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Antitrust Law -- Horizontal Mergers -- Section 7 of the Clayton Act

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HORIZONTAL MERGERS

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In United States v. Von's Grocery Co., the Supreme Court struck down a horizontal merger as a violation of Section 7 of the Clayton Act. In March of 1960, when Von's, the third largest retail grocery chain in the Los Angeles area, purchased the sixth largest, the United States brought action charging an antitrust violation. At trial, the District Court decided that from "the evidence, it cannot be concluded that the merger in question would probably lessen competition in the metropolitan area either at the time of the merger"


Justice Black said in the first Konigsberg case: "It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." Konigsberg v. State Bar, 353 U.S. 252, 273 (1957). See Brown & Fassett, Loyalty Tests for Admission to the Bar, 20 U. Chi. L. Rev. 480, 501 (1953). Another bad result is the attitude such questioning produces in the applicants. It perhaps tends to make them give only the "right" answers. *Ibid.* This is bad not only because the applicant feels he has to hide some belief, but also because it will hinder the committee from reaching conclusions based on truthful answers.


A horizontal merger is a merger between two companies that compete directly in similar economic functions, while a vertical merger is one between companies that buy or sell the product of the other, and a conglomerate merger is between companies that have no direct relationship with each other.
or in the foreseeable future." On appeal the Supreme Court reversed, basing its decision predominantly on the facts that there had been a continuing decline in the number of individually owned grocery stores in the area and that chain stores had acquired an increasing share of the market.

The first statutory expression of antitrust policy by Congress was the Sherman Act of 1890, enacted as an attempt to combat the trend toward monopolistic control of the economy by gigantic business trusts. Unfortunately, the Sherman Act was directed primarily at the trust device and mergers were not prohibited unless an immediate monopoly was created as a result. The statute did not refer to the possible future effects of a merger. Section 7 of the Clayton Act, enacted in 1914, was an attempt by Congress to remedy these deficiencies of the Sherman Act. However, since Section 7 only prevented illegal acquisition of corporate stock to effect merger, the law could be circumnavigated by purchasing company assets rather than stock in a merger operation. The 1950 Celler-Kefauver Amendment to Section 7 closed this loophole by applying the Clayton provisions to assets as well as stock. The present statute is in this form.

In the decisions leading to Von's, most of the confusion has centered around formulating a test under which the language of Section 7, "may be substantially to lessen competition," can be applied. The first case to reach the Supreme Court after the Cellar-Kefauver amendment was Brown Shoe Co. v. United States. That

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26 Stat. 206 (1890).
6 In invalidating a price-fixing agreement among railroads, the Supreme Court looked only at the immediate effects of the agreement. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
9 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964) : "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." (Material added by the 1950 amendment is in italics.)
case involved both horizontal and vertical mergers, and, although the background law concerning each type of merger was different, the court applied only one test. Mr. Chief Justice Warren rejected the idea that a mere quantitative analysis of the market share produced by the merger should be determinative of whether a violation of Section 7 existed. Rather, the majority opinion indicated that a broad economic analysis must be used in determining the anti-competitive effects of a merger. The court in Brown Shoe also recognized that the existence of a merger trend in a given line of commerce is an important factor that may require that the merger be struck down, thus formulating the so-called incipiency doctrine.

The next important case involving section 7 was Philadelphia Nat'l Bank. While the court did not there reject the broad economic analysis used in Brown Shoe, it found that the bank merger produced a firm controlling an "undue percentage share of the relevant market" and resulted in a "significant increase in the concentration of firms in that market." In such circumstances the degree of market control was alone large enough to create a presumption of illegality and make it unnecessary to resort to the cumbersome Brown Shoe test. The reasoning in Philadelphia Bank was carried a step further in United States v. Aluminum Co. of America and United States v. Continental Can Co. In each of these cases the actual increase in market share by the acquiring companies was very slight, unlike that in Philadelphia Bank. The court nevertheless struck down these mergers, noting that the industries involved were highly concentrated and that in each case the mergers involved the acquisition of a viable competitor by an industry leader.

The Supreme Court's difficulties in analyzing merger cases must
be attributed to the very nature of the problem itself. The statutory language is in effect a broad grant of power to the Court to decide for itself the distinction between good and bad mergers. This requires that the Court predict the effect of a merger before declaring it invalid. ¹⁰ But economics is an inexact science and even economists themselves cannot predict with certainty the future effects of a merger. ²⁰ The cost and time of accumulating sufficient data for a proper analysis is prohibitive and, indeed, the data may even be misleading to judges and lawyers lacking the necessary understanding of economic theory. In viewing the decisions from Brown Shoe through Von's, it seems that the Court must be recognizing this fact and is trying to formulate a simple test for applying Section 7. In Philadelphia Bank, Aluminum Co., and Continental Can, the Court in essence decided that the resulting share of the market after merger was simply too large in already concentrated industries and those mergers were invalidated largely on that basis. Even though in Von's the resulting market share was only seven and one-half per cent,²¹ far below that in the other cases, the merger was nevertheless invalidated, primarily because of a decreasing number of small competitors in the same line of commerce.²²

This attitude of the Court toward the individually-owned business suggests that something more than a desire for a "simple" Section 7 test underlines the Von's decision. From the history of antitrust litigation has emerged the idea that a system of small competitors is somehow inherently desirable.²³ This proposition has not

¹⁰ This point was virtually sidestepped by the majority in Von's. See Mr. Justice Stewart's dissent: "The Court has substituted bare conjecture for the statutory standard of a reasonable probability that competition may be lessened." 384 U.S. 270 at 286.

²² Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 228 (1960).

²¹ Before the merger, Von's had 4.7 per cent of the sales of the relevant market while Shopping Bag Food Stores, the acquired company, had 4.2 per cent of the total sales. The sales of the largest firm comprised 8 per cent of the market.

²² What we have . . . is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors. . . . United States v. Von's Grocery Co., 384 U.S. 270, 277-78 (1966).

²³ See Judge Learned Hand's view of antitrust laws in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945): "Throughout the history of these statutes it has been constantly assumed that one of their
gone unquestioned.\textsuperscript{24} Indeed, the very nature of the grocery store business demonstrates a fallacy in this idea. Supermarket chains certainly compete more among themselves than do small corner grocery stores sprinkled across a city, and the larger stores usually offer a better selection of products, often at lower prices. It surely must be asked whether the small competitor should be protected if circumstances have already made it difficult for him to compete,\textsuperscript{25} especially when the interests of the consumer and the industrious, expansion-minded store owner may suffer.

At any rate, the present test for legality of mergers under Section 7 is vague.\textsuperscript{26} The businessman is not given any ascertainable standard when considering a merger. In fact, as Mr. Justice Stewart remarked, "The sole consistency that I can find is that in litigation under Section 7, the Government always wins."\textsuperscript{27} Granted that this statement is very close to the truth, it is still difficult to say that the Supreme Court was wrong in \textit{Von's}. A merger, once allowed, is a permanent condition, and it is better to stop a trend toward oligopoly too soon than too late. Although the \textit{Von's} merger apparently did not injure competition, the door would have been open for similar mergers if this one had been allowed. The trend toward concentration had to be stopped at some point, and the Court cannot be seriously castigated for acting when it did.

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\textsuperscript{24} Rill, \textit{The Trend Toward Social Competition Under Section 7 of the Clayton Act}, 54 Geo. L.J. 891 (1966). The author questions the wisdom of prohibiting mergers which increase efficiency and competition.

\textsuperscript{25} It is not as difficult for small stores in Los Angeles to compete with the larger ones as the majority opinion in \textit{Von's} would lead one to believe. In some cases the large, retailer-owned cooperative buying organizations in the area "were able to offer even lower prices to their members than competing chains could obtain." United States v. Von's Grocery Co., 384 U.S. 270, 299, n. 32 (1966) (Stewart, J., dissenting).


\textsuperscript{27} United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). In the past eleven years the Justice Department has won forty-five of fifty antitrust cases before the Supreme Court. The Federal Trade Commission has not lost a single antitrust case before the Court in seven years.