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Antitrust—Clayton Act—Application of Section 7 to Bank Mergers.—United States v. Philadelphia Nat. Bank

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CASE NOTES

Antitrust—Clayton Act—Application of Section 7 to Bank Mergers.— ***United States v. Philadelphia Nat. Bank.***[1]—The Department of Justice brought suit in the district court to enjoin the proposed consolidation of the second and third largest banks in the Philadelphia metropolitan area.[2] In accordance with the Bank Merger Act,[3] the approval of the Comptroller of the Currency had been obtained. The resulting bank would have been the largest in the area, handling more than thirty per cent of the total banking business. The complaint, alleging violation of Section 7 of the Clayton Act,[4] was dismissed on the ground that section 7 did not apply to bank mergers, and that, assuming that it did, the proposed merger would not constitute a violation.[5] On appeal[6] the decision was reversed and remanded by the Supreme Court. HELD: The 1950 amendments to Section 7 of the Clayton Act expanded its scope to include bank mergers and the proposed consolidation violates that section.

The first part of the Court's holding dealt with the effect of the 1950 amendments on the scope of section 7.[7] That section was originally directed at the practice of one corporation acquiring (particularly secretly) stock or other shares in another corporation.[8] It forbade such acquisitions when they

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1 374 U.S. 321 (1963).

2 This transaction would, technically, be a consolidation since both entities would disappear into the resulting bank. A merger, strictly speaking, involves a transaction where one corporation disappears into a survivor. Nevertheless, the Court uses both terms interchangeably and considers both types of amalgamations on the same basis. These are to be sharply distinguished, however, both legally and factually, from the transaction in which one corporation would buy either the stock or assets of another, both corporations retaining their separate identity.

3 74 Stat. 129 (1960), 12 U.S.C. § 1828 (c) (Supp. II, 1959-61). The Federal Reserve Board controls mergers of state banks while the Comptroller of the Currency controls mergers of both state and national banks. Permission must be received from these agencies before a merger can be effected. The factors to be considered before a merger may be approved are listed in the statute.

4 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). In addition to the various agencies specifically charged with enforcement of the Act, the Department of Justice has broad equity powers to institute proceedings to enjoin violation of any part of the Act. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1958). This proceeding was commenced under the above authority.

5 201 F. Supp. 348 (E.D. Pa. 1962).

6 The appeal was taken directly to the Supreme Court under the provisions of the Expediting Act. 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958).

7 For a comparison of the original and amended section 7, the brackets will indicate deletions—italics will indicate additions.

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be [to] substantially *to* lessen competition [between the corporation making the acquisition, or to restrain such commerce in any section or community], or *to* tend to create a monopoly [of any line of commerce].

Supra note 4.

8 The legislative history of the 1914 Act is reviewed in Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

would lessen competition between the two corporations, create a monopoly or restrain such commerce in any section or community.[9] The basic design was to prevent possible violations of the Sherman Act "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[10] The Act, however, was silent as to asset acquisitions, mergers and consolidations, although these forms of corporate amalgamations were known at the time.

In 1926 the Supreme Court held that the Act did not apply to the acquisition by one corporation of the assets of another, but only encompassed stock purchases. Mergers were construed as asset acquisitions.[11] Subsequent cases tended to affirm this viewpoint; however, there was doubt as to whether the actual grounds of the decisions rested on the lack of authority of the Federal Trade Commission rather than the lack of the court's power under the scope of Section 7 of the Act.[12] In *United States v. Celanese Corp.*,[13] however, the district court held that, in a merger situation, the surviving corporation acquired nothing more than the assets of the disappearing corporation. Since the plaintiff was the Justice Department rather than the FTC the district court's decision rested directly on the substantive scope of section 7 rather than the procedural ground of the FTC's authority.[14]

As a result of this "loophole" in the federal antitrust laws, the number of mergers increased sharply, particularly since the advent of the Second World War, and the increase still continues.[15] In the opinion of the Federal Trade Commission, these mergers presented problems which, as has been noted, could not be dealt with under the original provisions of section 7, and the Commission repeatedly requested Congress to revise the Act.

It was against this background that the 1950 amendment was passed. The language concerning stock acquisition was re-enacted without change and the additional language referring to asset acquisition limits its scope only to corporations subject to the jurisdiction of the Federal Trade Commission.[16] Since banks are expressly exempted from the jurisdiction of the

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9 Supra note 4.

10 S. Rep. No. 1775, 81st Cong., 2d Sess. 7-8 (1950). See Transamerica Corp. v. Board of Governors of the Fed. Reserve Sys., 206 F.2d 163 (3d Cir. 1953); United States v. E. I. Du Pont de Nemours and Co., 353 U.S. 586 (1957).

11 FTC v. Western Meat Co., 272 U.S. 554 (1926).

12 Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934). That case involved a consolidation similar to the instant one, except, of course, that it did not involve banks. The Court held that the FTC was without a remedy since this was not a stock transaction but rather an asset acquisition. Had it been a stock transaction the FTC could have ordered its divestiture. See also Hernacki, Mergerism and Section 7 of the Clayton Act, 20 Geo. Wash. L. Rev. 659 (1952); Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L.Q. 28 (1928).

13 91 F. Supp. 14 (S.D.N.Y. 1950).

14 This was the sole action commenced by the Justice Department under section 7 prior to the 1950 amendments. It is therefore the only case in which the question of the authority of the FTC was not involved. The Justice Department has concurrent authority with each of the agencies to enforce the Act. See note 4, supra.

15 Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 230 (1960).

16 Supra note 7.

FTC,[17] the applicability of section 7 to the banking field would, on the surface, be limited to the acquisition of "stock or other share capital" as defined in the original act. This interpretation of the effect of the amendment was almost unanimous in the first few years following its passage.[18] It was even, for a time, conceded by the Justice Department.[19] This view was further supported by the passage, in 1960, of the Bank Merger Act[20] by a Congress which was apparently under the impression that the enactment of the 1950 Clayton Act amendment did not reach the banking field.[21]

The Court in the instant case, however, held that the clause prohibiting the acquisition of "stock or other share capital" which was re-enacted without change "must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties," leaving the new asset-acquisition provision to cover transactions involving no such transfer.[22] In short, the Court held that the amendment was directed at closing the "loophole" in the antitrust laws by subjecting all corporate, including bank, mergers to the prohibitions of section 7. The objective of the phrase "corporations subject to the jurisdiction of the Federal Trade Commission"[23] was not intended "to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section."[24]

Support for this construction could not, of course, come from the literal language of the statute itself in the light of prior judicial interpretations. The Court necessarily had to resort to the legislative history of the amendment, which it noted to be silent on the specific questions of "why the amendment made no explicit reference to mergers, why assets acquisitions by corporations not subject to FTC jurisdiction were not included, and what these omissions signify."[25] It is certainly a possibility that these omissions signify that Congress did not intend to reach mergers generally, but merely wished to extend

17 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1958).

18 Wemple and Cutler, 16 Bus. Law. 994 (1961); Celler, The New Antimerger Statute: The Current Outlook, 37 A.B.A.J. 897 (1951); Note, 75 Harv. L. Rev. 756 (1962); Hernacki, supra note 12; Note, 71 Yale L.J. 502 (1962).

19 See, e.g., Testimony of Attorney General Brownell: "On the basis of these provisions the Department of Justice has concluded . . . that asset acquisitions by banks are not covered by section 7 [of the Clayton Act] as amended in 1950." Quoted in the dissenting opinion, United States v. Philadelphia Nat. Bank, supra note 1, at 378; 2 Antitrust Bull. 519 (1957).

20 Supra note 3. Among the considerations to be considered by the banking agency approving a merger is the effect of the transaction on competition, including any tendency towards monopoly. Approval must not be given unless the merger be in the public interest after balancing all the factors. The Act requires the Attorney General to submit reports on the competitive factors involved.

21 S. Rep. No. 196, 86th Cong., 1st Sess. 1-2 (1959): " 'Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act.' " Quoted in the dissenting opinion, United States v. Philadelphia Nat. Bank, supra note 1, at 378. See also H.R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960).

22 Supra note 1, at 346.

23 Supra note 4.

24 Supra note 1, at 346.

25 Id. at 341.

the prohibitions of section 7 to asset acquisitions by corporations subject to FTC jurisdiction: leaving corporations not subject to FTC jurisdiction unaffected. This possibility was rejected by the Court.

The Court based its construction of the amended statute on four propositions: (1) that it would be illogical and inimical to the Congressional purpose of closing a "loophole" to construe the statute as applying only to corporations under FTC jurisdiction, leaving a large area of commerce beyond the reach of the prohibitions; (2) that Congress was well aware that there was a vital difference between merger and pure asset acquisition,[26] and that the announced Congressional purpose of preventing mergers of all types necessitates an expanded construction of the stock-acquisitions provision; (3) that the reference to the FTC in the amendment merely defines that agency's enforcement role and does not in any way limit the coverage of the statute, although the Court correctly noted that there had always been a certain amount of doubt as to the basis of the decisions exempting mergers from section 7;[27] (4) that immunity from the antitrust laws is not lightly implied. In addition, the Court held that the Bank Merger Act[28] was ineffective in conferring any immunity on banks from the federal antitrust laws. The Act itself conferred no express immunity,[29] and immunity by implication is utilized only where there is strong repugnancy between the antitrust and regulatory provisions. Although the Comptroller was required to consider the effect of the merger on competition, he was not required to give it any particular weight,[30] and he found no such repugnancy here.

Several basic difficulties are apparent in the Court's analysis. It is significant that Congress, in 1950, re-enacted without change, those clauses of section 7 that dealt with stock acquisition.[31] As a rule, courts will draw an inference that re-enactment of previously construed language indicates a legislative intent to adopt the judicial construction.[32] As has been noted, mergers were excluded from the previous judicial definition of "stock acquisition." In order to redefine the phrase, the Court found it necessary

26 The authority relied upon by the Court in support of this: H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8-9 (1949); Remarks of Senator Kilgore at Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2nd Sess. 176 (1950), although it indicates that Congress wished to place mergers on the same footing as stock acquisitions, does not negate the inference from the statute that they wished this extension to be limited to corporations subject to the jurisdiction of the FTC.

27 Supra note 12 and accompanying text.

28 Supra note 4.

29 Ibid. For example the Interstate Commerce Act exempts railroads, motor and water carriers from the antitrust laws when the consolidation is approved by the Interstate Commerce Commission. 49 U.S.C. § 5 (1958). Neither, however, does the Act contain what is known as a saving clause—that is, a clause specifically stating that the Act would not be construed as conferring exemption from the antitrust laws. The Justice Department had requested that such a clause be added. Wemple and Cutler, supra note 18, at 998.

30 Supra note 4. After weighing all the factors the Comptroller must decide whether the merger is in the public interest.

31 Supra note 7.

32 See for example: United States v. Dixon, 347 U.S. 381 (1954); Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

to consult the legislative history, which is usually resorted to only when there is an ambiguity in the statutory language. In the light of the prior decisions, it is difficult to detect any ambiguity in the amended statute. This is true even though some of the previous judicial constructions may have been dicta; they were nevertheless the only judicial definitions available to Congress. Mergers were defined as asset acquisitions, and Congress only extended the prohibitions of section 7 to asset acquisitions by corporations subject to the jurisdiction of the FTC. Nothing could be less ambiguous, particularly when one considers that the FTC was the agency requesting the amendment. The ambiguity, where it existed, was in the legislative history rather than the statutory language.[33] If the construction given by the Court was the one intended, Congress, as the dissent stated, "went at the matter in a very peculiar way."[34]

Given this extension of section 7, the remainder of the decision falls logically into place. The Bank Merger Act did not oust jurisdiction over mergers under the Clayton Act if that jurisdiction was already present.[35] In addition, if section 7 is applicable, this merger would violate it.[36] Commercial banking is a "line of commerce" and the four-county Philadelphia area would constitute a relevant geographical area according to the previous definitions of the Court.[37] Since the new bank would have more than thirty per cent of the banking business in this area, and since section 7 is designed to prevent possible violations of the Sherman Act in their incipiency, the necessary elements for an injunction appear to be present.

In conclusion, the primary problem with the decision is that Congress may, by recognizing the peculiar nature of banking in relation to the rest of the economy, have intended a different system of regulation: one that would not rely on enforced competition through the somewhat mechanical requirements of the Clayton Act, but one which would allow large, even monopolistic, amalgamations, when in the opinion of the regulatory authorities, they are in the public interest. If this was the Congressional intent when the section 7 amendment and the Bank Merger Act were passed, this intent is frustrated by the Court in this decision.

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Antitrust—Sherman Act—Conspiracy in Restraint of Trade to Eliminate Competition by the Transfer of Ownership of Patent Rights.—*United States v. The Singer Mfg. Co.*[1]—Singer Manufacturing Company, the sole domestic manufacturer of household zigzag sewing machines, developed an improved multicam zigzag machine. Singer executed a non-

[33] See note 25 and accompanying text.
[34] Supra note 1, at 387.
[35] United States v. Borden Co., 308 U.S. 188 (1939).
[36] For a discussion of the necessary elements for the maintenance of a section 7 suit, see More Ado About Mergers: Brown Shoe Co. v. United States, 4 B.C. Ind. & Com. L. Rev. 159 (1962).
[37] E.g., Brown Shoe Co. v. United States, supra note 8.

[1] 374 U.S. 174 (1963).