Volume 54 | Number 2 Article 4

1-1-1976

Antitrust -- United States v. American Building Maintenance Industries: A Narrow Construction of Section 7 of the Clayton Act

Richard A. Simpson

NOTES

Antitrust—United States v. American Building Maintenance Industries: A Narrow Construction of Section 7 of the Clayton Act

The United States Supreme Court has clearly and consistently held that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . ."[1] when it enacted the Sherman Antitrust Act. Consequently, the Sherman Act has been applied to cases involving entirely intrastate activities that substantially affect interstate commerce.[2] In *United States v. American Building Maintenance Industries*[3] the Supreme Court ruled that the jurisdictional reach of section 7 of the Clayton Antitrust Act[4] does not extend as far as that of the Sherman Act. Instead, the Court held that the Clayton Act applies only to corporations that are actually involved in interstate commerce.[5] The *American Building* decision, coupled with the Court's decision in *Gulf Oil Corp. v. Copp Paving Co.*,[6] which limited the application of the Robinson-Patman Act[7] to persons actually engaged in interstate commerce, not only limits the effective scope of the federal antitrust laws but also suggests that the present Supreme Court may be hostile toward vigorous enforcement of those laws.

The Government commenced a civil antitrust action against American Building Maintenance Industries, contending that the corporation's acquisition of the stock of J.E. Benton Management Corp. and its merger of Benton Industries into one of its wholly owned subsidiaries violated section 7 of the Clayton Act.[8] American Building was the

1. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944).

2. *See, e.g.*, United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

3. 95 S. Ct. 2150 (1975). Mr. Justice Stewart wrote the opinion of the Court. Mr. Justice White wrote an opinion concurring in the judgment, while Mr. Justice Brennan joined in the dissenting opinion of Mr. Justice Douglas. Mr. Justice Blackmun filed a separate dissenting opinion.

4. 15 U.S.C. § 18 (1970). This section deals with the acquisition by one corporation of the stock or assets of another.

5. 95 S. Ct. at 2157-58.

6. 419 U.S. 186 (1974). Mr. Justice Powell wrote the majority opinion in this case; Mr. Justice Brennan joined in Mr. Justice Douglas's dissent. Mr. Justice Blackmun was the only member of the majority in *Gulf Oil* to dissent from the *American Building* decision.

7. 15 U.S.C. § 13(a) (1970). In 1936 the Robinson-Patman Act rewrote the price discrimination provisions of section 2 of the Clayton Act.

8. 95 S. Ct. at 2153-54. The suit was filed in the United States District Court for

largest supplier of janitorial services in Southern California, handling ten percent of the sales in that area. The two acquired corporations together supplied an additional seven percent of those services. While American Building was clearly involved in interstate commerce,[9] the Court concluded that the Benton companies were not.[10] Therefore, since section 7 of the Clayton Act explicitly states that both the acquiring and the acquired corporation must be "engaged in commerce" for that Act to apply,[11] the Court ruled that this case did not fall within the jurisdictional ambit of the Act. The crucial aspect of the case, however, is not the Court's discussion of whether the Benton corporations were in fact engaged in interstate commerce;[12] more important is the Court's initial decision that the "engaged in commerce" language of the Clayton Act requires a corporation to be actually involved in interstate commerce rather than merely involved in activities that affect interstate commerce before it falls within the scope of the Act.

The Court persuasively reasoned that *FTC v. Bunte Brothers*[13] provided strong support for its construction of the "engaged in commerce" language of section 7 of the Clayton Act.[14] In that case the Court held that the jurisdiction of the Federal Trade Commission under

---

the Central District of California. The district court granted American Building Maintenance Industries' motion for summary judgment holding that there had been no violation of section 7 of the Clayton Act. The Government then appealed directly to the Supreme Court pursuant to section 2 of the Expediting Act, 32 Stat. 823 (1903), *as amended*, 15 U.S.C. § 29 (1970). 95 S. Ct. at 2152-53.

9. 95 S. Ct. at 2153. There was no dispute on this point.

10. *Id.* at 2158.

11. The relevant jurisdictional language of section 7 of the Clayton Act follows: "No corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any party of the stock or other share capital . . . 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." 15 U.S.C. § 18 (1970) (emphasis added).

12. All of the Benton companies' janitorial and maintenance contracts were performed within California. These companies did not advertise nationally, and they made only very limited use of interstate communications. The Benton companies hired their labor in the local market and purchased most of their equipment and supplies from local distributors. The companies did, however, service customers who were engaged in interstate commerce. For the Court's discussion of why such activities do not constitute participation in interstate commerce, see 95 S. Ct. at 2158-59. For Mr. Justice White's argument that such activities may well constitute participation in interstate commerce, see his concurring opinion, 95 S. Ct. at 2159.

13. 312 U.S. 349 (1941).

14. 95 S. Ct. at 2154-55. The Court also suggests that Gulf Oil v. Copp Paving Co., 419 U.S. 186 (1974), supports its conclusion. *Gulf Oil* held that the "in commerce" language of the Robinson-Patman Act does not extend to the full commerce clause power of Congress but rather is limited to activities actually constituting interstate commerce, *i.e.* the Robinson-Patman Act does not extend to purely intrastate activities that substantially affect interstate commerce. 95 S. Ct. at 2154.

section 5 of the Federal Trade Commission Act, which regulates "unfair methods of competition in commerce," was limited to competition that involved actual interstate commerce.[15] While this decision does not provide a direct precedent for the *American Building* issue, it is persuasive by way of analogy since section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act were enacted by the same Congress[16] and, as the Court notes, were both "designed to deal with closely related aspects of the same problem—the protection of free and fair competition in the Nation's market places."[17]

But there are several reasons for concluding that *Bunte Brothers* provides less support for the *American Building* decision than suggested by the Court. First, as the Court recognized, the words "in commerce" do not have a uniform meaning whenever used by Congress.[18] Certainly, the Federal Trade Commission Act and the Clayton Act were passed by the same Congress with the goal of protecting free trade and competition; but the two acts involve very different substantive provisions. While the Federal Trade Commission Act established an administrative agency with a broad mandate to police against unfair trade practices, the Clayton Act renders specified actions illegal.[19] The *Bunte Brothers* Court based its decision partially upon its fear that a broad construction of the jurisdictional language of section 5 of the Federal Trade Commission Act would create a grave danger of undue federal interference in local affairs.[20] The specific provisions of the Clayton Act, however, offend less against these notions of federalism than does the idea of a federal agency with "pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law."[21]

---

15. The Commission claimed that it could proceed against unfair methods of competition used in intrastate sales when those sales result in a handicap to interstate competitors. The Court rejected this view. 312 U.S. 349, 350.

16. The Sixty-third Congress.

17. 95 S. Ct. at 2155.

18. *E.g.*, Kirschbaum Co. v. Walling, 316 U.S. 517, 520-21 (1941).

19. For example, section 7 of the Clayton Act applies only to the acquisition of the stock or assets of one corporation by another corporation. For a discussion of the purposes of the Sherman, Clayton and Federal Trade Commission Acts see Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961). The purposes of these acts are also discussed in FTC v. Raladam Co., 283 U.S. 643, 647-48 (1931).

20. The Court emphasized the need for a proper adjustment of local and national interests in *Bunte Brothers*. The Court said, "We ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated." 312 U.S. at 351.

21. *Id.* at 354-55. The Court went on to say that "[a]n inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." *Id.* at 355.

Furthermore, Congress responded to the *Bunte Brothers* decision in 1974 by extending the Federal Trade Commission's jurisdiction to the full extent of Congress's commerce clause power.[22] While this action by a later Congress does not speak directly to the intent of the framers of the Act, it is at least suggestive.

In *American Building* the Court also relied upon the difference between the jurisdictional language of the Sherman Act and that of the Clayton Act to support its holding.[23] The Sherman Act forbids conduct "in restraint of trade or commerce among the several States, or with foreign nations",[24] while section 7 of the Clayton Act applies to corporations "engaged in commerce."[25] Certainly the Sherman Act's language is broader, and, as the Court suggests in *Gulf Oil v. Copp Paving Co.*, the "in commerce" language of the Robinson-Patman Act and the Clayton Act "appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."[26]

But the Court failed to investigate the import of this difference in jurisdictional language fully enough. It is clear from *Kirschbaum Co. v. Walling*[27] and related cases that the phrase "in commerce" does not have a uniform meaning whenever used by Congress. Furthermore, the *Bunte Brothers* case relied upon so heavily by the Court in *American Building* states that,

> [w]hen in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. . . . [T]o be sure, the construction of every such statute presents a unique problem in which *words derive vitality from the aim and nature of the specific legislation.*[28]

Since it is well established that the aim of the Clayton Act was to reach agreements embraced by the Sherman Act in their incipiency,[29] one

22. Congress replaced the words "in commerce" with "in or affecting commerce" in sections 5, 6 and 12 of the Act. The purpose of Congress was clear. "It is unrealistic to restrict the jurisdiction of the FTC under section 5 of the Act to only interstate transactions." U.S. CODE CONG. & AD. NEWS 1974, at 7712-13.

23. 95 S. Ct. at 2155-56.

24. Sherman Act, 15 U.S.C. § 1 (1970).

25. Clayton Act, *id.* § 18.

26. 419 U.S. at 195.

27. 316 U.S. 517 (1941).

28. 312 U.S. at 351 (emphasis added).

29. *E.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957); FTC v. Raladam Co., 283 U.S. 643, 647-48 (1931); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355-57 (1922).

cannot fairly conclude merely from an ambiguous change in jurisdictional language that Congress intended the Clayton Act to have a more limited jurisdictional reach than the Sherman Act.[30] Such a conclusion, based upon the jurisdictional language of the two acts, seems especially unwarranted when one considers that before the Clayton Act was enacted the Court often held that wholly intrastate acts could be "in restraint of trade or commerce" as that phrase was used in the Sherman Act.[31] Furthermore, the definition of "commerce" in the Clayton Act is "trade or commerce among the several States," and before the Clayton Act was enacted the Court held on several occasions that "among the several States" embraces all commerce "except that which is confined to a single State, and *does not affect* other States."[32]

The Supreme Court also offered a strong reenactment argument in support of its holding in *American Building*. The Court concluded that regardless of whether Congress intended to extend the Clayton Act to its full commerce clause power when that Act was enacted in 1914, by 1950 when the Clayton Act was reenacted the phrase "engaged in commerce" had become "a term of art, indicating a limited assertion of federal jurisdiction."[33] Certainly it is true that prior to 1950 the Court had clearly distinguished between activities "in interstate commerce" and those "affecting interstate commerce."[34] Furthermore, the *Bunte*

30. The Court also notes that the Sherman Act proscribes every contract, combination or conspiracy in restraint of trade or commerce, whether entered into by a natural person, partnership, corporation or other form of business organization, while section 7 of the Clayton Act is limited to corporate acquisitions. 95 S. Ct. at 2155. This limitation implies, according to the Court's analysis, that Congress might well have intended to limit the jurisdiction of section 7 in other ways as well. But the corporate limitation of section 7 involves an entirely different aspect of jurisdiction than does the "in commerce" language; the corporate limitation involves not the type of activity covered by the Act but rather the type of individuals and organizations covered by it. One would expect the very specific kinds of problems dealt with in section 7 of the Clayton Act, unlike the broad problems addressed by the Sherman Act, to involve primarily corporations. Furthermore, the Federal Trade Commission has held that it has authority under section 5 of the Federal Trade Commission Act to proceed against section 7 Clayton-type violations by persons and partnerships. *In re* Beatrice Foods Co., 67 F.T.C. 473, 724-27 (1965). In any case, the Court in *American Building* does not rely heavily upon the limitation of section 7 to corporate acquisitions.

31. United States v. Patten, 226 U.S. 525, 541-43 (1913); Swift & Co. v. United States, 196 U.S. 375, 397 (1905). On this point see Mr. Justice Douglas's dissent in *Gulf Oil*, 419 U.S. at 204.

32. Second Employers' Liability Cases, 223 U.S. 1, 46-47 (1912) (emphasis added); *see* Minnesota Rate Cases, 230 U.S. 352, 398-99 (1913). Mr. Justice Douglas discusses these cases in his dissent in *Gulf Oil*, 419 U.S. at 204.

33. 95 S. Ct. at 2156.

34. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); A.L.A. Schechter Corp. v. United States, 295 U.S. 495, 542-44 (1935). The *Bunte Brothers* decision is, of course, also on point here.

Brothers decision (limiting the jurisdiction of the Federal Trade Commission under section 5 of the Federal Trade Commission Act) preceded the reenactment of the Clayton Act in 1950. In addition, as the Court notes, Congress had demonstrated prior to 1950 its awareness of the distinction between a limited assertion of its commerce clause power, including only activities actually in interstate commerce, and a full assertion of its commerce clause power, including activities affecting interstate commerce.[35] Consequently, the Court concluded that Congress's decision to retain the "engaged in commerce" language in 1950 clearly implied a congressional intent, at least in 1950, to limit the reach of section 7 of the Clayton Act to corporations actually engaged in interstate commerce.[36]

While Congress's actions in 1950 do support the Court's conclusion, an investigation of the legislative history of the reenactment of the Clayton Act in 1950 raises serious questions about that conclusion.[37] The changes made in the language of the Act in 1950 were designed to expand its coverage. Congress intended, as the Court noted in *American Building*, to expand the Act's coverage to include acquisition of assets as well as stocks.[38] By deleting the "acquiring-acquired" language from the original text,[39] Congress hoped to render it clear that section 7 applied to vertical and conglomerate mergers as well as to mergers between competitors.[40] Indeed, "the dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[41] It seems anomalous at best that a Congress so clearly concerned with economic concentration would limit the jurisdictional ambit of an antitrust statute while simultaneously expanding its substan-

35. *E.g.*, the National Labor Relations Act, 29 U.S.C. § 160(a) (1970), adopted an "affecting commerce" jurisdictional standard.

36. 95 S. Ct. at 2157.

37. For a full discussion of the legislative history of the reenactment of the Clayton Act in 1950, see Brown Shoe Co. v. United States, 370 U.S. 294, 312-23 (1962).

38. 95 S. Ct. at 2157.

39. Material in brackets was deleted in 1950, while material in italics was added.

> 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 [to] substantially *to* 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 *to* tend to create a monopoly [of any line of commerce].

Brown Shoe Co. v. United States, 370 U.S. 294, 311 n.18 (1962).

40. *Id.* at 317.

41. *Id.* at 315.

tive scope. Furthermore, it is important to consider that Congress acted not only against the background of the *Bunte Brothers* decision and with an awareness of the in commerce-affecting commerce distinction, but also against the background of the broad judicial interpretation of the Sherman Act's jurisdictional scope and with an awareness that the phrase "engaged in commerce" does not have a uniform meaning. Consequently, an examination of the legislative history of the Clayton Act diminishes the strength of the Court's reenactment argument.

Finally, the *American Building* Court reasoned that the past enforcement policies of the Federal Trade Commission and of the Department of Justice suggest that a broad jurisdictional scope is unnecessary to accomplish the goals of section 7 of the Clayton Act.[42] The Federal Trade Commission has held that section 7 applies only to activities involving interstate commerce.[43] The Department of Justice has limited its previous cases under section 7 almost exclusively to those that clearly involved firms actually participating in interstate commerce.[44] But in concluding that these policies support its holding, the Court ignores two crucial points. First, whether the enforcement agencies choose to employ a power granted by Congress has no bearing upon what power Congress did in fact grant. Second, there may well be practical reasons, such as manpower shortages and department priorities, that explain the Justice Department's decision to limit its enforcement effort primarily to firms in interstate commerce. Such pragmatic decisions should not, however, imply that the Justice Department lacks or does not need the power to proceed against firms affecting interstate commerce when those firms pose serious antitrust problems.

The four arguments advanced by the Court to support its holding—the *Bunte Brothers* analogy, the language of the Act, the reenactment argument and the past enforcement policy argument—would be more than sufficient to justify its holding in the absence of strong countervailing considerations. But since the acknowledged purpose of the Clayton Act is to supplement the Sherman Act by arresting restraints on trade in their incipiency,[45] and since the Sherman Act clearly extends to the full limit of Congress's commerce clause power,[46] it is highly anomalous to attribute to Congress an intent to limit the

42. 95 S. Ct. at 2157.
43. *E.g.*, Mississippi River Fuel Corp., 75 F.T.C. 813, 918 (1969); Foremost Dairies, Inc., 60 F.T.C. 944, 1031-33 (1962).
44. 95 S. Ct. at 2157.
45. See note 27 *supra.*
46. See note 1 *supra.*

jurisdictional scope of the Clayton Act. Such an action should not be attributed to Congress without a very clear demonstration of congressional intent. Yet, the Supreme Court in *American Building* reached its conclusion on the basis of arguments that, while valid, fall short of clearly establishing such a congressional intent.

The direct practical implications of the Supreme Court's decision in *American Building* are not crucial since most section 7 actions do involve corporations actually participating in interstate commerce; only a relatively small number of important cases will fall outside the reach of the Clayton Act as a result of the decision. More importantly, however, the *American Building* decision, coupled with the *Gulf Oil v. Copp Paving Co.* decision, suggest a hostility on the part of the Burger Court toward vigorous enforcement of the federal antitrust laws. This hostility may be reflected in the Court's handling of other antitrust issues.

RICHARD A. SIMPSON

Civil Rights—A Back Pay Award Standard: Albemarle Paper Co. v. Moody

Title VII of the Civil Rights Act of 1964,[1] as amended by the Equal Employment Opportunity Act of 1972,[2] represents the Congressional effort to eradicate discrimination in public and private employment on the basis of race, color, religion, sex or national origin.[3] Since July 2, 1965[4] the federal judiciary has possessed discretion under Title VII to award back pay to employees and applicants for employment who prove that they were the victims of unlawful employment practices.[5] In exercising this discretion the lower federal courts have devel-

1. 42 U.S.C. § 2000e (1970), *as amended*, (Supp. II, 1972).
2. 42 U.S.C. § 2000e (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).
3. *Id.* § 2000e-2(a)(1)-(2) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2(a)(1)-(2) (1970).
4. This is the effective date of *id.* § 2000e (1970).
5. *Id.* § 2000e-5(g) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(g) (1970). This section provides that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay* . . . or any other equitable relief as the court deems appropriate (emphasis added).