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Trade Regulation—Section 7 of the Clayton Act—Horizontal Mergers—Share of Relevant Geographic Market.—United States v. Von's Grocery Co.; United States v. Pabst Brewing Co.

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A detailed examination of the merits of these two proposals is beyond the scope of this note, but it is urged that the Court's decision conclusively demonstrates the need for revitalizing the RLA, and also that legislation is the only source of relief.

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Trade Regulation—Section 7 of the Clayton Act—Horizontal Mergers —Share of Relevant Geographic Market.—*United States v. Von's Grocery Co.*;[1] *United States v. Pabst Brewing Co.*[2]—In 1960, the defendant in the first of these two cases, Von's Grocery Company, the third largest food retailer in the Los Angeles area, acquired Shopping Bag Food Stores, the sixth largest. As a result, Von's became the second largest food retailer in the area with a market share of about 7.5% of the gross sales. The United States brought suit, charging that the acquisition violated Section 7 of the Clayton Act.[3] The district court found: "From the evidence, it cannot be concluded that the merger in question would probably lessen competition in the metropolitan area either at the time of the merger or in the foreseeable future."[4] On appeal,[5] the Supreme Court HELD: Reversed. The merger of two very large and successful firms in an industry marked by a trend toward concentration violates section 7, because such a merger may substantially lessen competition in that industry.

Justice White concurred, stating that, although the majority opinion did not prohibit all mergers in a concentrating industry, nor all mergers where the resulting market share of the acquiring firm was 7.5%, a merger of two leaders, or of a leader and a lesser firm, in an industry marked by concentration and in which the top eight firms had 40% of the market "would be vulnerable under section 7, absent some special proof to the contrary." Justices Stewart and Harlan dissented, concluding that there was no violation of section 7, because the evidence revealed an unconcentrated retail food industry, vigorous competition, ease of entry, and equality of competitive position between chain and independent grocers.

In 1958, the defendant in the second case, Pabst Brewing Company, the tenth largest brewer in the United States, acquired Blatz Brewing Company, the eighteenth largest. As a result, Pabst became the fifth largest brewer in the United States with 4.49% of the sales in the nation, 11.32% of those in a three-state area (Wisconsin, Michigan, and Illinois), and 23.95% of those in Wisconsin. The United States brought suit, charging a violation of section 7. After the presentation of the Government's case, the district

1 384 U.S. 270 (1966).

2 384 U.S. 546 (1966).

3 As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

4 233 F. Supp. 976, 985 (S.D. Cal. 1964).

5 Both *Von's* and *Pabst* were appealed directly to the Supreme Court under the Federal Expediting Act § 2, as amended, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1964), which provides that the Supreme Court shall be the only court of appeal from a final judgment of a district court in a case charging a violation of the Clayton Act in which the United States is the complainant.

court dismissed the complaint[6] under Rule 41(b) of the Federal Rules of Civil Procedure. The court held, first, that the Government had failed to establish that either the three-state area or Wisconsin was a relevant section of the country in which to test the probable effects of the acquisition and second, that, as to the United States as a whole, the Government had not satisfied its burden of proving that there was a reasonable probability that the effect of the merger "may be substantially to lessen competition or tend to creat a monopoly."[7] On appeal, the Supreme Court HELD: Reversed and remanded. In a section 7 case, the Government need prove only that a merger has anti-competitive effects somewhere in the country. It does not have to prove that the section affected is a "relevant geographic market."

There were four concurring opinions to *Pabst*. Justice Douglas inserted a newspaper article on mergers[8] in support of the Court's opinion. Justices Harlan and Stewart rejected the majority's rationale but concluded that the Government had established a prima facie case that Wisconsin and the three-state area were "relevant sections of the country"; they refused to overturn the district court's finding of no violation as to the national market. Justice White felt that the merger violated section 7 only as to the national market. Justice Fortas maintained that the Government must clearly define the relevant geographic market before a section 7 violation can be found; however, he agreed that the district court had erred in dismissing the complaint.

The question raised by these two cases is whether the Court has made a significant change in the standards against which section 7 cases are to be measured. Section 7 of the Clayton Act declares illegal any acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[9] The standards which have been constructed by the courts relate to the key phrases of the statute: "line of commerce," "section of the country," and "substantially to lessen competition."

There was no issue in either case as to the line of commerce. In *Von's*, the parties stipulated at the trial that it was retail groceries and related products,[10] and in *Pabst*, the beer industry—"the production, sale, and distribution of beer."[11]

As to the second key phrase, there was a dispute in *Pabst* concerning consideration of either Wisconsin or the three-state area as an appropriate "section of the country" for testing the probable effects of the merger.[12] Both parties agreed that a delineation of a relevant geographic market was the threshold question in a section 7 case.[13] In the past, the Government had

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6 233 F. Supp. 475 (E.D. Wis. 1964).

7 Clayton Act § 7, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

8 Buchwald, The Ultimate Merger: Samson & Delilah, Wash. Post, June 2, 1966, § A, p. 21.

9 As amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

10 233 F. Supp. at 979.

11 233 F. Supp. at 477.

12 Brief for Appellant, pp. 26-27; Brief for Appellee, pp. 33-35.

13 Brief for Appellant, pp. 25-26; Brief for Appellee, pp. 34-37.

been required to prove that the "section of the country" named in its complaint was a relevant geographic market.[14] To do so, the Government had to prove that the area was economically distinct in terms of the industry in question—that there were economic barriers which prevented outsiders from successfully competing inside the area.[15]

The facts in the *Pabst* case apparently support the Government's contention, since there was evidence indicating that the barriers existed: beer is largely a regional industry; state liquor laws make market entry more difficult; and the brewers in the three-state area and Wisconsin have been able to maintain their control of the beer market over a long period of time without serious threats from outside competition.[16]

Instead of merely reversing the district court by holding that the Government had established the three-state area and Wisconsin to be relevant geographic markets, the Court went considerably further and held that the delineation of the geographic market area is secondary to proof of the anti-competitive effects of the merger.[17]

The Court's view creates a significant problem. Proving a section 7 violation usually requires selection of an area in which to test the effects of the merger, presentation of statistical information relating to the market position of the merging firms in the area, and estimation of the state of concentration of the local industry.[18] The problem is that without proof that a market area is relevant, statistical data drawn from the area forms an insufficient foundation upon which to base the finding of a violation.[19] In short, a section 7 case could easily turn on just which geographic area was being used to judge the effects of the merger, and, without the requirement of establishing a section to be relevant, a case might possibly be decided on statistical information which, in fact, was not relevant to the merger at all. This is possible because the defendant will be able to attack the Government's case only on the grounds that the proscribed effect of the merger does not exist, instead of being able to show as well that the area selected by the Government was not a relevant one.

There was an issue in both of these cases as to whether or not the acquisition came within the third key phrase of the statute: that is, whether it tended "substantially to lessen competition." In *Von's*, the Court found that there was sufficient concentration in the retail food industry to justify prohibiting the merger:

> What we have . . . is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend towards fewer and fewer owner-com-

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[14] See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 336-39 (1962).

[15] See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 360 n.37 (1963); Kaysen & Turner, Antitrust Policy 101-02 (1959).

[16] 384 U.S. at 557-61 (Harlan, J., concurring).

[17] Id. at 549-50.

[18] Id. at 555 (Harlan, J., concurring).

[19] Kaysen & Turner, op. cit. supra note 15, at 134.

> petitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.[20]

The Court clearly felt that the invalidation of the *Von's* merger followed automatically from the findings that the industry was concentrated and that this merger would increase that concentration because of the size of the firms involved.

The dissent arrived at the opposite result after concluding that the retail food industry in Los Angeles was not concentrated.[21] The disagreement results from the manner in which each opinion measured concentration. The majority based its finding on the decreasing number of single-store owners[22] and the increasing market share of the larger firms.[23] The dissent maintained that, judged by any standard other than the number of single-store owners, the retail food business is an expanding industry in Los Angeles. The number of chain-store firms is increasing, market entry is unobstructed, and competition is "vigorous to a fault" among the chains and between the independent and chain stores.[24]

The fact remains, however, that an increasingly greater portion of the market is being controlled by the largest firms in the industry. Although the dissent points out that there has been a "substantial turnover in the membership of the top 20 firms,"[25] it is clear that the largest firms are becoming more powerful.[26] It is just that threat of potential power against which section 7 was passed.[27]

The state of competition is also irrelevant, because the question is not whether competition is still vigorous, but whether a merger such as Von's signifies a movement toward greater concentration within the large-firm groups which will eventually undermine competition in the industry.[28]

To some extent, the dissent highlights the anomaly of the retail food

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[20] 384 U.S. at 277-78.

[21] Id. at 287.

[22] Between 1950 and 1961, the number of single-store owners decreased from 5,365 to 3,818; by 1963, it had declined to 3,590. Id. at 273.

[23] Between 1948 and 1958, the eight largest firms increased their market share from 33.7% to 40.9%, while the share of the twelve largest firms rose from 38.8% to 48.8%. After the merger, the share of the eight largest increased to 44%, and that of the top twelve to 50%. Id. at 281 (White, J., concurring). The top twenty firms controlled 57% of the market in 1957, an increase of 13% over 1948. Id. at 290 (Stewart, J., dissenting).

[24] Id. at 287-88, 291, 300.

[25] Id. at 290.

[26] See note 23 supra.

[27] 95 Cong. Rec. 11486 (1949) (remarks of Congressman Celler). See also Brown Shoe Co. v. United States, supra note 14, at 311-23. Compare S. Rep. No. 1775, 81st Cong., 2d Sess., reported in 2 U.S. Code Cong. & Ad. News 4293, 4295 (1950):

> The extent to which the American economy has become concentrated and centralized in the hands of a few giant corporations was strikingly revealed . . . in figures [which] . . . show that in 1946, . . . one-tenth of one percent of all American corporations . . . owned 49 percent of the assets of all American corporations; 2 percent of the number of corporations owned 78 percent. . . .

In Los Angeles, the top twenty retail food corporations (0.5%) did at least 54.3% of the business. United States v. Von's Grocery Co., supra note 4, at 984.

[28] See Brown Shoe Co. v. United States, supra note 14, at 333.

industry in the context of antitrust: while most industries are more competitive when they are atomistic in structure and become less competitive as the firms increase in size and decrease in number, the retail food industry was largely anti-competitive when there were many small stores and became tremendously competitive after the chain store evolved and the number of small stores decreased.[29] But what is inherent in the whole history of section 7 legislation is the belief that although competition might remain fierce while competitors are becoming fewer and fewer, eventually a point will be reached when competition in the industry will disappear.[30] In *Von's*, the Court is simply saying that section 7 was intended to stop such concentration in its incipiency.[31]

Despite the conspicuously small market percentage involved, it is not difficult to place two decisions within the context of prior section 7 case law. In past cases, the resulting market share of the acquiring company was large enough to be the determining factor in finding a violation.[32] In *Von's* and *Pabst*, the resulting market shares were too small to be determinative, but concentration was presént, and the Court found that the mergers would increase it. These cases, therefore, announce that in deciding a section 7 violation, more emphasis will be placed on the degree of concentration in the industry and less on the size of the acquiring firm.

Von's and *Pabst* raise the question of whether the Court is moving toward a per se rule in section 7 cases. There may not be a per se rule explicit in these two decisions, but there is a clear warning in the language and reasoning of the Court that a per se rule may be in the making. In *Von's*, Justice White stated that where the top eight firms in an industry control 40% of the market, a merger between any two of the top eight or between one of them and a lesser firm would be "vulnerable under section 7, absent some special proof to the contrary."[33] Although he leaves room for the consideration of "special proof," he clearly feels that an inference, if not a presumption, of illegality is raised by the concentration and market share data alone. The threat of a per se rule is increased by the fact that, in *Pabst*, the Court is willing to say that there was sufficient evidence of a section 7 violation in the national market solely on the basis of the decreasing number of competitors and the increasing market share of the leaders.[34]

Whether a per se rule in section 7 cases would be desirable depends on the degrees of concentration and resulting market share that are selected as the basis of the rule. If the permissible percentage is set too low, the Court may find itself in the position of having created a cure worse than

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29 384 U.S. at 289-90 n.14.

30 See Brown Shoe Co. v. United States, supra note 14, at 317.

31 384 U.S. at 278.

32 See, e.g., FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (32%); United States v. Continental Can Co., 378 U.S. 441 (1964) (25%); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (27.6%); United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (32.5%); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (50%); United States v. Philadelphia Nat'l Bank, supra note 15 (30%); Brown Shoe Co. v. United States, supra note 14 (10%-35.8%).

33 384 U.S. at 281.

34 384 U.S. at 551-52.

the disease.[35] The overall purpose of the Clayton Act and section 7 was to preserve the competitive environment of American business.[36] Two of the main characteristics of such an environment are ease of entry[37] and incentive for growth.[38] But making the possibility of exit by merger increasingly more difficult for a firm that has grown over a long period of time could create an adverse effect on the ease and attractiveness of entry for others.[39] Likewise, if the possibilities of expansion by merger become too limited for a firm already in the market, there might be an adverse effect on growth incentive.[40]

If the Court would draw the line with these two cases, then it seems unlikely that there will be any serious problems, and a per se rule would be helpful to those desiring to expand or to exit by merger, as well as those who want to take advantage of the expansion and exit of others. If, however, the Court is going to presume the illegality of mergers with smaller resulting market shares and lower concentration levels than those in *Von's* and *Pabst*, it seems that a per se rule in section 7 cases would be undesirable.

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Trade Regulation—Unfair Competition—Concurrent Rights to Trade Names.—*Food Center, Inc. v. Food Fair Stores, Inc.*[1]—New England Food Fair (New England) is a local supermarket chain doing business in the Boston, Massachusetts area. Food Fair Stores, Inc. (Food Fair) is a fifteen-state supermarket chain seeking to expand into Massachusetts under the "Food Fair" trade name. New England sued Food Fair to prevent this expansion. Food Fair counterclaimed, seeking to enjoin the use of the words "Food Fair" by New England. This is the second time these parties have litigated their respective rights to the disputed words. In 1948, in the first litigation,[2] Food Fair, then operating in seven states and actively contemplating expansion into Massachusetts under the "Food Fair" trade name, sought to pre-

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35 See Kaysen & Turner, op. cit. supra note 15, at 143.

36 Brown Shoe Co. v. United States, supra note 14, at 320.

37 Kaysen & Turner, op. cit. supra note 15, at 71-73.

38 Id. at 85-86:

The essential danger [of too stringent an antitrust policy] arises from the fact that an attack on market power that relies heavily on dissolution and divestiture is an attack on achieved growth, and may be viewed as a threat against further growth. In our economy, growth is the badge of entrepreneurial success, and the achievement of growth is an important stimulus to entrepreneurial effort. Any limitation of growth may thus have wide repercussions on the general efficiency of enterprise far beyond the firms directly affected by particular antitrust proceedings.

39 Id. at 127-28.

40 Ibid.

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1 356 F.2d 775 (1st Cir. 1966).

2 Food Fair Stores, Inc. v. Food Fair, Inc., 83 F. Supp. 445 (D. Mass. 1948), 17 Geo. Wash. L. Rev. 576 (1949), 24 N.Y.U.L. Rev. 929 (1949), 28 Texas L. Rev. 283 (1949), 98 U. Pa. L. Rev. 604 (1950).