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CASE NOTES

Antitrust—Clayton Act—First Attempted Use to Restrain a Joint Venture—Application of a Rule of Reason.—*United States v. Penn-Olin Chem. Co.*[1]—The Department of Justice initiated this action in the United States District Court of Delaware to restrain Penn-Olin Chemical Company (Penn-Olin), Olin Mathieson Chemical Corporation (Olin), and Pennsalt Chemicals Corporation (Pennsalt) from allegedly violating Section 7 of the Clayton Act[2] and Section 1 of the Sherman Act.[3] Pennsalt and Olin had formed their joint venture, Penn-Olin, to compete in the production and sale of sodium chlorate in the southeastern market, which was dominated by two of Pennsalt's nationwide competitors. Prior to the formation of Penn-Olin, Pennsalt had sold sodium chlorate in the southeastern market, and, because of a price disadvantage arising from the cost of transportation from its Portland, Oregon plant, it had contemplated building its own plant in the southeast. Similar intentions were held by Olin (a substantial competitor of Pennsalt in calcium hypochlorite), although it had never produced sodium chlorate. Before either company completely rejected the idea of its individual entry into that market, the joint venture was formed. The Government alledged that the effect of the joint venture might be to substantially lessen competition not only in sodium chlorate, but also in other non-chlorate chemicals, particularly calcium hypochlorite. The court HELD: The Government failed to meet its burden of proof that the probable effect of the joint venture would be the substantial lessening of competition in the relevant southeastern market. The court stated that the joint venture would be a more effective competitor than either Pennsalt or Olin individually, and

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1 217 F. Supp. 110 (D. Del. 1963), petition for cert. filed, 32 U.S.L. Week 3178 (U.S. Sept. 27, 1963) (No. 503).

2 38 Stat. 730 (1914), as amended by 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). The pertinent parts read (with the portion added by the 1950 amendment italicized):

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of* another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
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> . . . .
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> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

3 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). The pertinent parts read: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal. . . ."

that there was no evidence that both would have entered the market simultaneously.

The court, confronted with this first civil action under the Clayton Act against a joint venture, patterned its analysis of the facts after the method that has evolved from the merger cases arising under the 1950 amended version of the Clayton Act.[4] Although a joint venture "may be viewed as a form of quasi merger,"[5] it only achieves the results of a merger on a very limited basis, and in a more roundabout fashion. Significant is the fact that while a merger removes a corporation from competition, a joint venture creates a new entity. Thus, since a joint venture[6] is not a merger, there was pre-trial speculation as to the applicable standards of legality under the amended Section 7 of the Clayton Act.

It had previously been decided under Section 1 of the Sherman Act that "joint manufacturing ventures, even in domestic markets, are not made unlawful per se by the Sherman Act, but become unlawful only if their purpose or their effect is to restrain trade or to monopolize."[7] However, Section 7 of the Clayton Act was intended to reach monopolistic tendencies "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[8] "And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."[9] Thus, under the amended Clayton Act, there was some reason to believe that joint ventures might be found illegal per se, although several authorities had expressed their opinions that such was not the case.[10]

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[4] The usual method is for the court to define the relevant market. Then, within this relevant market the competitive effects on the economy are determined. For a discussion of a recent Supreme Court decision employing this method see More Ado About Mergers: Brown Shoe Co. v. United States, 4 B.C. Ind. & Com. L. Rev. 159 (1962).

[5] Kaysen and Turner, Antitrust Policy, An Economic and Legal Analysis, 136 (1959).

[6] A joint venture, such as here, goes by many names: "jointly-owned subsidiary," "fifty-fifty corporation," "business cooperative," and "corporate partnership." Dixon, Joint Ventures: What is Their Impact on Competition? 7 Antitrust Bull. 397, 398 (1962). A definition, sufficient for our purposes, could be that a joint venture "is a corporation whose stock is owned by other corporations and which engages in a business different from that of its parents (even though the difference be only that it sells its product in a foreign territory)." Hale, Joint Ventures: Collaborative Subsidiaries And The Antitrust Laws, 42 Va. L. Rev. 927 (1956).

[7] United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504, 557 (S.D.N.Y. 1951) accord, United States v. E. I. Du Pont de Nemours & Co., 118 F. Supp. 41, 219-20 (D. Del. 1953), aff'd, 351 U.S. 377 (1956).

[8] Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962), quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

[9] Id. at 328-29, accord, Att'y Gen. Nat'l Comm. Antitrust Rep. 117 (1955) (hereinafter cited as Attorney General): "This background immediately preceding amended section 7 discloses the apparent Congressional objective of establishing more effective rules against mergers. /The Committee believes that this intention provides the main guide to the administrative and judicial construction of that provision."

[10] Boyle, The Joint Subsidiary: An Economic Appraisal, 5 Antitrust Bull. 303, 307 (1960): "As a matter of law, it is quite clear that joint corporate ventures are not illegal *per se*." Kaysen and Turner, op. cit. supra note 5, at 137: "There has been

It is against this background that the *Penn-Olin* decision should be considered. While the case was still pending before the district court, several commentators evaluated the facts in light of the strict Clayton Act and concluded that "a decree in favor of the government would not be surprising."[11]

The court, in deciding otherwise, appeared to read a Rule of Reason[12] into section 7 as it applies to joint ventures. It seemed to do this by balancing the competitive advantages of the joint venture against the competitive disadvantages, finding that the former outweighed the latter, and then resolving every doubtful issue in favor of the joint venture.

Illustrative of this approach was the court's conclusion that under the relevant statute it would be illogical to hold a joint venture illegal per se. There is a total lack of authority on this issue, as has been shown above. Yet, the court seems to have decided that since on appearances the joint venture did not seem to adversely affect competition, it should not foreclose inquiry into the merits of the joint venture by a per se ruling.

Another indication of the court's adoption of a Rule of Reason was the court's limiting the relevant market to the Southeast. This was an essential part of the defendants' case, since a violation of section 7 clearly existed if the market were found to be nationwide. Within this southeastern market, the court found that the Government had not proved that any company had been deterred from entering into it.

But the Clayton Act is also concerned with future effects on competition,[13] and the court summarily handled this issue by stating that "what

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surprisingly little law on joint ventures as such. . . . [I]t is safe to assume that they are not illegal *per se* any more than mergers are. . . ." (Emphasis supplied.)

[11] Comment, Joint Subsidiaries and Section 7 of the Clayton Act, 39 U. Det. L.J. 223, 237 (1961). See, 14 Stan. L. Rev. 777, 786 (1962): "[T]he government appears to have chosen a strong case in which to initiate joint ventures to the rigors of section 7. The competitive situation most favorable to prosecution under section 7 would undoubtedly involve two currently competitive parents and a completely integrated joint subsidiary producing for the same market. Where the operations of the joint company are not vertically separated from its parents' market and where the joint company has a significant share of that market, the situation lends itself to—indeed invites—territorial division. Such arrangements are very uncommon in the corporate world. Yet the arrangement in *Penn-Olin* comes very close to presenting a hypothetically ideal case for the government."

It is submitted that the commentator of the above would not have been so definite if he had foreseen that the court would limit its attention concerning sodium chlorate to the relevant southeastern market, in which neither Pennsalt nor Olin were "actual" competitors.

[12] The "Rule of Reason", so-called, has never been applied to § 7 of the Clayton Act. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62 (1911) was the first case to read a Rule of Reason into the Sherman Act. A recent case where the Supreme Court dealt with the Rule of Reason as applied to the Sherman Act is White Motor Co. v. United States, 372 U.S. 253 (1963), noted, 5 B. C. Ind. & Com. L. Rev. 185 (1963).

[13] Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Colum. L. Rev. 629, 678 (1961): "The distinctive feature of the Clayton Act is its emphasis on reasonable probability. It is not merely concerned with what changes the merger has already wrought in the relevant market, but with what is apt to happen in the future. It asks the tribunal to forecast the likely impact of the merger on competition."

Penn-Olin's effect in the future may be upon would-be entrants can only be a matter of conjecture."[14] It is submitted that, if sustained, this cursory handling of an important part of section 7 would, in effect, do away with this provision as a realistic test as applied to joint ventures. The court could have examined the economic data to determine the probable future effects, or it could have shifted the burden of proof to the defendants who might be in a better position to come forward with relevant economic data.[15] Instead, the court made no such attempts, saying that "the imponderables are too great to hazard a forecast as to Penn-Olin's future deterrent effect. . . ."[16]

The court followed this attitude of resolving doubt in favor of the joint venture when it considered the Government's contention that the joint venture prevented Pennsalt and Olin from competing amongst themselves in the production and sale of sodium chlorate in the Southeast. The Government proved that both companies possessed the capability and the interest of entering into the southeastern competition. However, the court held that this was not sufficient under the standards of section 7, and that it must be a matter of probability that both companies would "simultaneously" have decided to enter the field, or that the prior entry of one would not have deterred the other. The court found that the most favorable assumption that it could adopt "is that one company would have decided to build while the other continued to ponder."[17]

It can be argued, as the Government has done on its appeal to the Supreme Court, that the court's latter finding is, by itself, sufficient to condemn the joint venture, and that to require that the government go further and prove that neither company would have lost interest had it been preempted by the other is to adopt an erroneous standard under section 7.[18] But it is submitted that this is another instance of a court's applying a Rule of Reason, notwithstanding the validity of the argument that to take away a potential competitor, "waiting in the wings" to enter the market when competitive conditions are inviting, is a substantial lessening of competition.[19]

In light of the court's finding that, at best, only one of the parents would have entered the market, it remained to be decided whether the joint venture would be less effective as a competitor than either of the parents. The court found that in light of the combined experience of the parents, it would be more reasonable to conclude that Penn-Olin would be the better competitor. The court went on to elucidate how competition had been increased since Penn-Olin's entry into the market. This was evidenced by the fact that "actual and in-prospect production in the Southeast will have more than doubled since the joint venture was entered into. . . ."[20]

[14] Supra note 1, at 128.

[15] But see Bok, Section 7 Of The Clayton Act and The Merging of Law and Economics, 74 Harv. L. Rev. 226, 253 (1960): "Another possible approach to section 7 is to hold for the defendant in any case in which the probable consequences of a merger cannot be ascertained, on the ground that the government has simply failed to meet its burden of proof."

[16] Supra note 1, at 128.

[17] Id. at 130.

[18] Brief for Appellant, pp. 17-18.

[19] Id. at 18.

[20] Supra note 1, at 132.

This latter fact of increased competition may well have been the chief influence in resolving the court's attitude toward the joint venture. The court found that "Penn-Olin was the means by which the strength of the two companies was joined . . . to break into a market to challenge the supremacy of two companies which were dominating it."[21] This factor seems to have tipped the scales in favor of the joint venture when the court balanced the competitive effects in its application of the Rule of Reason.

It is submitted that the court's Rule of Reason is entirely consistent with the Congressional intent at the time of the 1950 amendment to the Clayton Act. Congress was concerned with the protection of competition and not competitors.[22] It realized that there may be some mergers beneficial to the competitive health of the economy.[23]

Confronted with beneficial competitive effects, it seems not wrong for a court to give less consideration to a fact, which under different circumstances might render the whole transaction illegal. This is exemplified in *Penn-Olin* by the fact that the joint venture gives the parents, who are substantial competitors in another product, an opportunity for collusive action.[24] But the court once again read a Rule of Reason into section 7 and held that "the proof shows only an opportunity for illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant."[25]

This latter statement by the court adequately reflects the attitude with which it approached this joint venture. After examining the relevant economic data,[26] the court appears to have realized that if the beneficial

21 Id. at 125.

22 Supra note 8, at 320: "Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."

23 Supra note 8, at 319: "[S]upporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market." See Attorney General, supra note 9, at 125: "Similarly, in a vertical acquisition, the fact that competitors of one company are foreclosed from selling to the other need of itself signal no reasonable probability of a substantial lessening of competition or tendency to monopoly. On the contrary, the integration may create a company better able to compete with larger rivals."

24 See Boyle, supra note 10, at 308: "The important issue, and one apparent at first glance, is that the joint venture allows a common meeting place in which the supposedly competitive firms may legally meet." See Kaysen and Turner, op. cit. supra note 5, at 138: Among the potential risks of a joint venture are: (1) decisions on price, output, etc. of the joint venturers "may be so intrinsically interrelated that they will differ substantially from those that would be made if the venture were independently owned. . . . (2) [T]hat cooperation in the joint venture will spill over into collateral restrictive behavior among the joint venturers, simply as a matter of close association. (3) [T]hat substantial market power in one market may be used to create similar power in others."

25 Supra note 1, at 134.

26 For mergers falling under section 7 it may be relevant, however, to study: (1) character of the acquiring and the acquired company, (2) the characteristics of the markets affected, (3) immediate changes in the size and competitive range

competitive effects of Penn-Olin were to be utilized, a Rule of Reason would have to be read into section 7. Otherwise, a literal reading of the Act would surely have striken the joint venture to the detriment of the competitive health of the relevant market.

WILLIAM J. MCDONALD

Antitrust—Clayton Act—Preliminary Injunction Seeking to Enjoin Proposed Conglomerate Acquisition.—*United States v. Food Mach. Corp.*[1]—The United States, proceeding in the District Court for the Northern District of California under Section 7 of the Clayton Act,[2] sought a preliminary injunction against Food Machinery Corporation (FMC), and American Viscose Corporation (Avisco), to enjoin the consummation of a proposed acquisition of a substantial part of the assets of Avisco by FMC.[3] Due to the decline of rayon and acetate in favor of new synthetic fibres, the board of directors of Avisco considered that its shareholders would realize the value of their investment only if the corporation's diminishing assets, utilized in the production of cellulosic fiber (rayon and acetate) and cellulosic film (cellophane), were sold to a willing buyer. Avisco commenced negotiations with FMC which culminated in a contract of January 31, 1963, for the sale of Avisco assets on June 28, 1963. FMC, a widely diversified industrial company, which has never engaged in the fiber or film industries, desires to acquire the assets of Avisco in order to gain entry into the chemical fiber and film industries (nylon, orlon, dacron and polyethylene). Although the United States sought to label the contemplated acquisition vertical or horizontal, it was characterized by the court as conglomerate,[4] because it lacked the aspects of the former categories.[5] After

of the acquiring company and in the adjustments of other companies operating in the markets directly affected, and (4) probable *long-range* differences that the acquisition may make for companies actually or potentially operating in these markets. Attorney General, supra note 9, at 125.

1 218 F. Supp. 817 (N.D. Cal. 1963).

2 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). Section 7 of the Clayton Act provides:

> No corporation engaged in commerce . . . subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

3 The court has jurisdiction to grant the relief sought in accordance with the provisions of Section 15 of the Clayton Act which empowers a district court to "make such temporary restraining order or prohibition as shall be deemed just in the premises" pending final decision. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1958). In addition to the various agencies specifically charged with enforcement of the Act, the Department of Justice has broad equity powers to seek relief enjoining violation of any part of the Act. The injunctive relief in this case is sought under the above authority.

4 Congress has described conglomerate mergers as "those in which there is no discernible relationship in the nature of business between the acquiring and acquired firms." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

5 There were no horizontal aspects because FMC and Avisco had not competed in