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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.

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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

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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.

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[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

departing from its theory that this acquisition may substantially lessen competition in the manufacture and sale of rayon (because there was no evidence before the court to sustain the proposition), the government introduced affidavits and evidence attempting to prove a reasonable probability that the conglomerate acquisition of these assets may substantially lessen competition in the sale of packaging machinery used by converters of cellophane.[6] In denying the motion for injunction, the court HELD: A preliminary injunction was not warranted under the affidavits and evidence which were largely speculative and which did not meet the reasonable probability test of substantial lessening of competition.

Recent case law in the area of anti-merger litigation proscribed by section 7 indicates that in lieu of divestiture—an equitable antitrust remedy ordinarily employed subsequent to the completion of an improper merger—a court will grant an interlocutory injunction enjoining the consummation of a proposed merger under certain circumstances. The injunction has been granted where the government has sustained its burden of proving a reasonable probability of a substantial lessening of competition in any line of commerce.[7]

The government has sustained its burden of proof in two recent non-conglomerate cases in which preliminary injunctions were granted. In *United States v. Ingersoll-Rand Co.*,[8] the lower court's finding that the defendant corporation, by acquiring other companies engaged in manufacturing coal mining machinery, would tend to create a monopoly by eliminating competition enjoyed by other companies in that line of commerce was sustained on appeal as a proscribed "vertical" acquisition with anti-competitive effects reasonably probable. The automatic effect of foreclosing to competitors a market outlet or source of supply, present in a vertical merger even prior to consummation, enabled the government to sustain its burden. Without indulging in mere speculation, it was able to show that a

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the manufacture and sale of any product, and FMC would be merely substituted as a competitor. No vertical aspects were present because no customer-supplier relationship existed. Avisco had not sold products to FMC and did not manufacture any products needed by it. Although FMC sold two products (carbon bisulfide and caustic soda) to Avisco, the products were essentially incidental and de minimis in relation to the entire transaction. Supra note 1.

[6] One of the principal lines of machinery produced by FMC is its packaging equipment, including wrapping machinery for packages to be covered with cellophane or other films. Supra note 1, at 818.

[7] A merger characterized as "vertical," which usually has the automatic effect of foreclosing to competitors any market outlet or source of supply, or as "horizontal," characterized by automatically eliminating a competitor, presents less difficulty to the government in sustaining its burden of proof than does the "conglomerate" acquisition or merger since such automatic effects are not present. Nevertheless, the language of the statute and relevant legislative history indicate that a conglomerate merger violates section 7 if it has the proscribed effect. The House Committee report stated:

> [T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.

Supra note 4.

[8] 320 F.2d 509 (3d Cir. 1963).

lessening of competition was probable in the future. *United States v. Philadelphia Nat'l Bank*[9] involved a "horizontal" merger where the court held that it was reasonably probable that the proposed merger of the second and third largest Philadelphia banks, resulting in a single bank's controlling at least thirty per cent of the commercial banking business in a four-county metropolitan area, would substantially lessen competition so that the merger was forbidden by the Clayton Act and was required to be enjoined. Elimination of a competitor is the automatic effect present in a horizontal merger even prior to consummation. By introducing evidence of this effect, the government was able to hurdle the unsteady ground of speculation and show probability of anti-competitive effects.

However, where the government fails to sustain its burden of proving reasonable probability, the court will refuse to enjoin the proposed merger or acquisition. In *United States v. Gimble Bros. Inc.*,[10] a preliminary injunction against the consummation of a proposed merger of two Milwaukee department store chains was denied where the court found, on the affidavits submitted, that the proposed merger would not probably substantially lessen competition in retail merchandising in Milwaukee County but, in fact, would probably not lessen competition at all. In *United States v. Continental Can Co.*[11] where the government sought to enjoin a proposed "conglomerate" acquisition of corporate manufacturer of glass containers by corporate manufacturer of metal and plastic containers on the ground that such acquisition would substantially lessen competition, the court held that there was no proof of any reasonable probability of such substantial anti-competitive effects either in the relevant product markets or in any other product markets as a result of corporate acquisition, and denied the government's motion for injunction against consummation of the acquisition.

In order to make out a case under section 7, the government is required to show either that the acquisition had actually resulted in a significant diminution of the vigor of competition or that there was reasonable probability that it would do so.[12] Unless it shows that there are actual anti-competitive effects of a substantial nature, which cannot be done prior to the consummation of a proposed merger, the reasonable probability test has to be met. In establishing reasonable probability, it is usually necessary to define lines of commerce in which the acquired company was engaged and the section of the country affected in determining whether anti-competitive effects or tendency to monopolize are reasonably probable. The test is whether the acquisition will have demonstrable anti-competitive effects in any relevant product market in any section of the country.[13] Thus, under this test, the government has the burden of proof of delineating relevant product markets or submarkets in which it claims that competition would be adversely

[9] 374 U.S. 321 (1963). For a discussion of the 1950 amendments to Section 7 of the Clayton Act expanding its scope to include bank mergers, see Note, 5 B.C. Ind. & Com. L. Rev. 175 (1963).

[10] 202 F. Supp. 779 (E.D. Wis. 1962).

[11] 217 F. Supp. 761 (S.D.N.Y. 1963).

[12] Id. at 783.

[13] United States v. E.I. Du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

affected by acquisition and sections of the country that would be affected. In addition, the government must establish that in one or more such markets or submarkets in any particular section or sections of the country there is a reasonable probability of unlawful anti-competitive effects or of a tendency to create a monopoly.[14] In *United States v. Brown Shoe Co.*,[15] the first definitive interpretation of section 7 by the Supreme Court since amended in 1950, it was indicated that this same test would apply to conglomerate mergers or acquisitions as well as to any other matter coming within the purview of section 7 (mergers having vertical or horizontal aspects).

Since the automatic effects of a vertical or horizontal merger are not present in a conglomerate transaction,[16] the government's burden is necessarily difficult to meet, if it can be met at all prior to the consummation of the merger. Evidence relating solely to the competitive situation existing in the relevant market *prior* to the consummation of a conglomerate merger is speculative and without the above-mentioned automatic effects, such evidence can hardly move into the more solid ground of probability. But this does not mean that the government's burden is lessened. It is not relieved from the obligation of establishing relevant product markets or of showing reasonable probability of substantial anti-competitive effects in one or more of them as a result of the acquisition. This difficulty of market analysis in the conglomerate merger does not excuse the government from proving the proscribed effects of section 7 in accordance with the recognized test.[17] Since such effects are difficult to ascertain, and even if ascertainable, are always speculative prior to consummation,[18] it seems impossible to find a violation in a conglomerate transaction before the acquisition has long been completed and the actual effects have been observed,[19] and even then the government's burden is difficult. However, actual anti-competitive effects are ascertainable from a consideration of post-acquisition factors. In a recent conglomerate merger, Procter & Gamble acquired the assets of Clorox, the leading producer of household liquid bleach. On rehearing the FTC introduced into evidence various marketing reports showing a substantial lessening of competition in the liquid bleach industry. Procter & Gamble's ability to command consumer acceptance of its products and of valuable grocery store shelf space, as well as its ability to concentrate the full impact

[14] Supra note 11.

[15] 370 U.S. 294 (1962). See Comment, 4 B.C. Ind. & Com. L. Rev. 159 (1962).

[16] In the Matter of Procter & Gamble Co., 1961-1963 CCH F.T.C. Complaints and Orders, ¶ 15245, at 20257 (transfer binder, June 15, 1961).

[17] In the Continental Can Co. case, supra note 11, the court said that reasonable probability of a lessening of competition in the future is just as much subject to evidentiary proof as is actual lessening of competition. Mere speculation or conjecture cannot be substituted for proof of reasonable probability. Nor are mere possibilities that competition might be lessened in the future, or inferences to that effect, sufficient.

[18] This is so since the conglomerate acquisition does not have the "automatic" effects of a vertical or horizontal merger. Supra note 7.

[19] The first time a conglomerate acquisition case was before the Federal Trade Commission, it was remanded for additional evidence. The Commission determined that not even a sixteen month period following the acquisition of a dominant household liquid bleach firm by a leading soap and detergent manufacturer was sufficiently long to ascertain the market effects. Supra note 16.

of its advertising, promotional and merchandising experience into the liquid bleach field, had so enhanced the dominant market position held by Clorox prior to the merger as to be detrimental to the actual and potential competition by such products as those of Purex, the second largest producer of liquid bleach.[20]

In the present case, the government was not able to sustain its burden of reasonable probability. Its case was based on what it claimed to be anti-competitive effects which *might* occur in the future. It is a far cry from *might* occur to a reasonable *probability* of occurring. Unless the recognized "reasonably probable" test of matter coming within the purview of section 7 is to be changed when conglomerate acquisitions are involved,[21] it is difficult to see how the government may ever succeed in its motion for a preliminary injunction enjoining the consummation of a proposed conglomerate acquisition.

The court takes pains to indicate that the present case is novel in that it marks the first instance in which the Department of Justice has brought an action to restrain a conglomerate acquisition prior to consummation.[22] The statement is inaccurate in view of the *Continental Can Co.* case in which the Department of Justice sought a preliminary injunction in a conglomerate acquisition.[23] Thus, rather than being a case of first impression as the court indicates, it follows, as a definitive pronouncement, a new trend in the relatively recent series of conglomerate acquisitions where preliminary injunctions are denied. However, this decision is singularly unique in that it portends a policy of denial by the courts of motions for preliminary injunctions seeking to enjoin proposed conglomerate acquisitions. This policy is necessarily correct since the evidence of substantial lessening of competition will be speculative and will not meet the recognized test of anti-competitive effects. However, the government's predicament is not to be viewed with great alarm. A consideration of the legislative intent and the mandate of section 7 indicates that only those mergers or acquisitions having demonstrable anti-competitive effects are proscribed. There is no proscription of

[20] In the Matter of Procter & Gamble Co., 1961-1963 F.T.C. Complaints and Orders, 3 Trade Reg. Rep., ¶ 16,673, at 21,558 (Dec. 15, 1963). The Commission ordered Procter & Gamble to divest itself of all assets of Clorox.

[21] A suggested test for proposed conglomerate mergers or acquisitions, based solely on equitable principles would appear to be whether the corporations involved would be irreparably harmed by the injunction pending final decision. If not, then the court would grant the motion for preliminary injunction, disregarding the speculative nature of the government's contentions as to the proscribed effects of section 7. However, application of this and similar tests, which are not based upon an investigation into market structure and into the effects of the merger on competition, would be inherently opposed to acquisitions per se and contra to the legislative intent of section 7 which is to proscribe only those acquisitions having demonstrable anti-competitive effects. For an insight into the adverse effects of a non-economic test, see Comment, 72 Yale L.J. 1265, 1280 (1963).

[22] Supra note 1, at 818.

[23] Supra note 11. In this case, although the government, as in the instant case, attempted to label the proposed acquisition as vertical or horizontal, the court characterized it as "basically a conglomerate combination," and because the government had not sustained its burden of proving a reasonable probability of substantial lessening of competition, its motion for injunction was denied.

mergers per se, although such a proscription would be a necessary conclusion if the test of anti-competitive effects were one of speculation and possibility. The existing test of reasonable probability recognizes that section 7 is not concerned with possibilities. If the government has not met its burden of showing the reasonable probability of a substantial lessening of competition, the conglomerate merger should not be enjoined on the basis of speculative claims. Should investigation into post-acquisition factors indicate that the proscribed effects exist or will likely exist in the future, divestiture would be an adequate remedy.[24] To grant the motion for injunction would be to substitute what are at best mere ephemeral possibilities for reasonable probabilities.

GEORGE M. FORD

Antitrust—Clayton Act—Stock Exchange Held Liable under Antitrust Laws.—***Silver v. New York Stock Exchange.***[1]—The New York Stock Exchange directed certain of its member firms to terminate private wire connections with the petitioners who were registered broker-dealers[2] in over-the-counter municipal bonds, without assigning any reason therefor or giving the petitioners notice or an opportunity to be heard. The ensuing inability to receive instantaneous market quotations caused a sharp drop in petitioner's business. In consequence thereof, a suit was brought in the United States District Court for the Southern District of New York[3] alleging that the arbitrary action of the Exchange constituted a conspiracy in violation of Sections 1 and 2 of the Sherman Act[4] thereby entitling petitioners to treble damages and injunctive relief.[5] The district court held that antitrust laws applied to the Exchange and granted partial summary judgment, permanently enjoining it from interfering with private wire connections between its members and the petitioner.[6] On appeal the Second Circuit reversed, hold-

[24] Supra note 20.

[1] 373 U.S. 341 (1963).

[2] They were registered with the SEC as broker/dealers pursuant to the Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. § 780(b) (1958). They were also members of the National Association of Security Dealers, but were not members of the New York Stock Exchange.

[3] Silver v. New York Stock Exchange, 196 F. Supp. 209 (S.D.N.Y. 1961).

[4] 26 Stat. 209 (1890), 15 U.S.C. 1, 2 (1958). Petitioners alleged two additional causes of action which sounded in tort, based upon allegations that the Exchange tortiously induced its members to breach contracts for wire connections with petitioners and also that the Exchange caused petitioners intentional and wrongful harm without reasonable cause..

[5] These forms of relief are provided by the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. 15, 26 (1958).

[6] Supra note 3. The district court rejected the Exchange's contention that the scheme of the Act of 1934 was complete regulation and control of all matters relating to securities transactions and that as a registered Exchange it was therefore part of a regulated industry exempt from the antitrust laws, at least as to all the rules filed with the SEC. See note 11, infra.