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Merger Litigation under the Sherman Act - Choice or Echo

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I. INTRODUCTION

Although the Sherman Antitrust Act[1] is in its seventy-fifth year, an effective interpretation of the law has eluded the courts. The earliest Sherman Act cases, using a literal interpretation, construed the act as outlawing *every* combination resulting in *any* restraint of trade.[2] However, in the *Standard Oil* case,[3] the Supreme Court enunciated the so-called "rule of reason" under which the Sherman Act is interpreted as applying only to *unreasonable* restraints of trade. The courts and litigants have since faced difficulty with the application of this test.

Nowhere are the problems of Sherman Act interpretation more apparent than in the area of merger litigation. Early developments made it painfully clear that the Sherman Act, as interpreted by the courts, was not a very effective weapon with which to attack the practice of using mergers and acquisitions to gain monopoly power. In 1914 Congress passed the Clayton Act.[4] Section 7 of the act represented a legislative attempt to prevent the attainment of a monopoly through merger or acquisition by imposing stricter standards than the courts had imposed under the Sherman Act. The original act outlawed acquisitions the effects of which "may be substantially to lessen competition, or tend to create a monopoly."[5] Thus, the acquisition of stock[6] of a competing firm was proscribed if it resulted in an

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958); parts pertinent read:

> Section 1. . . . Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> Section 2. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

The act will be referred to frequently throughout this Note with full citation thereof omitted. References to §§ 1 and 2 will always pertain to the sections of the Sherman Act.

[2] *E.g.*, Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

[3] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[4] 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27, 44 (1958). Throughout this Note, reference will generally be to the popular name of the statute without complete citation. References to § 7 relate to the Clayton Act.

[5] Clayton Act § 7, ch. 323, 38 Stat. 731 (1914) (amended by 64 Stat. 1125 (1950), as amended, 15 U.S.C. § 18 (1958)).

[6] In its original form, § 7 was aimed at the acquisition of *stock* in a competing firm; hence another loophole remained—the acquisition of *assets*. This fact rendered § 7 largely impotent in merger litigation until amended in 1950. 64. Stat. 1125 (1950), 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914). Now, pertinent parts of § 7 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 sub-

unreasonable restraint of trade or if it *might* have substantially lessened competition or *tended* to create monopoly. The two acts are basically complimentary. The Clayton Act seeks to prevent increases in market power; the Sherman Act seeks to prevent undue exertion of market power.[7]

II. The Railroad Cases—The Great Competing Systems Test

Although the Government had relatively little success in attacking mergers by use of the Sherman Act, there were several early cases dealing with railroad consolidations that are notable exceptions. The first major Sherman Act victory for the government was in *Northern Sec. Co. v. United States.*[8] Northern Securities was a holding company incorporated in New Jersey for the purpose of acquiring stock in the Northern Pacific Railway and the Great Northern Railway, which were parallel and competing lines extending from Duluth, Minnesota, westward to Seattle. The Supreme Court held that the holding company was a combination in restraint of trade which violated section 1 of the act. The Court concluded:

> No scheme or device could more certainly come within the words of the act . . . or could more effectively and certainly suppress free competition between the constituent companies. . . . The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.[9]

The Court offered no clear test for determining illegality.[10] It found an intent to eliminate all competition between the companies through the holding company device but stated that intent to monopolize was not a necessary element of a violation. Furthermore, no predatory practices were alleged—indeed, the combination was assailed before any foul play could have transpired. It may be that, although

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ject 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 tend to create a monopoly. (Emphasis added.)

[7] Hall & Phillips, *Economic and Legal Aspects of Merger Litigation, 1951-1962,* 10 U. Houston Bus. Rev. 1 (1963).

[8] 193 U.S. 197 (1904).

[9] *Id.* at 327.

[10] The "rule of reason" was not enunciated until 1910 in the *Standard Oil* decision. See text accompanying note 3 *supra.* The majority in *Northern Securities* rejected a "reasonable" interpretation of § 1 although the concurring opinion urged the proposition. The concurring opinion indicates that use of the "rule of reason" would not have changed the outcome of the case. Northern Sec. Co. v. United States, 193 U.S. 197, 361 (1904).

the Government's case was ostensibly against the combination itself, two other factors were important to the case. First, the litigation apparently represented an indirect effort to attack the mechanism of the holding company as a device for gaining monopoly power.[11] The second of these factors was an attempt to curtail the activities of the so-called Robber Barons—Hill, Morgan, Stanford, Harriman and others. These men were financial giants who literally controlled the nation's purse strings.[12] They were the brains behind the trusts and the holding companies, and they fed upon these devices for controlling industry and fleecing the public. The Government's victory in the first railroad case was a great defeat to these institutions.

The second railroad case[13] involved the Union Pacific Railroad Company's acquisition of stock in the Southern Pacific Company. The Union Pacific's line extended from St. Louis westward to Ogden, Utah, at which point it connected with the Central Pacific, whose line terminated in San Francisco.[14] The Southern Pacific's tracks extended from New Orleans to San Francisco by way of Texas, New Mexico, and Los Angeles. The Government sought to divest Union Pacific of its forty-six percent stock interest in the Southern Pacific. The Supreme Court upheld the Government and ordered divestment. The Court inferred from the facts a scheme by which Union Pacific was attempting to monopolize the competing roads and to suppress competition.[15] However, no predatory practices were alleged in the pursuit of this scheme. Moreover, the percentage of competing traffic was small, but the Court brushed this factor aside arguing that it was large in dollar volume. The Court enunciated no specific test of illegality but, again, only noted that "the consolidation of two *great competing systems* of railroad engaged in interstate commerce . . . creates a combination which restrains interstate commerce within the meaning of the statute."[16] It is urged that the Court was determined to stop further railroad consolidations. It apparently shared a fear with the Government and the public—a fear that monopolization in this vital transportation industry could place the entire nation at the mercy of the railroads.

[11] See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Colum. L. Rev. 179, 192 (1932).

[12] For a fascinating and revealing background to this era, see Josephson, The Robber Barons (1962).

[13] United States v. Union Pac. R.R., 226 U.S. 61 (1912).

[14] This acquisition was later dissolved in the fourth railroad case. The fact that Southern Pacific owned the Central Pacific was examined but was not the basis for the decision. See text accompanying notes 19-20 *infra*.

[15] United States v. Union Pac. R.R., 226 U.S. 61, 95 (1912).

[16] *Id.* at 88. (Emphasis added.)

In *United States v. Reading Co.*,[17] the Government sought to dissolve a holding company the alleged purpose of which was to control the production and transportation of coal from the vast Schuylkill region of Pennsylvania. If such a purpose could have been effected, the holding company would have controlled practically the entire supply and distribution system for coal in the eastern United States. The Supreme Court, in upholding the Government, concluded that the holding company represented a calculated purchase for control of *great* competing carriers and *great* competing companies and, thus, was condemned by the Sherman Act.[18] Again, no real test of illegality was advanced by the Court, but the emphasis was placed on the presence of *great competing* firms and the elimination of competition between them through the holding company device. The Court noted that this factor was enough to render the combination unlawful without more. Hence, although the Court found that an intent to monopolize existed and that the railroad had engaged in such predatory practices as suppressing the building of a competing line, these factors apparently were not necessary to the decision.

In the fourth railroad case, the Government alleged as a violation of section 1 the ownership by the Southern Pacific Railway of controlling stock interest in the Central Pacific Railway.[19] As is noted above, the Central Pacific ran from San Francisco to Ogden where it connected with the Union Pacific, thus constituting a northern transcontinental system. The Southern Pacific constituted a southern transcontinental system. The Supreme Court upheld the Government and ordered divestment of the stock and cancellation of a lease agreement between the two systems. A specific intent to monopolize was found but there were no predatory practices involved. The Court again expressed concern about the combination of two "giant" systems of transportation and cited the previous three cases as collectively establishing that "one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade."[20]

The most significant thread to be found running through these four decisions is the element of *great competing systems.* Because of the importance of railroad transportation and the gigantic nature of railroad operations at the time of these decisions, the adjective is appropriate and the Court's concern understandable. Predatory prac-

[17] 253 U.S. 26 (1920).
[18] *Id.* at 59.
[19] United States v. Southern Pac. Co., 259 U.S. 214 (1922).
[20] *Id.* at 230-31.

tices were found to exist in only one of the cases, *Reading*, but this factor was not crucial to that decision. A specific intent to monopolize was found in each case but neither was this fact controlling. The controlling factor appears to have been the elimination of competition between *great* firms.

III. Columbia Steel—The Legitimate Business Defense

The last attempt before 1950 to apply section 1 of the Sherman Act to mergers or acquisitions was in *United States v. Columbia Steel Co.*[21] In that case the Government sought to prevent the acquisition of Consolidated Steel Corporation by United States Steel Corporation through its wholly owned subsidiary, Columbia Steel Company. The Government charged that the purchase would result in the exclusion of all manufacturers except United States Steel from the business of supplying Consolidated's requirements for rolled steel products. These requirements totaled less than one half of one percent of the national market or three percent of the market area of eleven western states and amounted to slightly more than two million dollars over the preceding ten-year period. Such an exclusion, according to the Government, constituted an unreasonable restraint of trade in violation of section 1.[22] In support of its contention the Government cited the railroad cases for the proposition that "control by one competitor over another violates the Sherman Act, even though the percentage of business for which they compete may be small."[23] The Court disposed of the railroad cases by simply noting that their facts were so dissimilar that they afforded little guidance. The Court held that the Government had failed to prove its case and that the restraint of trade was not unreasonable.

No predatory practices were found nor was any intent to restrain trade alleged. The Court did attempt to define a standard of illegality. It was suggested that many factors be considered in determining what constitutes an unreasonable restraint under the Sherman Act. Among the considerations are the percentage of business controlled, the strength of remaining competition, the purpose (legitimate or otherwise) of the acquisition, and the peculiar characteristics of the product market or area market.[24] As for market percentages, the

[21] 334 U.S. 495 (1948).

[22] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). It was alleged further that the elimination of existing competition between Consolidated and United States Steel in the sale of structural fabricated products and pipe was a violation of § 1.

[23] United States v. Columbia Steel Co., 334 U.S. 495, 531 (1948).

[24] *Id.* at 527-28.

Court refused to specify what was unreasonable, noting that this "varies with the setting in which that factor is placed."[25]

Turning its attention to the application of the test of illegality to the facts, the Court emphasized the *purpose* of the acquisition and concluded that it reflected a "normal business purpose rather than a scheme to circumvent the law."[26] This factor, namely the legitimacy of the acquisition, was ostensibly controlling. However, it is urged that the peculiar circumstances regarding United States Steel's purchase of its rolled steel plant at Geneva, Utah, from the Government tainted this litigation with what has been properly labeled "quasi-estoppel." The Court gave extensive treatment to the facts surrounding the purchase. The Government had urged United States Steel to submit a bid for the Geneva plant and the Attorney General had approved the proposed purchase so as to relieve United States Steel of any fears of antitrust repercussions. Hence, the Government was in a precarious position when United States Steel sought to assure itself a market for Geneva's products by purchasing Consolidated.[27]

Although the Court had proposed a test for illegality, that test is ambiguous at best. This fact, coupled with the perfunctory treatment of the railroad cases, left the law in a confused state with respect to the application of section 1 to mergers and acquisitions.

IV. Lexington Bank[28]—The Major Competitive Factor Test

In 1961, the merger of the First National Bank and Trust Company and Security Trust Company, both of Lexington, Kentucky, was approved by the Comptroller of the Currency[29] notwithstanding reports submitted by the Attorney General, the Federal Deposit Insurance Corporation, and the Board of Governers of the Federal Reserve System, each of which concluded that competition among commercial banks in Fayette County would be adversely affected by the proposed

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[25] *Id.* at 528.

[26] *Id.* at 533. The court seems to indicate that if a showing of anticompetitive effect had been made the acquisition would have been unlawful. The legitimate business defense emphasizes the motive behind a merger or acquisition and the many legitimate reasons for such a move. In this case the motive was to insure a market for the Geneva plant's products. Legitimate purposes could encompass any number of factors—desire to achieve economies of scale, to capitalize on technological advances, to enter a new market without internal expansion, etc. The emphasis is placed not so much on the structural characteristics as on performance features and the effect of the merger or acquisition on this performance.

[27] For an extensive analysis of the opinion and surrounding facts, see Note, 58 Yale L.J. 764. (1949).

[28] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[29] Pursuant to the Bank Merger Act of 1960, 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (Supp. II, 1961).

combination. Prior to the consolidation, First National and Security Trust ranked (of six competitors) first and fourth respectively in Fayette County in commercial bank assets, deposits, and loans. In trust department business, the respective positions were reversed. The proposed combination would possess 52.7 per cent of bank assets, 51.59 per cent of deposits, and 54.2 per cent of the loans in the area. The combined trust assets would approach ninety-five per cent with only four other competitors in this field.

The Government challenged the merger[30] under sections 1 and 2 of the Sherman Act urging that it constituted an unreasonable restraint of trade in the field of commercial banking (the relevant product market) in Fayette County (the relevant market area).[31] The complaint was dismissed by the trial court[32] but, on direct appeal, the Supreme Court reversed, holding that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of section 1 of the Sherman Act."[33] Considering the large portion of the relevant market shared by the two banks, the merger would, indeed, eliminate significant competition in that market.

The Court concluded that the case was governed by the railroad cases.[34] In *Lexington Bank,* no intent to monopolize was alleged. Although such an intent was found in each of the railroad cases, that factor was never considered controlling by the Court.[35] Neither did the government allege any predatory practices in the instant case. In only one of the railroad cases were such practices alleged and this factor was not considered controlling in that case.

The single factor of the railroad cases that remains from which the *Lexington Bank* holding supposedly is drawn is the elimination of some competition between great competing systems of transportation or great competing firms. But in applying this principle to the merger

[30] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), settled the issue of immunity of banks to antitrust litigation. Neither the Bank Merger Act of 1960, 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (Supp. II, 1961), nor the fact that banks already are regulated, renders banks immune to merger litigation. The application of the Clayton Act to bank mergers was established in this same case.

[31] The "factor of inconvenience" in the field of commercial banking localized the market area while the overall unique features of commercial banking defined the product market. 376 U.S. at 667-68.

[32] United States v. First Nat'l. Bank & Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962).

[33] 376 U.S. at 671-72. Since the Court found that the merger violated § 1, it was not necessary to consider the alleged violation of § 2 or to examine the impact of the merger on trust business in the area.

[34] See discussion of the railroad cases in text accompanying notes 8-20 *supra.* It is notable that in those cases percentage shares of the relevant market were not conclusive; it was the enormous dollar volume of competing business that was considered controlling.

[35] See paragraph of text following note 20 *supra.*

of two banks in Lexingon, Kentucky, the Court has used the term "major competitive factors." It is difficult to reconcile the terms "great competing systems" and "major competitive factors" in the context of antitrust law. The former was applied to the combinations of massive systems of transportation with social and economic significance that is unmatched by anything in modern life.[36] The latter term has been applied in only one case and is, as yet, undefined. In terms of abstract economic principles a railroad merger may be analogous to a bank merger in a given market. But, in the final analysis, one must view the railroad cases in their unique factual context.[37] Indeed, the peculiar facts of the railroad cases accounted for their rejection by the Court as precedent in *Columbia Steel*.[38]

In *Lexington Bank*, the Court limits *Columbia Steel* to *its* special facts. The implication of this is unclear. As noted earlier, *Columbia Steel* allegedly recognized a defense of "legitimate business purpose" to a section 1 charge.[39] The *Lexington Bank* opinion raises a question concerning the validity of such a defense in future antitrust cases.[40] Apparently, once the Government has established that merging companies control a high enough percentage of the relevant market so as to justify invoking the term "major competitive factors," the motive behind the acquisition is irrelevant. The question of legitimate business purpose or any other indicia of market performance must give way to the purely structural considerations of market shares. The dissenting opinion recognizes the danger of ignoring market performance and warns against condemning this or any merger on the principle of " 'bigness' alone."[41] Indeed, if no defenses save "failing firm"[42] are available, such a merger appears to be very close to a per se violation.[43]

V. THE MERGER OF SECTION 1 AND SECTION 7

Until this decision, one principle seemed well-established—namely,

[36] See Josephson, *op. cit. supra* note 12.

[37] See discussion of railroad cases in text accompanying notes 8-20 *supra*.

[38] United States v. Columbia Steel Co., 334 U.S. 495 (1948). See text accompanying note 23 *supra*.

[39] See note 26 *supra*.

[40] It appears that the only "special facts" to which the court could have referred in limiting *Columbia Steel* are those which gave rise to "quasi-estoppel." See text accompanying note 27 *supra*.

[41] 376 U.S. at 676.

[42] Under the test enunciated, if a party to a merger were a failing firm, it can be assumed that this firm would not be considered a "major competitive factor" and, hence, the test would not apply.

[43] Justice Department Views on Sherman Act Merger Cases, 5 Trade Reg. Rep. ¶ 50235 at 55293, in which the Antitrust Division Chief of the Justice Department is quoted as saying: "In the future . . . it may be that we no more need to examine the market impact of horizontal mergers than we need to examine the market impact of price-fixing agreements."

it was more difficult to challenge a merger under the Sherman Act than under the amended Clayton Act.[44] The dissent contended that the Government had not proved its case under the *stricter* statute but had presented "a Clayton Act case masquerading in the garb of the Sherman Act."[45] But this case may well have established that the Clayton Act test is no stricter than that of the Sherman Act. The majority is criticized for treating section 7 and section 1 as interchangeable;[46] but recent decisions indicate that this is what the Court has, in fact, done and will continue to do. An examination of some of these recent section 7 decisions clearly reveals this tendency.

The most significant section 7 decision in years was *United States v. Philadelphia Nat'l Bank*,[47] a case which is strikingly similar to *Lexington Bank*. In *Philadelphia Nat'l Bank*, the Court held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in the market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[48] Ostensibly, this amounts to a prima facia test as opposed to what this writer suggests may be a per se violation in *Lexington Bank*. But again it appears that only structural considerations were decisive (the merger involved thirty per cent of the relevant market) because the Court flatly rejected any defenses predicated on market performance.[49] In short, the burden of rebutting

[44] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958); see Note, 52 Colum. L. Rev. 766, 781 (1952). The writer confidently notes that "one of the few statements about the amendment to § 7 that can be made with certainty is that it embodies a test of illegality stricter than that of the Sherman Act. Beyond this the interpretation of the statute is left largely to the courts."

[45] "One can hardly doubt that it comes to us under these false colors only because the decision last Term [United States v. Philadelphia Nat'l Bank, see text accompanying notes 47-48 *infra*] that bank mergers could be reached under the Clayton Act was indeed a surprise to the Government." 376 U.S. at 679.

[46] 376 U.S. at 679 n. 10. Mr. Justice Reed laid open the way for this development in *Columbia Steel*. In an ominous footnote he suggested that the public policy enunciated by § 7 of the Clayton Act be considered when determining whether a given acquisition violates the Sherman Act. United States v. Columbia Steel Co., 334 U.S. 495, 507 (1948). See Note 58 Yale L. J. 764, 771 (1949), in which the author points out that this was the first merger case in which such a proposition was advanced. It was further suggested that the dissenter in the *Columbia Steel* Case would be more likely to support this point of view than the majority. Mr. Justice Douglas wrote the dissent in that case and now his opinion is that of the majority in *Lexington Bank*.

[47] 374 U.S. 321 (1963).

[48] *Id.* at 363.

[49] Three such defenses were specifically rejected by the Court. Philadelphia National Bank urged: (1) that only through the merger could it follow its customers to the suburbs; (2) that the increased lending limit would allow the new bank to compete effectively with the larger New York banks for business, and (3) that the city of Philadelphia would profit from having a larger bank which could stimulate economic development in the area by attracting new business. *Id.* at 370-71.

the presumption of a violation is practically unsustainable and one can find little, if any, distinction between the tests in the two decisions even though they are based on different laws.

In his most recent opinion to date on the subject,[50] Mr. Justice Douglas, writing for the majority, proscribed the acquisition of Rome Cable by Alcoa. Although this was a section 7 case, the Court emphasized the importance of keeping Rome as an "important competitive factor" and noted the "substantial" nature of Rome's competition. The *Rome* case was ostensibly governed by *Philadelphia Nat'l Bank;* but the language is so similar to *Lexington Bank* that one must conclude that Mr. Justice Douglas has, at last, carried the day[51] and that section 7 and section 1 *can* be used almost interchangeably for merger litigation.

A look at recent section 7 cases may also give an indication as to the market percentages which the Court might consider prohibitive under the Sherman Act. *Lexington Bank* involved fifty per cent of the market, but from the *Philadelphia Nat'l Bank* decision one can infer that the Court would outlaw a merger under section 1 if thirty per cent were involved.[52] In *United States v. Continental Can Co.,*[53] a section 7 case and the Court's most recent pronouncement to date on market shares, the Court outlawed a combination affecting twenty-five per cent of the relevant market. Mr. Justice White cited *Philadelphia Nat'l Bank* and concluded that twenty-five per cent was close enough to the market share outlawed in that case to be considered unlawful. One can only speculate as to how far this reasoning will be pursued.

It is reasonable to conclude that, given a high percentage of the relevant market controlled in a merger or acquisition, the Court will apply the same test under section 1 or section 7. But in a close case in which structural considerations are not as imposing, would the Court entertain defenses based on market performance? If this question is answered in the affirmative, another question remains. Would the fact that the combination was challenged under section 1 or section 7 influence the point at which these defenses would be heard or would the same structural scale apply under either act?

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[50] United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

[51] Note Mr. Justice Douglas' strong dissent in *Columbia Steel.* He now has apparently convinced a majority of the Court and may be able to take the law in whatever direction he wishes.

[52] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963). The Court specifically noted the threat to competition where 30% of the market is involved.

[53] 378 U.S. 441 (1964).