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Trade Regulations -- Section 7 of the Clayton Act

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effects on the sensitive buyer. Of course if the allergy is to common and well known substances such as strawberries, tomatoes, and pollen, a different legal consequence should naturally follow. In such cases the buyer can be expected to avoid the common substances to which he is allergic.

Hamlin Wade.

Trade Regulations—Section 7 of the Clayton Act

Section 7 of the Clayton Act as originally passed in 1914 read, in part:

"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 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."\(^1\)

The original Section 7 was passed to supplement the Sherman Act\(^2\) by forestalling restraints of trade and monopolization at an earlier stage than did that act. By judicial interpretation, an actual showing of conspiracy,\(^3\) monopolization,\(^4\) predatory practices,\(^5\) or an intent to restrain trade\(^6\) was held necessary in order to invoke the restraints of the Sherman Act. By the time this evidence was available to the government, the merger involved had already taken place, and the government then faced the difficult task of breaking up a corporation already integrated into one operating unit. The original Section 7 of the Clayton Act was intended "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."\(^7\) Since the most prevalent method of corporate merger at that time was the acquisition of the stock of one corporation by another, the original act was aimed at such acquisitions. By judicial interpretation,\(^8\) mergers were held not to be within the purview of the statute if the acquiring corpora-

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\(^3\) American Tobacco Co. v. United States, 328 U. S. 781 (1946).
\(^4\) United States v. Aluminum Co. of America, 149 F. 2d 416 (2d Cir. 1945).
\(^6\) Great Atlantic and Pacific Tea Co. v. United States, 227 Fed. 46 (2d Cir. 1915).
\(^7\) H. R. Rep. No. 698, 63d Cong., 2d Sess. 6553 (1914).
\(^8\) Swift and Co. v. Federal Trade Commission, 272 U. S. 554 (1926). A Company acquired the stock of B Company. The government brought suit under the old Section 7. Prior to judgment A Company used the stock to acquire the assets of B Company. The court held that the acquisition of the assets was a legal transaction and that A Company could be required to divest itself only of the now worthless stock. This became known as the "jurisdictional loophole" and relegated old Section 7 to insignificance.
tion acquired the assets of the acquired corporation as well as its stock. Thus the original Section 7 lost most of its effectiveness, and corporate mergers continued unabated through the use of this so-called "jurisdictional loophole."

Obviously any amendment to the statute would be concerned primarily with plugging this loophole. A comparison of Section 7 of the Clayton Act as amended in 1950 with the original version bears this out. The section as amended reads:

"That 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." (Emphasis added.)

A reading of this section shows that in attempting to solve one problem, Congress has created another. Note that if assets are acquired, there is little doubt that the section is not applicable unless the acquired corporation is engaged in commerce. This much is clear. The section expressly provides that "no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce. . . ." However, in transactions involving the purchase of stock, the section is vague in regard to whether the corporation whose stock is acquired must be engaged in interstate commerce. One eminent authority has taken the position that the acquired corporation need not be engaged in commerce where stock is acquired in order for the act to apply, on the grounds that it would be a grammatical strain to attempt to construe the words "of another corporation engaged also in commerce" as referring back and qualifying the words "of the stock or other share capital." He contends that if Congress did intend for the phrase to qualify both stock and asset acquisitions, it should have inserted a comma after the word "assets" thus making it grammatically possible. However, a diagram of the sentence shows that with or without such comma it is grammatically impossible for "of another corporation engaged also in commerce" to modify "the stock or other share capital." Therefore, since no court has yet construed this section, any reasonable interpretation must result from the evident congressional intent as seen in the light of common English usage.

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10 "Commerce," as used in the act, means interstate commerce.
11 McElroy, Section 7 of the Clayton Act, 5 BAYLOR L. REV. 121 (1953).
A comparison of the old section with the amended version shows that Congress re-enacted Section 7 using the identical language of the original section except that the phrase "and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets" (emphasis added) was inserted into the body of the paragraph. Thus it can be seen that Congress intended the act to read in effect as follows:

"That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital of another corporation engaged also in commerce and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire . . . the assets of another corporation engaged also in commerce. . . ."

The phrase "of another corporation engaged also in commerce" clearly was intended to relate back and qualify the prohibition against the acquisition of both stock and assets just as the qualifying clause that follows ("where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. . . .") also relates back and qualifies both types of prohibitions.

Furthermore, an interpretation of the Act in the light of common English usage gives a result in accord with the obvious intent of Congress regardless of the grammatical strain referred to previously. If the alternate construction (that "of another corporation engaged also in commerce" does not relate to stock acquisitions) were attempted, it would result in a sentence the meaning of which would be left to conjecture—i.e.:

"That no corporation engaged in commerce shall acquire . . . the stock or other share capital where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition. . . ."

In reading this sentence and arriving at "the stock or other share capital," the quaere immediately arises, "The stock or other share capital of what?" The use of the adjective "the" before the noun "stock" clearly indicates that the stock or other share capital of something specific is necessary in order to give significance to the sentence. "[T]he" specific "stock or other share capital" referred to necessarily must be that "of another corporation engaged also in commerce."

Of course, it is possible that Congress did desire to distinguish between stock and asset acquisitions. It may be that there was an intention to prohibit the buying up of stock of both interstate and intrastate
corporations while prohibiting asset acquisitions only if the acquired corporation was of an interstate nature. If this be so, a look at paragraph two of Section 7 shows that Congress probably has enacted a provision in excess of its powers. Paragraph two reads:

“No corporation shall acquire 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 one or more corporations engaged in commerce where the effect of such acquisition may be substantially to lessen competition. . . .”

Note that in this situation the acquiring corporation does not have to be engaged in commerce. Congress, by paragraph two, obviously wished to prohibit a lessening of competition in the competitive pattern of the market area where interstate firms are acquired by intrastate firms. Thus, if the phrase "of one or more corporations engaged in commerce" does not relate back and qualify the prohibition of stock acquisitions, the following construction will result:

“No corporation shall acquire the whole or any part of the stock or other share capital where . . . the effect of such acquisition . . . may be substantially to lessen competition. . . .”

The net result of such a construction is the highly dubious condemnation of an acquisition by a firm not engaged in commerce of the stock of a firm also not engaged in commerce. Surely it cannot be contended that the authority of Congress extends that far, or that such was the result intended by an act whose sponsors asserted would not injure small business. ¹²

Therefore, while faulty draftsmanship of Section 7 of the Clayton Act leaves it open to a possible dual construction, it appears that there is only one which is both reasonable and in accord with what seems to be the legislative intent. However, in order to insure future effectiveness of this section, Congress should redraft the statute in clear language lest it again be adjudicated into obscurity as was the old section.

TED G. WEST.

¹² The act was designed "to limit the future increases in the level of economic concentration resulting from corporate mergers . . . and thereby aid in preserving small business as an important competitive factor in the American economy." S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).