ANTITRUST—CLAYTON ACT—MERGER OF THIRD AND FIFTH LARGEST LOS ANGELES RETAIL GROCERY CHAINS HELD TO SUBSTANTIALLY LESSEN COMPETITION IN VIOLATION OF SECTION 7. *United States v. Von's Grocery Co.* (U. S. 1966).

In 1960 Von's Grocery Company acquired Shopping Bag Food Stores. In terms of retail grocery sales in the Los Angeles metropolitan area, Von's was the third largest and Shopping Bag the fifth largest supermarket chain, their merger creating the second largest retail grocery concern. The new firm controlled approximately 7.5% of the retail sales in the Los Angeles market.

The United States brought suit in the district court to enjoin the acquisition, alleging that it violated Section 7 of the Clayton Act.[1] The district court gave judgment for defendant.[2] On direct appeal to the Supreme Court,[3] *held*, reversed: On the basis of the evidence presented in the lower court, the effect of the merger on competition constituted a violation of Section 7. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

Section 7, as originally enacted,[4] was partially effective in proscribing intercorporate stock acquisitions which tended to reduce competition between the acquiring and acquired firms in a particular section or community. However, corporations soon found a way to merge without violating the law by simply purchasing the assets of the acquired corporation without disturbing the stock.[5] In 1926, the Supreme Court, in allowing this type of merger, held that where an illegal acquisition of stock enabled the acquiring corporation to pur-

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1 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

> [N]o corporation . . . shall acquire . . . the whole or any part of the stock or other share capital and no corporation . . . shall acquire the whole or any part of the assets of another corporation . . . 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. . . .

2 233 F. Supp. 976 (S.D. Cal. 1964).

3 Section 7 suits instituted by the United States require a direct appeal to the Supreme Court. Expediting Act § 2, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1964).

4 38 Stat. 731 (1914).

> [N]o corporation . . . shall acquire . . . the whole or any part of the stock . . . of another corporation . . . where the effect of such acquisition may be to substantially 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 tend to create a monopoly in any line of commerce. . . .

5 95 Cong. Rec. 11485 (1949) (remarks of Representative Celler). See United States v. Celanese Corporation of America, 91 F. Supp. 14, 17 (S.D.N.Y. 1950), where the court expressly stated that Section 7 was not intended to apply to asset acquisitions.

chase the assets of the acquired corporation, the former was required only to divest itself of the stock, but was allowed to retain the assets.[6] The Court also concluded that Section 7 did not give the Federal Trade Commission or the courts the power to order divestiture of assets, but that a Sherman Act suit would be necessary.[7] Consequently, the 1951 Celler-Kefauver Amendment was enacted to "plug the loophole" in Section 7 and prohibit not only stock acquisitions which have an adverse effect upon competition, but also asset acquisitions which have the same effect.[8]

Congress was also aware of other deficiencies under Section 7. Under the original Section 7, if there was a substantial decrease in competition *between the acquiring corporation and the acquired corporation* in any section or *community*, the merger was held to be a violation.[9] This standard, if strictly interpreted, could proscribe a merger between two companies engaged in a similar business which had competed with each other to even the slightest degree.[10] Congress felt that, due to the strictness of this test, the courts had been reluctant to apply the Clayton Act to mergers, relying instead upon the Sherman Act.[11] Such reliance was said to be ineffective because of the inapplicability of the Sherman Act until an acquisition "creates a monopoly or constitutes an attempt to monopolize."[12]

In an attempt to make Section 7 an effective measure which the courts would employ to halt a trend toward monopoly in its *incipiency*,[13] the Celler-Kefauver Amendment deleted the word "community," and changed the degree of the decrease in competition necessary to constitute a violation from a substantial lessening of competition *between the acquiring and the acquired companies* to a

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6 FTC v. Western Meat Co., 272 U.S. 554 (1926). See Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934), where the Court went a step further and held that where an illegal stock acquisition enabled an asset acquisition *after* the Federal Trade Commission had taken jurisdiction, but before judgment, the company was ordered to divest itself only of the stock.

7 272 U.S. at 561.

8 Statute cited note 4 *supra*. See also S. REP. No. 1775, 81st Cong., 2d Sess. 4293, 4294 (1950).

9 See, *e.g.*, International Shoe Co. v. FTC, 280 U.S. 291, 299 (1929), where the Court found no violation of Section 7 as no evidence appeared that the merging companies had competed with each other before the merger.

10 S. REP. No. 1775, *supra* note 8, at 4295.

11 *Id.* at 4296.

12 *Id.* at 4297.

13 In discussing the purpose of the Celler-Kefauver Bill, the Senate Committee on the Judiciary stated: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. REP. No. 1775, *supra* note 8, at 4296.

substantial lessening of competition *in any line of commerce.*[14] However, as is patently clear from *Von's*, the amendment has not effected a definite test to apply to Section 7 cases.[15]

In finding a violation of Section 7 in the instant case, the majority stated that the following factors were sufficient to support reversal: (1) Von's and Shopping Bag's positions in the market before the merger as compared with the new firm's market position after the merger;[16] (2) the new firm's aggregate share of the market;[17] (3) the expansion in the number of Von's and Shopping Bag stores in recent years;[18] (4) the increase in the share of the market each corporation had enjoyed in recent years;[19] (5) the decrease in the number of single-store owners over a thirteen year period;[20] (6) the

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14 Statute cited note 1 *supra.* Representative Celler, in explaining the effect of the amendment, said that it would make Section 7 more restrictive than before because it prohibited asset acquisitions as well as stock acquisitions. But he felt that, in another sense, it would make Section 7 more lenient than before because the prosecutor would have the burden of showing a decrease in competition in an entire line of commerce rather than merely a decrease in competition between the two corporations involved. 95 Cong. Rec. 11486 and 11488 (1949).

15 See United States v. Penn-Olin Chemical Co., 378 U.S. 158, 176-77 (1964), wherein the Supreme Court stated:

> We note generally the following criteria which the trial court might take into account in assessing the probability of a substantial lessening of competition: the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through [the other] . . . ; the effect, in the event of this occurrence, of the other joint venturer's potential competition; *and such other factors as might indicate potential risk to competition in the relevant market.*" (Emphasis added.)

See also United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Company of America, 377 U.S. 271 (1964); United States v. First National Bank Trust Co. of Lexington, 376 U.S. 665 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Maryland and Virginia Milk Producers Ass'n. v. United States, 362 U.S. 458 (1960); United States v. E. I. DU Pont DE Nemours & Co., 353 U.S. 586 (1957).

16 In 1958 Von's was third in Los Angeles retail grocery sales and Shopping Bag was sixth; after the merger, the new firm was second in Los Angeles retail grocery sales. 384 U.S. at 272.

17 The new firm controlled approximately 7.5% of the Los Angeles retail grocery market. *Ibid.*

18 From 1948 and 1958 the number of Von's stores increased from 14 to 27, while during the same period the number of Shopping Bag stores increased from 15 to 34. *Ibid.*

19 From 1948 to 1958 Von's percentage share of the retail market doubled while Shopping Bag's tripled. *Ibid.*

20 In 1950 there were 5,365 single-store owners in Los Angeles; in 1961 there were 3,818; and in 1963 there were 3,590. *Id.* at 273.

increase in the number of chains with two or more stores during the same approximate period of time;[21] (7) the acquisition of small competitors' stores by their large competitors;[22] and (8) the continuation of mergers during the period following the Von's-Shopping Bag merger.[23] These factors, in conjunction with the Court's determination that "the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business,"[24] formed the basis for the ultimate holding that Von's should divest itself of all Shopping Bag assets.

Mr. Justice White, concurring, agreed that the merger violated Section 7, but solely because there was the added factor of an increase in the aggregate market share of the leading grocery firms during recent years.[25] He concluded,

> Given a trend towards fewer and fewer sellers which promises to continue, it is clear . . . that where the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary.[26]

Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented, contending that the majority had placed too much reliance upon the decrease in the number of individual competitiors and thereby violated two principles laid down by the court in *Brown Shoe Co. v. United States*:[27] (1) Under Section 7 every merger must be judged *in the context* of its industry at the time of the merger, and (2) Section 7 was designed to protect competition, *not competitors*.[28] Mr.

21 From 1953 to 1962 the number of chains with two or more stores increased from 96 to 150. *Ibid.*

22 From 1949 to 1958 nine of the top 20 chains acquired 126 individual stores from smaller competitors. *Ibid.* From 1954 to 1961 the acquisition of small chains netted larger chains 150 individual stores. *Id.* at 279, (Table 1).

23 From 1961 to 1964, 31 stores were acquired through horizontal mergers with smaller chains. *Id.* at 280 (Table 2). A horizontal merger is one which involves two firms which were directly competitive in the sale of one or more products before the merger. Foremost Dairies, Inc., 60 F.T.C. 944, 1033 (1962).

24 384 U.S. at 275.

25 In 1948 the aggregate share of the retail grocery market which the four largest Los Angeles chains controlled was 25.9%; the eight largest—33.7%; and the twelve largest—38.8%. By 1958 these figures had changed to 24.4%, 40.9%, and 48.8%, respectively. *Id.* at 281.

26 *Ibid.*

27 370 U.S. 294 (1962).

28 *Id.* at 320-22. For a discussion of *Brown*, see Bork and Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 370-73 (1965); see also 37 ST. JOHN'S L. REV. 147 (1962); 37 TUL. L. REV. 109 (1962); 10 U.C.L.A. L. REV. 637 (1963).

Justice Stewart reasoned that, although a decrease in the number of individual competitors is a factor warranting further investigation, it is not sufficient in itself to support a conclusion that there exists a tendency to substantially lessen competition.[29] To support his conclusion, Mr. Justice Stewart cited several additional factors which he felt indicated the present and future competitive nature of the Los Angeles retail grocery market. In brief, these factors were: (1) a decrease in the market share of the largest chain;[30] (2) a decrease in the aggregate share of the two largest chains;[31] (3) a decrease in the aggregate share of the third, fourth, and fifth largest chains;[32] (4) an increase in the number of chains;[33] (5) the ability of single-store operators to expand into chains;[34] and (6) a substantial change in the composition of the twenty leading firms.[35] The dissent also examined the other statistics cited by the majority and concluded that the majority had ascertained the wrong meaning from them.[36]

In examining the degree of competition between Von's and Shopping Bag prior to the merger, the dissent concluded that the direct

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29 384 U.S. at 286-87.

30 In 1948 Safeway's market share was 14% and in 1958 it was only 8%. *Id.* at 290.

31 In 1948 the largest two firms had 21% of the market, and in 1958 their share had declined to 14%. *Ibid.*

32 This decrease is for the years 1952 to 1958. The case presents no percentage decrease. *Ibid.*

33 For the years 1953 to 1962 the number of chains (two or more stores) increased from 96 to 150. For the same years the number of chains of ten or more stores increased from ten to 24, seven of these chains not even existing as chains in 1953. *Id.* at 291.

34 From 1953 to 1962, 173 chains appeared in the market, 143 of which were chains of two or three stores. Almost all of these were expansions of one-store operations. *Id.* at 291-92.

35 Although during the years from 1948 to 1958 the market share of the 20 largest chains increased from 44% to 57%, seven of the chains existing in 1958 did not exist as chains in 1948. *Id.* at 290.

36 Mr. Justice Stewart criticized the majority's citation of statistics concerning the acquisition of small chains by larger chains, because the decline in the number of individual competitors occurred only among the single-store operators, while the number of chains had been increasing. See notes 20-23 *supra.* Mr. Justice Stewart also discredited the majority's statistics that from 1954 to 1961, 150 stores were acquired from small chains by pointing out that none of the top six chains expanded during that period (presumably excepting Von's), and that the expansion of these smaller chains was not significant in the face of competition by the six largest chains. Furthermore, the fact that nine of the top twenty chains acquired 126 stores from smaller competitors between 1949 and 1958 was declared by Mr. Justice Stewart to be insignificant because 40% of those acquisitions were made by three chains which subsequently went bankrupt. In addition, the dissent stated that of the twenty-nine stores acquired through horizontal merger since the Von's-Shopping Bag merger, nine were acquired through bankruptcy proceedings, which are immune to action by the government under Section 7. *Id.* at 293-94.

competition between Von's and Shopping Bag represented only about 25% of their combined total sales. This analysis led to the further conclusion that the market share actually foreclosed by the merger was less than 1% of the total Los Angeles retail sales.[37]

In general, Mr. Justice Stewart concluded that there were no indications of a decrease in competition in the Los Angeles grocery market, either presently or in the near future. Consequently, the majority made two basic errors: (1) They failed to realize that the cause of the decrease in the number of individual competitors was due to the supermarket revolution—*i.e.*, failed to consider the merger in the context of its business; and (2) they failed to distinguish between protecting competitors and protecting competition.[38]

United States v. Von's presents a formidable obstacle to any parties considering a merger. The myriad of statistics cited reaches a rather confusing point when both the majority and the dissent cite the same statistic to support opposite conclusions.[39] Perhaps the conflicting interpretations illustrate the lack of understanding as to what the statistics really indicate. One noted commentator has stated that: "The primary reason for our present inability to predict the probable effects of most mergers is that so much is still unknown concerning the relative importance of the various factors involved."[40]

Decisions such as *Von's* do not lend themselves to predictability. It is apparent that, on the basis of the *Von's* decision, businessmen still will not know if a proposed merger violates Section 7. Uncertainty of this type causes two primary effects: (1) Mergers which would stimulate competition are foregone in favor of more expensive internal expansion;[41] and (2) litigation is longer and more frequent than if the predictability factor were greater.[42]

To remedy this uncertainty, a more definite test for Section 7 is needed. Professor Bok suggests the following test for cases involving horizontal mergers such as the *Von's* case:

> [W]here concentration is an issue, the court or agency should look

[37] 384 U.S. at 296.
[38] *Id.* at 281-82.
[39] *Id.* at 273 and 291; see notes 21 and 23 *supra.*
[40] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 270 (1961).
[41] *Id.* at 272-73.
[42] *Id.* at 271. *But cf.* Kalinowski, *Section 7 and Competitive Effects,* 48 VA. L. REV. 827, 837 (1962) ("Decisions should . . . be guided by a true economic analysis which evaluates competiton, and not by concepts whose purpose it is to shorten trials.").

> to the change that has taken place in the aggregate share possessed by the largest firms in the market. The number of firms selected for this purpose should be large enough to include the acquiring firm but should not be unreasonably large (more than eight firms). The merger should then be disallowed if the aggregate share following the acquisition substantially exceeds (by seven to eight percentage points or more) the aggregate share of the market controlled by the same number of firms at any time during a period reasonably (five to ten years) prior to the acquisition. This rule, however, should be subject to exception in any case in which the market share of the acquiring firm following the merger is no larger than it was in the base period.[43]

However, at the core of the attempts to preserve competition is the interest of the public, and it would seem that to use a test as strict as that proposed by Professor Bok might ignore that interest, for it is based on the premise that, with one exception, a certain increase in the aggregate share of a particular number of the largest firms is *always* detrimental to competition. Usually, such an increase has a detrimental effect upon competition, but it seems possible that a merger which would be illegal under the above test might actually stimulate competition. The new firm might have research facilities and knowledge which would have been impossible to obtain without the merger, and which would make possible a technical innovation to stimulate competition in the market.

Therefore, it would seem that to achieve the ultimate goal of Section 7, the courts should strive to find a happy medium between the present situation and a strict, empirical test of mergers. But, as exemplified by *Von's*, the trend appears to be toward examining each case on its individual facts and deciding whether there is a substantial lessening of competition without ever defining the elements of the test.

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[43] Bok, *supra* note 40, at 321.