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# Amended Section 7 of the Clayton Act: Substantially to Lessen Competition in Vertical Integrations

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in the instant case, did not plead a breach of the fiduciary relation, but rather, a conspiracy to defraud him of his shares. For that reason, the court probably reached the correct result in denying recovery. However, the statement that "acts which are expressly or impliedly authorized by law cannot be made the basis of a claim for damages"[49] is perhaps too broad. It seems not to be, but should be, limited to good faith transactions. Otherwise, the statement may be used as authority for the proposition that statutory authorization and compliance puts a "shield" over a transaction and thereby bars all subsequent actions for damages. Such construction of the language could effectively negative the existence of any fiduciary relationship between majority and minority shareholders in Texas. Without the existence of that relationship, there would be no protection against or remedy for self-dealing on the part of the majority. Therefore, the language to the effect that an authorized transaction is not actionable should be given narrow application.[50]

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## Amended Section 7 of the Clayton Act: Substantially To Lessen Competition in Vertical Integrations

Brown Shoe Company, the third largest seller of shoes by dollar volume in the United States, proposed to acquire G. R. Kinney, the eighth largest seller by dollar volume, through an exchange of Kinney for Brown stock. The United States filed a civil antitrust suit to enjoin[1] the contemplated merger which the government claimed would violate section 7 of the Clayton Act.[2] Upon the district court's refusal to issue a preliminary injunction prohibiting the merger, Brown, also the fourth ranked shoe manufacturer with over 1230 owned, operated, or controlled retail outlets, had acquired Kinney, the nation's largest family shoe retailer with 350 retail shoe stores, subject to certain conditions.[3] At the trial, however, the

[49] 365 S.W.2d at 5.

[50] *But see* Stauffer v. Standard Brands, Inc., ___ Del. ___, 187 A.2d 78 (1962), in which the court stated that the very purpose of merger statutes was to provide a means of eliminating the minority interest in the enterprise.

[1] Injunctive relief was sought under § 15 of the Clayton Act, 62 Stat. 909 (1948), 15 U.S.C. § 25 (1958).

[2] Cellar-Kefauver Amendment, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

[3] The memorandum opinion of the district court stated, *inter alia*, that: (1) Kinney would retain ownership of its assets; (2) Kinney would be independently operated and none of Brown's directors or directors of Brown's subsidiaries could be on Kinney's board of directors; (3) all profits and assets of Kinney would be identified with Kinney; (4) Brown could hold but could not sell the stock of Kinney; (5) any newly acquired outlets

district court found that the merger violated section 7. Brown appealed to the Supreme Court.[4] *Held, affirmed*: The effect of the vertical and horizontal aspects of the Brown-Kinney merger "may be substantially to lessen competition" in the relevant lines of commerce within the pertinent geographic markets in violation of amended section 7 of the Clayton Act. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Prior to 1950, section 7 of the Clayton Act was designed basically to halt in their incipiency the growth of holding companies and the growth of corporations expanding through the acquisition of stock in their competitors.[5] Section 7 applied only to mergers which were consummated via stock acquisitions, and the purchase of a corporation's *assets* remained as an effective "loophole."[6] Enforcement officials[7] also interpreted the original section as being applicable only to horizontal mergers,[8] *i.e.*, the merging corporations had to be direct competitors.[9] Vertical integrations escaped unscathed under that sec-

by Kinney would be in the name of Kinney and controlled by Kinney; (6) no Kinney retail outlet could be closed because of competition with Brown; and (7) Brown could not take over or close any factory of Kinney. 179 F. Supp. 723, 724 n.4 (1959).

[4] Supreme Court jurisdiction rested upon § 2 of the Expediting Act, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958), which states: "In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Justice Harlan vigorously dissented on the issue of jurisdiction, arguing that a final judgment had not been rendered in the district court because the divestiture decree had not been ordered. 370 U.S. 294, 357 (1962). The majority, 370 U.S. at 304-11, upheld the finality of the judgment based upon (1) the disposal of all issues by the district court, (2) the nature of a full divestiture, and (3) the practice of the Court in prior cases. The Court cited Maryland & Virginia Milk Prods. Ass'n v. United States, 362 U.S. 458 (1960).

[5] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592-93, 597-98 (1957); see Martin, Mergers and the Clayton Act 43, 48, 258 (1959).

The original section 7, 38 Stat. 731 (1914), read in part as follows:

> No Corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another engaged also in commerce, where the effect of such acquisition may be to substantially lessen [*sic*] 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 of any line of commerce.

[6] Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 595 (1934); FTC v. Western Meat Co., 272 U.S. 554, 559-60 (1926) (assets purchased through stock unlawfully held, merger not proscribed); United States v. Celanese Corp. of America, 91 F. Supp. 14, 17 (1950); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 229-30 (1960).

[7] The Federal Trade Commission and the Justice Department are both charged with enforcing the federal antitrust laws.

[8] In United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957), the Court stated: "During the 35 years before this action was brought, the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions." See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

[9] International Shoe Co. v. FTC, 280 U.S. 291, 298 (1930); Vivaudou, Inc. v. FTC, 54 F.2d 273, 276 (2d Cir. 1931); Temple Anthracite Coal Co. v. FTC, 51 F.2d 656,

tion for at least twenty-five years until the 1957 *du Pont-GM*[10] case, in which the Supreme Court held that the original section did apply to vertical integrations.[11] Nevertheless, for many years prior to *du Pont-GM*, section 7 had not restricted corporate growth in its early stages unless a company purchased the *stock* of a *competing* corporation. Congress, cognizant of the numerous deficiencies, amended section 7 in 1950 to read:

> 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.[12] (Other parts omitted.)

The proscription of mergers which, in their incipiency, tended to lessen competition, continued to be an objective of section 7.[13] However, "asset acquisitions" no longer were immune,[14] since the amended provision stated that "no corporation . . . shall acquire . . . the assets of another corporation . . . ."[15] In addition, Congress expressed the intention to condemn both the previously prohibited horizontal combinations (mergers of businesses on the same level in the productive process) and vertical combinations (supplier-consumer arrangements), which had gone unprosecuted until the *du Pont-GM*[16] case.[17] According to the Committee Reports,[18] the amendment also

659-61 (3d Cir. 1931); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 Yale L.J. 1, 65 (1959). *Contra*, United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957).

In the *du Pont* case, the Court held that the companies did not have to compete directly to invoke the sanctions of section 7. According to the Court, the merger came within the scope of the statute so long as the combined effect restrained commerce or created a monopoly. However, that case, interpreting the original section 7, was not decided until 1957. The amendment of 1950 to section 7, 64 Stat. 1125, gave Congressional effect to the *du Pont* interpretation of the original provision. The new, amended provision eliminated the requirement that "competition between the corporation whose stock is . . . acquired and the corporation making the acquisition" must be lessened. See text accompanying note 12 *infra*, for the text of the new section.

10 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

11 See note 9 *supra* and accompanying text.

12 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

13 H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).

14 "The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder [*sic*] the present law it is prohibited from acquiring the stock of said corporation." S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).

15 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

16 See note 9 *supra* and accompanying text.

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

18 *Ibid.*

outlawed conglomerate mergers (fusion of related and unrelated businesses), which had completely escaped the purview of the original statute. By altering section 7 in such a manner, Congress intended to condemn all mergers whenever their effect "may be substantially to lessen competition" "in any line of commerce" "in any section of the country."[19]

*Brown Shoe* is the first major decision by the Supreme Court construing amended section 7 of the Clayton Act.[20] To find violations in both the horizontal and the vertical aspects of the merger, the Court had to resolve three issues in each plane: (1) what was the "line of commerce,"[21] (2) what was the "section of the country,"[22] and (3) was there a substantial lessening of competition within the defined market.[23] This Note is limited to the ruling that the vertical integration constituted a substantial lessening of competition.

## I. What Is "Substantially To Lessen Competition"?

### A. *Percent Of The Market Foreclosed*

Kinney concentrated on the retailing of shoes, since its leadership in the shoe industry was derived from its 400 retail outlets.[24] Kinney's stores accounted for 1.2 per cent of all national retail shoe sales by dollar volume or about 1.6 per cent of the national pairage of nonrubber footwear.[25] Kinney's manufacturing plants furnished 20 per cent of its retail needs, and the rest were acquired from outside suppliers.[26] Hence, for purposes of determining the percentage of the

[19] See S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950).

[20] See United States v. Jerrold Electronics Corp., 365 U.S. 567 (1961) (*per curiam*); Maryland & Virginia Milk Prods. Ass'n v. United States, 362 U.S. 458 (1960).

[21] The product market ("line of commerce") for both the vertical and horizontal phases of the merger consisted of men's, women's, and children's shoes.

[22] The geographic market ("section of the country") for the horizontal aspect of the merger comprised every city with a population exceeding 10,000 where Brown and Kinney either owned or controlled a retail outlet. However, as to the vertical aspect of the merger, the nation as a whole constituted the geographic market.

[23] The consolidation of Brown and Kinney's retail outlets, the horizontal aspect of the merger, substantially lessened competition because: (1) the combination resulted in Brown having 7.2% of the market share on the retail level; (2) the combination enabled the fusing enterprises, having a small share of the market, to deter competition in a highly fragmented industry; and (3) the combination gave the combined retail outlets the benefits of a manufacturer-supplier, allowing them to carry bigger inventories, to sell at lower prices, and to increase their advertising of shoes.

[24] 370 U.S. at 303.

[25] *Ibid.*

[26] *Ibid.* At the time of the trial, Kinney had 319 outside suppliers, 122 of whom furnished less than $1,000 worth of shoes each year. Because Brown, after the merger, supplied only 7.9% of Kinney's retail needs, only 22 of the suppliers were adversely affected by the merger. No data was furnished by either party or by the Court demonstrating how many competitors were actually injured. Therefore, it is not known if the 22 manufacturers which were injured by the merger constituted the small or the large suppliers of Kinney. See text *infra* for discussion.

wholesale market foreclosed by the Brown-Kinney merger, assume that the figure 1.2 per cent (*i.e.*, Kinney's national retail sales) was the dollar percentage of Kinney's purchases for its retail needs. Since Kinney supplied 20 per cent of the needs of its retail outlets, 1.2 per cent should be reduced accordingly. The market share thus affected by the merger was approximately 0.9 per cent, or less than 1 per cent. So presented, the question then is whether the possible foreclosure of this particular market threatened "substantially to lessen competition."

In interpreting the "effect" clause of section 7, the Court might have invoked a flat quantitative approach. Indeed, in *Standard Oil Co. v. United States*,[27] the Court stated in essence that "when competitors are foreclosed from a substantial enough share of the market, it is not far-fetched to infer a substantial lessening of competition."[28] However, in 1961 in *Tampa Elec. Co. v. Nashville Coal Co.*,[29] the Court dismissed as "quite insubstantial" the closing of less than one per cent of the relevant market by a twenty-year requirements contract. In the instant case, the Court refused to apply a per se test based upon quantitative grounds, stating that ". . . the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive."[30] The Court did recognize that a merger could be upheld or proscribed per se if the combination was either *de minimis* or monopolistic in proportion.[31] If *de minimis* in size, the consolidation would not even violate the Clayton Act;[32] if monopolistic, it would breach both the Clayton Act and the Sherman Act.[33] Ap-

[27] 337 U.S. 293 (1949) (decided under § 3 of the Clayton Act).

[28] Kessler & Stern, *supra* note 9, at 28. In Standard Oil Co. v. United States, 337 U.S. 293 (1949), Justice Frankfurter, writing for the majority, expressed the thought that a high volume of sales infers a substantial lessening of competition when he said:

> It is clear, therefore, that unless a distinction is to be drawn for purposes of the applicability of § 3 between requirements contracts and contracts tying the sales of a nonpatented to a patented product, the showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the *inference that competition has been or probably will be substantially lessened*. *Id.* at 305. (Emphasis added.)

[29] 365 U.S. 320 (1961). The suit was brought under § 3 of the Clayton Act, which contains language similar to that in § 7.

[30] 370 U.S. at 329.

[31] *Id.* at 328-29.

[32] *Id.* at 329. Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 824-25 (9th Cir. 1961) (dictum). See also International Salt Co. v. United States, 332 U.S. 392 (1947) (involving a tying clause under § 3 of Clayton Act).

[33] *Id.* at 328. Sherman Act §§ 1-3, as amended, 69 Stat. 282 (1955), 15 U.S.C. §§ 1-3 (1958). The exact point at which a market share becomes monopolistic is not clear. However, in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Judge L. Hand by way of *obiter dictum* said: "That percentage [90%] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *Id.* at 424 See United States v. E. I. du Pont de

parently, then, a quantitative analysis is applicable only if the percentage of the market share foreclosed lies at either extreme. If though, as in the principal case, the Court classifies the market share affected between *de minimis* and monopolistic in scope, a per se test will not be applied, and "other factors"[34] must be examined to obviate the merger.

### B. *The Nature And Purpose Of The Arrangement*

One "other factor" important in the analysis of a combination is the *nature and purpose* of the arrangement. From the Court's examination of this element alone in the principal case, it decided that the Brown-Kinney fusion tended substantially to lessen competition. The Court found that a merger is analogous to a tying agreement in that both foreclose a share of the market.[35] However, the reasoning is specious. Any "vertical integration, whether by contract or ownership, necessarily forecloses access to a segment of the market, since competitors of the integrating firm often can no longer deal with the integrated enterprise."[36] When one corporation purchases another, one of two purposes normally motivates the acquiring firm: (1) either it purchases for investment only; or (2) it buys in order to have a captive consumer or supplier of its product.[37] If one company

Nemours & Co., 351 U.S. 377 (1956), in which the Court essentially held that the question of monopoly turns on whether the seller has "power to control prices or exclude competition" (*id.* at 391); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 821-22, 827 (9th Cir. 1961) (court proscribed merger affecting 62% of the market share); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341-44 (D. Mass. 1953) (75% of the market share found sufficient).

[34] 370 U.S. at 329. The majority stated: "In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe."

[35] *Id.* at 332. A tying contract is inherently anticompetitive since it makes the customer take a different product in order to secure the desired one. The Court has held that such an arrangement substantially lessens competition even when a small share of the market is affected. See Standard Oil Co. v. United States, 337 U.S. 293 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947). On the other hand, a requirements contract does not have the inherent anticompetitive feature which is so evident in a tying agreement. The requirements contract is used to supply the needs of the customer and not necessarily to force other goods or products on him. Also, it is easily terminable and generally runs for only a short duration. Such an agreement can be beneficial to competition, because a market for the supplier can be created to insure that his goods will be bought. It also gives the consumer the benefit of a wider range of goods. Therefore, requirements contracts generally can be said to aid competition. However, if one tends substantially to lessen competition, it will be proscribed. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[36] Kessler & Stern, *supra* note 9, at 14. In United States v. Columbia Steel Co., 334 U.S. 495, 523 (1948), the Court stated: "A subsidiary will in all probability deal only with its parent for goods the parent can furnish." Adelman, *Corporate Integration*, in How To Comply With the Antitrust Law (1954), cited in Kessler & Stern, *supra* note 9, at 50 n.222: "Integration is always and necessarily an exclusion of competitors."

[37] *Cf.* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 567-68 (E.D. Pa. 1960), *aff'd per*

acquires another solely for investment, and there are no contacts whatsoever between the two except the flow of a proper share of the profits or dividends, section 7 is not violated.[38] On the other hand, a corporation purchased in whole or in part as a consumer or supplier does affect competition and adverse consequences can result.[39] Brown and Kinney did not plead that the purchase was for investment only, and the Court held that the merger foreclosed a segment of the market. Obviously, the nature and purpose approach begs the question, which is whether the segment foreclosed was "substantial." The only objective accomplished by the Court's discussion of the nature and purpose of the arrangement was to show that the "injurious" effects may flow from any merging enterprises.

### C. *Trend In The Industry And Injury To Competitors*

Since 1951, Brown had been in the process of acquiring retail outlets, either by franchise contract[40] or by outright purchase.[41] In each instance, Brown significantly increased its output to the acquired retailers.[42] Consistent with its growth on the retail level, Brown steadily increased its manufacturing facilities until in 1955 Brown accounted for 4 per cent of the total production of the nation's footwear.[43] Kinney, on the other hand, was the twelfth largest

*curiam,* 365 U.S. 567 (1960); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 316 (D. Conn. 1953), *aff'd,* 206 F.2d 740 (2d Cir. 1953).

[38] The phrase "no contacts whatsoever" should be taken literally. The acquiring company must completely separate itself from the acquired firm, for example, by having nonparticipating stock, not supplying to the integrated enterprise, or completely alienating itself from any activities of the purchased company. If any divergence from this course of action results, in all probability the acquiring firm will be ordered to divest itself of the stock. *Cf.* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 531 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 316-17 (D. Conn. 1953), *aff'd,* 206 F.2d 740 (2d Cir. 1953).

[39] See note 37 *supra* and accompanying text.

[40] The franchise agreement is a written contract with an independent retailer assuring the supplying company (Brown in this case) that a particular dealer will carry its line of shoes under certain stipulations. The agreement here further provided, *inter alia,* "that the retailer will 'concentrate . . . [his] business within the grades and price lines of shoes covered by Brown Shoe Company Franchises, and will have no lines conflicting with the Brown Shoe Company Brands.'" Brief for Appellant, p. 44.

[41] 370 U.S. at 302. The Court treated the franchise outlets as equivalent to company-owned stores and failed to recognize that control over the subsidiary is indirect when a contract is used as a basis for integration. The fact that the agreements were terminable upon thirty days notice by either party lessens the control to even a greater degree. Therefore, it is doubtful whether the 645 franchise outlets should be equated with the 500 or so company-owned stores. Whether such a distinction would have altered the analysis or result of the principal case is rather doubtful, but by making the distinction, the Court would have correctly analyzed the facts by recognizing the inferiority of such arrangements as compared with ownership. As the Court determined the case, it left the impression that any arrangement with a consumer, however loose, will suffice for purposes of showing supplier-consumer ties. See Kessler & Stern, *supra* note 9, at 4.

[42] 370 U.S. at 302.

[43] *Id.* at 303.

shoe manufacturer, accounting for 0.5 per cent of the nation's production.[44] Thus, Brown's acquisition of Kinney increased the former's production to 4.5 per cent by 1956.[45]

Brown was not the only company in the industry whose growth was obtained by the consolidation of manufacturing and retailing sources. Beginning in 1947, the industry as a whole moved in this direction.[46] By 1956 the top four manufacturers—International Shoe Company, Endicott-Johnson, Brown (including Kinney), and General Shoe—produced approximately 23 per cent of the nation's footwear.[47] Concomitantly, a 10 per cent decrease resulted in the number of shoe producers (from 1,077 to 970) during the period of 1947-54.[48] While increasing their shoe production, the larger firms also systematically acquired retail outlets.[49] Relying upon these facts, the Court found that a significant trend existed in the shoe industry on both the manufacturing and retailing levels; this finding also contributed as an "other factor" leading to the proscription of the Brown-Kinney merger.[50]

The natural question arising from this holding is at what degree or level do such trends contribute to a violation of section 7.[51] A trend that produces concentration equal to that in the automobile or steel industry quite noticeably deters competition within the scope of section 7,[52] but the shoe industry had not reached those levels of concentration. Instead of determining specific levels or degrees of the trend, the Court examined the effect of the trend upon the industry. Under the Court's analysis, a trend would result either in "injury to competition"[53] or "injury to competitors."[54] In the former,

[44] *Ibid.*

[45] 179 F. Supp. 721, 727. The district court spoke of 5%, but 4.5% is the more accurate figure.

[46] 370 U.S. at 301.

[47] *Id.* at 300.

[48] *Id.* at 301. By 1958, the number of shoe producers had been reduced to 872. *Id.* at 301 n.6.

[49] *Ibid.* Even though the Court recognized a trend on both the manufacturing and retailing levels, it did not produce a chart or figures showing the year to year acquisitions of manufacturers or retailers by the leading firms in the shoe industry. The Court, however, did note the number of retail outlets held by each major producer in 1945 and 1956, but it failed to supply figures for the intervening years. Merely because there was an increase in the number of retail outlets acquired over the eleven-year span, it does not necessarily follow that an upward trend in the acquisition of retail shoe stores continued throughout this period. It may be that the purchasing of independent stores had leveled off, and might even have been on the downswing. Therefore, by omitting this detailed study of economic data, the Court's analysis of a trend in the industry is not factually substantiated.

[50] See 1960 Wash. U.L.Q. 371.

[51] See 45 Cornell L.Q. 96 (1959).

[52] *Cf.* United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 604 (S.D.N.Y. 1958).

[53] Kessler & Stern, *supra* note 9, at 21.

[54] *Id.* at 22.

the effect on businesses is the sole concern;[55] whereas, in the latter, primary importance is placed upon the result in the market place, *i.e.*, lower prices, poorer quality, and decreased supply.[56] In the case of Brown-Kinney, the Court relied heavily upon the "injury to competitor" principle. Chief Justice Warren, writing for the majority, stated that "the necessary corollary of . . . [the trend of the shoe industry was] the foreclosure of independent manufacturers from markets otherwise open to them."[57] To substantiate this conclusion, he added:

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[58]

The Ninth Circuit had expressed the same sentiment earlier in *Crown-Zellerbach v. FTC*:[59]

> Congress was not concerned about increased efficiency; it was concerned about the competitor,—the small business man whose "little independent units are gobbled up by bigger ones," and about other competitors whose opportunities to meet the prices of the larger concerns and hence compete with it might be diminished by a merger which increased the concentration of power in the large organization.

In the principal case, for the first time, the Supreme Court indicated that an important concern of section 7 was the protection of small business.[60] The majority opinion revolved around the "injury to competitor" approach, even though the Court paid some small tribute to the "injury to competition" principle.[61] Thus, the dis-

[55] *Ibid.*

[56] *Id.* at 21-22.

[57] 370 U.S. at 332.

[58] *Id.* at 344.

[59] 296 F.2d 800, 825 (9th Cir. 1961).

[60] *Cf.* Maryland & Virginia Milk Prods. Ass'n v. United States, 362 U.S. 458 (1960) (horizontal merger); A. G. Spalding & Bros. v. FTC, 301 F.2d 585 (3d Cir. 1962) (horizontal and vertical merger); Reynolds Metal Co. v. FTC, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70471 (D.C. Cir. Sept. 27, 1962) (vertical integration); Scott Paper Co. v. FTC, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70271 (3d Cir. March 27, 1962) (backward vertical integration); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958) (horizontal merger via stock acquisition); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1960) (horizontal and vertical merger); United States v. Bethlehem Steel Co., 168 F. Supp. 576 (S.D.N.Y. 1958) (horizontal and vertical merger).

[61] This line of thought, however, is not limited to the majority's opinion. The concurring opinion of Justice Harlan found this point of primary importance in condemning the merger. Although he failed to acknowledge that only 22 manufacturers could potentially be damaged by the merger, he prohibited the combination simply because some of

cussion of the nature and purpose of the arrangement and of the trend in the industry served only as vehicles to effectuate the majority's interpretation of the statute. The ultimate conclusion to be drawn from the opinion is that a merger the effect of which "*may be*" *to drive competitors from the market* will substantially lessen competition, particularly when there is a definite trend towards constricting competitive opportunities.

Did Congress intend to protect small, locally owned businesses? Although the committee history suggests that intention,[62] the House and Senate reports relied upon by the Court expressed only the view of those in favor of the legislation and not necessarily that of Congress. The act as amended expresses the intent of Congress. It is not known whether a majority of the legislators intended section 7 to prevent invasion by larger firms into markets consisting of many small enterprises. However, the principal case employed this "protection theory" to aid in proscribing the merger.

D. *Position Of The Acquiring Firm In The Market Structure*

The fact that it was the fourth largest shoe manufacturer that was combining with another corporation, regardless of size, seemed to disturb the Court, although the concern was only implicit in its analysis. From the tenor of the opinion, the position of a firm within the market structure will always be an influencing factor in these cases. In the light of other recent decisions,[63] the importance of "rank" in the industry is recognizable, since the mergers that have been condemned as violative of section 7 generally have involved only major companies.[64] The overtone of the "rank" approach is to prevent concentration within any industry, thereby effectuating the

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the competitors were damaged, irrespective of the quantity. The full weight of his opinion reflects this approach. Justice Harlan said, 370 U.S. at 373: "[W]hen the volume of . . . [Kinney's] purchases from independent manufacturers in various parts of the country is large enough to render it probable that these suppliers, if displaced, will have to fall by the wayside, it cannot, in my opinion, be said that the effect on the shoe industry is 'remote' or 'insubstantial.' "

On the other hand, Justice Clark failed to give credence to either concept by stating simply that the vertical merger "created a 'reasonable probability' that competition in the manufacture and sale of shoes on a national basis might be substantially lessened." 370 U.S. at 357.

[62] See H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949); S. Rep. No. 1775, 81st Cong., 1st Sess. (1950).

[63] See Reynolds Metal Co. v. FTC, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70471 (D.C. Cir. Sept. 27, 1962); A. G. Spalding & Bros. v. FTC, 301 F.2d 585 (3d Cir. 1962); Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961); United States v. Koppers Co., Trade Reg. Rep. (1962 Trade Cas.) ¶ 70194 (W.D. Pa. Jan. 9, 1962); Union Carbide Co., Trade Reg. Rep. (1961 Trade Cas.) ¶ 29402; American Crystal Sugar Co. v. Cuban-American Sugar Co., 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 740 (2d Cir. 1953).

[64] See note 63 *supra*.

spirit and purpose of the statute. Congress favored industries with intense competition as opposed to oligopolistic markets made up of three or four firms producing most of the output.[65] A leading company which acquires a smaller enterprise may not increase its standing. However, it does expand its output potential because of its size, and it does lessen competition by being able to supply more consumers with more goods. That is precisely what the statute is designed to prohibit. Hence, the rank of a firm within a defined market structure will always prove to be of great importance in viewing a merger.

It may be argued that the position of a company in the industry, coupled with the share of the market foreclosed, will be sufficient for the courts to block mergers without examining any other factors. However, it is doubtful if the courts will ever limit themselves to such a restrictive test. More likely, the courts will consider all factors in analyzing all mergers, just as in the case of Brown and Kinney. In any event, position or rank will be weighed, analyzed, and considered in conjunction with the other factors, even though in fact it may be the determining issue.

## II. CONCLUSION

In the light of the trend towards vertical concentration in the shoe industry, the Supreme Court condemned the merger between the fourth largest shoe manufacturer (Brown) and the largest family shoe retailer (Kinney) in order to prevent a foreclosure of less than one per cent of the retail buying market. Although it is difficult to ascertain the importance ascribed to it by the Court, it is clear that the likely injury to competitors formerly supplying Kinney its retail needs was also considered. The Court thus has provided itself a number of broadly-stated criteria by which it can prohibit future vertical mergers. Unless it can qualify under the "failing firm" doctrine of *International Shoe Co. v. FTC*,[66] a merger involving a large enterprise has little chance of survival. Only combinations by small businesses trying better to compete in an imperfect market[67] or by enterprises producing "competitive, economic, or social ad-

[65] See S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

[66] 280 U.S. 291 (1930). See also 45 Va. L. Rev. 421 (1961).

[67] Chief Justice Warren speaking for the majority said:

> . . . Congress foresaw that the merger of the two large companies or a large and a small company might violate the Clayton Act while the merger of two small companies might not, although the share of the market foreclosed be identical, if the purpose of the small companies is to enable them in combination to compete with larger corporations dominating the market. 370 U.S. at 331.

vantages"[68] will avoid the strictures of section 7. The Court has promulgated several elusive tests which will enable it both to use wide latitude and to oscillate from a quantitative to a qualitative test in proscribing mergers. Section 7, as modified in 1950 by Congress, has moved from limited applicability to potentially unlimited application. The ability to predict the outcome of a given merger has decreased proportionately.

The result of the principal case is justified because of the legislative history of the Act. Congress in amending section 7 intended to thwart the inch-by-inch destruction of effective competition. A merger capable of causing that result is properly subject to condemnation. No longer is efficiency of production the sole purpose of legislation or the sole criterion for interpreting statutes. The preservation of competition and competitors is now to be considered in juxtaposition with the "efficiency of production" concept. Section 7, as construed by the Court, has turned back the inherent centripetal tendency of business. As a result, vertical integration can only be achieved safely via internal expansion rather than by merger.

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[68] *Id.* at 334.