Hastings Law Journal

Volume 9 | Issue 1 Article 6

1-1957

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THE COURT'S NEW GIANT KILLER—THE "TENDENCY TO MONOPOLY" CLAUSE

By ROBERT E. GREEN

Modern technology and new efficiency have bred in the United States numerous giant corporations holding great power in our economy. These corporations constitute a potential threat to the ideal of free competition. It was not surprising, then, that the face of free competition began to show wrinkles of worry when the giant of the chemical industry, E. I. du Pont de Nemours & Co., began to acquire stock in the giant of the automobile industry, General Motors Corp. By 1919, the du Pont Corp. held 23% of General Motors' stock, the largest single block of stock in this, the world's largest corporation having what well may be the largest diversification and distribution of stockholders of any corporation.[1] Nevertheless, it was not until 1949 that the Justice Department filed an action based on this acquisition. The complaint in that action alleged that the du Pont Company had violated sections 1 and 2 of the Sherman Act[2] and also section 7 of the Clayton Act[3] by substantially restraining trade in the automobile manufacturers' market through restricting competition in the sale of certain products manufactured by it to General Motors.

The District Court found in favor of the du Pont Company and its co-defendants.[4] The Supreme Court, per Brennan, J., reversed the decision of the court below on the ground that the du Pont Company's ownership of General Motors stock was tending to create a monopoly at the time of suit in violation of section 7 of the Clayton Act.[5] The applicable paragraph of that section states:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce."[6]

Burton, J., joined by Frankfurter, J., dissented.

Questions Raised by the du Pont Case

The opinion of the court in the *du Pont* case raises two interesting questions with regard to this section of our anti-trust laws. First, does section 7

[1] See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 607, n. 36. On some occasions at least, du Pont stock has been a majority at stockholders meetings. United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235, 254 (N.D. Ill. 1954).

[2] 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U.S.C. §§ 1, 2 (1952).

[3] 38 Stat. 731 (1914). This section was subsequently amended in 1950; 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952).

[4] United States v. E. I. du Pont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954).

[5] 353 U. S. 586 (1957).

[6] 38 Stat. 731 (1914).

apply to cases of vertical integration, i.e. supplier-consumer mergers, or only to cases of horizontal integration, i.e. mergers of competitors? Second —and this is the vital issue—if section 7 does apply to vertical integrations, does a violation occur if a tendency towards monopoly arises at any time after the acquisition of the stock, i.e. at the time of suit, or must this tendency exist at the time of and be collateral to the acquisition? The court's answer was that section 7 did apply to vertical mergers which tended to monopoly at the time of suit, the dissent disapproving both these conclusions.

Vertical or Horizontal Integration

In 1950, Congress settled the first of these questions by determining that thenceforth vertical integrations should fall within the purview of section 7.[7] However, this amendment is inapplicable to acquisitions occurring prior to 1950.[8] Since under the *du Pont* rule no time limit exists on how long after the acquisition suit by the government under section 7 may be filed—in the *du Pont* case thirty years had elapsed—suits based upon the many vertical mergers which occurred between 1914 and 1950 will still raise the problem as to their inclusion within section 7 as it stood at the time of the *du Pont* decision.

The Federal Trade Commission, as the administrative organ charged with enforcement of the anti-trust laws,[9] has been consistently of the opinion that section 7 as written in 1914 was not to be applied to vertical integrations but only to horizontal mergers.[10] While it is true that administrative interpretation is "a powerful indication" of statutory meaning,[11] so also are congressional committee reports where an ambiguity exists in a statute.[12] The report of the House Judiciary Committee on the 1950 amendments to the Clayton Act, on which the FTC relied in its 1955 Report on Corporate Mergers and Acquisitions,[13] stated, however, that it was only "some" who thought section 7 to be inapplicable to vertical integration and that Congress now intended to "make it clear" that the section was so applicable.[14] The FTC, then, appears to be includable among the "some" but not necessarily in agreement with Congress.

Basically, of course, the question is not Congress' interpretation in 1949, but Congress' intent in 1914. However, any expectation of assistance on this point from the 1914 congressional committee reports on the pro-

[7] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952); see H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

[8] 64 Stat. 1126 (1950), 15 U.S.C. § 18 (1952).

[9] Federal Trade Commission Act, 38 Stat. 721 (1914), 15 U.S.C. 46 (1952).

[10] FTC ANN. REP. 60 (1929); FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS, H.R. Doc. No. 169, 84th Cong., 1st Sess. 168 (1955).

[11] FTC v. Bunte Bros., 312 U.S. 349, 352 (1941).

[12] Gay v. Ruff, 292 U.S. 25, 31 (1934); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

[13] *Supra* note 10.

[14] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

posed Clayton Act is doomed to disappointment. The House report informs us only that the purpose of section 7 was abolition of the holding company[15] and the term, "holding company," is as applicable to vertical as to horizontal control. The only other contemporary congressional history is Senator Reed's interpretation that section 7 did not prohibit a consumer from controlling a supplier.[16] Even if this is acceptable evidence of statutory meaning,[17] control of consumer by supplier is distinguishable from control of supplier by consumer since the aim in the latter is only to insure a supply of raw materials while in the former it is to obtain monopoly control of the consumer's market.

However, if we examine the language of section 7, it appears questionable if any ambiguity in fact exists. An acquisition becomes unlawful under section 7 only where it *may* result in *any one* of three "effects": 1) a substantial lessening of competition between the corporation whose stock is acquired and the corporation making the acquisition; 2) a restraint of commerce in any section or community; or 3) a tendency to create a monopoly in any line of commerce.[18] The first does involve a lessening of competition "between" the acquiring and acquired corporations; contrastingly, no such language limits the second or third conditions, but rather broad terms are there employed—"in any section or community," "of any line of commerce." These phrases clearly indicate a violation does not only involve an "effect" affecting two corporations but also involves an "effect" affecting an area of commerce. Such an "effect," *i.e.* a tendency to monopoly, unquestionably could occur in an area or line of commerce as a result of a transaction not involving competing corporations. As was said in *Aluminum Co. of America v. FTC:*

> "A monopoly can be created by a transaction of stock acquisition where the effect is not to lessen competition with the corporation whose stock is acquired if the effect is to end competition elsewhere. . . . This is for the reason that the lessening of competition and a tendency to monopoly are not always synonomous."[19]

In at least two cases, District Courts have found violations of section 7 where the acquisition was not of a corporation competing with the acquiring corporation. In *United States v. New England Fish Exchange,*[20] a tendency to monopoly was discovered where a number of competing corporations had been acquired by two corporations competing between themselves but *not in competition with the acquired corporations.* This latter fact was apparently overlooked by Justice Burton in his attempt to distinguish this

[15] H.R. Rep. No. 627, 63rd Cong., 2nd Sess. 17 (1914).

[16] 51 Cong. Rec. 14455 (1914).

[17] See Duplex Printing Press Co. v. Deering, *supra* note 12.

[18] See Western Meat Co. v. FTC, 1 F.2d 95, 98 (9th Cir., 1924), *mod. and aff'd.* 272 U.S. 554 (1926); Aluminum Co. of America v. FTC, 284 Fed. 401, 406 (3rd Cir., 1922), *cert. denied,* 261 U.S. 616 (1923).

[19] Aluminum Co. of America v. FTC, *supra* note 18.

[20] 258 Fed. 732 (D. Mass., 1919).

case. In *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*,[21] section 7 was expressly applied to a case where the defendant consumer acquired the stock of its and the plaintiff's supplier. The dissent correctly states that the *Ronald Fabrics* opinion does not bind the Supreme Court, but this opinion together with the *New England Fish* case does illustrate an agreement on the applicability of section 7 to vertical mergers among those courts having considered it prior to the Supreme Court.

As supporting the view that section 7 is not so applicable to vertical integrations, Justice Burton in his dissent cites *International Shoe Co. v FTC*[22] and *Thatcher Mfg. Co. v. FTC*.[23] But in both those cases, the Supreme Court found only that the corporations involved were not in competition, thus ruling out any violation of the first prohibited effect, i.e. a lessening of competition between the acquiring and acquired corporations. Neither case considered the tendency to monopoly provision, the only element of section 7 involved in the *du Pont* case.

On the other hand, in *Van Camp & Sons Co. v. American Can Co.*,[24] the Court found that a "[tendency] to create a monopoly in any line of commerce" in violation of section 2 of the Clayton Act[25] (prohibiting price discrimination, *inter alia*, tending to create a monopoly) had occurred even though the violating corporation was not in the same line of commerce. If we apply the same interpretation to the words in section 7, "tendency to create a monopoly," this phrase will be applicable to any situation involving the acquisition by one corporation of the stock of another corporation though not in the same line of commerce and thus not competing.

There would seem to be no objection from the courts, then, to applying section 7 to vertical mergers tending to monopoly. The words of the section expressly limit the applicability of the first "effect" to acquisitions between competing corporations but there is no reason to imply the same restraint to the "tendency to monopoly" clause where no limiting words appear and in no case have the courts so done. A tendency to monopoly may as well exist where a supplier such as the du Pont company controls the market of an unusually large consumer as in the case of a merger of two large consumers; the elimination of competition is as possible in the one situation as in the other and it is this our anti-trust laws, including section 7, seek to prevent.

Time of Tendency to Monopoly

The second issue presented by the court's opinion is the time at which a tendency to monopoly must exist in order to violate section 7.

The first point to note is that the tendency to monopoly need not ever exist as an actual fact. The statute provides that

[21] 1946 CCH Trade Regulation Service para. 57, 514 (S.D. N.Y.).
[22] 280 U.S. 291 (1930).
[23] 272 U.S. 554 (1926).
[24] 278 U.S. 245 (1929).
[25] Act of October 15, 1914, c. 323, § 2, 38 Stat. 730.

> ". . . no corporation . . . shall acquire . . . the stock of another corporation . . . where the effect of such acquisition *may* be to . . . tend to create a monopoly . . ." (Emphasis added.)[26]

The court considers the words, "the effect . . . may be to . . . tend to create a monopoly . . ." to mean that there exists a "reasonable probability" of a tendency to monopoly—a holding with which Justice Burton concurs and which is well supported. The difference between the majority and the dissenters relates to the time at which this "reasonable probability" must exist. Is that time the time of the acquisition, as the minority contends, or anytime thereafter, i.e. the time of suit, as the majority maintains? The effect of the majority's interpretation of section 7 is to place no time limit on the section's applicability with the result that a corporation may be held guilty of a violation of the section regardless of when the tendency to monopoly arises with reference to the acquisition.

It is to be noted that the prohibition of section 7 is directed not against a tendency to monopoly as such but rather against an acquisition giving rise to a reasonable probability of the occurrence of that result. The court construes "acquire" as equivalent to "hold." The two words, however, clearly are entirely different in their meaning. To acquire means to *get or obtain* as one's own;[27] to hold means to retain or maintain possession of.[28]

> " '. . . [T]o hold rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined.' "[29]

Thus, the reference of "acquire" is to a specific act occurring at a specific time, viz. the time of obtaining or acquiring the stock, in contrast to "hold" which refers to a continuing act. It is well established that since the words here involved are not technical,

> " '[t]he legislature must be presumed to use words in their known and ordinary signification.' Levy's Lessee v. McCartee, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v. Lawrence, 16 How. 251, 261."[30]

In stating that "No corporation shall acquire . . . the stock . . . of another corporation" etc., section 7, then must be taken to mean that no corporation shall *obtain* such stock, not that no corporation shall *hold* such stock. The only purpose of the "effect" clause is to state in what circumstances the acquisition will be unlawful. The acquisition itself is the prohibited event but only when, at that time, it appears reasonably probable to the trier of the

[26] 38 Stat. 731 (1914), 15 U.S.C. § 18 (1946).

[27] Helvering v. San Joaquin Fruit & Investment Co., 297 U.S. 496, 499 (1936); Wulzen v. Board of Supervisors, 101 Cal. 15, 25, 35 Pac. 353, 356 (1894); WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd ed. 1946).

[28] Jack v. Walker, 79 Fed. 138, 140 (C.C.S.D. Ohio, 1897); State v. Nolte, 352 Mo. 1069, 180 S.W. 2d 740, 741 (1944); WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd ed., 1946).

[29] Griffin's Case, 11 Fed. Cas. No. 5815, at 24 (C.C.D. Va., 1869), quoting Webster.

[30] Old Colony R. Co. v. Commissioner, 284 U.S. 552 (1932).

facts that a tendency to monopoly will occur.[31] The court cannot impose its own meaning on statutory provisions the language of which is clear; rather,

> ". . . where the language of the act is unambiguous and explicit, courts are bound to seek the act itself, and they are not at liberty to suppose that the legislature intended any thing different from what their language imports."[32] "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."[33]

The Court justifies its interpretation on the ground that the Clayton Act was intended to arrest monopolies in their incipiency.[34] It then states that "incipiency" refers not to acquisition but to the effect of a tendency to monopoly and thus the prohibition of section 7 becomes effective at any time the effect becomes incipient, citing *Transamerica Corp. v. Board of Governors*.[35] That case involved the second paragraph of section 7 which prohibits stock acquisitions of two or more corporations where the effect may be a lessening of competition among such corporations, a restraint of commerce or a tendency to monopoly. The facts were that Transamerica, a bank holding company, had acquired a number of independent banks over a considerable period of time thus allegedly lessening competition. The complaint was based on all of these acquisitions up to the time of the suit. In contrast, the *du Pont* case involved but a single acquisition of a single corporation long before commencement of the suit. The cases are thus in no way analogous on this point. The idea of incipiency, of beginning,[36] is in no way inconsistent with the construction of section 7 suggested above and indeed conforms to the idea of attaching to the acquisition, the beginning of the transaction.

Nor does the construction here proposed limit the scope of the anti-trust laws, as is contended by the majority. The Clayton Act was not intended to be all-inclusive but rather was designed to supplement the Sherman Act.[37] Section 1 of that Act prohibits any combination or conspiracy in restraint of trade; section 2 prohibits any monopoly or attempt to monopolize.[38] The Sherman Act, then, becomes effective whenever a monopoly or attempt to monopoly comes into existence. The Clayton Act, on the other hand, was intended to prevent their existence.[39] With regard to section 7, this was to be accomplished by stopping any acquisition which reasonably probably tended to that result. If at the time of acquisition, the reasonable

[31] Compare Aluminum Co. of America v. FTC, 284 Fed. 401, 407 (3rd Cir. 1922), *cert. denied*, 261 U.S. 616 (1923).

[32] New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 663 (1875).

[33] United States v. Great Northern R. Co., 343 U.S. 562, 575 (1952).

[34] See S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914).

[35] 206 F.2d 163 (3rd Cir. 1953), *cert. denied*, 346 U.S. 901 (1953).

[36] WEBESTER'S NEW INTERNATIONAL DICTIONARY (2nd ed. 1946).

[37] See S. Rep. No. 698, 63rd Cong., 2nd Sess. 1 (1914); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922).

[38] 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U.S.C. §§ 1, 2 (1952).

[39] See S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914).

probability of a power to exclude competition was not foreseeable but subsequently did arise, the Sherman Act was adequate to deal with it. But if it could be foreseen as reasonably probable, then it would be stopped at what indeed was its incipiency.

This proposed interpretation is also in accord with that public policy which limits the time in which causes of action will be allowed. While the Clayton Act is not limited by any statute of limitations, and the dissent admits doubt as to the applicability of the doctrine of laches, nevertheless statutes are to be reasonably interpreted. To say that a corporation will never know whether an acquisition of stock in another corporation innocently made is unlawful, until such time thereafter as the government and the courts determine such to have resulted, would appear to be at best approaching the bounds of reasonableness.

Indeed, the court's interpretation of section 7 does raise a question as to the section's constitutionality. Due process requires that a person be given notice that his act will be criminal before he does that act. With regard to this requirement, the Supreme Court, through Chief Justice Warren, has said,

> "The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[40]

Can it be said that a corporation is given fair notice that it is committing a crime in acquiring the stock of another corporation where, under the majority opinion in the *du Pont* case, it will not know if its conduct is forbidden by statute until some indefinite time after it has acted and that the time when suit is commenced against it? True, the corporation knows that its acquisition will be criminal if any tendency to monopoly arises, but this event, under the court's interpretation, need not be foreseeable at that time and thus the corporation has no way of knowing before it acts if it acts unlawfully. It would thus seem that as so interpreted the statute deprives the corporation of a basic element of due process.

Conclusion

It would appear, therefore, that the correct and reasonable interpretation of section 7 is that adopted by the dissenting Justices, specifically that section 7 prohibits the acquisition of the stock of another corporation where at that time it appears reasonably probable that there exists a tendency to monopoly.

Whether a tendency to monopoly was reasonably foreseeable in 1917 as a result of the du Pont Company's acquisition or, indeed whether such

[40] United States v. Harriss, 347 U.S. 612 (1953).

tendency to monopoly has existed at all during the thirty years intervening between that time and the time of suit is a question of fact and too involved a question to be considered here.[41] But it does seem reasonable to suppose that if any tendency to monopoly was to appear, it would have matured to some extent by the time the government saw fit to bring this suit. In that case, the situation would fall, however, within the scope of section 2 of the Sherman Act, for a monopoly requires not the act of excluding competition, but only the power to so do.[42]

The court, though it considers the whole thirty years of evidence in determining its answer, avoids the specificity required to find a monopoly or attempt to monopoly and latches on to the amorphism of section 7's "tendency to monopoly." By misconstruing the language and the context of its origin, it expands the section's scope so as to make an event perfectly legal at the time a potential crime even after the dust has long been settled. The *du Pont* decision will thus take its place as another of the present court's sociological decisions supported by what appears to be a strained and incorrect legal analysis.

[41] The record in the trial court covers some eight thousand pages; the District Court opinion requires another one hundred pages.

[42] See United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).