell* is still frequently cited for its broadly focused treatment of the relevant geographic market issue. *See also* American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963) (an often-cited case with an approach to the relevant geographic market issue similar to that in *Grinnell*).

Grinnell probably represents an extreme in section 2 cases. But that extreme does not diverge too far from the mainstream of section 2 analysis; section 2 market definition cases are more consistent than those found in the section 7 case law.

174. Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

175. 440 F. Supp. 220 (E.D. Pa. 1976).

ria lacked the flexibility required for a section 7 case:

> In many of the [cases cited by the defendant], the court adopted a broader product at the request of the government. . . . Since the Clayton Act is concerned with *any* line of commerce, the government need not base its case on the narrowest possible market. Thus, when the government is attempting to prevent a merger between two companies, the courts frequently have rejected the argument that each company's product is in a separate market. However, nothing in these cases precludes use of a narrower product market if that is the "line of commerce" where competition is affected.
>
> . . . .
>
> . . . The Clayton Act was intended to retard economic concentration in its incipiency . . . . Since the Clayton Act deals with probabilities, a defendant may violate the act even though it does not have monopoly power and even though the defendant's product still faces substantial competition. Consequently, Sherman Act cases should not be controlling in defining a "line of commerce" under the Clayton Act.[176]

The *Mrs. Smith*'s court apparently believed that the submarket approach is an integral part of a section 7 action since the statute itself indicates its applicability to "*any*" relevant section of the country. In contrast, section 2's ambit is much broader since it is not "couched in such local and pragmatic terms."[177] Thus, the stricter standards of section 2, if applied to section 7 cases, would render the courts unable to reach many mergers in specific sections of the country.[178]

All of these considerations take on added significance in view of the predisposition of the courts to rely on principles established under one statute in applying the other statute.[179] In many cases, the ultimate market definition reached has been correct; however, the explicit reliance on standards from another line of case law could lead subsequent courts to misinterpret the proper approach to relevant geographic market delineation. Consequently, the approaches to relevant geographic market delineation under section 2 and section 7 should be kept distinct.

III. SUMMARY AND CONCLUSION

A defendant's antitrust liability will often turn on the choice of a relevant geographic market. Thus, the distinction to be drawn between relevant geographic market delineation under section 2 of the Sherman

176. *Id.* at 229-30 (emphasis in original).

177. United States v. Dairymen, Inc., 1978-1 Trade Cas. ¶ 62,053, at 74,540 (W.D. Ky.), *modified*, 1978-2 Trade Cas. ¶ 62,186 (W.D. Ky.), *modified*, 1979-1 Trade Cas. ¶ 62,493 (W.D. Ky. 1978).

178. See text accompanying note 126 *supra*.

179. See notes 67-85 *supra* and accompanying text.

Act and section 7 of the Clayton Act assumes critical importance. The improper application of standards developed under one statute to a case arising under the other statute could lead to results inconsistent with the basic thrust of the antitrust laws. This problem is particularly acute with respect to the submarket approach, which permits an alleged antitrust violation to be evaluated on several geographic levels at one time.

Unfortunately, the case law, with the exception of the *Dairymen* case, provides no decisive guidance in this area. Hence, practical and conceptual considerations, as well as the legislative history of the Clayton Act and the 1950 amendment, assume compelling significance. The history underlying the original Clayton Act clearly reveals that Congress intended to establish a scope of review for section 7 with a more localized focus than that available under the Sherman Act. A more flexible and discrete approach to relevant geographic markets was one of the primary tools Congress chose to accomplish this narrower focus. Congress found, over time, that section 7 of the original Clayton Act was not effectively accomplishing its whole purpose. Accordingly, it passed the 1950 Celler-Kefauver Amendment to section 7 in an effort to make the antimerger provisions of the Act more flexible and inclusive. The evidence indicates that Congress again depended heavily on the new provision for delineating relevant geographic markets to accomplish this purpose. Congress' intent in this regard was not realized until twelve years later when, in *Brown Shoe*, the Supreme Court adopted the submarket approach to relevant market delineation, basing its decision almost entirely upon the legislative history of section 7.

The hearings and the floor debate on the 1950 amendment emphasized the differences between the section 7 and section 2 approaches. These differences arise from the special purposes of the respective statutes. While section 7 addresses the general lessening of competition through mergers, section 2 proscribes actual monopolies. A monopoly, by definition, must exist in one market only. It is as extensive as, and no more extensive than, that market. There is no room for leeway and surely there is no room for submarkets. In contrast, section 7 actions are not bound by the conceptual framework of monopolization; simple lessening of competition may be found to varying degrees on different levels.

Aside from the fact that the conceptual differences between the statutes require distinct criteria for delineating relevant geographic markets, simple notions of fairness also compel such distinctions. Since criminal penalties attach to section 2 violations but not to section 7 violations, fairness requires a more careful, less inclusive approach to

the adjudication of section 2 cases. The prosecution of section 2 cases on the basis of section 7 submarket standards would all too often result in a finding of illegal monopoly to which criminal penalties would attach. If no distinctions in section 2 and section 7 relevant geographic market delineation standards are observed, the court could—and probably would—circumvent such onerous consequences by adjudicating section 2 cases more arbitrarily, thereby creating a great deal of uncertainty. Fortunately, both uncertainty and unfairness can be avoided at the outset simply by maintaining certain basic distinctions in the relevant geographic market definition standards of the respective statutes.

All of these conceptual, legal, and practical considerations demonstrate that certain distinctions between section 2 and section 7 relevant geographic market delineation are inescapable. The most important of these distinctions requires that the submarket approach be limited to section 7 actions.

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